NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees, please complete, sign and return this form to the registration staff **before you leave** the program.

PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Dispute Resolution Section
3-day Commercial Arbitration Training
June 18, 2018 - Morning | Benjamin N. Cardozo School of Law

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

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June 18, 2018 - Afternoon | Benjamin N. Cardozo School of Law

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Dispute Resolution Section
3-day Commercial Arbitration Training
June 19, 2018 - Morning | Benjamin N. Cardozo School of Law

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

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Dispute Resolution Section
3-day Commercial Arbitration Training
June 19, 2018 - Afternoon | Benjamin N. Cardozo School of Law

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Dispute Resolution Section
3-day Commercial Arbitration Training
June 20, 2018 - Morning | Benjamin N. Cardozo School of Law

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

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Dispute Resolution Section
3-day Commercial Arbitration Training
June 20, 2018 - Afternoon | Benjamin N. Cardozo School of Law

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NYSBA

3-Day Commercial Arbitration Training

Volume I

Dispute Resolution Section
Benjamin N. Cardozo School of Law
American Arbitration Association
New York International Arbitration Center
Silicon Valley Arbitration & Mediation Center

June 18-20, 2018

Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

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New York State Bar Association

MCLE INFORMATION

Program Title: **3-Day Commercial Arbitration Training**
Date/s: June 18-20, 2018 Location: New York, NY

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_4SnTfQHp9E0Hblb
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **25.0 New York CLE credit hours**

Credit Category:

9.5 Areas of Professional Practice	1.5 Diversity, Inclusion and Elimination of Bias
4.0 Ethics and Professionalism	10.0 Skills

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via webcast should refer to Additional Information and Policies regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

For official New York State CLE Board rules, please see www.nycourts.gov/attorneys/cle. In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format. The transitional CLE requirement for newly admitted attorneys does not include the Diversity, Inclusion and Elimination of Bias CLE credit component.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Dispute Resolution Section dues.** (law student rate is $10)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Dispute Resolution Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Dispute Resolution Section Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Continuing Legal Education and Programming (DRS1020)
___ Legislation (DRS1030)
___ Membership (DRS1040)
___ Diversity (DRS1100)
___ Collaborative Law (DRS1200)
___ Arbitration (DRS1300)
___ International Dispute Resolution (DRS1301)
___ ADR within Governmental Agencies (DRS1400)
___ ADR in the Courts (DRS1500)
___ Publications (DRS1600)
___ Ethical Issues and Ethical Standards (DRS1700)
___ Mediation (DRS1800)
___ Mediation of Trusts, Estates, Guardianship and Elderly Disputes (DRS1801)
___ International Mediation (DRS1802)
___ Education (DRS2200)
___ Website (DRS2300)
___ Liaison and District Rep Coordination (DRS2400)
___ Negotiation (DRS2500)
___ New Lawyers and Law Students (DRS2600)
___ Blog Master (DRS2800)
___ Liaisons (DRS2900)

JOIN OUR SECTION

2018 MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$275
Attorneys admitted 2011-2012	185
Attorneys admitted 2013-2014	125
Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$180
Attorneys admitted 2011-2012	150
Attorneys admitted 2013-2014	120
Attorneys admitted 2015 - 3.31.2017	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2016

Please return this application to:

MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

NEW YORK STATE BAR ASSOCIATION

Dispute Resolution Section and Benjamin N. Cardozo School of Law

Commercial Arbitration Training for Arbitrators and Counsel

Comprehensive Training for the Conducting of Commercial Arbitrations

25.0 CLE credits

4.0 Ethics, 10.0 credits in Skills and 9.5 Areas of Professional Practice, 1.5 Diversity, Inclusion and Elimination of Bias

June 18-20, 2018

Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003

Program Directors

CHARLES J. MOXLEY, JR., ESQ.
Past Chair
Dispute Resolution Section
New York City

EDNA SUSSMAN, ESQ.
Past Chair
Dispute Resolution Section
New York City

LEA HABER KUCK, ESQ.
Partner, Skadden, Arps, Slate, Meagher & Flom LLP
New York City

American Arbitration Association® | International Centre for Dispute Resolution®

NYIAC | New York International Arbitration Center

Silicon Valley Arbitration & Mediation Center

NYSBA®

AN OVERVIEW OF THE COURSE:

For new arbitrators and seasoned arbitrators interested in taking their skills to the next level – and for litigators interested in learning how to best represent clients in arbitrations to take advantage of the advocacy opportunities available in arbitration.

The training will be conducted by seasoned arbitrators, counsel, arbitration administrators, and academics, focusing on Best Practices, from the perspectives of arbitrators and counsel, for conducting commercial arbitrations in an economical, expeditious and fair manner, enabling parties to achieve the promise of commercial arbitration.

In addition to interactive sessions on managing an arbitration from the preliminary conference through the hearing and award, the program will include presentations on the law of arbitration, the ethical rules relating to service as an arbitrator, e-discovery, award writing, international arbitration, mental heuristics relevant to arbitral decision-making, and the development of an arbitration practice.

The training will be provided by commercial arbitrators **Charles J. Moxley, Jr.** and **Edna Sussman** and by arbitration counsel **Lea Haber Kuck** of Skadden, Arps, Slate, Meagher & Flom LLP, and will include presentations by **Jeffrey T. Zaino**, Vice President, American Arbitration Association, and **Luis M. Martinez**, Vice President, International Centre for Dispute Resolution. See the list below of the faculty members who will be presenting on the key substantive areas for conducting effective arbitrations.

Topics and Skills:

- Selecting Arbitrators
- Conducting Conflicts Searches
- Conducting the Preliminary Hearing electronic documents and depositions.
- Conducting Hearings on Applications for Preliminary Injunctions and Other Interim Relief
- Determining the appropriate scope of discovery, including documents, electronic documents and depositions
- Setting deadlines for discovery and motion practice
- Determining the appropriate scope of motion practice
- Hearing discovery and substantive motions
- Addressing motions to disqualify counsel
- Special considerations for pro se parties
- Determining what non-party subpoenas to sign
- Running the hearing effectively
- Determining what evidence to admit and exclude
- Dealing with difficult arbitrators, counsel and parties
- Issues as to the authority or not of arbitrators to award sanctions
- Preparing awards, both standard and reasoned
- Handling requests to submit additional evidence after the closing of the hearing
- Deciding applications to amend awards
- Arbitration ethics, diversity and inclusion
- Seeking vacatur of awards
- Cyber security in arbitration

The program faculty has presided over many hundreds of hearings and served as counsel in many arbitrations Faculty:

David J. Abeshouse, Law Office of David J. Abeshouse
Erin Gleason Alvarez, Arbitrator and Mediator
Albert M. Appel, Of Counsel, Stroock & Stroock & Lavan LLP
Hon. Ariel E. Belen, Arbitrator and Mediator, JAMS
Steven C. Bennett, Partner, Park Jensen Bennett LLP
David W. Brown, Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP
William J.T. Brown, Counsel, Arbitrator and Mediator
John F. Byrne, Arbitrator
Steven Certilman, Arbitrator and Mediator
Stephanie Cohen, Independent Arbitrator
Hon. Barry A. Cozier, Arbitrator and Mediator
Joseph V. DeMarco, Partner, DeVore & DeMarco, LLP
Alexandra Dosman, Managing Director, Vannin Capital
Eugene I. Farber, Partner, Farber, Pappalardo & Carbonari
Hon. Helen Freedman, Mediator and Arbitrator, JAMS
Walter Gans, Arbitrator and Mediator
Citlalli Grace, Dispute Resolution Services Manager, International Institute for Conflict Prevention and Resolution
James Hosking, Partner, Chaffetz Lindsay LLP
Sherman W. Kahn, Partner, Mauriel Kapouytian Woods LLP, Past Chair, NYSBA Dispute Resolution Section
Daniel F. Kolb, Senior Counsel, Davis Polk & Wardwell LLP, Chair, NYSBA Dispute Resolution Section
Lea Haber Kuck, Partner, Skadden, Arps, Slate, Meagher & Flom LLP
Jack P. Levin, Arbitrator and Mediator
Lela P. Love, Professor, Benjamin Cardozo School of Law; Director, Cardozo's Kukin Program for Conflict Resolution; Past Chair, ABA Dispute Resolution Section
Chrystal Loyer, Office of Dispute Resolution, FINRA
Luis M. Martinez, Vice President, International Centre for Dispute Resolution®
Richard L. Mattiaccio, Partner, Allegaert Berger & Vogel LLP
Karen Mills, KarimSyah Law Firm, Jakarta, Indonesia, Arbitrator, Mediator and Counsel
Mark C. Morril, Arbitrator
Charles J. Moxley, Jr., Arbitrator, Mediator and Counsel; Past Chair, NYSBA Dispute Resolution Section
Camille M. Ng, Deputy Counsel, ICC
Michael S. Oberman, Counsel, Kramer Levin Naftalis & Frankel LLP
Abigail J. Pessen, Arbitrator and Mediator; Past Chair, NYSBA Dispute Resolution Section
Amy M. Pontillo, Senior Counsel, NYS UCS ADR Office
Rekha Rangachari, Executive Director, New York International Arbitration Center (NYIAC)
Hon. Shira A. Scheindlin, Of Counsel, Stroock & Stroock & Lavan LLP
Richard H. Silberberg, Partner, Dorsey & Whitney LLP, President, College of Commercial Arbitrators
David C. Singer, Arbitrator and Mediator, Past Chair, Dispute Resolution Section
Michelle Skipper, Vice President, American Arbitration Association
Steven Skulnik, Arbitrator and Mediatior
Edna Sussman, Arbitrator and Mediator; Past Chair, NYSBA Dispute Resolution Section
Robyn Weinstein, Director, Arbitration and Mediation Program, United States District Court for the Eastern District of New York
Nicholas R. Weiskopf, Professor of Law (Retired), St. John's University School of Law, Special Counsel, Cox Law Firm, LLC
Daniel Weitz, Director, Division of Professional & Court Services, New York State Unified Court Systen; Adjunct Professor of Law, Cardozo Law School **John Wilkinson**, Arbitrator and Mediator; Past Chair, NYSBA Dispute Resolution Section
Jeffrey T. Zaino, Vice President, American Arbitration Association

PROGRAM DIRECTORS AND PRESENTERS:

CHARLES J. MOXLEY, JR., ESQ.

Mr. Moxley has presided over hundreds of arbitrations, including in the commercial, securities, insurance, employment, and international areas. He is an Adjunct Professor of Law teaching arbitration and international law at the Fordham University School of Law and the Distinguished ADR Practitioner in Residence at Benjamin N. Cardozo School of law. A Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators, he is a member of arbitration and mediation panels of the American Arbitration Association ("AAA"), the International Centre for Dispute Resolution ("ICDR"), the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County (Commercial Division and Part 137). He also serves as an arbitrator and mediator in ad hoc cases and is an IMI and CEDR Certified Mediator. Mr. Moxley lectures and speaks frequently at academic and professional functions and has written extensively on Best Practices in conducting commercial arbitrations.

EDNA SUSSMAN, ESQ.

Ms. Sussman is a full-time experienced arbitrator and mediator with experience with hundreds of disputes serving on leading ADR panels, including those administered by the American Arbitration Association ("AAA"), the International Centre for Dispute Resolution ("ICDR") the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, WIPO, the Swiss, Hong Kong, Singapore, Kuala Lumpur and Dubai Arbitration Centers, the Supreme Court, New York County (Commercial Division) and the U.S. District and Bankruptcy Courts in New York. The Distinguished ADR Practitioner in Residence at the Fordham University School of law, Ms. Sussman serves on the boards of the AAA and the College of Commercial Arbitrators, is a fellow of the Chartered Institute of Arbitrators and has published and lectured extensively on the arbitration and mediation process. She was selected as "2012 New York City Mediation Lawyer of the Year" by Best Lawyers and is listed annually in Best Lawyers and Super Lawyers for Alternative Dispute Resolution.

LEA HABER KUCK, ESQ.

Ms. Kuck is a partner at Skadden, Arps, Slate, Meagher & Flom LLP, and a member of its international litigation and arbitration group. Ms. Kuck concentrates her practice on complex litigation and arbitrations involving a wide range of corporate, commercial and securities matters. She regularly represents clients in disputes arising out of international business transactions and advises clients on a variety of issues relating to international dispute resolution, including forum selection, jurisdiction, service of process, extraterritorial discovery and enforcement of judgments. Ms. Kuck has experience in all phases of litigation, both at the trial and appellate levels, in federal and state courts in the United States as well as international arbitration conducted under UNCITRAL, ICC, ICDR and other arbitration rules. She frequently writes and lectures on topics of international litigation and arbitration.

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Monday, June 18, 2018, Morning Session *(1.5 Ethics; 2.0 Skills)*

8:00-9:00 a.m. **Registration and Continental Breakfast**

9:00-9:15 a.m. **Welcome and Introductions**
Professor Lela P. Love, Cardozo Law School
Charles J. Moxley, Jr., Training Co-Chair

9:15-10:30 a.m. **Pre-Preliminary Hearing Issues – Ethical and Other Issues** *(1.5 Ethics)*

- Selection of arbitrators
- Arbitrator disclosure of potential conflicts
- Organization meeting of panel members when there is a panel
- Preparing for the preliminary hearing
- Applications for interim relief
- Whether the preliminary hearing should be held in-person or by telephone
- Whether clients should be present at the preliminary hearing
- Whether to send the parties an agenda of items to be covered at the preliminary hearing
- Whether to ask the parties to meet in advance to agree on schedule
- Setting the date and time for the preliminary hearing
- Whether to encourage the parties to start the process of document disclosure in advance of the preliminary hearing
- Related ethical issues

Faculty:
Charles J. Moxley, Jr.
Edna Sussman
Lea Haber Kuck
Richard H. Silberberg

10:30-10:45 a.m. **BREAK**

10:45-12:25 p.m. **Preliminary Hearing: Part 1** *(2.0 Skills)*

- Purposes of preliminary hearing
- Role of Chair and "Wings" in the preliminary hearing
- Arbitrator's opening remarks in preliminary hearing
- Review of what documents the arbitrators have received in advance to make sure there is nothing missing
- Review of arbitration clause
- Requests for interim relief
- Applications for a change of venue
- Determination of applicable law
  - Substantive law applicable to the parties' agreement and conduct, etc.
  - Arbitration law, including whether the Federal Arbitration Act and/or state arbitration law apply
- Issues as to arbitrability
- Possibility of amended pleadings
- Particularization of damages claims or counterclaims
- Applications to disqualify counsel
- Related ethical issues
- Substantive Motions
  - Motions to Dismiss Claims or Counterclaims
  - Motions to Dismiss Punitive Damages Claims
  - Motions to Dismiss Based Upon Statutes of Limitations or Similar Defenses
  - Procedures for Screening Potential Motions

Faculty:
Charles J. Moxley, Jr.
Edna Sussman
Lea Haber Kuck
Walter Gans

12:25-1:25 p.m. **LUNCH**

12:40 p.m. **Lunch Address: *The Promise of Arbitration — What We're Trying to Do***
Speaker: *Charles J. Moxley, Jr.*

Monday, June 18, 2018, Afternoon Session *(5.0 Skills)*

1:25-3:05 p.m. **Preliminary Hearing: Part 2** *(2.0 Skills)*

- Discovery
  - Non-electronic documents
  - Electronic documents generally (there will be a more detailed panel on electronic documents later in the program)
  - Depositions
  - Interrogatories
  - Differences between domestic and international arbitrations
- Establishing a schedule for document production, including dates for:
  - Document requests
  - Objections to document requests
  - Counsel's conferring in an effort to resolve document disputes
  - Submission of letters to the arbitrator relating to remaining discovery disputes
  - Setting dates for oral argument of discovery disputes
  - Production of non-objected to documents
  - Establishing a completion date for all document production
- Issue of whether to set up a separate process to maintain control of e-discovery
- Approaches as to depositions
  - Avoiding them all together
  - Limiting the number of depositions
  - Limiting the duration of depositions
  - Phasing the depositions
  - Generally precluding speaking objections
  - Getting agreement on alternatives to standard depositions
    - Appearance at the hearing by videoconference
    - Appearance by videotaped deposition
    - Appearance by telephone
- Establishing cut-off dates for discovery
- Related ethical issues

Faculty:
Charles J. Moxley, Jr.
Edna Sussman
Lea Haber Kuck
John Wilkinson
Albert M. Appel

3:05-3:20 p.m. **BREAK**

3:20-5:30 p.m. **Preliminary Hearing: Part 3** *(2.5 Skills)*

- Other motions
  - Motions to consolidate or sever
- Possible alternatives to testimony
  - Stipulations of uncontested facts
  - Direct testimony by affidavit
  - Affidavits generally
- Expert witnesses
  - Identification of anticipated experts
  - Exchange of expert's reports
  - First exchange: On issues as to which parties have the burden of proof
  - Responsive expert's reports
- Pre-hearing papers

- Witness lists
- Whether/when to require summaries of testimony

- Exhibits
  - Joint exhibits
  - Individual exhibits
  - Organization of exhibits
    - Chronologically
    - By topic
    - Separate page ranges assigned to each side
- Key exhibits
  - To be exchanged on a joint basis or separately by each side
  - Marking up of key exhibits to designate portions relied upon
- Pre-hearing memoranda
- Relationship of pre-hearing memoranda to the question of what kind of post-hearing papers/oral argument will be interposed
- Form of testimony of witnesses
  - In person
  - By videoconferencing
  - By videotaped deposition
  - By telephone
  - By deposition
- Subpoenas for non-party witnesses and their documents
  - Materiality to the case of the documents or testimony sought
  - Legal issues as to the authority of arbitrators to sign subpoenas (to be discussed further in a later panel)
  - Legal and ethical concerns as to the appropriateness of arbitrators' signing subpoenas
  - Interplay of FAA versus state law on the question of the appropriateness of arbitrators signing discovery subpoenas
- Mediation: Whether to include a suggestion that, as some point, the parties discuss settlement/mediation
- Establishing dates for status conferences
- Form of decision: Standard versus reasoned awards (this topic will be covered in more detail in a later panel)
- Court Reporter
  - Whether the parties will arrange for a court reporter
  - Relationship of that question to the question of whether the parties want a reasoned award
  - What to do when one party wants to retain a court reporter and the other doesn't
- Scheduling of the hearing
  - When to schedule the hearing
  - How many days to schedule
- Report of preliminary hearing and scheduling order
- Related ethical issues

Faculty: *Charles J. Moxley, Jr.*
Edna Sussman
Lea Haber Kuck
Richard L. Mattiaccio

5:30 p.m. **Preparation of the Report of Preliminary Hearing and Scheduling Order** *(0.5 Skills)*

Faculty: *Charles J. Moxley, Jr.*
Edna Sussman
Lea Haber Kuck

6:00 p.m. **ADJOURN**

6:00 – 7:00 pm **Wine and Cheese Reception**

Tuesday, June 19, 2018, Morning Session

(2.0 Skills and 1.0 Areas of Professional Practice)

8:30-9:00 a.m. **Registration and Continental Breakfast**

9:00-10:00 a.m. **Issues Arising Between the Preliminary Hearing and the Hearing** *(1.0 in Skills)*

- Overall description of what happens during this period
- Hearings on applications for interim relief
- Discovery motions
- Discovery requests and productions subsequent to the discovery cut-off
- Handling of substantive motions
- Handling of substantive motions made subsequent to the cut-off date
- Requests for delays and extensions of established deadlines
- How to handle parties' notification of change of counsel, particularly when the change causes conflicts for arbitrators or is otherwise a basis for delay
- Non-compliance with deadlines and directives of the arbitrators
- Arbitrators' authority or not to issue sanctions
- Final pre-hearing status conference
- Withdrawal of claims on the eve of the hearing
- Related ethical issues

Faculty: *Charles J. Moxley, Jr.*
Edna Sussman
Lea Haber Kuck
Eugene I. Farber

10:00-11:00 a.m. **Session 2: The Hearing** *(1.0 Skills)*

- General introduction to the conducting of the hearing
- How to handle and limit breaks
- How, generally, to keep the hearing going efficiently
- How and when to handle objections as to documents
- Desirable affect of the arbitrator during the hearing
- Avoiding *ex parte* conversations during breaks at the hearing
- Sequestration of witnesses
- Opening statements, if any, by counsel
- Limited requirements as to foundations for documents and other exhibits
- Generally deeming un-objected to pre-marked exhibits as in evidence as of the opening of the hearing and alternate approaches
- What, if any, rules of evidence or the like to follow in deciding what evidence to permit as an arbitrator
- Attitude towards hearsay testimony and other evidence in arbitration
- Witness statements/experts
- Counsel's extensive reading from documents
- Cumulative testimony
- Repetitive witnesses
- Harsh cross-examination
- Witnesses on cross who keep repeating their overall points
- Counsel talking with witnesses while they are on cross-examination
- Excessive objections
- Closing statements, if any
- How to handle disclosures that become necessary during the hearing because of the identification of new parties or entities involved in the case
- Related ethical issues

Faculty: *Charles J. Moxley, Jr.*
Edna Sussman
Lea Haber Kuck
John F. Byrne

11:00-11:15 a.m. **BREAK**

11:15-12:15 p.m. **Post-Hearing Issues** *(1.0 Areas of Professional Practice)*

Part I: The Arbitrator's Perspective

- Drafting of the award (general introduction — There will be a more detailed discussion of this topic by a later panel)
- Post-hearing applications for introduction of additional evidence
- Post-award requests to change the award
- Mathematical or formal corrections and the like
- Substantive changes
- Rule as to *functus officio* status of arbitrators post-award
- No Contact with counsel or parties following the award
- Related ethical issues

Faculty: *Charles J. Moxley, Jr.*
Edna Sussman

Part II: The Court's and Litigator's Perspectives

- Motions to confirm and vacate and motions re arbitrability
  - How Litigators see them
  - How Courts see them
- How best to advance such motions
- What arbitrators should do to lessen likelihood of vacatur
- Remands to arbitrators

Faculty: *Hon. Helen Freedman*
Lea Haber Kuck

12:15-1:15 p.m. **LUNCH**

12:30 p.m. **Luncheon Address: *Introduction to the World of International Arbitration – and How it Fits into Today's World***

Speaker: *Luis M. Martinez*

Tuesday, June 19, 2018, Afternoon Session

(4.0 Areas of Professional Practice; 1.0 Skills)

1:15-2:30 p.m. **International Arbitration: How It Differs from Domestic Arbitration**
(1.5 in Professional Practice)

- Introduction to the overriding conventions and laws applicable to international arbitration as opposed to domestic contrasted with domestic arbitration
- Discussion of the practices of international arbitration that are different from domestic
- The extent and significance of international arbitration as the default methodology of choice for international business
- "soft law" applicable to international arbitration

Faculty: *Moderator: Charles J. Moxley, Jr.*
James Hosking
Sherman W. Kahn
Luis M. Martinez
Camille M. Ng
Rekha Rangachari
Edna Sussman

2:30-2:45 p.m. **BREAK**

SCHEDULE OF EVENTS

2:45-4:00 p.m. **Electronic Discovery** *(1.5 Areas of Professional Practice)*

- Significance of electronic discovery in terms of cost and delay
- Definition of terms
- Identification of the areas of greatest expense in connection with electronic discovery
- Matters to establish at the outset to minimize the expense and optimize the efficiency of electronic discovery
- ICDR recommended practices as to electronic discovery
- CPR Protocols as to electronic discovery
- Best practices as to electronic discovery

Faculty:

Moderator: Edna Sussman
Joseph V. DeMarco
Sherman W. Kahn
Hon. Shira A. Scheindlin

4:00-5:00 p.m. **Award Writing** *(1.0 Skills)*

- Standard versus reasoned awards
- Advantages and disadvantages of each type of award
- Consideration of what should be included in a standard award
- Consideration of what should be included in a reasoned award
- The structure of a reasoned award
- How to go about drafting a reasoned award
- When to start drafting a reasoned award
- Best Practices as to drafting a reasoned award where there is a panel of three arbitrators

Faculty:

Moderator: Charles J. Moxley, Jr.
Hon. Ariel E. Belen
Steven Certilman
Lea Haber Kuck
Richard L. Mattiaccio
David C. Singer

5:00-6:00 p.m. **Advocates' Best Practices in Selecting Arbitrators** *(1.0 Areas of Professional Practice)*

Faculty:

Moderator: Charles J. Moxley, Jr.
David J. Abeshouse
Erin Gleason Alvarez
David W. Brown
James Hosking
Lea Haber Kuck
Richard L. Mattiaccio

6:00 p.m. **ADJOURN**

Wednesday, June 20, 2018, Morning Session

(2.0 Areas of Professional Practice; 1.0 Ethics; 1.5 Diversity, Inclusion and Elimination of Bias)

8:20-8:50 a.m. **Registration and Continental Breakfast**

8:50-10:45 a.m. **Arbitration Law** *(2.0 Areas of Professional Practice)*

- Introduction to the FAA
- Introduction to New York arbitration law – CPLR Article 75
- Interplay of the FAA and New York arbitration law in arbitrations held in New York
- Arbitrability as to parties and non-parties
- The "Who Decides" issue: Who determines arbitrability, the arbitrators or a court?
- Arbitration due process
- Enforceability of non-party subpoenas for documents and testimony
- Within subpoena range of the seat of the arbitration
- Beyond subpoena range of the seat of the arbitration
- Standards of review under the FAA and New York arbitration law
- How these areas of law differ in the context of international arbitration
- Review of recent decisions applicable to arbitration

Faculty:
Moderator: Charles J. Moxley, Jr.
William J.T. Brown
Michael S. Oberman
Steven Skulnik
Nicholas R. Weiskopf

10:45 – 10:55 a.m. **BREAK**

10:55 – 11:45 a.m. **Ethics and Cyber Security for Arbitrators – Maintaining the Security of the Arbitration Process** *(1.0 Ethics)*

Faculty:
Moderator: Charles J. Moxley, Jr.
Stephanie Cohen
Mark Morril

11:45 – 1:00 p.m. **Diversity, Inclusion and Elimination of Bias – Implicit Bias, Serving a Diverse Population and Sensitivity to Culture and other Differences, Including Heuristics Affecting Arbitrators' Exercise of Judgment and Decision-Making** *(1.5 Diversity, Inclusion and Elimination of Bias)*

Faculty:
Moderator: Charles J. Moxley, Jr.
Professor Lela P. Love
Karen Mills
Edna Sussman
Daniel M. Weitz

1:00-2:00 p.m. **LUNCH**

1:15 p.m. **Luncheon Address: *Counsel Perspectives on Selecting Arbitrators***

Speaker: *Lea Haber Kuck*

Wednesday, June 20, 2018, Afternoon Session

(1.5 Ethics; 2.5 Areas of Professional Practice)

2:00-3:15 p.m. **Arbitration Ethics** *(1.5 Ethics)*

- Disclosure rules
- Codes of Ethics applicable to arbitrators and arbitration counsel
- Best practices for disclosures by arbitrators
- Ongoing nature of disclosure obligation
- Party-appointed arbitrators
- Appropriateness of an arbitrator's accepting appointment to a new case that involves parties or attorneys who are already appearing before the same arbitrator in another case
- Use of Associates/Assistants
- Appropriateness of an arbitrator's accepting employment as counsel for a party who had previously appeared before the arbitrator in an unrelated case
- Involvement of arbitrators with respect to possible settlement discussions among the parties
- Inclusion of all arbitrators on a panel in arbitrator discussions concerning the case
- Recent ethical decisions

Faculty: *Moderator: Lea Haber Kuck*
Steven C. Bennett
Hon. Barry A. Cozier
Daniel F. Kolb
Abigail J. Pessen

3:15-3:30 p.m. **BREAK**

3:30-4:00 p.m. **The Real World: Developing your ADR Career** *(0.5 Areas of Professional Practice)*

Faculty: *Jeffrey T. Zaino*
Michelle Skipper

4:00-5:40 p.m. **Perspectives on Practice Development in the Arbitration World**
(2.0 Areas of Professional Practice)

- Overview of the arbitration world
- Level of training and experience necessary to be a good arbitrator
- How to go about getting experience as an arbitrator
- Traits that parties and their counsel look for in prospective arbitrators
- Opportunities for arbitration training and skills building

Faculty: *Moderator: Charles J. Moxley, Jr.*
Erin Gleason Alvarez
Citlalli Grace
Lea Haber Kuck
Jack Levin
Crystal Loyer
Edna Sussman
Robyn Weinstein
Jeffrey T. Zaino
Amy M. Pontillo
Alexandra Dosman

5:40-5:55 p.m. **Questions and Answers/Final Wrap Up**

5:55 p.m. **ADJOURN**

To get involved with the NYSBA Dispute Resolution Section visit www.nysba.org/drs for a listing of upcoming Section programs, networking events, committee meetings, reports, and publications.

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COMMERCIAL ARBITRATION TRAINING
June 19-21, 2017

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Fact Pattern

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Arbitration Scenario – Fact Pattern

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

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

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

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

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

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

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

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

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

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

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

Arbitration Practice

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Increasing Diversity Among Arbitrators

A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal

By Sasha A. Carbone and Jeffrey T. Zaino

Introduction

This article is primarily for women and minority arbitrators who are looking to establish their careers. The path to success is not always clear, and there are different approaches to consider. However, there are fundamental guidelines that we think every new arbitrator, whether diverse or not, should consider. To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace. This article seeks to provide a basic reference on the subject of establishing a career in arbitration, keeping in mind that the challenges to becoming successful as a neutral can be even more acute for women and minorities.

Becoming a neutral can be rewarding and fulfilling, providing an opportunity to perform a crucial function necessary for this country's dispute resolution system. From incorporating alternative dispute resolution clauses in national and state legislation to court-mandated alternative dispute resolution (ADR) programs, ADR is increasingly a mainstay of our justice system. It is critical, therefore, that ADR neutrals reflect the diverse cultural makeup of its market. Diversity, as we see it, includes cultural, racial, geographic, language and gender differences.

Why is diversity important to ADR? Gwynne A. Wilcox, Esq., of Levy Ratner, P.C., in New York City, notes the following:

> I believe that increasing the diversity among arbitrators is extremely important to the process. While the diversity of the workforce has drastically changed over the years, it is evident that the arbitrator pool has not evolved to the same extent. The majority of arbitrators do not reflect the workers who appear before them and cannot identify with their realities as workers. Diversity among arbitrators will provide more credibility to the process in the eyes of the grievants. Also, a more diverse panel of arbitrators will provide a wider range of perspective and experiences that are often lacking among arbitrators who have had life experiences that differ greatly from those of the grievants.

A Look at the Numbers, a Greater Need for Diversity

There is no question that the ADR community is lacking in diversity. This can be attributed to a number of factors, including a lack or perceived lack of access for diverse candidates, failure by arbitral organizations to reach out to diverse candidates, and an arbitrator selection process that relies upon users to select neutrals to serve on their cases. And while corporations have been increasingly

vigilant in their employee diversity initiatives and require that their outside law firms employ and utilize diverse lawyers, they have not addressed the diversity issue in any coherent way when it comes to selecting neutrals to hear their disputes in arbitration. Arbitral associations continue to improve the diversity of the pool of arbitrators, but it is incumbent upon corporations to be mindful of diversity relative to the ADR process.

At the American Arbitration Association (AAA), creating and maintaining the diversity of our neutrals roster is part of our mission. While the AAA has made great strides, it recognizes that more work is needed. At the AAA, our overall Roster of Neutrals is approximately 23% diverse for gender and race. For the AAA's major divisions, the diversity varies depending upon the caseload: labor (27%), employment (42%), commercial (17%), construction (10%), and insurance (20%).

Despite the ongoing efforts to assist new arbitrators, certain fields have particular challenges. For example, breaking into the labor arbitration field is difficult because in order to be considered on most labor panels, you must be a truly neutral decision maker (i.e., a full-time decision maker or one in a profession considered neutral), which is not the case for other arbitration disciplines such as commercial, construction, international, or insurance. To be on the AAA's labor panel, an arbitrator cannot be an advocate for either unions or employers, or be employed by a government agency, company or union involved in labor-management disputes. Since the only source of income for many new labor arbitrators is their labor arbitration practice, this can pose significant financial and professional risks. Consequently, these arbitrators depend more on networking and visibility than arbitrators in other disciplines. In short, the need to network and develop a caseload, always critical for arbitrators, is even more important for nascent labor arbitrators.

Getting on a Panel Is Just the Beginning

Appointment to an arbitral panel or selection to become a neutral for an arbitral sponsoring organization is a significant achievement for a young arbitrator. The fact of selection means that the neutral has attained a high level of industry expertise or knowledge and has reached the point where that expertise can translate into the young arbitrator's selection as a panelist on arbitration cases. However, the new arbitrators may be unpleasantly surprised that acceptance as a member of an arbitral association's panel does not mean he or she will be selected for cases right away.

Yet, there is much a new arbitrator can do in this interim or transitionary period to increase visibility and gain training and practical experience. We list four examples below. While none of these elements assures success, taken together they provide best practices for positioning a neutral to leverage opportunities, which usually expand as the neutral becomes more active.

1. Mentoring

Mentoring should start when a professional is considering the ADR practice, and it should never end. Successful mentoring relationships can provide invaluable aid to building and managing an ADR practice. Mentorship is a tradition in many areas of alternative dispute resolution – for example, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides that one of the obligations an experienced arbitrator has to the profession is to cooperate in training new arbitrators.

> To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace.

When working with a mentor, it is useful to establish from the start goals and guidelines for how the relationship will work. Is the purpose of the mentorship to gain contacts, shadow the mentor in arbitration hearings, obtain advice or a combination of these goals? A new arbitrator should consider how often the mentor can reasonably be expected to be available and whether that fits the mentee's needs. These should be set early and communicated to the mentor to ensure that both parties start off on the right note.

Another consideration is the length of the mentorship period. Ideally, the mentoring relationship should have a timeline to help both parties manage expectations and goals.

There is no rule that arbitrators can only have one mentor. Using multiple mentors can provide increased exposure for the new arbitrator. For example, a mentor could be a highly experienced and work regularly but have a caseload limited to a few large ADR users or industry sectors (i.e., only private or public). Such exposure is valuable to the new arbitrator, but it could be limited. By researching the caseloads of mentors and using multiple mentors, the new arbitrator has a better chance of gaining exposure to different industries. Also, by using only one mentor the new arbitrator could run the risk of being negatively identified with one arbitrator or sector of an industry.

Shadowing experienced neutrals gives an inexperienced neutral the opportunity to observe peers' style and conduct. While the new arbitrator is not permitted to weigh in on any issues in the arbitration, shadowing

provides the additional benefit of allowing the new arbitrator the opportunity to consider how he or she would handle the issues if presiding over the case. Of course, the arbitrator hearing the case would need to obtain permission from the parties and the administrator.

Writing mock decisions is also a good way to hone skills. New arbitrators can write decisions of the case being observed for review by the arbitrator hearing the case. There are also many case scenarios available either through sponsoring organizations or, generally, on the Internet. New arbitrators can utilize these case scenarios to draft mock decisions, and have them reviewed by more seasoned arbitrators.

2. Pro Bono or Reduced Fee Work

Getting the first arbitration case can be difficult for the new practioner, but there are opportunities to serve on a pro bono basis or on reduced fee cases that may provide future opportunities.

Court-Sponsored ADR Programs

There are numerous court-sponsored ADR programs nationwide. Many of these programs require neutrals to serve pro bono on a minimum number of cases per year. Some programs allow a neutral who has completed his or her probono requirement to accept payment from the parties, provided they agree to the terms in writing in advance.

Bar Associations

The American Bar Association Section of Dispute Resolution urges arbitrators to devote at least 50 hours of pro bono ADR services annually. It has established a Pro Bono Committee to assist neutrals with locating opportunities. For example, many state and city bar associations have pro bono fee-dispute programs, which offer excellent experience.

Private ADR Providers

If an arbitrator is a member of a roster of neutrals for a private ADR provider, he or she should inquire as to whether there are opportunities to serve on a pro bono basis for hardship cases or on reduced fee cases, such as for expedited caseloads. While pro bono opportunities may be limited, expedited caseloads are gaining popularity for small-dollar disputes. These cases are often on a documents-only basis and provide a new neutral with an opportunity to handle a case on a smaller scale.

In addition to opportunities in arbitration, the new practioner should not foreclose other readily available ADR opportunities. Many local community mediation programs offer opportunities to mediate with the attractive benefit that they also often provide no-cost or low-cost training in exchange for a commitment to volunteer. This often enables the candidate to obtain experience in mediating disputes and to meet others embarking on similar careers.

3. Exposure – Networking Through Professional Organizations and Publishing Opportunities

Bar Associations

Almost every bar association in the United States has an alternative dispute resolution section, a mediation section and/or an international dispute resolution section. It is very important for those new to the field to get involved in these associations. The profession's leading thinkers are often members of these committees and involvement with them presents an unparalleled opportunity to network and learn about developments in the field.

Industry-Specific Organizations

Industry-specific organizations may provide new arbitrators opportunities for growth and development. For example, some of the 122 regional offices of the Better Business Bureau (BBB) have pro bono or modest honorarium ADR programs to handle consumer-to-business complaints and certain business-to-business disputes. The pro bono arbitrators receive internal training and observe a set amount of BBB arbitrations before being assigned a case.

Many state associations of realtors also have established ADR programs that use both mediators and arbitrators. These associations could provide opportunities for a new arbitrator to receive training and hear actual cases. Specifically in the area of labor law, most states have public employment relations boards that are quasi-judicial agencies that oversee public sector collective bargaining and adjudicate disputes using labor arbitrators who work pro bono or for a minimal fee.

Join Committees, Subcommittees

There are numerous opportunities to get involved by joining committees and subcommittees of bar associations and industry-specific organizations. Because of ADR's ever-evolving nature, there is always legislation to consider, case law to review, and best practices to create and evaluate. Joining these committees and subcommittees creates a real opportunity to shape the thinking on these topics, as well as to learn from colleagues.

Run for Office Within the Organization

Running for office within an organization provides opportunities not only to lead, but to learn and grow as a neutral. These offices are generally high profile, and the committees do substantive work and analysis that impacts the profession. Haydee Rosario, a new labor and employment arbitrator, notes the following:

> Gaining the acceptance of advocates on both sides of the aisle takes time, discipline and hard work It does not happen overnight because each side needs to trust you before they select you to hear their cases.

> There is a process that needs to take place before you become acceptable as an arbitrator. Your participation in organizations such as the New York City Labor and Employment Relations Association (LERA) is an essential part of that process LERA offers you the opportunity to network with other professionals and to learn about new developments, issues and practices in the field. Being part of LERA's Executive Committee has given me the opportunity to learn about changes in the labor and employment arena while working directly with many of the labor and management representatives in New York and New Jersey. This experience may prove to be invaluable in gaining the trust and credibility that I need as an arbitrator.

Attend Events: Speaking Events, Educational Programs, CLE Courses, Luncheons, and Other Networking Events

Bar associations, sponsoring organizations and law firms all provide ample opportunities for novice arbitrators to network at events and educational programs. To the extent that a neutral has a particular expertise in a noteworthy topic, speaking at an event is another way to gain exposure in the field. Start by approaching your sponsoring organization or bar association committee with an idea for a panel and topic, then work with more seasoned arbitrators to craft the presentation. Many sponsoring organizations law firms, and bar associations offer online seminars that have the added benefit of sharing your thoughts with potentially large audiences.

Publishing Articles

Publishing articles is another way to show the marketplace your subject matter expertise. Many organizations and journals have an ongoing need for articles, including those that focus on ADR. The field of ADR is ripe for articles covering recent case law developments. Whether it is a split among the Circuits on an ADR issue or best practices for limiting discovery in arbitration, neutrals should look for topics that interest them and that may provide an opportunity to get published. Aside from ADR specific topics, new arbitrators should also consider publishing on a topic specific to their area of expertise. Once published, obtain reprints and circulate.

Ongoing Evaluation and Review

Marketing yourself as a neutral is an ongoing process. New neutrals often lament that they are not being selected for cases as often as they think they should, despite their experience. New arbitrators should review their resume quarterly to make sure that it is current. Having your resume reviewed by other arbitrators or mentors is very important.

Give an honest assessment of your per diem, cancellation fee and study time fees. A new neutral should consider whether his or her rate is reasonable and competitive.

Neutrals should also consider taking advantage of opportunities for ongoing review of technique, style and writing skills through refresher and ADR training courses.

New arbitrators should not be afraid to take a stand. Neutrality and respect should be a primary concern; timidity, however, can hurt your reputation. The most successful arbitrators have strong personalities and make tough decisions without worrying about alienating individual ADR users or advocates.

4. What ADR Providers and Users Should Do and What They Are Doing

Sponsoring organizations that administer arbitrations bear a great degree of responsibility in both the recruitment and maintenance of diverse neutrals. It is not enough to have diverse neutrals on the roster; sponsoring organizations must ensure that there are opportunities for advancement in the field.

There are numerous ways that sponsoring organizations can provide assistance to diverse neutrals starting out in the field. At the outset, it is important for sponsoring organizations to commit to investing in diverse neutrals. This means that sponsoring organizations commit to provide resources to diverse neutrals early on in their careers, and continue that commitment. Many of the resources are readily available to sponsoring organizations, and are often utilized, albeit in a piecemeal way. In order to have a substantial impact on the profession, there needs to be a systematic way to provide these resources to those trying to establish themselves in the field.

Publish Written Opinions; Allow Easy Access by ADR Users

When researching unknown or new arbitrators, most ADR users seek written opinions. This can be challenging. LexisNexis and Westlaw offer some redacted arbitration opinions, but the majority of these opinions come from experienced arbitrators. Published opinions are usually selected from complicated, unusual and/or extraordinary cases. New arbitrators' opinions are rarely selected, which limits exposure.

Some ADR providers publish opinions but mostly by experienced arbitrators. So if a new arbitrator has published opinions, there needs to be a vehicle for easy access. Both ADR providers and users should collectively determine a method for publishing and widely distributing opinions of new arbitrators, possibly by developing easily accessible web pages and other electronic tools. ADR users need such a resource to obtain information about unknown and new arbitrators. Parties want a substantive reason for selecting the new arbitrator – whether obtained from referrals, resumes or published opinions.

Opportunities for Arbitrators to Publish and Showcasing New Arbitrators With Photographs and Q&A

One way for sponsoring organizations to provide exposure to diverse neutrals is to encourage publication in

their journals or newsletters. This is a low cost, high impact way to provide advancement opportunities.

Putting a "name to a face" is vital in the arbitration industry, especially for new arbitrators. Many new arbitrators are now developing web pages with pictures, testimonials and other useful information. ADR providers should assist with this effort by developing methods and/or better vehicles for showcasing new arbitrators. For new arbitrators in the labor field, the AAA implemented a pilot program in 2010 in which five labor arbitrators were spotlighted in an electronic publication that used a Q&A format and included photographs. Many of the questions were provided by ADR users, such as:

- What past professional and/or personal experiences have you had that make you a better arbitrator?
- What is the most difficult decision you had to make on a case that you presided over?

The *AAA Arbitrator Spotlights* were sent, via an email blast, to hundreds of ADR users.

Review of Ranking to Provide Guidance to Arbitrators

Once neutrals become members of a roster, they don't know if they are being listed on actual panels presented to the parties or what their level of acceptability is unless they are being selected for cases. For some, there is a long period – sometimes six months to a year – before being selected for a case. We propose that sponsoring organizations periodically share information with neutrals to let them know whether they are being listed and the number of cases for which they have been listed, and how parties are ranking the neutral if a list/strike process is being utilized.

Permanent Panels for New Arbitrators

A new arbitrator should seek, where possible, permanent panel assignments. Many ADR providers and large users have established permanent panels for their less complicated caseloads, geared towards new arbitrators who have substantive experience. For example, there could be specific discipline disputes in the labor-management context that are assigned permanent panels. Typically, the per diem is determined by the parties and there are set requirements for both the arbitrator's study time and cancellation fees. Many permanent panels are established because the volume of disputes. Such permanent panels work on a rotation basis and have annual reviews of the panel and fee structure. The parties must mutually agree on all arbitrators on the permanent panel.

ADR Providers and Users Need to Sponsor More New Arbitrator Programs and Meet-and-Greet Events

By sponsoring professional and social networking events, ADR providers and users can provide greater exposure, which benefits new arbitrators. In May 2010 and June 2011, the New York City Bar Association and AAA co-sponsored successful panel programs with 12 new arbitrators. More than 150 ADR users attended each program.

Ruth Moscovitch, a new arbitrator panelist on the May 2010 program, stated, "There is no question that I have benefited from the experience and exposure. Many people came up to me afterward to give me positive feedback, and I continue to hear that people are asking about me. I also got two new cases from the AAA, so that has been a tangible result."

Bring Together ADR Users, Providers, and Experienced and New Arbitrators to Discuss Collectively How This Goal Can Be Achieved

There is a need for more communication and dialogue about developing new arbitrators. This should no longer be an academic exercise, but an industry-wide effort. There should be actual initiatives and a clear understanding that investing in new arbitrators is mutually beneficial. The main players – ADR users, providers, experienced arbitrators, and new arbitrators – have to be on board and ready to make changes. Representatives from each group should meet annually or semi-annually to discuss goals, specific caseloads for new arbitrators, resources, and steps towards implementing programs.

Use New Arbitrators, Reaching Out to Women and Minorities, on Specific Caseloads to Provide Exposure and Experience

The best way to assist a new arbitrator is by putting him or her on a case. Plenty of arbitration caseloads involve straightforward factual and legal issues. These types of cases should not be decided by experienced arbitrators with high per diems but by new, less expensive arbitrators. The perceived risk factor for the ADR users is reduced and these cases provide an opportunity for the ADR user to create a larger pool of arbitrators. Seeing an arbitrator in action is the only true way for the ADR user to achieve an absolute comfort level. ADR providers offer less-complicated case services and try to utilize new arbitrators. For example, the AAA offers Labor Rapid Resolve where an arbitrator will hear up to three cases in a single day for a reduced flat fee. These types of cases, heard mostly by new arbitrators, usually involve suspension or discipline issues.

Conclusion

It can take several years for the novice arbitrator to achieve success in the field. This is true even for the arbitrator with stellar credentials and an active practice. While all professions demand that practitioners market and promote themselves to achieve broader success, arbitration's commitment to the highest ideals of fairness and access to justice is reflected in the path to success. They enhance and advance an arbitrator's career and are the foundation for the future of the entire profession. ■

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Articles

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

Tracey B. Frisch [a1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***178 VII. CONCLUSION**

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

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

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

Footnotes

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

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

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

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

4 *id.* at 1334.

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

6 *id.* at 625.

7 *Id.*

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

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

10 *id.* at 395.

11 *id.* at 394.

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

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

14 *id.* at 194.

15 *id.* at 193.

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

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

18 *Id.* at 592.

19 *Id.*

20 *id.* at 592-93.

21 *Id.* at 592.

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

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

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

25 *Id.* at 55.

26 *Id.*

27 *Id.*

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

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

30 *id.* at 770.

31 *Id.* at 772.

32 *id.* at 771.

33 *Id.* at 772.

34 *Id.* at 762.

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

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

37 *id.* at 389.

38 *Id.* at 388

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

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

41 *id.* at 17.

42 *id.* at 18.

43 *Id.*

44 *id.* at 20.

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

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

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

48 *id.* at 490.

49 *id.* at 491.

50 *id.* at 492.

51 *id.* at 490.

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

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

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

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

56 *Id.*

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

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

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

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

60 *Id.*

61 *Id.*

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

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

64 *id.* at 634.

65 *id.* at 638.

66 *id.* at 635.

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

68 *id.* at 637.

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

70 *Id.* at 1045.

71 *id.* at 1043.

72 *id.* at 1045.

73 *Id.*

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

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

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

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

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

79 *id.* at *1.

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

81 *id.* at *7.

82 *Id.*

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

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

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

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

87 *Id.*

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

89 *id.* at 499.

90 *Id.*

91 *Id.*

92 *Pacilli*, 1991 WL 193507.

93 *id.* at *1.

94 *Id.*

95 *id.* at *2.

96 *Id.*

97 *Id.* at *3.

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

99 *id.* at *6.

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

101 *id.* at 72.

102 *Id.*

103 *Id.*

104 *Id.*

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

106 *id.* at 602.

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

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

109 *id.* at 747.

110 *id.* at 750.

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

112 *id.* at 1100-01.

113 *Id.*

114 *id.* at 1101.

115 *id.* at 1101-02.

116 *Id.* at 1103.

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

118 *Id.*

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

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

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

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

123 *id.* at 85.

124 *Id.*

125 *id.* at 86.

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

127 *id.* at 343.

128 *Id.*

129 *id.* at 344.

130 *id.* at 354.

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

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

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

134 *id.* at 1565.

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

136 *id.* at 103.

137 *id.* at 111.

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

17 CDZJCR 155

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Some Tips for Conducting Muscular Arbitration Hearings

by Charles J. Moxley, Jr.[1]

The Overriding Imperative – That We Become "Muscular Arbitrators"And Choose "Muscular Arbitrators" For Our Cases

Following are some tips that have occurred to me in presiding over many arbitrations, as to how arbritators might begin to become the vaunted "Muscular Arbitrator" and as to how litigators in arbitration may improve the prospects of their receiving a "Muscular Arbitration."

The Muscular Arbitrator

- The Muscular Arbitrator will proactively manage the hearing from the beginning.
- The Message: Both sides will get a full and fair opportunity to present their case/defense, but we will move it along.
- Limit opening statements where appropriate and enforce the limits.
- Give guidance to counsel, at the first provocation, to not engage in repetitive or cumulative testimony or argumentative behavior and advise that redirect and recross will be limited.

Opening Statements: Tip to Counsel

- A colorful and engaging PowerPoint can add wonders to an opening statement—and, with a good one, the arbitrators may refer to it throughout the hearing.

All the Exhibits Are In

- Arbitrators should be very clear (unless there is a reason to do it differently in a particular case) that all pre-marked exhibits, except ones that have been objected to, are fully in evidence as of the beginning of the hearing.
- And further – that objections to objected-to documents will be heard when the documents are offered.
- This should be in the context of making the parties understand that, generally speaking, all exhibits come in, subject to issues as to authenticity, privilege, extreme irrelevance/prejudice or prior failure to pre-designate the documents.

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Study the Witness Statements and Experts' Reports in a Timely Way

- The Muscular Arbitrator will study the Witness Statements/Experts' Reports and related exhibits in advance – and will review them closely the night before, so as to be as familiar with them as she would have been had the substance thereof been presented by live testimony.
- The Muscular Arbitrator will tell the parties at the opening of the hearing that she will be doing this and that they can count on it.
- The same applies to reviewing the Key Exhibits in advance.
- Tips to Counsel:
  - Remember that arbitrators do not have a staff of junior attorneys and paralegals working with them on the arbitration.
  - Faciliate the arbitrators' access to Witness Statements, Experts' Reports for upcoming witnesses, and the like and keep them advised of changes in the order of witnesses.
  - It is generally a good idea for counsel to provide the arbitrators with *dramatis personae*, summaries, copies of earlier papers -- whatever counsel would like the arbitrators to be looking at or thinking about at any given point in time.

Having the Necessary Papers

- The Muscular Arbitrator will have copies of the pleadings and other important papers at ready access.

Paper Exhibits

- It is a very nice touch when the exhibits are in binders that are small enough that one can open and close them and not break one's back lifting them.
- Two-sided copies save a lot of trees and are easy on arbitrators' backs.
- It also can be a wonderful if the documents are organized in some sensible way, whether by chronology or by topic or the like.
- Another very handy device is for counsel to Bates stamp the individual pages of all the exhibits consecutively before having the copies made, so that one can reference any page of any exhibit by its unique page number.
- Further Tip to Counsel: Some arbitrators aren't in firms and have no real support staff. Helping the arbitrators with the set-up of the Exhibits and the shipping and/or storage of them between hearing days, when there are gaps, can be a nice touch.

The Electronic Hearing

- The Muscular Arbitrator will increasingly be ready for the fully electronic hearing.
- Tips for Counsel
  - Providing a thumb drive or the like containing all of the pleadings, Witness Statements, Experts' Reports, briefs, transcripts (if any), exhibits, copies of cases, *etc.* can be very helpful to arbitrators when evaluating the case and writing the award.
  - Particularly helpful are briefs that are hyperlinked to the exhibits and authorities cited.

- It can also be helpful, with the permission of the arbitrators, to mark up the important parts of exhibits and cases, etc.

Some Nice Touches with Respect to Individual Witnesses

- In a long case, it can be a nice touch for counsel to provide photos of individual witnesses.
- It is often a good idea to provide a CV of each witness, where applicable, in advance of her testimony, and to hand a copy of the CV to the arbitrators as the witness starts to testify, thereby making it possible to save time on foundations.
- Tip to Counsel: It's not unreasonable for counsel in such circumstances to make a nice summary statement of what the CV shows.

Organizational Charts as to the Positions and Responsibility of Witnesses and other Such Guides Can Be Helpful

- Tips to Counsel
  - Basic chronologies can be helpful.
  - A *dramatis personae* can be helpful where there are many witnesses.
  - Again, counsel are well-advised to recall that the arbitrators do not have a team of junior lawyers and paralegals to assist them in organizing materials for the arbitration.
  - In addition, arbitrators don't necessarily live with the case during the breaks, so it can be helpful to provide copies of materials like the forgoing to the arbitrators when the hearings resume to bring the arbitrators back into the picture (though the Muscular Arbitrator will obviously have done this on her own).
  - Accordingly, it is always a good idea for counsel to make available to the arbitrators whatever they would like the arbitrators to be looking at or thinking about at the time.

Argumentative Counsel

- It not infrequently happens that counsel are inclined to engage in heavy and sometimes vituperative colloquy among themselves.
- While parties have a right to make any objections they want and to be heard with respect to objections, there is no room for vituperation (not to mention that it is counter-productive), nor is extended colloquy helpful.
- These practices must be squelched when they first appear.
- Approaches:
  - Direct counsel, when they are too disputatious with one another, to direct everything to the arbitrators; and
  - Don't be afraid to limit argument once the point has been made.

Reviewing Upcoming Witnesses and Areas of Testimony at the End of the Day

- The Muscular Arbitrator will review upcoming witnesses and their anticipated areas of testimony with counsel at the end of each day.
- Particularly after the matter has gone on for a while and the arbitrator has heard enough testimony to have a sense of the matter, she will advise counsel as the case proceeds as to

what witnesses and what areas of testimony seem potentially helpful, and what ones do not.

- The Muscular Arbitrator will provide for extended days when necessary to get the job done on time --- and will remember that the court reporter (if there is one) has to be on board for extended days to be an option.

Limiting Direct Testimony When the Witness' Direct Testimony Has Been Presented by Witness Statement, Experts' Report or the Like

- A lot of time can be saved by avoiding extensive repetition of direct testimony when that testimony has already been provided by Witness Statement, Expert Report or the like.

Offers of Proof and Unnecessary Testimony

- The situation will arise where a party is going to put a witness on to testify to something that the party needs to establish but that the other side is not really going to be in a position to dispute anyhow, although they would not necessarily stipulate to it.
- In this situation, a quick compromise can be to have an offer of proof put on the record by offering counsel – and have that offer be stipulated to as testimony, *i.e.*, not that the matter is true, but that this is what the witness would have testified to.

Hearing Expert Witnesses on a Particular Topic at the Same Time

- It can save time to have expert witnesses on a particular topic testify at the same time, with all such witnesses being present when each testifies.

Arbitrator's Stream of Consciousness Notes at the End of Each Day

- A practice that some arbitrators follow – and that can be quite helpful in terms of helping the arbitrator understand a case and organize her thoughts on it, and also to get back into it promptly again after a break – is to dictate a stream of consciousness memorandum at the end of each day's hearing, setting forth in some detail the arbitrator's impressions and tentative conclusions based on the day's testimony and her overall analysis of the issues in the case, as they appear in the hearing to date, along with any questions the arbitrator has going forward.
- These dictated notes can be much more helpful than the notes arbitrators take on yellow pads or laptops during the hearing, since they typically provide more of an overview and analysis.
- Arbitrators who follow this practice find that it increases their understanding of the case and their sense of what will be most helpful in the case going forward.

Form of Award

- Reasoned awards are expensive and time-consuming.
- The Muscular Arbitrator will challenge the parties, as with discovery and motion practice, as to why they want a reasoned award, and will point out that, given the limited scope of review, in many instances, a standard award may be sufficient.
- Where the parties want a reasoned award, the question becomes what level of reasoning they want.
- Different arbitrators and counsel have markedly different views of what is meant by a "reasoned award."

- This should be a matter of explicit discussion: The Muscular Arbitrator will discuss with counsel what level of reasoning they want, conducting this discussion with reference to the potential costs of different levels of reasoned awards.
- The Muscular Arbitrator will also remember that at times, when counsel advise that they want a standard, non-reasoned award, this means not only that they do not want to incur the expense of a reasoned award, but also that they *affirmatively want to avoid having a reasoned award.* When this is the case, obviously the arbitrator will want to respect this.

Avoiding Post-Hearing Briefs When It Makes Sense/The Closing Statement Alternative

- Post-hearing briefing adds a considerable level of expense to arbitrations and results not only in substantial delay, but also in the arbitrators' not addressing the matter and writing their awards until weeks, or typically, months after the close of the hearing.
- Often — although counsel may have a hard time letting go — the arbitrators will know the case as well as counsel by the end of the hearing, so that post-hearing argument and briefing will not really be all that helpful to the arbitrators. This is worth discussing with counsel. Nonetheless, if, as often happens, counsel nonetheless want to brief the matter and/or have closing statements a week or two subsequent to the closing statements, that should generally be permitted.
- Closing statements can be an efficient alternative to post-hearing memoranda when counsel are satisfied with them.
- Where the parties and counsel are local, it is often convenient for them to come back a week or two after the hearing to provide their closing statements (in some instances after the transcripts (if any) are received.
- While this takes some time, it is generally more efficient and quicker than post-hearing briefs and, in many cases, may be more helpful to arbitrators because of the dialogue the closing statements make possible.
- Tips to Counsel:
    - A good closing PowerPoint presentation, annotated to the record can be helpful in an appropriate case (if counsel don't then just read it).
    - Also quite helpful and handy is a small binder of the key documents from the hearing, marked up to highlight the points counsel like (it can be particularly handy if the documents are somewhat reduced in size and 2-sided).

Attorneys' Fees and Costs

- In cases in which the arbitrators will be awarding attorneys' fees and costs, it becomes very important how this process is administered.
- Many arbitrators believe that the best practice is to ask both sides to submit their statement of their fees with their final briefs and to agree that the arbitrators may decide attorneys' fees based on those submissions.
- Assuming one gets buy-in for this approach, substantial potential delay in the future can be avoided. However, in the unusual case where either side objects and says they reserve the right to have a hearing as to fees, allowance will have to be made at a later time for such a hearing, since factual questions will presumably be presented.
- While this approach results in the winning party's having had to submit its fees as well, this should not be a significant burden because lawyers in most cases will have recorded

their time on a regular basis anyhow. Plus the fact, having the two submissions to review can be helpful as to reasonableness.

- The alternative – the submission of fees applications after the award – can take up much more time, as the losing party may, by that time, be quite uncooperative.

Dealing with Those Last Minute Troublesome Issues That Come Up

- It often happens that issues come up late – sometimes quite late in arbitration – which are really a nuisance.
- The Muscular Arbitrator, to protect the record of the case and avoid the risk of issuing an award that is unclear or in some way subject to challenge, will give fair consideration to such matters and, as appropriate, create a record as to that consideration, rather than simply brushing such matters aside.

Important Words to Add at the Very End

- Nothing can more derail the efficiency and economy of arbitration than to have the award be subject to challenge in court.
- Running a good hearing is obviously a way to decrease the likelihood that any such court challenge will have merit.
- One important stopgap is to very carefully and comprehensively ask counsel at the end of the hearing questions along the following lines: Have you had an opportunity to offer whatever proof you feel you're entitled to offer and to say whatever you feel you need to say? Do you feel you've had a full and fair hearing? Is there anything further you need in order to feel that you have a full and fair hearing?
- While this may seem like looking for trouble, it can save a lot of time in the long-run.

Non-Party Subpoenas

by Charles J. Moxley, Jr.

Significance of the Issue

- Importance of Non-Party Subpoenas: In many cases, non-parties are key witnesses and hold key documents.
- Concerns: Arbitration is a creature of contract. Non-parties should not be required to be involved absent a real need.

Overriding Practicalities as to Subpoenas

- Likely compliance by non-party witnesses: Anecdotally, it appears that non-party witnesses accept subpoenas in many instances, rather than disputing them, and then often negotiate convenient times for compliance.
- Reasons for acceptance of subpoenas: This may be because such witnesses want to come forward because they are aligned with a party, because they respect the process and feel a responsibility as a witness to cooperate, because they want to schedule their appearance to suit their own convenience, or because they want to avoid the time and expense of opposing the subpoena.

Considerations Applicable to What Subpoenas Arbitrators Should Sign

- Case specific considerations—Threshold Questions: Is this witness or are these documents reasonably necessary for the case? Is the other party objecting?
- Legal considerations: What law, federal or state, applies? What does that law provide?

Evolutionary Nature of Applicable Law

- Arbitration subpoenas as limited to "hearings": The Second and Third Circuits have held that FAA Section 7 only permits subpoenas to be returnable at hearings, albeit with "hearings" including pre-merits hearings – *see generally* The New York City Bar report at http://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf
- Possibility of deposition subpoenas under other law: Some federal courts and the arbitration law of numerous states (including, it appears, New York), however, permit pre-hearing non-party depositions and/or pre-hearing discovery of documents from non-parties under some circumstances, as does Section 17 of the Revised Uniform Arbitration Act (RUAA), as promulgated by the National Conference of Commissioners of Uniform State Laws.
- Scope of subpoenas: There are also various approaches by different jurisdictions, federal and state, throughout the United States, as to the range of subpoenas, potentially raising issues as to whether a particular subpoena will enforceable, depending on where it was issued or where a party may try to enforce it. Some jurisdictions permit the process whereby commissions may be issued by a court at the site of the arbitration requesting that a subpoena be issued by a court in the jurisdiction where the witness or documents in question are located.
- The roving arbitrator alternative: There is the possibility under the law of some jurisdictions that an arbitrator (including possibly one member of a panel of arbitrators)

might "rove" from the seat of the arbitration to the location of the witness or documents at issue, sitting there, so as to conduct a hearing session or the like there, in some instances potentially making it possible for the parties to obtain testimony or documents they might not otherwise have been able to obtain.

- Choice of law questions: Accordingly, in any case where subpoenas are presented to arbitrators for signature, there may be a myriad of choice of law issues as to what jurisdiction's law is applicable, and whether the federal or state law of that jurisdiction is applicable.

Ethical and Practical Significance of the Uncertainty of the Law in this Area

- Unenforceable subpoenas: Many would argue that it is inappropriate for an arbitrator to sign a subpoena which she knows is unenforceable.
- Colorable subpoena: But what about a subpoena whose enforceability is at least colorable? May an arbitrator sign such a subpoena?

Some Standards for Consideration (If Only by Analogy)

- Canon I.F of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.
- Canon IV: "AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY."
- Canon IV.B: "The arbitrator should allow each party a fair opportunity to present its evidence and arguments."
- Rule 4.1 of the New York Rules of Professional Conduct for Attorneys: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
- Rule 3.1(a): "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."
- Rule 3.1(b): A claim or defense is frivolous "that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;"
- Rule 4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person."
- Rule 8.4(c): A lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Some Tentative Conclusions

- Arbitrator's right and duty to help the parties obtain non-party testimony and documents where not inappropriate: Desiring to accord the parties a fair and efficient resolution of their issues and a fair opportunity to present their evidence and arguments, the Muscular Arbitrator will generally want to help the parties obtain necessary non-party testimony and documents where not inappropriate.
- Overriding responsibility for subpoenas: It is the right and obligation of the parties, when they disagree as to the matter, to argue the law and facts as to subpoenas issues in an arbitration. As a general proposition, arbitrators are not required independently to

research such matters, but rather to decide issues presented based on the law and facts argued to them by counsel. However, this will often be an area where the arbitrators possess specialized knowledge not familiar to the parties or even their counsel.

- No signing of subpoenas known to be unenforceable: It would appear to be inappropriate for an arbitrator to sign a subpoena that she *knows* to be unenforceable under any circumstances, since that subpoena could be misleading to the non-party recipient.
- Appropriateness of signing subpoenas that are colorably enforceable: Although there are differing views on this, many arbitrators believe it is reasonable for arbitrators to sign subpoenas that are colorably enforceable, subject to resolving issues as to enforceability in the ordinary course when presented by the parties or by non-party recipients of subpoenas who bring the matter to the arbitrators.

Back-up Alternative Approach

- Inappropriateness of subpoenas in some instances: There will be instances where the arbitrators will decide to decline to sign subpoenas.
- The information request alternatives: In such instances, a non-binding information request may still be helpful in assisting the parties in obtaining the desired testimony or documents.

Summary

- Scheduling order: Provide for the consideration of subpoenas in the scheduling order, leaving sufficient time for possible court challenges or enforcement proceedings.
- Appropriateness for the case: Get comments from all parties. The arbitrator should always make the threshold determination as to whether the requested witnesses or documents sought by a subpoena are reasonably necessary for the case.
- Legal considerations: Assuming they are, the Muscular Arbitrator will generally want to cooperate with counsel in signing subpoenas when requested, unless it would be inappropriate to do so.
- Hearing argument from the parties: Arbitrators should hear argument from the parties if there is a dispute about signing the subpoenas and from the non-party recipients of subpoenas if they are willing to address their objections with the arbitrators.
- Requiring colorability: Arbitrators should not sign subpoenas unless they are at least colorably enforceable.
- The non-subpoena alternative: The Muscular Arbitrator, when she is unwilling to sign a non-party subpoena, may suggest to the Parties a non-binding "subpoena"—an information or document request that requests that the witness testify or the documents be produced, rather than directing that that happen.

Arbitrability of Motions to Disqualify

by Charles J. Moxley, Jr.

Motions to Disqualify a Party's Attorney in Arbitration

- Trap for the unwary: Such motions can be a trap for the unwary, given applicable law.
- Applicable law: Numerous jurisdictions hold that, as a matter of public policy, the disqualification of counsel in arbitration is a matter for the courts, not arbitrators, since it involves attorney conduct. *See, e.g., Northwestern Nat'l Ins. Co. v. Insco, Ltd.*, 2011 U.S. Dist. LEXIS 113626 (S.D.N.Y. October 3, 2011); *but see, Canaan Venture Partners L.P. v. Salzman*, 1996 Conn. Super. LEXIS 245 (Conn. Super. Ct. Jan. 22, 1996); *SOC-SMG, Inc. v. Day & Zimmermann, Inc.*, 2010 Del. Ch. LEXIS 195 (Del. Ch. Sept. 15, 2010).

Parties' Right to Pick Their Counsel

- Rule 24 of the AAA's Commercial Arbitration Rules: "Any party may be represented by counsel or other authorized representative...."
- Canon IV.C of the Code of Ethics for Arbitrators in Commercial Disputes: "The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party."
- Impact of Rule: On a motion to disqualify counsel, the attorney conflict of interest rules would likely override Rule 24 and Canon VI.C.

How Should Arbitrators Handle Such Motions

- Advising counsel of the issue: Because of the possible risk of vacatur in some jurisdictions if an arbitrator decides this issue, the Muscular Arbitrator, depending on the jurisdiction, may want to alert the parties to the existence of this issue and accord them time to consider the issue and take a position on it.
- Whether arbitrators may decide this issue with the informed consent of the parties: Many arbitrators believe that, even in jurisdictions with the restrictive rule, they may hear the motion, if the parties give informed consent.
- Muscularity: The Muscular Arbitrator should hear the motion if the parties give informed consent, rather than subject the case to the delays and expense of ancillary litigation.

Respective Roles of the Chair and Other Arbitrators

by Charles J. Moxley, Jr.

Issues

- Arbitrator authority: What types of matters may be decided unilaterally by the chair? What types of matters need to be decided by all the arbitrators? What communications are appropriate among the arbitrators?

Three Different Situations in which These Questions Arise

- No party-appointed arbitrators: Where there are three neutral non-party-appointed arbitrators;
- Two party-appointed neutral arbitrators: Where there is a neutral chair and two party-appointed neutral arbitrators; and
- Two party-appointed non-neutral arbitrators: Where there is a neutral chair and two party-appointed non-neutral (Canon X) arbitrators.

Rules and Canons

- Rule 40 of the AAA's Commercial Arbitration Rules: "When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions."
- Canon IV.G of The Code of Ethics for Arbitrators in Commercial Disputes: "Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings."
- Official Comment to Canon IV.G: "Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief."
- Canon X.C(5): "Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator".

Situation Where there Are Three Neutral Non-Party-Appointed Arbitrators

- Decision-making: In this situation, the three arbitrators together make all substantive decisions. The chair runs the preliminary hearing and other conferences and the hearing, deciding routine evidentiary and procedural matters, but consults generally with the wing arbitrators in advance and along the way, and the three arbitrators consult on any matters as to which any of them would like consultation.
- Process: The communications between the three arbitrators are generally collegial and consultative. No arbitrator should be excluded, although there is no impropriety and

indeed nothing unusual in any two of the arbitrators discussing the matter between themselves without the presence of the third, although, even with three neutral arbitrators, this should generally be kept to a minimum—and certainly nothing may be decided without including all three arbitrators in the discussions. The parties and arbitrators may agree to a "discovery master" to hear and decide discovery and routine procedural matters, subject to convening the entire panel at the request of any party or arbitrator.

Situation Where There Are Two Party-Appointed Neutral Arbitrators and the Chair

- General rule: This situation is generally handled the same way as where there are three non-party-appointed neutral arbitrators.
- Exception: A possible exception is the situation where one or both of the party-appointed neutral arbitrators seem to be partisan, in which case, on a judgmental basis, the chair may choose to treat the situation more like the one where there are two party-appointed non-neutral arbitrators.

Situation Where There Are Two Party-Appointed Non-Neutral Arbitrators

- General rule: The rule, as set forth above, is that the chair will treat the non-neutral arbitrators essentially as she treats counsel, refraining from discussing the case with such non-neutral arbitrators unless both are present.
- Decision-Making: All substantive decisions will be made jointly. As in the other two situations, the chair runs the preliminary hearing and other conferences and the hearing, deciding routine evidentiary and procedural matters, but consults generally with the party-appointed arbitrators in advance and along the way, and the three arbitrators consult on any matters as to which any of them would like consultation.

The Muscular Arbitrator and Vacatur

by Charles J. Moxley, Jr.

What the Muscular Arbitrator Does

- Controlling discovery: The Muscular Arbitrator controls discovery to assure that each side gets the discovery it reasonably needs to prosecute or defend its case, without imposing the costs and delays of unnecessary discovery.
- Limiting motion practice: The Muscular Arbitrator does not permit parties to make substantive motions unless the motions appear likely to foster the economical, expeditious, and fair administration of the case, but is not afraid to grant meritorious substantive motions when that appears likely to foster those objectives.
- Conducting an expeditious hearing: The Muscular Arbitrator conducts a hearing that avoids duplicative, cumulative, and irrelevant testimony, while according each party a reasonable opportunity to prosecute or defend the case.

Applicable Canons, Rules, and Law

- Canon 1.F of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process."
- Canon IV: Arbitrators are required to "conduct the proceedings fairly and diligently" (Canon IV), "conduct the proceedings in an even-handed manner" (Canon IV.A), "afford all parties the right to be heard" (Canon IV.B), and "allow each party a fair opportunity to present its evidence and arguments" (Canon IV.B).
- Rule L-4(a) of the AAA's Commercial Arbitration Rules: "Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases."
- Rule L-4(b): "Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be *consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.*" (emphasis added).
- Federal Arbitration Act §10(a)(3): Grounds for vacatur under the FAA include, the situations "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy..."
- Requirement of a fundamentally fair process: By case law, parties in arbitrations are entitled to a fundamentally fair proceeding.

No Jeopardy to the Muscular Arbitrator

- Role of muscularity: The Muscular Arbitrator, in reasonably controlling discovery, limiting motion practice, and conducting an expeditious hearing does not run a significant risk of vacatur either under the FAA or the requirement of a fundamentally fair proceeding. Arbitrators have substantial discretion. Courts understand that arbitration is supposed to be faster and more economical than litigation.

- The greater risk: The alternative – extended, expensive, litigation-like arbitrations – pose a far greater risk to the effectiveness of arbitration.

What if the Parties Don't Want Arbitral Muscle?

by Charles J. Moxley, Jr.

Appropriate Process when the Parties want Expansive Discovery and Motion Practice

- Presumption of an expeditious process: The AAA Rules, including Commercial Arbitration Rule L-4(a), anticipate that arbitrators will accord the parties a just, speedy and cost effective process. Rule L-4(a):

  > Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.

- Party Control of the Process: Nonetheless, parties may, by agreement, override the applicable arbitration rules and the governing presumptions as to arbitration. *E.g.*, Rule 1:

  > The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

- Cases where parties want greater process: With increasingly large and complex commercial cases and other cases of great concern to parties being brought to arbitration, there will be instances where parties choose an expanded process.
- Making sure it is an informed choice: When counsel communicate their parties' agreement to an expanded process, the Muscular Arbitrator will schedule a meeting **with party representatives**, as well as counsel, to make sure that the parties' choice of that approach is an informed one.
- The arbitrator's power to jawbone: Even where the parties agree on an informed basis to an expanded process, the Muscular Arbitrator will jawbone the situation, trying to bring the process within reasonable bounds, for example, by limiting the number and length of depositions and possibly sequencing the depositions, if the parties are willing to agree to such limitations
- The risk of the "blame the arbitrator" outcome: Even after electing a fuller process, the parties, after the fact, may well "blame the arbitrator" for the expanded and expensive nature of the case, making it important that the Muscular Arbitrator do everything she can, at every step of the process, to make the proceeding as expeditious and economical as possible.

Talking Points on Best Practices of Arbitrators in Conducting Effective Arbitrations

Charles J. Moxley, Jr.

- **The arbitration difference**: Subject to the needs of the particular case, it is good practice generally for arbitrators to communicate to counsel early on their expectations as to how arbitration differs from litigation, particularly as to discovery, motion practice, and the conduct of the hearing.
- **Requirements of arbitration clauses**: Arbitrators should generally be alert to any issues as to compliance by the parties and the arbitrators with the requirements of the arbitration clause in a case and address the situation as necessary so as to protect the award.
- **Relations with other arbitrators**: It is important early on panel members to establish a good working relationship among themselves.
- **Listening and Hearing**: It is obviously important for arbitrators to listen to and understand the parties' arguments before ruling. It is generally best to "mediate" a ruling on intermediate disputes between the parties, such as discovery disputes, to the extent possible, rather than simply ruling on them off the top. This is particularly important in the early phases of the case when the lawyers know the case much better than the arbitrators.
- **Detailed pleadings, with the main supporting documents attached**: Where the parties present bare-bones pleadings, it will often make sense for the arbitrators to require that the parties interpose detailed pleadings, perhaps with supporting documents attached. This can sometimes lessen the scope of discovery/disclosure needed in the case. Doing this also advances the goal of giving each side reasonable notice of the other side's factual and legal assertions. This also applies to the need in some cases for the early particularization of a party's claimed damages, subject to any experts' reports on the subject that may be submitted later in the case.
- **Applications for interim relief**: Where parties press applications for interim relief, arbitrators should hear them on an expedited basis, conducting fact hearings as necessary. However, one should be very careful to limit one's rulings on such applications to matters that need to be decided at the time, and to make it clear, as a general matter, that the interim rulings are only that and do not necessarily reflect how the subject matters will be decided on the merits.
- **Focusing on the overall design of the case**: Arbitrators should see as their central role at the outset of a case figuring out the appropriate process for the case, the type of proceeding most suited to the needs of the case. This involves familiarizing oneself with the file and giving counsel a reasonable opportunity at the preliminary hearing to describe their views as to the case – most essentially, their sense of the appropriate scope of

process for the case, including with respect to discovery, particularly e-discovery and depositions (if any), motion practice, schedule and the like. Salient issues in this regard include the following:

- **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators can be a pivotal moment in the case for formulating the design – the very architecture – of the case. It generally makes sense for arbitrators to conduct a robust preliminary hearing, essentially covering, at least broadly, everything that can be anticipated that may come up in the case
- **Whether to ask counsel in advance of the preliminary hearing to try to work out a schedule and protocol for the case**: It is a judgment call in each case whether to ask parties to do this. Requiring this pre-hearing coordination among counsel can be efficient, and counsel tend to like it, but it can lead to counsels' agreeing to a litigation-style process, making it harder at the preliminary hearing to get buy-in from counsel on a scope of discovery that is appropriate for arbitration. However, it generally makes sense for arbitrators to at least figure out their mutual days of availability for the hearing and be prepared to present them to counsel on a unified basis. Where the arbitrators know from the papers or the case manager the general timeframe in which the parties would like to conduct the hearing (and when that timeframe makes sense to the arbitrators), it can be helpful for the arbitrators to advise counsel of their mutually available dates in advance of the preliminary hearing, so counsel can figure out which of those dates are most convenient for the parties. It will sometimes make sense for the arbitrators to send a detailed agenda to counsel several weeks in advance of the preliminary hearing. However, this has the disadvantage that it may be too cookie-cutter, in that the arbitrators may not yet know enough to really adapt the agenda to the particular needs of the case. As a result, sometimes it's best to just go into the preliminary hearing without a pre-fixed agenda and move forward as the needs of the case unfold.
- **The possibility of having the preliminary hearing in person with clients present:** Everyone seems to agree that this is a good idea when the scope of the case and the location of the parties, counsel, and arbitrators make it convenient. Nonetheless, preliminary hearings are still largely conducted telephonically. Perhaps, as arbitrators, we should be pushing harder for in-person preliminary hearings when the scope of the case and complexity of the issues justify it.
- **The scope of the preliminary hearing**: My sense is that it is now recognized as a Best Practice that arbitrators should conduct a robust preliminary hearing extending over several hours or more, when necessary, essentially covering, at least broadly, all the things that one can anticipate may come up in the arbitration. Nonetheless, there still appear to be some experienced arbitrators who prefer conducting the preliminary hearing essentially as a scheduling conference, generally taking an hour or less, without getting into any real discussion of the case. Perhaps this is a topic we might want to talk about in some detail. It is important to remember, if one intends to conduct a robust preliminary hearing, to give the parties advance notice, so they can allow sufficient time.

- **Standards as to discovery**: It still happens fairly often that counsel approach arbitration with a litigation mindset as to the scope of discovery and the like. This makes it important for arbitrators early on to discuss with counsel the arbitrators' expectations, subject to the needs of the particular case, as to the scope of discovery/disclosure in the case, perhaps even going so far, when it seems warranted, as to advise counsel of the robust body of "soft law" that exists in reports and studies by bar associations and other professional groups and the like and of the standards that can be found in the arbitration rules applicable to the case at hand.
- **Reliance documents**: The production by parties of their reliance documents is a normal expectation in international cases. However, this approach can also be helpful in domestic cases, sometimes serving as a substitute for the more expansive document production approach more typically used in arbitration in the United States, or at least for limiting the scope of the document production phase of the case. On the other hand, if, in a domestic case, the parties are going to want, in any event, to conduct more traditional discovery as to documents, with document requests, objections, and the like, requiring the production of reliance documents can be redundant, depending of the facts of the particular case. It is important to discuss this matter with counsel in the preliminary hearing and to review the advantages and disadvantages of the various approaches.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Not so long ago, most of us tended not to address the subject until a dispute concerning e-discovery was presented for decision. However, I think it is now a clear Best Practice to raise the issue of the appropriate scope of e-discovery in the preliminary hearing (or in a follow-up conference on the scope of discovery), and to suggest that the parties meet and confer on the subject within a reasonable timeframe, addressing such potential issues as the following: search terms and the possible testing thereof, time periods, custodians, hit counts, format in which documents will be produced, predictive coding as a possible option, metadata and other points relating to electronic discovery that may arise. It is probably worth telling the parties in the first procedural order that something along the lines of the following will apply to e-discovery in the case:
    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
    - Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrators will consider either denying such request or

ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

- **Depositions**: Arbitrators should generally make an effort to limit depositions in domestic cases (U.S.) and avoid them in international cases, subject to special need or other good cause shown. One will need to make the "deposition speech" in most preliminary hearings and to try to walk counsel back from the out-size deposition programs that they will often be proposing. Even in cases where the parties are in agreement on extensive depositions, arbitrators still have the option of trying to "jawbone" them down to something more reasonable and to requiring that in-house party representatives be present for a discussion of the time and expense factors attendant to depositions (although this is very rarely done). In many cases, it will be possible to get counsel to agree to a limited number of depositions per side and a limited total number of hours for all depositions taken by each side. However, the depositions issue is no longer as important a threshold issue as it used to me, given the emergence of e-discovery as the worst offender in imposing extraordinary costs and delay on the arbitration process. Paradoxically, there may now be cases where it will be efficient to permit a limited number of depositions as a way to limit e-discovery.
- **Using a discovery master**: This practice is efficient and to be recommended.
- **Parties' cooperation in making non-party witnesses available**: In contemporary arbitration there will often be non-party witnesses whose documents or testimony will be needed in the case. Quite often, such non-party witnesses are associated with one of the parties, often as a consultant, accountant, valuation expert, banker or the like. In probably most such instances, the party will not control such non-parties in a formal or legal sense, but will have influence over them and the *de facto* ability to get them to cooperate in providing the needed documents or testimony, subject, perhaps, to a pro forma subpoena. It is appropriate – and, I would argue, a Best Practice – for arbitrators to advise the parties early in the case that the arbitrators expect parties to exert best efforts to secure the cooperation of such non-parties, subject to the risk of an adverse inference if they fail to do so and it turns out at the hearing that they could have done it. This is a matter worth discussing.
- **Non-Party Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States can be quite complicated. This is such an area of specialized knowledge and there are so many pitfalls in obtaining enforcement of subpoenas in the US courts that I think this area deserves special attention. Specifically, I think it appropriate for arbitrators to advise counsel as to the range of issues that may come up as to non-party subpoenas and give them some guidance as to the form of such subpoenas that may be most effective or at least point them in the direction of bar reports or the like providing wisdom on the subject. I think arbitrators should also exercise some kind of gateway function in terms of making sure that the scope of subpoenas that they sign is reasonably limited to what is necessary in the case and appropriate in the context of arbitration.
- **Substantive motions**: This is a tricky area. The bottom line as to arbitrators' Best Practices in this area comes down essentially to the following: that

arbitrators should permit substantive motions that appear likely to foster the efficient administration of the case and not permit substantive motions that fail to meet that test.

- **Witness statements**: This is an area that deserves attention by arbitrators early on in a case and that should be discussed with counsel at the preliminary hearing. The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means clear that witness statements save much time or money, although opinions differ on the matter. Arbitrators should encourage sworn witness statements where this approach seems effective and efficient in a particular case and discourage it when it does not.

- **Confidentiality**: This area is a trap for the unwary in that counsel often assume that arbitration proceedings are necessarily more confidential than they typically are. I would suggest that it is now a Best Practice to alert counsel to the limits of the confidentiality that may exist in a case and invite them to stipulate to a broader scope of confidentiality if they so desire.
- **Sanctions**: It used to be extraordinarily rare that there was any need to consider sanctions in arbitration. However, the issue does occasionally arise in contemporary arbitration practice. The important thing is for arbitrators to be alert to recognize it when it does happen and stop it promptly and definitively, failing which, a detailed record should be kept of the matter so it can be dealt with at an appropriate time.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case. The last thing we want to do is schedule too many days and create a self-fulfilling prophecy. On the other hand, given the disadvantages of having to schedule additional days, it will often make sense, after a candid and substantive discussion with counsel as to the likely requirements of the hearing, to build in a little cushion, perhaps an extra day or two, or the like, in the schedule.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches here that make sense. The important thing is to establish a clear rule for each particular case. Perhaps the most usual approach in contemporary arbitration is to establish the procedure whereby all previously identified exhibits that have not been specifically objected to by the opening of the hearing are deemed in evidence as of the opening of the hearing. There is also the alternate approach whereby all exhibits actually used in the hearing are deemed in evidence as of the time of their use or as of the close of the hearing. It also makes sense to be clear early on, after consulting with counsel, as to whether documents relating solely to credibility need to be identified and marked in advance.
- **Having as much of the case briefed on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is necessary and helpful, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it possible after the hearing to have only limited and relatively quick

briefing or oral argument, getting the case to the panel quicker when it is fresh in their minds.

- **Summaries, Chronologies and *Dramatis Personae***: It can be quite helpful to have such materials in complex cases and well-worth asking counsel for them.
- **Stipulated facts**: These can be great if the parties want to embark on the effort, but it is often more efficient to have each side submit its own proposed factual findings or the like.
- **Opening statements using PowerPoint**: These can be quite helpful, but it is important to remember to require parties to exchange them in advance of the hearing, lest disputes about them take up valuable hearing time.
- **Disruptive counsel performance at the hearing**: As noted above, it is important for arbitrators to recognize trial abuses promptly when they are occurring and deal with them promptly.
- **Rules of evidence**: It is sometimes worth reminding counsel that, while the rules of evidence are not generally binding in arbitration, there are reasons for such rules – and that often evidence, such as extreme hearsay or extremely leading questions on key issues, that is problematical under the rules of evidence will also be lacking in credibility.
- **Heuristics**: Arbitrators are now generally familiar with recent psychological studies and popular books about heuristics, mental shortcuts that our minds take in assimilating information and making judgments that can produce distorted thinking. Contemporary arbitrators should be alert to red flags for problematic heuristics and take compensatory steps to correct for them.
- **Mediation window**: If arbitration is to be at least competitive with litigation, if not better, it must offer similar opportunities for settlement as litigation. I think it can be said that it is a contemporary Best Practice for arbitrators to build a time into the schedule for the parties to consider whether they want to engage in mediation. Any such effort by the parties should generally take place independently of the arbitrators, but their fostering this possibility for the parties is a service to the process of arbitration.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. This is such an esoteric area of arbitration practice that it is, in my view, appropriate for arbitrators to advise counsel of it when the issue comes up. I think it is appropriate, as a matter of arbitration practice, for arbitrators to entertain such motions, if the parties give their informed consent for the arbitrators to do so.
- **Choosing counsel who will create a conflict with an arbitrator**: This is a current hot issue. If it comes up, the ordinary practice of arbitrators would be to have the parties brief it, whereupon the arbitrators can decide it under the applicable rules and law**.**
- **Posing questions during the hearing**: When testimony is unclear, it is certainly fine for arbitrators to ask questions for clarification, and it will often make sense to do this as the testimony unfolds. However, subject to the needs of the particular case, I think it is generally preferable for arbitrators to refrain from asking extensive questions until counsel have completed their examinations. It is particularly important, it seems to me, for arbitrators, absent special circumstances, generally to refrain from asking questions that are outside the scope of the case as the parties have framed it.
- **Form of award**: It is generally good practice for arbitrators to have an open discussion with counsel as to the advantages and disadvantages of the different kinds of awards and

then, subject to the needs of the particular case, to do the form of award that the parties want when they are in agreement.

- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: There are real efficiencies in having the parties tee this issue up for resolution in their final post-hearing papers, so it can be dealt with by the arbitrators in the final award when they decide the substantive issues in the case. The alternate approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having that part of the case take on a life of its own, causing unnecessary delay and expense.

Discussion Points on Best Practices of Counsel in Representing Clients in Arbitration

Charles J. Moxley, Jr.

- **The arbitration difference**: It is important to appreciate the extent to which arbitration is different from litigation. It can be quite instructive reading through the "soft law," the numerous available "Best Practices" reports and protocols of bar and other professional groups, arbitration providers, and the like, when embarking on representing clients in arbitration.
- **Arbitration clauses**: Obviously, it can greatly streamline the administration of a case when the parties' arbitration clause is specific as to the various usual bones of contention in a case, such as discovery, motion practice, schedule and the like.
- **Selection of effective arbitrators**: It is important to select arbitrators who not only have subject matter expertise, management ability, and computer know-how (if e-discovery will be a significant issue), but who also have the ability to work effectively with the other panel members. Care should be given to the make-up of the panel qua panel.
- **Credibility with the arbitrators**: The most fundamental requirement for effective representation in an arbitration is credibility with the arbitrators. Cases that go to hearing are often characterized by hotly contested factual, contractual, and legal issues. Sometimes arbitrators have to really struggle to figure out who is right. Arbitrators expect counsel to represent their clients vigorously, but are also more likely to be persuaded by counsel whose representations as to the facts and law seem to be reliable. Acknowledging and addressing the issues in the case tend to work better and are certainly more helpful to the arbitrators than the two ships passing in the night scenario. Nor is extreme argumentativeness, essentially treating the arbitrators as if they were a jury, helpful.
- **Compliance or waiver of express requirements of arbitration clauses**: The requirements of arbitration clauses as to step clauses, timing and the like have binding effect, making it important that both sides comply with or expressly waive them.
- **Detailed pleadings, with the main supporting documents attached**: Detailed pleadings setting forth the factual and legal bases of a party's claims or defenses, along with supporting documents, can be quite helpful in educating arbitrators early on as to a party's view of the world, although there will be situations where one would prefer, or need to take, a more bare-bones approach, at least initially.
- **Pleadings that tell a clear and consistent story**: Pleadings that present a clear and consistent story are often more effective with arbitrators than pleadings that set forth multiple positions in the alternative or the like, although, of course, there will be cases when the latter is necessary or will otherwise make sense. The same applies to counsels' arguments generally in an arbitration.

- **Applications for interim relief**: Counsel generally have the option of making such applications before an arbitrator or a judge. The standards may be more open-ended and discretionary before an arbitrator, but an arbitrator does not have enforcement power, so it will generally make sense to proceed in court when time is of the essence, one really needs the relief, and it is uncertain that the other side would comply with an order by the arbitrator. Interim applications, particularly when made to the arbitrator(s), can serve as a way to get a case jump-started – and sometimes to lay a basis for settlement discussions, if that is what one wants in the particular case.
- **Focusing on the overall design of one's arbitration**: There are many considerations that go into the design of any particular arbitration. Different parties, counsel, and arbitrators will inevitably have different views of such matters in any particular case, including with respect to discovery, particularly e-discovery and depositions, if any, motion practice, schedule and the like. It well behooves arbitration counsel to focus on this aspect of the case early on and be prepared to advocate for the type of design of the case that they believe appropriate in the circumstances. Salient issues in this regard include the following:
  - **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators, can be a pivotal moment in the case for formulating the design – the very architecture – of the case. Counsel are well advised to put a lot of time into preparing for this conference as comprehensively as possible, given the uncertainties as to what matters may come up in it.
  - **Conferring with one's adversary in advance of the preliminary hearing to work out a schedule and protocol for the case**: It is a real judgment call whether to confer with one's adversary in advance. Relevant considerations include whether one thinks one will do better with one's adversary or with the arbitrators in terms of getting the design of the arbitration that one wants. This deserves a lot of thought and planning.
  - **The possibility of having the preliminary hearing in person with clients present:** While preliminary hearings are typically conducted telephonically, there can be real advantages, in cases that justify the expense, to holding them in person. An in-person session can provide a real opportunity for the parties, counsel, and the arbitrators to size one another up and begin to develop a working relationship. Having clients present can help with keeping the scope of discovery and the like under control, but can also lead to unhelpful showboating.
  - **The scope of the preliminary hearing**: Parties, counsel and arbitrators have different views as to the appropriate scope of a preliminary hearing, both in general and with respect to individual cases. On the one hand, many now believe that a very robust preliminary hearing extending over several hours or more and essentially covering, at least broadly, all the things that one can imagine may come up in the arbitration, makes sense. Others prefer the older practice of having the preliminary hearing serve essentially as a scheduling conference, generally taking an hour or less, leaving more detailed subjects for later discussion as they come up. It well behooves counsel to think in advance about what kind of preliminary hearing they would like in the particular case and to be able to advocate for that level of process.

- **Standards as to discovery**: Whether counsel in a particular case want expansive or narrow discovery, it can be quite helpful to frame one's arguments in either direction based on the wide array of "soft law" that is out there, in terms of reports and studies by bar associations and other professional organizations and the like. It is also important to be able to frame one's arguments based upon the standards expressed or implicit in the applicable provider rules, although they tend to be of a general nature.
- **Reliance documents**: The production by the parties of reliance documents early on can often serve, at least to some extent, as a substitute for a more expansive document production approach, particularly in international cases, but also in domestic ones. Building in an approach for the early exchange of reliance documents can be efficient in some cases.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Everyone has stories as to cases where e-discovery has gotten out of hand. It accordingly becomes important for counsel to be conversant with their clients' electronic systems and the underlying technical issues involved in e-discovery or to have a technical expert ready and available for discussions with the arbitrators concerning such matters and the overall administration of e-discovery. Whether one wants expansive or narrow e-discovery, the issue must be addressed, and the earlier the better. There are also emerging technologies that offer efficiencies in this regard, with which one should be aware, whether personally or through a technical expert.
- **Depositions**: Obviously attitudes towards depositions in arbitration differ and depositions are particularly disfavored in international arbitration. Whether counsel in any particular case want several or many depositions or to avoid them entirely, it is essential to be aware of the applicable standards emanating from the soft law as well as from the applicable rules to be able to advocate effectively for whatever scope of depositions, if any, one thinks appropriate in the particular case.
- **Using a discovery master**: This practice can be efficient, but sometimes, where important conceptual issues will be developed in connection with the discussion of discovery matters, it may make sense to have all three panel members be part of this issue. It well behooves counsel to think about this in advance. It is also worth remembering that, even when the chair is designated to serve as discovery master, any party may request the involvement of the entire panel on any particular issue. There may be issues of such broad potential impact that it will make sense to do this at times.
- **Cooperation or not as to non-party witnesses**: In many cases there will be non-party witnesses whose documents and testimony are potentially important in the case. A big threshold question will be whether parties are expected to cooperate in making non-party witnesses over whom they have influence available to produce documents and testify, whether on a pre-hearing or hearing basis, and whether the failure of a party to cooperate in this regard may serve as a basis for an adverse inference. There are arguments on both sides of this issue. It well

behooves counsel to think about it in advance of the preliminary hearing, since the issue may well (and should) come up there.

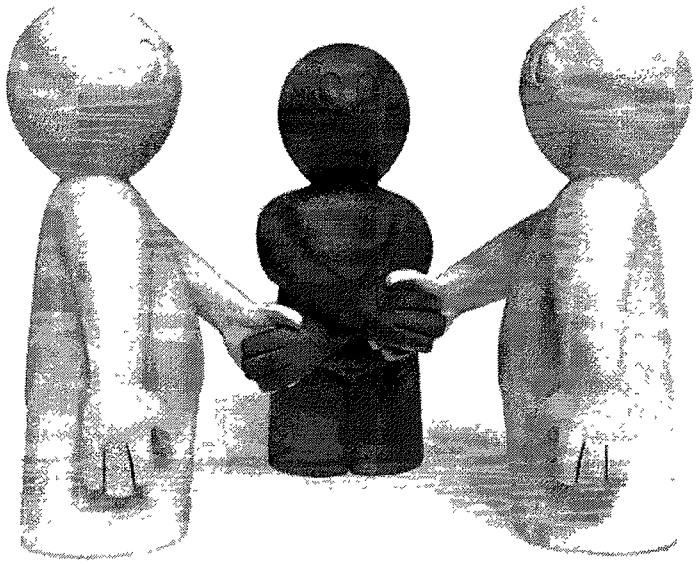
- **Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States and in other jurisdictions can be quite complicated. It well behooves counsel to be think about this issue in advance and be prepared on it.
- **Substantive motions**: Whether substantive motions will be permitted is an important issue in some cases. There will be cases where such motions will be potentially successful and also cases where making such a motion will be productive in terms of providing useful discovery and also potentially leading to a posture of the case where productive settlement discussions can take place. It well behooves counsel to focus on this issue in advance.
- **Witness statements**: The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration, as well as in many bench trials in court. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means whether witness statements save much time or money, although opinions differ on the matter. It well behooves counsel to think this out in advance and to have support for whichever approach they think appropriate for the particular case.

- **Confidentiality**: Parties sometimes assume that arbitration proceedings are necessarily more confidential than they actually are. This area deserves real attention and planning by counsel so that they will be in a position to seek to obtain a broad confidentiality order when they think it appropriate for the particular case and to avoid such an order when they don't think it appropriate.
- **Sanctions**: If one's adversary is acting in a sanctionable way, it is important to maintain a detailed log of contemporaneous examples of such conduct, as such details tend to get lost with the passage of time. There is no reason for counsel to be shy about raising the issue of sanctions when there is a significant basis for such relief.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of sometimes numerous busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches that arbitrators typically take as to the admission of documents, including the approach that all previously identified exhibits that had not been specifically objected to are deemed in evidence as of the opening of the hearing or the alternate approach that all previously marked exhibits that were actually used in the hearing are deemed in evidence as of the time of their use or as of the end of the close of the hearing. The issue also arises as to whether documents relating solely to credibility need to be identified and marked in advance. It well behooves counsel to think these through and be prepared to advocate for whatever approach they think appropriate in a particular case.
- **Briefing as much of one's case on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is needed, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it

possible to thereafter have a limited number of fairly expedited post-hearing memoranda, if any, submitted, and/or possibly closing statements a week or two after the close of the hearing. The advantage of having as much as possible of the parties' briefing done on a pre-hearing basis is that this can make it possible to get the case to the arbitrators for decision faster, sometimes several months faster, when the case is fresher in their memory.

- **Summaries, Chronologies and *Dramatis Personae*:** Up to the time of the hearing, counsel are generally living with the case far more than the arbitrators. At times the arbitrators, particularly the wing arbitrators if the chair is handling discovery, will only pick up the file occasionally. In such circumstances, it can be quite helpful for counsel to have provided the arbitrators with summaries, chronologies, *dramatis personae* and the like.
- **Stipulated facts**: While stipulated facts can be helpful, they often take more time than they are worth, except as to the most basic matters. It is often more efficient to have each side present its own chronology or the like.
- **Opening statements using PowerPoint**: These can be very effective, particularly if they are keyed to the documents. The arbitrators may use the PowerPoint printouts as a handy reference throughout the hearing.
- **Counsel performance at the hearing**: Excessive showmanship, harshness, and disruptive objections can harm counsel's credibility with counsel, depending on the facts of the case. Vigorous representation of one's client, which arbitrators expect and respect, does not generally require harsh litigation practices. Arbitrators tend to want to get to the merits and may typically be less than impressed by excessive litigiousness.
- **Rules of evidence**: The rules of evidence are not generally applicable in arbitration. However, this freedom from such rules should not lead counsel to become completely untethered from them. There are reasons for the rules of evidence, such as the hearsay rule. Arbitrators are more likely, for example, to give weight to the testimony of witnesses with personal knowledge.
- **Heuristics**: Recent psychological studies and popular books have identified heuristics, mental shortcuts that our minds take in assimilating information and making judgments. Be familiar with such heuristics and how one can protect one's client from unsound thinking in this regard. Some might add that one may consider how one might advantage one's own client by the exploitation of such heuristics, although ethical issues may be raised by such actions.
- **Mediation window**: While the possibility of building a mediation window into the schedule of a case may generally be something better raised by the arbitrators than by counsel, counsel should be alert to the potential to mediate the case concurrently with the conducting of the arbitration, given the substantial savings of time and money that can result from a successful mediation.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. However, agreement by both sides, under conditions of informed consent, may provide an appropriate basis for arbitrators to hear such motions.
- **Choosing counsel who will create a conflict with an arbitrator**: Whether this is permissible is a hot contemporary issue that bears study before one embarks on such a course of conduct.

- **Providing ammunition to an arbitrator who appears to favor one's view of the world**: If one senses that one has made headway with one of the arbitrators, that is no time to let up on nailing the point down, as that arbitrator may need ammunition to use with the other arbitrators in discussing the point.
- **Respond to, value, and catalogue questions from panel**: It's important to not only answer such questions on the spot or asap, but to also be sure to follow up on them in any way that seems potentially helpful.
- **Don't embarrasses the arbitrators by excessive chitchat**: A certain amount of collegiality with the arbitrators is human nature, but be careful not to overdo it to the extent of unnecessarily creating an issue or making the arbitrators feel uncomfortable.
- **If an arbitrator misses a matter that should have been disclosed, disclose it yourself**: It's far better to have a clean record than to have something come out later that could compromise the award.
- **Form of award**: Counsel should put real thought into this. There will be times when clients will prefer *not* to have a reasoned award, so as to avoid precedents on a particular point and, of course, times when just the opposite will be desired. Parties often like reasoned awards because they show the thinking of the arbitrators. On the other hand, the scope of appeal in arbitration is so narrow that at times it may make sense, at least in domestic cases in the United States, to go with a standard award, particularly when one has confidence that one's arbitrators will go through the full necessary analysis of the case even if they are not required to produce a reasoned award. In international cases, reasoned awards are not only the norm, but are required in many jurisdictions for the enforceability of an award.
- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: In cases where parties are seeking the award of costs and attorneys' fees, it can be helpful to tee this issue up for resolution at the latest in the final post-hearing papers, so that it can be dealt with by the panel in the final award when they decide the substantive issues in the case. Taking the other approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having the attorneys' fee part of the case take on an importance of its own, causing unnecessary delay and expense.
- **Clarification or Modification of Awards**: The scope of the doctrine of *functus officio* is somewhat fuzzy around the edges. Counsel should not be overly reluctant to go back to arbitrators for clarification of awards when there is a real need for it. This step is potentially available before moving in court for remand to the arbitrators or for vacatur.



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Why Arbitrate? The Benefits and Savings

By Edna Sussman

Choice – the opportunity to tailor procedures to business goals and priorities – is the fundamental advantage of arbitration over litigation.[1]

Much has been written in recent years about whether arbitration has become so much like litigation that arbitration's most commonly cited benefits – saving time and money – no longer pertain. One author, writing in a recent issue of the New York State Bar Association *Journal*, suggested that the cost of the arbitrators' fees makes litigation the less expensive alternative for resolving commercial disputes.[2] Response to this and other criticisms requires a review of the many benefits of arbitration, a look at the empirical data on the speed and cost of arbitration, and a summary of the mechanisms available to the parties and their counsel to control costs and increase efficiency.[3]

Why Arbitrate?

Benefits

The many benefits of arbitration have led to the extensive use of arbitration as the process of choice for dispute resolution in commercial disputes. These include:

Faster and Cheaper – As is discussed at greater length below, arbitration is the *parties'* process. The parties can craft and implement a streamlined procedure that can significantly reduce costs and provide for a much speedier resolution than can be found in court.

Flexible Process – As arbitration is a creature of contract, the parties can design the process to accommodate their respective needs. Hearings may be set at the parties' convenience and the less formal and less adversarial setting minimizes the stress on what are often continuing business relationships.

Subject Matter Expertise – Arbitration permits the parties to choose adjudicators with the expertise necessary to decide complex issues that often require such industry-specific expertise.

Finality – Judicial review of awards is restricted to very limited issues. The finality of awards is particularly important in business transactions. In many instances, with the cost of capital and the paralysis that indecision can bring to businesses, the most important consideration in a commercial dispute is that it be quickly and definitively decided.

Confidentiality – Arbitral hearings, as opposed to court trials, are generally private, and confidentiality can be agreed to by the parties. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards. This is an important feature for many cor-

porations, particularly when dealing with disputes over intellectual property and trade secrets.

International Arena

Certain additional features of arbitration in the international context are of particular importance:

Cross-Border Expertise – Arbitration permits the parties to choose adjudicators with the necessary expertise to decide the dispute. Such special expertise can include an understanding of more than one legal tradition – such as common law, civil law or sharia law – an understanding and ability to harmonize cross-border cultural differences and fluency in more than one language.

Neutrality – In the international context, arbitration provides a neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities who are detached from the parties or their respective home state governments and courts, in a setting in which bias is avoided and the rule of law is observed.

Enforceability – In the international context, a critical feature is the existence and effective operation of the New York Convention to which over 140 nations are parties. The Convention enables the enforceability of international arbitration agreements and awards across borders. It significantly limits the grounds for refusal to enforce an arbitration agreement or award, making it possible to enforce an award even in a jurisdiction that might otherwise find ways to favor its domestic party. In contrast, judgments of national courts are much more difficult and often impossible to enforce abroad.

Thus, even apart from the lower cost and greater speed, many parties choose arbitration for dispute resolution for one or more of these other benefits.

Is Arbitration Really Faster?

The availability of a process that is quicker than a court proceeding has long been a principal reason for the selection of arbitration for dispute resolution in business transactions. The statistics support the long-held belief that arbitration is a mechanism for achieving speedier dispute resolution. The American Arbitration Association (AAA) reports that for its business-to-business cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was 238 days or 7.9 months.[4] The AAA's international arm, the International Centre for Dispute Resolution (ICDR), reports that for its cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was exactly 365 days or 12 months.[5] The International Institute for Conflict Prevention and Resolution (CPR) reports that for its domestic and international cases combined in which an award was rendered in 2008, the median length of time from the filing of the demand to the award was 347 days or 11.5 months.[6]

By contrast, as reported for 2008, the median length of time for civil cases resolved through trial in the U.S. District Court for the Southern District of New York was 30.7 months for jury cases and 27.0 months for non-jury cases, a number in line with most other federal district courts.[7] The median length of time from filing in lower court to disposition in the Second Circuit for cases that were appealed was 43.1 months.[8] The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials 18.4 months.[9]

Thus as compared with both U.S. federal and state court systems, arbitration affords a significant time saving for the vast majority of cases. Indeed the average case appears to reach resolution three to five times faster in arbitration. And it must be noted that many international court systems are considerably slower than those in the United States.

Counsel expenses and fees are the most significant cost of litigation. Inevitably, a longer process requires the expenditure of additional lawyer time as it creates opportunities for additional discovery and motion practice. The abbreviated schedule in most arbitrations usually results in significant cost savings.

Is Arbitration Really Cheaper?

The reduced cost available in arbitration has historically been viewed as a principal reason to favor arbitration over litigation. It is true that access to the courts is essentially free while arbitration has some costs associated with it – *i.e.*, the cost of the administering institution if one is selected and the cost of the arbitrator(s) – but these must be viewed in light of the total cost of the proceeding, including counsel fees and the other costs of preparing a case. While there appear to be no definitive statistical studies comparing the costs of arbitration with litigation in commercial cases, through informal comparisons and anecdotal evidence arbitration appears to be generally cheaper.[10] Certainly it is a process that can be streamlined by the parties.

Only a small part of the total cost of arbitration goes for the fees and expenses of the arbitrators and the tribunal, the "additional" cost of arbitration. The International Chamber of Commerce reported that 82% of the costs incurred were what the parties spent to present their case, including lawyer fees and expenses, expenses related to witnesses and expert evidence, and other case preparation costs.[11] Thus, arbitrator and institutional charges were only 18% of the cost of the arbitration. And it should be noted that the costs for case preparation and presentation are much more easily controlled in arbitration than in litigation.

In litigation one is subject to the Federal Rules of Civil Procedure or parallel state court rules that allow for

broad discovery, including both document discovery and depositions. Typically, discovery is a very costly part of trial preparation, and it can be burdensome to the parties as well. Document discovery is generally more limited in arbitration; depositions are either dispensed with altogether or are severely limited in number. Extensive motion practice is commonplace in court but is much less common and, in fact, usually discouraged in arbitration.

If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

Court cases require more counsel time for preparation and trial than is the case with arbitration. For example, trial-related matters not pertinent to arbitration include evidentiary issues, voir dire and jury charges instructions, and proposed findings of fact and law. Appeals from trial court decisions are commonly filed, a process generally unavailable and, in any case, very unusual in arbitration.[12] All of these additional costs must be factored into any consideration of the costs of arbitration. This suggests that arbitration can be, and generally is, much less expensive even with a paid adjudicator.

What Can Parties Do to Make Arbitration Faster and Cheaper?

While a good arbitrator will manage the arbitration to expedite the proceeding and minimize costs, the parties and their counsel can have a determinative role and in all cases they play a significant part in establishing the timing and costs for the matter. Arbitrators can "jaw-bone," set schedules, emphasize efficiency and cost saving, and work with the parties to streamline the process, but they are required to follow the terms of the arbitration agreement. If, for example, the arbitration agreement establishes extensive litigation-like protocols, the arbitrator must follow them. If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

There are many steps counsel and parties can take to assure time and cost savings; much is in their hands. Efficiency and cost are not always the parties' principal goals in arbitration, however. But if speed and cost saving are objectives sought by the parties, attention should be devoted to carefully addressing the many choices available, including the following:

Contract Provisions – Counsel are increasingly coming to recognize the importance of tailoring the dispute resolution clause to the specific needs of the situation and are no longer simply inserting the "standard clause" at midnight. In order to assure a speedy and less costly arbitration process, counsel can consider contractually limiting document discovery, barring or limiting depositions, providing for fast-track procedures (such as limiting the length of time from appointment of the arbitrators to hearing and from the hearing to award), providing for "baseball arbitration," limiting the matter to one arbitrator at least for smaller disputes, excluding judicial review where that is permissible, and taking care to draft an arbitration clause that will not provide grounds for a court challenge as to its application. The selection of appropriate governing rules can make all the difference and can set up the time limits and other procedures desired. In selecting the arbitral institutional rules that will govern, they should be reviewed to make an informed choice. Unless the parties want a lengthy proceeding, counsel should not provide for the application of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Of course it takes two to tango, and this contractual approach to limiting dispute resolution timing and costs only works if agreed to by all parties.[13]

Choice of Institution – Examine the rules of the provider institution selected, if the matter will not be *ad hoc*, in deciding which is most suitable. The rules of the institutions vary. Some have rules that promote more expeditious and less costly resolution.

Choice of Counsel – Retain counsel who understand the interest in efficiency and cost savings and who are experienced in arbitration. Selecting counsel who are accustomed to litigation and see all cases as best tried with a "leave no stone unturned" attitude can lead to the conversion of the arbitration into a litigation-like process, especially if all parties subscribe to that view.

Choice of Arbitrator(s) – Select an arbitrator who (1) is experienced in case management and has the ability to conduct the pre-hearing procedures efficiently; (2) is available to deal promptly with pre-hearing issues, hear the case in the near term, and deliver awards without undue delay after the hearing; and (3) has the ability to move hearings along.

Choices on Discovery – Do not seek extensive document discovery; eliminate depositions altogether or limit them to one or two per party. If one party opposes broad discovery, it is much easier for the arbitrator to set tight limitations, as he or she is not faced with "the parties' process" and right to choose. Provide that a single arbitrator be authorized to rule on discovery issues.

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Choices on Pre-Hearing Issues – Don't make motions other than those as to such threshold issues as the jurisdiction of the tribunal or the statute of limitations. Work cooperatively with opposing counsel to minimize the matters that must be brought to the arbitrator for resolution.

Choices on Scheduling – Pick as early a date for the hearing as is realistic and consistent with the level of preparation the case merits based on client goals – and stick to it. Rescheduling a hearing can often cause a lengthy delay as it can be difficult to find dates on which all participants are available.

Choices for the Hearing – The conduct of the hearing can be expedited by (1) presenting direct testimony by affidavit; (2) limiting the time available for the hearing and, if appropriate, using the "chess clock method" to assure equal time; (3) using telephone and video conferencing technology; (4) choosing a hearing location that minimizes expenses to the parties; (5) conferencing or "hot tubbing" the experts; (6) using a single expert to advise the arbitrators rather than having the parties offer competing experts; and (7) limiting post-hearing submissions.

What Else Is Being Done to Make Arbitration Faster and Cheaper?

Current criticisms of arbitration – that it is neither speedy nor cost-effective – largely stem from two issues: the submission to arbitration of sophisticated business cases of significant monetary value and the advent of globalization with the resulting increase in complex cross-border disputes. Counsel and parties have in recent years chosen to handle some of these matters in a manner that has led to their falling within time frames and cost structures more akin to litigation than arbitration. These cases have led some to question the efficacy of arbitration.

The arbitral institutions have been responsive to the criticism and are devoting significant attention to fostering speedier and cheaper arbitration proceedings by promulgating rules, guidelines and protocols[14] intended to help parties select a more efficient process, and to provide a concrete, rule-based protocol for the arbitrator to resist burdensome party requests. Educational programs for arbitrators now often emphasize the ways in which the arbitrator can facilitate an efficient hearing. To meet the criticism head on, the College of Commercial Arbitrators is holding a national summit in October 2009 for all constituencies to come together to discuss and vote on a series of concrete, practical protocols.

In short, the institutions and the arbitrators are stepping up to the challenge of preserving the time- and cost-saving advantages of arbitration. However, it takes parallel motivation and action by parties and counsel to achieve the goal.

Conclusion

Any system of dispute resolution, whether arbitration or litigation, will have its outliers, the cases that run amok, and it is easy to point to those to support a negative view. However, any realistic analysis must look to the functioning of the overall system and the unique ability the parties have to craft a process that meets their needs. If cost and time savings are important to the parties, arbitration provides a mechanism for achieving those goals. Litigation may have many other virtues but it simply does not offer the parties the opportunity to tailor the process to meet those objectives. ■

1. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 De Paul Bus. & Comm. L.J. 3 (forthcoming 2009), *available at* http://papers ssrn.com/sol3/papers.cfm?abstract_id=1372291.

2. Ronald J. Offenkrantz, *Arbitrating Commercial Issues: Do You Really Know the Out-of Pocket Costs?* N.Y. St. B J. (Jul./Aug. 2009), p 30.

3 This article focuses on commercial disputes. Consumer and employment arbitration which has been controversial in recent years and has been the subject of numerous studies and articles is beyond its scope.

4. E-mail from American Arbitration Association on file with author.

5. E-mail from the International Centre for Dispute Resolution on file with author.

6. E-mail from the International Institute for Conflict Prevention and Resolution on file with author.

7. *Judicial Business of the United States Courts 2008* Table C-10, *available at* http://www.uscourts.gov/judbus2008/contents.cfm.

8. *Id* at Table B-4A.

9 *Civil Justice Survey of State Courts, Bureau of Justice Statistics 2005, available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf.

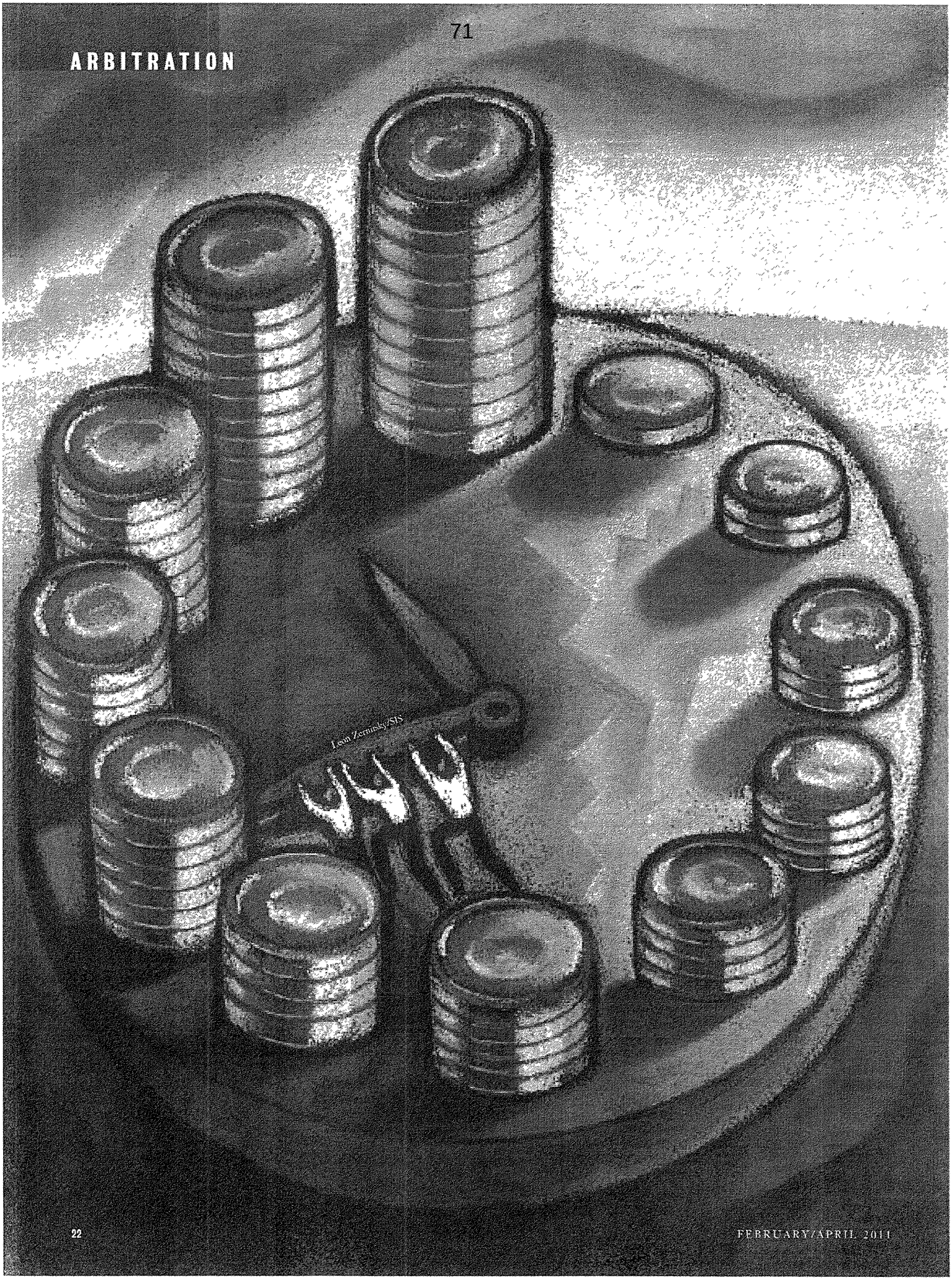
10 Susan Zuckerman, *Comparing Cost in Arbitration and Litigation*, 62 Disp. Res. J 42 (2007). An anecdotal study in which three construction litigators and arbitrators concluded that litigation was 27% more expensive than arbitration even assuming that several depositions were taken in the arbitration and excluding the costs of appeals in a court proceeding

11. International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration, available at* http://www iccwbo.org/uploadedFiles/TimeCost_E.pdf

12. *See, e.g., Hall St Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Some institutions provide for an appellate process with a panel of arbitrators but parties have not commonly availed themselves of this option. For example, CPR established rules for an appellate process with a panel of three arbitrators in 1999, but the process has never been used by any party.

13. For a discussion of the many issues a careful drafter should consider in drafting the dispute resolution clause, see Stipanowich, *supra* note 1; John Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Disp. Resol J. 28 (2003).

14. *See, e g*, AAA *Commercial Arbitration Rules. Expedited Procedures*; ICDR *Guidelines for Information Exchanges in International Arbitration*; JAMS *Streamlined Arbitration Rules and Procedures*; CPR *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, ICC Commission on Arbitration, supra* note 11; IBA *Rules on the Taking of Evidence in International Commercial Arbitration.*


Leon Zernitsky/SIS

The ideas from the protocols condensed in a convenient, easy-to-use format that you can carry around with you.

Time & Cost SOLUTIONS

for Commercial Arbitration: Highlights from the College of Commercial Arbitrators' Four Protocols for Parties, Counsel, Arbitrators and Arbitral Institutions

BY EDNA SUSSMAN AND CHRISTI UNDERWOOD

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"Cost is a fundamental concern of businesses. As cost concerns are often not addressed with vigor in arbitration, it is not surprising that many business users have chosen to use courts instead," said Michael McIlwrath, senior counsel for litigation with GE Oil & Gas. Cost and delay are key issues facing arbitration providers and arbitrators in the 21st Century.

Users of commercial arbitration are frustrated because their expectations for an efficient, low cost process are often not being realized. The issue has been tackled to some degree by some international arbitration providers, including the International Centre for Dispute Resolution (ICDR), the American Arbitration's (AAA) international division,1 and by the International Chamber of Commerce (ICC). More recently, William K. Slate, president and CEO of the AAA gave a talk on this problem at the 2010 AAA Neutrals Conference in Florida, emphasizing that the alternative dispute resolution (ADR) industry must solve the problem through action. Fortunately, the College of Commercial Arbitrators (CCA), a group of some of the most experienced and respected commercial arbitrators in this country, has already identified solutions. The CCA has developed real practical steps that every stakeholder in the arbitration process can take to reduce the cost of the process and accelerate the proceeding. These steps are incorporated into four protocols, one for users and their in-house counsel, one for outside counsel, one for arbitrators and one for arbitration institutions.

Each protocol has value, not only for the stakeholder to whom it is addressed, but also to the other stakeholders. For example, the Protocol for Arbitrators may help the parties decide what they should seek in an arbitrator or help them prepare for an interview with prospective arbitrators.

This article highlights the CCA's recommendations in each of the four protocols.

The Basis for the Protocols

The protocols are based on information and data obtained during a CCA conference in the fall of 2009, co-sponsored by the AAA, JAMS, the International Institute for Conflict Prevention and Resolution (CPR), the Chartered Institute of Arbitrators, and Pepperdine University's Straus Institute for Dispute Resolution, on the subject of business-to-business (B2B) arbitration. At the conference, which was attended by about 200 individuals (including corporate counsel, outside counsel, arbitrators and representatives of arbitration organizations and service providers), the CCA discussed the issues and challenges facing B2B arbitration, including the issues of cost and delay. Using an electronic polling process, the CCA gathered data on possible solutions to these problems and in August 2010, released a 95-page report entitled "Protocols for Expeditious, Cost-Effective Commercial Arbitration," authored by three CCA Fellows, Academic Director of Pepperdine's Straus Institute for Dispute Resolution, Thomas Stipanowich, and co-editors Curtis von Kann, a JAMS arbitrator, and Deborah Rothman, an AAA arbitrator.

The CCA's protocols represent the conclusions drawn by business users, in-house attorneys, provider institutions, outside counsel and arbitrators in response to concerns about arbitration becoming too much like litigation over the past few years.

Having an economic and efficient arbitration is a choice. Business users can make better choices to "promote cost-and time-saving" solutions and the protocols tell them how. As noted in the introduction to the protocol for users and in-house counsel, users have more than one opportunity to make these choices. The first is at the contract planning and negotiation stage, the second is after a dispute arises and the third is during all phases of the arbitration.

"Living Documents"

The CCA protocols can have a positive impact on the efficiency of B2B arbitration only if widely disseminated and widely used by all stakeholders. Thus, the next step is publicity and education. Our intention is to serve both purposes. In service of this idea, we have summarized the highlights of each protocol on pages 22-26. To make these summaries portable and convenient to use and distribute, we formatted three of them on a

single page and one on a two sides of a page.

Can we expect these protocols to remedy the cost and delay concerns about B2B arbitration? The answer is, it depends. First, CCA must educate the four different categories of stakeholders, about the protocols. The sponsoring provider organizations are already aware of the protocols. But business users, outside counsel and commercial arbitrators who are not affiliated with the CCA may not be. The CCA is making presentations, publishing articles, giving speeches and distributing the protocols to numerous business industry groups in order to communicate its message to stakeholders.

How, when, and to what extent the concepts set forth in the protocols are adopted will determine their ultimate influence upon improving B2B arbitration. What is clear is that, once in receipt of the protocols, stakeholders will have to make great behavioral changes in order to return commercial arbitration to its roots. Passive arbitrators will have to become pro-active managers. Litigators will have to restrain themselves from "littering the record with objections" and using litigation discovery practices in arbitration. Steve Smith, vice president and general counsel at Lockheed Martin Space Systems, reflected on the premise of change when he said, "The arbitral institutions, arbitrators themselves, outside counsel, and the user community, chiefly through inside counsel, all have key roles to play. In my mind, when my colleagues in-house participate as full team members with their outside arbitration counsel, and temper the desire of some such counsel to conduct arbitration like court litigation, significant improvements will result."

However, for far reaching solutions, change must take place even earlier, in the drafting of better arbitration clauses. Additional arbitration process provisions that fit the needs of the parties' particular transaction should be incorporated into the contract. This means that the protocol must get into the hands of business lawyers, not just the litigators.

McIlwrath predicted that if the protocols are implemented, "arbitration will become more attractive to the stakeholder who ultimately matters most: the parties who decide whether to have their commercial disputes submitted to arbitration."

The protocol summaries that articulate solutions today may need to be further refined tomorrow. This concept is best presented by Stanley Sklar, president of the CCA, who said "[t]he Protocols should be considered a 'living' document which will change as new ideas and procedures are developed to create a realistic alternative to the court system for business disputes."

The actual effect of the protocols on the cost and time of arbitration will have to be measured at some future time. The CCA anticipates holding another business summit in the future at which time feedback will be solicited and lessons learned will be shared with the commercial arbitration industry. Until then those involved in B2B arbitration should avail themselves of the myriad of tools offered in the protocols, stay mindful of the choices available, and try to conduct themselves in a manner that accomplishes two of the arbitration's central goals—efficiency and low cost. ■

Endnotes

[1] In May 13, 2008, the ICDR issued Guidelines for Information Exchanges in International Arbitration, A .PDF file can be accessed from www adr.org.

[2] In 2007, the ICC issued a report called Techniques for Controlling Time and Cost in Arbitration, ICC Publication 843. A .PDF file can be accessed from www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

[3] See the President's column on page 1 of the Nov. 2010-Jan. 2011 *Dispute Resolution Journal*, which is based on AAA president and CEO William K. Slate II's presentation at the Neutrals Conference.

[4] CCA called this conference a "national summit."

[5] Available on the CCA Web site at www.thecca.net/CCA_Protocols.pdf.

TURN THE PAGE TO SEE THE HIGHLIGHTS FROM THE FOUR PROTOCOLS

Highlights from the Protocol for Users and In-House Counsel

The recommendations in this protocol address dissatisfaction with the high cost and time of commercial arbitration. They can be adoopted in whole or in part depending on the circumstances.

1 Don't mindlessly choose "one-size fits-all" arbitration provisions. Consider whether it is desirable to tailor the procedures to limit discovery and establish other boundaries. Do incorporate a requirement for an institutional provider, such as the American Arbitration Association. It is possible to choose a more streamlined process.

2 Don't replicate litigation-style discovery in the arbitration process. Instead limit discovery to what is essential. There are opportunities to limit discovery in a pre-dispute arbitration agreement or during the pre-hearing phase of arbitration by agreement of counsel or the arbitrator's order.

3 Do set a limit on the phases of arbitration and the overall length of the proceeding. The arbitration agreement might provide a deadline of one year for large controversies and less for smaller ones.

4 Do choose fast track or an other form of expedited arbitration when suitable for the controversy. Either define the circumstances when it will be employed or incorporate a service provider's rules that detail such procedures.

5 Do stay involved throughout the dispute resolution process to ensure that the client's objectives are being met. Attend the preliminary conference. Conduct a case assessment, set a realistic budget, and require counsel to abide by it unless express approval to deviate is granted.

6 Don't select outside counsel based on litigation experience. Instead, base the selection decision on counsel's arbitration experience and willingness to honor the business goals. In-house counsel should also be willing to consider alternative fee arrangements, such as incentives for achieving an efficient and expeditious process. The comments to this protocol contain a list of questions to ask prospective outside counsel.

7 Select arbitrators who are strong managers and have demonstrated an ability to supervise an efficient and economical process. A pre-screening questionnaire or interview of prospective arbitrators may be appropriate, as more fully discussed in the comments to this protocol.

8 Be willing to enter into stipulations with opposing counsel and come to the preliminary conference with submissions that identify key issues, claims, defenses, damages, and indicate whether experts are needed.

9 Agree to controls on motion practice. While dispositive motions can be a valuable, cost efficient tool, they should be employed only pursuant to a procedure. Dispositive motions may be beneficial in certain circumstances, such as when damages are limited by contract, or a statutory remedy or statute of limitations is involved.

10 Consider using a single arbitrator in lieu of a panel when appropriate. Obviously, three arbitrators cost more than one. When three arbitrators are used, agree to delegate certain pre-hearing decisions to the chair to make the process more efficient.

11 Specify the form of the award and do not include a provision for judicial review of the award. Determine whether the award shall be bare, reasoned, or contain findings of fact and conclusions of law. Also, consider putting a limit on the length of the award. Do not attempt to give courts the authority to determine an appeal of the arbitration award. The comments summarize the risks and legal uncertainties in the area of expanded judicial review. Those who desire appellate rights should consider a private appellate process.

12 Conduct a post-mortem after the arbitration to identify "lessons learned." with regard to achieving efficiency and economy. Then revise internal company procedures accordingly ■

Highlights from the Protocol for Outside Counsel

This protocol offers "guidance" for lawyers retained by the parties to B2B arbitration to help them approach the arbitration process with the "goals and expectations" of the client in mind.

1 Outside counsel should only agree to represent a business client in B2B arbitration when they are familiar with the applicable arbitration rules and the service provider, and they have the experience and knowledge to efficiently meet the client's goals and expectations.

2 Outside counsel should provide the client with an early case assessment and then reach "an understanding" with the client (and memorialize the understanding) on the approach to arbitration, discovery, possible settlement discussions, length of resolution process, arbitration, and the client's budget. These understandings should be revisited periodically to determine whether the client has new instructions.

3 Outside counsel should undertake due diligence into the background and qualifications of the arbitrator candidates in order to select an arbitrator with the right philosophy, case management ability, and a willingness to meet the client's expectations as to the cost and length of arbitration.

4 Having a cordial professional relationship with opposing counsel saves more time and money than fighting. Thus, outside counsel should obtain the client's consent to cooperate with opposing counsel in order to agree on pre-hearing procedural and process issues.

5 Consistent with the client's goals, outside counsel should advise clients that limited discovery is the norm in arbitration, and seek ways to streamline discovery by cooperating with the arbitrator and opposing counsel.

6 Outside counsel should periodically discuss with clients the advantages of negotiating a settlement, pointing out when opportunities to settle arise, and the benefits of mediating before large expenditures are incurred.

7 Outside counsel should offer client alternatives to hourly billing, such as incentives for reducing the estimated time or costs of arbitration.

8 Outside counsel should "exploit" the differences between arbitration and litigation by behaving appropriately in the hearing, curbing the inclination to grandstand. They should avoid making repetitive objections to form and hearsay. Attorneys who object at every turn waste everyone's time.

9 Outside counsel should keep the arbitrator informed of developments in the case and seek the arbitrator's assistance (or the assistance of the chair of the panel) if a pre-hearing issue arises that the parties cannot resolve themselves. Arbitrators do not want to postpone hearing dates and savvy outside counsel will take the initiative to notify the arbitrator when a potential delay causing event arises.

10 Outside counsel should engage in a post-arbitration evaluation with the client to determine the lessons learned for the client and the lawyers involved in the arbitration. A lesson learned could warrant a change in the client's standard dispute resolution clause, arbitration training, or some other matter.

11 Outside counsel should share their insights about the process with arbitration providers so that improvements can be made in the dispute resolution clauses, arbitration rules and choices offered to arbitration users.

12 Outside counsel are often in a position to effect positive change in ADR processes by their affiliation with law schools, professional organizations and civil groups. Thus, they should help identify ways to improve arbitration education, training and ADR laws. ■

Highlights from the Protocol for Arbitrators

Ultimate responsibility for the efficient management of arbitration proceedings falls to the arbitrator. The recommendations in this protocol are corollaries of recommendations in the preceding protocols for users, outside counsel and providers.

Because the protocol for arbitrators may be of considerable help to users and their in-house and outside counsel, to avoid confusion we have chosen to avoid the first person "you" and refer to arbitrators in the third person.

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1 Commercial arbitrators should have ongoing training in commercial arbitration, including training in how to manage a case efficiently without sacrificing fairness to the parties. Being an effective consumer or labor arbitrator does not ensure effectiveness as a commercial arbitrator.

2 Arbitrators should mandate that everyone behave in a professional manner, cooperate in all phases of the arbitration to shape the procedures, and comply with deadlines. Arbitrators can "lead by example," for instance, by establishing a professionally cordial atmosphere, being on time and meeting their own deadlines.

3 Arbitrators should actively manage the proceeding and enforce timetables and deadlines, except when there are compelling, unforeseen circumstances. They should use their reasonable discretion to fashion an appropriate, fair and expeditious proceeding. This goal should be facilitated by the natural reluctance of parties and counsel to displease the decision maker in their case.

4 Arbitrators should conduct a thorough preliminary conference following CCA best practices as described in the CCA Guide to Best Practices in Commercial Arbitration, and then memorialize all schedules, procedures and deadlines in a comprehensive case management order. The preliminary conference is the single best tool to focus on creating a cost efficient and fair process. This protocol provides details.

5 Arbitrators should insist that the hearing be conducted on consecutive days whenever possible, because they are less expensive. To prepare a realistic schedule, it may be necessary to add a few days at the outset because of the tendency of counsel to underestimate how many days they will need to put on their cases.

6 Arbitrators should take an active role in limiting and streamlining discovery, consistent with the applicable arbitration rules and the circumstances. Arbitrators should monitor compliance with the pre-hearing schedule and resolve promptly any issue that could disrupt the hearing dates.

7 Arbitrators should identify a procedure for parties to file motions in order to discourage inappropriate and "unproductive" motions. Dispositive motions should be permitted if the subject matter can streamline or shorten the proceeding (for example, a motion to dismiss based on the statute of limitations).

8 Arbitrators should be reasonably available to counsel to resolve disputes that could delay the timely end of the case. To achieve "speed and efficiency," arbitrators "must encourage counsel to consult them quickly when obstacles to schedule compliance arise" Thus, arbitrators should be willing to convene a telephone conference on short notice and "be able to rule at the end of the call or very shortly thereafter."

9 Arbitrators should conduct a fair hearing in an efficient manner. The need for efficiency during the hearing is especially great because each hearing day involves a great deal of expense. Arbitrators are directed to Chapter 9 of the CCA Guide to Best Practices in Commercial Arbitration for 45 pages of guidance on efficient hearing management.

10 Because arbitrators must set an example and adhere to deadlines for the process, they must issue the award within the time required. The award should be in the appropriate form and be drafted with careful attention to detail in order to avoid grounds to vacate the award. ■

Highlights from the Protocol for Arbitration Providers

Neutral arbitration providers offer a valuable service to businesses that want to resolve B2B disputes in an efficient and timely manner. For example, the American Arbitration Association has a variety of arbitration rules that commercial parties can use, such as commercial, construction, international, and patent arbitration rules and it maintains a panel of experienced independent arbitrators in a wide variety of fields. The AAA helps many parties with arbitrator selection by providing them with a list of qualified arbitrators from the panel. In addition, a case manager is assigned to help the parties' counsel and the arbitrator schedule and organize the proceeding.

Arbitration providers can help parties make better process choices to achieve economy and efficiency, and identify arbitrators with "the proper case management skills and philosophy."

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1 Providers should offer business users a clear variety of options because business dispute resolution needs vary. For example, a small sales transaction contract is different from a multimillion dollar construction or commercial contract. Thus, business users need to be able to have a choice of procedures (i.e., fast track, expedited, streamlined, large complex case clauses, etc.) as well as a choice of dispute resolution clauses. In addition, providers should publish "guidance on their Web sites about the benefits and costs of each process." Furthermore, provider Web sites should be organized in such a way that the different procedural options and clauses can be easily located and user feedback can be obtained.

2 Providers should promote stepped dispute resolution clauses, which usually begin with negotiation, followed by mediation, followed by binding arbitration if the dispute is not completely resolved in one of the earlier steps. If successful, non-binding dispute resolution processes can save the parties time and money, give them more control over the outcome, and preserve their business relationship. Mediation has the additional advantage of providing confidentiality protections for private communications between a party and the mediator.

3 Too much "wiggle room" in provider arbitration rules tends to invite parties to use litigation-like discovery practices. Thus, provider rules should be drafted so that discovery is limited to only essential information. Providers should establish guidelines that limit electronic discovery, interrogatories and depositions; that require arbitrators to rule quickly on discovery disputes; and, that authorize arbitrators to shift costs for discovery abuses. In addition, providers should incorporate these limits on discovery into an arbitration clause that offer detailed discovery procedures that users can adopt in their pre-dispute agreement.

4 Providers should offer rules and train arbitrators in adherence to "presumptive" deadlines for each phase of the process. Providers and arbitrators should enforce stipulated deadlines absent clear unforeseen circumstances.

5 Providers should offer well defined, fast track arbitration programs, guidance on when to elect to use them, and promote the rules to users. As referenced in point 1, fast track rules provide the most economical and quickest final resolution.

6 Providers should develop and promote procedures for the appropriate use of dispositive or other motions in arbitration. These procedures could save time and money by requiring parties to obtain advance approval from the arbitrator instead of parties' counsel unilaterally filing such motions.

7 Providers should train arbitrators in process management and improving skills to reduce cost and time, particularly during the preliminary conference and up to the final hearing.

8 Related to Point 1 providers should offer users a rule that requires early detailed fact pleading, early disclosure of documents supporting each claim and defense, legal authority relied on, and anticipated witnesses.

9 Provider rules should require all pleadings, motions, orders and other documents to be exchanged by electronic service upon the parties, counsel and the arbitrator, unless special circumstances justify another procedure.

10 Providers should offer as a "core service" the opportunity to evaluate arbitrators based on their effectiveness as efficient case managers. This information should be acquired in a "post-arbitration telephone interview" and periodically communicated to the arbitrators. Inefficient arbitrators should be removed from the provider's panel.

11 Providers should expedite the appointment of arbitrators with rules that impose strict deadlines on appointments and take the appointment decision away from parties who fail to meet the appointment deadline.

12 Before offering an appointment to an arbitrator, providers should confirm the arbitrator's availability to hear and decide the case within the relevant time frame.

13 Providers should develop an ADR mechanism (for example, an ombudsperson) for the express purpose of hearing users' complaints about inefficient arbitrators or the arbitration process itself. The hearer of these complaints should have authority to generate solutions.

14 Providers should offer an orientation program for business users who are new to the commercial arbitration process. The format should identify the differences between arbitration and litigation and how to use the arbitration process to further the business user's goals. This type of program could be online or in person. ■

Religious Requirement for Arbitrators *(Continued from page 19)*

proceedings fairly in accordance with the rules of natural justice." But what was not needed, it said, was "any particular ethos." Therefore, it ruled that membership of the Ismaili community was "clearly not necessary for the discharge of the arbitrators' functions." Because the religious requirement was "an integral part of the agreement to arbitrate," the court held that the entire arbitration clause was unenforceable.

Implications

The Court of Appeal recognized that its decision "has a far wider significance that the present case" due to the fact that the term "employment" is defined identically, or nearly identically, in all English legislation forbidding discrimination, including Section 9(1)(b) of the Equality Act 2010, which prohibits discrimination based on "nationality and national origins."

Many arbitration clauses in international commercial agreements contain nationality requirements and those that do not routinely incorporate institutional arbitration rules with nationality considerations or requirements. For example, Article 6(4) of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR, the international division of the American Arbitration Association) permits the ICDR, in selecting "suitable arbitrators," to "appoint nationals of a country other than that of any of the parties." At least this rule is permissive. By contrast, Article 9(1) of the ICC Rules of Arbitration is mandatory: "In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality...." Article 6 of the LCIA Arbitration Rules, is prescriptive: "Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise."

Does the decision by the English Court of Appeals, if upheld, put at risk all arbitration clauses that specify nationality or that incorporate rules that specify nationality? There has been considerable disagreement in the English and European arbitration literature as to whether the implications would be wide or narrow, but there seems to be agreement that the implications of the UK Supreme Court decision are uncertain.

The ICC and the LCIA have both intervened as *amici curiae*, to express the arbitration community's concerns. Some major English law firms are advising clients that incorporate institutional arbitration rules in their arbitration agreements to exclude the application of any provisions relating to the nationality of an arbitrator.[2] Others are advising clients to "consider amending their arbitration agreements to delete any expressly discriminatory provisions and to disapply any relevant [institutional] rules."[3]

The UK Supreme Court's decision could be announced by the end of 2011. Until then, the concern and uncertainty about nationality requirements continue. ■

Endnotes

[1] [2010] EWCA Civ 712.

[2] See, e.g., "UK—Jivraj v Hashwani: Amendments needed to arbitration clauses," Linklaters' Technology, Media & Technology News, 13 October 2010.

[3] See A.Welsh and A. Pullen (Allen & Overy), "Jivraj v. Hashwani: is the sky falling in?" in Practical Law Company, October 2010.

Developing an Effective Med-Arb/Arb-Med Process

By Edna Sussman

"[Med-arb] proceedings, when properly executed, are innovative and creative way to further the purpose of alternative dispute resolution."

Bowden v. Weickert

The buzz is all about whether arbitration has become too much like litigation. Regardless of whether this query is based in reality for the vast majority of arbitrations and regardless of whether it is the arbitrators or the lawyers/clients who are the cause of some arbitrations having taken on a litigation-like process, there is no question that mediation is on the rise. As parties search for a more expeditious and less costly means for resolving their disputes, attention is increasingly being paid to hybrid processes—to combinations and permutations of arbitration and mediation that can serve the parties' needs and best fit the forum to the fuss. These combined processes are not new. Arbitrators attempting to settle cases (arb-med) and mediators serving as arbitrators if settlement is not achieved (med-arb) have been the subject of learned articles for many years[1] and have been part of the local culture in many parts of the globe for generations.[2]

The two-fold concerns raised most frequently as to the use of a hybrid process are applicable only if the same neutral serves as both arbitrator and mediator, a practice which serves the parties' purpose of maximizing efficiency and minimizing expense. First, it is generally accepted that the confidentiality of mediation is an essential element to successfully conducting a mediation as parties reveal their true interests and perspectives on the dispute. It is argued that if the parties know that the mediator will be the arbitrator if the mediation fails, they will not confide in the mediator and will instead try to "spin" the would-be arbitrator to achieve a better result in the arbitration. Second, there is concern, on the other hand, that the mediator will be privy to confidential information derived from private caucus sessions with the parties and the opposing party will not know what was said and will not have the opportunity to rebut the information in the arbitration phase, a breach of concepts of natural justice and due process. Some argue that these concerns are insurmountable and that a hybrid of mediation and arbitration jeopardizes both processes. Others argue that these issues can be dealt with in various ways and that, in any case, the parties should be able to design their own process and contract for the one that suits them best.

The Combinations and Permutations

The mediation and arbitration processes have been combined in a variety of ways. These include: (a) Med-arb: If an unbreachable impasse is reached, the same person serves as the arbitrator; (b) Arb-med or arb-med-arb: The appointed arbitrator attempts to mediate (or conciliate) the case but failing resolution returns to his or her role as arbitrator; (c) Co-med-arb: The mediator and the arbitrator hear the parties' presentations together but the mediator then proceeds to attempt to settle the dispute without the arbitrator, who is only called back in to enter a consent award or to serve as an arbitrator if the mediation fails; (d) MEDALOA (Mediation and Last Offer Arbitration): If the mediation fails, the mediator-now-arbitrator is presented with a proposed ruling by both parties and must decide between the two, as in a baseball arbitration.

Techniques to implement a combined arbitration-mediation process have been developed to avoid the problems identified with same neutral med-arb and arb-med. For example, the mediation can be conducted without caucus sessions, thus assuring that all parties are aware of the information being presented to the neutral with full opportunity to respond.[3] Or the arbitrator can complete his or her award following the hearing, but seals it and keeps it confidential pending an attempt to mediate the dispute between the parties. Or the parties can be allowed to opt out of the same neutral serving as the arbitrator after the mediation fails. Or two party appointed arbitrators can co-mediate the dispute without the chair, who is held in reserve for the hearing untainted by having been privy to confidential communications in case no settlement is reached. These and other process refinements can serve to ameliorate the difficulties presented in combining arbitration and mediation, but party consent may be viewed as overcoming all objections.

Can Consent Overcome Later Challenges?

While the case law in this area is still emerging, the courts in the United States that have had occasion to address med-arb have uniformly endorsed the ability of the parties to design a med-arb process to suit them. However, the courts caution that informed consent is essential. Absent informed consent, the arbitration award rendered in the med-arb or arb-med-arb context will not be confirmed. The devil here may be in the details. What must the consent include to effectively bar challenges to any arbitral award that may ultimately be rendered?

The court in *Bowden v. Weickert*[4] dealt with an arbitrator who attempted to mediate the dispute. Upon failure of the mediation process, the arbitrator returned to his role as arbitrator and rendered his award. The court reviewed the med-arb process and delineated the nature of the agreement necessary for such a hybrid:

> The mediation-followed-by-arbitration proceeding engaged in by the parties in this case is sometimes referred to as a combined, or hybrid, "med-arb" proceeding. Such proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution. However, given the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain: (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process ... in the event that their disputes are later arbitrated.[5]

Finding that the arbitrator had relied on information obtained in his role as mediator in violation of statutory protections of mediation confidentiality and that there had been no explicit agreement by the parties regarding the use of confidential information, the court found that use of the same neutral as arbitrator and mediator rendered the arbitrator's decision "arbitrary and capricious" on its face.[6]

In *Gaskin v. Gaskin*,[7] the court noted that the mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator, creating the potential for a problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. The court concluded that it would be improper for the mediator to act as the arbitrator in the same or a related dispute "without the express consent of the parties."[8]

Where the parties have consented, the use of confidential information by the arbitrator in the arbitration decision should not serve to provide a basis for vacating the award. In *U.S. Steel Mining Company v. Wilson Downhole Services*,[9] the parties had agreed to have the mediator serve as the arbitrator if the mediation failed to lead to a resolution and empowered the mediator, now arbitrator, to select between the parties competing proposals in a baseball arbitration. The parties expressly authorized the mediator-arbitrator to rely on confidential mediation disclosures in reaching his decision. The parties' agreement provided:

> The Parties anticipate that *ex parte* communications with the Arbitrator will occur during the course of the mediation. The Parties agree that the Arbitrator, in evaluating each Party's best and final offer, may rely on information he deems relevant, whether obtained in an *ex parte* communication or otherwise, in making the final Award.[10]

In attacking the award, the challenging party claimed fraud in the presentation of information in the mediation. The court held that such evidence of fraud had to be clear and convincing and no such finding could be made on the facts presented in the face of the consent given.

In an analogous case, in *Conkle and Olesten v. Goodrich Goodyear and Hinds*,[11] the court reviewed a challenge to an arbitration award where the party had waived disclosure by the arbitrator and did not know that the arbitrator had previously mediated a closely related case. The court refused to set aside the award finding that the "waiver was direct and unequivocal."[12] The court said that to adopt an "absolutely-cannnot-waive-disclosure rule would give one party the unilateral right to repudiate any arbitration it didn't like."[13]

Nor will the court necessarily vacate the award even absent express consent on use of confidential information in limited circumstances. In *Logan v Logan*,[14] the loser in the arbitration sought to set aside the award on the grounds that the mediator–arbitrator referred to confidential information from the mediation in his arbitral award. The court noted that:

> if there was an improper reference to the mediation in the arbitration proceedings, this would constitute grounds for vacating or modifying the arbitration order and subsequent judgment, if the reference materially affected appellants' substantial rights.[15]

However, on the facts before it, the court refused to set aside the award, stating that no showing had been made that the reference in the arbitration order to matters that

occurred at the mediation "materially affected substantial rights."[16]

Care must be taken in designing the process, crafting the consent document and in the terminology used if an enforceable award is to be achieved. In *Lindsay v. Lewandowski*,[17] the parties agreed to "binding mediation" by the mediator upon the conclusion of a failed mediation. The court refused to enter judgment on the stipulated settlement agreement, which included provisions determined in "binding mediation" on unresolved terms following a mediation by the same neutral. The court noted the confusion that would result from allowing the development of myriad alternative dispute resolution processes such as "binding mediation" for which no legal guiding principles existed:

> If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to chose? Should the trial court take evidence on the parties' intent or understanding in each case? A case-by-case determination that authorizes a "create your own alternate dispute resolution" regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting *more* complexity and litigation into a process aimed at less.[18]

Clarity as to the nature of the roles to be played and the use of constructs and terminology with which the law is familiar and as to which legal principles already exist are important in drafting the contract language establishing the process to be used.

Thus the court in *Lindsay v. Lewandowski* expressly recognized that such a combined process could be developed by the parties. The court stated that it did not preclude the parties from agreeing, if the mediation fails, to proceed to arbitration with the same neutral. But the court warned that whether or not this arbitrator (*née* mediator) may consider facts presented to him or her during the mediation would also have to be specified in any such agreement. As confirmed in the concurring opinion, "only a clearly written agreement signed by the parties can set forth a process whereby an unsuccessful settlement conference (or mediation) morphs into a *de facto* arbitration. The key to approval of such agreement is clarity of language and informed consent."[19]

As the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties. A sample of a consent form for consideration by the reader was developed by Gerald Phillips, a well-known California mediator and arbitrator and a strong supporter of med-arb, which addresses many of the concerns.[20]

Do You Have the Right Neutral?

The differences between the demands of the job and the skill sets required for an arbitrator versus a mediator were summed up in an anecdote by a world-class neutral who reported that his wife always knew whether he had arbitrated or mediated that day. If he arbitrated he came home in time for dinner with energy for companionship and conversation. If he mediated he came home very late, emotionally drained, and went immediately to bed.

Arbitration and mediation are two entirely different processes. In arbitration the arbitrator is charged with managing the proceeding efficiently, providing a fair opportunity to each side to present its case and analyzing the facts and the law based on the evidence to arrive at the ultimate award. The mediator is charged with working with the parties to craft a process most likely to lead to a resolution, uncover the parties' interests, understand their relationship and their motivations, explore the strengths and weaknesses of the respective positions, assist in developing workable solutions and help parties overcome psychological barriers to settlement. Bottom line: The mediator's role requires use of many of the skills of a psychologist, while the arbitrator's role requires use of many of the skills of a judge.

The trainings offered for each discipline bear little resemblance to one another. For example, a good deal of attention is devoted in arbitration training to how to manage the pre-hearing process efficiently, while in mediation training significant attention is devoted to how to overcome impasse. The good mediator and good arbitrator employs a completely different approach and set of tools in each role. Not every arbitrator is qualified to be a good mediator and vice versa.

In selecting the neutral, it is not only important to consider the qualifications of the neutral for each role but to select someone with a strong reputation for integrity who the parties can trust and respect to handle appropriately the special challenges associated with combining the roles of arbitrator and mediator.

Conclusion

Combining mediation and arbitration in a hybrid process with the same neutral can be an effective mechanism for reducing costs, increasing efficiency and maximizing the possibility of achieving the win-win result that optimizes the position of all parties and arrives at the best resolution of a dispute. If the parties are fully informed and consent knowingly to same neutral mediation and arbitration, party autonomy should be respected and the resolution derived from the process should be honored.

Endnotes

1. *See, e.g.*, Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential*, 27 Willamette L. Rev 661 (1991); John T Blankenship, *Developing Your ADR Attitude*, 42-NOV Tenn B. J 28 (2006); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 Am. Rev. Int'l. Arb. 1 (1999); James T. Peter, *Med-Arb in International Arbitration*, 8 Am. Rev. Int'l. Arb. 83 (1997).
2. For a review of institutional rules on combined neutral functions around the world, see Francesco Anchini, *"Concintration:" The Ultimate Example of ADR*, 13 World Arb & Mediation Rep. 162 (2002).
3. Indeed, a no-caucus model is the basic premise of the understanding-based model of mediation. See Gary Friedman and Jack Himmelstein, Challenging Conflict: Mediation Through Understanding, American Bar Association and Harvard Program on Negotiation (2008). The book is reviewed in this issue of *New York Dispute Resolution Lawyer*.
4. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175 (Ohio App. 6 Dist. June 20, 2003). The case went back for a second arbitration; see *Bowden v Weickert*, No. S-05-009, 2006 WL 259642 (Ohio App. 6 Dist. Feb. 3, 2006).
5. *Id* at *6.
6 *Id.* at *7.
7. *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App.- Fort Worth, Sept. 21, 2006).
8. *Id.* *2 (citations omitted) *See also Wright v. Brockett*, 150 Misc. 2d 1031, 571 N.Y.S. 2d 660 (Sup. Ct., Bronx Cty. 1991); in reflecting on a proposal to expand the use of med-arb, the court cautioned that careful study was required before full implementation "to insure that there is a legally sufficient written 'plain language' consent by the parties both to the arbitration of the dispute and the specific procedures to be employed." *Id.* at 150 Misc. 2d at 1039.
9. *U.S Steel Mining Company v. Wilson Downhole Services*, No 02:00CV1758, 2006 WL 2869535 (W.D Pa. Oct 5, 2006).
10. *Id* at *5.
11. *Conkle and Olesten v Goodrich Goodyear and Hinds*, Nos G033972, G034063, 2006 WL 3095964 (Cal. App 4 Dist. Nov. 1, 2006)
12. *Id.* at *12
13. *Id* at *12. *See also, Estate of McDonald*, No. B189178, 2007 WL 259872 (Cal. App. 2 Dist. Jan. 31, 2007) where the parties entered into a settlement agreement following a mediation and agreed to a binding decision by a retired judge on disputed items; the court refused to set aside the decision, holding that the challenger was estopped from challenging the procedural settlement mechanism she had accepted.
14. *Logan v Logan*, No. F051606, 2007 WL 2994640 (Cal App. 5 Dist. Oct. 16, 2007).
15 *Id.* at *1.
16. *Id* at *3. See also, *Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167736 (S.D. Ohio Nov. 1, 2006) where the party attempted to set aside an award rendered by an arbitrator who heard the case, wrote the award and sealed it while he unsuccessfully attempted to mediate the case based on a communication by the arbitrator/ mediator in the course of the mediation The court held that the communication was protected by mediation confidentiality and was not admissible.
17. *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 43 Cal. Reptr 3d 846 (Ct. Appeals, 4th Dist. Div. 3, 2006).
18. *Id.* at 43 Cal Reptr. 3d at 850.
19. *Id.* at 43 Cal Reptr. 3d at 853. *See also, Weddington Productions Inc. v. Flick*, 60 Cal. App. 4th 793, 71 Cal Reprtr. 2d 265 (Ct. Appeals, 2d District, Div. 2, 1998).
20. Gerald F. Phillips, *Same Neutral Med-Arb: What Does the Future Hold?* 60- Jul Disp. Resol. J. 24 (May-July, 2005). This article is reprinted in this issue of *New York Dispute Resolution Lawyer*.

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CONTRACT

Drafting the Arbitration Clause:

A Primer on the Opportunities and the Pitfalls

By Edna Sussman
and Victoria A. Kummer

A review of some of the crucial issues that should be considered in order to draft an effective arbitration clause.

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The arbitration clause is often thrown into the contract at the last minute as the parties toast the conclusion of their negotiations. Usually little more than an afterthought, it deserves considerably more attention from the careful lawyer. Because the arbitration clause can become highly significant down the road if the parties' relationship deteriorates, arbitration practitioners have recognized that the clause should be shaped in a thoughtful and careful way to the transaction and the parties' needs for an economical and efficient dispute resolution process. The opportunity to do this is before the heat of battle. It is during the drafting of the contract.

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The ability to choose the terms of the arbitration clause is one of the signal advantages of arbitration, and it is this ability that differentiates arbitration from court litigation, where parties are bound by local court rules and the civil procedure laws of the jurisdiction in which the court sits. Drafters have the opportunity to streamline the resolution of any subsequent dispute, to ensure that it is heard by appropriate decision makers, and to maximize the chances of enforcing the ultimate decision. Conversely, carelessness in drafting can lead to "pathological clauses" that are not enforceable, procedural requirements that are impossible to satisfy, and provisions that endanger the enforceability of the final award.[1]

While length constraints and the vagaries of the many kinds of contracts containing arbitration clauses preclude an exhaustive review of all of the considerations that should go into drafting an arbitration clause, we review some of the most crucial issues that should be considered. The "boilerplate" arbitration clause and the arbitration provision used in the last deal are not sufficiently tailored to be inserted automatically in all contracts.

Do No Harm

Litigation over the arbitration clause is the last thing parties want when a dispute arises and a party demands arbitration, but that is precisely what will occur when arbitration is demanded against an unwilling respondent under a poorly drafted arbitration agreement. Such agreements can prompt litigation of fundamental issues, such as whether there is an agreement to arbitrate and, if there is, what its scope is. To avoid making drafting mistakes, practitioners who are unfamiliar with the nuances of arbitration clauses should use established arbitration clause phraseology. There are excellent resources to assist in the drafting of the dispute resolution clause, for example, the American Arbitration Association's (AAA) *Drafting Dispute Resolution Clauses*[2] and the International Bar Association's (IBA) *Guidelines for Drafting International Arbitration Clauses*,[3] both of which provide detailed guidance on the subject.

The AAA Commercial Arbitration Rules (AAA commercial rules) contain the following straightforward, broad arbitration clause, which has been tested in court:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[4]

Litigation over the arbitration clause is the last thing parties want, but that is precisely what will occur when arbitration is demanded against an unwilling respondent under a poorly drafted arbitration clause.

First Steps in the Analysis

The first step the drafter should take is to raise a number of questions with the client, such as: What kinds of disputes are likely to arise? Is the client likely to be a claimant or respondent? Will there be a need for prompt resolution from a business perspective? Will there be a need to assert extra-contractual claims (i.e., claims that are beyond the subject of the contract containing the arbitration clause)? Is confidentiality important? Does the transaction have international ramifications? Answers to these and other questions will help the drafter craft an appropriate arbitration clause for the transaction. They will also alert the drafter to the need to consult, during the drafting process, with counsel in other jurisdictions, including those abroad, where the arbitration may be seated or enforcement may be sought.

Scope of the Arbitration Agreement

Based on the client's answer to the question about the nature of possible future disputes, the drafter can determine the appropriate scope of the arbitration clause. If the parties agree to limit arbitration to certain types of disputes (for example, only contract disputes, or only payment disputes, or disputes under a certain dollar value), the drafter can tailor the clause to cover just those disputes. But care should be taken in adopting this approach as it may lead to challenges to the arbitrator's jurisdiction with the consequent increased costs and risk of inconsistent results.

If the parties want a broad arbitration clause for the resolution of all disputes between them, it is important to use language that has been accepted by the courts of the applicable jurisdiction.

If they also desire to resolve claims in the arbitration that are not related to the subject of the contract, such as an unrelated offset, the contract must include a provision to that effect.

Selection of the Arbitral Forum and Rules

A properly drafted arbitration clause will serve to bind the parties to arbitrate the disputes specified, and will be enforceable, but the careful drafter should not stop there. Additional details specifying how, when, and where to conduct the arbitration should be addressed. Failing to specify these items could lead to procedural disputes that may require court intervention. Such skirmishing can be nipped in the bud by addressing these issues in the arbitration clause.

The first issue is whether to have *ad hoc* arbitration, or arbitration administered by a neutral arbitral institution. Some litigants think that *ad hoc* arbitration is cheaper because no payments need to be made to an administering institution. But that view may be shortsighted, since there are a great many advantages to administered arbitration, including the help of a case administrator assigned by the institution to help the arbitrator and the parties' attorneys move the proceedings along, and the use of the institution's arbitration rules and roster of neutrals. In addition, the institution serves as a neutral intermediary to deal with challenges to arbitrators and manage payments of the arbitrator's compensation. The presence of the arbitral institution may lessen the chances that court intervention will be needed to resolve procedural issues. In addition, it may improve the chances of enforcement and may even be required in some jurisdictions.

If administered arbitration is desired, thought should be given to the rules of the institution. The rules of the major arbitral institutions are similar in many ways, but they are by no means identical; they may differ significantly on such issues as the availability of punitive damages, confidentiality, and hybrid ADR processes, such as "med-arb." The AAA commercial rules and the international arbitration rules of the International Centre for Dispute Resolution (ICDR rules), the AAA's international division, provide that the selection of the AAA or ICDR to administer the arbitration is deemed a selection of the AAA and ICDR rules—and the selection of the AAA or ICDR rules constitutes a selection of the AAA or ICDR as the arbitration administrator.[5]

In addition, attention should be paid to the version of the rules the parties wish to govern their disputes. Many institutional arbitration rules are revised from time to time and provide that the rules in effect at the time of the filing of the arbitration govern, absent a contrary modification in the arbitration agreement.[6] Modifications of other provisions in the selected institution's rules should be approached with caution to avoid the possibility that the institution may conclude it cannot administer the dispute under the rules as amended by the parties.

If selecting an *ad hoc* proceeding, the selection of *ad hoc* arbitration rules is advisable to provide a framework for the conduct of the arbitration.

Selection of Arbitrators

Qualifications. The opportunity to select the arbitrators is one of the chief advantages of arbitration. The parties can choose the decision maker they believe is best suited to the dispute (rather than just being stuck with a judge randomly assigned to the case). Parties can make the most of this unique opportunity by having the drafter of the arbitration clause include arbitrator qualifications or other selection criteria.

The drafter can specify in the agreement the kind of experience, expertise, or other qualifications that the parties want the arbitrator to have. For example, the arbitration agreement could require the arbitrator to possess a specified amount of experience as an attorney or arbitrator, familiarity with the law of a specific jurisdiction, expertise in a particular legal field, or work experience in a particular industry. Care should be taken, however, to avoid making the arbitrator qualifications so constricting that it will be difficult or even impossible to find arbitrators who satisfy them.

Selection Method. The two most common methods for selecting arbitrators are the list method and the party-appointment method. Both methods allow the parties to select their decision maker. Under the list method, frequently used at the AAA and the ICDR, the case administrator, after input from the parties as to their preferences, usually provides a list of 10 to 15 names from the panel of arbitrators. The parties "strike" the names they don't want and "rank" the remaining names in order of preference (known as the "strike and rank" method).

Under the party-appointment system, one arbitrator is selected by each side and the chair is jointly selected by those two arbitrators, often in consultation with the parties. Under the AAA commercial rules, if the party-appointed mechanism is not specified in the arbitration clause, the list "strike and rank" method will be employed. This method is also utilized at the ICDR.

There has been considerable debate in recent years about the desirability and fairness of the party-appointed arbitrator system, but it remains popular, especially in international cases. The

AAA and ICDR will administer a party-appointed process if called for in the arbitration agreement.

Default methods of arbitrator selection are provided in the AAA rules in the event the parties' chosen process fails for some reason to result in the constitution of the panel. In an *ad hoc* proceeding, it is wise to provide in the arbitration agreement for a default appointing authority, to ensure the appointment of the arbitrator.

Number of arbitrators. The arbitration agreement may specify the number of arbitrators, but if it does not, the rules the parties have selected may make the choice for them. If the parties want to control the costs of their arbitration, specifying only one arbitrator in the arbitration agreement should be considered.

If the parties anticipate disputes that will not be especially significant (e.g., in terms of dollar amount, disruption, or impact on their respective businesses), a single arbitrator may do the trick. If larger disputes are possible, three arbitrators may be preferable, although the parties must recognize that three arbitrators will increase both the costs of resolving disputes, and the length of proceedings, due to difficulties in coordinating the arbitrators' schedules. Alternatively, the agreement can provide for one arbitrator for certain types of disputes (e.g., those under a certain dollar amount), and three for others.

When including arbitrator qualifications in the arbitration clause, avoid making them so constricting that it will be difficult or impossible to find arbitrators who satisfy them.

Selection of the Seat

The selection of the seat of the arbitration, which need not be the place where the arbitration is physically held, is a critical choice. The seat selected should be one that is friendly to arbitration. It is generally the procedural law of the seat that is applicable to the arbitration and sets the baseline requirements. It is the jurisdiction that will deal with issues relating to the appointment of arbitrators, challenges to arbitrators, and jurisdiction over a party or a claim. Another important fact is that, although other courts may, in very limited circumstances, refuse to recognize and enforce an arbitral award, the seat of the arbitration is the only forum that can vacate the award.

A seat should be selected that will recognize and enforce the agreement to arbitrate, not interfere in the arbitral process; assist the arbitration proceedings when necessary; and act expeditiously. In making this selection, the parties should also consider whether the law of the seat allows non-nationals to appear as counsel in an arbitration proceeding, specifies criteria for arbitrators to be qualified, determines the language of the arbitration, or requires any special procedures in the arbitration itself. The selection of an arbitration-friendly seat, versus one not-so-friendly, can make a huge difference in the efficiency of the arbitral proceedings and the enforceability of the award.

Another factor to be considered when selecting a seat is whether cross-border enforcement of the award is likely. The laws and procedures of the jurisdictions where enforcement might be sought (as well as requirements as to the conduct of the arbitration) should be researched to avoid problems later if an award from the seat will be the subject of enforcement proceedings. There are traps for the unwary here. An award might not be enforceable in some countries, depending on the seat from which it emanates. For example, although India is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it will only recognize awards from the 44 countries that have been "notified" by India. Some important jurisdictions are not on that short list.

Arbitrability—Who Decides the Scope of Arbitral Jurisdiction?

The drafter should consider whether to include a provision stating that the arbitrators have the authority to determine their own jurisdiction. The precise application of this principle of "competence-competence" varies from country to country. In the United States the delegation to the arbitrator must be "clear and unmistakable."[7] The rules of most arbitral institutions specify that the arbitrators are empowered to determine their own jurisdiction, and several appellate courts in the United States have held that the adoption of these institutional rules in the arbitration agreement constitutes the requisite "clear and unmistakable" delegation of this power to the arbitrators. However, to provide clarity on this issue and avoid a potentially long and costly detour into the courts at the commencement of an arbitration, the drafter may consider incorporating

into the arbitration agreement language that expressly delegates this power to the arbitrators.

Streamlining the Arbitration

Another opportunity afforded by arbitration is the ability to tailor the process to the transaction and the parties' needs. As arbitration has increasingly been used in large-stakes disputes, it has become commonplace for some attorneys to treat arbitration proceedings like full-blown court litigation—dragging out the process by using expansive, time-consuming and expensive discovery. Arbitration is not litigation and using litigation procedures in arbitration runs counter to the purpose for which arbitration was originally conceived—as a swift and efficient alternative dispute resolution process.

To avoid falling victim to this trend, the parties should agree during the negotiation and drafting of their contract to an authentic arbitration process, one that will preclude litigation maneuvering and return arbitration to its roots as an expeditious and less costly mechanism for resolving disputes. Before such measures are added to the arbitration agreement, care must be taken to think through the nature, size, and complexity of the likely disputes and determine the procedures necessary to obtain a fair result.

One option could be for the drafter to incorporate into the arbitration clause the ICDR Guidelines for Arbitrators Concerning Exchanges of Information in international arbitration.[8] This can be done to streamline discovery in domestic arbitrations as well. Another helpful source of ideas for limiting pre-hearing procedures can be found in the Protocols developed by the College of Commercial Arbitrators.[9]

In order to circumscribe discovery, the parties' counsel should decide what forms of discovery they will need or want, and what methods of discovery they might want to avoid. For example, depositions can be expressly precluded, and a standard of need for document production can be set at a high bar. It also may be possible to agree on e-discovery limitations in the arbitration clause. It might even make sense to dispense with e-discovery altogether.

When limitations on discovery are practicable and can be agreed upon, putting them in the arbitration agreement will help defray (and even avoid) tremendous costs and business disruptions. When a dispute arises, if the parties find their agreement with regard to discovery to be too onerous, they can always agree to change it by mutual consent. The agreement can also provide for adjustments of the discovery limitations at the discretion of the arbitrator upon a requisite showing of need.

The parties can also provide for time limitations, whether because business considerations mandate an expeditious outcome, or because it will foster cost-savings in the arbitration. Typically, such provisions require that the arbitration conclude within a certain number of days from the filing of the demand, or from the appointment of the arbitrators, or require that the award be issued a certain number of days from the closing of the hearing. The drafter should be careful to make time limitations subject to adjustment at the discretion of the arbitrators, to avoid putting the award at risk if the time limits cannot be met.

Form of Award

Party autonomy extends to providing for the type of award to be rendered. The parties can provide for a "bare" award that merely states what relief is granted and to whom, a reasoned award, or a more detailed award with findings of fact and conclusions of law (which is rarely used). The parties may wish to have a reasoned award so they have the satisfaction of knowing the basis for the decision and/or to obtain guidance for future conduct. On the other hand, there may be circumstances in which the parties do not want a reasoned award because it might contain specific findings that could be harmful to them in some way in the future. In arbitration, unlike court, parties can prevent such findings by limiting the nature of the award to be issued in the arbitration agreement.

Under the AAA commercial rules, unless a request for a reasoned award is made in writing by the parties prior to the appointment of the arbitrators, the arbitrators need not render a reasoned award.[10] Parties rarely consider this point at the commencement of the arbitration, so if a reasoned award is desired, it is best to provide for it in the arbitration agreement.

In the past, many arbitrators felt that a reasoned award would provide grounds for a court to refuse to enforce it (despite the fact that a merits review is generally prohibited under the Federal Arbitration Act and most state laws). More recently, there has been a shift by many arbitrators towards providing at least some reasoning in their awards as a reaction to several court decisions that, while enforcing the awards, nevertheless criticized them for their lack of reasoning.

In the international context, it must be noted that some jurisdictions outside the United States require arbitral awards to be reasoned in order to be enforceable. The ICDR rules, like the rules of many institutions, require a reasoned award unless the parties have agreed that no reasons be given.[11]

Confidentiality

Another opportunity offered by arbitration is the ability to provide for confidentiality and avoid the public exposure attendant to court proceedings. Many practitioners wrongly assume that arbitration is "confidential." It is generally accepted that arbitrators and administering institutions have an obligation to keep arbitral proceedings confidential. But in many legal regimes and under many institutional rules, the parties have no such obligation, absent an express confidentiality agreement. Thus, although arbitration is "private," the confidentiality obligations of the parties depend on their express agreement, local law (which varies by jurisdiction), and the rules chosen to govern the arbitration.

If the confidentiality of future disputes is important, it is best to include in the arbitration agreement itself language binding the parties to confidentiality. The ability of the parties to agree on anything diminishes precipitously after a dispute arises and litigation tactics take over. Therefore, confidentiality, like virtually all of the procedural issues that arise in the course of an arbitration, is best addressed during the drafting of the arbitration clause while the parties are working harmoniously. Further, any contractual confidentiality agreement must contain exceptions, such as allowing disclosures required by law. It must also allow submissions to a court necessary for enforcement of the award. If court proceedings ensue, it may not be possible to maintain confidentiality.

Interim Measures

Interim measures, such as attachments or preliminary injunctions, can be as important in arbitration as in litigation. Jurisdictions vary as to whether the arbitrators or the courts have the authority to issue interim measures of protection. Most institutional arbitration rules authorize arbitrators to issue interim measures,[12] and parallel jurisdiction is available in many cases. The AAA commercial rules expressly provide: "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate." Given the variability of local law on this point and certainly in *ad hoc* arbitration, the parties may wish to consider providing express authority for the courts to issue interim measures, or for the arbitrators to do so, and review the enforceability of such a provision in the relevant jurisdictions.

When the parties need interim relief prior to the appointment of the arbitrator, there could be a delay in obtaining relief because, unlike the courts, where such an application can be made at any time, there is no panel of arbitrators waiting to rule on such a request when the arbitration is first commenced. In addition, empanelling arbitrators takes time.

Rules providing for an emergency arbitrator to be appointed to hear a request for interim measures prior to the constitution of the tribunal are optional under the AAA commercial rules and therefore must be affirmatively elected in the arbitration clause.

The AAA was a leader in developing an emergency arbitrator procedure under which an arbitrator could be appointed to hear a request for interim measures of protection so that relief would be available before the panel is constituted. The emergency arbitrator rules are part of the ICDR international rules.[13] However, they are optional under the AAA commercial rules and therefore must be affirmatively elected in the arbitration clause. The drafter should consider electing the optional emergency arbitrator rules in the arbitration clause if the contracting parties have selected the AAA commercial rules to apply.[14]

Attorney Fees and Costs

Arbitration agreements often contain provisions addressing how attorney fees will be paid. Some provide that each party will bear his or her own attorney fees (known as the American rule), while others provide that the "prevailing party" shall recover its attorney fees and costs from the losing party (the loser pays rule). Arbitration agreements may provide that if an enforcement proceeding is necessary to obtain payment, the losing party will pay the attorney fees and costs of the enforcement proceeding. The purpose of this provision is to encourage voluntary compliance with the arbitral award. Likewise, an arbitration clause may provide that the party demanding arbitration must pay all filing and tribunal fees, subject to adjustment, if at all, in the final award. Alternatively, it may provide that a respondent

who fails to pay his or her share of the costs of the arbitration shall suffer specified consequences. Fee- and cost-shifting provisions are intended to deter frivolous arbitration demands and court challenges. In addition, they can help streamline the proceeding. However, their use should be carefully considered.

Arbitrators generally apply the American rule in U.S. arbitration proceedings conducted under the AAA commercial rules, absent a reason to do otherwise. Under these rules, the arbitrator is authorized to award attorney fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement."[15] However, the ICDR rules, consistent with international practice, provide that the arbitrators "shall fix the costs of the arbitration in its award,"[16] leaving the arbitrators' discretion, if there is no provision in the arbitration agreement dictating the application of the American rule. It should be noted that some jurisdictions outside the United States do not enforce agreements to have each party bear its own attorney fees and costs unless that agreement is reached after the dispute has arisen.

Other Essential Terms

Under virtually all regimes, arbitration agreements must be in writing. In arbitration agreements involving a U.S. party, or where enforcement in the United States may be sought, it is important for the drafter to include an "entry of judgment" provision in order to avoid further litigation on issues of enforcement. The entry of judgment language in the AAA standard arbitration clause states: "Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

To avoid later disputes as to where the arbitration hearing will take place, the drafter should identify with specificity the locale of the hearing. Absent such a provision, the choice may be made under the applicable rules.

If the transaction is international, the drafter should specify in the arbitration agreement the language in which the arbitration will be conducted and in which the submissions should be made. It may also be appropriate to specify the currency in which any damages awarded should be paid and, if a party is a government that would be entitled to sovereign immunity, include a waiver of such immunity and an agreement to submit to the jurisdiction of the court and to entry of judgment.

The law chosen by the parties to govern their contract will dictate the law governing claims that are asserted thereunder. But what about claims that do not arise under the contract but which the parties nevertheless agree may be arbitrated? Where the parties agree on arbitration of extra-contractual claims, the drafter should include the substantive law to govern those claims.

The applicability of the FAA can also be a puzzle unless the arbitration clause expressly says that the FAA applies. The FAA applies to transactions "involving commerce." The term "commerce" is broadly defined under the FAA. The breadth of the FAA has led many courts to hold that the FAA preempts many aspects of state law. Yet, because the applicability of the FAA is not always clear (and courts can be inconsistent in their understanding of its reach), the drafter should expressly provide in the arbitration clause for the FAA to govern, if this is what parties want, and most do. If the FAA governs, state law provisions will then be applicable only to the extent not in conflict with the FAA.

Contracts of adhesion (such as take-it-or-leave-it contracts between parties of unequal bargaining power, e.g., consumers) are always drafted by the stronger party. Since mandatory arbitration provisions in adhesion contracts could be challenged in court on unconscionability grounds, the drafter must be very familiar with state unconscionability law and adhesion contracts. This is necessary to avoid putting into the clause any provisions that may cause the courts to find the arbitration clause to be unconscionable and unenforceable.

There are a host of other issues that could be important in drafting an arbitration clause.[17] Addressing all of them is beyond the scope of this article, but that does not relieve careful practitioners from considering them and deciding whether it would be appropriate to include them in the arbitration clause.

Step Clauses

In recent years, "step clauses," which call for the parties to take certain preliminary steps before they can commence arbitration, are being used with greater frequency. Their popularity may be due to the fact that they give the parties an opportunity to resolve disputes in a less adversarial forum. The contract usually requires a "business persons only" negotiation first, followed by mediation to help the parties amicably resolve the matter before incurring the costs and expenses of arbitration. Requiring mediation first can make it easier for all parties to come to the table. There is no need for either side to "suggest" mediation, which often makes counsel worry that the suggestion alone shows weakness.

Some courts have held that a step clause cre-

ates a condition precedent that must be satisfied before the commencement of arbitration. Accordingly, it is important for the drafter of a step clause to include time limits for completing each step so that it is clear when the next step can be taken.

We do not recommend providing for "good faith" participation in a dispute resolution provision. The good faith requirement may sound nice, but it is a fuzzy, easily circumvented term that can lead to court fights over what constitutes "good faith" participation and whether it has been satisfied.

Additional considerations in drafting a step clause include whether the statute of limitations will be tolled during any of the preliminary processes, and whether to allow applications for interim relief during the mediation. If time is money, the step clause can be varied to have the mediation run concurrently with the arbitration.

Where mediation is used alone, or is part of a step clause, designating an administering institution in the mediation clause can help make the mediation proceed smoothly. The institution's rules provide the procedures for notice and selection of the mediator, and the case manager assigned to the case can help facilitate the initiation and management of the mediation. If the mediation is not administered, these procedures must be included in the mediation portion of the step clause.

Conclusion

The arbitration clause provides an opportunity to tailor the dispute resolution process in the manner desired by the contracting parties. This opportunity should not be squandered. The drafter must be careful to include in the arbitration agreement all provisions that will be needed to ensure its enforceability, as well as the enforceability of any awards that are issued, while still satisfying the parties' needs. The arbitration clause is an essential element in providing users with the kind of arbitration they say they want: one that resolves disputes with a minimum of time and business disruption and at lowest cost. ■

ENDNOTES

[1] Although pathological clauses may sometimes be saved by the courts, they may, in other instances, preclude enforcement of the arbitration agreement. Examples include. arbitration clauses that are unclear as to whether binding arbitration is intended; naming an institution that does not exist or is misnamed; providing too little time for the arbitration to take place with no safety valve for extensions, or providing too much specificity for the arbitrator's qualifications.

[2] This publication can be downloaded from the American Arbitration Association's Web site at www.adr.org (click on Education & Resources).

[3] International Bar Association, IBA Guidelines for Drafting International Arbitration Clauses, (2010), available on the IBA Web site at www.ibanet.org

[4] The AAA's standard arbitration clause is in the introduction to the AAA Commercial Arbitration Rules (AAA commercial rules).

[5] AAA commercial rules, R-1 & R-2; ICDR international rules, art. 1. Other institutions have similar rules.

[6] This is true of the AAA and ICDR rules. See AAA commercial rule R-1(a) and ICDR rules, art 1.

[7] See, *First Options of Chicago Inc v. Kaplan*, 514 U.S. 938 (1995). See also *Rent-A-Center, West Inc v Jackson*, 130 S. Ct. 2772 (2010). Such a provision ensures that in the United States, as in the United Kingdom, the courts will only review jurisdiction after determination in the arbitration. See *Dallah Real Estate and Tourism Holding Co. v The Ministry of Religious Aff Gov't of Pakistan*, [2010] UKSC 46.

[8] Available for downloading at www.adr.org (click on Education & Resources).

[9] The College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration, 2010, available at www.thecca.net/CCA _Protocols.pdf.

[10] Rule R-42(b).

[11] ICDR rules, art. 27(2).

[12] AAA rules, R-34(a).

[13] ICDR rules, art. 37.

[14] AAA commercial rules, optional rule O-1-8.

[15] AAA commercial rules, R-43(d)(ii).

[16] See, e.g., ICDR rules, art. 31.

[17] Additional provisions that might be considered include whether to: (1) limit the types of damages that the arbitrator can award (e.g , by excluding punitive and consequential damages); (2) specify the interest rate to be applied; (3) limit specific issues for expert determinations; (4) permit summary disposition on written submissions; (5) waive the right to appeal (or, alternatively, allow appeals as permitted by law); (6) allow joinder and consolidation in certain circumstances; (7) include class action provisions; (8) empower the arbitrator to decide the case based on the equities (*ex aequo et bono*); (9) provide for a special type of arbitration (such as high-low or baseball arbitration); or (10) provide for online dispute resolution mechanisms.

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ARBITRATOR DECISION-MAKING: UNCONSCIOUS PSYCHOLOGICAL INFLUENCES AND WHAT YOU CAN DO ABOUT THEM

*Edna Sussman**

> *"Most studies of arbitration are devoted to discussions about the applicable law or the various procedural rules It seems far more important to try to analyze how and why arbitrators make up their minds"*
> Robert Coulson, President
> American Arbitration Association, 1990[1]

I. INTRODUCTION

Mr. Coulson's discussion of what was known at the time about psychological influences on arbitrator decision-making presaged the vigorous discussion of that subject which developed recently, some 20 years later. With the explosion of best-selling books on decision-making and the popularization of the psychological learning on the subject,[2] attention has turned to its applicability to arbitrators. Presentations at meetings of the International Bar Association,[3] the Swiss Arbitration Association and Brunel University[4] in 2013 and the upcoming International Council for Commercial Arbitration ('ICCA") Congress in 2014 have all focused on arbitral decision-making and the role of psychology.[5]

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[1] Robert Coulson, *The Decisionmaking Process in Arbitration*, 45(3) ARB. J. 37, 37 (1990).

[2] Recent best-selling books on the subject include: DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010); MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

[3] For a report on this session, see Allison Ross, *What Goes on in Arbitrator Deliberations?*, 8(2) GLOBAL ARB. REV. (April 30, 2013).

[4] Summaries of the presentations delivered at the Brunel conference are available at http://www.brunel.ac.uk/law/research/events/bcsiacbi-brunel-centre-for-the-study-of-international-arbitration-and-cross-border-investment/ne_283957.

[5] In an earlier burst of interest, a series of papers on the subject were delivered at the ICCA Congress in 2002. *See* papers collected as *The Psychological Aspects of Dispute*

The field of psychology is immense and the number of biases, i.e. unconscious psychological influences, identified by those that study the subject is far beyond what can be discussed in a single article. This article focuses on a few of the more significant, and offers suggestions for both arbitrators and counsel to overcome them or at least lessen their influence.[6]

The literature which studies the psychological phenomena that are the subject of this article refers to them as "biases." Because the word "bias" has such profound negative connotations in the field of arbitration and forms the basis for the extensive learning on arbitrator disclosures and challenges which are not the subject of this article, this article borrows the nomenclature used by Professor Guthrie, and refers to biases as "blinders."[7] The biases/blinders discussed here are those that are simply human nature. While constraints imposed by the law to increase certainty and predictability, such as specifying elements for causes of action and establishing burdens of proof, are effective to some degree, ultimately decisions are made by judges and arbitrators who are human beings. Their minds function anatomically just as do the minds of others. Legal training cannot and does not alter that fundamental reality.

The human brain has both an intuitive and a deliberative component, a fact long known and now scientifically proven by the study of neuroscience.[8] Plato, in discussing what drives people's actions, used the image of two horses, a good horse governed by reason and a bad horse who hurries along violently and without control.[9] Descartes wrote about "intuition and deduction" as the way to arrive at

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Resolution, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA Congress Series, No. 11, London 2002 (Albert Jan van den Berg ed., 2003). But only in the last few years has concerted attention been devoted to the interface of psychology and arbitration.

[6] For other discussions of arbitrators and psychology, see Christopher Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMPORARY PROBLEMS 105 (2004) (reviewing the research as of 2004 on decision-making by arbitrators); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*, 6(4) WORLD ARB. & MED. REV. 801 (2012) (discussing the anchoring effect, the framing effect, the availability heuristic, the halo effect, and the narrative fallacy); Lucy Reed, *Arbitral Decision-Making. Art, Science or Sport?* The Kaplan Lecture 2012, *available at* http://www.arbitration-icca.org/media/1/13581569903770/reed_tribunal_decision-making.pdf (discussing the anchoring effect, hindsight bias, egocentric bias, cultural effects and extremeness aversion).

[7] "Blinders" is the terminology used by Professor Guthrie in Chris Guthrie, *Misjudging*, 7 NEV. L. J. 420, 420 (2007) [hereinafter Misjudging].

[8] For a historical perspective on the concept of the dual mind, see Keith Frankish & Jonathan St. B. T. Evans, *The Duality of Mind: An Historical Perspective*, *in* TWO MINDS: DUAL PROCESSES AND BEYOND (Jonathan St. B. T. Evans & Keith Frankish eds., 2009).

[9] PLATO, PHAEDRUS 34-36 (Christopher Rowe trans., 2005). In *The Republic*, Plato couched it differently and referred to three parts rather than two: reason, spirit and appetite, with reason seeking to control the other two. Thus, one could combine spirit and appetite to arrive at the dual model. PLATO, REPUBLIC (Robin Waterfield trans., Oxford University Press 1993).

knowledge.[10] Recently Nobel Prize winner Kahneman popularized what he refers to as System 1 – our fast, automatic, high capacity, low effort, and intuitive mode, and System 2 – our slow, deliberate, limited capacity and high-effort mode.[11] His modern, research-based analysis essentially posits that we cannot function without both and that human decision-making operates with System 1 making intuitive judgments, which are sometimes modified by System 2's deliberative process. This dichotomy mirrors the two traditional models with which judging has traditionally been viewed: the "formalist" model pursuant to which it is believed that judges apply the law to the facts in a logical and deliberative way, and the "realist" model pursuant to which it is believed that judges follow their intuition to reach their judgment and later rationalize their judgment with reasoning.[12]

Scholars have explored systems 1 and 2 as they impact legal decision-making. Research has shown that, as with all human beings, the intuitive reactions of System 1 play a significant role in judges' decision-making.[13] While there is a lack of agreement as to whether there has been sufficient study of the subject to draw conclusions as to the extent to which a judge's deliberative faculties are invoked to override the intuitive reaction,[14] there is no question that System 1 is operative and impacts a judge's decision-making as it does for everyone. Given the similarity of the tasks, one must conclude that arbitrators' decision-making is similarly impacted.[15]

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[10] RENE DESCARTES, RULES FOR THE DIRECTION OF THE NATURAL INTELLIGENCE, Rule III, at 79 (George Heffernan ed. & trans., Rodopi 1998). *See also Rules for the Direction of the Native Intelligence, in* DESCARTES, SELECTED PHILOSOPHICAL WRITINGS (John Cottingham trans., Cambridge University Press 1988) (written 1626, published 1684).

[11] KAHNEMAN, *supra* note 2, at 19-105.

[12] Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. R. 101, 102-03 (2007) (The authors are two law professors and a U.S. magistrate). *See also* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1 (1998) (the author offers a comprehensive review of the prior thinking about judicial decision making).

[13] *Blinking on the Bench, supra* note 12; Anna Ronkainen, *Dual-Process Cognition and Legal Reasoning, in* ARGUMENTATION 2011: INTERNATIONAL CONFERENCE ON ALTERNATIVE METHODS OF ARGUMENTATION IN LAW I-32, (Michał Araszkiewicz et al. eds., 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2004336; Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 COURT REVIEW 114 (2013), *available at* http://www.andrew.cmu.edu/user/epeer/Eyal_Peer/Publications_files/Heuristics%20and%20biases%20in%20judicial%20decisions.pdf.

[14] See Frederick Schauer, *Is There a Psychology of Judging?, in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103-20 (David Klein & Gregory Mitchell eds., 2010) (urging that more research be done to examine whether judges diverge in deep and cognitively significant ways from other human beings in judicial decision-making lacking their training and experience). *See also* Christopher Drahozal, *Behavior Analysis of Arbitral Decision Making, in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 319-37 (Christopher Drahozal & Richard Naimark eds., 2005).

[15] Drahozal, *supra* note 6; *see also* Donald Wittman, *Arbitration in the Shadow of a Jury Trial Comparing Arbitrator and Jury Verdicts*, DISPUTE RESOLUTION JOURNAL 59

Jurists have long recognized the power of the unconscious. As Justice Cardozo wrote almost 100 years ago, "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[16]

The English judges have also recognized the unconscious influence. As Lord Goff said, "[T]here is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias."[17]

Similarly Judge Frank, an early proponent of the realist model of judicial decision-making, wrote, "Judges are not a distinct race . . . And their judging must be substantially like that of other men."[18] He cautioned jurists to take note and attempt to remedy the impact of the unconscious: "The conscientious judge will, as far as possible, make himself aware of his biases . . . and by that very self-knowledge nullify their effect."[19]

U.S. Supreme Court Justice Scalia, in his book on persuasive advocacy, advises counsel to address this aspect of the decision-making process if they wish to prevail: "While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are)."[20]

A growing body of scholarship has developed suggesting that one needs to look at both the intuitive and the deductive models, suggesting that "judges rely on their intuitions, but sometimes override their intuitions with deliberative decisions." They propose an "'intuitive override' model of judicial decision making that can best be characterized as realistic formalism... [which] recognizes the power of the judicial hunch and... recognizes the importance of rule-based deliberation as a means of constraining the inevitable, but oft-times undesirable influence of intuition."[21]

It is the unconscious intuitive processes, the blinders, which are addressed in this article with suggestions to foster a more robust deliberative overlay and improve the quality of decisions by arbitrators. In order to provide a context that reflects actual arbitrator decision making, I conducted a survey of arbitrators in October of 2012 (the "2012 Arbitrators Survey"). The survey, which was distributed both in the U.S. and to colleagues around the world, drew 401

(2003-2004) (finding that monetary outcomes did not differ significantly between arbitrators and juries in automobile accident cases).

[16] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 107 (Quid Pro Books 2010), *original publication* (Yale University Press 1921).

[17] R v. Gough, [1993] AC 646, 659, (HL).

[18] JEROME FRANK, LAW AND THE MODERN MIND 105-106 (1930).

[19] In re J.P. Linahan, 138 F. 2d 650, 652 (2d Cir. 1943).

[20] Antonin Scalia, *Introduction, in* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).

[21] Chris Guthrie, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Judicial Intuition 3, available at* http://law.vanderbilt.edu/files/archive/Judicial_Intuition.pdf.

responses.[22] The relevant survey results are reported where they illustrate and amplify the psychological influence discussed.[23]

II. UNCONSCIOUS BLINDERS

Guthrie, Wistrich and Rachlinski, in their leading works on the subject of judicial decision-making, addressed the question of why it can be difficult to get a decision in a case right. They constructed a series of scenarios and presented them to 265 trial court judges as part of their study.[24] They identified three sets of blinders that are the psychological influences that can lead to erroneous decisions: informational blinders, cognitive blinders and attitudinal blinders.[25] These categorizations are useful and are adopted here.

A. *Informational Blinders – Inadmissible Evidence*

1. *The 2012 Arbitrators Survey*

Question: Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum rather than take the evidence and give it such weight as you deem appropriate?

Always	1%
Usually (i.e., around 75% of the time)	5.1%
Often (i.e., around 50% of the time)	4.8%
Sometimes (i.e., around 25% of the time)	55.2%
Never	33.9%[26]

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[22] The survey was disseminated by e-mail to several arbitration list serves. Of the 401 respondents, 79% were from the United States, 12% were from Europe, 5% were from North America outside the United States, and the remainder were from Asia, Latin America and Africa. Over 55% of the respondents had served as an arbitrator in over 50 cases while 20% had served as an arbitrator in between 21 and 50 cases. Seventy-eight percent of the respondents were male and 22% were female. Forty-two percent were born between 1941 and 1950, 20% were born in 1940 or before and the remainder were born after 1951. While this sample may not be completely representative of the overall population of arbitrators, this survey provides a useful benchmark.

[23] For results of another survey conducted with arbitrators focusing on psychological aspects, see Sophie Nappert & Dieter Flader, *Psychological Factors in the Arbitral Process*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 121 (Doak Bishop & Edward G. Kehoe eds., 2010).

[24] Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. Rev. 1251, 1279-81 (2005); *See also* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAVIORAL SCIENCES AND THE LAW 113 (1994).

[25] Misjudging, *supra* note 7, at 420.

[26] For all questions, in order to give context to the numbers, the survey defined "Usually" as around 75% of the time; "Often" as around 50% of the time and

2. *The Empirical Studies*

Study 1: To illustrate the impact of informational blinders several experiments were conducted with groups of judges in the United States to ascertain whether information that was inadmissible as evidence in court impacted decision-making. In the first experiment, half of the judges saw a document claimed to be protected by attorney-client privilege which was devastating to plaintiff's case. Seventy-five percent of those judges ruled that the communication was privileged and excluded it. Half of the judges, who constituted the control group, did not see the document. Of the judges who did not see the document, 55% found in favor of plaintiff, while of the judges who saw the document and ruled that it was privileged, 29% found for the plaintiff. [27]

Study 2: In the second experiment, subsequent remedial measures which are not admissible under the federal rules of evidence in the United States were in issue. The case study concerned a gasoline can which flared up and caused a bad burn. The corporate defendant responded by saying that such flare ups almost never happened. Half of the judges saw a warning and recall sent by the company two years later recalling the product and warning of the possibility of flashbacks in the gasoline storage containers. The company moved to exclude the evidence as a subsequent remedial measure and the evidence was excluded. Of the judges who were exposed to the excluded evidence, 75% ruled in favor of the defendant, while 100% of the judges in the control group who did not see the recall notice found no liability.[28]

Study 3: The third experiment concerned a prior criminal conviction. The plaintiff was injured by a piece of machinery in a products liability case. The defendant claimed that the plaintiff was exaggerating his injury and introduced evidence of the plaintiff's conviction for swindling old ladies in a scheme 12 years earlier. Eighty percent of the judges who saw this evidence suppressed it on the grounds that its prejudicial effect substantially outweighed its probative value. The judges who had seen the evidence of the prior criminal conviction awarded a median damages amount of $400,000, while those who had not seen it awarded a median damages amount of $500,000.[29]

3. *Implications for Arbitration*

It is not surprising that judges, and undoubtedly arbitrators, are not able to unring the bell, as these experiments demonstrate. The formal rules of evidence are generally not applied in arbitration. For example, the IBA Rules on the Taking

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"Sometimes" as around 25% of the time. The order of the possible responses was randomized where appropriate to avoid possible effects of presentation order.

[27] Inadmissible Information, *supra* note 24 at 1294-98.

[28] Misjudging, *supra* note 7 at 422-24.

[29] Inadmissible Information, *supra* note 24, at 1304-1308.

of Evidence[30] (the "IBA Rules") provide some guidance, but in leaving it to the arbitrator to determine the "admissibility, relevance, materiality and weight of the evidence,"[31] they are a far cry from imposing standards of admissibility similar to formal rules of evidence.

Concerned principally about making sure that the parties have a full and fair opportunity to present their case and mindful of the time and cost that would be incurred if formal rules of evidence were to be applied, arbitrators tend to allow inadmissible evidence. The survey results revealed that 33% of the arbitrator respondents never excluded evidence and 55% excluded evidence only about 25% of the time. Thus 88% of arbitrators admit evidence even though it is inadmissible under evidentiary standards at least 75 % of the time. Only 1% of the arbitrators always exclude such evidence.

In light of these findings, should arbitrators be more willing to exclude evidence that does not meet evidentiary standards? Should arbitrators be more careful to ensure that they are not giving undue weight to unreliable evidence that enters the record? What does it mean when arbitrators say they will give evidence as to which an objection is lodged the "weight it deserves"? What can arbitrators do to try to overcome this blinder?

Concern about protecting the award and forestalling the creation of grounds for challenge, which even if without merit prolong resolution of the dispute and cause parties to incur significant expense, understandably cause arbitrators to act as the survey indicated. Moreover, studies have shown that parties are more likely to accept and honor a decision if they perceive the process to have been fair; the admission of evidence they offer and acceptance of their "voice" in the tribunal's proceedings, enhances their perception of procedural justice, even if ultimately that evidence is not influential.[32] Given the increasing proclivity of parties to challenge awards, arbitrators' practice of generally admitting evidence serves important objectives.

But arbitrators should take care to try to counter this blinder. First and foremost, arbitrators should really do what they say they will do and consciously weigh the reliability of evidence they have promised to assess as to weight. Reviewing preliminary conclusions of the case to see if the outcome would differ if unreliable evidence admitted on that basis had not been introduced may serve as a check by showing the arbitrators the extent to which such pieces of evidence have influenced their thinking.

A special situation presents itself when the tribunal is asked to review documents to determine a privilege objection. If the determination cannot be made without a review of the documents and a demand is made for such a review,

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[30] International Bar Association, RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010).

[31] *Id* at Art. 9(1).

[32] Shari Seidman Diamond, *Psychological Aspects of Dispute Resolution: Issue for International Arbitration, in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, *supra* note 5, at 631-33.

should the tribunal perform that task itself knowing that it may be influenced by what it sees?[33] Article 3(8) of the IBA Rules, provides that in exceptional circumstances the tribunal may, after consultation with the parties, appoint an independent and impartial expert to conduct the review. While the appointment of such an independent expert may cost time and money, in light of the danger of prejudice, if a party asks for such an independent review, careful consideration should be given to all of the relevant factors before deciding on the tribunal's response.

A similar issue arises with respect to expert testimony. Arbitrators frequently accept experts who might not qualify to testify as to the subject of their testimony if they were presented in court and arbitrators often permit experts to stray from their area of expertise to offer additional opinions. Should arbitrators be so lax in admitting expert testimony? At the very least arbitrators should be aware of the psychological influence such testimony may have on their thinking and carefully assess the credentials of the experts in determining the weight to be given.

For their part, should counsel point out the inadmissibility and unreliability of evidence, if appropriate, more than is now common in order to highlight the matter for the tribunal? Or, as studies have shown with juries who remember the evidence that was excluded even more vividly than the evidence that was admitted,[34] do counsel risk exacerbating the problem by focusing the arbitrators on the problematic document or testimony? Should counsel do more to focus the tribunal's attention on the lack of expertise of a proffered expert?

Counsel should carefully weigh the pros and cons in considering their alternatives. While no one would argue for turning an arbitration into a courtroom-style debate about the admissibility of every piece of evidence, a brief, one-word objection on critical pieces of evidence as to which a valid evidentiary objection can be lodged may be advisable in some circumstances. If there are many such pieces of evidence that are important, it may be advisable to offer evidentiary objections to the tribunal in a succinct filing. Such assistance by counsel may cause the tribunal to more carefully assess the reliability of such evidence.

B. *Cognitive Blinders – Heuristics*

Cognitive blinders are patterns of deviation in judgment which can lead to perceptual distortion, inaccurate judgment, or illogical interpretation. They include heuristics, mental short cuts that permit people to solve problems, make

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[33] Courts recognize the prejudice that may result from an *in camera* review of documents as to which privilege is asserted because it "may be difficult to 'unring the bell.'" *See, e g.,* National Labor Relations Board v Jackson Hospital Corp., 257 F.R.D. 302, 307 (D. Col. 2009).

[34] Shari Siedman Diamond and Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1865 (2001); Joel D. Lieberman and Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence,* 6 PSYCHOL. PUB. POL'Y & L. 677, 703 (2000).

judgments and react to situations quickly and efficiently. These rule-of-thumb strategies shorten decision-making time and allow people to function without constantly stopping to think about the next course of action.

1. *Hindsight Blinder*

a. *The empirical study*

Study 1: The study required assessing the reasonableness of conduct in foresight and in hindsight. The case presented involved the question of whether a failure to take precautions against flooding was negligent. Liability was to be found if at the time of the alleged unlawful conduct it were found that there was more than a 10% likelihood of a flood. All of the judges received the same set of facts but half of the judges were told that no precaution was taken and that later a flood costing $1 million occurred. The other half of the judges, the control group, were told that no precaution was taken, but were not told about the flood. Of the control group who were not informed about the flood, 24% found negligence and that the company should have taken precautions. Of the judges who were told about the flood, 57% found negligence and that precautions should have been taken, demonstrating the tendency to overestimate the predictability of past events based on later events.[35]

b. *Implications for arbitration*

The very nature of arbitration calls for an evaluation of events after the fact, thus making the process particularly vulnerable to the hindsight blinder. Hindsight has been described as the "most troublesome problem for judges."[36] Arbitrators understand this difficulty and often speak of the need to avoid being influenced by hindsight, but do they adequately appreciate the difficulty of putting aside what ultimately occurred in deciding what happened or should have happened in the past? Judicial decisions such as those relating to stock values and predictions of the market have been laid by some scholars at the feet of hindsight.[37]

The burden of proof may in some instances be of assistance in countering hindsight.[38] If one isolates and lists the facts that were proven as of the relevant time frame from later biasing events and apply the burden of proof just to the earlier facts, it might assist in minimizing the impact of hindsight. Counsel may wish to emphasize precisely which facts in the record are properly presented on an

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[35] Misjudging, *supra* note 7, at 432-33, *citing* Kim A. Kamin & Jeffrey Rachlinski, *Ex Post Ex Ante. Determining Liability in Hindsight*, 19 LAW AND HUMAN BEHAVIOR 89 (1995).

[36] Chris Guthrie, Jeffrey Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 825 (2001); Mitu Gulati, Jeffrey Rachlinski & Donald Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773, 776 (2004) ([t]he influence of hindsight on judgment is notoriously difficult to avoid").

[37] *Id*

[38] Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 615-16 (1998).

issue and stress that it is based on those facts alone that the tribunal must rule with reference to the burden of proof.

2. *Anchoring Blinder*

a. *The 2012 arbitrator survey*

Which do you find more difficult to decide: liability or quantum of damages?

Liability	18.7%
Damages	43.7%
Both the same	37.6%

b. *The empirical studies*

Study 1: The first case involved an auto accident which resulted in an amputated arm. The same facts were presented to all of the judges but some judges heard a demand of $10 million in a settlement conference while the control group heard a demand for "a lot of money." The judges who heard the $10,000,000 demand awarded a mean of $2,210,000 while the judges who only heard a large number awarded a mean of $808,000.[39]

Study 2: The second dispute presented to the judges involved a pedestrian hit by a truck who was badly injured. He must now use a wheel chair and was seeking lost wages and damages for pain and suffering. The braking system on the truck was faulty. The defendant moved to dismiss for failure to meet the court's $75,000 jurisdictional minimum. All but two judges who heard that motion denied it. The judges in the control group did not hear the motion. The judges who did not hear the motion awarded a mean of $1,200,000. The judges who heard the motion awarded a mean of $880,000.[40]

Study 3: The subjects were asked to guess the average temperature of San Francisco. The anchor group was first asked whether the temperature was higher or lower than 558°F or 292°C. After answering this question, the anchor group was asked to give a number estimating San Francisco's average temperature. The anchor group provided higher estimates of average temperature than the control group. They had latched on to the initial high, although obviously irrelevant, figures they had heard before the final question was posed to them.[41]

c. *Implications for arbitration*

Arbitrators may question whether the anchoring studies cited are of any significance to their practice since most of their cases involve commercial or financial disputes in which there is no element of damages as discretionary as a determination of the value of an amputated arm or of pain and suffering and considerable evidence of damages is offered. But there is often considerable room

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[39] Inadmissible Information, *supra* note 24, at 1288-91.

[40] Misjudging, *supra* note 7, at 43.

[41] Inside the Judicial Mind, *supra* note 36, at 788-89.

for differences of opinion in determining which damages calculation to believe, which expert is credible, and what aspects of the damages analysis should be adopted. Numbers are suggestive, and high or low numbers, even those that are presented at the start of the arbitration, can impact an arbitrator's thinking despite the careful damages analysis conducted based on the concrete evidence presented by the parties. Study after study has proven that people will be anchored in their response by numbers that bear no relationship to the question they are asked to answer and will adjust from it.

Where it appears that one arbitrator is leaning heavily in one direction and has in mind a damages figure that does not seem to comport with the evidence, the chair might want to consider being the first one to suggest a damages figure. Such an introduction of a number that the chair believes is appropriate may deflect the anchoring bias as the deliberations proceed.

As the survey results demonstrate, many arbitrators find that quantifying damages is often more difficult than determining liability. There is often no clear right answer, perhaps opening the door for the influence of the anchoring blinder. Being mindful of the anchoring blinder should assist arbitrators to avoid falling prey to it. Counsel should carefully weigh in each case, based on its particular circumstances, whether they are better served offering a number that is very high or very low in the hope that it will influence the arbitrator to unconsciously react with the anchoring bias, or whether in doing so they will lose all credibility and would be better served by presenting a number that is credible, and supporting it in such a convincing fashion that they will overcome any anchoring blinder.

3. *Framing Blinder*

a. *The empirical studies*

Study 1: In this experiment the same two sets of adjectives in a different order were used to describe two people.

> Alan- intelligent-industrious-impulsive-critical-stubborn-envious
> Ben- envious-stubborn-critical-impulsive-industrious-intelligent

The study found that the initial adjective colored the subjects' assessment of the later adjectives, leading the experiment subjects to view Alan as an able person with some shortcomings and Ben as a problem person whose abilities are hampered by serious difficulties.[42]

Study 2: The subjects were all shown the same film. Then they were asked how fast the cars were going using different words to describe the moment of contact. The responses varied depending on the word used.

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[42] Inadmissible Information, *supra* note 24, at 1266.

Smashed	40 MPH
Collided	39 MPH
Bumped	38 MPH
Hit	34 MPH
Contacted	31 MPH[43]

b. *Implications for arbitration*

Every arbitration counsel knows that how the story is presented is crucial to persuading the tribunal to accept their version of the case. The words that are chosen to express the story, the elements of the story that are emphasized, the order and manner in which parts of the story are presented are essential elements in persuasive advocacy. Arbitrators are conscious of the fact that differences in the quality of the lawyering can affect their decision. Without overstepping and assisting counsel in inappropriate ways, arbitrators do try to look beyond the manner and style of presentations to ascertain the true story. Again, recognition of the psychological influence that a well-crafted presentation can have should serve to heighten arbitrator's ability to improve his or her decision-making. Counsel, of course, should use their skills to the best of their ability and present their story in the most favorable light and in a manner most likely to have the psychological impact they desire.

4. *Coherence and Ego-Centricity Blinders*

a. *The 2012 arbitrator survey*

On a scale of 1 to 10 with 10 being the most certain, how certain are you that you have reached the correct result by the time you sign the award?

1	0.3%
2	0%
3	0.3%
4	0%
5	0.3%
6	0.3%
7	3.3%
8	16.4%
9	52.4%
10	27%

b. *Empirical studies*

Study 1: Judges were asked to estimate their reversal rate on appeal by stating what quartile they would fall into as compared to other judges, with the top

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[43] Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction An Example of the Interaction between Language and Memory*, 13 J. OF VERBAL LEARNING AND VERBAL BEHAVIOR 13, 385-86 (1974).

quartile being the one with the highest reversal rate. Fifty-six percent put themselves in the lowest quartile and 31% in the second lowest quartile. Thus, 87% of the judges thought at least half their peers had higher reversal records on appeal,[44] confirming that "the psychology of judging includes the belief that one is almost always (some judges think always) right."[45]

c. *Implications for arbitration*

The coherence blinder is the psychological model which examines the shift from conflict to closure. During the course of deciding a case the judge's or arbitrator's view of the dispute gradually moves towards a state of coherence so that the arguments that support one result are endorsed and the opposing arguments are rejected. By the end of this process one view of the case emerges as the winning position.[46]

Justice Cardozo explained the process most eloquently:

> Then suddenly the fog has lifted. I have reached a stage of mental peace. I know in a vague way that there is doubt whether my conclusion is right. I must needs admit the doubt in view of the travail that I suffered before landing at the haven. I cannot quarrel with anyone who refuses to go along with me; and yet, for me, however it may be for others, the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally extinguished, in the calmness of conviction.[47]

Once the state of coherence is reached, certainty, a state the mind strives for, takes hold. Jurists have long commented on the human inclination to reach a state of certainty which leads to conviction as to the accuracy of conclusions reached. As Judge Posner remarked, "People hate being in a state of doubt and will do whatever is necessary to move from doubt to belief."[48] Justice Holmes similarly stated, "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind."[49] Robert Burton in his book on the subject discussed this phenomenon of reaching certainty in physical terms with reference to the brain's mesolimbic dopamine system which provides feelings of pleasure.[50]

Judges have used the concept of the hunch to explain their arrival at a decision. Judge Hutcheson, who was undergoing Freudian psychoanalysis, originated the concept in an early work: "after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play,

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[44] Misjudging, *supra* note 7, at 436-37.

[45] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 192 (1990).

[46] Simon, *supra* note 12, at 20.

[47] Benjamin N. Cardozo, *The Paradoxes of the Legal Science*, *in* THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 80-81 (Margaret E. Hall ed., 1947).

[48] Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

[49] Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. R. 457, 465 (1897).

[50] Robert Burton, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN IF YOU ARE NOT 86-101 (2008).

and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and . . . sheds its light along the way."[51] Judge Friendly spoke of the decisional conclusion as "flashes before the shaving mirror in the morning" which he attributes to trained intuition.[52]

But the question must be asked, does feeling certain upon reaching a state of coherence provide assurance that the result reached is correct or is this really just overconfidence leading to the "illusion of validity."[53] Overconfidence may lead to premature conclusions and insufficient consideration of alternative possibilities, thus decreasing judgment accuracy.[54] Is the certainty with which a conclusion is reached also the natural result of yet another blinder, the confirmation blinder?

5. *Confirmation Blinder*

a. *2012 arbitrator survey*

Do you form a preliminary view of the merits of the case after receiving the prehearing submissions?

Always	3.5%
Usually	14.1%
Often	19.4%
Sometimes	50.5%
Never	12.4%

In what percentage of your cases have you changed your mind and rendered an award that is at variance with your prehearing preliminary view if formed?

0 -10%	9.9%
11 -20%	20.3%
21 -30%	31.3%
31 - 40%	16.6%
41 -50%	18.9%
Over 50%	8%

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[51] Judge Joseph C. Hutcheson, Jr., *The Judgment Intuitive. The Function of the "Hunch" in Judicial Decisions,* 14 CORNELL L. Q. 274, 288 (April 1929); *quoted in* Simon, *supra* note 12, at 119; *see also* Charles M.Yablon, *Justifying the Judge's Hunch· An Essay on Discretion,* 41 HASTINGS L. J. 231 (1990).

[52] Judge Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge,* 71 YALE L. J. 218, 230 (1961). *See also* R. George Wright, *The Role of Intuition in Judicial Decisionmaking,* 42 HOUSTON L.R. 1381 (2006).

[53] Raymond S. Nickerson, *Confirmation Bias· A Ubiquitous Phenomenon in Many Guises,* 2(2) REV. OF GENERAL PSYCHOLOGY 175, 188 (1998).

[54] Hal R. Arkes, et al., *Eliminating the Hindsight Bias,* 73(2) J. OF APPLIED PSYCHOLOGY 305, 307 (1988).

In Approximately what percentage of your cases have you changed your view of the case outcome while writing the award?

0 - 10%	55.4%
11 - 20%	28.4%
21 - 35%	10.1%
36 - 50%	5.8%
Over 50%	0.3%

Which of the following practices do believe is better?

Share views early in the process and discuss reactions to the merits throughout the proceeding.

63.4%.

Wait until all the evidence is in before discussions among the arbitrators about the merits of the case.

26.8%

No opinion

9.8%

b. *Empirical studies*

Study 1: When a mind reader gives an analysis of one's character in essentially universally appropriate descriptive terms, people who want to believe that their minds are being read easily find substantiating evidence in what the mind reader says as they focus on what fits and discount what does not. They do not consider the possibility that equally accurate descriptions can be given if their minds were not being read.[55]

Study 2: A series of studies demonstrated that when a person draws a conclusion on the basis of information acquired and integrated over time, the information acquired early in the process is likely to carry more weight than that acquired later, the so-called primacy effect. People often form an opinion early in the process and then evaluate subsequently acquired information in a way that is partial to that opinion.[56]

c. *Implications for arbitration*

In the context of arbitral decision-making the confirmation blinder is a particularly pernicious blinder. All arbitrators say that they keep "an open mind" until the close of the hearing and surely arbitrators honestly believe that to be true. However, the psychological learning suggests this to be a blinder in and of itself.

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[55] Nickerson, *supra* note 53, at 180.

[56] *See* studies discussed in Nickerson, *supra* note 53, at 187; *see also* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization The Effects of Prior Theories on Subsequently Considered Evidence*, 37(11) J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 2098 (1979).

Francis Bacon stated hundreds of years ago, "The first conclusion colors and brings into conformity with itself all that comes after."[57] A similar conclusion was reached by Waites and Lawrence, both lawyers and social psychologists known for their courtroom decision-making work, who concluded in their foremost article on the subject of psychology and arbitrators:

> A typical arbitrator concludes the initial phase with a single dominant story in mind . . . [A] sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case—to either confirm or to alter their original notion of what the case story really is . . . Arbitrators . . . will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed . . . Once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified.[58]

The 2012 Arbitrator Survey results are instructive. Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions, while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their preliminary determination 30% or less of the time. And still, 28.4% changed their minds while writing the award 11 to 20% of the time while 10.1% did so 21 to 35% of the time.

These results suggest that arbitrators do review the case as it progresses and are not necessarily as locked into their preliminary view as the confirmation blinder would suggest. The deliberative functions do appear to be operating and the confirmation blinder may not be as strong an influence on arbitrators as some of the other blinders. But is enough being done by arbitrators to counter the confirmation blinder? Is it the case in too many arbitrations that a conclusion reached early tends to be substantiated by later evidence as conflicting evidence is filtered out by the unconscious?

The law has recognized the impact of confirmation bias in the context of jury trials in the United States. Jurors are admonished to keep an open mind during the presentation of evidence and to form no conclusions until all the evidence has been presented and they have been instructed by the judge. The jurors are instructed not to talk about the case with one another until the judge sends them to commence the deliberation process. Studies conducted with mock jurors suggest

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[57] Francis Bacon, *Novum organum*, XLVI, *available at* http://intersci.ss.uci.edu/wiki/ebooks/BOOKS/Bacon/Novum%20Orgum%20Bacon.pdf (1620).

[58] Richard C. Waites & James E Lawrence, *Psychological Dynamics in International Arbitration Advocacy, in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 69, 109-110, 114 (Doak Bishop & Edward G. Kehoe eds., 2010).

that such admonitions alone are insufficient to accomplish their purpose, and that jurors often come to favor a particular verdict early in the trial process and deliver final verdicts consistent with their tentative conclusions.[59]

It is likely that the 27% of arbitrators whom the survey showed follow a similar protocol and wait until the conclusion of the evidence before talking to their fellow arbitrators about their reactions likely do so for the same reasons as the instructions to the juries: to avoid reaching decisions too early. But it is also likely that, like the findings of juries, this practice does not achieve its goal of forestalling a premature conclusion. Thus the 63% of arbitrators who believe that it is a best practice to share views early in the process and discuss reactions to the testimony and the developing merits throughout the proceeding are likely not, in fact, prejudicing a fair result. And many arbitrators would feel that many of the benefits of having three decision-makers would be lost if views and reactions could not be exchanged and debated during the course of the proceeding.

However, how those conversations are conducted can have a significant impact on whether or not the confirmation bias that is human nature is ameliorated. There are practices that can be followed by the arbitrators in the course of their discussions in a conscious effort to truly keep an open mind and forestall the impact of the confirmation blinder and ensure that all aspects of the case are being fully considered throughout.

Making sure that both "stories" are played for discussion throughout the proceeding would help. Many believe the role of the party-appointed arbitrator is to make sure the position asserted by his or her appointing party is understood. This can be viewed as a virtue as it may serve to forestall the confirmation blinder in that all arbitrators hear all sides throughout the process. But, it does pose the risk of the party-appointed arbitrator becoming increasingly convinced of his appointing party's position as the confirmation blinder strengthens.

To defuse this blinder and perhaps even counter to some extent any unconscious predisposition towards the position of the appointing party, consider whether it would be useful, in particular cases where an arbitrator seems unduly wedded to one view, to have the party-appointed arbitrators sum up the evidence each day over lunch, but have them switch which side's evidence they are marshaling from time to time. Any party-appointed arbitrator who does not perform this function in good faith and marshal the evidence competently will lose credibility in the tribunal.

If there are no party-appointed arbitrators, consider having the co-arbitrators develop the story from each party's perspective and marshal the evidence that supports each party's case continuously throughout the proceeding. It may also be helpful to have them switch sides from time to time so they don't develop a confirmation blinder in favor of the side they are presenting.

As arbitrators question witnesses they should make sure questions are asked that elicit the full story and not just questions that will confirm or support a preliminary view. If questions might be viewed as partial if asked by a party-

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[59] Nickerson, *supra*, note 53, at 193-194.

appointed arbitrator, the chair can be asked if he or she would be willing to pose those questions.

Whether such a process would lead to more dissents is a question that might be asked. The fact that there are very few dissents in commercial cases even where there are party-appointed arbitrators suggests that the risk is slim. In any case, it should be trumped by the importance of fairly hearing all sides of the case.

III. ATTITUDINAL BLINDERS – BACKGROUND AND EXPERIENCE

A. *Empirical Studies*

Study 1: In a striking study, researchers worked with staunch supporters of candidates Bush and Kerry in the 2004 U.S. presidential elections. Statements by the candidates were played for them while they were connected to a magnetic imaging device that measured the location and level of brain activity. The study demonstrated that only the intuitive parts of the brain (System 1) were triggered; the reasoning part (System 2) remained completely inactive as any negative information about their candidate was simply filtered out automatically. The same result was found when they played positive messages about the opposing candidates. The information never reached the deliberative part of the brain.[60]

Study 2: In an experiment conducted with arbitrators, twenty different panels of arbitrators listened to a tape of the same contract dispute. All were arbitrators, but half were brokers and half were manufacturers. The dispute concerned a sale of goods contract and the issue was whether or not the defendant broker had the right to cancel the contract. The comparison between the manufacturer arbitrators and broker arbitrators demonstrated that the brokers were far more likely to favor decisions for the broker defendant than were the manufacturers.[61]

B. *Implications for Arbitration*

Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision-making processes. Each arbitrator is uniquely influenced by his or her lifetime experiences and cultural influences and like judges is influenced by that background. As Justice Holmes said, "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices

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[60] Drew Westen et al., *Neural Bases of Motivated Reasoning An fMRI Study of Emotional Constraints and Partisan Political Judgment in the 2004 U.S Presidential Election,* 18(11) J. COGNITIVE SCIENCE 1947 (2006).

[61] Diamond, *supra* note 32, *citing* Ernest A. Haggard & Soia Mentschikoff, *Responsible Decision-Making in Dispute Settlement, in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES, 277 (June Louin Tapp and Felicia J. Levine eds., 1977).

which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." [62]

His comment was echoed by Justice Cardozo who said, "If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge, just as the legislator gets it, from experience and study and reflection; in brief, from life itself."[63] The English judges similarly acknowledge that a judge's individual circumstances can predispose him/her. As Lord Phillips noted, "Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge toward a particular view of the evidence or issue before him."[64]

The influence of life's experience is best exemplified by Justice Stewart's words in a landmark obscenity case. In deciding that the offending item was not obscene, Justice Stewart summed up the basis for his conclusion, "I know it when I see it."[65]

Speaking of this aspect of human nature in the context of arbitrator decision-making, Shari Diamond referenced three psychological influences at the 2002 ICCA Congress. The "affinity effect" occurs when "decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behavior they must consider in reaching their decisions."[66] The "self-serving or egocentric bias" is the "tendency for people to reach judgments that are biased in a self-serving direction."[67] And, finally, the "expectancy effect" causes "beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses [to] affect how decision-makers evaluate evidence" and causes decision-makers to be more "likely to reject information that is inconsistent with their beliefs and expectations."[68] Yet, people feel that they are free of prejudice or bias, the illusion of objectivity.[69]

IV. IMPROVING ARBITRATOR DECISION-MAKING

A great deal has been written about how a reasoned award should be written and what is required to satisfy the requirements of a reasoned award, but further attention should also be given to the process of reaching a decision on the merits and avoiding blinders in the process. Psychological studies conclude that simply

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[62] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Publ'ns 1991) (originally published 1881); *see also* RICHARD A. POSNER, HOW JUDGES THINK (2008) (discussion of political and personal elements in judging).

[63] CARDOZO, *supra* note 16, at 71.

[64] *Re* Medicaments and Related Classes of Goods (No.2), [2001] 1 WLR 700, 711, ¶ 37.

[65] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

[66] Diamond, *supra* note 32, at 336-37.

[67] *Id.* at 337.

[68] *Id.* at 337-38.

[69] Mahzarin R. Banaji et al., *How (Un)ethical Are You ?*, HARV. BUS. REV. 3 (Dec. 2003).

understanding the need to avoid blinders and the desire to overcome one's blinders and to correct them is not sufficient to cure the problem. Awareness of the mental contaminant and motivation to correct it has been found not to lead to control. Human nature and the workings of the brain are such that, even if people know they have blinders and understand that they have predispositions, they do not believe those blinders infect their judgment.[70] Indeed, they recognize that the judgment of others is affected by blinders, but remain convinced that they themselves are unaffected. This has been labeled as the "bias blind spot."[71]

While there is strong support in the psychological literature for the bias blind spot conclusion, other psychologists argue, based on a different set of studies, that people will view information more objectively and rely less on intuitive reactions if they are motivated. Speaking about judges, they describe this as "bottom-up" decision-making (matching the formalist perspective on judicial decision-making) and conclude that it can be motivated by a fear of invalidity, a feeling of accountability for decisions taken, and/or a desire to be accurate. They report that given sufficient time availability, such motivations will lead to a more deliberative process.[72] Surely all of these motivations are applicable to arbitrators who care deeply about making the right decision and feel a strong personal sense of responsibility to the parties and to the other members of the tribunal to whom they are accountable.

While humans cannot function without the operation of the intuitive part of the brain and it certainly has a role to play in all arbitrator functions, arbitrators owe it to the parties to take whatever steps they believe would be effective to counter their unconscious blinders and prompt the deliberative portion of the brain to engage fully in the assessment of all aspects of the case. The psychological research on debiasing techniques is far less advanced than the research that identifies biases.[73] However, some work has been done and the following

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[70] Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations,* 116(1) PSYCHOLOGICAL BULLETIN 125-26 (1994); Emily Pronin, Thomas Gilovich, & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111(3) PSYCHOLOGICAL REVIEW 781-82 (2004).

[71] Emily Pronin, Daniel Y. Linn & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28(3) PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 369 (2002). The truth of this conclusion was confirmed in my own personal experience. I gave a talk on this subject at an arbitration conference and asked one of my esteemed colleagues during the break what he thought of the presentation. He said that the presentation was all about judges and we are arbitrators. The clear implication of his reaction was that somehow we arbitrators are different and not subject to the same biases and blinders as judges.

[72] Brandon Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning, in* THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING, *supra* note 14, at 46, 48.

[73] Scott O. Lilienfeld, Rachel Ammirati & Kristin Landfield, *Giving Debiasing Away, Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4(4) PERSEPECTIVES ON PSYCHOLOGICAL SCIENCE 390, 391 (2009).

suggestions are offered to arbitrators to assist in assuring the active engagement of the brain's deliberative faculties and hopefully the reduction of the influence of unconscious blinders. Many arbitrators already take some of these steps, and the 2012 Arbitrator Survey suggests that many perform well in applying their deliberative functions to the decision-making process, but there is value in developing a list and reviewing it for applicability and action to further counter psychological blinders:

- As you consider your decision and as you write the award consider the opposite side, assuming each to be correct.[74]
- Identify why you may be wrong, what are the important pieces of evidence that go the other way and why are they not reliable or credible.
- Consult your co-arbitrators and review all aspects of the facts and law and conclusions with them.[75]
- Make sure you elicit the independent thinking of each member of the tribunal.[76]
- Create a checklist with columns for each party and list the facts that favor that party.[77]
- Create a checklist listing the legal claims and the elements of each claim and review how and whether they have been met, looking at it from each side's perspective.[78]
- Reduce your reliance on memory; look for record citations for all of the important facts for both sides to ensure that you have recalled them correctly.[79]
- Replay how you reached your conclusion and think about what evidence you rejected and why, in reaching that conclusion.[80]

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[74] Yves Derains, *The Arbitrator's Deliberation,* 27 AM. U. INT'L L. REV. 911, 923 (2012); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite A Corrective Strategy for Social Judgment*, 47(6) J. PERSONALITY AND SOCIAL PSYCHOLOGY 1231, 1231-32 (1984).

[75] Ronkainen, *supra* note 13, at 12.

[76] JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 109 (2012).

[77] Bishop, *supra* note 6, at 808-809. Benjamin Franklin gave similar advice 250 years ago. *Benjamin Franklin's letter to Joseph Priestley* (Sept. 19, 1772), *available at* http://www.procon.org/view.background-resource.php?resourceID=1474. Checklists create a mental schema and a forcing function that promotes careful deliberative analysis by disrupting the automatic intuitive response.

[78] *Blinking on the Bench*, *supra* note 12, at 138-140.

[79] Hal R. Arkes, *Principles in Judgment/Decision Making Research Pertinent to Legal Proceedings*, 7(4) BEHAVIORAL SCIENCES & THE LAW 429, 451 (1989).

[80] Baruch Fischhoff, *For Those Condemned to Study the Past: Reflections on Historical Judgment*, 4 NEW DIRECTIONS FOR METHODOLOGY OF SOCIAL AND BEHAVIORAL SCIENCE 79, 85 (1980).

- Write down your reasoning, even if you are issuing a bare award at the request of the parties.[81]
- Estimate the odds of being wrong. If you conclude they are too high, rethink the case until you are more certain of your conclusion.[82]
- Try to identify any significant evidence that would be inadmissible or is unreliable that may have influenced you and consider the outcome without that evidence.[83]
- Focus especially on the blinders that have been shown to affect judicial decision-makers, such as the anchoring and hindsight blinders, and affirmatively and consciously consider whether you may have been influenced by them.
- Don't take too many cases. Make sure you leave enough time to think through all of the issues, both factual and legal.[84]
- Leave time to sleep on the award so that you can continue to think about it and then go back and review it with fresh eyes.[85]
- Consider what evidence you would have needed presented to you in order to come to the opposite conclusion, and consider whether in fact such evidence was presented.
- Ask yourself what the losing party would feel that you overlooked in your analysis.
- Consider, if somebody were to have concluded the other way, how would he or she write the award and where and how would it differ.[86]
- Stay informed as the study of arbitral decision-making and psychology develops to learn more about blinders and improve your practices.[87]

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[81] Arkes, *supra* note 54, at 307; *Blinking on the Bench*, *supra* note 12, at 135-136.

[82] Jason Zweig, *How to Ignore the Yes-Man In Your Head*, WALL STREET J., Nov. 19, 2009, *available at* http://online.wsj.com/article/SB10001424052748703811604574533680037778184.html.

[83] *See* Lilienfeld et al., *supra* note 73, at 395.

[84] *See* Bartels, *supra* note 72, at 46; *see also* Steven L. Neuberg, T. Nicole Judice & Stephen G. West, *What the Need for Closure Scale Measures and What it Does Not: Toward Differentiating Among Related Epistemic Motives*, 72(6) J. PERSONALITY AND SOCIAL PSYCHOLOGY 1396, 1396-97 (1997) (citing studies that showed that when a person is motivated by a desire for closure activated by time pressures they are likely to exhibit the impact of the primacy effect (persuaded by what was presented first), make stereotypical judgments, assimilate new information to existing active beliefs and, in the presence of prior information, resist persuasion).

[85] Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108:17 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 6889 (2011), *available at* http://www.pnas.org/content/108/17/6889.full.pdf+html?sid=9a2ec5a6-0510-477a-bec3-c50c5a7c8950 (demonstrating that fatigue and lack of nourishment affect decision-making by judges).

[86] Lord et al., *supra* note 74, at 1240.

[87] Lilienfeld et al., *supra* note 73, at 393.

The 2012 Arbitrator Survey results described in this article provide some perspectives on current practices with respect to a few of these steps. A follow-up survey could review whether the specific suggestions listed are in fact part of arbitrators' current practice.

Question: Do you review the evidentiary record before you prepare the award?

Response:	
Always	69.9%
Usually	17.8%
Often	7.3%
Sometimes	5%
Never	0%

Question: When you deliberate as a panel, how often do you review the evidence in favor of what you have preliminarily assessed to be the losing side?

Always	31.4%
Usually	22.4%
Often	21.1%
Sometimes	19.3%
Never	5.8%

Based on these survey results, it appears arbitrators can do more to counter their blinders. As reported, 46% of arbitrators review the evidence that supported what was preliminarily viewed to be the losing side when deliberating 50% or less of the time. And it is not clear if the arbitrators' responses as to their own review of evidence referred to looking for citations to support a conclusion or a review of evidence that supports both sides. As arbitrators learn more about the blinders that affect their thinking, best practices to foster a more engaged deliberative process is likely to evolve to improve the quality of decision-making.

V. ADVICE FOR ARBITRATION COUNSEL

It is common wisdom that one of the most important, if not the most important step, in the arbitration for a party is the selection of the arbitrator. Because arbitrators are not all the same and, as discussed above, their decisions may be greatly influenced by their background and experience, many have argued that the party-appointed system for arbitrator selection is a *sine qua non* if arbitration is to prosper. Parties wish to have one arbitrator with whom they feel comfortable and to whom they feel they can craft a presentation that will appeal. It has not been established that only the party-appointed system, which has been both severely criticized and roundly defended by leading scholars in recent years,[88] is the only

[88] Edna Sussman, *The Debate Unilateral Appointment of Arbitrators,* American Bar Association Section of International Law, I(1) ARBITRATION COMMITTEE NEWSLETTER 2 (July 2013) (discussing the subject and citing the leading articles on the debate: Jan

way to identify arbitrators that the parties would trust. But, as the discussion above makes clear, arbitrator selection is a critical part of the arbitration from the party's perspective and will perhaps draw even more attention as the psychology of decision-making becomes better known.

Many sources offering guidance for effective advocacy have been published.[89] Such tips as reading everything a prospective arbitrator has written, developing an appealing "story," tailoring the manner and substance of the presentation to appeal to the specific arbitrators, are all practices which are, in fact, designed to understand and/or play to the unconscious of the arbitrator.

To the wealth of literature on the subject, consider one additional thought and two additional approaches for counsel addressed specifically to uncovering and addressing or deflecting unconscious blinders.

A. *How Many Arbitrators*

If the size of the case warrants it and the accuracy of the decision is paramount, consideration should be given to having three arbitrators rather than one. There are many issues to consider in deciding how many arbitrators to suggest, time and cost among them.[90] But the suggestion in the literature that "group decision-makers might be better equipped to combat some of the more pernicious cognitive blinders like hindsight bias"[91] should not be ignored. Groups can remember more facts than individuals and in deliberating with one another can share remembered information leading to a more accurate determination. Beyond recollection and focus on different facts, three arbitrators bring different backgrounds and experiences to the arbitration and bring to the deliberations "differing insights and views of the events and motivations" which "provide the group with a more complete perspective out of which a better quality decision can be made." [92]

B. *Tapping the Social Scientists*

Jury consultants have long been employed in the United States as a response to the importance of selection and messaging in winning cases. Users of jury

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Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. 339 (Fall 2010) and Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7 (2013)).

[89] *See, e g*, discussions in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION, *supra* note 23.

[90] Jennifer Kirby, *With Arbitrators, Less Can Be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May Be Overrated*, 26(3) J. INT'L ARB. 337 (2009) (questioning whether having three arbitrators, with two party-nominated co-arbitrators, generally improves quality and increases party confidence).

[91] Misjudging, *supra* note 7, at 452-453.

[92] Waites & Lawrence, *supra* note 58, at 115.

consultants find them useful[93] and their widespread use is a testament to their utility. The arbitration community is just beginning to explore the arbitrator's psychology. In cases that warrant such an additional expenditure, utilizing the services of social scientists to assist with an understanding of the psychological dimensions may be useful.

Waites and Lawrence concluded in the foremost article on the subject of psychology and arbitrators that, like the mock jury used to prepare for a jury trial, "the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study . . . Many, if not most, of the perceptions of the mock arbitrators will be close enough to those of the actual arbitration panel that the data will be valuable in developing recommendations for themes, case story, and other aspects of the actual presentation."[94]

Social scientists can be helpful from the beginning of the process with the selection of the arbitrators, just as they currently vet jury prospects and assist in jury selection. They may bring an understanding of human nature and ability to discern likely reactions which can be a useful additional input into the process of considering prospective arbitrators. With the globalization of commerce and the increased participation of arbitrators from many different cultures, such input may be particularly useful. [95]

Social scientists can also assist in developing the presentation of the case, as they now do for both juries and judges.[96] Many practitioners test their arguments or presentations with colleagues at the firm or with an arbitrator hired as a consultant to advise on procedure or strategy. That is a very useful exercise, but mock arbitration is different and should elicit different but still important information.

First, the social science consultant will try to find an arbitrator or arbitrators that match as closely as possible the characteristics and background of the real arbitrators. This in and of itself, knowing what we know now about psychology, makes the exercise infinitely more useful. In addition, conducted with the assistance of a social scientist, the exercise will not suffer from what is known as the "good subject" response or from confirmation bias which reduces the ability of the colleague or retained specialist to view the presentation with truly unbiased eyes.[97] Rather, the independent mock arbitrators will evaluate themes and facts without knowing which party the counsel presenting before it is representing in real life, since ideally both sides will be presented by that firm with equal effort.

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[93] Dr. Philip K. Anthony & Les J. Weinstein, *The Social Science Edge in Arbitration and Mediation*, 5(2) NEW YORK DISPUTE RESOLUTION LAWYER 17 (2012).

[94] Waites & Lawrence, *supra* note 58, at 118-19.

[95] *See also* Peter L. Michaelson, *Enhancing Arbitrator Selection: Using Personality Screening to Supplement Conventional Selection Criteria for Tripartite Arbitration Tribunals*, 76 ARB. 98 (2010) (urging psychological personality screening in the selection of three arbitrators to maximize the likelihood of their compatibility and so as to contribute to an efficient and high quality arbitral process).

[96] Anthony & Weinstein, *supra* note 93.

[97] *Id* at 18.

These mock arbitrators can provide a road map on such matters as how to refine or revise the theme developed to tell the story more sympathetically for the selected arbitrators, which legal theories to emphasize, whether particular kinds of graphics would be helpful and what kind of expert explanations would be most useful. Recalibration of the case based on these insights should result in a more persuasive presentation to the arbitrators actually sitting in the case.[98]

C. *Enhanced Arbitrator Interviews*

There is general approval of interviews of prospective arbitrators in the arbitral community, with only 12% of the respondents to the 2012 Queen Mary and White & Case International Arbitration Survey considering them inappropriate.[99] However, there was lack of agreement as to precisely what kinds of questions were permissible.

To assure an independent and impartial tribunal it is generally agreed that areas of permissible inquiry should be restricted.[100] Guideline 7 of the IBA Guidelines on Party Representation in International Arbitration [101] provides the most recent guidance on this issue. It permits a party representative to communicate with a prospective party-nominated arbitrator to determine "his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest." The comments to Guideline 7 explicitly bar "seeking the views of the prospective arbitrator on the substance of the dispute," but state that inquiries can be made as to "any activities . . . that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality" and with respect to "the general conduct of the proceedings."

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[98] STEPHEN TUHOLSKI, MOCK ARBITRATIONS: GETTING THE MOST VALUE FOR YOUR PROJECT 20 (providing guidance on how to structure a mock arbitration process); Edna Sussman, *Improving your Arbitration Presentation with a Mock Arbitration Two Case Studies* 15 (providing details of two actual mock arbitrations); Anthony & Weinstein, *supra* note 93 (providing background on the development of mock arbitrations and explaining the role of the consultant); all collected in 5(2) NEW YORK DISPUTE RESOLUTION LAWYER (2012).

[99] Queen Mary University of London and White & Case, *2012 International Arbitration Survey. Current and Preferred Practices and the Arbitral Process, available at* http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf.

[100] For a collection and discussion of sources on the subject, see Guigi Carmanati, *A Review of the Principles Governing Arbitrator Pre-Selection Interviews*, American Bar Association, 1(1) INTERNATIONAL ARBITRATION COMMITTEE NEWSLETTER, *supra* note 88, at 14 (guidelines and commentators have suggested strict limiting protocols for arbitrator interviews).

[101] International Bar Association Guidelines on Party Representation in International Arbitration (2013).

With what we know now about arbitrators and psychology, how should these permissible areas be construed? Can we and should we now ask questions tailored to the dispute to flush out psychological drivers?

In the 2012 Queen Mary/White & Case Survey, 84% of the respondents believed that asking questions about the candidate's position on legal questions relevant to the case was not appropriate. However, only 64% felt that it was not appropriate to ask if the candidate was a strict constructionist or influenced by the equities; 59% felt it was inappropriate to ask for prior views expressed as an expert or arbitrator on a particular legal issue; 30% felt it was inappropriate to ask about attitudes towards particular procedures such as evidence by videoconference or bifurcation and only10% believed it was inappropriate to ask about experience and knowledge of a particular legal topic, technical environment or industry.[102]

Based on the Queen Mary/White & Case survey, it would appear that 70% of the arbitral community believes that questions related to matters of procedure, similar to the IBA guidelines permitting questions relating to the conduct of the proceedings, are appropriate. There are numerous questions that can be asked about procedure that could serve as an inquiry into, and in fact may likely prompt, the utilization of debiasing techniques. But is the danger too great that an expanded interview on procedural issues will be used to gain advantages that will influence the merits?

Little thought has been given to the nature of the questions about the candidate's personal history that might be appropriate. Ninety percent of the respondents believed that it is appropriate to ask about past experience and knowledge. While it has not been common to consider that question as relating to personal experiences as opposed to professional ones, should there be a difference? Would such questions be viewed as perfectly permissible, much as they would likely be if asked of a potential juror, or would they be viewed as subtly intimating and inquiring into views on the merits?[103]

Should we be concerned that an expansion of the permissible scope of an arbitrator's interview would create precisely the prejudice that the strictures on such interviews were intended to prevent? It might be argued that allowing an expansion of permissible questions would open a Pandora's Box and counsel could easily find themselves, even inadvertently, contaminating the neutrality of the prospective arbitrator. However, in the wake of the new information about psychology and the arbitrator, a more detailed discussion of what should or should not be permissible in an arbitrator interview may be inevitable.[104]

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[102] Queen Mary University of London/White & Case Study, *supra* note 99, at 6-8.

[103] Joe Matthews, *Identifying and Overcoming Arbitrator Bias – Advocacy in International Arbitration*, 5(4) TRANSNATIONAL DISPUTE MANAGEMENT 1, 15-16 (2008) (asking if expanded interviews "may be a proper and essential part of advocacy in international arbitration conducted in the 21st Century").

[104] Jeffery P. Aiken, *Due Diligence in Arbitrator Selection: Using Interviews and Written "Voir Dire"*, 64 DISPUTE RES. J. 28 (May/June 2009) (urging more thorough interviews of arbitrators).

In an administered arbitration, the interview can be conducted in a way that circumvents the potential problems. The American Arbitration Association and the International Centre for Dispute Resolution has a vehicle to enable such inquiries with its Enhanced Neutral Selection Process for Large Complex Cases.[105] Parties can develop questions, which after review and approval by the institution, are presented to prospective arbitrators for response to all parties either in writing or on a telephone conference. The arbitrator has the option of responding or declining the invitation to respond to any or all questions. The process works very well and can provide information that no amount of web research or calls to colleagues at other firms could uncover.

Consideration might also be given to a joint interview of a prospective chair with all parties participating to make the inquiries relevant to the case to assure the selection of a chair with the least prejudicial attitudinal blinders and a practice which strives to overcome informational and cognitive blinders.

VI. CONCLUSION

While legal principles and precedents provide a constraint and impose some rigor on decision-making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. Many arbitrators already take steps to assure a sound award but, with the current recognition of the psychological influences, a reexamination of best practices in arbitrator decision-making is in order.

There are concrete debiasing steps that arbitrators can take to improve the quality of their decisions and to assure a more impartial result. Time and cost considerations must always be taken into account in deciding which additional steps to take. However, many of the steps that are suggested here for consideration do not take any more time or cost any more money.

A party's selection of an arbitrator most likely to come into the arbitration with unconscious predilections favorable to that party's position can be an important factor in maximizing the chances of winning. Similarly, counsel's framing of the dispute and the theme developed to tell the story to evoke a positive response from the arbitrators is known by all to be essential to a persuasive presentation. But more can be done to enhance the arbitrator selection process and to tailor the presentation to the particular arbitrators selected. Whether the additional steps suggested for consideration are cost justified in a particular case must be considered. With the significant dollar values now often seen in arbitration cases, additional effort to factor psychological influences into the selection of the arbitrator and into the case presentation may be desirable.

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[105] American Arbitration Association, *Enhanced Neutral Selection Process for Large Complex Cases*, *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003909.

Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration

By Edna Sussman

> *[The absence of common legal cultures] "does not mean that international practitioners are pirates sailing under no national flag; it only means that on the high seas, navigators need more than a coastal chart."*
>
> **V.V. Veeder**[1]

The call for something more than a "coastal chart" to govern counsel ethics in international arbitration has intensified in recent years and has led to action. Following a comprehensive review of the subject, in May of 2013 the International Bar Association issued its Guidelines on Party Representation in International Arbitration (the "Guidelines").[2] In developing its recommendations, the IBA's Arbitration Committee investigated the different ethical and cultural norms and disciplinary rules that apply to counsel in international arbitrations. While these are only Guidelines with no inherent authority, the Guidelines are likely to foster significant changes that will aid in the accomplishment of their objectives.

The Guidelines should inspire tribunals in international arbitrations to at the very least conduct a conversation with counsel at the inception of the case to clarify what ethical norms govern each party's counsel and whether there are strictures that apply to some but not all of the parties that create inequities. Agreements as to conduct can be incorporated into the first procedural order. But even absent agreement, awareness alone can enable the tribunal to make appropriate adjustments to ensure a fair process. And just knowing about the counsel's practices enables opposing counsel to be better prepared to counter them. If the Guidelines serve no other purpose than to enable and encourage a dialogue of this nature early in the proceeding, they will accomplish a great deal.

The Guidelines may serve to focus the arbitral institutions' attention more closely to counsel ethics and to what role they can play in ensuring the integrity of the process. It is the institutions that have the ability to establish an ethics regime that empowers tribunals with the enforcement powers necessary to drive conduct. In the wake of the Guidelines release, the arbitration community may look to the institutions to issue rules that proscribe unethical conduct or conduct that obstructs or delays the proceedings and authorize the tribunal to issue appropriate sanctions.

Practitioners should welcome the promulgation of the IBA Guidelines. Adherence to the Guidelines would not automatically protect counsel from being in violation of the ethical code of their home jurisdiction. But local ethical codes may provide, or be amended to provide for counsel to be governed by the ethical regime adopted by an international arbitral tribunal. The existence of the Guidelines and the growth of international arbitration as a practice area should encourage the development of such local ethical provisions.

I. Background

Consideration of issues relating to counsel ethics in international arbitration is not new. Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.[3] Jan Paulsson proposed the idea in 1992.[4] The topic gained prominence in recent years. Catherine Rogers, a leading scholar in the field, expressed the view in 2010 that this "ethical no-man's land"[5] should not be permitted to persist. A number of commentators believed that there can be no workable solution to this problem, that there were too many guidelines already confusing the field of international arbitration, and that regulation would diminish the flexibility of the process.[6] However, an increasing number supported the view that the adoption of a code of ethics specific to the conduct of counsel in international arbitration was long overdue. Several proposed solutions emerged.

Doak Bishop and Margrete Stevens proposed an *International Code of Ethics for Lawyers*[7] which adopted an approach of positing simple, elegant and essential rules for counsel's ethical duties. *The Hague Principles on Ethical Standards*, the work product of the International Law Association, provided another proposed set of ethical rules.[8] Cyrus Benson offered the *Checklist of Ethical Standards for Counsel in International Arbitration*, a proposal in the form of a checklist to be reviewed at the start of the arbitration by all parties and subject to the agreement of the parties.[9]

Sundaresh Menon's opening address at the ICCA Congress in 2012,[10] urging the development of "a code of conduct and practice to guide international arbitrators and international arbitration counsel," galvanized further debate on the issue. The concept gradually gained acceptability.[11] The survey broadly disseminated by the Arbitration Committee of the IBA in order to inform its work

helped identify specific divergent counsel practices that presented the greatest difficulties and confirmed support for the development of international guidelines for party representatives.

II. The Issues to Be Addressed

The Guidelines address the two issues relating to counsel conduct that have been the subject of discussion. First, it addresses the practices that are unethical under some national codes or rules of professional conduct but not under others. Second, it addresses what has come to be known as "guerrilla tactics," tactics used to delay, obstruct or subvert the arbitration process.

a. Divergence in Ethical Obligations

Differences in ethical obligations are inherent to an international forum where counsel come from different jurisdictions and often find themselves conducting an arbitration seated in a yet another jurisdiction and physically held in yet a third jurisdiction. Without an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable as among all of these possible jurisdictions. Moreover, there is the potential for disadvantaging parties if their counsel is bound by the more restrictive ethical rules. Only a common set of ethical obligations can level the playing field.

The examples most frequently used to illustrate the significant divergences in ethical obligations of counsel include witness preparation, the nature of counsel's obligation to assure production of responsive documents, *ex parte* communications with the arbitrator, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to report perjury, the obligation to advise the court of adverse legal authority and differences concerning lawyer communication with employees of an adverse corporate party.[12]

b. Guerrilla Tactics

Like counsel ethics, the use of "guerrilla tactics," those intended to obstruct, delay or derail an arbitration, has been the theme of a growing number of articles[13] and has been the subject of several recent international arbitration conferences. It was urged that any ethical regulation issued should include provisions that inhibit such conduct.[14]

Two reasons are typically offered for the changes in the practice of arbitration that have made this issue of such pressing concern. First, arbitration has evolved from a forum for a speedy, inexpensive and pragmatic decision on trade disputes to a forum that resolves sophisticated legal disputes with millions of dollars, and often hundreds of millions, at stake. With so much at stake, differences in ethical obligations that give a party an advantage are problematic and the size of the amount at stake can drive counsel over the line from zealous representation to guerrilla tactics. Second, as international arbitration has grown, both counsel and arbitrators new to the practice have become active. With the entry of new practitioners not schooled in the norms of the practice and not part of the former elite international arbitration "club," there is no shared understanding with the new entrants of how they perceive their role and no in-group induced constraint on their conduct. Whatever the cause, the reality was felt to require action.

A survey conducted to determine whether the use of guerrilla tactics in international arbitration was really a problem of sufficient frequency and moment to warrant attention confirmed the importance of the issue. Sixty-six percent of the 81 respondents reported that they had been subjected to or had witnessed guerrilla tactics. The most common examples of guerrilla tactics described included abuse of document production, delay tactics, creating conflicts, frivolous challenges of arbitrators, last-minute surprise, frivolous anti-arbitration injunctions and other approaches to courts, *ex parte* communications, witness tampering, lack of respect, courtesy towards the tribunal and opposing counsel and various strategies to frustrate an orderly and fair hearing.[15]

III. Guidelines Provisions Highlighted

The Guidelines address many of the issues frequently flagged as the most problematic ethical conflicts: The Guidelines:

- Preclude the creation of a conflict by barring taking on a party representation that would create a conflict with an arbitrator and states that the tribunal may exclude the new party representative who takes on a representation in violation of this guideline. Guidelines 5-6.
- Forbid *ex parte* communications (apart from circumscribed interview contacts and absent specific agreement by the parties to the contrary or party non-appearance). Guidelines 7-8.
- Bar knowingly presenting false evidence and provide guidance on action to be taken if falsity is later discovered. Guidelines 9-11
- Address the need to preserve documents and to produce responsive documents and prohibit the making of any request to produce documents for an improper purpose such as to harass or cause unnecessary delay. Guidelines 12-17.
- Permit counsel to meet and discuss with experts and lay witnesses to help prepare witness statements and prepare for prospective testimony but counsel may not invite or encourage false evidence. Guidelines 18-25.

While the provisions cover the most frequently cited ethical conflicts, a question remains whether these provisions are sufficient to curb the many faces of guerrilla

tactics. The Guidelines do specifically deal with two of the identified guerrilla tactics: creating a conflict with the arbitrator and document related tactics. Perhaps the wide variety of obstructive and delaying actions by counsel and the amorphous wording that would be required to describe them precluded their specific inclusion in the guidelines.

The Guidelines do, however, empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined to include a "breach of the present Guidelines, or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative."[16] We will have to wait and see if the word "misconduct" is read broadly enough to encompass a wide variety of guerilla tactics.

The Guidelines give the tribunal power to respond to behavior in violation of the Guidelines. The tribunal may admonish the party representative, draw inferences, apportion costs, and take other "appropriate measures in order to preserve the fairness and integrity of the proceeding." In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knew about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award. Guidelines 26-27.

IV. Implementation of the Guidelines

Like all guidelines, the Guidelines are just guidelines and have no weight beyond that given to them by counsel and/or the arbitrators. As they state, the Guidelines are not intended to displace otherwise applicable mandatory law, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. Nor are they intended to vest arbitral tribunals with powers otherwise reserved to bar associations or other professional bodies. It is the intention of the drafters of the Guidelines that the parties may adopt the Guidelines by agreement or that arbitral tribunals may apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they conclude they have the authority to do so.

While not automatically binding in an arbitration, the Guidelines provide an excellent opening for the tribunal to initiate a discussion with counsel as to what should be deemed to be appropriate conduct in the arbitration to equalize ethical norms, curb guerrilla tactics and ensure fundamental fairness. Those in the arbitral community who were of the view that no counsel ethics regulation should be issued because "if it ain't broke, don't fix it," may be persuaded that it is "broke" now and that corrective action is required.

The Guidelines provisions can be used as a jumping off point to see if other limiting parameters for conduct can be established by agreement. Reference to the Benson checklist, the Bishop & Stevens ethical code and the Hague Principles discussed above can provide specific ideas for expansion by agreement of the Guidelines scope to protect against additional areas of ethical conflict and of potential obstruction and delay. For example, if the tribunal wishes to go further in discouraging guerrilla tactics, the parties can be asked to consider whether they also wish to adopt one of Benson's checklist items: "A lawyer shall not assert a position, conduct a defense, question witnesses or take other action on behalf of the client when the lawyer knows, or when it is obvious that, such action is irrelevant to the case and/or would serve merely to (i) delay proceedings, (ii) cause undue burden or expense or (iii) harass or maliciously injure another."[17] It would be difficult for counsel to reject such a provision. But in balancing how far to go with the imposition of specific restraints on misconduct, a tribunal must keep in mind that such strictures could give rise to the possibility of repeated approaches to the tribunal during the pendency of the proceeding asserting violations and requesting sanctions, a scenario which the tribunal may not wish to encourage. Like so many things, judgment must be exercised as to what is best for the case and care must be taken in structuring any special process.

A system of counsel regulation cannot be truly effective unless the tribunal is authorized to take corrective action. The Guidelines limit the tribunal to actions they believe they have the authority to undertake and expressly take no position as to whether the tribunal has the authority to rule on matters of party representation or to apply the Guidelines in the absence of an agreement by the parties. Thus the Guidelines are limited by their very nature. In order to give effect to the Guidelines, in the absence of case-by-case agreement of the parties, action by the arbitral institutions is essential. While it would not comfortably be the institutions' role to enforce ethical codes, it is well within their purview to promulgate rules that impose ethical constraints and rules that empower the tribunal to impose appropriate remedies.

The institutions have already taken some steps in this direction and it appears further steps will be taken in the near future. For example, the ICDR addressed some of the concerns a few years ago. Article 7 of the ICDR International Dispute Resolution Procedures bars *ex parte* communications with the chair altogether and, like the Guidelines, limits communications with the party-appointed arbitrators to the interview. The ICDR Guidelines for Arbitrators Concerning Exchanges of Information seeks to put the parties on the same footing by providing that the tribunal should to the extent possible apply the same rules as to ethics and privilege to both sides, giving preference to the party's rule that provides the highest level of protection. By establishing a limited scope for disclosure

and empowering the arbitrator to exercise firm control, the ICDR Guidelines also serve to control many of the document disclosure-related guerrilla tactics.

The ICC 2012 arbitration rules revision now provides in Article 37(6) that in the allocation of costs the tribunal may consider the extent to which the party "conducted the arbitration in an expeditious and cost effective manner" thus specifically authorizing cost shifting if a party delays or obstructs the proceedings. The LCIA is reported to be planning to adopt a rule later this year which incorporates "basic norms expected of counsel in an arbitration under their auspices," and gives tribunals the power to exclude counsel who were found to be in serious and persistent violation of those norms.[18]

V. Conclusion

The Guidelines are likely to be accepted over time as a source of soft law with at least as much influence as has been achieved by the IBA Guidelines on Conflicts of Interest in International Arbitration, which deals with arbitrator conflicts and disclosure obligations. But it is likely that the Guidelines will have much greater impact than would result from their mere adoption in an arbitration. The Guidelines are likely to encourage a meaningful dialogue between the tribunal and the parties regarding ethical obligations that go beyond those dealt with in the Guidelines. The Guidelines are also likely to inspire institutional action to embrace the issue and adopt institutional rules that give the tribunal authority to enforce rules that foster a fair process undisturbed by obstructionist tactics.

Endnotes

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ARBITRATION CONTRACT CLAUSES

By John H. Wilkinson

The recent trend toward arbitration of larger and larger commercial cases has led to a number of expensive elements that have traditionally been reserved for litigation. Devising an arbitration process that is significantly more efficient than litigation is not an easy task in the context of a complex commercial dispute. However, the scorched-earth mentality that frequently follows the inception of a dispute can often be countered, before the fact, through effective drafting of the arbitration clause in the underlying commercial contract.

An initial caution. Parties have expanded their arbitration contract clauses (Contract Clauses) in an effort to place meaningful limits on discovery and other aspects of any ensuing arbitration. Although this approach has the benefit noted above, it also has significant drawbacks that should be discussed at the outset, namely: (a) the drafter of the Contract Clause is setting forth the timing and discovery rules for a dispute that has not yet arisen, and (b) the dispute that ultimately emerges might better lend itself to a very different approach with respect to timing and discovery. In this regard, the following considerations are pertinent. It makes most sense to include discovery and timing limitations (Limitations) in a Contract Clause under circumstances where the contracting parties have a good idea as to the size and complexity of any dispute that might thereafter arise. If the parties are unsure as to what the scope of a later dispute might be, they can still put Limitations in the Contract Clause but, then, condition the applicability of the Limitations on there being substantial arbitrable claims, as defined by the parties in the particular context of their commercial relationship. Also, include a provision that the arbitrators are empowered to modify the Limitations upon a clear and compelling showing of good cause.

Set forth below is a discussion of some of the various types of Limitations that one might consider including in a Contract Clause.

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> **"The ultimate efficiency is settlement through mediation before any arbitration is even initiated."**

General scope of document discovery. It often makes sense for a Contract Clause to contain some broad language as to what the general scope of document discovery in an ensuing arbitration is going to be. Thus, for example, the Contract Clause might limit such discovery to "documents directly relevant to one or more of the issues," "documents needed for fair resolution of an issue of importance," "necessary documents that can be located and produced at a cost that is reasonable in the context of all surrounding facts and circumstances," or "documents for which there is a direct, substantial, and demonstrable need." This wording provides helpful guidelines for the parties and gives arbitrators a practical tool that can effectively be used to help keep document discovery under control.

E-discovery. Addressing e-discovery in the Contract Clause can be an effective means to place some realistic limits on the otherwise bottomless pit of e-disclosure. The New York State Bar Association and the Chartered Institute of Arbitrators provide examples of early language that might be used to put meaningful limits on e-discovery in appropriate circumstances, such as:

- "Production of electronic documents shall generally be limited to those located in sources that are used in the ordinary course of business. It will normally not be appropriate to order restoration of backup tapes; erased, damaged, or fragmented data; archived data; or data normally deleted in the ordinary course of business."
- "Electronic documents shall normally be furnished on the basis of generally available technology in a searchable format that is usable by the party receiving it and convenient and economical for the producing party."
- "When the cost and burden of e-discovery are disproportionate to the likely importance of the requested materials, the arbitrator may deny the requests or require that the requesting party advance the reasonable cost of production to the other side."

Restrictive clauses of this kind can be effectively incorporated at the time

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FOR MORE INFORMATION ABOUT THE SECTION OF DISPUTE RESOLUTION

This article is an abridged and edited version of one that originally appeared on page 9 of *Dispute Resolution*, Fall 2009 (16:1). The original article is an excerpt from Dwight Golann's *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* (ABA Section of Dispute Resolution, 2008).

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of the drafting of the Contract Clause.

Depositions. The absence of any depositions in a complex arbitration can significantly lengthen the cross-examination of key witnesses and unnecessarily extend the completion of the hearing on the merits. On the other hand, runaway deposition programs are extremely expensive, wasteful, and time consuming.

Balancing the foregoing considerations, it can sometimes make sense to include in the Contract Clause a provision such as the following with respect to depositions:

> Each side may take 4* discovery depositions in connection with an arbitration arising from or related to this agreement. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions. The total period for the taking of all depositions shall not exceed 6* weeks. (*The asterisked numbers can, of course, be changed to match the particular circumstances of each case.)

Prevailing party. Many Contract Clauses specify that: (a) the prevailing party in an arbitration is entitled to recover the reasonable costs and attorney fees incurred in connection with the arbitration, and (b) if the prevailing party wins on some but not all claims, then it is to recover an appropriate proportion of its reasonable costs and attorney fees.

This type of provision furthers efficient, cost-effective arbitration because (a) it discourages frivolous claims and counterclaims, and (b) it reduces the chances of scorched-earth discovery and hearing tactics.

Mediation in advance of arbitration. The ultimate efficiency in resolving a dispute is settlement through mediation before any arbitration is even initiated. Such mediation can be difficult to put in process in the charged atmosphere after a dispute arises because at that point both sides may be fearful that a suggestion of mediation will be taken by the other side as a sign of weakness. This problem disappears if the requirement of mediation prior to arbitration is contained in the Contract Clause of the underlying commercial contract. But if the parties opt to take that route, they should provide a tight deadline (perhaps 30 days) for the entire mediation as a way to preclude use of the mediation as a means to delay.

Appeal. As arbitration awards have involved increased amounts of money, there has been significantly more activity in the courts in trying to overturn them. This has substantially added to the time and cost of arbitration while seldom changing the result.

One approach that achieves the goal of a meaningful, expeditious, and cost-effective appeal from an arbitration award is to include in the Contract Clause a provision adopting the JAMS (Judicial Arbitration and Mediation Services, Inc.) Optional Arbitration Appeal Procedure (Appeal Procedure), which permits a cost-effective, expeditious appeal based on the same legal principles as would have pertained in court.

Deadlines. Contract Clauses are increasingly including provisions that place specific time limits on various phases of any arbitration arising under the agreement and, sometimes, an overall time limit for the period from the filing of the arbitration demand to the entry of an award.

Some practitioners are concerned that a failure to meet a Contract Clause's arbitration deadlines might leave the ensuing award vulnerable to a motion to vacate. Language such as the following addresses this concern while maintaining the possibility that a failure to meet such deadlines will have serious repercussions:

> Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable, or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.

While there are a number of possible approaches to making arbitration faster and more cost-effective, the most practical and effective means of achieving this goal may prove to be the inclusion of appropriate provisions in Contract Clauses.

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EXPERT EVIDENCE REPORT

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Arbitration is the "wave of the future" in many complex cases, and there is an important role for expert witnesses to play in these proceedings, says alternative dispute resolution expert John Wilkinson. The author also responds to criticism that arbitration has become too much like litigation—with motions, interrogatories, depositions—and offers practical suggestions on how to strike a fair balance between the need for quick justice and fair resolution of complex claims.

The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims

BY JOHN WILKINSON

John Wilkinson, Esq., a full time mediator and arbitrator with JAMS, The Resolution Experts, is a recognized authority on ADR, with over 20 years of arbitration and mediation experience primarily involving complex, multiple-party commercial disputes relating to antitrust, computer systems, construction, employment (executive), energy, entertainment, franchising, insurance, intellectual property, investment banking, mergers and acquisitions, partnership disputes, publications, real estate (commercial), securities, and telecommunications. Based in New York, the author can be reached at 212-751-2700 or jwilkinson@JAMSADR.com.

In order to meaningfully assess the future of arbitration, it is first necessary to focus briefly on the remarkable developments in the field over the last 10 to 15 years. This can almost be done through use of a single word—bigger, bigger, bigger! Yes, the growth has been spectacular, and it is largely attributable to the fact that general counsel have been putting more and more huge cases into arbitration, and they have been doing so in ever accelerating fashion. I recently chaired an arbitration panel, for example, where $20 billion was legitimately in dispute, and arbitrations in the $10 million to $100 million range have come to be commonplace.

An important aspect of arbitration's exponential growth is its increasing expansion into areas of big case litigation which had traditionally been reserved for the courts. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), for example, the Supreme Court opened the way for arbi-

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tration of class actions and, since then, the arbitration of class claims has increased at an accelerating rate. So too, many believe that arbitration is the wave of the future in large product liability cases and even in certain categories of toxic tort litigation. And the courts have already authorized arbitration of many other categories of large disputes, including antitrust, securities and patents.

The dramatic increase in the size and types of arbitrations has led to other significant changes in the overall arbitration process. Thus, for example:

- As arbitrations get bigger and bigger, parties have increasingly been trying to inject into them what had traditionally been reserved for litigation—things like dispositive motions, interrogatories, depositions and the like.
- Along with bigger and bigger have come better and better panels of arbitrators. The days when an arbitrator goes to sleep in an important case are long gone.
- As awards involve more and more money, it is certainly not surprising that there is vastly more activity in the courts in trying to overturn them.
- All of this has been accompanied by much longer and more detailed reasoned awards to accommodate the added complexity, and
- The increased size has also led to a striking upturn in the level of arbitration advocacy. Again, this is not surprising—as arbitrations get bigger and bigger, the large firms are of course jumping in and putting themselves in position to represent that they are accomplished experts in the field.

Addressing the Most *Common Criticism*

All this growth has brought us to a real crossroads in the life of large case arbitration. In my view, what lies in arbitration's future is completely dependent on how well we deal with a highly significant result of this growth, *i.e.*, the ever increasing complaint that arbitration is becoming too much like litigation. If there is significant and continuing validity to this commonly voiced criticism, then why would anyone arbitrate? The simple answer is that, in large part, they wouldn't—arbitration would make little if any sense in such circumstances.

The arbitration community has two fundamental expectations that bear on this problem and, in a sense, they are light years apart:

> ***FIRST***, There are expectations based on the notion that the purpose of arbitration has historically been to dispense quick and dirty rough justice that is over and done with in a blink, and
>
> ***SECOND***, There are the expectations of those who perceive that cases in arbitration are getting larger and more complex every year and that such cases cannot be fairly resolved without a comprehensive, sometimes rather extended pre-hearing and hearing process.

It is easy in the pre-hearing and hearing phases of a complex arbitration to accommodate one of the foregoing expectations, while ignoring the other. More particularly, for example, it is easy for an arbitrator to slash the discovery, refuse to allow inquiry into large segments of proof and, basically, shorten the case significantly by being invasive and peremptory. The problem with this, however, is threefold:

- It isn't fair.
- The case might well be reversed because one of the few grounds for vacatur under the Federal Arbitration Act is a refusal "to hear evidence pertinent and material to the controversy," and,
- We are left with two general counsel who will probably never use arbitration again.

At the other end of the spectrum, it is similarly easy for an arbitrator just to open the floodgates and permit mountains of pointless discovery and evidence—all in the interest of following the safe approach and permitting a full hearing. The problem with this, of course, is that such an arbitration may very well be as expensive and time-consuming or even more expensive and time-consuming than if the case had simply been litigated in court. And again, there would be two General Counsel who would likely never use arbitration again.

While it is certainly much easier said than done, the fact is that an arbitrator can and must strike a balance between the foregoing two extremes in a complex case. More particularly:

> 1) The arbitrator must be sufficiently assertive to ensure that the case will be resolved much less expensively and in much less time than if it had been litigated in court and ***at the same time***,
>
> 2) The arbitrator must be sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

Available Tools

Fortunately, the arbitrator has many tools which are unique to arbitration and which can be used to facilitate an efficient and fair result in a complex case. Set forth below are a few of many examples:

- Time-consuming objections to admissibility of documents can be kept to a minimum in arbitration because few such objections will be sustained. Rather than excluding a document for lack of admissibility, an arbitrator will generally take the document into evidence and, then, consider any factors detracting from its reliability when ultimately deciding how much weight it should be accorded. This is far more efficient than engaging in endless arguments about admissibility and, given the fact the case is not being presented to a jury, it is eminently fair.
- Unlike a court, an arbitrator need not strictly apply the rules of evidence. This greatly enhances arbitration's informality, flexibility and efficiency and, again, is fair to the parties since there is no need for strict rules of evidence when the proof is being presented to an arbitrator, as opposed to a jury.
- Arbitration dispenses with the laborious process of authenticating every document that is offered into evidence. In arbitration, documents are presumed to be authentic, and arbitrators will only entertain argument about authenticity in extreme circumstances involving things such as a possible forgery. While this shortcut in no way reduces the likelihood of a fair result, it greatly speeds the arbitration process in relation to what one encounters in court.
- In arbitration, exhibits are typically arranged in tabbed binders, and everyone can simply fly from tab to tab, saving huge amounts of time. In a trial in court, on the other hand, documents are generally trotted out one by one, with each document being separately marked, distributed and pored over by counsel before it might ever be accepted in evidence.

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■ Serious scheduling and jurisdictional problems can sometimes be averted in arbitration by taking video testimony outside the presence of the arbitrators on the understanding that the arbitrators will review the entirety of the testimony before rendering their award.

■ There is generally no need to even offer a document in evidence in arbitration. If a questioning attorney begins to use a tabbed document and if opposing counsel does not promptly object, the document is deemed to be in evidence, without more, in most arbitrations.

■ Arbitration witnesses can be taken out of order to facilitate efficient and expeditious scheduling. Thus, for example, it is not at all unusual in arbitration to have a key witness for respondent testify in the middle of claimant's case. While this time-saving device in no way detracts from the fairness of presentations to an arbitrator, it would be literally unthinkable in a case being tried to a jury.

■ In arbitration, there is typically no need to qualify a witness as an expert. This eliminates the endless argument and voir dire which one so often encounters in court on that subject. This is not to say that lack of expert qualifications is ignored in arbitration but, rather, it is explored in orderly fashion on cross examination and is ultimately considered by the arbitrator in determining how much weight to accord the expert's testimony.

■ Testimony of both sides' experts is often taken in a single phase of an arbitration so that the arbitrator has one side's experts well in mind when hearing the expert testimony from the other side. So too, arbitration testimony of experts is often taken simultaneously in a kind of town meeting setting where the experts are seriatim responding to the same questions and where they even get to question each other. This can be highly effective and save a lot of time for the reason, among others, that experts' areas of disagreement really do narrow in this kind of face-to-face format.

■ The direct testimony of some if not all witnesses in an arbitration is often introduced in written form with the live testimony being limited to that which is adduced on cross examination. When used appropriately, this has time and again been proven to vastly increase the efficiency and cost-effectiveness of an arbitration, in relation to a trial in court, and,

■ Finally, there is great flexibility in scheduling arbitrations, with hearings not being unusual on Saturdays, Sundays and holidays, as well as during evenings. While this can often be a most effective tool for moving the process forward to a prompt conclusion, it is almost never an option in a trial in court.

The foregoing are just a few of many examples of tools that are available in arbitration, but not in court. An arbitrator who makes good use of the full array of such tools and who is intent on carefully balancing the need for efficiency, on the one hand, and the need for a fair hearing, on the other, is going to be a critically important factor in continuing the dramatic growth of arbitration in complex cases.

A Recent Important Trend

Many general counsel have come to understand that it can sometimes be difficult for an arbitrator to effectively balance efficiency and fairness in a complex arbitration and, as a result, general counsel have recently been injecting themselves into the process and have been taking some of the judgment calls out of the hands of the arbitrators. These general counsel have primarily been doing this by adding to their large, commercial contracts a variety of highly aggressive, detailed arbitration clauses which, for example, might:

■ Provide for a very limited scope of discovery in any upcoming dispute, with the totality of such discovery to be completed within 60 days of appointment of the arbitrator;

■ Require that the hearing will commence not more than 90 days from appointment of the arbitrator;

■ Mandate that a reasoned award will be rendered within 30 days of receipt of post-hearing briefs; and,

■ Provide that an arbitrator must agree to all of this before he or she accepts appointment

While it is sometimes necessary to further negotiate and refine such arbitration clauses in the context of the particular dispute that arises, the fact remains that these clauses really do work—they really do get the job done. And while they place a most difficult burden on both parties and arbitrators, they may nonetheless be commonplace in the not too distant future.[1]

A Recent, Important Decision

In *Hall Street Associates LLC v. Mattel Inc.* (No. 06-989, Slip Opinion, March 25, 2008), the Supreme Court cut back markedly on any trend toward arbitration's assuming the trappings of litigation. There, the issue was whether parties could contract to expand the standards of review of arbitration awards, as set forth in Sections 9-11 of the Federal Arbitration Act (FAA). More particularly, the question was whether parties could contract to inject traditional grounds for appeal into FAA arbitrations or whether they were limited to what was already provided in Sections 9-11 of the FAA, *e.g.*, "corruption," "fraud," "evident partiality," refusal to hear "pertinent and material" evidence, and acts exceeding the powers of the arbitrator. In holding that parties could not contract to introduce customary grounds of appeal into an FAA case, the court struck a telling blow in favor of efficient, cost-effective arbitration. As the court stated:

[1] There is still a need to clarify the legal consequences of missing one or more of the deadlines in one of these clauses. In this regard, however, it should be noted that the author has been involved in implementing a number of these clauses and has never encountered the missing of a deadline which led to a dispute among the parties.

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> Instead of fighting the text [of Sections 9-11], it makes more sense to see the three provisions . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," . . . and bring arbitration theory to grief in [the] post-arbitration process. (Citations omitted.)

In the author's view, the criticism that arbitration has become too much like litigation in no way marks the beginning of the end of complex arbitration, as so many obliquely predict. Rather, the criticism presents a challenge to which the arbitration community can and must respond with understanding, imagination and resolve and if it does (and I fully expect it will), then complex case arbitration will be very healthy indeed for many years to come.

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Arbitration Dos and Don'ts for the Trial Lawyer

By Richard L. Mattiaccio

A client has just asked you to represent it in the arbitration of a contract dispute. The case looks pretty much like others you have taken to bench or jury trial victories. You think you are all set.

Think again. You would not try a jury trial as if it were a bench trial, or vice versa. Why assume that you should try a case in arbitration as if it were in court?

Arbitration rules, handbooks and training programs can provide valuable insight into the steps leading to the evidentiary hearing. The literature and training programs will take the practitioner in detail through the filing of claims; the initial administrative conference in administered cases; the arbitrator selection process; the first conference with the arbitrator(s) leading to the crucial first procedural order; the pre-hearing exchange of documents; limitations on discovery, motions, subpoenas on nonparties, and evidentiary objections; the filing of witness lists, pre-marked exhibits, witness statements, expert reports, and pre-hearing memos; and post-hearing confirmation or vacatur of awards. Relatively little can be found in the literature, however, about the evidentiary hearing itself.

In the real world, much depends on the arbitrator's background, so the common wisdom is that cases are frequently won or lost at the arbitrator selection phase. A second commonplace that should resonate with every trial lawyer is the need to learn as much as possible about the arbitrator and adapt attorney style to what works with an arbitrator assigned to the case. For example, some arbitrators like the hearing to feel like a bench trial. Others like every step in the process to function more like a business meeting. An attorney representing a party needs to know this in advance or take cues from the arbitrator during the preliminary conference.

Unlike jury selection, which often follows motions and discovery practice, an attorney in arbitration needs to determine at the beginning of the case what sort of arbitrator would be receptive to the case on the merits and to his or her style. Arbitrator selection is a subject worthy of dedicated study.[1] The mechanics of arbitrator selection can vary depending on the nature of the case, the governing rules, and the terms of the arbitration clause. Still, some characteristics do appear across the commercial arbitrator spectrum.

Commercial arbitrators generally like to think of themselves as problem solvers and look to counsel to provide the tools arbitrators need to solve those problems. Arbitrators like to see the attorneys (a) focusing on the merits, (b) finding common ground on preliminary matters, and (c) using the time allotted efficiently and cost-effectively. They do not appreciate extensive attorney wrangling over procedure either before or at the hearing.

Arbitrators pride themselves on getting the point the first time it is made. They do not appreciate duplicative argument, briefing or testimony. They rarely see the point of having multiple witnesses testify to the same facts. They appreciate effective cross-examination, but they expect the cross-examiner to remain courteous and stay within pre-agreed time limits.

A good deal of planning, preparation and compromise with opposing counsel goes into effectively representing a client at a low-key, business-like, problem-solving evidentiary hearing. The following "dos and don'ts" are some practical tips offered to help a lawyer get started thinking about how to work with, not against, arbitration custom and practice in order to achieve good results for clients.

Dos	Don'ts
A. Study the Rules and Guidelines	
Read the arbitration rules and guidelines from cover to cover. • Think about how they differ from what you are used to in court; • Assume the arbitrator(s) will enforce the rules and follow the guidelines; and • Review the literature on commercial arbitration, especially when it is addressed to counsel's obligations.[2]	Don't read only the published rules applicable to the case. Also review the most relevant guidelines and protocols that tend to shape the conduct of the arbitrator(s) in specific categories or phases of arbitration.[3]
B. Advise the Client About Arbitration	
Provide your early case assessment with the arbitration process in mind. • Positions can be stronger or weaker in arbitration; figure it out *before* you advise the client. • Provide the client with realistic projections of arbitration cost and time in your early case assessment, and update your assessments.[4]	Don't overlook the strategic and tactical advantages or potential disadvantages of arbitration when you provide the client with your case assessment. Don't assume your client knows what to expect in arbitration; determine its experience level and adjust your advice accordingly.
Introduce the concept of mediation as a related step in the arbitration process.[5] • Make clear that arbitrators are generally not expected or supposed to get involved in settlement discussions but appreciate it when the parties give it a try. • Point to the provider organization's policies or procedures that favor mediation and that may treat mediation as a normal step within the arbitration process.[6]	Don't be deterred by a client's concern that suggesting mediation may send a signal of weakness. Explain that, if the arbitrator(s) find out that your side wants to pursue mediation or some other settlement device, the only risk is that your side will come across as sane.
Send the client a few articles if it is skeptical. • Providers and bar groups offer guides for the lawyer and non-lawyer alike;[7] read them, send the best-suited one to your client, and have a discussion with the client about the pros and cons of the process.	Don't unnecessarily place stress on your credibility with a client that is highly resistant to the advice. You can point to provider institution user handbooks and to neutrals on record providing the same advice.
C. Map Case Strategy Before the First Conference with the Arbitrator(s)	
Have an early game plan, ideally, before arbitrator selection. • Before the first conference with the arbitrator(s), know what you need in terms of exchanges of documents and other information. The first procedural order is your road map for the case.	Don't improvise. Your game plan may have to be adjusted, but, without one, you will not make good use of those crucial early encounters with the arbitrator(s), and the first procedural order will feel like a straightjacket as the case evolves in unexpected ways.

Dos	Don'ts
D. Assume Very Little Discovery	
Develop your core case and defenses on the assumption of little or no discovery. • Search your client's records to dig out all the essential documents. • Line up, interview and lock in the availability of all of your key witnesses. • Use the Internet. • Consider a private investigator, if needed, to fill in the blanks. • Look to some limited discovery for the gravy and, whenever possible, not for the meat and potatoes. Prepare your basic discovery plan before arbitrator selection. • If discovery is essential to your case, select arbitrator(s) with an active case load in court, or with experience as counsel in litigation, or as a judge in a court that allows broad discovery.	Don't think that you can build a case out of the other side's files or deposition testimony of its witnesses. Broad discovery is rarely allowed in domestic arbitration, and is just not available in international commercial cases. Arbitrators are trained to limit discovery, related expense, and the time needed to get to an award.[8] Don't assume that all arbitrators appreciate the challenges you face as counsel. Look for clues in the arbitrator candidate's professional experience. Has the arbitrator ever tried a case in court or in arbitration? How important will arbitrator empathy for the trial lawyer be as you prepare and present your case?
E. Gear Up for Arbitrator Selection	
Network to find the right arbitrator(s). • Ask experienced arbitration counsel and other neutrals about potential arbitrators. • Select arbitrator(s), especially the chair or sole arbitrator, with a proven ability to manage the process.[9]	Don't rely entirely on an official arbitrator biography if you can reach out to lawyers who have had experience with that arbitrator. There are online resources to help in some circumstances.[10]
Know the rules governing arbitrator selection in your case before starting the selection process. • The process of arbitrator selection can vary depending on the arbitration clause and the governing rules and procedures. • To some degree, an arbitration clause can vary the procedures that are generally incorporated by reference.	Don't expect busy case managers to focus right away on any special provisions on arbitrator selection or qualifications in your arbitration clause; point out those provisions before the case manager gets too far along in the arbitrator selection process.
F. Ask for an Early Administrative Conference and Work Collaboratively with the Case Manager at All Times	
Ask for an administrative meeting with the case manager prior to arbitrator selection. • Make clear what your preferred criteria are for arbitrator selection. • Engage in *ex parte* communications with the case manager to the extent allowed by the rules. • Propose an administrative conference with all counsel present.	Don't miss any opportunity to show the case manager that you are trying your best to be practical and that you are a straight shooter. Counsel cannot have ex parte communications with arbitrators, but case managers can and do talk with the arbitrator(s), and vice versa, whenever they think it serves a purpose.

Dos	Don'ts
Treat case managers like the important people they are. • Be practical and helpful; it's a joint problem-solving exercise. • Case managers can help counsel avoid costly missteps.	Don't condescend. Case managers may or may not have law practice experience or law degrees, but they are hard-working professionals and they understand some aspects of the arbitral process better than counsel ever will.
G. Address Confidentiality Up Front	
Assess the confidentiality of the process before exchanging sensitive information. • Not all arbitration rules provide the same level of confidentiality.[11] • Determine whether express confidentiality protections should be negotiated with the other side or, failing agreement, whether a procedural order regarding confidentiality should be sought from the arbitrator(s).[12] • Ask the arbitrator(s) to embody any agreement in a procedural order.	Don't assume that the parties are bound to confidentiality without checking the rules. Don't rely on customary practice in litigation. Don't rely on informal agreements, especially if the confidentiality stakes are high.
H. Confer With Opposing Counsel to Work Out as Much as Possible	
Reach out to counsel for the other side to try to agree on the basics, including: • Selection criteria for panel-selected arbitrator(s); • The extent and timing of the exchange of documents and other information; and • When, during the arbitration, mediation is most likely to be fruitful. Develop an agenda for the administrative conference. • Try to develop, collaboratively with opposing counsel, a list of at least some points to be addressed at the first conference.	Don't just spot an issue, pick a fight, and run to the arbitrator(s) to resolve it. The case manager or arbitrator(s) may conclude that there are no other adults in the room besides themselves. That will not help you when you need to ask for some leeway on any number of issues. Don't expect case managers to be mind-readers. If you need something out-of-the-ordinary to be addressed, make sure it makes it onto the agenda.
I. File an Early Witness List	
File as comprehensive a list of witnesses as possible, as early in the case as possible. • Include in the witness list the current affiliations of witnesses.	Don't hold back on identifying your witnesses in the hopes of springing a surprise witness at the hearing. Generally, surprise is not allowed or is mitigated by allowing opposing counsel time to regroup. If you do hold back, you run the risk of arbitrator disclosures later in the case, resulting in (a) a disruptive replacement of an arbitrator mid-stream, or (b) continued service of an arbitrator who might not have been selected in the first place if the disclosure had been made earlier.

Dos	Don'ts
J. Propose Rather Than Impose	
Present joint proposals as just that: proposals for consideration by the arbitrator(s). • Arbitration is a creature of contract, but joint proposals that go too far in transforming arbitration into litigation can undermine the nature and integrity of the arbitral process.	Don't send the arbitrators edicts. Arbitrator(s) need to be persuaded that whatever you jointly propose is a reasonable approach because they are trained by the provider organizations to achieve efficiency and to maintain the distinctiveness of the arbitration process.
Prepare to present to the arbitrator(s) some of your own reasonable proposals to resolve open issues.	Don't just expect the arbitrator(s) to figure it out; you may not like how it goes, especially if opposing counsel offers solutions.
K. Remember the Golden Rule	
Be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel and staff, and witnesses. • And, if you want to convey the impression to the arbitrator(s) that you think you have a good case, show good humor at all times.	Don't grandstand for clients or, if things seem to be going badly, shift into high (make-the-record-for-appeal) gear. There is no effective right of appeal. Don't go on the offensive, unless it is a charm offensive.
L. Be the Problem-Solver in the Room	
Anticipate practical needs and likely disputes. • Try to resolve disputes with opposing counsel. • Try to present unresolved disputes at scheduled conferences.	Don't pepper the arbitrator(s) with many disjointed requests that could have been presented at one time.
Keep your presentation interesting but low-key.	Don't waste time on theatrics. There is no jury to wake up or to impress. Would you bring a megaphone to a poker game?
M. Limit Discovery Requests to What Is Absolutely Essential	
Whatever discovery you might ask for in court, cut it back. • You may get more from opposing counsel than from the arbitrator(s). • Consider the legal limits on arbitrator power to compel discovery from non-parties.[13]	Don't assume Federal Rules-style discovery is inscribed in the Bill of Rights. Even if broad discovery is written into your arbitration clause, arbitrators have discretion to streamline the process, and they feel pressure from provider associations to do just that.
Consider tools to cut discovery time and costs. • Computer-assisted electronic document review a/k/a "predictive coding" is one example. • Arbitrators appreciate a creative and practical approach.	Don't underestimate arbitrator receptiveness to creative solutions or the ability of technology to solve or mitigate problems created by technology.

Dos	Don'ts
If the arbitration is international (i.e., between commercial parties of different nations): • Do not expect to be able to take *any* discovery depositions at all.[14] • Exchange of written fact witness statements in lieu of live direct is the norm.[15] – Fact witness statements are often the only way to avoid surprise under international procedures. • Document exchange is limited.[16] – Prepare extremely specific requests for documents you don't already have but really need.	Don't try to look for the needle in the other side's haystack. The world detests American-style discovery. International arbitration practice and procedure reflect that consensus. If the case is governed by international arbitration rules, the fact that arbitration is taking place in the U.S. does not make discovery any more available.
If the case is domestic in nature: • Expect to be told you can take, at most, a very limited number of depositions of limited duration.[17] –The smaller the case, the fewer and shorter the depositions, so figure out what you *really* need, and go for that.	Don't assume that proportionality is a term first coined in response to discovery excesses in Federal Rules practice. Providers have been training commercial arbitrators for years to limit discovery to what is needed *and* proportional.
Expect push-back in response to a litigation-like discovery plan: • Even if you work out a joint proposal and present it on a silver platter. • Advise your client realistically and up front about the limits of discovery in arbitration. There are guidelines and articles explaining the limits of discovery in arbitration. Send one or two to your client if it does not believe you when you explain the limitations on discovery in arbitration.	Don't panic if you are used to broad discovery before trial. In arbitration, the hearing-by-installment approach usually affords ample opportunity to regroup. Arbitrators have the flexibility to remedy genuine surprise and are sensitive to the need for procedural fairness.
N. Present Disputes Informally	
Provide the arbitrator(s) with a brief, written, jointly submitted or at least even-handed preview of the dispute.	Don't expect the arbitrator(s) to rule on complex and important discovery disputes at a conference without having had time to think about it and confer with one another.
O. Propose Dispositive Motions When They Meet Arbitration Standards	
Propose a dispositive motion only if it is likely to succeed *and* to streamline the case.[18] • Prepare a one or two-page letter outlining the grounds, likelihood of success, and likely economies to be achieved from the dispositive motion.	Don't ask to make dispositive motions just to condition arbitrator thinking in your favor. It is not efficient, and busy arbitrators might conclude that you are trying to make extra work for yourself.

Dos	Don'ts
P. Use Witness Statements and Exchange Experts' Reports	
Consider agreeing to the use of witness statements as part of direct testimony even if not required to do so. • Fact witnesses rarely crack on direct examination. • Exchange experts' reports. Parties rarely have an opportunity to take the deposition of opposing experts in arbitration. You may as well take some credit for adopting an approach that otherwise will be imposed. • Incorporate your expert report as an integral part of the expert's sworn testimony.	Don't fight tooth-and-nail against the witness statement procedure just because it is unfamiliar or can sometimes be abused; you can negotiate the ground rules to limit abuse. Don't assume that witness statements and experts' reports prevent the witness from telling her story. Arbitrators can be persuaded to let witnesses give brief overviews of direct testimony and to update or correct statements or reports just before cross-examination at the hearing.
Prepare fact witness statements with the witness and in the witness' own voice.	Don't submit a witness statement that reads like a memo of law. It will not be effective and your witness may deserve better.
Q. Design Helpful Hearing Submissions	
Organize hearing exhibits so that they are arbitrator-friendly. • Arbitrators pick up bundles of hearing exhibits and read them.	Don't submit exhibit volumes that resemble shuffled decks of playing cards.
Submit a separate volume of joint exhibits that are the key, undisputedly authentic documents in the case. • Parties may disagree as to the meaning of undisputedly authentic and relevant documents, but that does not mean the documents are not authentic or are not key to the dispute.	Don't create logistical challenges for the arbitrator(s) by burying the basic documents in larger document groupings. Many arbitrators work without any office support.
Provide documents in whatever form(s) the arbitrator(s) request. • Arbitrators on the same panel may have very different working styles. • Offer to have a courtesy paper set in the hearing room for each arbitrator.	Don't assume that all arbitrators have the same technological savvy. Some may consider the courtesy set to be essential; others may see it as unnecessary and wasteful. The key is to find out each arbitrator's preference.
Keep the record organized and make it easy for the arbitrator(s) to focus on what's important. • Consider with an open mind an arbitrator's request for authorization to work with a colleague on some aspects of a complex, large-record case. Arbitrators do not have access to law clerks and they cannot ask for help from law firm colleagues unless the parties expressly authorize it.	Don't automatically react negatively if an arbitrator, particularly in a complex, big-document commercial matter, asks for authorization to draw on a colleague for support for specific tasks. Depending on how the arrangement is structured, it could result in time and cost savings, and a better structured or reasoned award.
Keep Pre-Hearing Memos Concise. • Say things once.	Don't engage in repetition. Repetition tends to annoy arbitrators. Don't engage in repetition. Don't.

Dos	Don'ts
R. Decide on a Form of Award Well Before the Hearing	
Inform the arbitrator(s) before the evidentiary hearing as to what form of award is required. • Depending on the applicable rules, arbitrator(s) may decide on the form of award much sooner in the case, but the eve of the evidentiary hearing should be the absolute minimum notice so the arbitrator(s) can identify the tools they need to receive from the parties.	Don't ask for a reasoned award without agreeing to provide the arbitrator(s) with a hearing transcript or, if no transcript is made, to provide the arbitrator(s) with proposed findings of fact or some less formal version thereof.
S. Discuss the House Rules in Advance of the Hearing	
Clarify any restrictions on communicating with witnesses during their testimony, or on the witness' attendance during the testimony of other witnesses. • Ask the arbitrator(s) to set forth any restrictions in a procedural order.	Don't assume that you, the arbitrator(s) and opposing counsel all have the same practice experience background with respect to the handling of witnesses and other hearing-room conduct.
T. Propose Hearing Procedures That Maximize Time for Witness Testimony and That Help Keep the Arbitrator(s) Organized	
Keep housekeeping at the hearing to a minimum. • Try to limit discussion of administrative details to the beginning or end of the hearing day. • Try to work out problems off the record and then confirm agreements on the record.	Don't burden the transcript with lengthy discussions unrelated to the merits. The transcript (even in paper form) should be user-friendly for the arbitrator(s) in preparing the award.
Submit an order of presentation of witnesses in advance of the hearing. • Update the line-up at the end of each day for the next day.	Don't try to surprise the arbitrators with your next witness. Arbitrators like to prepare for witnesses too.
Have your next witness in the batter's box.	Don't waste expensive hearing time waiting for a witness who is stuck in traffic. Some arbitrators, and some clients who hear an arbitrator grousing about it, might hold it against you.
Make evidentiary objections briefly, in writing, and focused on significant matters; time the objections so as not to disrupt hearing flow. • Limit evidentiary objections during the hearing to important questions of time management, relevance, weight and confidentiality.	Don't use evidentiary objections to break a witness' rhythm or to run the clock. Arbitrators recognize the tactic, and may deduct points from your credibility score and/or help the witness get back on track. Don't fuss over prejudice unless the evidence is irrelevant and borders on the outrageous. Arbitrators think they are too sophisticated to have to worry about becoming prejudiced, but might draw the line at attempts to delve into clearly non-probative personal matters.

Dos	Don'ts
Ask the arbitrator(s) whether closing arguments or post-hearing briefs would be more helpful. • Ask the arbitrator(s) what points they would most like to be addressed in closing arguments and/or briefs, and adjust accordingly. • This is not just about being courteous. You want to know what might be troubling the arbitrator(s) and you want to deal with it as best you can. • Make use of arbitrator flexibility. For example, in some cases it might make sense to have a closing argument as to some issues plus a short brief on a point or two that are better addressed in writing, with a chart that the arbitrators might find helpful but requires a bit more time to prepare, etc.	Don't just repeat in closing the themes you have been developing all through the case; address what's on the mind(s) of the arbitrator(s) at that point in the hearing. It is your last chance to put the arbitrator(s) at ease with respect to what may be bothering them about your case or defenses. Don't repeat arguments that are not essential to your case and that have not gotten any traction with the arbitrator(s) just because your client likes to hear them. You are not there to entertain or soothe the client but to get the client the best possible result.
Provide the arbitrator(s) with hearing transcripts at the same time you receive them. • If you are getting daily copy, offer it. • Ask each arbitrator what form (paper, electronic, software) is preferred, and include any court reporter index.	Don't just do the minimum or the usual; go out of your way to make it as easy as possible for the arbitrator(s), particularly when doing so has no material impact on cost.
Supply a joint, definitive, final list of all the documents in evidence. • This is especially important in the larger-document cases or when exhibits have been moved into evidence without testimony. • Arbitrators like to have a reliable checklist to make sure they have reviewed and considered all the evidence in the record.	Don't rely on the court reporter to provide the exhibit list if there are exhibits in evidence that were not used with witnesses or not formally moved in evidence on the record.
U. Be Courteous to the End	
Thank the arbitrator(s) and case manager, each by name, for their service and attention. Acknowledge the members of your team at all levels. Thank the opposing attorney(s). If counsel was generally obstructive but cooperated in some small way, thank counsel specifically for that small detail even though (or perhaps because) it might seem like faint praise. Acknowledge the hard-working junior members of the other side's team, including non-lawyers, for their contribution and cooperation, even if you cannot utter a word of thanks to lead counsel.	Don't just say thank you; when you say it, say it like you mean it.

Endnotes

1. For a practical overview of some key considerations in arbitrator selection, *see* Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 2005 DISP. RESOL. J., 1, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897 (last visited Sept. 9, 2014).

2. *See* STIPANOWICH, ET AL., PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 61-67 (2010), *available at* http://www.thecca.net/sites/default/files/CCA_Protocols.pdf (last visited Sept. 9, 2014) [hereinafter CCA Protocols].

3. *See generally*, NEWMAN, ET AL, GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS (2012), *available at* http://www.c-pradr.org/Portals/0/Resources/ADR%20Tools/Tools/Arbitration%20Award%20Slimjim%20for%20download.pdf (last visited Sept. 9, 2014); NEWMAN, ET AL., GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/GuidelinesonEarlyDispositionofIssuesinArbitration.aspx (last visited Sept. 9, 2014) [hereinafter CPR Early Disposition Guidelines]; NEWMAN, ET AL., PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx (last visited Sept. 9, 2014); N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations* [hereinafter NYSBA Domestic Guidelines] and N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration* [hereinafter NYSBA International Guidelines], both *available at* http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf (last visited Sept. 9, 2014); *Protocol for E-Disclosure in Arbitration*, CHARTERED INST. OF ARB., Oct. 2008, *available at* http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf (last visited Sept. 9, 2014) [hereinafter CIArb E-Disclosure Protocol]; *Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations*, JAMS, Feb. 1, 2011, *available at* http://www.jamsinternational.com/wp-content/uploads/JAMS-International-Efficiency-Guidelines.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Efficiency Guidelines]; Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), *available at* file:///C:/Users/tmb/Downloads/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf (last visited Sept. 9, 2014); THE CODE OF ETHICS FOR ARB. IN COM. DISP., *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (last visited Sept. 9, 2014).

4. *See* CCA Protocols, *supra* note 2, at 61-63.

5. The AAA Commercial Arbitration Rules now provide for mediation in the course of arbitration unless the parties opt out. *See* Am. Arb. Ass'n, *Commercial Arb. Rules and Mediation Procedures R-9*, at 14 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter AAA Commercial Arb. Rules].

6. *Id.; see also* Luis M. Martinez and Thomas Ventrone, *The International Centre for Dispute Resolution Mediation Practice*, 494-95, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002567 (last visited Sept. 9, 2014); Int'l Chamber of Com., Mediation Guidance Notes, ¶¶ 28-35, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes (last visited Sept. 9, 2014).

7. *See, e.g.*, Am. Arb. *Ass'n, A Guide to Commercial Mediation and Arbitration for* Business People (2013), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2019455 (last visited Sept. 9, 2014); Am. Bar Ass'n, *Benefits of Arbitration for Commercial Disputes, available at* http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Sept. 9, 2014); Int'l Chamber of Com., *Introduction to ICC Arbitration, available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/ (last visited Sept. 9, 2014).

8. *See, e.g.*, JAMES M. GAITIS, ET AL., THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES 137-76 (3D ED. 2013) [hereinafter CCA Best Practices Guide]; CCA PROTOCOLS, *supra* note 2, at 72-73; CIArb E-Disclosure Protocol, *supra* note 3, at 6; INT'L DISPUTE RESOLUTION PROCEDURES, INT'L CENTRE FOR DISPUTE RESOL., art. 21.1, June, 2014, *available at* https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter ICDR Dispute Resol. Procedures] ("The arbitral tribunal shall manage the exchange of information among the parties with a view to maintaining efficiency and economy."); Mitchell Marinello & Robert Matlin, *Muscular Arb. and Arbitrators Self-Mgmt. Can Make Arb. Faster and More Econ.*, 67 DISP. RESOL. J. 69, 73-75, *available at* http://www.novackmacey.com/wp-content/uploads/2013/06/Muscular-Arbitration-and-Arbitrators-Self-Management-Can-Make-Arbitration-Faster-and-More-Economical-Dispute-Resolution-Journal-Vol.-67-No.-4-2013-PDF.pdf (last visited Sept. 9, 2014).

9. *See* CCA Protocols, *supra* note 2, at 32-34.

10. *See, e.g., Due Diligence Eval. Tool for Selecting Arbitrators and Mediators*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (2010), *available at* http://www.cpradr.org/Portals/0/File%20a%20Case/Engagement%20Guidelines%20final.pdf (last visited Sept. 9, 2014); Energy Arbitrator's List, Int'l Centre for Disp. Resol., *available at* http://www.energyarbitratorslist.com/ealsearch/faces/eal?_adf.ctrl-state=1bae1uglv_4 (last visited Sept. 9, 2014).

11. *Compare* AAA Commercial Arb. Rules, *supra* note 5, M-10 (for mediation only), and ICDR Dispute Resol. Procedures, *supra* note 8, art. 37, and *Comprehensive Arb. Rules & Procedures*, JAMS, R-26, Oct. 1, 2010, *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Comprehensive Arb. Rules], *with* Rules, Int'l Inst. For Conflict Prevention & Resol., Inc., R-20, July 1, 2013, *available at* http://www.cpradr.org/RulesCaseServices/Arbitration/AdministeredArbitration/Rules.aspx (last visited Sept. 9, 2014) [hereinafter CPR Rules], *and* ICC Rules of Arb., Int'l Chamber of Com., art. 22, Jan. 1, 2012, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_b1 (last visited Sept. 9, 2014) [hereinafter ICC Rules of Arb.]; see also CCA Best Practices Guide, *supra* note 8, at 439-40, Table 17.3.

12. *See* AAA Commercial Arb. Rules, *supra* note 5, art. R-23; CPR Rules, *supra* note 11, art. R-11; JAMS Comprehensive Arb. Rules, *supra* note 11, art. R-26(b).

13. If the arbitration is governed by the Federal Arbitration Act (FAA), the courts are split as to whether FAA Section 7 authorizes the arbitrators to issue subpoenas for discovery document production or deposition testimony, or whether Section 7 only extends to subpoenas for attendance at the evidentiary hearing. *See generally*, CCA Best Practices Guide, *supra* note 8, at 149-52. If the arbitration is governed by state arbitration law, the power of the arbitrator(s) to issue subpoenas to nonparties may vary from state to state.

14. ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("10. Depositions…generally are not appropriate procedures for obtaining information in an arbitration under these Rules."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In JAMS international arbitrations, the prevailing practice is that depositions are not

permitted."). *Compare* NYSBA Domestic Guidelines, *supra* note 3, at 13-14, *with* NYSBA International Guidelines, *supra* note 3, at 28.

15. *See, e.g.*, ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In international arbitrations, the use of written witness statements in lieu of direct testimony…is a common, broadly accepted practice.").

16. *See* NYSBA International Guidelines, *supra* note 3, at 27-28.

17. *See* NYSBA Domestic Guidelines, *supra* note 3, at 14.

18. *See* AAA Commercial Arb. Rules, *supra* note 5, R-33 ("The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."); CPR Early Disposition Guidelines, *supra* note 3, Guideline 2.4 ("It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.").

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Expert Q&A: International Arbitration in New York

London and Paris traditionally have been the preeminent forums for complex international arbitration, with foreign parties routinely resisting efforts to arbitrate in the US. Recently, however, New York has emerged as an increasingly popular venue for the resolution of cross-border disputes. Practical Law asked *Richard L. Mattiaccio* of *Allegaert Berger & Vogel LLP* to discuss this trend and the reasons behind New York's growing status as a global center for international arbitration.

RICHARD L. MATTIACCIO
PARTNER
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Richard has over 35 years of experience in commercial and international arbitration and litigation in the federal and state courts of New York, and over 25 years of service as chair, panel, and sole arbitrator in commercial and international cases. He serves on AAA, ICDR, ICC, and CPR arbitration panels and is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators and a Fellow of the of the College of Commercial Arbitrators. Richard is Chair of the New York City Bar Association's International Commercial Disputes Committee, Vice Chair of the Chartered Institute of Arbitrators New York Branch, a Vice Chair of the New York International Arbitration Center, and a member of the CPR Institute Arbitration Committee.

New York has hosted more international arbitrations over the last several years than ever before. What are some of the reasons for this change?

One factor contributing to this change is an increase in cross-border transactions involving middle-market American companies, as well as large multinationals and classic trading and import companies, with foreign counterparties. As a result, there has been an overall increase in international arbitrations arising out of or relating to these transactions.

Additionally, concerns about discovery in the US have, in the past, made parties wary of pursuing international arbitration proceedings here. Because many foreign parties hail from jurisdictions that do not allow any discovery, they are often shocked and appalled at the scope of permissible and anticipated discovery in US courts. However, updated rules

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from major arbitral institutions, along with protocols and guidelines from bar associations, make clear that international arbitration is treated differently from domestic arbitration and civil litigation, particularly with regard to the scope of discovery. This has increased parties' willingness to entertain US jurisdictions, including New York, as potential seats for arbitrating international disputes.

Recognizing and seeking to support these trends, in the past few years:

- The International Chamber of Commerce (ICC) established SICANA, Inc., which administers and supports arbitration in New York.
- The London-based Chartered Institute of Arbitrators (CIArb) started the CIArb New York Branch.
- The New York International Arbitration Center (NYIAC) opened its doors to provide state-of-the-art facilities for hearings, a high level of service to hearing participants, and a center for the study of international arbitration.

The availability of world-class facilities at NYIAC and sophisticated arbitrators with substantial legal and industry experience have also contributed to increased interest in New York as a place for international arbitration hearings, and reflect New York's growing importance as a global hub for arbitration.

Why have parties historically been reluctant to pursue New York as a venue for international arbitration, and how have these concerns been addressed?

As mentioned above, many foreign parties have been concerned that the level of discovery contemplated by the Federal Rules of Civil Procedure would be available if their arbitration took place in the US. However, the approach in some judicial systems outside the US, in which each party presents the documents on which it intends to rely and nothing further, has exerted a significant influence on the development of international arbitration practice in New York.

A number of guidelines published by the main arbitration providers in New York contain provisions that foreign parties would find familiar and consistent with their experience in international arbitrations seated abroad. These guidelines include:

- The International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information.
- The JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations.
- The International Institute for Conflict Prevention and Resolution (CPR) Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

These guidelines are consistent with practices that have developed in other major international arbitration centers, perhaps most notably in ICC arbitration. Similarly, the New York State Bar Association (NYSBA) issued the following two sets of guidelines on conducting discovery, which treat discovery in domestic commercial arbitration and international arbitration separately:

- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations.
- Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

Like the guidelines and protocols promulgated recently by the major arbitral institutions, the NYSBA guidelines do not impose an absolute ban on discovery. They do clarify, however, that the exchange of information in international arbitration must be more restricted than in both domestic arbitration and civil litigation practice in some courts in the US. Because civil discovery in New York state courts typically has been more limited, New York attorneys tend to adapt well to the need to restrict discovery in arbitration.

Search Evidence in International Arbitration for more on the principles and procedures governing the presentation of evidence in international arbitration.

Some foreign parties have questioned the desirability of New York as a seat for arbitration based on the manifest disregard of the law doctrine. Are international arbitration awards issued in New York more vulnerable to being set aside?

Some advocates of keeping international arbitration outside the US have perpetuated the myth that arbitral awards by arbitrators sitting in the US are often vacated on grounds of manifest disregard of the law, and that manifest disregard challenges, even if unsuccessful, create uncertainty.

However, manifest disregard challenges mounted in domestic arbitration cases are rarely successful. US courts have made clear that an arbitral tribunal's interpretation and application of the law are not subject to judicial second-guessing, observing that *vacatur* of an arbitral award for manifest disregard of the law "is a doctrine of last resort," reserved for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent but where none of the provisions of the [Federal Arbitration Act] apply" (*Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)).

US courts also have shown deference to an arbitrator's interpretation of a contract. According to the US Supreme Court, it is the arbitrator's construction of the contract that was bargained for, and the "arbitrator's construction holds, however good, bad, or ugly" (*Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013)). If the arbitration agreement grants the tribunal the authority to render an award, the award must stand even where the tribunal misidentifies the source of its authority (see *Salus Capital Partners, LLC v. Moser*, 2018 WL 566409, at *7 (S.D.N.Y. Jan. 16, 2018)).

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A party challenging an award on the basis of manifest disregard bears the heavy burden of showing the following:

- The arbitrator was made aware of a governing legal principle.
- The legal principle was well-defined, explicit, and clearly applicable to the case.
- The arbitrator chose to ignore the law.

(*Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002).) An award may not be vacated on grounds of manifest disregard of the law if there is even a "barely colorable justification" for the outcome (*Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004)).

Moreover, the New York City Bar Report of its International Commercial Disputes Committee (ICDC) in 2012 explained that the concern about manifest disregard is largely theoretical in international arbitration.

Search Enforcing Arbitration Awards in New York for more on manifest disregard and other grounds on which enforcement of an arbitration award might be challenged in New York.

What are some of the key differences in conducting an international arbitration in New York when compared to the traditionally popular venues such as London or Paris?

In theory, there should be no difference. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and related treaties and laws, international arbitration should proceed in its own autonomous realm, independent of local law and regulation.

In practice, however, there are several differences. The most obvious is that New York has a deeper bench of arbitrators and counsel who know New York law and applicable federal law. New York-based arbitrators also have a vast range of industry expertise.

Another potential distinction is the degree to which the arbitration providers that are most active in New York have emphasized the need to contain costs and avoid duplication in their arbitrator training and continuing education programs.

For example, there was at least one ICDR hearing that continued in midtown Manhattan right through Hurricane Sandy in 2012, which had stranded the parties, counsel, and one arbitrator in their hotels. Despite the treacherous storm, the arbitrators agreed to continue the hearing without interruption, saving the parties the additional expense and inconvenience of another trip to New York from the Midwest and Europe. Instances like this demonstrate how hard providers and arbitrators in New York are working to burnish New York's reputation as a practical, cost-effective international center.

What aspects of New York law and jurisprudence make New York an attractive venue for international arbitration?

New York has a stable, well-developed and predictable body of contract law that adheres to international commercial standards and offers a legal culture that is receptive to enforcing international treaties to which the US is a signatory.

New York law should be attractive to international commercial parties because it allows the parties maximum autonomy in negotiating the terms of their agreement and rarely imposes terms as a matter of public policy. For example, New York law allows commercial parties to:

- Limit recoverable damages, including punitive damages (for more information, search Punitive Damages in US Arbitration on Practical Law).
- Waive jury trials.
- Decide whether they want to shift attorneys' fees and expenses to the prevailing party in litigation or arbitration. By contrast, in England, an agreement that requires a party to pay the whole or part of the costs of the arbitration, regardless of outcome, is valid only if the agreement was reached after the dispute had arisen. This approach precludes parties from contracting in the arbitration agreement that each party will pay its own costs in any event or that one party will pay the other party's costs whatever the outcome of the arbitration. (For more information, search Costs in Arbitration Under English Law on Practical Law.)

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New York law also affords considerable deference to the parties' selection of venue and choice of law, subject to very few limitations. Unless a foreign party has been conducting unauthorized business in New York, it must meet only minimal requirements to avoid jurisdictional and *forum non conveniens* challenges. Therefore, even where New York otherwise might be considered an inconvenient forum, it will provide a forum to the foreign party if:

- The amount in dispute is in excess of a statutory threshold.
- The agreement in question provides for the application of New York law and the choice of New York as the forum.
- The foreign party contractually agrees to submit to the jurisdiction of the New York courts.

(N.Y. Gen. Oblig. Law §§ 5-1401 and 5-1402.)

Conversely, where business parties choose not to take advantage of the New York courts, and instead agree to arbitrate or litigate in another forum, they can rely on New York's strong presumption in favor of enforcing these agreements. As New York courts have recognized, this approach fosters predictability, an important goal in commercial relationships.

Search Anti-Suit Injunctions and Anti-Arbitration Injunctions in the US Enjoining Foreign Proceedings for guidance on the legal issues counsel should consider when seeking an anti-suit or anti-arbitration injunction in the US to enjoin foreign proceedings.

New York courts also offer a range of provisional remedies to aid arbitration so that arbitral awards are not rendered ineffectual.

Search Provisional Remedies in New York: Overview, Attachment in Aid of Arbitration in New York, and Interim, Provisional and Conservatory Measures in US Arbitration for information on provisional remedies.

At the conclusion of the case, New York courts routinely enforce arbitral awards (see, for example, *Kailuan (Hong Kong) Int'l Co. v. Sino E. Minerals, Ltd.*, 2016 WL 7187631, at *4 (S.D.N.Y. Dec. 9, 2016)). In one case, a New York state court even granted prejudgment attachment of the defendants' in-state assets pending the court's consideration of an action to recognize a Singapore judgment (that confirmed an arbitral award) under Chapter 53 of the Civil Practice Law and Rules (*Passport Special Opportunities Master Fund, L.P. v. ARY Commc'ns, Ltd.*, 2015 WL 7511540, at *3 (Sup. Ct. Nassau Co. Nov. 17, 2015)).

Additionally, there are substantive, sometimes technical considerations that make New York law attractive to commercial parties. For example, New York's well-developed law on secured transactions can provide assurance to foreign parties because it looks to the local law of the jurisdiction where the collateral is located to govern issues of perfection and the priority of a security interest in collateral.

New York also has a balanced approach to contract interpretation that corresponds to the expectations of commercial parties. This represents a middle ground between a formalistic, hard-and-fast prohibition against going beyond the language of an agreement, on the one hand, and freely allowing testimony on the meaning of language even when it is clear, on the other hand. As many attorneys may recall from law school, although New York's "four corners" rule allows for parol evidence only if there is ambiguity in a written agreement, it is a recognized principle that, under New York law, "a promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed" (*Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

Further, New York law recognizes a duty of good faith and fair dealing in the performance of a contract, but does not impose, as some other jurisdictions do, a broad obligation of good faith on the part of commercial parties in their negotiation of an arm's length agreement.

The NYSBA released a brochure pointing out these and other advantages of choosing New York law to govern international contracts (NYSBA, Choose New York Local Law for International Commercial Transactions, available at *nysba.org*).

PRACTICE NOTES

The following related Practice Notes are available on Practical Law.

>> Simply search the resource title

- Attachment in Aid of Arbitration in New York
- Choosing an Arbitral Seat in the US
- Compelling and Staying Arbitration in New York State Supreme Court
- Compelling Evidence from Non-Parties in Arbitration in the US
- Drafting Arbitration Agreements Calling for Arbitration in the US
- International Litigation: Recognition and Enforcement of Foreign (Non-US) Judgments and Arbitration Awards
- Introduction to US Arbitral Institutions and Their Rules
- The Preclusive Effect of Arbitration Awards in the US

Since October 2013, all international arbitration cases have been assigned to a single justice within the Commercial Division of the New York Supreme Court. Has this change affected the resolution of these disputes?

Litigation related to international arbitration is limited and primarily conducted in federal court because either side can select federal court in cases governed by the New York Convention.

For those cases filed in New York State Supreme Court, New York County, the fact that all international arbitration-related matters are assigned to a single judge tends to reassure counsel that their matters will be heard by an individual with experience in international disputes. As a practical matter, however, the federal district court offers a deeper and broader level of experience as a by-product of the higher volume of international arbitration-related applications filed in federal court.

Search Practicing in the Commercial Division of the New York State Supreme Court for more on civil practice in the Commercial Division.

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Arbitration Tips and Traps for Corporate Counsel

***Richard L. Mattiaccio,* Corporate Counsel**

October 16, 2014 | 0 Comments

Arbitration is a field of study worthy of Hermann Rorschach. Parties who bring to it a preference for the formality and forensic opportunities of litigation see arbitration as the Wild West. Others, who prefer to resolve all business disputes quickly and informally, see it as just another form of litigation. Businesspeople who want to submit disputes to a business-oriented, neutral third party bound by rules that ensure basic fairness, but do not want all the bells and whistles of litigation, see arbitration as a happy medium.

In practice, the parties to a large extent create their own arbitration reality, starting from the time they choose the applicable rules and otherwise construct their arbitration clause, to the time the arbitrators close the hearing.

The following, admittedly partial list of "tips" and "traps" is offered to suggest practical ways to make arbitration work better for companies that rely on it as a more efficient and business-like way to resolve disputes than litigation in court.

The Arbitration Clause

Businesspeople in the throes of negotiating an agreement rarely want to spend time, energy or negotiating capital on the arbitration clause. Inside counsel can count on second-guessing, however, if a dispute goes to arbitration and it takes too long, costs too much and is decided by arbitrators who seem like aliens to the businesspeople.

The company that has a well-considered, consistent approach to arbitration clauses has a better chance of shaping the clause in any given contract, and is more likely to be satisfied with the arbitration process.

Tip: *Develop a standard arbitration clause and fallback positions in advance of negotiations.*

Trap: *Assuming all provider rules and arbitrator panels are the same.* Arbitration rules and panels can vary greatly, even within the same provider organization.

Tip: *Select the place of arbitration based on its law regulating the arbitration process and the quality of its arbitrator community.* Your corporate home might seem best, but its courts could interfere excessively in arbitration, or it might lack a deep bench of arbitrators suited to your dispute or industry.

Trap: *Selecting the place of arbitration for local advantage or proximity to your litigators.* A "home court" advantage is unlikely in arbitration. Good litigators are more easily found than good arbitrators.

Tip: *Think about the ideal number of arbitrators and consider the new appeal-within-arbitration options.* The trend is toward sole arbitrators in all but the highest-stakes cases. Leading providers now allow parties to opt-

in to a well-defined, expedited appeal process within the arbitration itself. The appeal process addresses concerns that some companies may have about the risk of a "runaway" sole arbitrator.

Trap: *Assuming the need for three arbitrators in all cases.* It is more difficult to schedule hearings with three arbitrators, resulting in an increased time lapse from filing to award. A full hearing with one arbitrator followed by an appeal within arbitration may involve much less time and expense than a three-arbitrator panel without any appeal.

Arbitrator Selection

As in jury selection, cases can be won or lost during arbitrator selection. Unlike jury selection, arbitrator selection happens at the beginning of a case. A party and its counsel should invest substantial time and effort in the selection process, and should understand the case as deeply as possible before selecting arbitrators.

Tip: *Front-load the planning of your case.* Having a strategy lets you select arbitrators who are more likely to be open and receptive to your arguments.

Trap: *Filing quickly and developing the case over time.* This approach results not only in less-effective arbitrator selection, but less-effective advocacy in those crucial early conferences.

Tip: *Select counsel familiar with the arbitrator pool and selection process.* An arbitrator's prior awards rarely are available to the public, and this hampers the evaluation of potential arbitrators. If counsel does not know or have access to those who know arbitrator candidates well, consider engaging specialized counsel to assist in arbitrator selection.

Trap: *Relying entirely on official arbitrator resumes.* Arbitrator bios tend to be designed to trigger keyword search hits; they rarely convey a sense of the individual.

Discovery

Discovery is the most debated and misunderstood phase of arbitration. Some parties complain that too much discovery is allowed, making arbitration time-consuming and expensive and too similar to litigation. Others complain that too little discovery is allowed, making it difficult to develop claims or defenses.

Arbitration providers train arbitrators to limit discovery so that the process keeps its promise of offering a faster and cheaper alternative to litigation. Parties may influence these ground rules to some degree by adding specific language about discovery to their arbitration clause or by presenting agreed discovery plans, but arbitrators retain discretion to limit discovery to what is proportional. Counsel needs to be ready to present a limited-stakes case with little document exchange beyond what each side plans to rely on at the hearing, and to proceed to hearing with limited or no discovery depositions, especially in international cases.

Tip: *Locate and preserve all relevant company documents early, and develop the facts from those documents and company witnesses*. In a high-stakes case, a party also should consider authorizing an ethically conducted investigation to supplement internally available information.

Trap: *Planning to build your case out of the other side's files.* Many factors work against this approach in arbitration.

Tip: *Identify and disclose your witnesses early in the case.* Arbitrators need this information to conduct effective conflicts checks.

Trap: *Holding back names to achieve surprise at the hearing.* The party who holds back witness names risks disruptive midstream replacement of an arbitrator, continued service of an arbitrator who might not have been selected or preclusion of a key witness.

Motions, Papers and Objections

Arbitration traditionally is a more hearing-driven and less paper-driven process than litigation. Thanks to a generational shift and to recent changes in provider rules, arbitrators are becoming more comfortable with dispositive motions and other complex written submissions. There remains, however, a strong emphasis in arbitration on looking carefully at whether a proposed motion would result in net savings of time and expense to the parties. Similarly, evidentiary objections work differently in arbitration than in litigation. Attorneys need to understand and use these differences to be effective advocates in arbitration.

Tip: *Be skeptical if your counsel wants to engage in extensive motions practice.* Arbitrators really need to be convinced not just that a motion likely has merit but that, if granted, the motion will save hearing time and net expense to the parties.

Trap: *Asking arbitrators to decide motions with little practical effect on case complexity.* Arbitrators might conclude that your side is playing for time or intentionally running up expenses, or that counsel just does not understand arbitration.

Tip: *Encourage counsel to keep memos of law short and focused on essentials.* Be sure counsel briefs clearly and succinctly all the law on which your side principally relies. Arbitrators are expected to work without associate or law clerk support in most cases and cannot be faulted for not finding the law themselves. Very few commercial arbitrators like to read learned treatises, however, so a memo of law needs to get quickly to the point.

Trap: *Repeating points for emphasis in papers.* Arbitrators generally read everything submitted and do not appreciate repetitive papers, especially repetitive rhetoric.

Tip: *Encourage counsel to make evidentiary objections briefly and only if focused on the most significant matters.* Arbitrators rarely sustain evidentiary objections. However, if an objection shows an important document to be unreliable, it can be effective even if overruled.

Trap: *Using objections to disrupt rhythm and flow.* Arbitrators recognize this tactic and can overcompensate when they help the witness get back on track.

Demeanor and Etiquette

Litigation sometimes resembles the combat of gladiators, but arbitration is more like chess and requires different approaches and skills.

Tip: *Encourage counsel to offer reasonable solutions to disputes with opposing counsel.* Arbitrators respect the problem-solver more than the die-hard.

Trap: *Expecting arbitrators to figure it out.* Opposing counsel may offer a solution, and your side may not like it.

Tip: *Insist that your counsel be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel, staff and witnesses.* Arbitrators tend to pay more attention to the adults in the room.

Trap: *Encouraging counsel to be aggressive.* If you lose, you'll quickly forget how good it felt to hear your trial lawyer roar.

Tip: *Make sure that your lead counsel thanks the arbitrators for their service, attention and patience.*Most arbitrators are human. They tend to like it when others appreciate them.

Trap: *Appearing ungracious with opposing counsel.* Graciousness is particularly impressive when opposing counsel has done little to deserve it.

Richard L. Mattiaccio, a New York-based partner in Squire Patton Boggs (U.S.), has 30 years of experience as counsel in commercial arbitration and in cross-border and IP-related litigation. He has served as an arbitrator for 25 years; is a Fellow of the College of Commercial Arbitrators; co-chairs the International Dispute Resolution Committee of the New York State Bar Association Dispute Resolution Section; is a founding member and former co-chair of the New York City Bar In-House/Outside Litigation Counsel Group; and is a member of the executive committee of the New York International Arbitration Center Inc.

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Guidelines for Arbitrators Conducting Complex Arbitrations

CPR INTERNATIONAL COMMITTEE
ON ARBITRATION

GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

Introduction

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

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

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

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

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

Lawrence W. Newman
Chairman of the CPR Arbitration Committee

GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS

Preface

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

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

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

1. ORGANIZATION AMONG THE ARBITRATORS

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

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

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

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

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

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

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

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

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

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

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

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

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

3. PRESENTATIONS BY EXPERTS

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

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

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

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

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

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

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

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

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

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

4. HEARING AND POST-HEARING MEASURES

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

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

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

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

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

5. MEETINGS OF THE ARBITRATORS

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

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

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

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

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

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

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

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

7. AWARD OF COSTS AND INTEREST

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

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

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CPR GUIDELINES

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GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

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ABOUT CPR

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CPR Guidelines on Early Disposition of Issues in Arbitration

CPR INTERNATIONAL COMMITTEE
ON ARBITRATION

CPR GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

Introduction

In arbitration, as in other dispute resolution processes, there may be occasions when certain claims, defenses or other issues can and should be winnowed out from the more meritorious claims so that the disputes may be resolved more efficiently. How and when arbitrators and counsel may wish to seek this separation is addressed in these Guidelines, which are designed to strike a balance between, on the one hand, eliminating early on claims that do not justify full-blown hearings and, on the other hand, not providing encouragement to non-meritorious applications for early disposition.

The Guidelines set out the types of issues as to which early disposition may be appropriate and suggest ways they may be addressed and responded to – always providing that early disposition will result in overall efficiencies. The Guidelines also provide disincentives for the making of premature or meritless requests for early disposition by suggesting ways in which the tribunal may assess costs and fees against unsuccessful applicants.

It is hoped that arbitrators and other users of arbitration will find the balanced approach taken in these Guidelines to be of value in the management of arbitration proceedings.

These Guidelines are the product of drafting done by the Reporter, John Basinger, and the Chair and, very importantly, the scrutiny and vetting of the various drafts by the members of the Working Group listed at the end of this document.

Lawrence W. Newman
Chairman of the CPR International Committee on Arbitration

CPR GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION

These Guidelines address the circumstances under which it may be appropriate for an arbitral tribunal to undertake early disposition of one or more issues. The Guidelines are intended to provide guidance to the tribunal unless the rules selected by the parties expressly prohibit summary dispositions – which will rarely be the case.[1]

The term "early" is intended to refer to a preliminarily stage of the arbitration, before the parties proceed to a hearing of the entire dispute, before the taking of any evidence, or, where appropriate, after taking only limited evidence. The issues that may be dealt with through early disposition may be claims, counter-claims, defenses or factual or legal questions. Early disposition can have the effect of narrowing the issues in dispute in order to simplify and expedite the further hearing of the arbitration, or, where appropriate, disposing of the entire case.

The Guidelines are intended to provide guidance to the tribunal, parties and counsel on the processes by which claims, defenses and other issues may be disposed of early in proceedings, thereby streamlining the dispute resolution process. A number of principles provide a useful frame of reference for consideration of when and how applications for early disposition of issues should be entertained. In considering these principles and their implementation, it should be borne in mind that early disposition is only appropriate when greater overall efficiencies will be achieved through early disposition of one or more issues than if all issues were considered in a single proceeding.

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[1] Institutional rules, such as those of the CPR, AAA, ICDR, ICC and LCIA, do not expressly authorize early disposition, but have the flexibility to permit it. JAMS Comprehensive Arbitration Rule 18(a) explicitly authorizes early disposition. Indeed, of the commonly used rules, only the FINRA rules prohibit early disposition, with certain enumerated exceptions.

Guidelines

1. Arbitrator Initiatives

1.1. Arbitral tribunals should take an active role in promoting early identification and disposition of issues. Early in an arbitration proceeding, and thereafter, the tribunal should consider inquiring of the parties as to issues that might be appropriate for early disposition.

1.2. In considering whether and how to engage in early disposition of issues, the tribunal should give appropriate deference to the likelihood that parties and their counsel will have a broader understanding than they of the legal and factual matters at issue and of the commercial, political and other ramifications of the arbitration. The tribunal should also respect the parties' choices regarding early disposition, as may be reflected in their selection of institutional rules, the *ad hoc* procedures they adopt, and the joint positions they take in the arbitration proceedings.

1.3 In any event, the tribunal should consider, in the manner described herein, the practicality and advisability of entertaining applications for the early disposition of issues if at least one party requests it.

1.4. The tribunal should also consider setting out guidelines in its first scheduling order for dealing with early disposition of issues, taking into account the principles and modes of application set out below.

2. Principles Underlying Early Disposition

2.1. When a requesting party can demonstrate that early disposition of any factual or legal issue may be accomplished efficiently and fairly, or when all parties agree that early disposition of a particular issue would be desirable, the tribunal should ordinarily take steps to initiate early disposition procedures.

2.2. A variety of issues may be appropriate for early disposition. In each case, parties and the tribunal should weigh the difficulty and cost of establishing the issue in question (including the

amount of evidence and argument expected to be needed for an early decision to be reached), and the effect that early disposition of the issue can be expected to have on proceedings that will follow.

2.3. Issues for which early disposition may be appropriate include, but are not limited to, the following:

2.3.1. ***Jurisdiction and standing.*** Early disposition is generally appropriate where the tribunal must address such matters as the scope of their authority.

2.3.2. ***Claims or legal theories of recovery.*** Early disposition may be appropriate for claims or theories of recovery·

2.3.2.1. That can be accepted or rejected as a matter of law, without the need for an evidentiary hearing.

2.3 2.2. That may be barred by defenses, such as contractual covenants, prescription/limitation periods, statutes of fraud, release, settlements, *res judicata*, or collateral estoppel.

2.3.2.3. Where the claimant cannot demonstrate that it will be able to provide evidence to satisfy a required element of the claim or theory of recovery.

2.3 3. ***Defenses.*** As with early disposition of claims, it may be possible to resolve certain defenses because· the defense fails as a matter of law, the party asserting the defense will not be able to establish one or more required elements of the defense, or the party is barred from asserting the defense.

2.3.4. ***Damages.*** In some cases, issues relating to damages may be appropriate for early disposition. For example, early disposition of issues that significantly limit damages may help to resolve related merits issues or facilitate settlement.

2.4. It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.

3. Modes of Application

3.1. *Discussions during early scheduling or other conferences.* Initial conferences provide an opportunity for the tribunal and parties to focus their attention on the key elements at issue and to discuss ways of resolving them at an early stage of the proceeding. The tribunal should consider instructing the parties to come to such conferences prepared to discuss issues which might be appropriate for early disposition.

3.2. *Discussions among parties.* Should a party propose early disposition, the tribunal should require the proponent to confer with the other parties on whether agreement can be reached on the steps to be taken to present the issue for determination. Matters dealt with in such an agreement might include a limited exchange of documentary and other information and focused briefing. The tribunal, in considering whether and how to conduct early disposition proceedings, should defer to such party agreements.

3.3. *Scheduling order.* Should it be determined, as a result of these discussions, that early disposition is appropriate, a procedural order should be issued implementing the parties' agreement, providing, where necessary, for the exchange of information and presentation of evidence and supporting arguments. The scheduling order should also provide for the disposition of issues not subject to early disposition or that will have to be dealt with if early disposition should not be awarded.

3.4. *Preliminary applications.* Unless the parties have agreed to a process for early disposition, the tribunal should generally require that a party requesting early disposition submit a letter or other written preliminary application, subject to recognized page limits, briefly

explaining why the matter in question should be resolved before other issues in the case. The application should set forth. (1) the issue(s) to be resolved; (2) how disposition of the issue(s) will advance efficient resolution of the overall dispute; and (3) the applicant's proposal as to the procedure by which the issue(s) would be resolved. Such preliminary applications may be made before or after the parties have engaged in an exchange of documents or afforded other disclosure. Unless the tribunal concludes that the preliminary application fails to state a sufficient basis for the relief requested, they should afford an opportunity to the other parties to respond in writing to the application.

3.5. *Prompt review of applications.* The tribunal should review promptly the preliminary application and any responses and determine whether there is a reasonable prospect that hearing the application may result in increased efficiency in resolving the overall dispute. If the tribunal concludes that early disposition of the issue is appropriate, it should instruct the parties on the procedure to be followed thereafter.

3.6. *Deciding early disposition issues.* Many applications for early disposition may be resolved on the basis of written submissions. In appropriate cases, witness testimony by affidavit or otherwise in written form may be considered, or limited hearings may be held. The procedures adopted should assure a reasonable opportunity to a party opposing the motion to make factual and other presentations in opposition.

3.7 *Consideration of issues under bifurcated hearing schedule.* Where proceedings are bifurcated, such as between liability and damages, early disposition may still be appropriate to reduce issues in each of the separated proceedings.

3.8. *Decision on early disposition proceedings.* The tribunal's decision on early disposition may be to grant or deny (in whole or in part) the relief requested, or to defer decision on the issue until the arbitration proceeding has been completed. If the tribunal grants an application

for early disposition, it should give consideration to whether its decision should take the form of a procedural order, interim award, or partial final award. The tribunal should limit further proceedings in accordance with its decision.

4. Allocation of Costs

4.1. To the extent not barred by the parties' agreement or applicable institutional rules, the tribunal may, if it has the authority to do so, treat its award of costs (including, where permitted, attorneys' fees) attributable to early disposition separately from any award of costs relating to other elements of the arbitration proceeding.

4.2. In order to discourage premature or meritless requests for early disposition, or requests made for tactical advantage or delay, the tribunal may assess against the unsuccessful applicant the costs and fees attributable to early disposition proceedings, and in its decision should give its reasons for allowing or denying assessment of costs and/or fees with respect to the application for early disposition. The tribunal may require, as a condition of its considering a party's request for early disposition, that the applicant acknowledge that the tribunal may impose fees and costs attributable to unsuccessful requests against the applicant.

4 3. The consent of all parties to early disposition of an issue may make a separate award of costs and fees inappropriate.

4 4. Separate awards of costs and fees may be inappropriate when early disposition submissions, whether successful or not, substantially reduce the need for additional briefs or other submissions.

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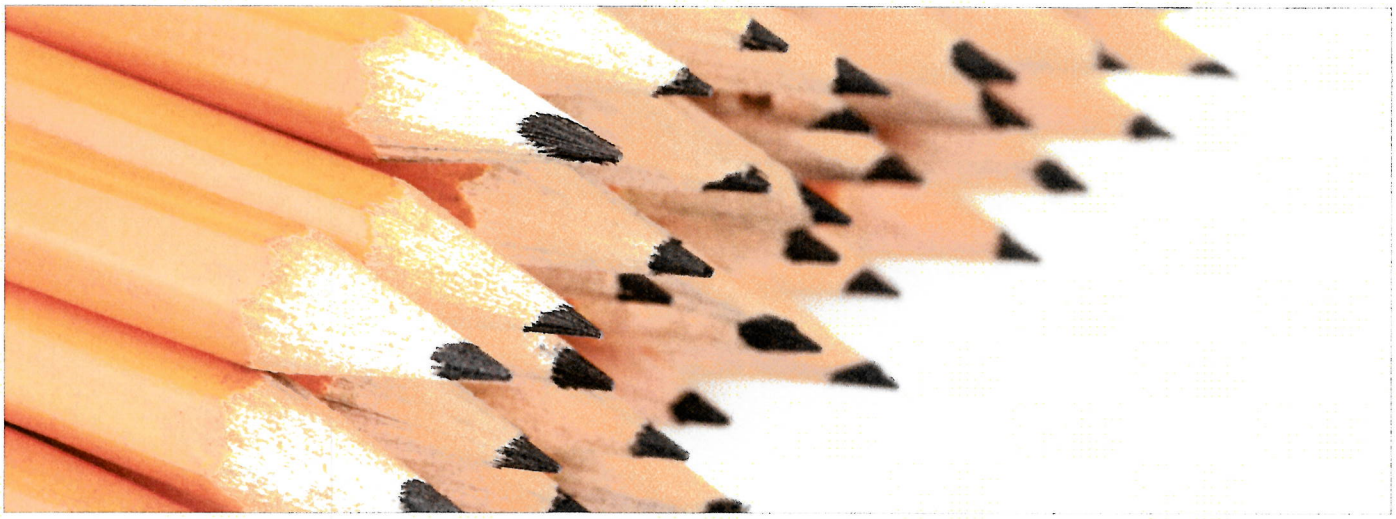

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Standard Arbitration Clauses for the AAA and ICDR

This excerpt of Standard Clauses from our website can be used when drafting an arbitration agreement applying the rules of the American Arbitration Association (AAA) or the International Centre for Dispute Resolution (ICDR). These clauses are modeled on the standard recommended arbitration clauses of the AAA and ICDR, and have integrated notes with important explanations and drafting tips. For the complete, continuously maintained version of this resource, which includes the standard recommended clauses of the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL), visit Practical Law online.

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An arbitration agreement should identify or describe:

- The arbitral tribunal whose rules will govern the proceeding.
- The parties' rights to judicial review, including the parties' ability to appeal the arbitral award.
- The number of arbitrators and the method for their appointment.
- The specific disputes subject to arbitration, including any disputes that may be consolidated with the arbitration or parties that may be joined to the arbitration.
- The seat of the arbitration and the language used during the arbitration.
- The parties' expectations concerning the confidentiality of the arbitration and any materials used during the proceeding.
- The parties' ability to obtain interim or emergency relief.
- The remedies and damages that the arbitral tribunal may impose.

The provisions that follow are based on the text of various standard arbitration clauses recommended by the AAA and its international arm, the ICDR. The AAA is headquartered in New York and has administrative centers throughout the US, with a roster of more than 8,000 arbitrators. The AAA has specialized rules for various industries and is divided into the following sections:

- The Commercial Division.
- The Construction, Real Estate and Environmental Division.
- The ICDR.
- The Labor, Employment and Elections Division.
- The Government and Consumer Division.
- The AAA Mediation Services.

The ICDR has offices in the US, Mexico and Singapore, and has an international panel of approximately 400 arbitrators and mediators. It also has cooperative agreements with 62 arbitral institutions in 43 countries, allowing ICDR-administered arbitrations to be filed and heard in many parts of the world.

SELECTED PROVISIONS AND DRAFTING NOTES

AAA CLAUSES

1.1 Arbitration of future disputes.

(a) Scope, governing rules. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be determined by final and binding arbitration administered by the American Arbitration Association (**"AAA"**) under its Commercial Arbitration Rules and Mediation Procedures (**"Commercial Rules"**) [including, if appropriate, [the Procedures for Large, Complex Commercial Disputes] [,/and] [the International Commercial Arbitration Supplementary Procedures] [and] [the Supplementary Rules for Class Arbitrations]].

DRAFTING NOTE

GOVERNING RULES

The AAA Commercial Arbitration Rules and Mediation Procedures (Commercial Rules) are commonly used for domestic arbitrations conducted in the US between US parties. Unless the parties agree otherwise, the Commercial Rules used are those in effect when both:

- A demand for arbitration has been filed with the AAA.
- The administrative requirements to commence an arbitration have been satisfied.

(*R. 1(a), Commercial Rules.*)

Search AAA Arbitration: A Step-By-Step Guide for more on arbitrations under the Commercial Rules.

Complex Procedures

Where a party's claim or counterclaim is at least $500,000 (not including any claimed interest, attorneys' fees, arbitration fees or costs), the additional Procedures for Large, Complex Commercial Disputes apply unless the parties agree otherwise (*R. 1(c), Commercial Rules*). These rules require the parties to address certain procedural aspects of the arbitration at the preliminary conference with the arbitrator, including the scope of discovery and whether depositions may be taken (*L-3, Procedures for Large, Complex Commercial Disputes*).

By contrast, where no claim or counterclaim exceeds $75,000 (not including any claimed interest, attorneys' fees, arbitration fees or costs), the AAA's Expedited Procedures apply unless the parties provide otherwise

(*R. 1(b), Commercial Rules*). Among other things, the Expedited Procedures require a hearing to be set within 30 days of the arbitrator's appointment and the arbitrator must render an award within 14 days of the hearing (*R. E-7, E-8, E-9, Expedited Procedures*). Under certain circumstances, the parties may want an expedited arbitration even where the amount in dispute exceeds $75,000. However, an expedited process generally is not recommended for complex arbitrations.

International Arbitration

Where the parties have designated the Commercial Rules, or other domestic procedural rules, but the arbitration is deemed an international proceeding due to the nationality of the parties or their parent companies, the International Commercial Arbitration Supplementary Procedures (International Supplementary Procedures) also apply. Among other things, these procedures:

- Specify how an arbitrator may be challenged for alleged partiality or lack of independence (*R. 1, International Supplementary Procedures*).
- Require the default language of the arbitration to be that of the documents containing the arbitration agreement, subject to the authority of the tribunal to determine otherwise (*R. 5, International Supplementary Procedures*).
- Require the tribunal to state its reason for its award, unless the parties agree otherwise (*R. 6, International Supplementary Procedures*).

Class Arbitration

Since 2003, the Commercial Rules have included the Supplementary Rules for Class Arbitrations (Class Rules) for arbitrations where a party submits a dispute on behalf of or against a class or purported class (*R. 1, Class Rules*). Arbitrators have applied the Class Rules even where the arbitration clause was silent on the issue of class arbitration.

However, the US Supreme Court cast doubt on this practice with a 2010 decision that held a tribunal had exceeded its authority under the Federal Arbitration Act (FAA) by ordering class arbitration based on an arbitration provision that was silent on resolving class-wide claims. The decision stressed the importance of the parties' consent to class arbitrations and rejected the notion that parties can impliedly consent to class arbitration. (See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685-87 (2010)*.)

The Supreme Court has gone on to provide additional guidance on the availability of the class-wide arbitration of claims. In *AT&T Mobility LLC v. Concepcion*, it upheld an arbitration agreement that included a waiver of class arbitration (*131 S. Ct. 1740, 1750-53 (2011)*). The Supreme Court also upheld a class arbitration waiver even where the cost of individually arbitrating the claim might be greater than the claimant's potential recovery (see *Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309, 2312 (2013)*). However, another recent decision upheld an arbitrator's determination that the parties' agreement permitted class arbitration, even though the clause was facially silent (see *Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2069-71 (2013)*).

Although the Class Rules explicitly provide that their existence should not be a factor in determining whether the parties consented to class arbitration, at least two federal district courts have held that invoking the AAA rules is relevant in determining whether a court or the arbitrator should decide if the parties have agreed to class arbitration. These courts found that the parties' inclusion of the AAA rules in arbitration agreements necessarily demonstrated their consent to the Class Rules, and therefore, to have the arbitrator decide whether the agreement allows class arbitration. (*Crook v. Wyndham Vacation Ownership, Inc., 2015 WL 4452111, at *1, *8 (N.D. Cal. Jul. 20, 2015); Chesapeake Appalachia, LLC v. Burkett, 2014 WL 5312829, at *8 (M.D. Pa. Oct. 17, 2014)*.)

However, the Courts of Appeals for both the Third and Sixth Circuits have held that the

availability of class arbitration is a gateway issue to be decided by the court unless the parties have unambiguously provided otherwise (see *Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 332 (3d Cir. 2014)*; *Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013)*).

Given that this is a developing area of the law, parties who wish to preclude class arbitrations should include explicit language in their arbitration clauses making that intention clear.

Search Class Arbitration Waiver for more on class arbitration.

(b) Authority of tribunal, judicial review. The award rendered by the arbitrator[s] shall be final [,/and] [non-reviewable] [,/and] [non-appealable] and binding on the parties and may be entered and enforced in any court having jurisdiction[, and any court where a party or its assets is located (to whose jurisdiction the parties consent for the purposes of enforcing the award)]. [Judgment on the award shall be final and non-appealable.]

DRAFTING NOTE

JUDICIAL REVIEW

Judicial review of arbitral awards is limited under the FAA, which permits:

- Courts to vacate an award only if the award was the result of fraud or corruption, or if the arbitrators:
  - exceeded the scope of their authority;
  - engaged in misconduct; or
  - had evident bias.

  (*9 U.S.C. § 10(a)*.)
- Parties to appeal a district court's order confirming or vacating an award to the appropriate circuit court (*9 U.S.C. § 16(a)(1)(D), (E)*).

Some courts have held that arbitral awards may be vacated on the common law ground of manifest disregard of the law. This "can be established only where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature." (*Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002)* (internal citations and quotations omitted).)

The availability of manifest disregard as a basis for vacatur has been questioned following the Supreme Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.* In that decision, the court held that parties may not contractually expand the grounds for judicial review beyond those set out in the FAA (*552 U.S. 576, 584, 589-90 (2008)* (holding that parties may not include additional grounds for vacatur or modification of an arbitral award beyond those identified in Sections 10 and 11 of the FAA, but not addressing whether parties may further restrict the limited grounds for review under the FAA by contract)).

However, in a separate decision, the Supreme Court expressly declined to decide whether manifest disregard survived *Hall Street* "as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth" in Section 9 of the FAA (*Stolt-Nielsen, 559 U.S. at 672 n.3*).

After *Hall Street*, some federal district courts have held that parties may contract to waive their right to seek vacatur under Section 10(a)(4) of the FAA, which examines whether an arbitrator exceeded his authority, but cannot eliminate judicial review of other grounds under Section 10(a), such as fraud and corruption (see *Swenson v. Bushman Inv. Props., Ltd., 870 F. Supp. 2d 1049, 1056 (D. Idaho 2012)* (recognizing that parties can contractually eliminate judicial review of an arbitral award); *Kim-C1, LLC v. Valent*

Biosciences Corp., 756 F. Supp. 2d 1258, 1264-67 (E.D. Cal. 2010) (holding that an arbitration provision that stated that an arbitrator's rulings "shall be binding, non-reviewable, and non-appealable" demonstrated that "both parties agreed to waive their ability to seek vacatur")).

However, at least one circuit court has suggested that the grounds for vacatur identified by the FAA "may not be waived or eliminated by contract." The US Court of Appeals for the Ninth Circuit reasoned that the FAA provision governing confirmation of an award "carries no hint of flexibility" and "does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else." (*In re Wal-Mart Wage & Hour Employment Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013)*) (internal quotations omitted).)

(c) Selection of tribunal. There shall be one arbitrator agreed to by the parties within twenty (20) days of receipt by respondent[s] of the request for arbitration or in default thereof appointed by the AAA in accordance with its Commercial Rules.

OR

There shall be three arbitrators. The parties agree that one arbitrator shall be appointed by each party within twenty (20) days of receipt by respondent[s] of the Request for Arbitration or in default thereof appointed by the AAA in accordance with its Commercial Rules, and the third presiding arbitrator shall be appointed by agreement of the two party-appointed arbitrators within fourteen (14) days of the appointment of the second arbitrator or, in default of such agreement, by the AAA.

OR

There shall be three arbitrators agreed to by the parties within thirty (30) days of receipt by respondent[s] of the request for arbitration or, in default of such agreement, by the AAA.

DRAFTING NOTE

SELECTION OF TRIBUNAL

The Commercial Rules supply procedures to appoint arbitrators if the parties have not otherwise contracted an appointment method or cannot reach an agreement (*R. 12, 13, Commercial Rules*). A three-member tribunal is generally advisable for multi-million dollar disputes. For smaller disputes, a one-member tribunal may be preferable due to its lower cost and greater efficiency.

The AAA also appoints a case manager and supervisor for arbitrations conducted under its rules.

(d) Consolidation, joinder. If more than one arbitration is commenced under this Agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator[s] selected in the first-filed proceeding shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before [that/those] arbitrator[s]. [RELATED PARTIES] are bound to each other by this arbitration clause, provided that they have signed this Agreement or [OTHER RELATED AGREEMENTS]. Each related party may be joined as an additional party to an arbitration involving other parties under this Agreement or [OTHER RELATED AGREEMENTS].

DRAFTING NOTE

CONSOLIDATION AND JOINDER

If there are more than two parties to the agreement, the arbitration provisions should address the possible joinder of claims, in addition to any provisions permitting or prohibiting class arbitration (see above *Drafting Note, Governing Rules: Class Arbitration*). This clause provides for the consolidation of two or more separate arbitrations and the joinder of a third party, which is particularly useful if the agreement is linked to other agreements between the same, related or different parties.

(e) Seat of arbitration, languages. The seat or place of arbitration shall be [CITY, COUNTRY]. The arbitration shall be conducted and the award shall be rendered in the [LANGUAGE(s)] language[s].

DRAFTING NOTE

SEAT OF ARBITRATION AND LANGUAGES

The parties should choose a neutral or otherwise suitable venue that recognizes arbitration as a valid dispute resolution mechanism, such as jurisdictions that follow the UNCITRAL Model Law on International Commercial Arbitration. The AAA may choose the seat of the arbitration if the parties cannot reach agreement or failed to specify a location in the arbitration provisions (*R. 11(a), (c), Commercial Rules*).

When choosing the seat of the arbitration, parties should be aware of several differences between an arbitration conducted in the US and those conducted in other well-known international arbitration venues. The procedural law of the seat of the arbitration typically applies to issues such as court intervention and questions of arbitrability. Additionally, the law of the seat establishes the nationality of the award, and therefore the parties should choose a country that is a signatory to the New York Convention for enforcement purposes.

The arbitration agreement should specify the language of the arbitration. This clause also may address the selection and costs associated with a translator. Under the Commercial Rules, the party that desires and arranges for the translator assumes the costs (see *R. 29, Commercial Rules*).

(f) Confidentiality. Except as may be required by law, neither a party nor the arbitrator[s] may disclose the existence, content or results of any arbitration without the prior written consent of both parties, unless to protect or pursue a legal right.

DRAFTING NOTE

CONFIDENTIALITY

Arbitration often is assumed to be automatically confidential. However, the FAA and most state arbitration statutes do not address confidentiality. Further, many arbitration rules, including the AAA and ICDR rules, do not prescribe confidentiality duties on the parties themselves but instead

offer procedures for the parties to protect confidential materials (see, for example, *R. 23(a), Commercial Rules* (arbitrator shall have the authority to issue orders governing "any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing"); *Art. 37(2), ICDR International Arbitration Rules (ICDR Rules)* ("Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.")).

Therefore, parties should expressly provide that the arbitration is confidential in their arbitration agreement, even if that information ultimately is disclosable by law or in litigation related to the arbitration.

(g) Remedies. The arbitrator[s] will have no authority to award [[punitive damages] [,/or/.] [consequential damages] [,/or/.] [liquidated damages] [,/or/.] [compensatory damages exceeding $[LIMIT OF COMPENSATORY DAMAGES]]].

DRAFTING NOTE

REMEDIES

The Commercial Rules permit arbitrators to grant any remedy or relief that they consider "just and equitable and within the scope of the agreement," unless the parties agree otherwise. This can include monetary damages and injunctive relief, including specific performance. (See *R. 47(a), Commercial Rules*.)

The Commercial Rules empower the tribunal to issue interim relief (*R. 37, Commercial Rules*), and provide for the appointment of a single emergency arbitrator who may grant interim relief (see *R. 38, Commercial Rules*).

Search Interim, Provisional and Conservatory Measures in US Arbitration for more on interim relief in arbitration.

Parties may consider specifying the powers of the tribunal to award compensatory damages (excluding punitive damages) and permanent injunctive relief. Depending on the applicable law, arbitrators may award punitive damages in arbitrations in the US governed by the FAA, unless the parties agree otherwise.

Search Punitive Damages in US Arbitration for more on punitive damages.

1.2 Arbitration of existing dispute.

(a) Scope, governing rules. We, the undersigned parties, hereby agree to submit to arbitration administered by the AAA under its Commercial Rules the following controversy: [BRIEF DESCRIPTION OF DISPUTE]. We further agree that the above controversy will be submitted to [one/three] arbitrator[s].

(b) Authority of tribunal, judicial review. We further agree that we will faithfully observe this Agreement and the Commercial Rules, that we will abide by and perform any award rendered by the arbitrator[s], and that a judgment of any court having jurisdiction may be entered upon the award.

DRAFTING NOTE

ARBITRATION OF EXISTING DISPUTE

This clause may be used where the underlying contract does not provide for arbitration, but the parties subsequently agree to submit an existing dispute under the contract to arbitration.

Parties submitting an existing dispute to arbitration also may apply any of the other clauses described above. However, because the parties may have a better sense of their respective arbitration needs after a dispute arises, they may assess these clauses differently.

ICDR CLAUSE

1.1 Arbitration. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with the International Arbitration Rules. [The number of arbitrators shall be [one/three].] [The place of arbitration shall be [CITY, COUNTRY].] [The arbitration shall be held, and the award rendered, in the [LANGUAGE(S)] language[s].]

DRAFTING NOTE

ICDR ARBITRATION

The ICDR Rules apply where the parties have provided for arbitration of an international dispute by the AAA or the ICDR, but have not specified whether the Commercial Rules or the ICDR Rules apply.

Where the ICDR Rules apply, the arbitration is subject to the version of the ICDR Rules in effect when the arbitration is commenced (*Art. 1(1), ICDR Rules*).

Selecting the Arbitral Tribunal

The ICDR appoints arbitrators where the parties have not provided otherwise or cannot reach an agreement (*Art. 12(3), (6), ICDR Rules*). Where there are two or more claimants or respondents, the ICDR appoints all of the arbitrators unless the parties agree otherwise (*Art. 12(5), ICDR Rules*).

The ICDR also assigns a case manager to each arbitration proceeding.

Designating the Arbitral Seat

If the parties have not agreed on the seat of the arbitration by a date set by the ICDR, the ICDR may initially determine the seat. Within 45 days of the tribunal's selection, it must determine finally the seat. (See *Art. 17(1), ICDR Rules.*)

Search ICDR Arbitration: A Step-by-Step Guide for more on arbitrations under the ICDR Rules.

Search ICDR Arbitration Flowchart for information on all the stages of an arbitration under the ICDR Rules.

The views expressed in this article are those of the authors and not necessarily those of Skadden, Arps, Slate, Meagher & Flom LLP or its clients.

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International Commercial Arbitration Clause

This excerpt of a Standard Clause on our website can be used when drafting an arbitration clause for many types of international commercial agreements. This Standard Clause has integrated notes with important explanations and drafting tips. For the complete, online version of this resource, visit practicallaw.com.

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An arbitration clause must include:

- The disputes the clause covers, commonly referred to as the scope of the arbitration agreement.
- An unambiguous statement that all of the disputes covered under the arbitration agreement are to be resolved only through arbitration.
- An unequivocal endorsement of arbitration to resolve the defined disputes in a binding and final manner.

Without all of these elements, an arbitration clause may be unenforceable.

In addition, an arbitration clause should indicate:

- The number of arbitrators and the method for their appointment.
- The place of arbitration or arbitral seat.
- The language of the arbitration, if the parties do not share the same language.

Although the absence of these elements may not render the clause unenforceable, it may delay the commencement or continuation of an arbitration while the parties argue over the appointment of arbitrators, the arbitral seat or the language of the arbitration.

Beyond these elements, arbitration allows the parties to select other features when designing their dispute resolution process to best suit their needs.

Search Drafting International Arbitration Agreements for more on issues that counsel should consider when finalizing an arbitration agreement.

SELECTED PROVISIONS AND DRAFTING NOTES

1.1 Arbitration.

(a) Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof (**"Dispute"**), shall be submitted to mandatory, final and binding arbitration before [PREFERRED ARBITRAL INSTITUTION], in accordance with [RULES OF PREFERRED ARBITRAL INSTITUTION] in effect at the time of filing of the demand for arbitration, with the arbitration administered by [PREFERRED ARBITRAL INSTITUTION], subject to the provisions of this Section 1.1, pursuant to the United States Federal Arbitration Act, 9 U.S.C., Section 1, *et seq*.

DRAFTING NOTE

SCOPE AND SELECTION OF THE INSTITUTION

Mandatory and Exclusive Nature of Arbitration

The arbitration clause must specify that arbitration is the exclusive dispute resolution mechanism between the parties. It is imperative that the clause use the word "shall," instead of the word "may." For example, "[a]ny dispute . . . shall be determined by arbitration."

Occasionally, however, one of the parties may want to reserve the option to choose between arbitration and litigation. Clauses that include this option are referred to as sole option or asymmetrical arbitration clauses.

Scope

The arbitration clause should clearly delineate the disputes that fall within its scope. The scope of the clause should be as broad as possible, allowing all potential disputes between the parties relating to the agreement to be resolved only through arbitration. Otherwise, a party may argue that a particular claim lies outside of the arbitration agreement and should be brought in court, thereby making parallel

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proceedings possible. (See *IBA: Guidelines for Drafting Arbitration Clauses* (IBA Drafting Guidelines).)

To cover all potential claims relating to the agreement, including not only contractual, but also potential tort and statutory claims, the language in Section 1.1(a) may be used, which is commonly referred to as a broad arbitration clause.

AD HOC VERSUS ADMINISTERED ARBITRATION

Arbitration administered by an arbitral institution is often preferable to ad hoc arbitration because it usually results in a more predictable procedural process. The benefits of administered arbitration include that the arbitral institution:

- Offers administrative services, such as:
  - confirming the appointment of arbitrators nominated by the parties; and
  - appointing arbitrators when the parties cannot agree.
- Fixes and collects arbitrators' fees.
- Considers challenges to the appointment of an arbitrator.

With an institution standing behind the arbitration, one party may avoid difficulties if the other party fails to comply with the arbitration agreement.

Ad hoc Arbitration

In an ad hoc arbitration, there is no arbitral institution in charge of administering the proceeding from beginning to end. Therefore, the parties need not pay administrative fees. However, in large commercial disputes, administrative fees are relatively lower than attorneys' and experts' fees and therefore should not determine whether the parties agree to administered arbitration.

Administered Arbitration

If the parties opt for institutional or administered arbitration, the arbitration agreement should make clear that the parties are choosing an institution to act as the administrator, thereby preventing a party from later arguing that the arbitration should be non-administered. Traditionally, courts have interpreted an arbitration clause stating that an arbitration will be held "in accordance with" an arbitral institution's rules to mean by inference that the designated institution will administer the arbitration (see *York Research Corp. v. Landgarten, 927 F.2d 119, 121-23 (2d Cir. 1991)*; *St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp., 111 F.3d 124 (table), 1997 WL 187332, at *1 (2d Cir. 1997)*; *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's, 888 N.Y.S.2d 458, 459 (1st Dep't 2009), aff'd, 14 N.Y.3d 850, cert. den'd 131 S. Ct. 463 (2010)*).

However, the First Department of the New York Supreme Court Appellate Division held that an arbitration clause including the phrase "a decision of the matter so submitted shall be rendered promptly in accordance with the commercial rules of the American Arbitration Association (AAA) . . ." was only "a choice of law clause" and did not reflect an agreement that the arbitration be administered by the AAA (*Nachmani v. By Design, LLC, 901 N.Y.S. 2d 838, 839 (1st Dep't 2010)*). The *Nachmani* decision therefore counsels in favor of an arbitration clause expressly stating that the arbitral institution chosen by the parties will administer the arbitration.

The clause should also specify that the arbitral rules of the chosen institution will govern the arbitration, even though many institutional rules require arbitrations administered by that institution to proceed under that institution's rules. Certain institutions have more than one set of rules, however, and counsel should expressly select the appropriate body of rules.

Search Standard Arbitration Clauses for the AAA, ICDR, ICC and UNCITRAL and Standard Recommended Arbitration Clauses for sample arbitration clauses recommended by several arbitral institutions.

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(ii) The language of the arbitration shall be [LANGUAGE]. The place of arbitration shall be [[CITY], [COUNTRY]].

DRAFTING NOTE

THE PLACE OF ARBITRATION

The place or seat of the arbitration should be a venue that recognizes arbitration as a valid dispute resolution mechanism and is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention) (*21 U.S.T. 2517, 330 U.N.T.S. 3*) (enabling legislation codified at *9 U.S.C. § 201*). There are currently more than 140 parties to the New York Convention.

The New York Convention has two main functions:

- First, it provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration" (*New York Convention, Art. II(1)*).
- Second, "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon" save for limited circumstances where recognition and enforcement may be refused (*New York Convention, Arts. III and V*).

The chosen place of arbitration should be known to support, and not unduly interfere with, arbitration. For example, the parties should ensure that the courts at the place of arbitration allow for judicial injunctive relief in aid of arbitration to provide for the enforcement of the arbitration agreement or otherwise award interim relief.

Unless the parties agree otherwise, the law of the seat is also the governing arbitration law, also known as the procedural law. The governing law of the underlying agreement, usually set out in a section of the agreement separate from the arbitration clause, is generally understood as the substantive law of the agreement governing the rights and obligations of the parties, but not the procedural law of the arbitration. The parties should ensure that the choice of law clause does not also contain forum selection language that contradicts the arbitration agreement, thereby jeopardizing its enforcement. Additionally, an agreement should not contain two or more conflicting arbitration clauses.

The law of the seat also establishes the nationality of the award. The parties or the tribunal may choose to conduct hearings in another location, but this will not change the designated seat for legal purposes.

Usually a party seeking to set aside an award should do so in the seat (that is, the place where the award was issued).

(iii) [. . .]

(iv) By agreeing to arbitration, the Parties do not intend to deprive any court of its jurisdiction to issue a pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings and the enforcement of any award. Without prejudice to such provisional remedies as may be available under the jurisdiction of a court, the Tribunal shall have full authority to grant provisional remedies and to direct the Parties to request that any court modify or vacate any temporary or preliminary relief issued by such court, and to award damages for the failure of any Party to respect the arbitral tribunal's orders to that effect. In any such judicial action: (a) each of the Parties irrevocably and unconditionally consents to the [exclusive] jurisdiction and venue of the federal or state courts located in [[CITY], [COUNTRY]] (the **"[COUNTRY] Courts"**) for the purpose of any pre-arbitral injunction, pre-arbitral attachment, or other order in aid of arbitration proceedings, and to the non-exclusive jurisdiction of such courts for the enforcement

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of any judgment on any award; (b) each of the Parties irrevocably waives, to the fullest extent they may effectively do so, any objection, including any objection to the laying of venue or based on the grounds of *forum non conveniens* or any right of objection to jurisdiction on account of its place of incorporation or domicile, which it may now or hereafter have to the bringing of any such action or proceeding in any [COUNTRY] Courts; and (c) each of the Parties irrevocably consents to service of process by first-class certified mail, return receipt requested, postage prepaid.

DRAFTING NOTE

JUDICIAL INJUNCTIVE RELIEF IN AID OF ARBITRATION

Authority to Grant Injunctive Relief

The rules of most arbitral institutions vest in the arbitral tribunal the power to issue injunctive relief. Nevertheless, the parties should make clear in their arbitration clause that the arbitral tribunal has this authority. The parties also should consider adding a provision allowing a party to seek injunctive relief in the courts to aid in arbitration proceedings.

Injunctive Relief Before Constitution of a Tribunal

Ensuring that a party may avail itself of judicial relief in aid of arbitration is important because it may wish to seek this type of relief before the constitution of the tribunal. For example, Company A commences arbitration against Company B according to their arbitration agreement. Before the constitution of the tribunal, Company B attempts to dilute its assets and divert them beyond the reach of Company A, the tribunal and the courts in the place of arbitration. To prevent Company B from doing this, Company A may need to seek court intervention.

For this reason, arbitration clauses often include a provision allowing a party to seek injunctive relief in aid of arbitration. Insofar as judicial relief in the place of arbitration is concerned, this provision may be unnecessary because the applicable statute or case law may provide for judicial assistance in aid of arbitration. Nonetheless, it is useful to clarify the parties' intent to be bound by interim judicial relief and, as appropriate, permit judicial action in aid of arbitration in a place other than the seat of the arbitration.

Emergency Arbitrator

Several arbitral institutions have rules providing for an emergency arbitrator to be appointed specifically to address requests for interim relief pending the constitution of the tribunal. These emergency procedures are welcome, but they may not effectively address the needs of a party facing a recalcitrant opponent who refuses to recognize the legitimacy of the arbitration process. In such cases, judicial relief may be more effective.

The proposed language of the first two sentences in the sample subclause makes clear that the designated courts and the arbitral tribunal both have the power to issue injunctive relief in aid of arbitration.

Designating an Exclusive Judicial Forum That May Grant Injunctive Relief in Aid of Arbitration

The advantages of designating an exclusive jurisdiction for the granting of injunctive relief, which is normally the jurisdiction where the arbitration is seated, are that:

- The parties know in advance where any court proceedings may be brought.
- It reduces the risk of a party seeking to undermine the arbitration by bringing judicial proceedings in a foreign state (for example, its state of residence, where the party may perceive it will receive a more favorable decision or delay the arbitration).

The disadvantage is that a party limits its ability to seek judicial injunctive relief to a single forum, which may reduce the effectiveness of the relief if the chosen forum is not the place of residence of the party against whom the relief is sought. Therefore, where a party seeks relief requiring enforcement in another jurisdiction (for example, where it needs to enjoin the

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opposing party from selling assets located in a jurisdiction other than the selected forum), that type of relief may be foreclosed by the exclusive forum selection clause.

Even if the parties choose an exclusive forum in which to seek judicial injunctive relief, they should not provide that any venue has exclusive jurisdiction over actions brought to enforce a judgment on any award. A party must be free to enforce an award anywhere the opposing party may have assets.

Search Interim, Provisional and Conservatory Measures in International Arbitration for more on the range of interim measures available in the context of international arbitration.

(v) – (vi) [. . .]

(vii) [If a claim or Dispute arises under this Agreement, any Party [shall/may] request for the [TITLES OF COMPANY OFFICERS] to meet within [NUMBER] days at a mutually agreed time and place to discuss and negotiate the Dispute. The meeting may be held via telephone conference.

If the claim or Dispute has not been resolved by negotiation within [NUMBER] days after the scheduled meeting provided for above, then the [TITLES OF COMPANY OFFICERS] [shall/may] refer the matter to the [TITLES OF SENIOR COMPANY OFFICERS] of each Party who shall have authority to settle the Dispute (the **"Senior Representatives"**). The Senior Representatives will meet within [NUMBER] days after the end of the [NUMBER]-day period referred to above at a mutually agreeable time and place. The meeting may be held via telephone conference. In the event that the Senior Representatives are unable to resolve the claim or Dispute by negotiation within [NUMBER] days after their scheduled meeting, then any Party shall have the right to submit the Dispute to arbitration in accordance with the following arbitration clause. A party may submit the dispute to arbitration if any party fails to respond to a request to meet.]

DRAFTING NOTE

SETTLEMENT NEGOTIATIONS AS A PRECONDITION TO ARBITRATION

The parties may wish to provide for the option of negotiations before commencement of an arbitration. Counsel may consider the optional language above for pre-arbitration negotiations, which may be mandatory or permissive.

The arbitration clause should clearly state whether pre-arbitration negotiations are mandatory. If they are, the clause should set out clear time limits and either party should be entitled to commence an arbitration when they expire. This is necessary to avoid delays and disputes about whether:

- The parties have complied with a negotiation provision.
- A party may commence arbitration, and if so, when.

(See *IBA Drafting Guidelines, para. 87.*)

(viii) – (xi) [. . .]

For more on drafting clauses concerning the procedure for appointing arbitrators, providing for interim and provisional relief, and the payment of costs, among others, see the complete, online version of this resource. Search International Commercial Arbitration Clause.

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PEMEX and US Enforcement of Foreign Arbitration Awards Nullified in Their 'Home' Courts

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One of the benefits of using arbitration to resolve international disputes is the availability of worldwide mechanisms to enforce an arbitral award. For example, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention) state that a "winning" party may take an award rendered in a signatory country and enforce it in the courts of any other signatory country where the losing party's assets are located. Moreover, these treaties provide only very narrow grounds upon which a court may refuse enforcement of a foreign award. Such grounds include violation of fundamental due process, the absence of an arbitration agreement or a breach of international public policy.

The New York Convention also empowers a court to decline enforcement of an award that had been "set aside ... by a competent authority of the country in which, or under the law of which, that award was made." The Panama Convention has a similar provision. A "set aside" sometimes occurs where the "losing" party resided in the country where the award was made and/or was affiliated with that country's government and persuaded its own local courts to annul the award, leading to claims that it used its "home court advantage."

Historically, the attitude of U.S. courts toward foreign set-aside decisions has varied. Several courts have taken the view that, where an award was annulled in the place where arbitration occurred, the award can no longer be enforced in the United States. A few U.S. decisions have taken a different view. In 2016, in *COMMISA v. PEMEX*, the U.S. Court of Appeals for the Second Circuit held that, under the right circumstances, U.S. courts may enforce international arbitration awards even when foreign jurisdictions annul them.

Enforcement in US Courts

PEMEX arose from a dispute between private enterprise COMMISA, a Mexican subsidiary of the Texas-based corporation KBR Inc., and state-owned Mexican petroleum company PEMEX concerning two contracts to build oil platforms in the Gulf of Mexico. Those contracts provided for arbitration of disputes in Mexico. In 2009, an arbitral tribunal awarded COMMISA over $350 million in damages for breach of the construction contracts. In 2011, however, a Mexican court set aside the award, on the grounds that Mexican administrative law did not permit arbitration of claims against a state instrumentality.

Undeterred, COMMISA sought enforcement of the award in U.S. courts. In 2013, a New York federal judge held that the award should be enforced because the Mexican court judgment had offended "basic notions of justice" by retroactively applying administrative laws in such a manner that rendered the case nonarbitrable. The Second Circuit affirmed the lower court's decision on August 2, 2016.

The Second Circuit's ruling is in sharp contrast with previous rulings on the issue, including in *TermoRio S.A. E.S.P. v. Electranta S.P.* (D.C. Cir. 2007), in which the U.S. Court of Appeals for the District of Columbia Circuit held that, absent "extraordinary circumstances," awards that were set aside by the courts of the country in which they were made should not be enforced in the United States. That case involved annulment by the Colombian courts of an international arbitration award rendered in that country.

Several recent U.S. decisions have followed the *TermoRio* approach. In *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Rep.* (S.D.N.Y. 2014), a New York

PEMEX and US Enforcement of Foreign Arbitration Awards Nullified in Their 'Home' Courts

federal court denied enforcement of an arbitration award rendered in Kuala Lumpur that was subsequently set aside by Malaysian courts. And in *Getma Int'l v. Rep. of Guinea* (June 9, 2016), the U.S. District Court for the District of Columbia denied enforcement of an award rendered by a regional West African arbitral tribunal that had been set aside by Ivory Coast courts on the grounds that the arbitrators allegedly were paid above ordinary scale.

In *PEMEX*, the Second Circuit held that under the Panama Convention's enforcement framework, a U.S. court "*must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses [in Article V of the Convention]; if one of the defenses is established, the district court *may* choose to refuse recognition of the award" (emphasis in original). Here, one of those defenses was established, *prima facie*, because the award had been set aside in the courts of the place in which it was made.

Although the Panama Convention provided "discretion" as to whether to give effect to the Mexican court's ruling, the Second Circuit held that this discretion "is constrained by the prudential concern of international comity," which treats the judgment of a foreign court as conclusive "*unless* ... the enforcement of the foreign judgment would offend the public policy of the state in which enforcement is sought — which requires the US court to analyze whether the foreign set-aside decision violated fundamental notions of what is decent and what is just" (citation and internal quotations omitted; emphasis in original).

The Second Circuit held that the Mexican court's decision in setting aside the award violated these principles. In particular, it found that: (1) the Mexican court had allowed an "eleventh hour" sovereign immunity defense to succeed, even though PEMEX had not timely raised this defense during the arbitration; this "shattered" COMMISA's "investment-backed expectation in contracting" and "impair[ed]" a "core" precept of contract law; (2) the Mexican court's decision allowed Mexico's statutes to be enforced on a "retroactive" basis so as to shield PEMEX from arbitration; (3) the set-aside decision deprived COMMISA of any effective forum for seeking relief; and (4) the net effect of the decision was to expropriate assets, without compensation. Thus, the lower court's decision affirming the award, and entering judgment against PEMEX, was affirmed.

In reaching its conclusion, the Second Circuit panel wrote that a court should "act with trepidation and reluctance in enforcing an award that has been declared a nullity by the courts having jurisdiction over the forum in which the award was rendered." However, it concluded that the *PEMEX* case was not one of the U.S. courts "second-guess[ing]" a foreign judicial decision. Rather, in this "rare" case, enforcement of the foreign award was necessary to uphold "public confidence in laws" and to prevent the diminishment of "personal rights and liberty."

PEMEX, having failed to obtain *en banc* review of the Second Circuit's decision, will likely seek to appeal the matter to the U.S. Supreme Court. Regardless of whether the Court weighs in on the issue, *PEMEX* is not likely to be the last case to deal with awards that are vacated in the losing party's "home" court — and the U.S. courts are not the only courts to have addressed this issue. For example, in 2016, the French courts held that a large arbitration award against Russia (brought by the former shareholders of Yukos) may be enforced, even though it was annulled by a first-instance judge in the Netherlands, where the arbitration occurred.

These cases thus serve as a timely reminder not only of the importance of choosing an appropriate arbitration seat but also of the complex enforcement issues that may arise once an award is rendered. They also show that, although the U.S. courts generally will respect the decisions of foreign courts (such as those in Mexico), that deference is far from absolute, and foreign judicial decisions will not be enforced where they violate basic U.S. conceptions of fairness and due process.

Challenging Arbitrators for Alleged 'Conflict of Interest' in US-Based International Arbitrations

Skadden

10/12/16

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A number of significant international arbitrations, particularly involving claims by investors against sovereign states, are venued in Washington, D.C. A September 30, 2016, decision by the U.S. District Court for the District of Columbia provides guidance on the issue of whether the losing party may seek to vacate the award on the grounds that one of the arbitrators had a conflict of interest that impaired his or her impartiality or independence.[1] In particular, the case holds (1) that where a "challenge" to an individual arbitrator occurred during the course of the arbitration, a U.S. court can take into account the "challenge decisions" issued under the rules of the relevant arbitral institution while the arbitration was pending; and (2) that in the courts of Washington, D.C. (as is the case in New York), a challenge based on "evident partiality" will only succeed where the court finds that the facts would cause a reasonable person to conclude that the arbitrator was "actually partial" — mere "impressions" or "suspicions" are not sufficient.

The case of *Republic of Argentina v. AWG Group*[2] arose after a U.K. investor — the former holder of interests in water and sewage concessions in Buenos Aires, Argentina — obtained a $20.9 million damages award in 2015 from a Washington, D.C.-based arbitral tribunal.[3] The tribunal, constituted under the U.K.-Argentina bilateral investment treaty[4] and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), held that Argentina's treatment of the water concessions had violated its treaty obligation to accord "fair and equitable" treatment to investors.[5] Argentina moved to vacate the award, and AWG cross-moved to enter the award (plus interest) as a final judgment.

The arbitration, which ran in tandem with a parallel claim by various co-investors led by the Suez group, had a 12-year history. Shortly after Suez and AWG commenced their claims in 2003, they appointed professor Gabrielle Kaufmann-Kohler, a Swiss lawyer, as their party-appointed arbitrator. Argentina appointed professor Pedro Nikken of Venezuela. A third arbitrator, professor Jeswald W. Salacuse of the United States, was then appointed as presiding arbitrator.

In 2006, the tribunal held that it had jurisdiction to hear and determine AWG's claims against Argentina.[6] In 2007, in the wake of that decision, Argentina sought to disqualify the claimant-appointed arbitrator, Ms. Kaufmann-Kohler, on several grounds. One was that Ms. Kaufmann-Kohler had recently (in 2006) been appointed a nonexecutive director at an international bank, whose investment portfolio included an interest in one of the claimants. By prior agreement,[7] both challenges were heard and rejected by the

[1] This article is a follow-up to our January 2016 *Insights* article, "Challenging the Selection of Party-Appointed Arbitrators," which discussed the same case.

[2] *Argentina v. AWG Group Ltd.*, No. 15-1057 (BAH) (D.D.C. Sept. 30, 2016) (AWG (*Confirmation Opinion*)).

[3] The tribunal awarded a total of $20,957,809 to AWG. *AWG Group v. Argentina*, Decision on Liability (UNCITRAL 2015). In a companion case, $383,581,241 was awarded to AWG's co-investors. ***See Suez,*** *Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentina*, No. ARB/03/19, Award ¶ 105 (ICSID 2015).

[4] Agreement for the Promotion and Protection of Investments Between the United Kingdom and Argentina, 1990.

[5] See *AWG* Group Ltd. v. Argentina, Decision on Liability (UNCITRAL 2010) (finding liability under U.K.-Argentina bilateral investment treaty for governmental measures that impaired investments in Buenos Aires water concessions); *see also Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A.*, No. ARB/03/19 (parallel finding of liability in favor of French investors).

[6] *AWG Group Ltd. v. Argentina*, Decision on Jurisdiction (UNCITRAL 2006).

[7] Ordinarily, challenges in an UNCITRAL arbitration are resolved by a third party (the "appointing authority") — often an arbitral institution or a neutral lawyer or judge. Because the *AWG* case operated in tandem with the *Suez* case — which was governed by the 1965 Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) — it was agreed that arbitral challenges would be determined in the manner applicable to the ICSID Convention, *i.e.*, by the two nonchallenged arbitrators.

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two other members of the tribunal, which noted, first, that Ms. Kaufmann-Kohler had been unaware of the bank's investment and, in any event, that the investment did not compromise her independence or impartiality, among other things, because the size was not material.[8]

After the award was rendered in April 2015, Argentina commenced proceedings to vacate the award before the U.S. District Court for the District of Columbia. Among the grounds advanced by Argentina was that the arbitrator's ties revealed "evident partiality," warranting *vacatur* under Section 10(a)(4) of the Federal Arbitration Act[9] (FAA).

In her opinion issued on September 30, 2016, Judge Beryl Howell first addressed the standards to be applied to the challenge. These included three threshold issues:

- What deference, if any, should be given to the 2007 reasoned decision by Ms. Kaufmann-Kohler's co-arbitrators, rejecting the challenge to her independence and impartiality. Judge Howell determined that she should accord deference to this decision, particularly given that it took into account considerations that were relevant and applicable to the "evident partiality" test under the FAA.
- What deference, if any, should be given to a 2010 arbitral decision in a related case (*Vivendi v. Argentina*) that also analyzed the alleged "conflict" and arrived at a decision that was not only very critical of Ms. Kaufmann-Kohler for failing to detect the bank's connections with Vivendi, but also implied that arbitrators were subject to a particularly stringent test in ascertaining potential "conflicts of interests."[10] In Judge Howell's view, the 2010 decision warranted no deference because, among other things, it failed to inquire into the "materiality" of the bank's investment in Vivendi.[11]
- By what standard "evident partiality" should be assessed. In this respect, Judge Howell referred to the seminal 1968 United States Supreme Court case *Commonwealth Coatings Corp v. Continental Casualty Co.*, a plurality decision of the Supreme Court, which contains no clear majority holding. In that decision, she noted, the justices articulated two competing tests for arbitrator challenges. In his concurring opinion, Justice Byron White advocated a pragmatic test, which required a party to prove that an arbitrator had a "substantial interest in a firm which has done more than trivial business with a party." In contrast, Justice Hugo Black advocated a stricter standard, which held arbitrators to a quasi-judicial standard, to "avoid even the appearance of bias."

On this issue, Judge Howell noted that the D.C. Circuit had adopted Justice White's approach and that the burden on a challenging party for vacating an arbitral award due to "evident partiality" requires the challenging party to demonstrate facts that would cause a reasonable person to conclude that an arbitrator was partial to one party to the arbitration.[12] Judge Howell considered that this test was functionally identical to the 2nd Circuit standard (applicable in New York)[13] — but was not the same as the (stricter) 9th Circuit standard, which follows Justice Black's opinion and looks to whether there is an "impression" of partiality.[14]

Applying the D.C. standard, Judge Howell held that Argentina's evidence was "wholly insufficient" and that the bank's investment was "inconsequential" because it consisted mainly of shares held on behalf of third parties. The record showed that the arbitrator had no involvement in the investment decisions of the bank and that the arbitration would have a "negligible effect" on the bank's financial fortunes.[15] Because the arbitrator had served in a nonexecutive capacity and only for a three-year period during the course of the 12-year arbitration, the court held that Argentina had not demonstrated that there was "evident partiality."[16] After rejecting the remainder of Argentina's challenges to the award, it confirmed the award, with the result that the judgment will be entered upon the full award sum (including interest).

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[8] *See Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentina*, No. ARB/03/19, Decision on Second Challenge to Gabrielle Kaufmann-Kohler, ¶¶ 36-40 (UNCITRAL/ICSID 2006). Indeed, Judge Howell's opinion noted that the investment represented a mere 0.056 percent of the bank's total portfolio. *AWG (Confirmation Opinion)* at 25.

[9] Argentina further argued that the tribunal had exceeded its powers in awarding damages.

[10] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID No. ARB/97/3, Decision on Annulment ¶ 222 (UNCITRAL/ICSID 2010) ("In the view of the ad hoc Committee, this does not only require an arbitrator becoming or having become a member of the board of a major international bank first to specifically investigate whether the bank has any connection with or interest in any of the parties in its pending arbitrations but, if such an arbitrator decides in principle to continue, also to notify the parties in each arbitration of such a connection or interest. This imposes a continuous duty of investigation.").

[11] *AWG (Confirmation Opinion)* at 27, n. 23 (D.D.C. Sept. 30, 2016).

[12] *See id.* at 22 ("Following the lead of Justice White's concurrence, the D.C. Circuit, in *Al-Harbi v. Citibank*, instructed that 'the burden on a claimant for vacation of an arbitration award due to "evident partiality" is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator.'") citing *Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C. Cir. 1996) (internal citations omitted).

[13] *Id.* at 23 ("Other circuits to have considered the issue have employed an objective test that 'evident partiality ... will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.") quoting Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d. Cir. 1984).

[14] *See New Regency Prods., Inc. v. Nippon Herald Films Inc.*, 501 F.3d 1101, 1103 (9th Cir. 2007) (vacating award because there was a "reasonable impression of partiality" even though there was no evidence the arbitrator was aware of the potential conflict. The arbitrator's failure to disclose the facts of his employment and ongoing negotiations with one of the parties was sufficient to create a reasonable impression of partiality to warrant vacatur.")

[15] *AWG (Confirmation Opinion)* at 25.

[16] *Id.* at 27.

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If affirmed, the decision provides guidance for parties whose arbitrations are seated in Washington, D.C., New York and other locations whose federal judicial circuits have adopted Justice White's test from *Commonwealth Coatings*.[17] It confirms that in the event of a post-award challenge, an arbitrator may only be found to have displayed "evident partiality" upon a showing of specific facts and not just the mere "appearance of bias." Moreover, the case provides a useful example of a U.S. court being willing to consider (and potentially give deference to) the reasoned "arbitrator challenge" decisions made during the course of the arbitration.

[17] For jurisdictions such as California, which are governed by the 9th Circuit view of *Commonwealth Coatings*, the ruling is of potentially less significance.

International litigation and arbitration associate ***Eva Y. Chan*** *assisted in the preparation of this alert.*

Discovery in Arbitration

CPR
International Institute for
Conflict Prevention & Resolution

Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration

"Thank you for the protocol. It was the most succinct and lucid compendium of options for arbitration evidence that I have seen. It will be the basis of my future discussions with counsel concerning discovery and evidence at hearings. Well done!" - Hon. William A. Dreier of Norris, McLaughlin & Marcus, P.A.

Introduction

The CPR Protocol addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly and time-consuming. The Protocol addresses these concerns by providing guidance in the form of recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules or under other *ad hoc* or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.

Recognizing that there may be different interests and expectations on the part of arbitration users and their counsel, the Protocol offers various "modes" of disclosure and presentation of witnesses, ranging from minimal to extensive, so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.

The Protocol is the product of two working groups of the Information Exchange Subcommittee chaired by Prof. Thomas J. Stipanowich of the CPR Arbitration Committee. The Working Group on the presentation of witnesses was chaired by Ben H. Sheppard, Jr. and the other Working Group, on documentary disclosure, was chaired by me. Members of those groups and members of the Arbitration Committee who have participated in the several meetings over the time since early in 2007 when this project was started are listed on the last page of this document.

Lawrence W. Newman
Chairman of the CPR International
Committee on Arbitration

Preamble

1. This Protocol has two purposes. The first is to assist the arbitrators in CPR or other tribunals (hereinafter "the arbitrators" or "the tribunal") in carrying out their responsibilities under Rule 11 of the CPR Rules by setting out general principles for dealing with requests for the disclosure of documents and electronic information[1] and for establishing procedures for the testimony of witnesses. The second purpose is to afford to the parties to an arbitration agreement the opportunity to adopt, before or after a dispute arises, certain modes of dealing with the disclosure of documents and the presentation of witnesses, as they may select from Schedules 1, 2 and 3.

2. The tribunal is encouraged to direct the attention of the parties to this Protocol at the outset of the arbitration and to draw upon it in organizing and managing the proceeding.

3. References to CPR Rules are to the CPR Non-Administered Arbitration Rules effective November 1, 2007. However, arbitrators are encouraged to draw upon this Protocol in organizing and managing arbitrations under any of the CPR arbitration rules or under the rules of any other institution.

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[1] As used herein, the term "documents" is intended to refer to all types of stored or recorded information, whether in the form of physical documents or not, including electronic information.

Section 1. DISCLOSURE OF DOCUMENTS

General Considerations

(a) Philosophy Underlying Document Disclosure

Whether or not the parties adopt any of the modes of disclosure as provided herein, parties whose arbitrations are conducted under the CPR Rules should understand that CPR arbitrators are expected to conduct proceedings before them in accordance with the general principle that arbitration be expeditious and cost-effective as well as fundamentally fair. Consistent with this philosophy, it is expected that the parties will ensure that their counsel appreciate that arbitration is not the place for an approach of "leave no stone unturned," and that zealous advocacy in arbitration must be tempered by an appreciation for the need for speed and efficiency. Since requests for information based on possible relevance are generally incompatible with these goals, disclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position. CPR arbitrators should supervise any disclosure process actively to ensure that these goals are met.

(b) Attorney-Client Privilege and Attorney-Work-Product Protection

No documents obtained through inadvertent disclosure of documents covered by the attorney-client privilege or attorney work-product protection may be introduced in evidence and any documents so

obtained must upon request of the party holding the privilege or work product protection, be returned forthwith, unless such party expressly waives the privilege or work product protection. The arbitrators should apply the provisions of applicable law that afford the greatest protection of attorney client communications and work product documents.

(c) Party-Agreed Disclosure

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter, for certain modes of disclosure that they and the tribunal will follow. Suggested modes are set forth in Schedule 1 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [?> in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders for disclosure of documents pursuant to a time schedule and other reasonable conditions that are consistent with the parties' agreement. Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure. Disclosure of documents different from that which is provided for in the mode of disclosure selected by the parties may be ordered by the tribunal if it determines that there is a compelling need for such disclosure.

(d) Disclosure of Electronic Information

(1) General Principles

In making rulings on disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the disclosure of electronic information. It is frequently recognized that e-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

(2) Modes of Disclosure

In order to give themselves greater assurance of predictability as to the extent of disclosure of electronic information, the parties may wish to provide, in their agreement to arbitrate or separately thereafter, for certain modes of disclosure of electronic information as set out in Schedule 2, pursuant to such language as the following:

"The parties agree that disclosure of electronic information shall be implemented by the tribunal

consistently with Mode [?> in Schedule 2 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

If the parties do not select a mode of disclosure for electronic documents under Schedule 2, the mode of disclosure selected by the parties from Schedule 1 shall apply to both electronic information and non-electronic documents.

(3) Preservation of Electronic Information

In view of the high cost and burden of preserving documents, particularly in the form of electronic information, issues regarding the scope of the parties' obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference, or as soon as possible thereafter. The parties' preservation obligations should comport with the Schedule 2 mode of disclosure of electronic information selected.

(e) Tribunal Orders for the Disclosure of Documents and Information

The arbitrators should ensure that they are sufficiently informed as to the issues to be determined, the burden and costs of preserving and producing requested documents and other information, and the relative value of the requested information to the issues to be determined, so as to enable the arbitrators to make a fair decision as to the requested disclosure.

Whether or not the parties have selected one of the modes for disclosure in Schedules 1 and/or 2, the tribunal, in making rulings on the disclosure of documents and information, should bear in mind the points set forth below:

(1) Timing of Disclosure

The tribunal should establish a reasonable and expeditious timetable for disclosure. Any issues or disagreements regarding disclosure should be identified and resolved as early as possible, preferably at a scheduling conference with the parties held early in the proceeding for the purpose of discussing the scope and timing of disclosure, identifying areas of disagreement and adopting expeditious procedures for resolving any such disagreements.

(2) Burdens versus Benefits

Arbitrators should carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents or information requested. Where the costs and burdens of disclosure requested are likely to be substantial in comparison to the amount in dispute or the need for the information to aid in resolving the dispute, the tribunal should ordinarily deny such requests. If extraordinary circumstances justify production of the information, the tribunal should condition disclosure on the requesting party's paying to the requested party the reasonable costs of a disclosure.

(3) Documents for Use in Impeachment in Cross-examination

Except for the purpose of impeaching the testimony of witnesses, the tribunal should not permit a party to use in support of its case, at a hearing or otherwise, documents or electronic information unless the party has presented them as part of its case or previously disclosed them. But the tribunal should not permit a party to withhold documents or electronic information otherwise required to be disclosed on the basis that the documents will be used by it for the impeachment of another party's witnesses.

SCHEDULE 1

Modes of Disclosure

Mode A. No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.

Mode B. Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.

Mode C. Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Mode D. Pre hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.

SCHEDULE 2

Modes of Disclosure of Electronic Information

Mode A. Disclosure by each party limited to copies of electronic information to be presented in support of that party's case, in print-out or another reasonably usable form.

Mode B. (1) Disclosure, in reasonably usable form, by each party of electronic information maintained by no more than [specify number] of designated custodians. (2) Provision only of information created between the date of the signing of the agreement that is the subject of the dispute and the date of the filing of the request for arbitration. (3) Disclosure of information from primary storage facilities only; no information required to be disclosed from back up servers or back up tapes; no disclosure of information from cell phones, PDAs, voicemails, etc. (4) No disclosure of information other than reasonably accessible active data.

Mode C. Same as Mode B, but covering a larger number of custodians [specify number] and a wider time period [to be specified]. The parties may also agree to permit upon a showing of special need and relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means.

Mode D. Disclosure of electronic information regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.

Parties selecting Modes B, C, or D agree to meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.

Section 2. PRESENTATION OF WITNESSES

The CPR Non-Administered Arbitration Rules provide that the testimony of witnesses "may be presented in written and/or oral form as the Tribunal may determine is appropriate." Rule 12.2.

(a) Testimony of Witnesses in Written Form (Witness Statements)

Witness statements are detailed presentations in writing of the testimony, including references to documents that are also presented, that a witness would give if questioned before the tribunal. These statements are exchanged prior to the presentation of oral evidence at a hearing. Witnesses then appear at the hearing to be questioned concerning their written statements.

Witness statements have been found to save considerable time that would otherwise be spent in hearings before the tribunal and offer other advantages as well: They serve to eliminate surprise, narrow the issues and permit more focused questioning of the witness at the hearings. They may also eliminate the need for oral testimony from uncontroversial or distant witnesses. Witness statements also allow the arbitrators and the parties to become acquainted with material facts in advance of the hearing, and they may therefore promote settlement.

The use of witness statements is referred to in the rules of the major international arbitral institutions, in the UNCITRAL Arbitration Rules and in the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
The following are procedures that generally apply to the use of witness statements:

1. Each statement should be signed by the witness, contain an affirmation of its truth and be sufficiently detailed to constitute the entire evidence of that witness.

2. Each witness who has provided a statement must appear for examination at the evidentiary hearing by the opposing parties and the tribunal unless the parties and the tribunal agree otherwise. The tribunal may disregard the statement of any witness who fails to appear in support of it.

3. The parties may agree or the tribunal may direct that the witness statement shall serve as the direct testimony of the witness. In that event, the witness should, at a hearing before the tribunal, swear or affirm to tell the truth, confirm her/his witness statement following an opportunity to make any needed corrections to the statement and then be subject to cross-examination. However, absent party agreement, the tribunal may consider whether to permit witnesses who have submitted a statement to respond to questions from the sponsoring party before being cross-examined so long as this oral testimony is brief and does not introduce matters not contained in the written statement. This allows the witness to "warm to the seat" and permits the tribunal to hear the witness testify in her/his own words.

4. The tribunal may wish to explore with the parties alternative forms of witness statements. Although such statements are commonly submitted in narrative form, they may also be submitted in question and answer format, as they are in some administrative proceedings in the United States. Testimony submitted in

question and answer format is potentially more interesting and persuasive than a narrative text and more nearly replicates the presentation of oral testimony.

5. The tribunal should also explore with the parties whether witness statements are to be submitted simultaneously or sequentially, as well as the need for reply or rejoinder submissions.

6. A party may elect, a reasonable time prior to the hearing, not to question a witness presented by an opposing party. In such event, the tribunal should consider whether it wishes to have the witness appear before it for questioning by members of the tribunal.

(b) Testimony of Witnesses in Oral Form

In the absence of a witness statement, the testimony of a witness is presented at a hearing through questioning by counsel and the tribunal. Since the oral process permits the witness to present the evidence in her/his own words, the tribunal may benefit, especially where the credibility of a witness is important, from having the opportunity to observe the demeanor of witness in presenting his or her position in the case.

(c) Depositions

Depositions are recorded sessions at which witnesses are questioned by the parties outside the presence of the tribunal, enabling the parties to obtain information from witnesses in advance of their testifying at the hearings. Depositions should be permitted only where the testimony is expected to be material to the outcome of the case and where one or more of the following exigent circumstances apply: Witness statements are not being used, the parties agree to the taking of the deposition and/or the witness may not be available to testify, in person or by telecommunication, before the tribunal. The tribunal should impose strict limits on the number and length of any depositions allowed. Deposition transcripts may, as the tribunal determines, be used at hearings or otherwise be made part of the record before the tribunal.

(d) Determining the Appropriate Forms of Witness Evidence

The tribunal in its agenda for the initial pre-hearing conference should call to the attention of the parties the options for the presentation of witness testimony and should explore those options with the parties at the conference. The “Modes of Presenting Witnesses” set forth on Schedule 3, to the extent not previously agreed on by the parties, may be useful for this purpose. See Section 2(h) below. Any of the “modes” or variants of them can be effective methods for the presentation of witness testimony depending upon the circumstances of the particular case. Any procedure elected should be applied consistently with the expectations of the parties and their counsel and with the cost-effective resolution of the dispute.

(e) Presentations by Party-Appointed Experts

Although the tribunal is empowered to appoint neutral experts, this authority appears to have been seldom employed. Instead, the prevailing practice is for the parties to present the evidence of experts retained by them in support of their positions.

The following procedures may be applied to the use of party-appointed experts.

1. At the initial conference with the parties, the tribunal should ascertain whether the parties intend to present the evidence of expert witnesses and, if so, establish a schedule for the submission of expert reports.

2. Each expert witness should submit a signed report, setting forth the facts considered and conclusions reached in sufficient detail to serve as the entire evidence of the expert, together with a curriculum vitae or other biographical information describing the qualifications and experience of the witness.

3. The tribunal should discuss with the parties whether expert reports will be submitted simultaneously or sequentially, and whether there will be a need for reply or rejoinder submissions from the experts.

4 Each expert who has submitted a report must appear at a hearing before the tribunal unless the parties agree otherwise and the tribunal accepts this agreement. The tribunal may disregard the report of an expert who fails to appear at a hearing.

5. The tribunal may wish to consider directing that, within a specified period of time after the exchange of expert reports, opposing experts on the same issues meet and confer, without the parties or their counsel and prior to the submission of any reply expert reports, for the purpose of narrowing the scope of disputed issues among the experts.

6. The sequencing of expert testimony may be important. In order to avoid having experts on the same issue testify days or weeks apart, the tribunal may wish to arrange for such witnesses to testify sufficiently close to one another in time to enable the tribunal most effectively to consider the subjects of their testimony.

(f) Hearings

As a supplement to the applicable arbitration rules, the following procedures may also apply to the conduct of hearings:

1. The tribunal should require every witness to affirm, in a manner determined appropriate by the tribunal, that she or he is telling the truth. If the witness has submitted a witness statement or expert report, he or she should confirm the statement or report and note any corrections to it. In the tribunal's discretion the witness whose testimony has been presented in writing may thereafter be briefly questioned by the party presenting the witness, provided that no new testimony other than corrections is presented in this way.

2. The tribunal may consider whether to direct that expert or fact witnesses appear before them at the same time for questioning, in a process known as "witness conferencing." A typical application is for expert witnesses to provide their written or oral testimony separately and then appear jointly for further questioning by the tribunal and counsel.

(g) Cross examination of Witnesses

Any witness whose testimony is received by the tribunal must be made available for examination by other parties and the tribunal. The form and length of cross examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged.

(h) Party-Agreed Procedures for the Presentation of Witnesses

The parties to an arbitration may provide, in their agreement to arbitrate, or separately thereafter (as in an initial conference with the tribunal – see paragraph (d) above), for certain modes of witness presentation that they and the tribunal will follow. Suggested modes are set forth in Schedule 3 hereto and may be agreed to by the parties in such language as the following:

"The parties agree that the presentation of witnesses shall be implemented by the tribunal consistently with Mode [?> concerning witness presentation selected from Schedule 3 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

If the parties have agreed on the applicability of any one of such modes, the tribunal shall issue orders and shall conduct the proceeding consistently with the parties' agreement. Any agreed mode of witness presentation shall be binding on the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of witness presentation. The tribunal may direct the use of procedures apart from the mode of presentation selected by the parties if it determines that there is a compelling need for such procedure.

SCHEDULE 3

Modes of Presenting Witnesses

Mode A. Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.

Mode B. No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.

Mode C. As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.

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Attachments: Protocol on Disclosure of Documents & Presentation of Witnesses in Commercial Arbitration PDF

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Discovery in Commercial Arbitration: *How Arbitrators Think*

By Charles J. Moxley, Jr.

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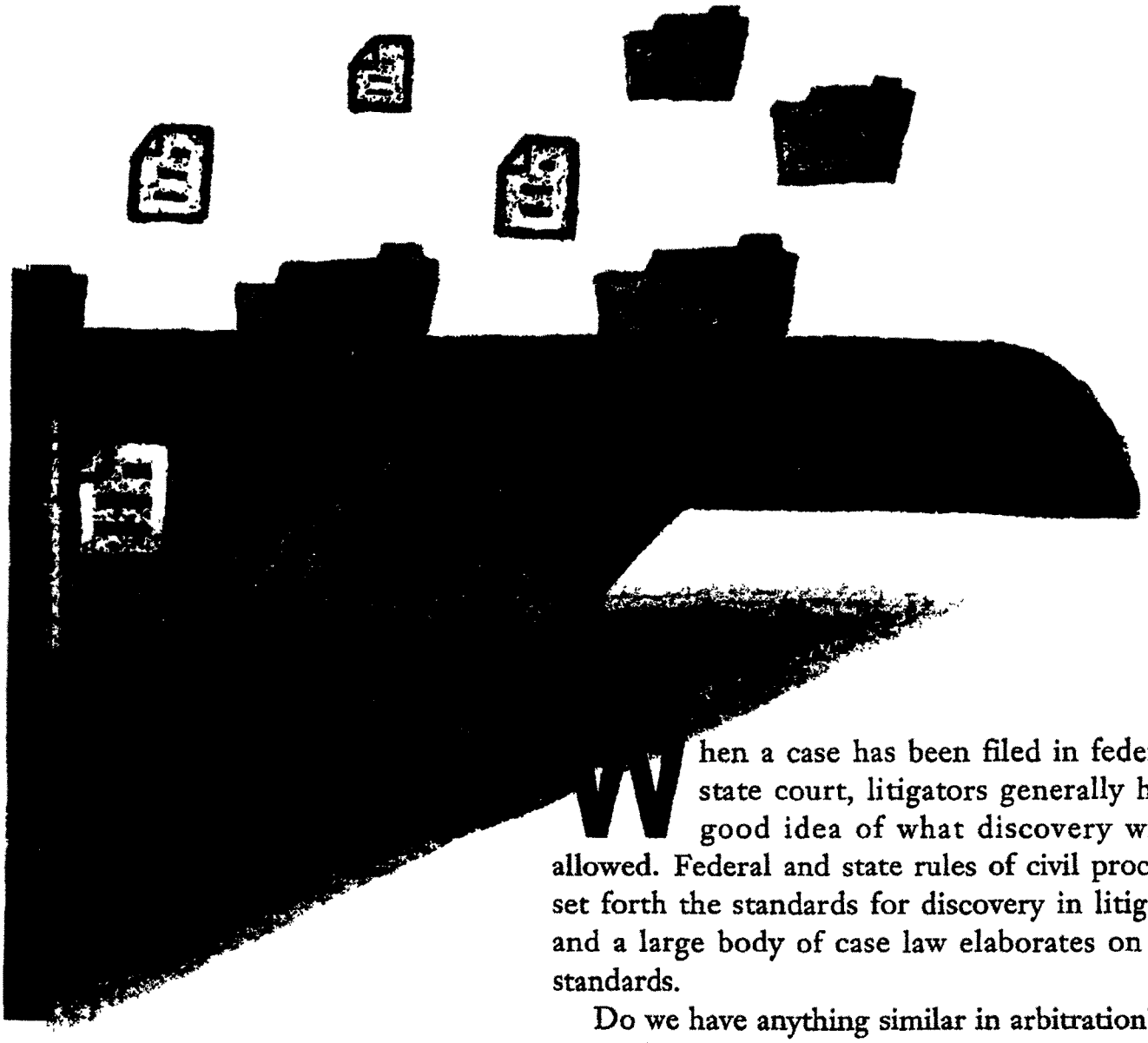
Discovery in arbitration is different from the virtually unlimited discovery process used in litigation. The reason is that the arbitrator's job is to deliver a faster and less expensive process. This article discusses how arbitrators handle discovery in arbitration and the considerations they take into account when deciding how much and what type of discovery to allow. It also discusses the approaches to discovery taken in arbitration rules and the Revised Uniform Arbitration Act.



When a case has been filed in federal or state court, litigators generally have a good idea of what discovery will be allowed. Federal and state rules of civil procedure set forth the standards for discovery in litigation, and a large body of case law elaborates on these standards.

Do we have anything similar in arbitration? Can counsel and the parties know with reasonable certainty how much discovery will be allowed in their commercial arbitration? What kind of discovery is typically permitted? Are the answers to these questions entirely within the discretion of the arbitrator? Is there a governing standard?

Given the confidentiality of arbitration, there are generally no published arbitral decisions on discovery questions in arbitration. So in this article I set forth some tentative answers to these questions in the context of domestic commercial arbitration based on my personal experience as an arbitrator in over 125 commercial cases, the varied experience of arbitrators with whom I have served. I also discuss the relevant rules of the American Arbitration Association (AAA) and other arbitration institutions, as well as the treatment of discovery in the Revised Uniform Arbitration Act (RUAA).

Rationale for Discovery in Arbitration

Arbitrators generally have three primary objectives in deciding discovery disputes in a commercial case: (1) a speedier disposition than in litigation; (2) a less expensive process than litigation; and (3) a fair opportunity for both sides to prepare and try the case. Satisfying each of these objectives depends in large measure on the amount of discovery allowed in the arbitration. To obtain a speedier and less costly disposition, discovery, which consumes the bulk of time and attorney fees in litigation, needs to be more limited than in litigation. Yet the parties must have the discovery they need for a fair hearing.

To obtain a speedier and less costly disposition, discovery needs to be more limited than in litigation. Yet the parties must have the discovery they need for a fair hearing.

As a result, the discovery that is automatic and often virtually unlimited in litigation is subject to close scrutiny in arbitration. The arbitration goals cited above cause arbitrators to require the parties to *justify* the discovery they seek. There is a bedrock amount of discovery in arbitration, particularly the reasonable disclosure of the parties' claims and defenses and the exchange of relevant documents. But beyond that, parties are generally only allowed to take depositions and serve interrogatories if they can demonstrate a real need for them. Of course, the parties' counsel may agree to more extensive discovery, although that can compromise the two main benefits of arbitration.

Discovery in Commercial Litigation

The discovery phase in a multi-million dollar commercial litigation typically takes years, not months. First counsel for the parties prepare and serve very broadly worded document discovery requests that ask to see all documents "in connection with or relating to" one subject or another. They also invariably prepare lengthy interrogatories and sometimes "requests to admit." They have to review and number their client's documents for document production purposes. Often, each side files objections to the other side's document requests, which could include claims of attorney-client privilege or attorney work product. The parties could end up in protracted motion practice fighting about these documents. Meanwhile, each side serves deposition notices on the other. It is not unusual to receive a dozen or even dozens of such notices. Attorneys for the parties commonly seek to depose everyone who may have relevant information, even if the testimony is likely to be cumulative or redundant. They don't want to leave any stone unturned.

Litigators hate surprises and they generally find it unacceptable to wait until trial to take the testimony of important witnesses who are not under their control. They typically seek to depose every witness who could possibly show up at trial, even those who are fully on the record in documents and hence whose testimony is readily subject to cross-examination.

Although depositions are scheduled for months down the road, they rarely take place as scheduled because the attorneys or the witnesses are busy that day. It is common to defer depositions multiple times. A year could go by and they still have not been taken. Finally one party may get fed up and seek an order compelling the completion of discovery. If not, the judge may see that this case is not moving forward and will take matters into his or her own hands. The process initially developed to foster fair trials by avoiding unfair surprise at trial has taken on a life of its own, one that eats up years of time and incurs huge expenses for each side, often without telling counsel much that they did not already know from the documents and their own witnesses.

When depositions are taken, the lawyer taking

them may make the session as long as possible in order to be sure to exhaust the deponent's knowledge. Sometimes, depositions result in disputes that have to go before a judge. This can occur when the deponent's counsel directs the witness not to answer or unilaterally cuts short the deposition.

Meanwhile, each side "responds" to the other's interrogatories and requests to admit, usually by giving the narrowest possible answer or no answer.

Discovery in Arbitration

This is all very different in commercial arbitration. Arbitrators usually want the hearing to be scheduled within three to eight months. It would be a rare arbitration, and a particularly large or complex one at that, in which the arbitrators would be happy with an expanded hearing schedule that exceeds eight months. Arbitrators on the panel of the American Arbitration Association (on which I serve) are trained to believe it is their job to deliver the expedited proceeding that arbitration promises and the parties bargained for.

Thus, arbitrators generally have a different perspective on discovery. They do not want the parties to engage in a fishing expedition of the kind that is typical of discovery in litigation. They want to allow just enough discovery to permit each side to prepare and try its case, but no more. Arbitrators have a strong belief that witnesses should testify only once, and that is at the hearing. So there is no need to incur the expense of earlier (and generally protracted) depositions.

If a party reasonably needs to examine a person under the control of the adversary and asks the arbitrator to order this witness to be produced, the arbitrator will usually obtain the adversary's agreement to produce the witness at the hearing. Similarly, when the exigencies of a case require the testimony of a non-party witness who reside within subpoena-range of the hearing, the arbitrator will subpoena the witness but generally only for purposes of the hearing (i.e., not for a deposition).

When non-party witnesses reside beyond subpoena range, they could still agree to testify, and when they do agree, arbitrators prefer to have them testify live at the hearing. When it is difficult getting them there in person, video-conference technology makes it possible to have them virtually present at the hearing. Testimony by telephone, which involves little expense, is also possible and frequently used where it makes sense in the context of the particular case.

This does not mean that depositions are never allowed in arbitration. That is not the case. If the parties make a convincing case that a reasonable number of depositions of limited duration seem necessary, arbitrators will generally permit them.

Despite their penchant for deposing every witness, litigators who arbitrate have learned that they have the skills to capably cross-examine the other side's witnesses without depositions. To conduct the cross, they use the information they have learned from their informal investigation of the facts of the case, documents, witness lists and expert reports exchanged before the hearing. The huge number of depositions typically taken in litigation is not as important as litigators have come to believe.

What Is Reasonable?

The amount of discovery reasonably needed to arbitrate a particular case depends on the facts and circumstances. It is reasonable to need documents specifically related to the dispute. It is also reasonable to need to know the particulars of the other side's claims, defenses, purported damages and the like. If requested, arbitrators will generally direct that such information be provided.

Arbitrators typically establish the idea at the preliminary hearing that they expect counsel to work out any discovery issues that arise. When the parties' attorneys cannot resolve these issues by themselves, arbitrators are prepared to direct them if necessary.

The Size of the Case

Parties are increasingly submitting huge commercial cases to arbitration. Cases in the tens and hundreds of millions of dollars and more are not uncommon. Some general counsel prefer to arbitrate cases of all sizes for the opportunity it gives them to pick a highly experienced arbitrator (or panel of arbitrators) with knowledge of the subject matter who can be selected with eyes open, rather than take a chance on the spin of the wheel in the court clerk's office.

Some general counsels at large corporations have stressed the importance of preserving the speed and economy in arbitration. Yet some cases have so much at stake that both parties may agree that they want the "no stone unturned" approach to discovery in arbitration. This is their right since arbitration is a process that belongs to the parties.

In large cases involving multiple issues, arbitrators will generally recognize the need for more substantial document exchanges, and possibly more than a couple of depositions and a limited number of targeted interrogatories. But they nonetheless try to keep the cases moving more expeditiously than would typically happen in court.

The Easy Case

Discovery is easiest when the parties' arbitration clause specifies the scope of discovery. Occasionally the parties provide in their arbitration clause that the federal or state rules of procedure shall apply to discovery in arbitration, resulting essentially in pseudo-litigation before a private judge. In my experience, this is relatively rare (I would say anecdotally that it occurs in fewer than 5% of cases).

Arbitrators will apply the procedures specified in the parties' arbitration agreement. However, they are not prevented from trying to "jawbone" the parties' counsel into agreeing that what they actually need is more limited discovery, not more. ("Jawboning" is the term I use for the practice many arbitrators follow of probing for consensus on pre-hearing issues before ruling on them.) Arbitrators who educate themselves about the case can engage in a meaningful dialogue with the attorneys about what discovery is reasonably necessary (as distinguished from what they have stated is needed) and then build on that foundation to create consensus on a reasonable discovery plan.

In large cases involving multiple issues, arbitrators will generally recognize the need for more discovery.

To do this effectively, arbitrators try to develop an early understanding of the case. This is one of the reasons arbitrators invite counsel to discuss the case at the preliminary conference and at interim conferences throughout the discovery period. It is in counsels' interest to project their case as fully as possible whenever the opportunity arises.

The Most Typical Case

Although the parties could include the scope of discovery in their arbitration agreement, they rarely do. Usually the arbitration clause is silent as to the scope of discovery. However, if the agreement calls for arbitration by a particular arbitration institution or provides for arbitration under specific institutional rules, the institution's rules will be incorporated by reference, including the discovery provisions. (For example, an arbitration clause may provide for AAA arbitration or arbitration under the AAA Commercial Arbitration Rules.)

Discovery is normally one of the issues on the table at the first preliminary conference, which, in most instances, is conducted via a conference call. In a commercial case, counsel for the parties usually decide on the scope of discovery before the call is scheduled and advise the arbitrator of their agreement during the course of the conference call. The attorneys commonly agree to exchange relevant documents and to depose two or three of the adversary's witnesses.

Until a dispute arises, arbitrators generally will not get involved in document production issues. The attorneys know their case and if they can agree on document discovery, great.[1]

As to depositions, arbitrators will consider whether their use is really needed. Why depose a witness who lives within subpoena-range of the hearing or a witness under the control of the adversary? Counsel may need to be reminded that arbitration is different from litigation and has economy and efficiency as two of its goals. Often counsel will respond to this by agreeing that depositions are not necessary. Should this lead to concern that they are merely being deferential to the person who will resolve the dispute? Theoretically that is possible. But as a practical matter it should not be a concern if the attorneys understand that the arbitration process is supposed to be different from litigation, the arbitration involves a dispute between parties who are familiar with the matters in contention, and the relevant documents and witnesses will be available at the hearing.

When Both Sides Want Depositions

When cajoling by the arbitrator does not work and both sides want to depose multiple witnesses, the arbitrator must step back and accept the idea that there will be more, rather than fewer, depositions in the case. But the arbitrator can continue to try to limit their number and duration.

In the unusual case where this does not work, arbitrators generally will respect counsels' agreement on the subject and allow the depositions to be taken, after warning them of the effect on the time and cost of the arbitration.

When One Side Does Not Want Depositions

What if one side wants depositions and other discovery and the other side objects? In that situation, there is a discovery dispute on which the arbitrator must rule. The arbitrator will generally decide based on what he or she thinks is fair, con-

sidering the need for an expeditious and economical process.

Some arbitrators will decide discovery disputes based on the parties' briefs. Others will hold a conference with the attorneys for both sides after the briefs are submitted, at which point the arbitrator will have a serious talk with counsel as they go through each disputed item one by one. I think this approach yields more enlightened rulings. Often, it is only necessary for the arbitrator to go through a few disputed items or types of items to establish guidelines, whereupon the attorneys work out the rest. Notwithstanding positions taken in party briefs, the attorneys tend to move towards consensus when the arbitrator suggests restraint on both sides in the service of figuring out what discovery would provide the requesting party with information it reasonably needs while protecting the objecting party's interests. When a sensible accommodation of each side's rights and interests is reached, the arbitrator will incorporate it in a ruling.

Where no consensus is reached, the arbitrator will have to go it alone, deciding the dispute based on the goals of arbitration and the interests and needs of both sides. The ruling will often bear a striking resemblance to the approaches the arbitrator suggested in the conference with the parties on the discovery dispute.

AAA Rules

Decision making by arbitrators on discovery questions is not typically based on rules. This is because most arbitration rules give wide discretion to the arbitrator to determine the scope of discovery. Attorneys rarely argue for or against discovery based on an institution's arbitration rules. Yet it is interesting to see that the "expeditious/economical/fair" mantra that arbitrators generally use to decide discovery disputes reflects principles in the arbitration rules of leading arbitration organizations.

The AAA Commercial Arbitration Rules focus on information exchanges.[2] Rule 21(a) provides that the arbitrator, "consistent with the expedited nature of arbitration," may direct "the production of documents *and other information.*" (Emphasis added) Rule 21(c) provides that the arbitrator "is authorized to resolve any disputes concerning the exchange of information." Thus, this rule places discovery issues in the discretion of the arbitrator, subject to the need for an expeditious proceeding.

The AAA Procedures for Large, Complex Commercial Disputes (which are included in the AAA Commercial Arbitration Rules) recognize the goals of having "a just, speedy and cost-effective resolution." Rule L-4(a) provides that "[a]rbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution...." These rules also recognize the discretion of arbitrators in discovery matters. Rule L-4(c) provides: "The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate." The rule contemplates that if the parties cannot agree on discovery, "the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery."[3] Interestingly, Rule L-4(c) gives the arbitrator the discretion, in the interests of an expedited process, to override even the parties' agreement as to discovery.

Rule L-4(d) also explicitly addresses the issue of depositions and interrogatories. They may be permitted "in the discretion of the arbitration(s) and upon good cause shown ...consistent with the expedited nature of arbitration" if the person to whom they are addressed has information "determined by the arbitrator to be necessary to determination of the matter."

Finally, Rule L-4(g) authorizes the arbitrator to resolve any discovery disputes.

The AAA's Employment Arbitration Rules use different language but are the same in principle. Rule 9 authorizes the arbitrator to order "discovery, by way of deposition, interrogatory, document production or otherwise" if the arbitrator "considers it necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."[4]

Other Providers and the RUAA

Rule 17 of the JAMS Arbitration Rules is comparable to the AAA Rules, except that it contemplates one deposition per side, while leaving additional depositions to the discretion of the arbitrator based on "the reasonable need" for the information, the availability of other discovery options, and the burdensomeness of the request."[5]

Rule 11 of the Rules for Non-Administered Arbitration promulgated by the International Institute for Conflict Prevention and Resolution's provides that arbitrators may permit such discovery as they deem appropriate, "taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."[6]

The RUAA's[7] discovery provisions are similar to the provider rules above. The arbitrator's authority as to discovery is in Section 17(c). It pro-

vides: "An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." This provision covers discovery depositions.

Comment 3 to Section 17 states in the first paragraph that the approach to discovery in subsection (c) "follows the majority approach" under the case law involving the Federal Arbitration Act (FAA) and the 1955 Uniform Arbitration Act, which is that "unless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery." The second paragraph notes that, although Section 17(c) allows an arbitrator to permit discovery so that the parties can obtain necessary information, "the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost."

Depositions for purposes of the hearing are addressed in Section 17(b). This section states: "In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing." This provision goes on to say that "[t]he arbitrator shall determine the conditions under which the deposition is taken."

Non-Party Witnesses

The above focuses on party discovery. Complex and largely unsettled issues arise when information is needed from non-party witnesses who are beyond subpoena-range of the site of the arbitration.[8] These issues include the extent to which, under the FAA[9] and other laws, a non-party witness may be compelled to produce documents or give testimony at a deposition or in a formal "hearing session" where he or she is located, and the related question of whether the arbitrators (or one member of a panel) may preside over the taking of this witness's testimony at that locale. These issues are beyond the scope of this article. However, it is worth noting again that non-party witnesses who are outside the jurisdiction of an arbitrator's subpoena are frequently willing to testify by teleconference or telephone conference at a time convenient to them in response to an informally transmitted subpoena, even though they could challenge the subpoena in court, or even ignore it and await enforcement proceedings. Some witnesses agree because of the potential time and expense of contesting the subpoena. Others do so out of a spirit of cooperation or respect for the arbitration process.

Conclusion

The principles for resolving discovery-related issues in arbitration are clear, sensible and workable. The vast majority of party discovery disputes in commercial cases are worked out among counsel. When counsel cannot agree, arbitrators will rule on the discovery issues by balancing the arbitration objectives of providing an expeditious and economical yet fair proceeding. Parties may provide for more expanded discovery in their arbitration agreements or they may subsequently agree to such discovery before the hearing. ■

ENDNOTES

[1] The subject of electronic discovery is beyond the scope of this article. Parties in arbitrations are often willing to limit electronic discovery in the interests of having an expeditious and economical proceeding, although there will increasingly be cases where it will be important. See, e.g., Irene C. Warshauer, "Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence," 61(4) *Disp. Res. J.* (Nov. 2006/Jan. 2007).

[2] The AAA rules are available at www.adr.org.

[3] The extent of an arbitrator's power to order sanctions against parties for discovery abuse is addressed in Philip D. O'Neill, "The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse," 60(3) *Disp. Resol. J.* (Nov. 2005/Jan. 2006); Philip D. O'Neill, "Update: Mass. Allows Arbitrators to Award $$ Sanctions to Remedy Discovery Abuse," 60(2) *Disp. Resol. J.* (May-July 2006).

Section 17(d) of the RUAA provides, that the arbitrator may "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state." The RUAA is available at www.nccusl.org.

[4] The AAA Employment Arbitration Rules are available at www.adr.org.

[5] JAMS Comprehensive Arbitration Rules and Procedures are available at www. jamsadr.com.

[6] CPR's rules are available at www.cpradr.org.

[7] See n. 5.

[8] See, e.g., Leslie Trager, "The Use of Subpoenas in Arbitration," 62(4) *Disp. Resol. J.* (Nov. 2007/Jan. 2008).

[9] 9 U.S.C. § 7.

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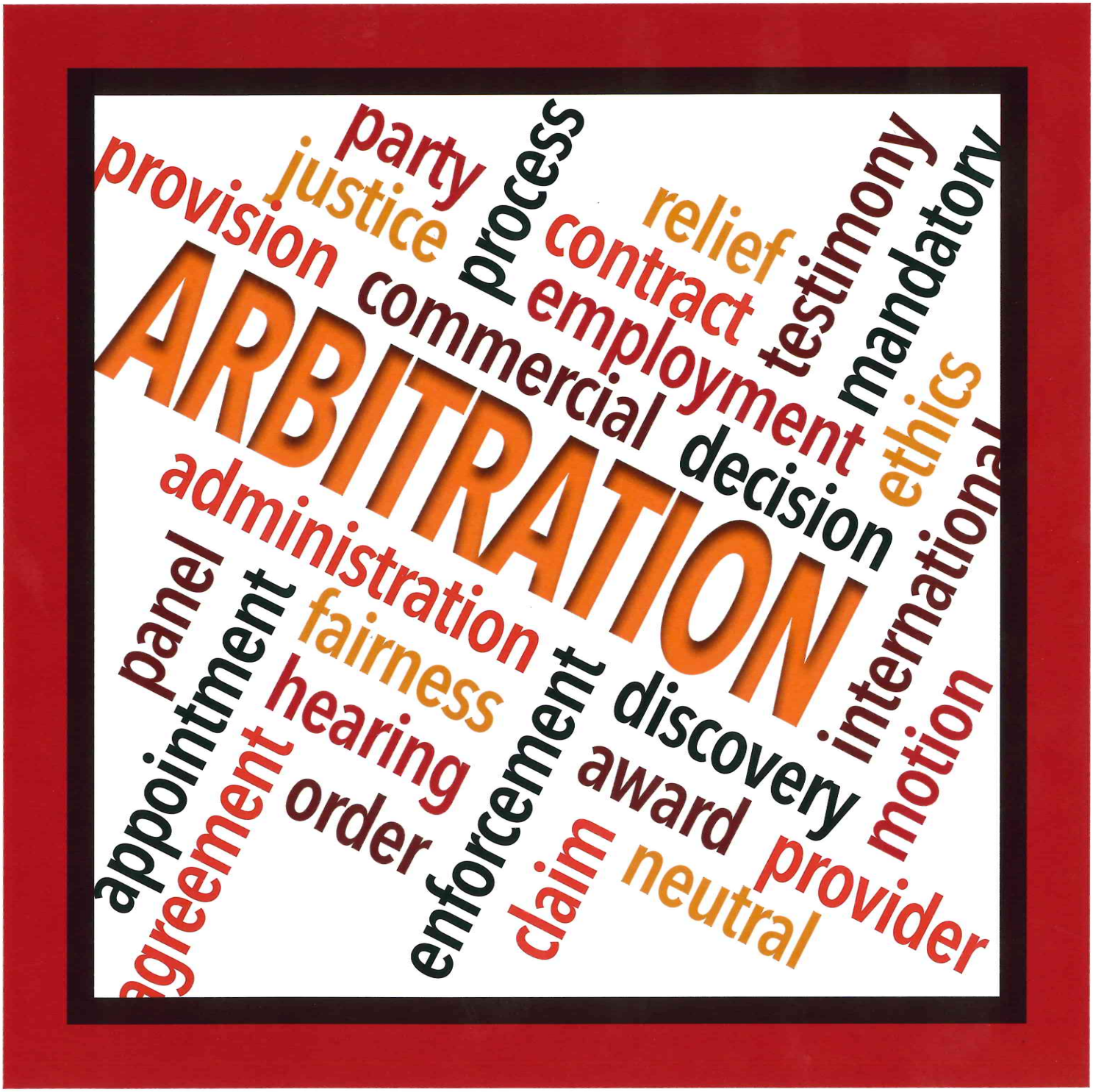

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Arbitration Discovery

Getting It Right

By John Wilkinson

When I started practicing as an arbitrator, the scope of discovery in arbitration was not an issue. Arbitrated cases were relatively small, and arbitrating parties typically were content with a swift dose of rough justice without any discovery at all. More recently, however, the size of cases has increased dramatically, to the point where arbitrations involving millions of dollars are almost commonplace.

As the amounts at stake in these cases have increased, there has been an effort to include in arbitration many of the expensive, time-consuming elements of cases litigated in court such as interrogatories, broadly worded document requests, extensive depositions, dispositive motions, and even appeals. This is understandable, since a multi-million-dollar corporate dispute clearly requires more intense preparation than has historically been available in arbitration. The problem, however, is that: (i) arbitration must still be significantly faster and more cost-effective than litigation since otherwise, arbitration will lose much of its value; and (ii) contrary to this core principle, a few arbitrators have taken expanded arbitration discovery to an extreme and have opened the floodgates by permitting oppressive, expensive, and unnecessary discovery. While these instances are relatively rare, they get more than their share of publicity. Such publicity is misleading, though, because statistics furnished by the largest arbitration providers indicate that the average time from commencement of a domestic commercial arbitration to issuance of a final award ranges from 7 to 7.3 months. By contrast, the median length of time in 2011 from the filing of a civil case in district court to the disposition of appeal by the US Circuit Courts of Appeal was 30.8 months – and in some of the busier courts, considerably longer.[1]

Statistics aside, criticism of the time and cost of commercial arbitration persists, with the result that many constructive, remedial measures have been introduced. The American Arbitration Association and other arbitration providers, for example, have adopted rules aimed at maintaining the speed and cost-effectiveness of arbitration while at the same time allowing for sufficiently broad discovery to permit a fair result in a complex case.[2] After months of exhaustive study, the New York State Bar Association issued *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations* (*NY Guidelines*).[3] And subsequent to the *NY Guidelines*, the College of Commercial Arbitrators released its *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, which address arbitration discovery issues from the varying perspectives of business users, in-house counsel, arbitration providers, outside counsel, and arbitrators.

The purpose of this brief article is to present in summary form some of the more important practices that help achieve limited, cost-effective, and sufficiently comprehensive discovery in arbitration.[4]

First Preliminary Conference

Shortly after appointment of the arbitrator[5] in a commercial dispute, the arbitrator typically convenes a conference with the parties for the purpose of planning the entire case. This conference is the single most important event in an arbitration; it is the engine that makes the process run and can be the foundation for a limited, cost-effective discovery program. Following the conference, the arbitrator typically drafts and circulates a procedural order that sets forth dates for everything that needs to be done between the conference and the hearing on the merit and establishes the dates for the actual hearing. Equally as important, the procedural order will, in most cases, set forth rules and guidelines for the cost-effective conduct of discovery.

The Occasional Problem of Comprehensive Discovery

Occasionally, both sides come to the first preliminary conference in agreement that there will be comprehensive discovery in accordance with the Federal Rules of Civil Procedure. If the parties persist with this approach, there is little the arbitrator can do, since he or she has no power other than what is conferred by agreement of the parties. In these situations, I recommend that the arbitrator make a concerted effort to dissuade the parties from following the Federal Rules – an effort I have found to be successful in a surprising number of instances. Outside counsel, for example, often want all-encompassing discovery; if the arbitrator is able to include in-house counsel (who pay the bills) in the arbitration planning process, the approach to discovery often can be significantly reduced from what outside counsel initially proposed.[6]

First Procedural Order

Assuming both sides are receptive to limiting arbitration discovery in a reasonable way, a number of measures can be included in the first procedural order to help accomplish this. Some of the more important ones are discussed below.

Scope of Document Requests

The scope of document discovery should always be discussed at the first preliminary conference. In many cases, the parties are able to devise their own reasonable standard for inclusion in the procedural order. In other cases, the parties might adopt the limited document discovery suggested in the *NY Guidelines*[7] or in the International Centre for Dispute Resolution *Guidelines for Arbitrators Concerning Exchanges of Information* (*ICDR Guidelines*).[8] (See an excerpt from the *ICDR Guidelines* on the right of this page.)

***ICDR Guidelines* on the Scope of Document Requests**

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

When the parties adopt a reasonable standard for document production at the start of an arbitration, the arbitrator is well on the way to achieving the goal of an expeditious, cost-effective, and fair proceeding.

eDiscovery

By far the most expensive and time-consuming aspect of discovery in both arbitration and litigation arises from the recent growth of electronically stored information ESI (See the article by Susan H. Nycum on page 15 of the magazine.) The delay and increased cost arising from ESI is attributable to the following, among other things:

1. Unlike paper files, ESI is typically located in a wide variety of storage media such as company servers, clouds, personal computers, smartphones, iPads and other tablets, and social media.
2. ESI can be stored in many different formats, some of which may not be readable by humans.
3. To locate and present ESI in forms readable by human beings, many different information technology mechanisms are often required.
4. ESI is often widely disseminated, which means electronic documents may have many custodians. This can lead to expensive, time-consuming redundancies if all or most potential sources of electronic documents are searched.
5. Most electronically stored documents are accompanied by metadata, which tell the history of the document. When significant amounts of metadata are included in the eDiscovery process, discovery's time and cost increase dramatically.[9]

While it is unrealistic to expect arbitrators to be experts in the enormously complex technology of eDiscovery, they should at least familiarize themselves generally with the kinds of technological questions that might arise. Having done that, they should ask the parties to look carefully at eDiscovery issues that might potentially be in dispute and to be prepared to discuss

them (perhaps including a technological expert) at the first preliminary conference.

When discussing eDiscovery at the first preliminary conference, the goals of the arbitrator should include the following:

- Limit the custodians of data whose hard drives must be searched.
- Restrict the scope of eDiscovery to matters that are directly relevant and material to the outcome of the case.
- Narrow the number of storage devices to be searched.
- Define a reasonable time period to be covered by the search.
- Reduce to the extent possible the number of search terms to be used when scanning the ESI for relevant data.

The procedural order following the first preliminary conference should encourage the parties to finalize limits on eDiscovery along the above lines. In addition, the *NY Guidelines* suggest that the order contain language such as the following with respect to other aspects of eDiscovery (see the shaded box below).

New York Guidelines eDiscovery Recommendations

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for email correspondence.

When the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the relevance of the materials requested, the arbitrator shall either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to further allocation of costs in the final award.

Discovery Disputes

If there are no ground rules at the outset concerning presentation and resolution of discovery disputes, an arbitration can grind to a halt as the participants attempt to deal with voluminous discovery motions accompanied by lengthy briefs, affidavits, and hours of oral argument. To avoid such a result, the first preliminary conference should include discussion of possible disputes over discovery, and the first procedural order should contain guidelines such as the following:

- In cases involving a three-arbitrator panel, any discovery disputes should be decided by one of the three. This should be done with agreement of the parties and with the understanding that the deciding arbitrator can consult with the other panel members if an issue appears particularly important. This approach avoids the time and expense of having three arbitrators plod through and come to agreement on every objection to every document request. And if there is to be argument, the single-arbitrator approach avoids the scheduling delays that can typically occur with three busy arbitrators.
- Objections to document requests should be exchanged on a date certain, after which the parties should be required to engage promptly in a good-faith "meet and confer" to resolve any objections.
- If all objections are not resolved at the meet and confer, on a specified date shortly after that gathering, the parties should submit four- or five-page letter briefs succinctly explaining their discovery differences and why they think their respective positions are correct.
- Following receipt of the letter briefs, the tribunal should render a prompt decision on the basis of the letters or quickly convene a telephonic conference for the purpose of addressing the discovery issues. Only in extraordinary circumstances should the tribunal take more than two weeks from the time of receipt of the letter briefs to decide the issues presented.
- Following resolution of the discovery issues, the parties should promptly produce documents responsive to requests as to which objections were overruled. This production should be on an expedited basis, generally not later than two or three weeks following the tribunal's decision, and
- In no event should resolution of discovery objections delay compliance with document requests as to which there was no objection.[10]

Depositions

Traditionally, depositions have not been a part of arbitration, and that is one of the distinctions drawn as to why arbitration is so much more cost-effective and efficient than litigation. But as the use of arbitration has mushroomed and as general counsel have put increasingly complex matters into arbitration, we have seen increased use of depositions in arbitration. If kept in control, this is not a bad development. Absent depositions, cross-examination at arbitration hearings can slog aimlessly through one fruitless area after another as the questioner gropes for even a tidbit of helpful information. Thus the arbitration can sometimes resemble a discovery deposition, and when it does, the testimony can go on for much too long on issues that are largely unimportant.

While depositions no doubt have a place in complex, commercial arbitrations, they must never approach the scope of deposition discovery in court. In light of this, the procedural order following the first preliminary conference in a commercial arbitration must place meaningful limits on any depositions. For example, each side might be allocated 10, 15, or 20 hours of depositions to be taken over a four- or five-week period. Or each side might be allowed a few two-hour depositions – again, over a limited period. Either way, speaking objections should not be permitted because the lawyer defending the deposition could use up most of the allotted deposition time with objections.[11]

Final Analysis

Arbitrators and parties must strike a delicate balance in commercial arbitrations, especially in complex cases, working to ensure that the discovery will allow the case to be resolved more quickly and less expensively than it would be in litigation while at the same time providing sufficient discovery to allow for a truly fair resolution.

Achieving such a balance is no doubt challenging, but as participants have become increasingly knowledgeable and focused on the need to attain this goal, effective and efficient arbitration discovery has more and more become a reality that parties have a right to expect. ◆

Endnotes

1 ABA Section of Dispute Resolution, Benefits of Arbitration for Commercial Disputes.

2 *See* The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration 144 (James M. Gaitis et al. eds., 3rd ed. 2013) (hereinafter CCA Best Practices Guide) (citing International Institute for Conflict Prevention & Resolution [CPR], Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx).

3 The New York State Bar Association has also issued similar Guidelines for the Conduct of the Pre-Hearing Phase of International Arbitrations.

4 Thomas Stipanowich has compiled what many different institutions have done to enhance arbitration efficiency. *See* Thomas J. Stipanowich, *Soft Law in the Organization and General Conduct of Arbitration Proceedings*, *in* Soft Law in International Arbitration 73 (Lawrence W. Newman & Michael J. Radine eds., 2014).

5 For the sake of simplicity, this article will refer to "arbitrator" in the singular, although many cases involve a panel of three arbitrators.

6 *See* CCA Best Practices Guide, *supra* note 2, at 140, 141; *See also* New York State Bar Association, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations at 15, 16 (hereinafter NY Guidelines).

7 NY Guidelines, *supra* note 6, at 8.

8 The International Centre for Dispute Resolution ("ICDR") is the international arm of the American Arbitration Association.

9 See CCA Best Practices Guide, *supra* note 2, at 160-161 for a discussion of the various problems that are generated by eDiscovery.

10 *See* NY Guidelines, *supra* note 6, at 15.

11 *See* John Wilkinson, *Streamlining Arbitration of the Complex Case*, 55 Disp.Resol. J., no. 3, Aug.-Oct. 2000, at 8; *See also*, NY Guidelines, *supra* note 6, at 13-14.

John Wilkinson *is on the arbitration and mediation panels of the American Arbitration Association, including the panel for Large, Complex Commercial Disputes. He is immediate past Chair of the Dispute Resolution Section (Section) of the New York State Bar Association (NYSBA) and has previously chaired the Section's Arbitration and Mediation Committees. He is a primary author of NYSBA's* Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitration. *His website is www.johnwilkinsonlaw.com.*

Other Pre-Hearing Conference Issues

A MODEL FEDERAL ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING

By the International Commercial Disputes Committee
and the Arbitration Committee of the New York City Bar Association

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Introduction

This annotated model federal arbitration witness summons (so titled because the Federal Arbitration Act ("FAA") uses the term "summon" rather than "subpoena" in Section 7) brings together in one resource guidance on law and practice in regard to the issuance by arbitrators of compulsory process for evidence to be obtained from non-party witnesses.[1] A major impetus for this project was the amendment of Rule 45 of the Federal Rules of Civil Procedure in December 2013, which in relevant part provided for nationwide service of a federal judicial subpoena. By implication, a federal arbitral witness summons, which per FAA Section 7 is to be served in the same manner as a federal judicial subpoena, now may be served nationwide. The consequences are likely to be (i) more extensive proposed and actual use of arbitral subpoenas than was the case when an arbitrator could compel attendance only of a witness found within 100 miles of the place of arbitration, and (ii) a greater frequency of litigation concerning the witness's duty of compliance.

The structure of this document, as the Table of Contents indicates, is to provide a Model Summons and a series of annotations that discuss applicable law and/or issues of practice and policy. The annotations are keyed to aspects of the Model Summons by footnotes (or hyperlinks) in the Model Summons, so the reader can readily refer to the analysis that underlies the various components of the Model Summons.

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[1] The subject of non-party evidence in international arbitration has been addressed in two recent reports by the International Commercial Disputes Committee of the New York City Bar Association. *See Obtaining Discovery from Non-Parties in International Arbitration in the United States,* 20 Am. Rev. Int'l Arb. 421 (2009); *28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration ─ Applicability and Best Practices,* http://www.nycbar.org/pdf/report/1782_Report.pdf (2008).

CASE NO. [if applicable][2]

[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR APPLICABLE RULES OF ARBITRATION]

IN THE MATTER OF AN ARBITRATION
BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

ARBITRATION SUMMONS[3] TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING[4]

TO: [J. Smith][5]
[Z Corporation][6]
[address]
[City], [State][7]

By the authority conferred on the undersigned arbitrators[8] by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to

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2 *See* Annotation L (Procedure in Regard to Arbitral Subpoenas Governed by FAA Section 7).

3 *See* Annotation A (Denomination as "Witness Summons").

4 *See* Annotation K (Arbitral Role in Deciding Enforceability of Subpoenas).

5 *See* Annotation B (Natural Person As Witness Summons Recipient).

6 *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

7 *See* Annotation C (Location of the Witness/Nationwide Service).

attend as a witness at a hearing before one or more of the undersigned arbitrators[9] to be held on [insert date providing reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State],[10] and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.[11]

Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of Civil Procedure,[12] then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State][13] or a competent court of the State of [State][14] may compel your attendance, or punish you for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]][15] identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal[16] in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also

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8 *See* Annotation D (Who May Issue a Subpoena).

9 *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

10 *See* Annotation F (Place of Hearing).

11 *See* Annotation G (Scope of "Duces Tecum" Witness Summons).

12 *See* Annotation C (Location of the Witness/Nationwide Service).

13 *See* Annotation F (Place of Hearing).

14 *See* Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

15 The Model encourages the witness to communicate with counsel for the parties and the Case Manager, if applicable, to avoid *ex parte* communications between the witness and the arbitral tribunal.

16 *See* Annotation I (Proper Setting for Witness to Raise Objections)

be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].[17]

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[name], Arbitrator	[name] Presiding Arbitrator	[name], Arbitrator
[Address]	[Address]	[Address]

[17] Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

Annotation A: Denomination as "Witness Summons"

FAA Section 7 refers to the compulsory process issued by an arbitrator as a "summons" and states that it should be served "in the same manner as subpoenas." We therefore make this formal distinction in the text of the Model Summons. In our annotations, however, we use interchangeably the terms "summons" and "subpoena" to refer to an arbitrator's compulsory process to a non-party witness.

Annotation B: Natural Person as Witness Summons Recipient

It is recommended to identify a natural person as the witness whenever possible. In a judicial proceeding, a party might in discovery serve a subpoena based on Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and require the corporate recipient to identify a representative to testify. Uncertainty exists about whether such an approach is permissible in arbitration. For further explanation, *see* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

Annotation C: Location of the Witness/Nationwide Service

The Summons may be issued to a witness residing at a considerable distance from the place of the arbitration. This is the consequence of amendments to Rule 45 of the Federal Rules of Civil Procedure ("FRCP") in December 2013 that provide for nationwide service of process of a judicial subpoena. *See* Annotation F (Place of Hearing). Section 7 of the FAA provides that the arbitral witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." FRCP 45(b)(2) as amended December 1, 2013 provides that "[a] subpoena may be served at any place within the United States."

Annotation D: Who May Issue a Subpoena

Statutory background. Section 7 of the FAA provides that "*the arbitrators, or a majority of them*" (emphasis supplied) may "summon in writing any person to attend before them or any of them." Section 7 further provides that "[said] summons shall issue in the name of the arbitrator or arbitrators, or a majority of them." Section 7 therefore provides no authority for the issuance by counsel of a summons or subpoena, signed by such counsel, for a party to testify or produce records in an arbitration. In this respect Section 7 of the FAA differs from Section 7505 of the New York Civil Practice Law and Rules ("CPLR"), which provides: "An arbitrator *and any attorney of record in the arbitration proceeding* has the power to issue subpoenas" (emphasis supplied).

Caselaw. Federal court decisions suggest, even if they do not squarely hold, that state laws and rules conferring power on attorneys to issue subpoenas are not applicable in an arbitration to which the FAA applies , at least unless the parties have expressly agreed upon use of state law rules of arbitral procedure. *See*, *e.g.*, *Nat'l Broadcasting Co.* v. *Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (Section 7 "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents and witnesses"); *St. Mary's Med. Center* v. *Disco Aluminum*

Prods., 969 F.2d 585, 591 (7th Cir. 1992); *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980); *Kenney, Becker LLP* v. *Kenney*, 2008 WL 681452, at *2 (S.D.N.Y. Mar. 10, 2008) (citing *NBC* for the proposition that "under the Federal Arbitration Act . . . only arbitrators – and not parties to an arbitration – have the authority to issue subpoenas"); *Suratt* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 2003 WL 24166190, at *2 (S.D. Fla. July 31, 2003) (granting motion to quash attorney-issued subpoena because "[t]he FAA does not allow attorney-issued subpoenas in arbitration actions"). To the extent these cases held that an attorney-issued subpoena was improper, they did so on the basis that FAA Section 7 did not provide for it.

But these courts were not asked to find that a state law or rule allowing attorney-issued subpoenas in arbitration was pre-empted by the FAA. No federal court, to our knowledge, has directly answered the question whether FAA Section 7 pre-empts state arbitration rules concerning the powers of arbitrators or parties to issues subpoenas to non-parties for evidence to be used in an arbitration. Thus if an attorney in a New York-seated arbitration issued a subpoena upon the purported authority of CPLR 7505, in a case involving interstate or international commerce, it would apparently be a question of first impression in the Second Circuit whether CPLR 7505 is pre-empted by FAA Section 7.

Party agreement on state procedures. Federal case law suggests that one approach that may authorize use of state law procedures in an FAA arbitration would be for the parties to agree to such procedures, thereby triggering the federal policy in favor of enforcing the parties' agreed-upon procedures. *See Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (generic choice-of-New-York-law clause in contract containing arbitration clause to which the FAA applies should be construed to make applicable only substantive principles of New York law and not New York law restricting the powers of arbitrators); *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 476 (1989) (FAA does not reflect congressional intent to occupy the entire field of arbitration, and FAA does not prevent enforcement of agreements to arbitrate under rules different from those set forth in the FAA itself); *Savers Prop. & Cas. Ins. Co.* v. *Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 715-16 (6th Cir. 2014) ("Although the FAA generally preempts inconsistent state laws and governs all aspects of arbitrations concerning 'transaction[s] involving commerce,' parties may agree to abide by state rules of arbitration, and 'enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA'"); *Bacardi Int'l Ltd.* v. *V. Suarez & Co.*, 719 F.3d 1, 13 n.16 (1st Cir. 2013) ("[T]o use local arbitration rules instead of the FAA, the contract must say so

unequivocally"); *Ario* v. *Underwriting Members of Syndicate 53 at Lloyd's*, 618 F.3d 277, 288 (3d Cir. 2010) ("We have interpreted the FAA and *Volt* to mean that 'parties [may] contract to arbitrate pursuant to arbitration rules or procedures borrowed from state law, [and] the federal policy is satisfied so long as their agreement is enforced.'").

Annotation E: Viability of Pre-Hearing Discovery Subpoenas

Federal court decisions addressing pre-hearing document discovery. Some federal courts of appeals have interpreted the text of Section 7 to require the appearance of the witness at a hearing before one or more members of the arbitral tribunal, and thus have concluded that Section 7 does not permit a documents-only arbitral subpoena for pre-hearing production of documents by a non-party witness. This was the position taken by the Third Circuit (in an opinion authored by then Circuit Judge Samuel Alito) in *Hay Group, Inc.* v. *E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). The Second Circuit agreed with the Third Circuit in *Life Receivables Trust* v. *Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

The implication of the reasoning in both decisions – that the language of Section 7 requires the attendance of a witness at a hearing before one or more arbitrators – is that Section 7 also precludes an arbitral subpoena for a pre-hearing discovery deposition, but this issue was not directly presented in either case. Both of these courts rejected the view adopted by the Eighth Circuit that, under Section 7, "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *In Re Sec. Life Ins. of Am.*, 228 F.3d

865, 870-71 (8th Cir. 2000). The Second and Third Circuits also rejected the view adopted by the Fourth Circuit that, while Section 7 generally precludes discovery subpoenas, discovery subpoenas may be allowed exceptionally upon a showing of special need or hardship. *COMSAT Corp.* v. *Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

For federal cases that follow *Life Receivables* and *Hay Group* and deny enforcement of pre-hearing discovery outside the presence of an arbitrator, *see Chicago Bridge & Iron Co.* v. *TRC Acquisition, LLC*, 2014 WL 3796395 (E.D. La. July 29, 2014); *Ware* v. *C.D. Peacock, Inc.*, 2010 WL 1856021 (N.D. Ill. May 7, 2010); *Empire Fin. Group* v. *Pension Fin. Servs., Inc.*, 2010 WL 742579 (N.D. Tex. Mar. 3, 2010); *Kennedy* v. *Am. Express Travel Related Servs.*, 646 F. Supp. 2d 1342 (S.D. Fla. 2009). For a district court case following the Eighth Circuit position that the power to require pre-hearing discovery is implicit in Section 7, *see Ferry Holding Corp.* v. *GIS Marine, LLC*, 2012 WL 88196, at *2-3 (E.D. Mo. Jan. 11, 2012). An older case predating the emergence of the conflict between the Circuit courts finds the position that arbitrators may not order pre-hearing non-party discovery to be "unfounded." *See Stanton* v. *Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1243 (S.D. Fla. 1988).

New York State court decisions addressing pre-hearing document discovery. The Appellate Division of New York Supreme Court, First Department, in a 2005 case (pre-dating *Life Receivables)* held that in a case governed by the FAA, it would apply Section 7 to permit discovery depositions of non-parties pursuant to a summons "where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." *ImClone Sys. Inc.* v. *Waksal*, 22 A.D.3d 387, 388 (1st Dep't 2005). The Court stated that it would adhere to this view "in the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts." *Id.* We are not aware of any New York State appellate decision after *Life Receivables* that either follows or overrules *ImClone* in light of *Life Receivables*. At least one New York State trial court has followed *Imclone* after and notwithstanding *Life Receivables*, finding that pre-hearing document discovery by subpoena under FAA Section 7 to a non-party may be ordered upon a showing of special need or hardship (although in that case the court found that this test was not satisfied). *Connectu* v. *Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. Mar. 11, 2010).

Implications of federal-state split in New York. For New York practitioners, the divergence between the position of the Appellate Division of the New York

Supreme Court and the Second Circuit, if it continues, may be significant, as many Section 7 subpoenas in domestic cases involving interstate commerce may have to be enforced in the New York courts because federal subject matter jurisdiction is absent. *See, e.g.*, *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005) (holding that Section 7 of the FAA does not, by virtue of its reference to federal district courts as courts that may compel compliance, create federal question subject matter jurisdiction for enforcement of subpoenas in FAA-governed arbitrations, and that Section 7, like other provisions of FAA Chapter 1, requires an independent basis for federal subject matter jurisdiction). *See* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons).

Practice question: how should a tribunal conduct document production? Assuming that a tribunal adopts the position in *Life Receivables* and *Hay Group*, a practice question is presented: How should the tribunal conduct the procurement of documents from the non-party witness if the parties and witness do not agree? (If there is agreement, the non-party often will elect to avoid the inconvenience of a testimonial appearance by a documents custodian by delivering the requested documents to counsel for the parties. Thus pre-hearing non-party discovery may often occur simply because it is the path of least resistance).

The Model Summons contemplates that, absent agreement of the parties, the documents sought will be received into evidence in conjunction with testimony from a non-party witness at a hearing at which the parties and one or more members of the tribunal would be present. We believe this is required by the text of Section 7, which contemplates that document production should be an adjunct to the testimony of a witness. This interpretation of Section 7 is supported by the fact that, as the Third Circuit in *Hay Group* observed, the forerunner of modern Rule 45 of the Federal Rules of Civil Procedure ("FRCP") as it was at the time Section 7 was adopted did not permit a documents-only subpoena.

Tribunals retain discretion, however, to conduct a witness hearing in any fashion that comports with due process and so it is not inevitable that the physical presence of the arbitrator and the witness in the same place is necessary. If the parties waive cross-examination, the witness's testimony could be presented through a witness statement or declaration. There should be no obstacle to the fulfillment of the testimonial requirement, if the witness consents, via a telephonic or video-conferenced hearing during which the documents are received by an

electronic submission.[18] In order to comply with the view that this is not discovery but a hearing preceding the final merits hearing, the tribunal should receive the documents as evidence and may then rely upon them in an award whether or not the parties in their further submissions refer to them.

In practice, arbitrators will continue to be asked to issue pre-hearing subpoenas for discovery, especially when the witness resides in a location within a federal judicial circuit that either takes an approach to Section 7 that permits an arbitral summons for discovery in at least some instances (*e.g.*, the Fourth and Eighth Circuits) or has not taken a position on the question. We believe the Second and Third Circuit decisions are well reasoned, and faithful to the text of Section 7, and that in practice it makes sense for arbitrators to issue witness summonses that conform to the evidentiary-hearing model. The Model Summons is therefore structured along those lines. If the witness agrees to a discovery-like procedure, the interests of the party that sought compulsory discovery are not prejudiced, and the subpoena functions as a sort of predictable back-up method for obtaining the non-party's evidence.

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[18] As we discuss in Annotation F, while we believe that taking testimony telephonically or by videoconference does not require a witness to consent, it may be prudent to obtain that consent where possible.

Subpoenas for pre-hearing witness testimony. In the *Life Receivables* and *Hay Group* cases, the Second and Third Circuits, respectively, reversed orders of the district courts that had enforced subpoenas for pre-hearing document production by non-party witnesses. The decisions therefore implied that a subpoena requiring pre-hearing document production at a hearing held in the presence of one or more of the arbitrators would be enforceable. But the question of enforceability of a subpoena for witness testimony was not directly involved in the *Life Receivables* and *Hay Group* cases, and therefore those decisions did not squarely answer the question of whether Section 7 permits a non-party subpoena for witness testimony at a proceeding held in the presence of one or more arbitrators that is not the arbitration hearing on the merits.

Prior to *Life Receivables*, the Second Circuit in *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 577 (2d Cir. 2005), had affirmed enforcement of a subpoena for witness testimony at a hearing before the arbitrators to be held prior to the arbitration merits hearing, and rejected the contention that the pre-merits timing of the non-party witness hearing converted the proceeding into a deposition not permitted under Section 7. The Second Circuit held that "there is nothing in the language of Section 7 that requires, or even suggests," that the non-party witness may only be required to attend and testify at the merits hearing. *Id.* at 579-80.

Based upon *Life Receivables* and/or *Hay Group*, arbitral subpoenas that specifically required a witness to appear and give testimony at a pre-merits hearing have been enforced. *E.g.*, *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606 (S.D.N.Y. July 18, 2014); *In re Nat'l Fin. Partners Corp.*, 2009 WL 1097338 (E.D. Pa. April 21, 2009).

Annotation F: Place of Hearing

The Model Summons envisions that the arbitrators will convene a hearing to secure the testimony of a witness (or receive documents) at or near the place where the witness is located, rather than at the place of arbitration. This procedure results from the interplay of the nationwide service of process provisions of Rule 45 of the Federal Rules of Civil Procedure ("FRCP"), the limitations in that Rule on how far a witness may be compelled to travel and the language of FAA Section 7 that calls for the summons to be enforced by "the United States district court for the district in which such arbitrators, or a majority of them, are sitting."

Nationwide service of process and distant witnesses. FAA Section 7 provides in part that the arbitral witness summons "shall be served in the same manner as subpoenas to appear and testify before the court." As amended effective December 1, 2013, FRCP 45(b)(2) provides that a judicial subpoena may be served anywhere in the United States. Previously the subpoena could be served only within the judicial district of the issuing court, within 100 miles of the courthouse of the issuing court, or state-wide where the judicial district was within a state whose civil procedure law provided for state-wide service of process. The new availability of nationwide service of process has implications for a witness

summons issued by an arbitral tribunal under FAA Section 7 to a witness located at a considerable distance from the seat of the arbitration.

If the witness does not indicate willingness to comply, the arbitral summons served in a far-flung corner of the country with the benefit of the new Rule 45 provision for nationwide service of process may need to be enforced by the federal court or a competent state court in the judicial district where the arbitrators are "sitting." *See* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons). Section 7 states: "[T]he United States district court for the district in which such arbitrators, or a majority of them, *are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." (Emphasis added.)

Court decisions on place of hearing prior to nationwide service rule. The new statutory authorization for nationwide service of process clears at least one procedural hurdle to such enforcement: that there must be statutory authorization for the service of process as a precondition to personal jurisdiction over the witness in the enforcing federal district court. That was a problem under FAA Section 7 before the recent Rule 45 amendment. In *Dynegy Midstream Servs., LP* v.

Trammochem, 451 F.3d 89 (2d Cir. 2006), an arbitral tribunal sitting in New York issued a subpoena to a Houston witness calling for production of documents at a Houston location. When the witness ignored the subpoena, a motion to compel compliance was made in the U.S. District Court for the Southern District of New York, the motion was granted, and the Houston witness appealed on grounds that the New York federal district court lacked personal jurisdiction. The Second Circuit agreed, holding that personal jurisdiction over the Houston witness could not exist because FAA Section 7 in conformity with Rule 45 did not authorize a New York-based arbitral tribunal summons to be validly served on a Houston witness in Houston, just as Rule 45 would not allow a Southern District of New York trial subpoena to be validly served on a Houston witness in Houston.

A similar outcome occurred in *Legion Ins. Co.* v. *John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26 (3d Cir. April 11, 2002). There, the Third Circuit held that the U.S. District Court for the Eastern District of Pennsylvania did not have power to enforce a subpoena, issued by an arbitral tribunal in Philadelphia, directed to a non-party witness located in Florida, which required the witness to appear for deposition in Florida and to bring with him certain documents and papers. The Court relied on the language in Section 7 that arbitration subpoenas "shall be served in the same manner as subpoenas to appear and testify before the

court," and held: "In light of the territorial limits imposed by Rule 45 upon the service of subpoenas, we conclude that the District Court did not commit error in denying John Hancock's motion to enforce the arbitration subpoena." *Id.* at 28.

Remaining limits on personal jurisdiction. Rule 45(b)(2) as amended to permit nationwide service of a judicial subpoena, and by extension nationwide service of an arbitral summons to a non-party witness, solves the threshold personal jurisdiction problem found to exist in *Dynegy* and in *Legion Insurance*. But this does not mean that the federal district court at the seat of the arbitration will always have personal jurisdiction over a witness upon whom valid personal service of the arbitral summons has been made. Statutory authorization for nationwide service of process is a necessary step to establish personal jurisdiction, but there are two more steps: personal jurisdiction must be available under the law of the state in which the district court is located, and if that law extends personal jurisdiction to the federal Constitutional limit, the subpoena must also comport with due process under the U.S. Constitution. *See Licci* v. *Lebanese Canadian Bank*, 673 F.3d 50, 60-61 (2d Cir. 2012).

Now that nationwide service of an arbitral summons is possible, two questions linked to personal jurisdiction over the non-party witness for enforcement purposes arise:

1) Can an arbitral summons require the witness to appear at a hearing at the place of arbitration even though it is far distant from his or her domicile?

2) If the summons calls for a hearing near the domicile of the witness, with arbitrators in attendance, do the local courts have power under Section 7 to enforce compliance?

Can a summons require the witness to travel to the place of arbitration? On the first question, as to where the witness might be required to attend a hearing, the Rule 45 amendments have not fundamentally changed the Rule's geographic boundaries for the place of compliance, but merely consolidate them in amended Rule 45(c). Rule 45(c)(1) now provides, "A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense." Thus, an arbitral summons cannot properly call for a non-party witness to travel to a hearing more than 100 miles from where the witness resides, is employed or regularly transacts business, except that the witness can be required to travel further within the state if the witness would not incur substantial expense.

What court enforces the summons? As for the enforcing court, the amendments to Rule 45 now make it clear that the federal district court at the place of compliance with a judicial subpoena is the court in which enforcement should be sought, unless that court elects to transfer the enforcement case to the federal district where the action is pending. This effects no real change in judicial practice as to enforcement, except that previously the federal district court at the place of compliance was the court in whose name a judicial subpoena for pre-trial discovery was issued by an attorney as an "officer of the court," and now such a subpoena is issued in the name of the federal district court where the action is pending. In parallel to federal judicial subpoena practice, we believe that the federal district court at the place of proposed compliance with the arbitral subpoena (or a state court if there is no basis for federal subject-matter jurisdiction, *see* Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons)) should be the enforcement court.

Limitations in FAA Section 7 on where the witness hearing can take place. The question arises whether an arbitral summons can call for attendance at a hearing to be held at a place other than the seat/locale of the arbitration. As illustrated by the *Dynegy* and *Legion Insurance* cases, before the December 1, 2013 amendment, Rule 45's territorial limitation on service of process answered

the place-of-compliance question, making it impossible to secure non-party evidence from witnesses not within striking distance of the place of arbitration. But now that an arbitral summons, like a federal subpoena, may be served nationwide, the question is squarely presented whether there are territorial limits on where a witness served with an arbitral summons may be required to appear to give evidence in the arbitration.

Section 7 lodges power to enforce the arbitral summons by an order compelling the witness to appear, or by an order of contempt for non-compliance, in "the United States district court for the district in which such arbitrators, or a majority of them, are sitting." If the arbitrators (or a majority of them) elect to convene a hearing in the district where the witness resides, there is no obstacle to personal jurisdiction over the witness in the local federal district court, and that court (provided it has subject-matter jurisdiction (Annotation H)) may enforce the subpoena under Section 7 if the arbitrators "are sitting" in that district. Federal courts to our knowledge have not considered this question. In the case of a federal judicial discovery subpoena, whether for documents or a deposition, amended Rule 45 specifically provides that the enforcement court shall be the federal district court embracing the place of residence or employment of the witness. If that is the correct paradigm for arbitral subpoena practice, then it would follow that the

federal district court embracing the place of compliance with the arbitral subpoena, or the competent state court at that place, should be the enforcement court.

If, by contrast, the place where the arbitrators "are sitting" under Section 7 refers to a single fixed location that has been designated as the place of arbitration – the seat of the arbitration, in international arbitration parlance – then there is only one federal judicial district where courts (federal and state) have enforcement power, and their ability to exercise that power over a distant witness would depend upon those courts having personal jurisdiction over the witness. But if the arbitrators "are sitting," in Section 7 terms, at the hearing location specified in their summons, then enforcement power will be lodged in the federal judicial districts where witnesses served with arbitral summonses are found.

We favor this interpretation for several reasons. First, it ensures that enforceability of an arbitral subpoena will not depend on personal jurisdiction over the witness in a court at the place of arbitration, a criterion which would make the availability of non-party testimony unpredictable and would invite collateral litigation over the personal jurisdiction issue. Second, it is logical that the witness should not face the inconvenience and cost of defending a motion to compel compliance in a court at a distant place of arbitration, when that burden is not imposed on a witness served with a federal deposition subpoena because such a

witness must be compelled in a proceeding before the federal district court in the locale of the witness. Third, this interpretation aligns judicial enforcement power in international arbitrations seated in the United States with the typical provisions of international arbitration rules permitting arbitrators to convene hearings at any place convenient for obtaining evidence.[19] Fourth, this interpretation does no violence to the language of Section 7 because the term "sitting" does not clearly and unambiguously refer to the legal seat of the arbitration as opposed to the place where the arbitrators gather to hear evidence. Fifth, this interpretation does not violate, and indeed can be seen as consistent with, the expressed intent of Congress

[19] From an arbitration procedure perspective, there is usually no difficulty in having the arbitrators venture out physically or virtually to a location other than the place of arbitration to conduct proceedings. For example, under Rule 11 of the Commercial Arbitration Rules of the American Arbitration Association: "The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations (i.e., other than the agreed or designated 'locale' of the arbitration) if reasonably necessary and beneficial to the process." Further, Rule 32(c) of the Commercial Rules provides: "When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination." *See also*, to similar effect, Rules 17(2) and 20(2) of the International Arbitration Rules of the International Centre for Dispute Resolution, and Article E-9 of the International Expedited Procedures, effective as of June 1, 2014. This is in conformity with the provisions that have long been included in the UNCITRAL Arbitration Rules and most institutional rules for international arbitration, permitting the tribunal to convene hearings at locations other than the seat of the arbitration.

in the enactment of Section 7 – as it appears to have been Congress's intent that Section 7 would evolve in parallel with changes in federal judicial practice with regard to non-party witnesses. If, after the 2013 Rule 45 amendments, the "are sitting" language were construed to refer only to the court at the place of arbitration, the ability of the parties and arbitrators in an arbitration to obtain relevant and material testimony from non-parties would be significantly less than in litigation before the federal courts.

The more restrictive interpretation, *i.e.*, that only a court at the place of arbitration is located where the arbitrators "are sitting," significantly limits the actual impact on arbitral evidence gathering of the extension of nationwide service of process to arbitral witness summonses. This may be said to conform to a view of arbitration as a private method of dispute resolution between the parties that involves less fact gathering and places fewer burdens on non-disputants than does court litigation. As set forth in a separate annotation to this Model Summons (*see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas)), our interpretation of Section 7 supports this view of arbitration in the requirement that evidence should be gathered from non-parties in the presence of the arbitrator. We believe that the Congress that enacted Section 7 in 1925 left the matter of where arbitrators might "sit" to hold such hearings without specific restriction.

Hearing witnesses by video link. Suppose, for example, that an arbitral tribunal sitting in New York does wish to hear from an unwilling non-party witness residing in Seattle. Suppose the tribunal issues a subpoena that calls for the witness to appear and give testimony by video conference at the offices of a Seattle law firm or in the Seattle regional office of the AAA, with a video link to a New York location where the arbitrators, or at least one of them, will be present. In our view, Section 7's objectives (as considered by some courts) of requiring a hearing are achieved, even though the witness and the arbitrators come together by electronic means. Electronic presence of the arbitrator is an adequate substitute for physical presence, because the arbitrator *could* lawfully attend in person. However, the use of technology in this fashion ought not to become entangled with the enforceability of the witness summons by a federal or state court where the witness is located. Some recalcitrant witnesses may argue that the tribunal is not "sitting" in the federal district where the witness is found if the subpoena provides for a video link.

While we believe FAA Section 7 is reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness – that *adjudicative* presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7 according to the interpretation given in the

Life Receivables and *Hay Group* decisions – it is prudent to avoid controversy on this point by providing in the subpoena that the arbitrators will attend in person unless otherwise agreed. However, if a subpoena does call for video-linked hearing, enforceability of the subpoena might be supported by reference to FRCP 43, which expresses the judicial preference for testimony in open court but provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." FRCP 43(a).

Annotation G: Scope of "Duces Tecum" Witness Summons

Section 7 of the FAA refers to production of a document or record that "may be deemed material as evidence in the case." Under the present version of Rule 26(b)(1) of the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." That Rule further provides, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The latter clause is widely understood – and evidently misunderstood[20] – as the benchmark for a very broad scope of discovery in federal litigation.

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[20] The Judicial Conference of the United States has proposed an amendment of Rule 26(b)(1) that would replace the "reasonably calculated to lead" phrase with the following language: "Information within this scope of discovery [*i.e.*, relevant to a claim or defense] need not be admissible in evidence to be discoverable." The report of the Judicial Conference observes that the original intent of the "reasonably calculated" language was only to prohibit objections to discovery based on rules governing admissibility of evidence at trial, and that the amendment should dispel the common misperception that the phrase expands the scope of discovery beyond what *is* relevant to sources that *might contain* relevant information. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Appendix B-1 at pp. 9-10 (September 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.

"Materiality" embraces an assessment of the importance of the evidence to resolution of the case. When requests for information are reasonably specific, arbitral tribunals can more effectively assess the importance of the evidence than when a request seeks all documents containing information within a broad category of subject matter. As a general practice, tribunals should require a high degree of specificity in the "duces tecum" portion of a subpoena, aiming for non-cumulative evidence known to exist (or perhaps reasonably believed to exist), not available from sources within the party's control, and reasonably necessary to establish a fact in dispute. While in exceptional cases a party may demonstrate a clear need for a broader search for evidence, this narrower approach will fulfill the statutory mandate that the subpoena seek material evidence,[21] not sources or repositories of potential evidence.

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[21] Specificity of requests for information, and/or a substantial showing of importance of the requested information, is emphasized in many rules and guidelines applicable to international and U.S. domestic commercial arbitration. *See, e.g.*, International Arbitration Rules of the International Centre for Dispute Resolution, Rule 21(4) ("Requests for documents shall contain a description of specific documents or classes of documents . . . ."); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Section 1(a) ("[D]isclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position."); JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases (document requests "should be restricted in terms of time frame, subject matter and person or entities to which the requests pertain, and should not include broad phraseology such as 'all documents directly or indirectly related to.'"); IBA Rules on the Taking of Evidence in International Arbitration, Article 3(3)(a)(ii) ("A Request to Produce shall contain . . . a description in

Annotation H: Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons

Court decisions holding that FAA Section 7 does not provide subject-matter jurisdiction. The text of the Model Summons takes into account that a federal district court may or may not have subject-matter jurisdiction to enforce the arbitral witness summons, and that enforcement may have to be sought in a state court if there is no independent basis for federal subject-matter jurisdiction. The two federal circuit courts of appeals that have addressed the issue have held that Section 7 of the FAA does not confer subject-matter jurisdiction on federal district courts, notwithstanding that Section 7 empowers those courts to compel compliance and punish non-compliance with an arbitral witness summons. The position taken in these decisions is that an "independent" basis of subject-matter jurisdiction, *i.e.* a source of subject-matter jurisdiction other than the text of Section 7, must exist. *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005); *Amgen, Inc.* v. *Kidney Ctr. of Delaware Cnty., Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996).

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sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist . . . .").

District courts in other circuits have found these decisions persuasive. *See, e.g.*, *Chicago Bridge & Iron Co.* v. *TRC Acquisition LLC*, 2014 WL 3796395 (E.D. La. July 14, 2014); *Schaieb* v. *Botsford Hosp.*, 2012 WL 6966623 (E.D. Mich. Nov. 13, 2012). *But see Ferry Holding Corp.* v. *GIS Marine LLC*, 2012 WL 88196 (E.D. Mo. Jan. 11, 2012) (holding that Section 7 confers subject matter jurisdiction on the federal district court for the district in which the arbitrators are sitting).

FAA Chapters 2 and 3 provide jurisdiction in international cases. When the witness summons is issued by a tribunal in an international arbitration seated in the United States, FAA Chapter 2 and/or 3 provides the necessary basis for subject-matter jurisdiction. An action or proceeding under Chapter 2 or 3 is deemed to arise under the laws and treaties of the United States because the eventual award in the arbitration is subject to recognition and enforcement under either the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). *See* 9 U.S.C. §§ 202, 203, 302. FAA Section 7 is included in FAA Chapters 2 and 3 covering international arbitrations by virtue of the provisions in those chapters for residual application of non-conflicting sections of FAA Chapter 1. *See* 9 U.S.C. §§ 208, 307.

Federal court may have jurisdiction if it has previously acted with respect to the arbitration. Federal subject-matter jurisdiction may also exist if the federal district court had previously entered an order relating to enforcement of the agreement to arbitrate. *See, e.g.*, *Stolt-Nielsen*, 430 F.3d at 572 (admiralty jurisdiction provided basis for jurisdiction to enforce subpoena because the parties to the arbitration had previously appeared before the court, based on admiralty jurisdiction, in the context of a motion to stay the arbitration).

Diversity jurisdiction to enforce an arbitral summons. The application of diversity jurisdiction principles to an enforcement proceeding under FAA Section 7 is not a well-developed area of law. The few decisions on point in federal district courts have held that diversity jurisdiction must exist over the enforcement proceeding, *i.e.*, between the movant and the witness. *See, e.g.*, *In re Application of Ann Cianflone*, 2014 WL 6883128, at *1-2 (N.D.N.Y. Dec. 4, 2014) (dismissing petition to enforce arbitral subpoena, finding no diversity jurisdiction where there was "no allegation or plausible indication" that the amount in controversy between the petitioner and the witness exceeded $75,000); *Chicago Bridge & Iron Co.*, 2014 WL 3796395, at *2 (rejecting amount in controversy in the underlying arbitration as reference point for diversity jurisdiction over arbitral subpoena enforcement case, and finding no facts of record to support amount in controversy

exceeding $75,000 between movant and the witness). But if the amount in controversy between movant and witness is decisive, it may be wondered how the requirements for diversity jurisdiction may be satisfied in most cases.

Jurisdiction based on the underlying arbitration? Federal courts may wish to consider whether federal subject-matter jurisdiction based on diversity should be measured by the citizenship of the parties to the underlying arbitration and the amount in dispute in that arbitration (and likewise whether federal question jurisdiction may be based on the subject matter of the underlying arbitration). Even if Congress did not intend Section 7 to be a jurisdiction-conferring statute, the enforcement of a subpoena brings before the court one aspect of enforcing the parties' agreement to arbitrate – not the right to arbitrate itself, but the enjoyment of a key procedural attribute of the arbitration the parties bargained for. In this view, a federal court would have jurisdiction to enforce the subpoena whenever it would have jurisdiction to compel arbitration – that is, whenever the court would have plenary jurisdiction over the dispute but for the agreement to arbitrate.[22] Further, from a broader perspective, Section 7 does clearly contemplate

[22] Section 4 of the FAA provides "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" has jurisdiction to enter an order compelling arbitration under a written arbitration agreement.

proceedings in federal district courts and calls upon judges to invoke the remedies provided by federal law to compel compliance or punish non-compliance. The statutory language indicates at least that Congress intended that there would be a meaningful involvement of federal district courts in arbitral subpoena enforcement, and that level of involvement would not exist if, for example, the "amount in controversy" requirement for diversity jurisdiction must be measured as between the movant and the witness.

State court jurisdiction to enforce FAA summons. In all events, the FAA applies in state courts when the arbitration involves interstate or foreign commerce. *See, e.g.*, *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012); *Vaden* v. *Discover Bank*, 556 U.S. 49, 58-59 (2009), *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, a state court would be obligated either to enforce the arbitral subpoena under Section 7 or to provide for enforcement of the arbitral subpoena in a fashion that does not derogate from the enforcement rights the applicant would enjoy under Section 7 before a federal district court.

Annotation I: Proper Setting for Witness to Raise Objections

We have included in the Model Summons a sentence that directs that any motion to quash the subpoena should be made to the arbitral tribunal, except that a motion to quash based on the position that the subpoena violates FAA Section 7 may also be made to a competent court. This language is based on court decisions described below that direct that objections to the relevance, materiality, privileged nature or confidentiality of evidence sought, as opposed to objections based on the limitations imposed by FAA Section 7, be asserted before the arbitral tribunal in the first instance, rather than a court. Witnesses unfamiliar with the arbitral process might naturally assume that the proper forum in which to raise such issues is a competent court. The inclusion of such language may tend to overcome that assumption, and thus avoid the delay associated with a judicial adjudication that may well lead to such issues being remanded to the arbitral tribunal for determination.

Objections to power to issue subpoena under FAA Section 7. The text of Section 7 refers only to a potential motion to compel compliance with an arbitral subpoena. Unlike Rule 45 of the Federal Rules of Civil Procedure, Section 7 does not refer to a motion to quash by the recipient of an arbitral subpoena. We know of no federal decision that squarely holds, based on the text of Section 7, that a

motion to quash made by the recipient is improper. However, those instances in which courts have granted motions to quash have largely been where the witness asserted that the arbitrators lacked power to issue the subpoena under Section 7, and the subpoena was found to have transgressed a specific textual limitation on arbitral power under Section 7. *See, e.g.*, *In re Proshares Trust Sec. Litig.*, 2010 WL 4967988, at *1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash arbitral third-party document discovery subpoena that was "plainly inappropriate" under Section 7 in view of the Second Circuit's holding in the *Life Receivables* case); *Ware* v. *C.D. Peacock, Inc.*, 2010 WL 1856021, at *3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitral deposition subpoena, based on district court adopting position of Second and Third Circuits that Section 7 only empowers arbitrators to compel testimony at a hearing in presence of one or more arbitrators).

Objections to relevance, materiality, privilege, confidentiality, etc. In contrast, when motions to quash made by the witness, or a witness's objections to a motion to compel, have presented such issues as relevance and materiality of the evidence sought, attorney-client privilege, or confidentiality, courts have denied these motions or objections on the basis that the determination of these matters in the first instance is left to the arbitrators. *See, e.g.*, *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870, 71 (8th Cir. 2000) (Section 7's requirement that information

sought by arbitral subpoena be "material as evidence" does not entitle the witness to judicial assessment of materiality, as such a requirement would be "antithetical to the well-recognized policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand"); *Am. Fed. of Television & Radio Artists* v. *WJBK-TV*, 164 F.3d 1004, 1010 (6th Cir. 1998) (relevance of information sought by arbitral subpoena should be determined by arbitrator in the first instance); *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606, at *2-4 (S.D.N.Y. July 18, 2014) (denying motion to quash that sought independent judicial review of materiality of evidence sought by arbitral subpoena and holding that once an arbitral tribunal has determined that evidence sought by subpoena may affect the outcome of its deliberations, a court may not "draw[] an independent conclusion on the same topic") (citing and quoting from *In re Security Life* with approval); *Walt Disney Co.* v. *Nat'l Ass'n of Broadcast Emps. & Technicians*, 2010 WL 3563110, at *4 (S.D.N.Y. Sept. 10, 2010) (denying motion to quash and granting cross-motion to compel compliance with arbitral subpoena, on the ground that issues of attorney-client privilege associated with information sought by the arbitral subpoena are reserved to the arbitrator "at least in the first instance"); *Festus & Helen Stacy Found.* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (denying motions to quash and granting

cross-motions to enforce subpoena on the basis that issues of relevance and materiality should be determined by the arbitrators); *Odfjell Asa* v. *Celanese AG*, 348 F. Supp. 2d 283, 288 (S.D.N.Y. 2004) (denying motion to quash on basis that "objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable" and expressing "considerable doubt" that a district court is the proper forum to hear such matters "since the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena").

Annotation J: Arbitral Subpoena Based on FRCP 30(b)(6)

The Model Summons, by naming in brackets both a natural person and a corporation as the witness, seeks to identify a possible enforcement problem where only a legal person such as a corporate entity is named, and the entity is expressly or by implication directed to designate a representative. This problem is avoidable if the subpoena can be addressed to an individual located in the United States. Parties and arbitrators are therefore encouraged to avoid the potential enforceability issues by using available means to identify an individual witness who is subject to arbitral subpoena power pursuant to Section 7 of the FAA.

But if the individual witness with most pertinent knowledge cannot be so identified, or is located abroad but in the employ of a U.S. company, there is uncertainty as to whether an arbitral witness summons may, like a deposition subpoena under Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), be addressed to the corporation and call for the appearance of a corporate representative found within the United States to testify about the designated subject matter. Only one federal district court decision, to our knowledge, has addressed this question, and that decision held that Section 7 does not permit enforcement of

such an arbitral subpoena. *Progenics Pharm., Inc.* v. *IMS Consulting Group*, No. 14 Misc. 245 (RA) (S.D.N.Y. Aug. 13, 2014) (unpublished).[23]

Our Committees take no position on whether a FRCP 30(b)(6) type of procedure should be available under Section 7, but do think it is helpful to identify issues that may arise when courts or arbitrators consider this question.

FRCP 30(b)(6) as a pre-trial discovery procedure. One way of framing the issue is to focus on the fact that FRCP 30(b)(6) is a pre-trial discovery procedure. Thus, courts that interpret Section 7 of the FAA as not permitting pre-hearing discovery – as perhaps most now do (*see* Annotation E "Viability of Pre-Hearing Discovery Subpoenas") – may conclude that the FRCP 30(b)(6) procedure has no place under Section 7. However, a court might read cases like *Life Receivables* and *Hay Group* only to say that, under Section 7, non-party evidence must be adduced in the presence of an arbitrator, and not that such evidence must (or should) be received at "the" merits hearing. Under this view, the "discovery

[23] In another recent case, the arbitral subpoena was issued to a New York bank, not an individual, and the subpoena was enforced, although the bank evidently did not raise the "30(b)(6)" objection. The court stated that the subpoena was "a straightforward exercise of the panel's power to command third parties to appear for testimony before it and to bring with them documents related to the subject of their testimony." *Bailey Shipping Ltd.* v. *Am. Bureau of Shipping*, 2014 WL 3605606, at *4 (S.D.N.Y. July 18, 2014).

objection" to proceeding with an arbitral subpoena by analogy to Rule 30(b)(6) is not necessarily an obstacle to enforcement.

FAA Section 7 and federal trial subpoenas. A second issue flows from reading the statute to mean that the Section 7 arbitral summons procedure must be in procedural lockstep with a federal trial subpoena. This reading focuses on the final sentence of Section 7, which provides that the arbitral summons shall be enforceable by a federal district court by the same methods (orders compelling compliance, contempt) used to "secure[] the attendance of witnesses . . . in the courts of the United States." Under this reading, one must answer the question whether a FRCP 30(b)(6)-type of subpoena may be used at trial. The courts seem to be split on this issue. *Compare Donoghue* v. *Orange County*, 848 F.2d 926, 932 (9th Cir. 1987) (affirming district court order quashing "30(b)(6)" trial subpoena) *and Dopson-Troutt* v. *Novartis Pharm. Corp.*, 295 F.R.D. 536, 539-40 (M.D. Fla. 2013) (quashing "30(b)(6)" trial subpoena) *with Conyers* v. *Balboa Ins. Co.*, 2013 WL 2450108, at *1-2 (M.D. Fla. June 5, 2013) (enforcing trial subpoena that required corporate witness to designate representative) *and Bynum* v. *Metro. Transp. Auth.*, 2006 WL 6555106, at *2-3 (E.D.N.Y. Nov. 21, 2006) (upholding "30(b)(6)" trial subpoena to labor union).

Interpreting Section 7's final sentence to require procedural lockstep with judicial trial subpoenas is not, however, the only possible interpretation. The language might be understood to mean simply that judges have available to enforce arbitral subpoenas the same arsenal of coercive devices as federal law provides for enforcing judicial subpoenas. And the statutory phrase "attendance . . . in the courts" might be understood to refer to *any testimonial appearance* in a judicial proceeding, not only an appearance at a trial. 9 U.S.C. § 7. If this language in Section 7 is given this less restrictive construction, then the enforcement of an arbitral witness summons to a corporation would not be linked to the question whether a trial subpoena may be addressed to an entity by analogy to Rule 30(b)(6). Further, because Section 7 specifically contemplates a separate hearing to obtain evidence from the non-party witness that is *not* the merits hearing – the hearing may be held before only one of three arbitrators – there is specific support in the text for the view that Section 7 enforceability need not turn on whether the same procedure could be used to compel a witness to testify at a judicial trial.

Policy issues relating to use of Rule 30(b)(6) procedures. There are also a number of policy issues to consider. On the view that, by agreeing to arbitrate, a party agrees to a more limited evidentiary process that does not involve all the evidence gathering tools available in court, a court may hesitate to say that Section

7 permits a hybrid procedure that combines elements of a federal trial subpoena and a federal deposition subpoena. Furthermore, with regard to international arbitration, there is already a perception abroad that arbitration in the United States is characterized by discovery similar in scope to what occurs in our courts. Importing Rule 30(b)(6) into Section 7 will further reinforce that perception. There is a concern that foreign criticism of U.S. evidence gathering methods will intensify, and the perception in some foreign circles of the United States as an inhospitable environment for international arbitrations will be reinforced, if a common practical effect of Rule 30(b)(6) arbitral subpoenas is to compel foreign-resident employees of U.S.-based companies to testify in U.S.-seated arbitrations.

Another possible view is that concerns about expansion of evidence gathering from non-parties in arbitration should not necessarily lead to the position that Section 7 categorically provides no power to enforce a "30(b)(6)" arbitral subpoena. Under this view, such concerns may be addressed on a case-by-case basis (i) by arbitrators in considering whether to issue a particular subpoena, and/or (ii) by courts in the enforcement context under the rubric of "undue burden" under FRCP 45.

Annotation K: Arbitral Role in Deciding Enforceability of Subpoenas

The tribunal's handling of a request for issuance of a subpoena is properly subject to judicial review during the arbitration to the extent provided for in Section 7 of the FAA, unlike other procedural orders the tribunal may issue. Section 7 provides that "if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person for contempt." The prospect of interlocutory review in the context of subpoena enforcement raises the question of what is the proper role of the tribunal, at the time a proposed subpoena is presented for signature, with respect to the legal validity and enforceability of the subpoena.

The role of the tribunal – administrator or gatekeeper. As to the interplay between Rule 45 of the Federal Rules of Civil Procedure ("FRCP") and the effectiveness of the subpoena, some tribunals conceive their role as more or less administrative. On this view, the tribunal acts as a proxy for the requesting party, provides the signature for issuance that a party's attorney is permitted to furnish in a judicial proceeding (or in arbitration under some state statutes, including Section 7505 of New York's Civil Practice Laws and Rules), and leaves questions about

the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge if the recipient of the subpoena resists enforcement and the proponent of the subpoena moves in court to compel compliance.

An alternative view is that Section 7 of the FAA is – uniquely among the provisions of the FAA – a rule governing the conduct of arbitrators during the arbitration and not a rule mainly concerning judicial enforcement of arbitration agreements and awards. We believe this view is to be preferred, for reasons that are both textual and practical, but we say this with an important caveat: The law concerning the permitted scope of subpoenas under Section 7 is not uniform nationally, and the implications for arbitration of the recent Rule 45 amendment to permit nationwide service of process have yet to be addressed by courts. Arbitral tribunals should hesitate to deny issuance of a proposed subpoena based on their preferred view of the law, or based upon a prediction of how an issue may be decided by a court that is not bound by *stare decisis* to decide it in a particular fashion.

Reasons supporting view that arbitrators should consider enforceability of proposed subpoenas. With that caveat, we encourage arbitrators to consider carefully the enforceability of proposed subpoenas as a condition of issuance. First, had Congress intended the arbitral role to be purely administrative, it could

have permitted attorneys in arbitrations to issue subpoenas as they do in cases before the courts, or the FAA might have provided for signature by any member of a three-member tribunal rather than a majority or for the pre-issuance reference of any Rule 45 issue to the federal district court. The fact that Section 7 was written to require issuance by a majority of a three-member tribunal connotes that the issuance is adjudicative. The fact that no distinctions were drawn between elements primarily in the domain of the tribunal (relevance and materiality) and matters relating to Rule 45 suggests that Congress intended that arbitrators should apply Rule 45 subject to judicial review as provided in Section 7.

Second, Section 7 vests arbitrators with the same authority that courts possess in regard to a subpoena, to command a party to appear and give testimony. The subpoena, if drafted by reference to standard judicial subpoena forms, will "command" the witness to appear, and the fact that a tribunal rather than counsel for a party has issued the subpoena carries a stronger implication of the legal validity of the "command" than does a judicial subpoena signed not by a judge but by the attorney for a party. Arbitral tribunals that allow an inference of validity to be drawn by a non-party witness who may not be represented by counsel, if the tribunal has in fact formed a judgment that the subpoena would not be enforced by

the relevant court, risk misleading a non-party, and inducing compliance through the apparent authority of the subpoena.

Third, on a purely practical level, the tribunal should handle subpoenas in a fashion that minimizes, to the extent possible, collateral litigation over enforceability, by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance. This is of course subject to the caveat stated above. If the law in the relevant jurisdiction that would have power to enforce the subpoena concerning permissibility of non-party discovery under FAA Section 7 is unsettled, the tribunal by issuing the subpoena permits judicial review of that issue if the witness does not agree to appear. If the tribunal on the other hand denied issuance of the subpoena based on its own preferred view of that issue, and the issue is unsettled in the court where enforcement could be sought, the tribunal's denial of issuance of the subpoena is not judicially reviewable and the party seeking the subpoena is deprived of the opportunity to establish enforceability through the courts.

Illustrations of the proper role of the arbitral tribunal. As illustrations of the approach a tribunal might take, in different situations, we provide the following:

***Illustration #1 – The "Discovery" Subpoena*:** The party proposing a subpoena submits a draft that calls for production of documents at an office of the witness or in proximity to the witness' place of residence, but does not provide for the documents to be brought to a hearing to be held in the presence of one or more arbitrators. It is a "discovery" subpoena. We believe the tribunal should modify the proposed subpoena to provide for a hearing before one or more of the arbitrators, at which the witness will testify and bring the requested documents. Although some federal courts may permit the "discovery" subpoena, by providing for the hearing any doubts about enforceability are removed. The proponent of the subpoena may seek the consent of the witness to produce the documents without a hearing. *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

***Illustration #2 – The Subpoena Calls for the Witness to Travel to the Place of Arbitration*:** The party proposing a subpoena submits a draft that calls for a witness residing in Alaska to appear for a hearing before one or more of the arbitrators in New York, which is the seat of the arbitration. We believe the tribunal should modify the proposed subpoena to provide for a place of compliance that is within 100 miles of the place of residence or place of business of the witness. As it is relatively clear that the geographic limitations of compliance under Rule 45 apply to arbitral subpoenas, and that a subpoena that does not

respect these geographic limitations would not be enforced, the tribunal should not, by issuing a subpoena that is likely to be unenforceable, imply the contrary. To do so, in the Committees' view, risks an abuse of power by the tribunal. *See* Annotation F (Place of Hearing) and Annotation C (Location of the Witness/Nationwide Service).

***Illustration #3 – The "30(b)(6)" Subpoena*:** The party proposing a subpoena submits a draft that identifies a corporation or other legal person as the witness and directs the legal person to designate a natural person as its representative to appear at a witness hearing and bring along the requested documents. The tribunal may wish to inquire of the parties whether there is a natural person with particular knowledge of the matters in issue who might be identified as the recipient of the subpoena, calling the attention of the parties to the uncertain status of arbitral subpoenas to legal persons. If no natural person can be identified, the tribunal should issue the subpoena to the legal person. Where the enforceability of the subpoena is uncertain because the law is not well developed, as is the case for example with regard to a subpoena that seeks a corporate representative witness designation by analogy to FRCP Rule 30(b)(6), the tribunal should not deprive the subpoena proponent of the opportunity to obtain the evidence with the consent of the witness nor should the tribunal, by denying

issuance, deprive the proponent of a judicial forum to litigate the enforceability question. *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).

Annotation L: Procedure in Regard to Arbitral Subpoenas Governed By FAA Section 7

Addressing need for use of arbitral subpoenas at early procedural conferences. Procedure relating to requests to arbitral tribunals for issuance of arbitral subpoenas often receives less attention than it deserves in early-stage procedural conferences. One possible explanation is that counsel may be less familiar than arbitrators with the nature of arbitral subpoena power and the procedure surrounding it. Or they may assume that, as is the case under the arbitration law of New York and some other states, attorneys themselves may issue subpoenas as they routinely do in judicial proceedings. *See* Annotation D (Who May Issue a Subpoena). Thus, even in those arbitrations in which the parties are invited to agree insofar as possible on an initial procedural order, it is not unusual to find that the parties do not establish a timetable or a procedure for dealing with subpoenas for non-party witnesses.

If not addressed in the procedural timetable, subpoena-related issues may threaten delay and disruption of the schedule. Parties and arbitrators will open their calendars to find mutually available dates for merits hearings, but they may overlook the need to hold pre-merits hearings to obtain evidence from non-party witnesses. Parties and arbitrators need to focus on the need for these hearings to be

held in the presence of one or more of the arbitrators unless the parties and the witnesses otherwise agree, and identify dates when members of the tribunal can be available to attend in person a hearing in a location where the witness will agree to attend or could be compelled to attend. An adverse party may not agree that a proposed subpoena should be issued, and the briefing, hearing and determination of that issue (and ancillary issues such as the scope of the subpoena and the timing of the witness' appearance) may require considerable time. Judicial proceedings that might ensue concerning enforcement of a subpoena bring into play the timetable applicable in the enforcement court, which may or may not be able to tailor its schedule to the timetable of the arbitration.

It is therefore suggested that the tribunal advise the parties that the issue of subpoenas is one the parties should address in their draft of the initial omnibus procedural order, and that the tribunal should endeavor to resolve disagreements over this aspect of procedure at the time the initial procedural order is made.

Matters relating to subpoenas that might be addressed in initial procedural order. The tribunal might provide for a deadline for: the parties to submit proposed subpoenas, the submission of an accompanying statement as to relevance, materiality and need, *see* Annotation G (Scope of "Duces Tecum" Witness Summons), and a timetable for briefing and resolving disputes over

proposed issuance. The parties might also be invited to declare by a particular date whether it is proposed to receive the testimony at the merits hearing or in advance thereof, and if the latter, at what location and whether it is proposed that the full tribunal or one of its members should be present. If a party proposes to seek issuance of a discovery subpoena, either for document production or a deposition, the party should be invited to make a *prima facie* legal showing that, in the relevant jurisdiction(s) (*e.g.*, embracing the place of arbitration or the place where the witness will attend), Section 7 of the FAA is applied to permit such practice, and the tribunal may wish to draw the attention of the parties to the conflicting positions of federal circuit courts of appeals in this respect, *see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas), and the uncertainty about enforcement that may arise if a subpoena seeks discovery.

Risks of denying a requested subpoena. The tribunal's refusal to issue a requested subpoena might lead the aggrieved party to challenge the award based on denial of a fair hearing. For examples of unsuccessful challenges, *see*, *e.g.*, *Doral Fin. Corp.* v. *Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013), and *Rubenstein* v. *Advanced Equities, Inc.*, 2014 WL 1325738 (S.D.N.Y. 2014). Reasons for refusal to issue a requested subpoena might include – in addition to territorial scope, *see* Annotation F (Place of Hearing) – that the proposed evidence is not relevant and

material, that it is cumulative, or that the request is untimely. In one decision, *Tempo Shain Corp.* v. *Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997), the Second Circuit refused to confirm an award on the ground that the arbitrators decided not to keep hearings open to hear from a witness whom one of the sides wanted to call (albeit not through a subpoena) but who became unavailable as a result of family medical issues. The district court confirmed the award but the Second Circuit reversed, holding that the arbitrators did not sufficiently explain why they believed the excluded evidence would merely be cumulative. Although it would be a truly exceptional case where an award would be vacated because a party was denied the opportunity to obtain evidence from a non-party witness, the risk of this contention being made in a motion to vacate context to obstruct enforcement of an award is sufficiently present that arbitrators who elect to deny issuance of a subpoena might find it useful to explain in a written procedural order the basis for having refused to issue a subpoena rather than merely issuing a one-sentence order stating that the proposed subpoena is denied.

Appendix: Model Subpoena Without Annotations

CASE NO. [if applicable]

[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR APPLICABLE RULES OF ARBITRATION]

IN THE MATTER OF AN ARBITRATION
BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING

TO: [J. Smith]
[Z Corporation]
[address]
[City], [State]

By the authority conferred on the undersigned arbitrators by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to attend as a witness at a hearing before one or more of the undersigned arbitrators to be held on [insert date providing reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State], and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.

Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of

Civil Procedure, then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State] or a competent court of the State of [State] may compel your attendance, or punish you for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]] identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[name], Arbitrator	[name] Presiding Arbitrator	[name], Arbitrator
[Address]	[Address]	[Address]

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***** Members of the Subcommittee that drafted the Report

NEW YORK CITY BAR

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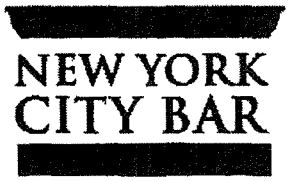

OBTAINING EVIDENCE FROM NON-PARTIES IN INTERNATIONAL ARBITRATION IN THE UNITED STATES

The International Commercial Disputes Committee
of the Association of the Bar of the City of New York

Introduction

Section 7 of the Federal Arbitration Act ("FAA")—which applies to any arbitration in the United States involving interstate or international commerce—provides:

> The arbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.[1]

Under Section 7, the ability of the parties to and arbitrators in domestic or international arbitrations to obtain documents and testimony from non-parties is far more circumscribed than the ability of litigants in US litigation to obtain evidence from non-parties in federal court. It is subject, in the first instance, to the discretion of the arbitrators, who must issue any subpoena and, potentially, to the review of the federal district court in the place where the arbitrators are sitting, which must enforce it.[2]

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[1] 9 USCS § 7.

[2] In these respects, the procedure for obtaining evidence from non-parties under Section 7 is comparable to the procedure under the law of a number of foreign jurisdictions. For example, in England and Wales, Section 43(1) of the Arbitration Act 1996 permits a party to arbitral proceedings to "use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence." Under Section 43(2), "This may only be done with the permission of the tribunal or the agreement of the other parties." Arbitration Act 1996, c. 23 (Eng.). *See also*, Section 1050 of the German Civil Procedure Statute: "[T]he arbitral tribunal or a party with the approval of the arbitral tribunal may request court assistance in taking evidence or performance of other judicial acts which the

Two main issues have confronted courts under Section 7. The first issue is whether it authorizes arbitrators to compel *pre-hearing* document production or testimony from non-parties.[3] There is a conflict regarding this issue among the circuits and between federal and state courts in New York. The Second[4] and Third[5] Circuits have held that Section 7 does *not* authorize arbitrators to order the pre-hearing production of documents or testimony from non-parties; rather, non-parties may be ordered to provide documents and testimony only at a hearing before one or more of the arbitrators. The Fourth Circuit has suggested that a federal court may compel a non-party to comply with an arbitrator's subpoena for prehearing document production or testimony upon a showing of "special need or hardship."[6] In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under Section 7, courts may require pre-hearing document production and testimony from non-parties in cases of "special need."[7] The Sixth[8] and Eighth Circuits[9] have concluded that arbitrators are authorized by Section 7 to issue orders requiring pre-hearing production of documents from non-parties, but have not addressed the question whether pre-hearing testimony is also permitted.

The second issue is whether Section 7 imposes any territorial limitation on an arbitrator's power to summon a non-party to testify and produce documents, or upon the power of a federal district court to enforce such an order. There is a split of authority on this question as well. The Second Circuit has held that Section 7 does *not* authorize nationwide service or enforcement of arbitral orders for testimony or production of documents and that the territorial limitations set forth in Fed. R. Civ. P. 45 for service and enforcement of subpoenas issued by district courts

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arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions." Zivilprozeßordnung [ZPO] [Civil Procedure Statute] Jan. 1, 1998, Bundesgesetzblatt, Teil I [BGBl. I], § 1050 (F.R.G.); Article 35(1) of the Japanese Arbitration Law): "The arbitral tribunal or a party may apply to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary as entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence (excluding documents that the parties may produce in person) or inspection (excluding that of objects the parties may produce in person) prescribed in the Code of Civil Procedure." Chusai Ho [Arbitration Law], Law No. 138 of 2003, art. 35 (Japan); Article 184 of the Swiss Private International Law Act: "Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court of the seat of the arbitral tribunal. Such court shall apply its own law." Bundesgesetz über das Internationale Privatrecht (IPRG) [Private International Law Act], Dec. 18, 1987, AS 1776 (1988), art. 184, ¶ 2 (Switz.); and Section 27 of the UNCITRAL Model Law: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent Court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.".

[3] Courts have accepted that arbitrators have power to require pre-hearing discovery from the *parties* to the proceeding. *See* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 217 (2d Cir. 2008) ("Although section 7 does not distinguish between parties and non-parties to the actual arbitration proceeding, an arbitrator's power over parties stems from the arbitration agreement, not section 7. . . . Where agreements so provide, that authority includes the power to order discovery from the parties in arbitration since 'the FAA lets parties tailor some, even many features of arbitration by contract, including . . . procedure.' . . . . An arbitrator can enforce his or her discovery order through, among other things, drawing a negative inference from a party's refusal to produce . . . and, ultimately, through rendering a judgment [sic] enforceable in federal court. . . .") (citations omitted).

[4] Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

[5] Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004).

[6] COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999).

[7] ImClone Sys. v. Waksal, 22 A.D.3d 387, 802 N.Y.S.2d 653 (N.Y. App. Div. 2005).

[8] Amer. Fed'n of TV & Radio Artists v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999).

[9] Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000).

apply to arbitral orders.[10] The Third Circuit, in an unpublished opinion, has reached the same conclusion.[11] In contrast, the Eighth Circuit has held that Section 7 permits nationwide service of arbitral orders for non-party production of documents and that a district court in the place where the arbitrators are sitting has jurisdiction to enforce such orders, even against non-parties located elsewhere.[12] One federal district court has adopted what has been characterized as a "compromise position," holding that the territorial limits of Rule 45 apply but that a court in the place of arbitration may avoid those limits by authorizing an attorney for a party to the arbitration to issue a subpoena in the enforcement proceeding as an officer of a federal district court in the place where discovery is sought.[13]

The FAA was enacted in 1925, before discovery was commonly available in U.S. courts. Under Section 7, arbitrators were given power to require testimony and production of documents from non-parties comparable to that of federal courts of that era. Considering the language of Section 7 and the historical background against which it was enacted, this Committee agrees with the reasoning of those decisions that have held that Section 7 does *not* authorize courts to enforce arbitral subpoenas for pre-hearing document production or testimony from non-parties and does *not* authorize nationwide service or enforcement of arbitral subpoenas. Despite these limitations, as a practical matter, documents and testimony can, under Section 7, be obtained from non-parties prior to the hearing on the merits. Both the Second and Third Circuits have held that an arbitral subpoena may require production of documents or testimony at a "pre-merits" hearing convened for that purpose—a hearing that may then be adjourned to give the parties time to review the material produced.[14] In order to avoid the territorial limitations imposed on service and enforcement of arbitral subpoenas, the pre-merits hearing may be scheduled for a place within 100 miles of the person subject to the subpoena. The need to employ these measures has been the subject of a good deal of debate.

In the Committee's view, the ability under the FAA to obtain documents and testimony from non-parties as evidence in arbitrations should remain limited and subject to the control of the arbitrators and the courts. However, with respect to production of documents, Section 7 should be modified to remove procedural obstacles and lacunae that are vestiges of a bygone era and that impose unnecessary burdens and costs on all concerned—the parties, the arbitrators and the non-parties who are subject to the subpoena. The Committee does not advocate a piecemeal amendment of the FAA merely to correct these deficiencies. As explained below, amending only Section 7 of the FAA might be perceived as an expansion of the scope of arbitrators' authority to obtain evidence from non-parties—a perception that could potentially discourage some parties and their counsel from agreeing to arbitrate in the United States.

If and when other provisions of the FAA are amended, the Committee believes that Section 7 should be amended in two respects:

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[10] Dynegy Midstream Servs. v. Trammochem Div. of Transammonia, Inc., 451 F.3d 89 (2d Cir. 2006).
[11] Legion Ins. Co. v. John Hancock Mut. Life Ins. Co., 33 Fed. Appx. 26 (3d Cir. 2002).
[12] Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000).
[13] Amgen, Inc. v. Kidney Ctr. of Del. County, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995).
[14] Stolt-Nielsen Transp. Group, Inc. v. Celanese AG, 430 F.3d 567 (2d Cir. 2005); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 413 (3d Cir. 2004). With respect to documents, as noted in a concurring opinion in *Hay Group*, "the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence." *Id.*

First, Section 7 should be amended to eliminate any requirement of appearance at a hearing for production of documents by non-parties.[15] Because providing testimony potentially imposes a greater burden on non-parties than document production, the Committee would retain Section 7's requirement of an arbitrator-attended hearing for the taking of testimony from non-parties.

Second, Section 7 should be modified to permit arbitral subpoenas directed to non-parties outside the district in which the arbitrators are sitting to be served and enforced in the place where the prospective witness or document custodian is located.

This report also contains the Committee's recommendations for best practices with respect to the procedures available under existing law for obtaining evidence from non-parties in international arbitrations[16] The Committee believes that rules, practices and expectations concerning disclosure and evidence-taking in international arbitration differ in significant respects from the rules, practices and expectations prevailing in domestic arbitration and that best practices for international cases should reflect those differences. Accordingly, while the Committee believes that Section 7 provides a useful means of obtaining essential non-party evidence in appropriate cases, it also recommends that in international arbitrations in the United States, arbitrators should limit resort to Section 7 to exceptional circumstances, issuing subpoenas for non-party evidence only when the evidence sought is unavailable from any of the parties to the arbitration and is required for the fair and just resolution of the parties' dispute. The Committee also believes that, in issuing such orders, arbitrators in international cases should be guided by international standards for the scope of disclosure and evidence, such as those reflected in the IBA Rules on the Taking of Evidence in International Arbitration (adopted 29 May 2010), and should take measures to minimize the burden that such orders impose upon non-parties.

I. The current state of U.S. law

A. There is a split among the Circuits and between federal and state courts in New York as to whether section 7 of the FAA authorizes arbitrators to issue subpoenas for pre-hearing document production and testimony from non-parties.

The Circuits are divided on whether Section 7 authorizes arbitrators to require pre-hearing production of documents and testimony from non-parties. The Second and Third

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[15] For cases in federal court, Rule 45(c)(2)(A) provides that no such appearance is required either for discovery or for trial. FED. R. CIV. P. 45(C)(2)(A). This provision is considered to be protective of non-parties and to avoid undue burden and expense. This Committee sees no justification for a different rule for production of documents by non-parties in arbitration.

[16] Under 9 U.S.C. § 202, the New York Convention applies to agreements for arbitration in the United States between citizens of different countries or between citizens of the United States if the relationship between them "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 n.2 (2d Cir. 1983); *see also* Yusuf Alghanim & Sons v. Toys 'R' Us, Inc., 126 F.3d 15, 18–19 (2d Cir. 1997), *cert. denied,* 522 U.S. 1111 (1998); Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 481–82 (7th Cir. 1997), *cert. denied,* 522 U.S. 811 (1997).

Circuits, relying upon the plain language and historical background of Section 7, have held that the FAA does not provide arbitrators with such authority. The Fourth Circuit has agreed, but has indicated that Section 7 would permit a district court to enforce an arbitral subpoena for pre-hearing document production or testimony from a non-party when a "special need" is shown—a position that has been rejected by the Second and Third Circuits. The Sixth and Eighth Circuits have concluded that the power expressly granted to arbitrators under Section 7 to require non-parties to appear and produce documents at a hearing implicitly includes the "lesser power" to require production of documents prior to a hearing. The Second, Third and Fourth Circuits have rejected this notion.[17]

There is also a conflict between federal and state courts in New York. In New York, the Appellate Division for the First Department, purporting to follow the Fourth Circuit, has held that, under the FAA, courts may compel pre-hearing discovery from non-parties in cases of "special need." [18]

1. The Second and Third Circuits have held that Section 7 does not authorize pre-hearing document production or testimony from non-parties.

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,[19] the Third Circuit reversed a district court order requiring pre-hearing production of documents from a non-party witness. Focusing on the "plain language" of Section 7, the Court held that the statute did not authorize arbitrators to order pre-hearing document production from non-parties:

> The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party "to attend before them or any of them as a witness *and* in a proper case *to bring with him or them* any book, record, document or paper which may be deemed material as evidence in the case." *9 U.S.C. § 7* (emphasis added). The power to require a non-party "to bring" items "with him" clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, *Section 7*'s language unambiguously restricts an arbitrator's

[17] The Seventh and Eleventh Circuits do not appear to have decided this question and there are conflicting decisions among the lower courts within these circuits. In the Seventh Circuit, see *Matria Healthcare, LLC v. Duthie*, 584 F. Supp.2d 1078 (N.D. Ill. 2008) (holding that Section 7 does not authorize pre-hearing non-party discovery) and *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F.Supp. 878 (N.D.Ill. 1995) (holding that implicit in the arbitrators' power to compel testimony and production of documents for purposes of a hearing is the "lesser" power to compel pre-hearing testimony and document production). In the Eleventh Circuit, see *Kennedy v. Am, Express Travel Related Servs. Co.*, 646 F.Supp.2d 1342, 1344 (S.D. Fla. Aug. 12, 2009) (finding that an arbitrator is not statutorily authorized under the FAA to issue summonses for pre-hearing depositions and document discovery from non-parties) and *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (holding that the FAA impliedly permits an arbitration panel to order document discovery prior to a hearing). We have not found any cases addressing this issue in the First, Fifth, Ninth, Tenth or D.C. Circuits.

[18] ImClone Sys. v. Waksal, 22 A.D.3d 387, 388, 802 N.Y.S.2d 653, 654 (1st Dep't 2005).

[19] 360 F.3d 404 (3d Cir. 2004) (Alito, J.).

> subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.[20]

As noted in a recent district court decision,[21] the historical background against which Section 7 was enacted also supports the conclusion that it was not intended to authorize pre-hearing document production from non-parties:

> That Congress had in mind in § 7 testimony by a witness at the arbitration and not at a deposition is apparent not only from the plain language of § 7 but from the historical background against which it was enacted. The Federal Arbitration Act was enacted in 1925 . . . . The Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away.
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> While it was possible to apply to equity for a bill of discovery to require the production of documents in advance of trial, such pretrial production was anything but common and could not in any circumstances call for an adversary's documents . . . . Prior to 1937 there had long been a statute that allowed a court in an action at law to compel one party to produce in advance of trial books and papers for examination and inspection of his adversary. *See* § 724 of the revised statutes (U.S.Comp.Stat.1901, p. 583) . . . . But the Supreme Court . . . held that the statute only required production at the trial.
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> Thus, Congress could not have intended when it enacted § 7 of the FAA in 1925 to have authorized arbitrators and district courts to require pre-hearing production in arbitrations when such production was not authorized by § 724 in actions at law . . . . Moreover, the language of the current version of § 7 is identical to the 1925 version . . . . The fact that Congress has not changed the language of § 7 in eighty years is compelling evidence that the original limitations inherent in § 7 were intended to remain undisturbed . . . .[22]

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,[23] the Second Circuit joined the Third Circuit in holding that Section 7 does not authorize arbitral orders for pre-hearing document production or testimony from non-parties:

> The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying

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[20] *Id.* at 407.

[21] Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1080-1081 (N.D. Ill. 2008).

[22] *Id* (citations omitted). In *Matria*, a merger agreement established an escrow account to satisfy potential post-closing claims and provided for arbitration of certain disputes in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). A subpoena was issued in the arbitration for the depositions of two former officers of one of the merged corporations. Initially, the former officers agreed to be deposed on condition that their attorneys' fees and expenses in connection with the depositions would be paid. When a dispute arose as to whether those fees were reasonable the former officers refused to be deposed.

[23] 549 F.3d 210 (2d Cir. 2008).

> witness. The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties, but we must interpret a statute as it is, not as it might be, since "courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . ." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 . . . . (1992). A statute's clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.[24]

Although faced with requests for the production of documents, the Third Circuit in *Hay* and the Second Circuit in *Life Receivables* made it clear that Section 7 also precludes orders for pre-hearing testimony.[25]

2. Both the Second and Third Circuits have held that an arbitral subpoena may require production of documents or testimony at a "pre-merits" hearing convened for that purpose.

The Second and Third Circuits have each concluded that, notwithstanding the absence of any statutory authority for pre-hearing discovery from non-parties, documents and testimony may be obtained from non-parties in advance of any hearing on the merits at a "pre-merits" hearing convened especially for that purpose. In *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, the Second Circuit held that "Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel . . . ."[26] The court in *Stolt* rejected the argument of the non-party seeking to quash a subpoena that Section 7 permits arbitrators to summon witnesses "only to a merits hearing akin to a full-blown trial." [27]

In *Hay*, Judge Chertoff, in a concurring opinion, observed that, although Section 7 did not authorize pre-hearing document discovery, it could, as practical matter, be obtained in many cases by ordering production of the documents at a pre-merits hearing:

> Under *section 7 of the Federal Arbitration Act*, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator,

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[24] *Id.* at 216-217.

[25] *See* Life Receivables, 549 F.3d at 216 (citing Odjfell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004), *aff'd*, Stolt-Nielsen Transp. Group. v. Celanese AG, 430 F.3d 567 (2d Cir. 2005) (quashing a deposition subpoena); *Hay Group*, 360 F.3d at 410 ("Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery.") (quoting COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999)).

[26] 430 F.3d 567, 581 (2d Cir. 2005).

[27] *Id.* at 579.

> who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 *of the FAA*. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence . . . . To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed.[28]

In *Life Receivables*, the Second Circuit expressed its agreement with the views of Judge Chertoff of the Third Circuit:

> Interpreting section 7 according to its plain meaning "does not leave arbitrators powerless" to order the production of documents. *Hay Group*, 360 F.3d at 413 (Chertoff, J., concurring). On the contrary, arbitrators may, consistent with section 7, order "any person" to produce documents so long as that person is called as a witness at a hearing. 9 U.S.C. § 7 . . . . In *Stolt-Nielsen*, we held that arbitral section 7 authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters . . . . As then-Judge Chertoff noted in his concurring opinion in *Hay Group*, the inconvenience of making a personal appearance may cause the testifying witness to "deliver the documents and waive presence." 360 F.3d *at* 413 (Chertoff, J., concurring). Arbitrators also "have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings." Section 7's presence requirement, however, forces the party seeking the non-party discovery -- and the arbitrators authorizing it -- to consider whether production is truly necessary. *See id.* at 414 . . . . In sum, arbitrators possess a variety of tools to compel discovery from non-parties. However, those relying on section 7 of the FAA must do so according to its plain text, which requires that documents be produced by a testifying witness.[29]

3. The Fourth Circuit has held that an arbitral subpoena for pre-hearing discovery may be enforced when there is a showing of "special need or hardship."

In *COMSAT Corp. v. Nat'l Science Foundation*,[30] the Fourth Circuit also concluded that Section 7, by its terms, did not authorize arbitrators to issue orders requiring either pre-hearing testimony or production of documents from nonparties. The court held, however that, a non-party

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[28] *Hay Group*, 360 F.3d at 413-14.

[29] 549 F.3d at 218 (citations omitted). *Accord* Guyden v. Aetna, Inc., 544 F.3d 376, 386-387 (2d Cir. 2008) ("The FAA . . . provides the arbitrator with further authority to compel the production of evidence and witnesses at a pre-merits hearing . . . . Guyden thus has both a contractual and a statutory basis for further discovery should it prove necessary for her claim.").

[30] 190 F.3d 269, 276 (4th Cir. 1999).

could be compelled by a district court to comply with such an order upon a showing of "special need or hardship." In this regard, the court said:

> Yet COMSAT argues quite persuasively that in a complex case such as this one, the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. For this reason, in *Burton* we contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship. 614 F.2d *at* 391.
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> We do not now attempt to define "special need," except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable COMSAT did not attempt such a showing before the district court, and we infer from the record that no such showing would be possible.[31]
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> [W]e hold today that a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship. [32]

The court in *COMSAT* did not cite any case in which an arbitral subpoena for prehearing discovery was enforced upon a showing of special need or hardship. Instead, it relied upon cases involving requests by one party to an arbitration agreement for pre-arbitration discovery from the other party.[33]

Shortly after its decision in *COMSAT*, the Fourth Circuit had occasion to address a claim of "special need." Again, unlike *COMSAT*, the context was a request by one party to an arbitration agreement for pre-arbitration discovery from the other party. In *Deiulemar Compagnia di Navigazione S.P.A. v M/V Allegra*,[34] the court held that Fed. R. Civ. P. 27 permitted pre-arbitration discovery when the petitioner, the charterer of a vessel under a charter party containing a London arbitration clause, "sought evidence from a ship that was soon leaving United States waters" for the "perpetuation of evidence that, if not preserved, was going to disappear or be materially altered [and which] was necessary to its arbitration claim . . . ."[35] The

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[31] *Id.* at 276. The court observed that COMSAT had already obtained many of the documents through FOIA requests and that other documents were available from the opposing party in the arbitration.

[32] *Id.* at 278. Because there was no showing of "special need," the *COMSAT* court's views regarding the possible enforcement of arbitral subpoenas in the case of "special need" have been characterized as "*dicta*." *Hay Group*, 360 F.3d at 410.

[33] The court in *COMSAT* referred to its *dictum* in *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980), which, in turn, cited *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973) and *Ferro Union Corp. v. SS Ionic Coast*, 43 F.R.D. 11 (S.D. Tex. 1967).

[34] Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 481 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000).

[35] 198 F.3d at 481. Rule 27(a)(1) provides, in pertinent part that

> A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must

court in *Deiulemar* observed that its holding was narrow:

> We . . . do not intimate that by recognizing Rule 27 discovery in aid of arbitration in these specific facts, we intend to open all forms of prearbitration discovery in circumstances of "special need." To the contrary, we limit our holding today to Rule 27 perpetuation in the specific circumstances described above. We leave for future determination the proper scope of the "special need" exception as it applies to other forms of discovery in aid of arbitration.[36]

All but one of the reported cases in which federal courts have ordered discovery in aid of arbitration, whether or not they rely on Rule 27, have involved circumstances similar to those in *Deiulemar*—the need to obtain and preserve from a departing vessel and its crew evidence that might otherwise disappear or be materially altered.[37] We have found no subsequent cases in the Fourth Circuit delineating further the scope of the "special need" exception or applying it to enforce an arbitral order for non-party discovery.[38]

Both the Second and Third Circuits have rejected the suggestion in *COMSAT* that a federal court might, under Section 7, enforce an arbitral subpoena for pre-hearing non-party

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show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

The Fourth Circuit in *Deiulemar* concluded that it was sufficient to satisfy the requirements of Rule 27(a)(1)(A) that, at the time of the petition, the charterer expected to be a party to an action to compel the owner to arbitrate even though it soon became clear that no such proceeding would be necessary.

[36] *Id.* at 481 n.10.

[37] *See In re* Compania Chilena de Navegacion Interoceanica S.A., 03 cv 5382, 2004 U.S. Dist. LEXIS 6408 (E.D.N.Y. 2004) (granting charterer's Rule 27 request for deposition of crew members and production of documents from vessel about to leave port when charterparty provided for London arbitration); *In re* Deiulemar, 153 F.R.D. 592, 593 (E.D. La. 1994) (same); Koch Fuel International, Inc. v. M/V South Star, 118 F.R.D. 318 (E.D.N.Y. 1987) (refusing in an admiralty action commenced under 28 U.S.C.S. § 1333, to vacate an order for the expedited depositions of crew members of vessel about to depart the country when the charterparty provided for London arbitration); Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11 (S.D. Tex. 1967) (granting a vessel owner's request, under Section 3 of the FAA to stay trial of an matter pending a New York arbitration, but denying the owner's motion to quash or vacate deposition notices of the master and crew members and granting charterer's motion under Fed. R. Civ. P. 34 for production and inspection of documents on board a vessel about to leave the port). The one exception is *Bigge Crane*, where the court, in declining to stay discovery, found a sufficiently extraordinary circumstance in the fact that formal discovery would hasten the ultimate resolution of the parties' dispute. 371 F. Supp. at 246.

[38] If its requirements are satisfied, Rule 27 can be used to obtain discovery from non-parties. *See, e.g., In re* I-35w Bridge Collapse Site Inspection, 243 F.R.D. 349, 352 n.3 (D. Minn. 2007) ("Rule 27 authorizes such an order to be entered against both parties and non-parties to anticipated litigation.") (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456, at 29 (2d ed. 1995) ("A subpoena duces tecum also may issue pursuant to a court order without the commencement of an action for the perpetuation of testimony under Rule 27.").

discovery based upon a showing of "special need or hardship." In *Hay Group*, the Third Circuit reversed the district court's holding that "special need" justified enforcement of a subpoena for pre-hearing document production, stating that "there is simply no textual basis for allowing any "special need" exception."[39] In *Life Receivables*, the Second Circuit also expressed disagreement with *COMSAT*, referring, with approval, to the "emerging rule" that "the arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena nonparties or third parties for prehearing discovery even if a special need or hardship is shown."[40]

4. The First Department has held that courts may issue orders for pre-hearing discovery in arbitration when there is a showing of "special need or hardship."

There is a conflict between federal and state courts in New York as to the availability of pre-hearing document production and testimony from non-parties under Section 7 of the FAA. Citing *COMSAT*, the Appellate Division for the First Department has held that the FAA does permit parties to an arbitration agreement to obtain pre-hearing discovery from non-parties in cases of "special need." In *ImClone Sys. v. Waksal*,[41] the First Department affirmed a lower court order issuing "open commissions in aid of arbitration."[42] The open commissions provided for pre-hearing depositions of out of state non-party witnesses.[43] The lower court observed that they were issued at the joint request of the parties to the arbitration and that "the arbitrators [had] determined that it [was] appropriate to take such depositions."[44] The lower court denied a subsequent motion of the non-party witnesses to vacate its order, holding that New York law applied and that the depositions were authorized by CPLR 3102(b), which has been held to permit pre-hearing discovery from non-parties when sought pursuant to a stipulation between the parties to an arbitration.[45]

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[39] 360 F.3d 404, 410.

[40] 549 F.3d at 216 (citation omitted).

[41] 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005).

[42] *Id.*

[43] *Id.* CPLR 3108 permits the issuance of commissions "where necessary or convenient for the taking of a deposition outside of the state. The deposition to be taken can be on oral or written questions, as the parties may agree or as the court directs. If on oral questions, it is commonly called an 'open' commission." DAVID D. SIEGEL, NEW YORK PRACTICE § 360, at 589 (4th ed. 2005).

[44] *See* ImClone v. Waksal, No. 602996/02, 2005 WL 5351321, slip. op. at 2 (N.Y. Sup. Ct. April 4, 2005).

[45] *Id.* at 2. In this regard, the lower court cited *Textron, Inc. v. Unisys Corp.*, 138 Misc. 2d 124, 126 (Sup. Ct. N.Y. County 1987) ("Both parties to the arbitration, by stipulation and joint application, sought the contested disclosure resulting in the commissions here, and the matter is authorized by CPLR 3102 (b) where stipulated disclosure is favored.") and *In re* ACE American Insurance Co., 800 N.Y.S.2d 342 (Sup. Ct. N.Y. County 2004) (unpublished table decision) (same). The lower court in *ImClone* held that any restrictions that might otherwise be imposed by CPLR 3102(c), which permits disclosure "to aid in arbitration," applied to a request for discovery only "when one party is resisting it, not where the parties agree." Slip op. at 2. CPLR 3102(c) provides: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony." N.Y. C.P.L.R. 2004. *Textron* stated that this provision was intended to apply to discovery sought by one party from the other. In any event, as one commentator has observed, it has "been generally understood to require very special circumstances before court aid will be offered for this purpose, although one occasionally sees cases that seem to take a more liberal view of the matter." DAVID D. SIEGEL, NEW YORK PRACTICE § 597, at 13 (4th ed. 2005). Among the "liberal" cases is *Hendler & Murray P.C. v. Lambert*, 127 A.D.2d 820, 821, 511 N.Y.S.2d 941, 942 (2d Dep't 1987) (permitting an order requiring discovery from party when "the respondent has demonstrated that the documents are required 'to present a proper case to the arbitrator'" (quoting Moock v. Emanuel, 99 A.D.2d 1003, 473 N.Y.S.2d 793 (1st Dep't 1984))). Federal courts in the Second Circuit have also indicated that discovery in aid of arbitration is available. *See* Oriental

On appeal in *ImClone*, the First Department affirmed on different grounds. First, the court determined that the arbitration in question was subject to the FAA. The court assumed that Section 7 of the FAA preempted state procedural rules such as CPLR 3102 that permit a court to require discovery in aid of arbitration.[46] The court observed that "it is an open question in the Second Circuit whether prehearing nonparty depositions are authorized under the FAA[47] . . . and there is substantial federal authority that they are not . . . ."[48] Then, citing the decisions of the Fourth Circuit in *COMSAT* and *Deiulemar*, the court held that:

> depositions of nonparties may be directed in FAA arbitration where there is a showing of "special need or hardship," such as where the information sought is otherwise unavailable . . . . This view properly takes into consideration the realities and complexities of modern arbitration.[49]

The First Department held that the showing required to demonstrate "special need or hardship" was what the court in COMSAT described as the "minimum"—that the information was unavailable from sources other than the non-party:

> Here, the information sought would plainly be unavailable from other sources, since the crucial issue in plaintiff's attempt to vitiate the agreement is its claim that it was induced by fraud, and the nonparties defendant seeks to depose are the officers and directors who took part in its drafting and negotiation. It was unnecessary for defendant to state in so many words that such information was otherwise unavailable or that exceptional circumstances, special need or hardship exist.[50]

Commercial & Shipping Co. v. Rosseel, N.V., 125 F.R.D. 398, 400 n.3 (S.D.N.Y. 1989) ("Discovery in aid of arbitration is permitted by federal courts in this Circuit under essentially the same standard as under New York law."); Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240 (E.D.N.Y. 1973) (pre-arbitration discovery permitted as consistent with Federal Arbitration Act and New York law).

[46] We note that *ImClone* was decided before *Dynegy Midstream Servs. v. Trammochem Division of Transammonia, Inc.*, 451 F.3d 89 (2d Cir. 2006), discussed below, which held that Section 7 imposed territorial limitations on issuance and enforcement of arbitral subpoenas. Based on the very broad view of the court in *ImClone* concerning the preemptive effect of Section 7, it could conceivably be argued that these territorial limitations would also apply to issuance of commissions for taking of discovery from out of state witnesses.

[47] *ImClone* was decided before *Life Receivables* resolved this question in the Second Circuit. *Life Receivables* is not, in any event, binding on New York state courts interpreting the FAA. *See* Flanagan v. Prudential-Bache Security, Inc., 67 N.Y.2d 500, 506, 504 N.Y.S.2d 82, *cert. denied*, 479 U.S. 931 (1986) ("When there is neither decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts . . . a State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits . . . .").

[48] 22 A.D.3d at 388; 802 N.Y.S.2d at 654 (citing Hay Group, Inc. v E.B.S. Acquisition Corp., 360 F.3d 404, 410 (3d Cir. 2004); Integrity Ins. Co. v Am. Centennial Ins. Co., 885 F Supp 69, 71-73 (S.D.N.Y. 1995); Odjfell ASA v Celanese AG, 328 F Supp 2d 505, 506 (S.D.N.Y 2004)). Each of these cases concerned whether arbitrators had authority to require non-party discovery under Section 7—*not* whether a state court could order such discovery under state procedural rules.

[49] *Id.* at 388.

[50] *Id.* It is questionable whether the Fourth Circuit would find a "special need" to exist in these circumstances. *See* Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra, 198 F.3d 473, 479 (4th Cir. 1999) (observing that courts have allowed discovery in aid of arbitration "where a movant can demonstrate 'extraordinary circumstances,"

Since the decision of the Second Circuit in *Life Receivables*, there has been a conflict between state and federal courts in New York regarding the availability and extent of pre-hearing discovery from non-parties under Section 7 of the FAA. As a recent state court decision put it:

> The hardline rule of the Second Circuit permitting document discovery of non-parties only when it is part-and-parcel of the non-parties' giving of testimony at an arbitration hearing is at odds with the First Department's decision in *ImClone* . . . . The law in the First Department is that under the FAA a court may compel compliance with arbitrators' subpoenas for pre-hearing depositions and document discovery if a "special need or hardship" exists . . . .[51]

5. The Sixth and Eighth Circuit have concluded that arbitrators have an "implied power" under Section 7 to require pre-hearing production of documents.

In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, the Eighth Circuit held that the power expressly granted to arbitrators under Section 7 to require non-parties to appear and produce documents at a hearing included the implicit power to require production of such documents prior to a hearing.[52] The court relied upon *Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co.*,[53] which held that the authority conferred by Section 7 to require production of documents from non-parties at a hearing implicitly included the "lesser power" to compel the production of documents prior to the hearing. The court in *Security Life* also observed that allowing production of documents would assist in the efficient resolution of disputes:

> Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.[54]

In *AFTRA v. WJBK-TV*,[55] the Sixth Circuit held, upon similar grounds, that a labor arbitrator had authority under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to issue a subpoena requiring a non-party to produce documents either before or at an arbitration hearing. The court held that the arbitrators' power under the LMRA was as broad as that of arbitrators under the FAA and that "the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held

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such as "where a vessel with crew members possessing particular knowledge of the dispute is about to leave port," or where there is a "special need for information which will be lost if action is not taken immediately.").

[51] Connectu, Inc. v. Quinn Emanuel Urquhart Oliver & Hedges, No. 602082/08, slip op. at 10 (Sup.Ct. N.Y., Mar. 11, 2010).

[52] 228 F.3d 865 (8th Cir. 2000).

[53] 157 F.R.D. 42, 44-45 (M.D. Tenn. 1993).

[54] 228 F.3d at 870-71.

[55] 164 F.3d 1004 (6th Cir. 1999).

to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing."[56]

Neither the Sixth Circuit in *AFTRA* nor the Eight Circuit in *Security Life* reached the question of whether the implied power they found in section 7 authorized arbitrators to order depositions of non-parties.[57] The district court cases that have addressed this issue (many of which were decided by courts in the Second Circuit prior to *Life Receivables*) have almost uniformly held that the implied power does *not* extend that far and that arbitrators may *not* order the deposition of non-parties.[58] In each of the cases, the distinguishing factor was that depositions imposed a greater burden on non-parties than document production. As stated in *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*:

> Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice—once for deposition and again at the hearing. That a nonparty might suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it. Furthermore, as the deposition is not held before the arbitrator, there is nothing to protect the nonparty from harassing or abusive discovery. The nonparty would, of necessity, turn to the court, obligating the court to become enmeshed in the merits of the matter being arbitrated. This would leave "the parties with one foot in court and the other in arbitration."[59]

In *Hay Group*, the Third Circuit rejected altogether the "implied power" approach, stating:

> We disagree with this power-by-implication analysis. By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had been meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items

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[56] *Id.* at 1009 (citing Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988)).

[57] *Id.* at 1009 ("We do not reach the question of whether an arbitrator may subpoena a third party for a discovery deposition relating to a pending arbitration proceeding"); *Security Life*, 228 F.3d at 871 (declining to reach the question of whether Section 7 authorized arbitrators to issue orders requiring depositions of nonparties, as that issue had become moot through the nonparties' compliance with that portion of the subpoena.).

[58] Atmel Corp. v. LM Ericsson Telefon, AB, 371 F. Supp. 2d 402 (S.D.N.Y. 2005); Nat'l Union Fire Ins. Co. v. Marsh USA, Inc. (*In re* Hawaiian Elec. Indus.), No. M-82, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y. July 9, 2004); Procter and Gamble Co. v. Allianz Ins. Co., No. 02-cv-5480(KMW), 2003 U.S. Dist. LEXIS 26025 (S.D.N.Y. Dec. 3, 2003); *In re* Meridian Bulk Carriers, Ltd, No. 03-2011, 2003 U.S. Dist. LEXIS 24203 (E.D. La. July 17, 2003); Integrity Ins. Co. v. Amer. Centennial Ins. Co., 885 F. Supp. 69 (S.D.N.Y. 1995). *But see* Amgen, Inc. v. Kidney Center of Delaware County, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995) (enforcing compliance with a subpoena requiring the deposition and production of documents by a nonparty).

[59] 885 F. Supp. at 73 (citations omitted).

> with him to an arbitration proceeding. As mentioned above, until its amendment in 1991, Rule 45 of the Federal Rules of Civil Procedure was framed in terms quite similar to Section 7 of the FAA, but courts did not infer that, just because they could compel a non-party witness to bring items with him, they could also require a non-party simply to produce items without being subpoenaed to testify.[60]

B. There is a split of authority among the Circuits as to whether Section 7 of the FAA imposes any territorial limitation on an arbitrator's power to summon a non-party to testify and produce documents or upon the power of a federal district court to enforce such an order.

Section 7 does not contain any express territorial limitation on the power of the arbitrators to summon "any person" to attend before him and produce documents or upon the power of courts to enforce such orders. The statute does state, however, that such orders "shall be served in the same manner as subpoenas to appear and testify before the court." Regarding judicial enforcement of such orders, Section 7 provides that

> if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition *the United States district court for the district in which such arbitrators, or a majority of them, are sitting* may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (2006) (emphasis added).

Fed. R. Civ. P. 45(b)(2) governs service of subpoenas to appear and testify in proceedings in federal court. It imposes certain territorial limits on service, providing that:

> a subpoena may be served at any place
>
> (A) within the district of the issuing court;
> (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
> (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
> (D) that the court authorizes on motion for good cause, if a federal statute so provides.

Regarding issuance of subpoenas, Fed. R. Civ. P. 45(a)(2) provides:

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[60] 360 F.3d at 408-9.

> (2) A subpoena must issue as follows:
> (A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;
> (B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and
> (C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

Under Rule 45, motions to compel compliance with a court issued subpoena or to quash or modify it are decided by the issuing court. In the case of a subpoena for the production of documents, that court would ordinarily be the court for the district where the production or inspection is to be made.

There is a split of authority among the circuit courts as to (a) whether the requirement in Section 7 that arbitral subpoenas be served in "the same manner as subpoenas to appear and testify before the court" incorporates the territorial limits on service of such subpoenas imposed by Fed. R. Civ. P. 45(b)(2); and (b) whether a "district court in which such arbitrators . . . are sitting" may enforce an arbitral subpoena served upon a witness beyond those limits.

1. The Second and Third Circuits have held that Section 7 does not authorize nationwide service or enforcement of arbitral subpoenas.

In *Dynegy Midstream Servs. v. Trammochem, Division of Transammonia, Inc.*,[61] the Second Circuit held that a federal district court in New York could not enforce a *subpoena duces tecum* issued by a New York arbitral tribunal requiring the pre-hearing production of documents in Houston, Texas by Dynegy, a non-party located in Houston. The court observed that "the Federal Rules governing subpoenas to which *Section 7* refers do not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations." *Id.* at 95. The Second Circuit rejected the district court's conclusion that Section 7 authorizes nationwide service and enforcement of arbitral subpoenas.

> Contrary to the district court's reading of the statute, nothing in the language of FAA Section 7 suggests that Congress intended to authorize nationwide service of process. In fact, the language of Section 7 specifically suggests that the ordinary rules applicable to the district courts apply by stating that subpoenas under the section "shall be served in the *same manner* as subpoenas to appear and testify before the court" and the district court may compel attendance "in the *same manner provided by law* for securing the attendance of witnesses . . . in the courts of the United States." 9 U.S.C. § 7 (emphasis added).[62]

In *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*,[63] the Third Circuit, in an

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[61] 451 F.3d 89 (2d Cir. 2006).
[62] *Id.* at 95.
[63] 33 Fed. Appx. 26, 2002 U.S. App. LEXIS 6797 (3d Cir. 2002).

unpublished opinion, reached the same conclusion. The Third Circuit held that a district court in Philadelphia properly denied a motion to enforce an arbitration subpoena requiring a nonparty to appear for a deposition in Florida.[64] Like the Second Circuit in *Dynegy*, the Third Circuit held that service and enforcement of arbitral subpoenas were subject to the territorial limits set forth in Fed. R. Civ. P. 45.

2. The Eighth Circuit has held that the territorial limitations of Rule 45 do not apply to the issuance by arbitrators or to the enforcement by a federal district court of subpoenas for the pre-hearing production of documents.

In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*,[65] the Eighth Circuit held that a district court in Minnesota had the power to enforce a *subpoena duces tecum* issued by an arbitral tribunal sitting there requiring pre-hearing production of documents from a nonparty in California.[66] The court's conclusion seems to have been based upon its view that there was an implied power in Section 7 to require production of documents from nonparties and its perception of the minimal burden upon the non-party of producing documents at a distance. In this regard, the court said: "[W]e do not believe an order for the production of documents requires compliance with Rule 45(b)(2)'s territorial limit. This is because the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."[67] At least two district courts have followed the decision in *Security Life*.[68]

One district court has reached what has been described as a "compromise position." In *Amgen, Inc. v. Kidney Center of Delaware County*,[69] a federal district court in Illinois was asked to enforce compliance with a subpoena issued by an arbitrator sitting there requiring the deposition of and production of documents by a nonparty in the Eastern District of Pennsylvania. A federal district court in Pennsylvania had previously refused to enforce the subpoena, holding that under Section 7, only the court in the place where the arbitrators were sitting could do so.[70]

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[64] *But see In re* Nat'l Fin. Partners Corp., No. 09-mc-00027, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009) (refusing to quash a subpoena issued by arbitral tribunal in Pennsylvania for the deposition of a non-party in Florida).

[65] 228 F.3d 865 (8th Cir. 2000).

[66] As noted above, the court in *Security Life* did not reach the question whether Section 7 authorized arbitrators to issue orders requiring depositions of nonparties, as that issue had become moot through the nonparties' compliance with that portion of the subpoena. 228 F.3d at 871.

[67] *Id.* at 872.

[68] SchlumbergerSema, Inc. v. Xcel Energy, Inc., 02-4302, 2004 U.S. Dist. LEXIS 389 (D. Minn. Jan. 9, 2004), (holding that a district court in Minnesota was authorized to compel compliance with a subpoena duces tecum issued by an arbitral tribunal there requiring the deposition of and production of documents by a nonparty located in the Eastern District of New York, notwithstanding the provisions of Fed.R.Civ.P 37 that a motion to compel disclosure or discovery from a nonparty must be made in the court where the discovery is or will be taken); Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc., 432 F. Supp. 2d 1375, 1378-1379 (D. Ga. 2006) (holding that Section 7 authorized the court to enforce a subpoena issued by an arbitral tribunal sitting in Atlanta, Georgia requiring production of documents from a nonparty in the Southern District of New York and that Rule 45 did not circumscribe its authority.).

[69] 879 F. Supp. 878, 882-83 (N.D. Ill. 1995)

[70] Amgen Inc. v. Kidney Ctr., No. 94-mc-0202, 1994 U.S. Dist. LEXIS 15451, at *3 (E.D. Pa. Oct. 19, 1994) ("Since the arbitrator in the underlying arbitration is sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7, to bring its petition to compel compliance in the United States District Court for the

The Illinois court concluded that, although Section 7 "does not provide for extraterritorial service or extraterritorial enforcement" of arbitral subpoenas, failing to enforce such a subpoena would leave an unsatisfactory "gap in the law":[71]

> KCDC's argument is unavailing because it leaves a gap in the law, which is contrary to Congressional intent, and unnecessary. By definition, the FAA applies only to actions involving interstate commerce, 9 U.S.C. § 2; indeed, the Act itself is based on congressional power to regulate interstate commerce. *Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F. Supp. 988 (D. Minn. 1990). By enacting the FAA, Congress declared a national policy favoring arbitration. *Perry v. Thomas*, 482 U.S. 483, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987). The arbitration of any action affecting interstate commerce is likely to involve parties and witnesses located in more than one district or state. To find that the wording of the FAA precludes issuance and enforcement of an arbitrator's subpoena of a witness outside the district in which he or she sits, particularly where, as here, such discovery is agreed upon by the parties to the arbitration, would likely lead to rejection of arbitration clauses altogether. That would be contrary to the intent of Congress in enacting a national policy favoring arbitration.[72]

In order to avoid the territorial limitations of Rule 45 on service and enforcement, the federal court in Illinois authorized an attorney for a party to the arbitration to issue a subpoena as an officer of the Pennsylvania court, using the case name and number of the action pending in the Illinois court as permitted by Fed. R. Civ. P. 45(a)(3)(B).[73]

In *Dynegy*, the Second Circuit rejected the approach used by the court in *Amgen*:

> Appellees . . . ask us either to adopt the compromise position created in Amgen, Inc. v. Kidney Center of Delaware County, 879 F. Supp. 878, 882-83 (N.D. Ill. 1995), where the district court enforced an arbitration subpoena against a distant non-party by permitting an attorney for a party to the arbitration to issue a subpoena that would be enforced by the district court in the district where the non-party resided, or to suggest another method to get around this gap in enforceability. We decline to do so. We see no textual basis in the FAA for the *Amgen* compromise. Indeed, we have already held that Section 7 "explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to

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Northern District of Illinois.").

[71] 879 F. Supp at 882-883.

[72] *Id.* at 882.

[73] Rule 45 (a)(3) (B) provides that an attorney "may issue and sign a subpoena as an officer of . . .. a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending." The same procedure was later used by the district court in *Security Life*. The Eighth Circuit did not reach the question whether it was authorized, however, because of its holding that an order requiring the production of documents did not require compliance with the territorial limitations of Rule 45. 228 F.3d at 872 On appeal in *Amgen*, the Seventh Circuit questioned whether the district court had subject matter jurisdiction and remanded for the district court to make and certify a finding of jurisdictional facts. *Amgen, Inc. v. Kidney Ctr.*, 95 F.3d 562, 567 (7th Cir. 1996). The district court concluded that it lacked either federal question or diversity jurisdiction, and the Court of Appeals accordingly dismissed the action. *Amgen, Inc. v. Kidney Ctr., 1996 U.S. App. LEXIS 28250* (7th Cir. Oct. 28, 1996).

> an arbitration may not employ this provision to subpoena documents or witnesses." NBC v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. 1999). Moreover, we see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law.[74]

C. The role of state statutes permitting pre-hearing discovery from non-parties.

There are a number of state statutes, such as those based upon the Revised Uniform Arbitration Act ("RUAA"),[75] which allow arbitrators to require pre-hearing discovery from non-parties without the restrictions that have been imposed under Section 7.[76] Under Section 17 (c) of the RUAA, an arbitrator may "permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective."[77] Official Comment 5 of the RUAA states that "sometimes arbitrations involve outside, third parties who may be required to give testimony or produce documents. Section 17(c) provides that the arbitrator should take the interests of such 'affected persons' into account

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[74] 451 F.3d at 96. It is questionable whether the "gap" in Section 7 can be seen as an "intentional choice" on the part of Congress. When the FAA was enacted in 1925, federal courts had nationwide subpoena authority. A federal statute provided: "Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: *provided*, That in civil cases, no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding without the permission of the court being first had upon proper application and cause shown. . . ." Act of September 19, 1922, ch. 344, 42 Stat. 848 (1922) (codified as amended at 28 U.S.C. 654 (1925-1926)). *See* James B. Sloan and William Gotfryd, *Eliminating The 100 Mile Limit For Civil Trial Witnesses: A Proposal To Modernize Civil Trial Practice*, 140 FED.RULES DECISIONS 33, 36 (1992) ("[A]fter the end of World War I, Congress pressed the Executive branch to pursue civil damage actions against war material contractors who had defrauded the United States. In response to the entreaties of the Justice Department, which protested its inability to assure the appearance and testimony of all necessary witnesses, Congress passed an amendment to the general subpoena statute which provided that for a period of three years, 'the permission of the court being first had upon proper application and cause shown' a trial subpoena could be served anywhere in the United States. Although the Congressional intent was to provide broader subpoena power only to the Justice Department in the prosecution of war fraud cases, and specifically to allow all such cases to be brought before courts in the District of Columbia, no such restrictions were written into the Statute. The Statute was subsequently amended again to provide for another three-year extension of nationwide service power."). Arguably, any gap in enforcement of arbitral subpoenas developed in 1928 when the statute authorizing nationwide service of subpoenas expired with no corresponding amendment of Section 7. *See* Vincennes Steel Corp. v. Miller, 94 F.2d 347, 349 (5th Cir. 1938); Barnett v. Merck & Co. (*In re* Vioxx Prods. Liab. Litig.), 438 F. Supp. 2d 664, 667 (E.D. La. 2006) ("[E]xcept for a six year period between 1922 and 1928, the 100 mile rule has always remained a part of the federal subpoena's life . . . .").

[75] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ARBITRATION ACT (2000), http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf (hereinafter "RUAA").

[76] The RUAA has been adopted in the following states: Alaska, Colorado, District of Columbia, Hawaii, Nevada , New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. In 2010, legislation to enact the RUAA has been introduced in Alabama, Arizona, Massachusetts, Minnesota and Pennsylvania. *See* National Conference of Commissioners of Uniform State Laws, A Few Facts About the Uniform Arbitration Act (2000), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp (last visited July 8, 2010).

[77] RUAA at 58.

in determining whether and to what extent discovery is appropriate."[78] Section 17(d) provides that [i]f an arbitrator permits discovery under subsection (c), the arbitrator may . . . issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding . . . ."[79] According to Official Comment 6, "Section 17(d) explicitly states that if an arbitrator allows discovery, the arbitrator has the authority to issue subpoenas for a discovery proceeding such as a deposition."[80] Taking note of cases such as *COMSAT*, which held that, under the FAA, arbitrators generally did not have authority to issue subpoenas to non-parties for pre-hearing discovery, Comment 6 further states: "Because of the unclear case law, Section 17(d) specifically states that arbitrators have subpoena authority for discovery matters under the RUAA."[81]

Under Section 17(g) of the RUAA, courts in states where the RUAA has been enacted may enforce subpoenas issued by arbitral tribunals in other jurisdictions. Section 17(g) provides:

> The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.[82]

Other state statutes may also permit pre-hearing discovery from non-parties.[83]

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[78] *Id.* at 61.
[79] *Id.* at 58.
[80] *Id.* at 61.
[81] *Id.*
[82] *Id.* at 59. Official Comment 9 to Section 17(g) states: "Section 17(g) is intended to allow a court in State A (the State adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has received the subpoena first to go to a court in State B to receive an enforceable order. This procedure would eliminate duplicative court proceedings in both State A and State B before a witness or record or other evidence can be produced for the arbitration proceeding in State B. The court in State A would have the authority to determine whether and under what appropriate conditions the subpoena or discovery-related orders should be enforced against a resident in State A. Similar to the language in 17(b) and (c), the statute directs the court to enforce subpoenas and discovery-related orders to 'make the arbitration proceeding fair, expeditious, and cost effective.' The last sentence of 17(g) requires that the subpoena be served and enforced under the laws of a civil action in State A where the request to enforce the subpoena is being made." *Id.* at 63.
[83] For example, in *Hay Group*, then Judge Alito cited the original Uniform Arbitration Act, as enacted in Delaware and Pennsylvania, as an example of statutes that "explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties." 360 F.3d at 407 n.1 (citing DEL. CODE ANN. tit. 10, § 5708(a) (2003) ("The arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths.") and 42 PA.CONS.STAT. ANN. § 7309 (2003) ("The arbitrators may issue subpoenas in the form prescribed by general rules for the attendance of witnesses and for the production of books, records, documents and other evidence.")). In Judge Alito's view, "The language of these state statutes clearly shows how a law can give authority to an arbitrator to issue pre-hearing document-production orders on third parties." 360 F.3d at 407 n.1. A number of states have

Significantly, there is authority for the proposition that state procedural rules are not pre-empted by the FAA. As the Supreme Court observed in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*,[84] "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[85] In *Volt*, a contractual choice of law clause had been determined by the state courts to incorporate not only California substantive law but also California procedural law governing arbitration—including § 1281.2(c) of the California Civil Procedure Code, which permits a court to stay an arbitration pending the outcome of litigation involving one of the parties. The Supreme Court held that the FAA did not bar the enforcement of such an agreement, even though no such stay of arbitration is available under the FAA. In this regard, the Court said: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[86] Since *Volt*, a number of state courts have held that the FAA does not preempt state arbitral procedural rules, as long as those rules do not defeat the substantive right to arbitration granted by the FAA, and have applied state arbitration rules regarding procedural matters.[87]

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enacted International Commercial Arbitration Acts, some of which confer broad powers upon arbitrators to order pre-hearing discovery from non-parties. *See e.g.*, HAW. REV. STAT. ANN. § 658D-7 (2010) which provides, in pertinent part, "that any arbitral tribunal or other panel established pursuant to such rules shall: . . .

> (2) Be able to utilize any lawful method that it deems appropriate to obtain evidence additional to that produced by the parties;
>
> (3) Issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents, and other evidence;
>
> (4) Be empowered to administer oaths, order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located . . . ."

One case in Pennsylvania has indicated that discovery in aid of an arbitration taking place in another state or foreign country is available under the Uniform Interstate and International Procedure Act (UIIPA). Quijada v. Unifrutti of Am. Inc., 12 Pa D. & C.4th 225 (Pa. Ct. Com. Pl. 1991). Jurisdictions that have enacted the relevant provisions of the UIIPA include Massachusetts: MASS. GEN. LAWS ch. 223A, §§ 1-14 (2000); Michigan: MICH. COMP. LAWS §§ 600.1852, 600.2114a, 600.2118a (1970); Pennsylvania: 42 PA. CONS. STAT. §§ 5321-5329 (2010); and the Virgin Islands: V.I. CODE ANN. tit. 5, §§ 4901-4943 (2010). Section 3.02(a) of the UIIPA provides in relevant part: "[A court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a matter pending in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement of producing the documents or other things." UNIF. INTERSTATE & INT'L PROCEDURE ACT § 3.01(a), 13 U.LA. 355 (1986). The commentary to this section of UIIPA states provides that "the term 'tribunal' is intended to encompass any body performing a judicial function." *Id.*

[84] 489 U.S. 468, 477 (U.S. 1989)

[85] *Id.* at 477.

[86] *Id.* at 476.

[87] *See, e.g.*, *In re* Houston Pipe Line Co., No. 08-800, 2009 Tex. LEXIS 468, at *5 (Tex. 2009) (holding that "[w]hen Texas courts are called on to decide if disputed claims fall within the scope of an arbitration clause under the Federal Act, Texas procedure, [including rules permitting pre-arbitration discovery,] controls that determination); Clites v. Clawges, 685 S.E.2d 693, 696 (W. Va. 2009) (holding that the FAA did not preempt state law permitting appeal from a writ of prohibition staying all judicial proceedings pending arbitration of the dispute between the parties); Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (holding that the FAA did not preempt California law permitting the parties to an arbitration agreement to contract for an expanded scope of judicial review); St. Fleur v. WPI Cable Sys./Mutron, 879 N.E.2d 27, 34 (Mass. 2008) (holding that state law procedure for petitions to enforce or vacate arbitral awards did not "undermine the purposes" of the FAA and therefore, was not preempted by the FAA); Moscatiello v. Hilliard, 939 A.2d 325, 330 (Pa. 2007) (holding that the FAA did not preempt state procedural law setting a thirty-day time limit for challenging an arbitration award);

However, as noted above, in *ImClone Sys. v. Waksal*,[88] the First Department concluded that Section 7 of the FAA preempted state procedural rules such as CPLR 3102 that permit a court to order discovery from non-parties in aid of arbitration. In reaching this conclusion, the court in *ImClone* first examined the choice of law clause in the contract between the parties and found it to be a "generic" New York law clause, which did not specifically incorporate New York procedural rules. Therefore, the court reasoned, the FAA preempted New York law.

The court in *ImClone* evidently assumed that, unless specifically incorporated by the parties in their agreement, state procedural rules governing arbitration were preempted by the FAA. However, in the absence of any express pre-emptive provision in the FAA or any Congressional intent to occupy the entire field, it may be argued that there is no basis for such a presumption. In this view, whether a choice of law clause is "generic" will be relevant for a state court only when that court must determine whether it may apply provisions of state law that impose substantive restrictions on the parties' rights under the FAA or "special rules limiting the authority of arbitrators."[89] In such cases, the federal policy favoring arbitration requires

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Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co., 647 S.E.2d 102, 105 (N.C. Ct. App. 2007) (holding that the FAA did not preempt application of RUAA provisional remedies); Walther v. Sovereign Bank, 872 A.2d 735, 742 (Md. 2005) ("In enforcing § 2 of the FAA . . . state courts are not bound by the federal procedural provisions of the FAA, which are found in §§ 3 and 4 of the FAA, but may generally apply their own procedures."); Webb v. Am. Employers Group, 684 N.W.2d 33, 40 (Neb. 2004) (holding that the FAA did not preempt state procedural law regarding appeal of an order denying a motion to compel arbitration); Sultar v. Merrill Lynch, No. CV040527411S, 2004 Conn. Super. LEXIS 3003 (Oct. 13, 2004) (holding that the Connecticut deadline for petitions to vacate an arbitration award applied and not the longer period set forth in the FAA.); Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 586 S.E.2d 581, 584 (S.C. 2003) (holding that the FAA does not preempt South Carolina's procedural rule on appealability of arbitration orders): Bush v. Paragon Prop., Inc., 997 P.2d 882, 887-88 (Ore. 2000) (en banc) (holding that provisions in the FAA for interlocutory appeal of an order denying a petition to compel arbitration did not preempt state law that failed to provide state court jurisdiction for such an appeal); Simmons Co. v. Deutsche Fin. Servs. Corp., 532 S.E.2d 436, 439-440 (Ga. Ct. App. 2000) ("[W]e find that the Georgia rule allowing a preliminary appeal from an order compelling arbitration does not undermine the purposes or objectives of the FAA to enforce arbitration agreements."); Collins v. Prudential Ins. Co., 752 So. 2d 825, 828-29 (La. 2000) ("[S]tates are free to follow their own procedural rules regarding appeals, unless those rules undermine the goals and principles of the FAA."); S. Cal. Edison Co. v. Peabody W. Coal Co., 977 P.2d 769 (Ariz. 1999) (same); Superpumper, Inc. v. Nerland Oil, Inc., 582 N.W.2d 647, 651 (N.D. 1998) ("[A] state is not obligated to altogether ignore its own procedural requirements in light of the procedural aspects of the FAA, provided the state enacted procedure does not defeat the rights granted by Congress."); Manson v. Dain Bosworth Inc., 623 N.W.2d 610, 614 (Minn. Ct. App. 1998) (holding that FAA governs arbitrability of dispute and Minnesota law governs all other issues, including procedural ones); Duggan v. Zip Mail Servs., Inc., 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) ("Our courts are not bound by the procedural provisions of the FAA and state procedural rules may be applied when arbitration is pursuant to the FAA."); *In re* Propulsora Ixtapa Sur, S.A. De C.V. v. Omni Hotels Franchising Corp., 621 N.Y.S.2d 569, 211 A.D.2d 546, 548 (N.Y. App. Div. 1995), *app. denied*, 85 N.Y.2d 805, 650 N.E.2d 415 (1995) (holding that the FAA did not preempt the twenty-day limitation period for petitions to compel or stay arbitration under CPLR 7503(c)).

[88] 802 N.Y.S.2d 653 (N.Y. App. Div. 1st Dept. 2005).

[89] Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 64 (1995). The cases relied upon by the court in *ImClone* are not to the contrary. *See* Diamond Waterproofing Sys. v. 55 Liberty Owners Corp., 4 N.Y.3d 247, 253, 793 N.Y.S.2d 831, 834-835 (N.Y. 2005) (holding that a generic choice-of-law clause in a contract containing a broad arbitration agreement was insufficient to withdraw from the arbitrators the authority to decide whether a claim was barred by New York's statute of limitations); Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39, 47 (N.Y. 1997) (holding that a generic New York choice-of-law clause was not sufficient to withdraw from the arbitrators the authority to decide questions of arbitrability when a broad arbitration clause specifically incorporated by reference rules providing that the arbitration panel shall have the power to rule on its own jurisdiction).

something more than generic language to incorporate such restrictions or limits.

In the Prefatory Note to the RUAA, the Commissioners on Uniform State Laws addressed the pre-emption issue.[90] They expressed the view that the FAA would probably not preempt the RUAA's provisions on discovery. ("It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption.")[91]

If the FAA does not preempt state procedural rules concerning non-party discovery, then, under current law, the availability and extent of pre-hearing discovery from non-parties in FAA cases may depend on whether enforcement of orders for non-party discovery is sought in federal court or state court.[92] For purely domestic arbitrations, this may depend on such fortuities as whether there is complete diversity between the parties to the arbitration or whether there is some other independent basis for federal court jurisdiction. Even where there is a basis for federal jurisdiction, parties may choose to proceed in state court in order to take advantage of state procedural rules. The inconsistency between state and federal procedural law creates a potential for forum shopping.

A further potential anomaly under Section 7 is that another federal statute, 28 U.S.C. § 1782, has been held to allow courts to order both document discovery and depositions from non-parties anywhere in the United States for private international arbitrations seated outside the United States.[93] As a result, access to pre-hearing discovery from non-parties, at least when it is

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[90] *See* RUAA at 1.

[91] *Id.* at 5.

[92] Whether a federal court sitting in diversity should apply state law rules authorizing courts to order discovery in aid of arbitration is an *Erie* question. *See generally* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). We have found no authority directly addressing this question. Although arguments can be made to the contrary, we assume for the purpose of this discussion that such rules would be regarded as procedural and would not be applied in federal court.

[93] *See In re* Application of Chevron Corporation, No. M-19-111, 2010 U.S. Dist. LEXIS 47034 (S.D.N.Y. May 10, 2010); OJSC Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492 (D. Conn. Aug. 27, 2009); Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co., LLC, No. 08-135-GMS, 2008 U.S. Dist. LEXIS 90291 (D. Del. Oct. 14, 2008), *appeal dismissed as moot*, No. 08-3518, 2009 U.S. App. LEXIS 17289 (3d Cir. Aug. 3, 2009); *In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007); *In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233 (D. Mass. 2008); *In re* Oxus Gold PLC, No. Misc. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006). In a report on § 1782, this Committee has concluded that the statute applies to private international arbitrations. *See* Association of the Bar of the City of New York, International Commercial Disputes Committee, *28 U.S.C. § 1782 as a Means of Obtaining Discovery in aid of International Commercial Arbitration—Applicability and Best Practices*, http://www.nycbar.org/pdf/report/1782_Report.pdf (2008) (hereinafter "*§1782—Applicability and Best Practices*"). A minority of cases have held that the Section 1782 does not apply to private international arbitrations, El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, No. 08-20771, 341 Fed. Appx. 31, 2009 U.S. App. LEXIS 17596 (5th Cir. Aug. 6, 2009); *In re* Operadora DB Mex., S.A., No. 6:09cv383, 2009 U.S. Dist. LEXIS 68091 (M.D. Fla. Aug. 1, 2009); *In re* Arbitration in London between Norfolk Southern Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d 882 (N.D. Ill. 2009).

authorized by the arbitrators,[94] may be granted to parties to foreign arbitrations[95] but denied, under Section 7, to parties to U.S. arbitrations.[96]

II. The Views of the Committee

A. Section 7 of the FAA does not authorize arbitrators to issue orders for pre-hearing testimony or document production from nonparties

The Committee agrees with the reasoning of the decisions of the Second and Third Circuits holding that Section 7 of the FAA does not authorize arbitrators to require pre-hearing testimony or production of documents. The only authority expressly granted to arbitrators under Section 7 is the authority to "summon in writing any person to attend *before them or any of them* as a witness and in a proper case to *bring with him or them* any book, record, document, or paper . . . ." [97] The statute does not, by its terms, grant any authority to arbitrators to require testimony or production of documents from non-parties prior to a hearing. It would be anachronistic to impute to the Congress that enacted Section 7 in 1925 an intent to grant such authority to arbitrators when, at the time, federal courts had no such authority and "the Federal Rules of Civil Procedure, with their provisions for depositions and other mechanisms for discovery, were more than a decade away."[98]

The Committee does not agree with the reasoning of the courts in *Security Life* and other cases that have held the power to require production of documents at a hearing includes the "lesser" power to require such production prior to a hearing.[99] It is debatable whether the power to require pre-hearing document production is, in fact, a lesser power included within the power to require production of documents at a hearing or whether it is something qualitatively different.[100] To assume that it is a "lesser" power effectively begs the question.[101] As to the assertion that such a reading would further the interest in the efficient resolution of disputes, we

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[94] In its report on § 1782, the Committee has suggested that courts should be deferential to arbitrators in exercising and issue such orders only upon the request of the arbitral tribunal. *§1782—Applicability and Best Practices* at 30-32.

[95] In its § 1782 report, a majority of the Committee concluded that discovery in aid of arbitration should be available only in those private international arbitrations seated outside the United States. *Id.* at 35.

[96] If they wish to do so, parties to international commercial arbitrations seated in New York may possibly be able to avoid application of state procedural rules which provide broader access to non-party discovery by removing any enforcement proceedings to federal court under Section 205 of the FAA., 9 U.S.C. § 205, which provides that the defendant in any state court action relating to an arbitration agreement falling under the New York Convention may remove such action to federal court. We have, however, found no case in which the removal statute has been employed in a proceeding to enforce or quash an arbitral subpoena.

[97] Matria Healthcare, LLC v. Duthie, 584 F. Supp. 2d 1078, 1080-1081 (N.D. Ill. 2008) (emphasis added).

[98] *Id*

[99] As one commentator has observed, "Despite its prevalence and appeal, the argument that the greater includes the lesser must be used cautiously." Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 B.Y.U.L. Rev. 227, 241.

[100] *Id.* (noting that one "obvious error in relying on the greater-includes-the-lesser argument occurs when one proposition is not in fact 'the lesser' of the other.").

[101] In this regard, we note that, before the enactment of the federal rules allowing for pretrial discovery, the Supreme Court held that section 24 of the revised statutes (U.S. Comp. Stat. 1901, p. 583), which allowed courts to require parties to produce books or writings "in the trial of actions at law," did *not* authorize courts to require such production *prior to* the trial. Carpenter v. Winn, 221 U.S. 533 (1911).

agree with the Second and Third Circuits that, while there may be valid reasons to empower arbitrators to require pre-hearing testimony and production of documents from non-parties, a "statute's clear language does not morph into something more just because courts think it makes sense for it to do so."[102]

One leading commentator has suggested that the reliance in *Hay* and *Life Receivables* upon the plain language of the FAA and the historical context of its enactment reflects an excessively narrow minded approach to statutory interpretation and laments the fact that courts have not been more flexible in interpreting the FAA.[103] Among other things, he observes that the "plain meaning" approach reflects an underlying assumption that "a rational legislature would have wished to freeze the structure of an arbitration in the amber of 1925—rendering irrelevant any later evolution in our notions of procedure . . . ."[104] *At* 12. While the Committee agrees that the current state of the law is unsatisfactory, we believe that the solution is for Congress, at the appropriate time, to amend the statute and not for courts to continue to interpret it in ways that they think appropriate (or that they think a rational legislature would have found appropriate) – a process which, thus far, has resulted in conflicting decisions.

We also agree with the reasoning of the Second and Third Circuits that Section 7 does not confer upon federal courts authority to enforce arbitral orders for pre-hearing non-party discovery in the case of "special need or hardship," as suggested by the court in *COMSAT*. We note that there is authority for the proposition that federal courts may order discovery under Fed.R.Civ.P 27 in order to preserve evidence for arbitrations.[105] However, the Committee believes that, in most cases, the requirement of Rule 27 that the party seeking such discovery "expects to be a party to an action cognizable in a United States court"[106] would be an obstacle to the use of Rule 27 in connection with arbitrations.

It is true that, under current law, advance production of documents can be obtained in many cases by holding a pre-merits hearing or by threatening one, as suggested by Judge Chertoff in *Hay Group*. It is also true that territorial limitations on service and enforcement of arbitral subpoenas can possibly be avoided by relocating the arbitral tribunal or one of its members, or by threatening to do so. However, as explained below, the Committee believes that, ideally, Section 7 should be amended to provide for a more straightforward and less burdensome

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[102] Life Receivables, 549 F.3d at 216.

[103] Alan Scott Rau, Evidence and Discovery in American Arbitration: The Problem of "Third Parties", 19 AM. REV. INT'L ARB. 1, 9 (2008). Professor Rau found the decisions in *Hay* and *Life Receivables* "eerily reminiscent of the Supreme Court's equally wooden reading of § 10 in the recent *Hall Street* decision." *But see* Hayden v. Pataki, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting). ("[I]t might be a good idea if . . . courts were permitted to read the law according to what they perceived to be the will of the current Congress, rather than that of a long-gone-by one. . . . But whatever the merits of such an arrangement in the abstract, it is simply not a part of our legal system.").

[104] Rau, *supra* note 102, at 12.

[105] 198 F.3d at 481. Although *Deiulemar* involved a request for interparty discovery, discovery may also be obtained from non-parties under Rule 27. *See, e.g*, *In re* I-35w Bridge Collapse Site Inspection, 243 F.R.D. 349, 352 n.3 (D. Minn. 2007) ("Rule 27 authorizes such an order to be entered against both parties and non-parties to anticipated litigation.") (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2456, at 29 (2d ed. 1995) ("A subpoena duces tecum also may issue pursuant to a court order without the commencement of an action for the perpetuation of testimony under Rule 27.")).

[106] FED.R. CIV. P. 27(a)(1)(A).

procedure for obtaining documents and testimony from non-parties.

B. Section 7 of the FAA should be amended in due course.

The Committee recommends that Section 7 of the FAA be amended in due course to eliminate any requirement of a hearing for production of documents from non-parties, and to allow arbitral subpoenas to be served and enforced in the place where the testimony or production is to take place. We do not advocate, however, an amendment of the FAA solely for the purpose of revising Section 7; we believe that such a piecemeal amendment could send the wrong message to the international arbitration community. Amending only Section 7 of the FAA might be perceived as an expansion of the scope of arbitrators' authority to obtain evidence from non-parties—a perception that could potentially discourage discovery-adverse parties from agreeing to arbitrate in the United States. Accordingly, the Committee believes that the revisions it recommends to Section 7 below be made only if and when other sections of the FAA are amended as well, as part of a broader review and amendment of the FAA.[107]

1. Section 7 should be amended to eliminate any requirement of a hearing for production of documents from non-parties.

The Committee believes that, as part of a broader amendment of the FAA, Section 7 should eventually be amended to eliminate any requirement of a hearing for production of documents from non-parties. Most of the decisions that have addressed the question appear to recognize that allowing pre-hearing document production from non-parties would enhance the efficiency of arbitration and would not impose any undue burden. The Second and Third Circuits have recognized that the efficient, cost effective resolution of disputes is an important goal of arbitration, but have concluded that the prospect of enhanced efficiency cannot cause the language of the statute to morph into something else. Congress should eventually act to rectify the problem.

The requirement for arbitrators to hold a hearing or to employ the stratagem proposed by Judge Chertoff in order to obtain pre-hearing document production from non-parties has been sharply criticized. As Professor Siegel has observed:

> What can happen . . . suggests the court as one way around the restriction, is for the arbitrator to subpoena the nonparty to appear, with designated materials, after which the hearing can be adjourned, presumably affording the boning-up opportunity—analogous to pretrial disclosure in litigation—by that route. Maybe the party seeking the documents can just bargain with the nonparty: we'll save you the trouble of an appearance if you'll just give us the documents without one. Extorting a circuitous gambol like that suggests in any event that maybe the

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[107] There has been debate among commentators as to the potential benefits and risks for international arbitration of amending the FAA. *See* William W. Park *Amending the Federal Arbitration Act*, 13 AM. REV INT'L ARBITRATION 1(2002); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L LAW 1241 (2003); Jan Paulsson, "International Arbitration is Not Arbitration," John E. C. Brierley Memorial Lecture McGill University, Montreal, 28 May 2008. *Cf.* J. Townsend *The Federal Arbitration Act Is Too Important To Amend*, THE INTERNATIONAL ARBITRATION NEWS (ABA), Summer 2004.

federal cases on the other side of the conflict have the better of the argument.[108]

Another commentator was equally blunt:

> It is supposed to be more flexible and less costly than litigation. The decisions in *Hay* and *COMSAT* invite an absurd subterfuge that is inconsistent with the purposes of arbitration. Judge Chertoff's concurring opinion in *Hay* actually endorses this subterfuge. He wrote that "arbitrators have the power to compel a third-party witness to appear with the documents before a single arbitrator, who can then adjourn the proceedings." He dismissed the cost issue, stating, "To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents." But it is not the arbitrators who will be inconvenienced; it is the parties, who will have to pay the arbitrators for wholly unnecessary activity.[109]

The Committee shares these concerns. Although it may be necessary and appropriate for arbitrators to hold hearings to rule on disputed issues of privilege or other document production issues that might be ripe for decision prior to a merits hearing, in many cases the identity of the documents to be produced may not be in dispute. In such cases, the requirement of a hearing and an appearance by the witness to obtain production of documents is a relic of a distant era. There is no longer any comparable requirement for production of documents by a non-party witness in cases in litigation in U.S. federal court. Since 1937, the federal rules have permitted pre-trial document production from non-parties without any requirement of a hearing. In 1991, Rule 45 was amended to eliminate any requirement of an appearance by a witness for document production, whether for discovery or at a hearing or trial.[110] In the Committee's view, the ability under the FAA to obtain documents from non-parties should remain limited and subject to the control of the arbitrators and the courts. However, it is difficult to conceive of any justification for maintaining the requirement of a hearing and an appearance by the witness for document production in arbitration. It potentially imposes unnecessary burdens and costs on all concerned—the parties, the arbitrators and the non-parties who are subject to the subpoena. Indeed, Rule 45(c)(2)(a), which eliminated the requirement of an appearance by the witness for production of subpoenaed documents, is one of a number of provisions listed under the heading "Protecting a Person Subject to a Subpoena."[111]

Judge Chertoff sought to rationalize Section 7's requirement of a hearing for document production with one or more arbitrators present by suggesting that it "will induce the arbitrators and parties to weigh whether advance production is really needed."[112] While it is conceivable

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[108] David D. Siegel, *Under Federal Arbitration Act, While Arbitrator can Subpoena Nonparty as Witness, it Can't Separately Compel Discovery; What's N.Y. Rule?* SIEGEL'S PRAC. REV. 2, December 2008.

[109] Lowell Pearson, *The Case for Non-Party Discovery Under the Federal Arbitration Act*, DISP. RESOL. J., AUG.-OCT. 2004, at 46, 52.

[110] Rule 45(c)(2)(A) provides that "a person commanded to produce documents . . . need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial." FED. R. CIV. P. 45(c)(2)(A).

[111] FED. R. CIV. P. 45(c).

[112] 360 F.3d at 414.

that it will have that effect, it may also cause arbitrators and parties to forego advance production even when there is a legitimate need.

2. The requirement of Section 7 of a hearing for testimony of non-parties should be maintained.

Under *Life Receivables* and *Hay Group*, any examination of non-party witnesses must take place with one or more arbitrators in attendance. The Committee believes that this requirement should be maintained. In this regard, the Committee agrees with the concerns expressed by the court in *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, including the concern that the non-party might be required to appear twice (once for a deposition and again at the hearing) and the concern that, without the presence of the arbitrators, there is nothing to protect the non-party from harassing or abusive discovery, with the result that the non-party would be obliged to turn to the court for protection.[113]

3. Section 7 should be amended to allow arbitral subpoenas directed to non-parties to be served and enforced in the place where the non-parties are located, in same manner as subpoenas issued under Rule 45(a)(3)(B).

Rule 45 (a)(3)(B) provides that an attorney "may issue and sign a subpoena as an officer of . . . a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending."[114] The Rule effectively permits nationwide service and enforcement of discovery subpoenas for litigation in federal courts as long as they are issued in the name of a district court for the district where the deposition or document production is to take place and served either within that district, outside that district but within 100 miles of the place specified for the deposition or document production, or within the state of the issuing court. As these provisions of Rule 45 recognize, commerce, communications and business enterprises in the United States transcend state lines and the borders of judicial districts. In many cases, information necessary for the fair and efficient resolution of a dispute subject to arbitration will be in the hands of parties more than 100 miles from the place where the arbitrators are sitting. The Committee sees no reason why similar mechanisms for service and enforcement should not also be available for subpoenas for pre-hearing document production and testimony issued by arbitral tribunals.

There may be ways, under current law, to overcome the territorial limitation imposed in such cases as *Dynegy* on the service and enforcement of arbitral subpoenas. For example, as the authors of one article have observed: "One way for an arbitral panel to overcome this territorial jurisdictional obstacle is temporarily to relocate the arbitration hearing to within 100 miles of the subject of the subpoena."[115]

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[113] 885 F. Supp. at 71-72.

[114] FED. R. CIV. P. 45(a)(3)(B).

[115] Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 227 (2003). *See also* Robert W. DiUbaldo, Evolving Issues in Reinsurance Disputes: the Power of Arbitrators, 35 FORDHAM URB. L.J. 83, 99 (2008) ("[A]n arbitration panel could decide to 'sit' in a location other than where the arbitration is taking place but within 100 miles of the nonparty from whom discovery is sought for the sole purpose of complying with the territorial limits of FRCP 45 and section 7 to obtain nonparty discovery."); Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts under the Federal Arbitration Act*, 34 TORT & INS. L.J. 101,

Most institutional international arbitration rules permit arbitral tribunals to conduct hearings and meetings at locations other than the arbitral *situs*.[116] It is possible that, even in *ad hoc* arbitrations, the authority of arbitrators to establish their own procedural rules includes the authority to hold hearings elsewhere.[117]

At least one court has upheld a subpoena requiring a non-party to appear and testify before a relocated tribunal. In *In re Nat'l Fin. Partners Corp.*,[118] a federal district court in Pennsylvania refused to quash a subpoena issued by a sole arbitrator in Philadelphia ordering a non-party witness to appear and testify and to produce documents at a pre-merits hearing to be held within 100 miles of her home in Florida.[119] The court rejected the argument that the arbitrator lacked authority to issue such an order, holding: "The arbitrator apparently has concluded that the third-party testimony is relevant and is important enough to warrant travel to Florida, and I see no basis to disturb that determination." [120]

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108 (1998) ("To deal with the difficulty created by the FAA's limits on enforcing subpoenas of nonparty witnesses, the parties can change the locale of the arbitration to coincide with the judicial district where the nonparty witnesses reside."); Leslie Trager, *The Use of Subpoenas in Arbitration*, DISP. RESOL. J., NOV. 2007-JAN. 2008, at 14, 17 ("To circumvent this issue, we should ask whether the arbitrator could hold a separate document production hearing in the district where the witness resides and have the subpoena made returnable to that hearing. If the witness did not appear, then the party requesting the subpoena could ask the district or state court in that location to enforce the subpoena and for purposes of §7 of the FAA, the arbitrators would be sitting in that district.")

[116] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 427, 458 (2d ed. 2001); ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 275-6 (4th ed. 2004). *See, e.g.*, UNCITRAL Rules 16(2) ("[The arbitral tribunal] may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration."); ICC Arbitration Rules 14(2) ("The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties."); AAA International Dispute Resolution Procedures Rule 13(2) ("The tribunal may hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate. The parties shall be given sufficient written notice to enable them to be present at any such proceedings."). *But see* Trager, *supra* note 115. at 5 ("Because it is not entirely clear that arbitrators have the authority under the AAA rules to conduct a special hearing for document production purposes at a location other than the one originally chosen, the AAA may wish to consider whether it is necessary to make this authority explicit.").

[117] On the authority of arbitrators to fashion procedural rules, see *Commercial Risk Reinsurance Co. Ltd. v. Security Insurance Company of Hartford* 526 F.Supp.2d 424, 428 (S.D.N.Y.) (stating that arbitrators "possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions.").

[118] *In re* Nat'l/Fin. Partners Corp., No. 9-mc-00026, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009).

[119] *Id.* at *2.

[120] *Id.* It is questionable whether the Pennsylvania court in *National Financial Partners* had authority to decide a motion to quash a subpoena issued for documents and testimony from a non-party witness in Florida. First, in the district court in *Stolt*, Judge Rakoff questioned whether federal courts have authority under Section 7 to quash a subpoena, observing that "the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena." 348 F. Supp.2d 283, 288 (S.D.N.Y. 2004). Judge Rakoff noted that there is some authority for the idea that the right to bring a motion to quash goes hand in hand with the court's power to enforce or refuse to enforce an arbitration subpoena, citing *Integrity Insurance Co. v. American Centennial Insurance Co.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995). On appeal in *Stolt*, 430 F.3d 567 (2d Cir. 2005), the Second Circuit seemed to assume that there was such authority. In *National Financial Partners*, however, the only possible basis for the arbitrator's authority to issue the subpoena was that he was (or would be) "sitting" in Florida. Therefore, under Section 7, the only court that would have authority either to enforce or quash that subpoena would be a court in the place where the arbitrator was or would be "sitting"—a federal district court in Florida.

However, in the absence of an express rule permitting the arbitrators to do so, it may be possible for a recalcitrant party to object to the holding of hearings in any place other than the agreed place of arbitration.[121] One commentator has suggested that there is some uncertainty as to whether federal courts would, in fact, enforce a subpoena issued by an itinerant panel, noting the absence of any case law on this issue and observing that some cases have equated Section 7's reference to "the place where the arbitrators are sitting" with the *situs* of the arbitration.[122]

In New York, another possible approach to obtaining evidence from a distant non-party would be to do what the parties did in *ImClone*: obtain open commissions from a state court permitting the taking of evidence from out of state non-parties. However, under *Life Receivables*, such evidence-taking measures will not be available to parties who find themselves in federal court.

The Committee believes that Section 7 should be amended in order to provide clear authority for the service and enforcement of arbitral subpoenas in much the same manner as subpoenas issued Rule 45(a)(3)(B). However, the Committee would not change the requirement of Section 7 that only the arbitrators are authorized to issue such subpoenas, subject to review by the courts. The Committee would not extend that right to the attorneys for the parties as permitted under Rule 45.

C. Recommended Best Practices Under the Current Law.

The Committee believes that Section 7 of the FAA provides parties and arbitrators in U.S.-based international arbitrations with useful means of obtaining evidence from non-parties located in the United States where such evidence is necessary for the fair and efficient resolution of the parties' dispute. As indicated above, the Committee believes that certain aspects of Section 7 could, and eventually should, be amended to provide more efficient means of obtaining necessary evidence from non-parties. The availability of these means of obtaining evidence from non-parties is entirely consistent in principle with international arbitration norms, as reflected in the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") which codify prevailing international arbitration evidence-taking procedures and which specifically contemplate the possibility of obtaining evidence from non-parties.[123]

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[121] *See* Snider, *supra* note 115,. at 101 ("However, many arbitration agreements require the consent of all parties to change the locale of the arbitration hearing, and a party may resist moving the hearing in order to preclude court enforcement of a subpoena."). The assertion that "many" arbitration agreements contain such specific limitations is questionable.

[122] DiUbaldo, *supra* note 115, at 99. *See* Gresham v. Norris, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004) ("[A] district court maintains jurisdiction over such a petition [to enforce a subpoena under 9 U.S.C. § 7] if the *situs* of the pending arbitration is within its jurisdiction."). *But see In re* Nat'l Fin. Partners Corp., No. 09-mc-00027-JF, 2009 U.S. Dist. LEXIS 34440 (E.D. Pa. Apr. 21, 2009).

[123] A new version of the IBA Rules was issued on May 30, 2010. *See* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. With respect to documents, Article 3.9 of the IBA Rules provides: "If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents or seek leave from the Arbitral Tribunal to take such steps itself.. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take,

The Committee believes, however, that control over the process of obtaining evidence from non-parties must remain with the arbitrators (as opposed to the parties), and that arbitrators should exercise their discretion to subpoena evidence from non-parties only in exceptional circumstances where necessary to obtain evidence indispensible for the fair and just resolution of the parties' dispute. This arbitral control and discipline over the process of obtaining non-party evidence is necessary not only to protect the efficiency of the arbitral process against attempts by parties to obtain a broader scope of discovery or evidence from third parties than the arbitrators might otherwise allow, but also to respect the interests of non-parties who have not agreed to arbitration and are not parties to the arbitration. More specifically, in exercising control and discipline over the non-party evidence process, the Committee believes that arbitrators in international arbitrations: (i) should limit the scope of documents and testimony sought from non-parties to the tailored scope of disclosure and evidence ordinarily available in international arbitration as reflected in the IBA Rules;[124] (ii) should issue arbitral subpoenas for non-party evidence only when the evidence sought is unavailable from any of the parties to the arbitration and is indispensible to the fair and just resolution of the parties' dispute; and (iii) should ensure that the non-parties are burdened as little as possible by the demand for non-party evidence. Thus, arbitrators should subpoena non-parties only for "evidence" as opposed to "discovery," should request only evidence without which the case cannot likely be fairly decided, and should ordinarily ensure that a non-party need only testify once (rather than twice, first at a "pre-merits" hearing and again at the merits hearing). Finally, while Section 7 provides that non-party evidence may be taken "before [the arbitrators] or any of them," the Committee believes that all arbitrators should be present when a non-party provides testimony in an international arbitration. This is recommended both to ensure that arbitrators carefully weigh whether the non-party's testimony is "really needed" (to borrow Judge Chertoff's words), and to protect the enforceability of the arbitrators' eventual award from any challenges under the FAA or the New York Convention.[125]

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authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies. With respect to testimony, Article 4.10 provides: "If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome."

[124] Article 3(3) of the IBA Rules, for example, requires that Requests to Produce describe each requested "Document" or "a narrow and specific . . . category of Documents that are reasonably believed to exist," contain a statement as to how the Documents requested are "relevant to the case and material to its outcome." Under Article 9(2)(c) of the IBA Rules, the Arbitral Tribunal must exclude from evidence or production any document or testimony "an unreasonable burden to produce the requested evidence."

[125] For instance, a losing party could argue that testimony taken from a non-party outside the presence of the arbitrator appointed by that party was "not in accordance with the agreement of the parties" that the case be heard and decided by all of the arbitrators within the meaning of Article V(1)(d) of the New York Convention. In this regard, we note that some arbitration rules require the presence of all of the arbitrators for the taking of evidence. For example, Rule 31 of the AAA Commercial Rules provides: "All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be

When arbitrators have concluded, based on the factors outlined above, that it is appropriate to issue an order for the production of documents or testimony from non-parties, questions may arise as to the procedure to be followed. As discussed above, there is conflict among the Circuits and between state and federal courts as to the availability of pre-hearing evidence from non-parties. The Committee believes that, in formulating orders for the production of documents by non-parties, the best practice for arbitrators under current law is to endeavor to follow the clearly authorized path prescribed in such cases as *Life Receivables* and *Hay Group*. This will involve the issuance of an order for the production of documents at a "pre-merits" hearing convened especially for that purpose. In order to comply with the requirements of *Stolt*, the order should command the non-party "to appear . . . in an arbitration proceeding" and "to bring with [them] and produce at that time and place any and all documents and things, of which [they] have custody or control, which are responsive" to the requests contained in the subpoena.[126]

It is possible that, as Judge Chertoff suggested, the inconvenience of making such a personal appearance may well prompt the non-party witness to deliver the documents and waive presence. When a non-party witness is located outside the jurisdiction of the United States district court for the district in which the arbitrators are sitting, the arbitrators should be prepared to hold the pre-merits hearing at a place within 100 miles of the subject of the subpoena. Again, it is possible that even distant non-parties will deliver documents in response to such a subpoena without the need for the tribunal to relocate. A similar approach may be followed where the arbitrators believe that it is appropriate to require the testimony of a non-party prior to or in connection with a hearing on the merits.[127]

In states that have enacted the RUAA or other statutes permitting pre-hearing depositions of non-parties without the presence of the arbitrators, arbitrators may be asked to issue subpoenas for such depositions. In arbitrations subject to the FAA, courts that are asked to enforce arbitral subpoenas will also be faced with the question whether the FAA preempts state procedural law in this regard. The Committee believes that, whether or not state law is preempted by the FAA, arbitrators in international arbitrations should *not* issue subpoenas for depositions of non-party witnesses. As the International Centre for Dispute Resolution's

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present." Some state statutes also seem to impose such a requirement. *See, e.g.*, N.Y. C.P.L.R. § 7502(e), which provides: "The hearing shall be conducted by all the arbitrators, but a majority may determine any questions and render an award."

[126] *See* Odfjell ASA v. Celanese AG, 348 F. Supp. 2d 283, 285 (S.D.N.Y. 2004).

[127] In New York, an arbitral tribunal may be asked to cooperate with one or more of the parties in requesting the assistance of a state court in obtaining evidence from out of state non-parties. In *ImClone*, the First Department interpreted the FAA to permit pre-hearing discovery, including the issuance of commissions for the deposition of out of state witnesses, in "special circumstances" which, the court held, meant only that the information was unavailable from sources other than the non-party. In the lower court decision in *ImClone*, such commissions were issued at the joint request of the parties to the arbitration where "the arbitrators [had] determined that it [was] appropriate to take such depositions." ImClone v. Waksal, No. 602996/02, 2005 WL 5351321, slip. op. at 2 (N.Y. Sup. Ct. April 4, 2005). The Committee believes that state courts should require such a finding from the arbitrators before issuing commissions for obtaining evidence from out of state non-party witnesses. This decision should be left to the arbitrators in order to minimize the intrusion of courts into the sphere of arbitration and to avoid the waste of resources by ensuring that the information thus obtained can be used in the arbitration. As discussed below, the Committee believes arbitrators in international cases should *not* request state courts to issue commissions for depositions.

Guidelines for Arbitrators Concerning Exchanges of Information states in its Article 6(b): "Depositions . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration."[128]

Finally, the Committee believes that, in international arbitrations, the issuance of orders for documents or testimony from non-parties should always be subject, in the first instance, to the control of the arbitrators. There are some state statutes which permit attorneys for the parties to arbitrations to issue subpoenas.[129] (As discussed above, the RUAA confers such authority only upon the arbitrators.) In cases subject to the FAA, federal courts have held that only the arbitrators may issue subpoenas for production of documents or testimony.[130] The question whether subpoenas issued by attorneys under state law should be enforced is likely to arise only in state courts.[131] The Committee believes that courts asked to enforce attorney-issued subpoenas for non-party testimony or document production for international arbitrations should exercise their discretion not to do so.

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[128] INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, art. 6(b) (2008), http://www.adr.org/si.asp?id=5288.

[129] For example, N.Y. C.P.L.R. § 7505 provides: "An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas."

[130] A number of federal courts have held that, under Section 7, the parties to an arbitration may not issue subpoenas. *See* NBC v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. 1999) ("§ 7 explicitly confers authority only upon *arbitrators*; by necessary implication, the *parties* to an arbitration may not employ this provision to subpoena documents or witnesses,"); St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 591 (7th Cir. 1992); Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) ("While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.") (citations omitted).

[131] Under *ImClone*, a New York court is likely to hold that the Section 7 of the FAA preempts CPLR §7505.

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Reflections on the Use of Dispositive Motions in Arbitration

By Edna Sussman and Solomon Ebere

Responding to the perception that arbitration is not sufficiently time and cost-effective, the use of all of the tools at the arbitrator's disposal to streamline the process is being urged. Summary disposition is increasingly being suggested by arbitration practitioners as such a tool.[1] Corporate arbitration users too are urging the greater use of early resolution of issues, noting that "early resolution of...issues could streamline the proceedings and eliminate the necessity for much evidence, briefing and pleading of factual detail and therefore reduce the cost of arbitration. At the very least, early resolution of such issues could conceivably push the parties to an early settlement."[2] While allowing the kind of motion practice in arbitration that prevails in court would lead to the delays and costs incurred in court and is to be assiduously avoided, an examination of the desirability of the greater use of summary adjudication in appropriate cases is warranted.

For purposes of this article, dispositive motions are motions that resemble the type of motions filed in U.S. civil litigation and that a court would consider dispositive of a case or of parts of a case, such as motions for summary judgment or motions to dismiss or strike claims or defenses. In U.S. civil litigation, these mechanisms are frequently used to set aside unmeritorious claims or defenses, and promote a faster resolution of disputes. Proponents of the greater use of dispositive motions in arbitration argue that, for similar reasons, arbitrators ought to use similar procedural tools to resolve disputes at an early stage of the arbitration proceeding where appropriate.

In practice, however, it is generally believed that arbitrators have been reluctant to hear and grant dispositive motions.[3] This hesitation can be caused by several concerns: many major arbitration rules lack explicit rules authorizing arbitrators to entertain dispositive motions; summary disposition of a case may render the resulting award vulnerable to challenges before courts; the absence of the right of appeal in arbitration creates a hesitation to abbreviate the process and raises concerns about the appearance of justice, or lack thereof, in a truncated proceeding. While the latter concerns cannot be ignored, users are resoundingly asking for a more muscular process. Since arbitration is a creature of party choice, the users' stated preferences should be given serious consideration.

This article reviews the arbitrator's authority to decide dispositive motions and the cases in the U.S. which have dealt with petitions to vacate an arbitrator's award on a dispositive motion. In brief, U.S. courts accord a summary adjudication the same deference as an adjudication after a full blown hearing, as long as the parties have been afforded a fundamentally fair proceeding.

The Arbitrator's Authority

Neither the Federal Arbitration Act ("FAA"), nor the Uniform Arbitration Act ("UAA") expressly provide for dispositive motions. However, based on the flexibility and discretion granted to arbitrators,[4] courts have found that arbitrators have the authority to grant such motions even when the arbitral rules governing the arbitration, such as the American Arbitration Association's ("AAA") Commercial Arbitration Rules, do not expressly grant such authority.[5] As the Third Circuit said in *Sherrock Brothers, Inc. v. Daimler Chrysler Motors Company, LLC:*

> Granting summary judgment surely falls within this standard [of broad discretion to the arbitrator] and fundamental fairness is not implicated by an arbitration panel's decision to forego an evidentiary hearing because of its conclusion that there were no genuine issues of material fact in dispute. An evidentiary hearing will not be required just to find out whether real issues surface in a case.[6]

Moreover, many institutional arbitration rules do provide arbitrators with express authority to entertain dispositive motions. These include Rule 32(c) of the AAA's Construction Industry Rules, Rule 27 of the AAA's Employment Arbitration Rules, and Rule 18 of the JAMS Comprehensive Arbitration Rules.[7] The utility of enabling the arbitrator to decide dispositive motions was recognized and arbitral authority to decide such motions was expressly incorporated into Section 15(b) of the 2000 Revised Uniform Arbitration Act ("RUAA") which provides: "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue."[8]

In international arbitration, as in domestic arbitration, the general grant of discretion to the arbitrator under institutional rules supports the authority of the arbitrator to make summary adjudications. See, ICDR Rules Article 16:3, ICC Rules Article 20: LCIA Rules Article 14:2: UNCITRAL Rules Article 15.2. In 2006 ICSID revised its Arbitration Rules and included Article 41(5), which expressly provided arbitrators with the power to summarily dispose of a case.[9]

The view of the international arbitration bar as to the arbitrator's authority is also reflected in the International Bar Association Rules on the Taking of Evidence in Inter-

national Arbitration, Article 2, which states, in relevant part: "3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues (...) for which a preliminary determination may be appropriate." The Commentary on the Rules further states: "While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognized that in some cases certain issues may resolve all or part of a case. In such circumstances, the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work."[10]

Judicial Review of Summary Adjudications

Summary dispositions by arbitrators have been sanctioned by the courts. Generally, parties challenging an arbitration panel's decision to grant a dispositive motion have contended either that the arbitrators had "exceeded their power," and/or that they engaged in "misconduct in...refusing to hear evidence pertinent and material to the controversy," two of the grounds for vacatur stated in Section 10(a) of the Federal Arbitration Act.[11] In addition to these statutory grounds, parties have raised challenges based on manifest disregard of the law and violation of public policy.

A court's review of challenges to summary adjudications is grounded in the same premise as that applicable to all other arbitral awards. The court's "scope of... review is narrow" and the analysis is not an "occasion for a de novo review of an award." Arbitration awards, including summary adjudications, are to be "be enforced despite a court's disagreement with the merits, if there is a barely colorable justification for the outcome reached."[12] But the courts do review arbitration awards, including summary adjudications, to ensure that parties to arbitration are not deprived of a "fundamentally fair proceeding" which requires that a party receive "notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers."[13]

In *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, Judge Rakoff of the Federal Court in the Southern District of New York was not persuaded to vacate an award based on claims that the arbitrator had resolved factual disputes without discovery or an evidentiary hearing. The court stated that "arbitrators have great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings" and "need not compromise the speed and efficiency goals of arbitration by allowing the parties to present every piece of relevant evidence."[14] The court concluded that the arbitrator was well within his discretion when he determined that the contracts were clear on their face and that further evidence or testimony was not necessary to resolve the issue of contract interpretation before him. The court found that by permitting the losing party to fully brief the issue and submit all evidence it believed to be relevant, conducting a four-hour oral argument and reviewing all of the relevant contracts, the arbitrator had afforded the losing party an adequate opportunity to present its evidence and argument.

Other courts have similarly stated that a refusal to hear all evidence is not enough to vacate an award. "The law only requires that the parties be given *an* opportunity to present their evidence, not that they be given every opportunity" (emphasis in original).[15] Those seeking to vacate an award must show that the excluded evidence was material to the panel's determination and that the refusal to hear the evidence was so prejudicial that the party was denied fundamental fairness.[16] If complaining about a denial of discovery, in order to prevail on a vacatur, a party must show that the evidence that would have been obtained in discovery would overcome the panel's decisions.[17] Parties are not entitled to full discovery that would not change the outcome when the matter can be decided on a pre-hearing motion.

Parties are not entitled in every case to a full-blown evidentiary hearing. In *Schlessinger v. Rosenfeld, Meyer & Susman*, the court (applying California law) stated that a party is entitled to cross-examine if a witness appears at a hearing, but the law does not give a party an absolute right to present oral testimony in every case. The court recognized that a legal issue or defense could possibly be resolved on undisputed facts, and the purpose of arbitration to deliver a speedy and inexpensive means of dispute resolution would be defeated by precluding summary adjudications and requiring a full scale evidentiary hearing in all cases.[18] At least one court has even said that self-serving conclusory statements rejected by the arbitrator as insufficient to create a genuine issue of material fact to defeat the summary judgment motion need not block the granting of a motion.[19]

There are many fact patterns in which a summary adjudication of all or part of the claims and defenses asserted in an arbitration may be appropriate.[20] To illustrate, summary adjudications by arbitrators were granted and confirmed by the courts on the following grounds: res judicata and collateral estoppel,[21] plain meaning of the contract,[22] statute of limitations,[23] standing and preemption,[24] waiver and estoppel,[25] employment at will,[26] failure to comply with a contractual claims or notice procedure,[27] evidence insufficient to permit a rational inference by a trier of fact,[28] and failure to state a claim because no duty was owing.[29] The availability of summary adjudication and its enforcement for international arbitrations under the New York Convention has also been confirmed.[30] While there have been cases in which a summary adjudication has been vacated,[31] those cases are few, and they present facts in which the arbitrator failed to allow for the presentation of material non-cumulative evidence.

A Cautionary Note

As the cases instruct us, while arbitrators have the authority to consider motions for summary disposition and courts have generally affirmed summary adjudications, arbitrators must take great care in exercising this power.

First, the avoidance of increasing the costs of the proceedings and/or delaying its conclusion must be paramount. How sound is the motion and what is its likelihood of success? Are there issues of fact that would preclude ruling in favor of the motion? Will the motion, if granted, really reduce costs and expedite the arbitration, or will it lead to just the opposite result?

In many cases, striking a few unmeritorious claims or defenses of several asserted would not serve to abbreviate the proceedings. Consideration of a motion not likely to succeed will waste time and money. The cost and dilatory impact of court-style motion practice, where the making of dispositive motions is the norm, is precisely what arbitration should avoid. In order to deflect inappropriate motions, arbitrators often discuss the issue of motions in the first preliminary conference to determine the parties' plans in this regard and consider with the parties whether there are appropriate motions to be made. Arbitrators also often require that a letter application for leave to file motions (other than discovery motions) be submitted before a motion is made and afford the opposing party an opportunity to respond to the application.

Second, arbitrators must ensure that they apply the appropriate standard for summary disposition, *i.e.*, that the facts upon which the dispositive motion is made are not in dispute. If there are genuine issues of fact material to the decision, granting a dispositive motion would likely be viewed as depriving the party of a fair proceeding. Arbitrators must also ensure that they have carefully considered any discovery requests by the opposing party. If a party is denied requested discovery that is material to the motion and could alter the result, there would likely be a finding that the party was denied its right to a fundamentally fair proceeding. Issuing an award that is vacated for failure to provide a fundamentally fair proceeding thus requiring the parties to relitigate the matter is the worst result an arbitrator can deliver.

Accordingly, arbitrators must carefully balance the possible benefits to be derived from allowing a dispositive motion to be made against the costs and potential delays occasioned by the motion before allowing the motion to be made. Arbitrators should be confident that the movant is entitled to the relief sought based on undisputed facts and the opponent has had the benefit of any relevant and material discovery sought before granting a dispositive motion.

If a summary adjudication is granted, the arbitrator would serve the parties well and diminish the likelihood of vacatur by writing a reasoned award explaining the basis for the decision and why any evidence that was not considered or discovery not permitted was not material and would not have changed the result.

Conclusion

As in so many aspects of the arbitrator's role, the exercise of good judgment is crucial. Each case must be reviewed in light of its particular facts. An ill-advised consideration of a dispositive motion or a grant of a dispositive motion later vacated by a court will occasion even more cost and delay and deny the parties the benefits arbitration is intended to provide. But dispositive motions are a powerful tool available to streamline proceedings, and arbitrators should not shy away from meritorious dispositive motions that will reduce time and cost. If arbitration is to deliver on its promise of offering a faster and cheaper dispute resolution mechanism, arbitrators should be proactive in considering with the parties the possible advantages of addressing claims or defenses that are legally insufficient at the earliest opportunity.

The College of Commercial Arbitrators protocol for arbitrators with respect to dispositive motions strikes just the right balance in urging arbitrators to "discourage the filing of unproductive motions; limit motions for summary judgment to those that hold reasonable promise for streamlining or focusing the arbitration process, but act aggressively on those."[32]

Endnotes

1. *See* Catherine M. Amirfar, Claudia D. Salas, *How Summary Adjudication Can Promote Fairness and Efficiency in International Arbitration*, International Bar Association, Arbitration Newsletter (2010), *see also* Alfred G. Ferris and Biddle W. Lee, *The Use of Dispositive Motions in Arbitration*, 62 Disp. Resol. J. 17, 24 (2007), Mark Friedman and Steven Michaels, *Is It Summary Judgment Time?*, Global Arbitration Review, Vol. 1 Issue 2 (2008), *available at* http://www.globalarbitrationreview com/journal/issues/issue/173/volume-1-issue-2/
2. *See* Lisa Davis George, *The Case for User Feedback in Arbitrator Selection*, 65 Disp. Resol J. 18 (2011).
3. *See* D. Brian King and Jeffery P. Commission, *Summary Judgment in International Arbitration: The "Nay" Case*, ABA International Law Spring 2010 Meeting, at 1 (Spring 2010), *available at* http://apps.americanbar.org/intlaw/spring2010/materials/Common%20Law%20Summary%20Judgment%20in%20International%20Arbitration/King%20-%20Commission pdf (observing that "there is little empirical evidence of use of such a mechanism in the practice of arbitral tribunals ").
4. *See e.g.*, American Arbitration Association, Commercial Arbitration Rules, Rule R-30(b).
5. Of course, if summary adjudication is precluded in the contract's arbitration clause, it is not available
6. *Sherrock Brothers, Inc v. DaimlerChrysler Motors Co., LLC*, 260 Fed. Appx. 497, 502 (3rd Cir 2008).

7. *But see* Rule 12504 of the Financial Industry Regulatory Authoity's Code of Arbitration Procedure for Customer Disputes, which allows dispositive motions but only with respect to very limited specified issues.

8. 2000 Revised Uniform Arbitration Act ("RUAA"), Section 15(b), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm. As of 2007, it has been enacted in 12 states.

9 For a discussion of these rules, *see* Judith Gill, *Applications for Early Disposition of Claims in Arbitration Proceedings*, ICCA Congress Series No. 14, Proceedings of June 2008 Dublin Conference (2009)

10. International Bar Association Rules on the Taking of Evidence in International Arbitration, *available at* http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.

11. Federal Arbitration Act, 9 U.S.C. 10(a).

12. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, No. 08 civ. 7338, 2009 U.S. Dist. LEXIS 7697, *3 (S.D N Y. January 20, 2009).

13. *Dave Sheldon v. Jay Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001).

14. *Global Int'l Reinsurance Co. Ltd. v. TIG Ins. Co.*, *supra* note 12, at *4.

15. *See Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 252 n 23 (S.D.N.Y 1999)

16. *See Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, No. 01 C 5226, 2004 U.S. Dist. LEXIS 3494 (N.D. Ill. March 8, 2004); *Warren v. Thacher*, 114 F. Supp. 2d 600 (W.D. Ky. 2000).

17. *See The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 U.S. App. LEXIS 1909 (6th Cir. 2000); *Warren v. Thacher, supra* note 16.

18. *See Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995); *accord, Warren v. Thacher, supra* note 16.

19. *See LaPine v. Kyocera Corp.*, No. 07-06132, 2008 U.S. LEXIS 41172 (N.D Cal., May 22, 2008).

20. For a discussion of additional cases *see* David Raim and Nancy Monarch, *Summary Disposition in Arbitration Proceedings*, 11 Arias-US Quarterly, 12 (2004); David E. Robbins, *Calling All Arbitrators. Reclaim Control of the Arbitration Process—The Courts Let You*, 60 Disp Res J. Vol. 9 (2005).

21 *See Sherrock Brothers, Inc v DaimlerChrysler Motors Co., LLC, supra* note 6.

22. *See Global Int'l Reinsurance Co Ltd. v. TIG Ins. Co , supra* note 12; *Intercarbon Bermuda Ltd, v. Caltex Trading and Transp Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993).

23. *See Ozormoor v. T- Mobile USA Inc.*, 2010 U.S. Dist LEXIS 85248 (E D.Mich. August 19, 2010); *see also Stifler v Weiner*, 488 A.2d 192 (Ct Spec. App. Md. 1985).

24. *See Max Marx Color & Chem Co. Employees' Profit Sharing Plan v. Barnes, supra* note 15

25. *See LaPine v. Kyocera Corp., supra* note 19.

26. *See Goldman Sachs & Co. v. Patel QDS:224S164*, 222 N.Y.L.J. 35 (S. Ct., N.Y. Cty. 1999).

27. *See Pegasus Constr Corp. v. Turner Constr. Co.*, 929 P.2d 1200 (Ct App Wash. 1997); *The Louisiana Brown 1992 Irrevocable Trust v. Peabody Coal Co., supra* note 17.

28. *See Hamilton v. Sirius Radio*, 375 F. Supp. 2d 269 (S.D.N Y 2005).

29. *See Warren v. Thacher, supra* note 16.

30. *See LaPine v. Kyocera Corp., supra* note 19.

31. *See e.g. Int'l Union, United Mine Workers v. Marrowbone*, 232 F.3d 383 (4th Cir. 2000) (arbitrator in a labor dispute where the parties had acknowledged that there were factual disputes refused evidence which he had not determined was cumulative, irrelevant or immaterial); *Prudential Secs. v. Dalton*, 929 F Supp. 1411, 1417 (N.D. Okla. 1996) (arbitrators dismissed facially sufficient claim and failed to allow claimant to present evidence pertinent and material to the controversy); *Thomas Neary v. The Prudential Ins. Co. of Am.*, 63 F. Supp. 2d 208 (D. Conn. 1999) (arbitrators manifestly disregarded standard for summary judgment); *Andrew v. CUNA Brokerage Serv. Inc.*, 976 A. 2d 496 (Sup. Ct Pa. 2009) (arbitrators granted summary judgment on statute of limitations ground on a fraud claim where the losing party claimed he did not know and could not have reasonably been expected to know about his investment losses until a later date and that accordingly an evidentiary hearing was required to determine the validity of the limitations defense).

32 College of Commercial Arbitrators, *Protocols for Expeditious, Cost Effective Commercial Arbitration*, at 73 (2010), *available at* http://www.thecca.net/CCA_Protocols.pdf.

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Arbitration Rules

COMMERCIAL

Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes

AMERICAN ARBITRATION ASSOCIATION®

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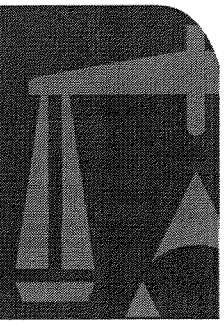
Commercial Arbitration
Rules and Mediation Procedures
(Including Procedures for Large, Complex Commercial Disputes)



Important Notice

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

Introduction

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

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

Standard Arbitration Clause

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

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

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

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

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

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial

Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

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

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

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

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

- A highly qualified, trained Roster of Neutrals;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*+

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

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

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

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

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

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

R-2. AAA and Delegation of Duties

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

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.

(b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

- **i.** The filing party shall include a copy of the court order.
- **ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
- **iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

(d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.

(e) Information to be included with any arbitration filing includes:

- **i.** the name of each party;
- **ii.** the address for each party, including telephone and fax numbers and e-mail addresses;
- **iii.** if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
- **iv.** a statement setting forth the nature of the claim including the relief sought and the amount involved; and
- **v.** the locale requested if the arbitration agreement does not specify one.

(f) The initiating party may file or submit a dispute to the AAA in the following manner:

- **i.** through AAA WebFile, located at **www.adr.org;** or
- **ii.** by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.

(g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

(h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

(i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

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

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

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

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

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

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

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

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

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

R-16. Number of Arbitrators

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

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

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

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

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

- **i.** partiality or lack of independence,
- **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and
- **iii.** any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

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

R-19. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.

(d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

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

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

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

R-21. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

i. require the parties to exchange documents in their possession or custody on which they intend to rely;

ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality,

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

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

R-25. Attendance at Hearings

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

R-26. Representation

Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

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

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

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

R-30. Postponements

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

R-31. Arbitration in the Absence of a Party or Representative

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

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

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

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

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

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

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

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

R-37. Interim Measures

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

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

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

R-38. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall

proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

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

R-42. Extensions of Time

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

R-43. Serving of Notice and Communications

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

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

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

(d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement – Consent Award

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

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

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

R-50. Modification of Award

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

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

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

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

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

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

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

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

R-54. Expenses

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

R-55. Neutral Arbitrator's Compensation

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

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

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

R-56. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.

(b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

- **(i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- **(ii)** whether all necessary or appropriate parties are included in the arbitration;
- **(iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **(iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **(v)** which:
  - **(a)** arbitration rules;
  - **(b)** procedural law; and
  - **(c)** substantive law govern the arbitration;
- **(vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation:
  - **(a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **(b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - **(c)** consolidation of the claims or counterclaims with another arbitration; or
  - **(d)** bifurcation of the proceeding.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;

(xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

(xii) whether, according to a schedule set by the arbitrator, the parties will:

(a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

(b) exchange and pre-mark documents that each party intends to submit; and

(c) exchange pre-hearing submissions, including exhibits;

(xiii) the date, time and place of the arbitration hearing;

(xiv) whether, at the arbitration hearing:

(a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

(b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

(xv) whether any procedure needs to be established for the issuance of subpoenas;

(xvi) the identification of any ongoing, related litigation or arbitration;

(xvii) whether post-hearing submissions will be filed,

(xviii) the form of the arbitration award; and

(xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in rule R-45, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in rule R-45, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard And Flexible Fees)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.
In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.

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

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

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

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

Standard Fee Schedule

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

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

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

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

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

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

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

The minimum fees for any case having three or more arbitrators are $2,800 for the Initial Filing Fee, plus a $1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs.

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

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

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

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

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

Note: The date of receipt of the Demand for Arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

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

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

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

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

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

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

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

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

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

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

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

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings.

Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the Demand for Arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

Hearing Room Rental

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

Commercial Mediation Procedures

M-1. Agreement of Parties

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

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

M-2. Initiation of Mediation

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

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

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

(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

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

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

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

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

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

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

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

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

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

M-6. Vacancies

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

M-7. Duties and Responsibilities of the Mediator

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

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

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

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

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

M-8. Responsibilities of the Parties

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

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

M-9. Privacy

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

M-10. Confidentiality

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

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

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

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

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

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

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

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated, or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

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

M-14. Interpretation and Application of Procedures

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

M-15. Deposits

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

M-16. Expenses

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

M-17. Cost of the Mediation

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

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

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the cost is $250 plus any mediator time and charges incurred.

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

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

Conference Room Rental

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

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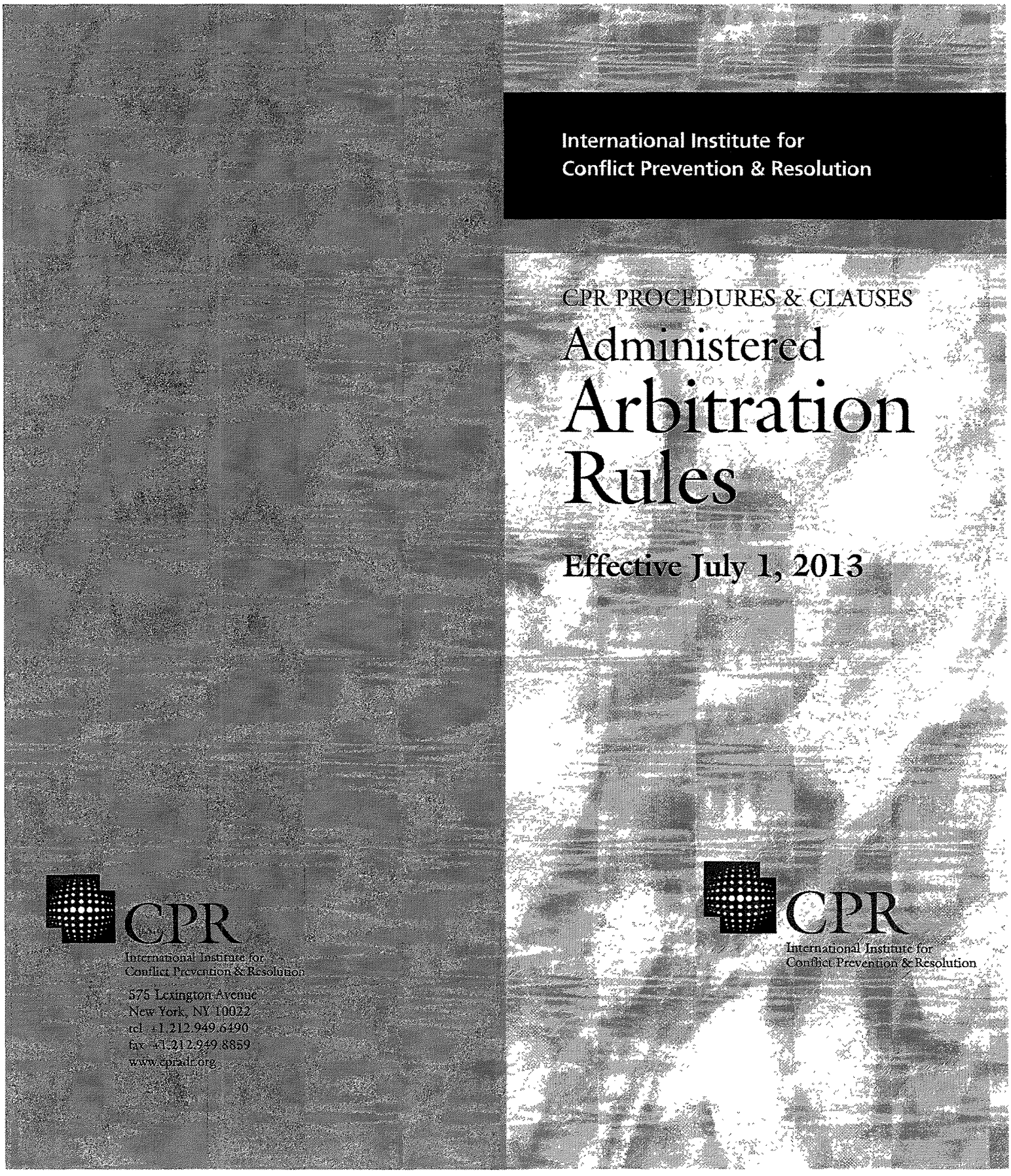
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Kathleen A. Bryan, President & CEO

Changing the Way the World Resolves Conflict

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

Dispute Resolution Services:

- With litigation costing billions of dollars each year, effective conflict management is essential to reduce costs, increase privacy, lower litigation risks and improve business relationships.
- Mediation, arbitration and other consensual dispute resolution methods offer a low-cost, high-return option for parties.
- CPR's Panels of Distinguished Neutrals, comprised of former judges, prominent attorneys and academics, are uniquely qualified to resolve worldwide complex business disputes in more than 20 specialized practice areas.

CPR's Clauses and Rules:

- Allow parties to constructively and efficiently resolve disputes.
- Reduce time and money.
- Provide a range of options for administrative involvement.
- Enable proceedings to be held anywhere in the world.
- Conduct complex arbitration and/or mediation more efficiently with role of administered body determined by parties.

CPR Panels of Distinguished Neutrals:

- More than 500 distinguished neutrals, both in the United States and abroad.
- A highly selective vetting and evaluation process.
- A diverse Global Panel of Distinguished Neutrals across more than 20 countries.
- Highly skilled lawyers provide the administration and selection process.

CPR Services Include:

- Resources for drafting pre-dispute ADR clauses and custom post-dispute ADR agreements.
- Developing selection criteria for neutral selection, as well as generating lists of neutral candidates to meet parties' specific complex needs.
- Fund-holding capabilities.
- Procedures for challenging and/or replacing neutrals.
- Appointment of special arbitrator for emergency relief.
- Fully administered arbitration.

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CPR PROCEDURES & CLAUSES

Administered Arbitration Rules

Effective July 1, 2013

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CPR'S FULL RANGE OF ARBITRATION OPTIONS

The International Institute for Conflict Prevention and Resolution ("CPR") has long championed its Rules for Non-Administered Arbitration (Rev. 2007) as a means of providing for a fair, expeditious, and economical arbitration process. Hallmark features of non-administered or *ad hoc* rules include management of the process by the Tribunal and counsel, without the need for the involvement of a separate administering entity. To aid participants in a non-administered process when necessary, CPR offers customized services, such as arbitrator selection and a challenge procedure. For a full menu of such services, please refer to CPR's website, www.cpradr.org.

CPR maintains its commitment to non-administered processes. However, mindful of the benefits that an arbitral institution can provide in appropriate cases, CPR has promulgated a set of administered arbitration rules to increase parties' range of options. The CPR Rules for Administered Arbitration (July 1, 2013) provide parties with the same well-designed procedures and high quality arbitrators as CPR's non-administered option, while also allowing the parties to avail themselves of CPR's quality staff and resources when an administered process is desired.

Mediation and Other ADR Procedures. The following Rules are intended to govern administered arbitration proceedings. However, parties also may wish to incorporate pre-arbitral negotiation or mediation phases in their contract provisions. Parties desiring to use such procedures should consult the *CPR Mediation Procedure* and CPR's *Dispute Resolution Clauses* (available on CPR's website at www.cpradr.org).

To obtain a copy of any of our rules and procedures, or to find out more about our Dispute Resolution Services and fees, visit our website at www.cpradr.org or call CPR's office at +1.212.949.6490.

CPR MODEL CLAUSES FOR ADMINISTERED ARBITRATION

Standard Contractual Provisions

The CPR Rules for Administered Arbitration (the "Administered Rules" or "Rules") are intended in particular for use in complex commercial arbitrations where parties desire an administered process. They are designed to assure the expeditious and economical conduct of proceedings. The Administered Rules may be adopted by parties wishing to do so by using one of the following standard provisions:

A. Pre-Dispute Clause for Administered Arbitration

"Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state)."

B. Existing Dispute Submission Agreement for Administered Arbitration

"We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") the following dispute:

[Describe briefly]

We further agree that the above dispute shall be submitted to (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). [We further agree that we shall faithfully observe this agreement and the Administered Rules and that we shall abide by and perform any award rendered by the arbitrator(s).] The arbitration shall be governed by the Federal Arbitration Act, 9 U S.C. §§ 1 *et seq* , and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be (city, state)."

A. GENERAL AND INTRODUCTORY ADMINISTERED RULES

Rule 1: Scope of Application

1.1 Where the parties to a contract have provided for arbitration under the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules"), they shall be deemed to have made these Administered Rules a part of their arbitration agreement, except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Administered Rules. Unless the parties otherwise agree, these Administered Rules, and any amendment thereof adopted by CPR, shall apply in the form in effect at the time the arbitration is commenced. If the parties have provided for CPR arbitration without specifying either the Non-Administered or Administered Rules, the CPR Administered Rules shall apply to any arbitration agreement dated July 1, 2013 or later.

1.2 These Administered Rules shall govern the arbitration except that where any of these Administered Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail.

Rule 2: Notices

2.1 Notices or other communications required under these Administered Rules shall be in writing and delivered to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given by registered mail, courier, telex, facsimile transmission, email or any other means of telecommunication that provides a record thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed *prima facie* proof of receipt of any notice or communication given under these Rules.

2.2 Time periods specified by these Administered Rules or established by the Arbitral Tribunal (the "Tribunal") shall start to run on the day following the day when a notice or communication is received, unless these Rules or the Tribunal shall specifically provide otherwise. If the last day of such period is an official holiday or a non-business day at the place where the notice or communication is received, the

period is extended until the first business day which follows. Official holidays and non-business days occurring during the running of the period of time are included in calculating the period.

Rule 3: Commencement of Arbitration

3.1 The party commencing arbitration (the "Claimant") shall deliver to the other party (the "Respondent") a notice of arbitration with an electronic copy to CPR at the same time in accordance with Rule 3.3.

3.2 The notice of arbitration shall include in the text or in attachments thereto

a. The full names, addresses, telephone numbers and email addresses for the parties and their counsel;

b. A demand that the dispute be referred to arbitration pursuant to these Rules,

c. The text of the arbitration clause or the separate arbitration agreement that is involved;

d. A statement of the general nature of the Claimant's claim;

e. The relief or remedy sought; and

f. The name, address, telephone number and email address of the arbitrator designated for appointment by the Claimant, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.3 Delivery of the notice of arbitration to CPR required under this Rule 3.1 shall be as specified on the CPR website. Simultaneous with delivery of the notice of arbitration to CPR, the Claimant shall make payment to CPR of the appropriate Filing Fee as provided in the Schedule of Administered Arbitration Costs on the CPR website. In the event the Claimant fails to comply with this requirement, CPR may fix a time limit within which the Claimant must make payment, failing which the file shall be closed without prejudice to the Claimant's right to submit the same claim(s) at a later date in another notice of arbitration if permissible.

3.4 The date on which CPR is in receipt of both the notice of arbitration and Filing Fee shall, for all purposes, be deemed to be the date of the commencement of the arbitration ("Commencement Date"). CPR will determine the Commencement Date and so notify the parties.

[redacted]

3.5 CPR shall notify the Respondent of its time to deliver a notice of defense, which shall be 20 days after the Commencement Date.

3.6 The Respondent shall deliver to the Claimant a notice of defense by the date provided by CPR under Rule 3.5 with an electronic copy to CPR at the same time. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the notice of arbitration shall be deemed denied. Failure to deliver a notice of defense shall not excuse the Respondent from notifying the Claimant and CPR in writing, by the date provided by CPR under Rule 3.5, of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.7 The notice of defense shall include:

a. The full names, addresses, telephone numbers and email addresses for the parties and their counsel;

b. Any comment on the notice of arbitration that the Respondent may deem appropriate;

c. A statement of the general nature of the Respondent's defense, and

d. The name, address, telephone number and email address of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.

3.8 The Respondent may include in its notice of defense any counterclaim within the scope of the arbitration clause. If it does so, the counterclaim in the notice of defense shall include items (a), (b), (c), (d) and (e) of Rule 3.2.

3.9 If a counterclaim is asserted in accordance with Rule 3.8, CPR shall notify the Claimant of its time to deliver a response, which shall be 20 days after CPR's receipt of the notice of defense and counterclaim. Such response shall have the same elements as provided in Rule 3.7(b) and (c) for the notice of defense. Failure to deliver a reply to a counterclaim shall not delay the arbitration; in the event of such failure, all counterclaims set forth in the notice of defense shall be deemed denied.

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3.10 Claims or counterclaims within the scope of the arbitration clause may be freely added, amended or withdrawn prior to the appointment of the Tribunal and thereafter with the consent of the Tribunal. Notices of defense or replies to added or amended claims or counterclaims shall be delivered by the date CPR provides, which shall be within 20 days after CPR's receipt of the addition or amendment or such other date as specified by CPR, or, if the Tribunal has been appointed, by the date specified by the Tribunal.

3.11 If a dispute is submitted to arbitration pursuant to a submission agreement, this Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement.

Rule 4: Representation

4.1 The parties may be represented or assisted by persons of their choice.

4.2 Each party shall communicate the name, address, telephone number and email address, and function of such persons in writing to the other party, to the Tribunal and to CPR.

B. RULES WITH RESPECT TO THE TRIBUNAL

Rule 5: Selection of Arbitrator(s) by the Parties

5.1 a. Unless the parties have agreed otherwise in writing, the Tribunal shall consist of three arbitrators, one designated for appointment by each of the parties as provided in Rules 3.2 and 3.7 respectively, and a third who shall chair the Tribunal, selected as provided in Rule 5.2.

b. Unless otherwise agreed, any arbitrator not designated for appointment by a party shall be a member of the CPR Panels of Distinguished Neutrals ("CPR Panels"). Upon request, CPR will provide a list of candidates from the CPR Panels in accordance with the Rules.

c. Where a party has designated an arbitrator for appointment, CPR will query such candidate for their availability and request that the candidate disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7 Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of any candidate on grounds of

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lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment on the objection. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as a party-appointed arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection made under this Rule 5.1(c) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

5.2 a. Unless the parties agree that the third arbitrator who shall chair the Tribunal be selected jointly by the party-appointed arbitrators, CPR shall select the third arbitrator as provided in Rule 6.

b. If the party-appointed arbitrators shall designate for appointment the third arbitrator who shall chair the Tribunal, such designation cannot occur until after appointment by CPR of both of the party-designated arbitrators. The party-appointed arbitrators shall inform CPR of the candidate designated by them to be the third arbitrator, whereupon CPR will query such candidate for availability and request such candidate to disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of such candidate on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as the third arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.2 (b) by referring

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it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

In the event that the party-appointed arbitrators are unable to agree on a third arbitrator within 20 days of CPR's appointment of the second arbitrator, the third arbitrator shall be selected by CPR as provided in Rule 6.2.

5.3 If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be designated for appointment by either party, the parties shall attempt jointly to designate such arbitrator(s) within 20 days after the notice of defense provided for in Rule 3.6 is due. CPR will query such jointly designated candidate(s) in accordance with the procedure provided for in Rule 5.1(c). The parties may extend their selection process until one or both of them have concluded that a deadlock has been reached, but in no event for more than 30 days after the notice of defense provided for in Rule 3.6 is due. In the event the parties are unable to designate the arbitrator(s) within the extended selection period, the arbitrator(s) shall be selected as provided in Rule 6.2.

5.4 If the parties have agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them, as provided for in this Rule 5.4, CPR shall conduct a "screened" selection of party-designated arbitrators as follows:

a. CPR will provide each party with a copy of a list of candidates from the CPR Panels together with confirmation of their availability to serve as arbitrators and disclosure of any circumstances that might give rise to justifiable doubt regarding their independence or impartiality, as provided in Rule 7. Within 10 days after the receipt of the CPR list, each party shall designate from the list three candidates, in order of preference, for its party-designated arbitrator, and so notify CPR and the other party in writing.

b. Within the same 10-day period after receipt of the CPR list, a party may also object to the appointment of any candidate on the list on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no

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objection to the first candidate designated by a party, or if the objection is overruled by CPR, CPR shall appoint the candidate as the arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7 6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.4 (b) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

c. If the independence or impartiality of the first candidate designated by a party is successfully challenged, CPR will appoint the subsequent candidate designated by that party, in order of the party's indicated preference, provided CPR does not sustain any objection made to the appointment of that candidate.

d. Neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or appointed arbitrator as to which party selected either of the party-designated arbitrators. No party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate or appointed arbitrator pursuant to this Rule 5.4.

e. The chair of the Tribunal will be appointed by CPR in accordance with the procedure set forth in Rule 6.2, which shall proceed concurrently with the procedure for appointing the party-designated arbitrators provided in subsections (a)-(d) above.

5.5 Where the arbitration agreement entitles each party to designate an arbitrator but there is more than one Claimant or Respondent to the dispute, and either the multiple Claimants or the multiple Respondents do not jointly designate an arbitrator, CPR shall appoint all of the arbitrators as provided in Rule 6.2.

Rule 6: Selection of Arbitrator(s) by CPR

6.1 Whenever (i) a party has failed to designate its arbitrator to be appointed by CPR; (ii) the parties, acting jointly, have failed to designate the arbitrator(s) for appointment by CPR; (iii) the parties have agreed that the party-designated arbitrators who have been appointed by CPR shall designate the third arbitrator and such arbitrators have failed to designate the third arbitrator, (iv) the parties have provided that one or more arbitrator(s) shall be

appointed by CPR; or (v) the multi-party nature of the dispute calls for CPR to appoint all members of a three-member Tribunal pursuant to Rule 5.5, the arbitrator(s) required to complete the Tribunal shall be selected as provided in this Rule 6.

6.2 Except where a party has failed to designate the arbitrator to be appointed by it, CPR shall proceed as follows:

a. CPR shall jointly convene the parties by telephone to discuss the selection of the arbitrator(s).

b. Thereafter, CPR shall provide to the parties a list of candidates, from the CPR Panels, of not less than five candidates if one arbitrator is to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall appoint as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

6.3 Where a party has failed to designate the arbitrator to be appointed by it, CPR shall appoint a person whom it deems qualified to serve as such arbitrator.

Rule 7: Qualifications, Challenges and Replacement of Arbitrator(s)

7.1 Each arbitrator shall be independent and impartial.

7.2 By accepting appointment, each arbitrator shall be deemed to be bound by these Administered Rules and any modification thereof agreed to by the parties, and to have represented that he or she has the time available to devote to the expeditious process contemplated by these Administered Rules.

7.3 Each arbitrator shall disclose in writing to CPR and the parties prior to appointment in accordance with the Rules, and also promptly upon there arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.

7.4 No party or anyone acting on its behalf shall have any *ex parte* communications concerning any matter relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise an arbitrator candidate being considered for designation as its appointed arbitrator of the general nature of the case and discuss the candidate's qualifications, availability, and independence and impartiality with respect to the parties, and a party also may confer with its designated arbitrator after the arbitrator's appointment by CPR regarding the selection of the chair of the Tribunal. As provided in Rule 5.4(d), no party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate designated or appointed pursuant to Rule 5 4.

7.5 Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, provided that a party may challenge an arbitrator whom it has designated only for reasons of which it becomes aware after the designation has been made.

7.6 A party may challenge an appointed arbitrator only by a notice in writing to CPR, with a copy to the Tribunal and the other party, in accordance with the CPR Challenge Protocol (excluding its fee requirement) given no later than 15 days after the challenging party (i) receives notification of the appointment of that arbitrator, or (ii) becomes aware of the circumstances specified in Rule 7.5, whichever shall last occur. The notice shall state the reasons for the challenge with specificity. The notice shall not be sent to the Tribunal when the challenged arbitrator is a party-designated arbitrator selected as provided in Rule 5.4; in that event, CPR may provide

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each member of the Tribunal with an opportunity to comment on the substance of the challenge without disclosing the identity of the challenging party.

7.7 When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. Neither of these actions implies acceptance of the validity of the challenge.

7.8 If neither agreed disqualification nor voluntary withdrawal occurs, the challenge shall be decided by CPR in accordance with the CPR Challenge Protocol (excluding its fee requirement) after providing the non-challenging party and each member of the Tribunal with an opportunity to comment on the challenge in accordance with these Rules.

7.9 In the event of death, resignation or successful challenge of an arbitrator not designated by a party, a substitute arbitrator shall be appointed pursuant to the procedure by which the arbitrator being replaced was selected. In the event of the death, resignation or successful challenge of an arbitrator designated by a party, that party may designate a substitute arbitrator, provided, however, that should that party fail to notify CPR and the other party of the substitute designation within 20 days from the date on which it becomes aware that the opening arose, that party's right of designation shall lapse, and CPR shall appoint a substitute arbitrator forthwith in accordance with these Rules.

7.10 In the event that an arbitrator fails to act or is *de jure* or *de facto* prevented from duly performing the functions of an arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement. If the parties do not agree on whether the arbitrator has failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination forthwith.

7.11 If the sole arbitrator or the chair of the Tribunal is replaced, the successor shall decide the extent to which any hearings held previously shall be repeated. If any other arbitrator is replaced, the Tribunal in its discretion may require that some or all prior hearings be repeated.

7.12 If an arbitrator on a three-person Tribunal fails to participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision,

ruling or award, notwithstanding the failure of the third arbitrator to participate, unless the parties agree otherwise. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of a third arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement.

Rule 8: Challenges to the Jurisdiction of the Tribunal

8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

8.2 The Tribunal shall have the power to determine the existence, scope or validity of the contract of which an arbitration clause forms a part. For the purpose of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made no later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended, a challenge to jurisdiction over such claim or counterclaim must be made not later than the response to such claim or counterclaim as provided under these Rules.

C. RULES WITH RESPECT TO THE CONDUCT OF THE ARBITRAL PROCEEDINGS

Rule 9: General Provisions

9.1 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chair shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal, and shall keep CPR informed of such arrangements throughout the proceedings.

9.2 The proceedings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each

phase of the proceeding, including without limitation, the time allotted to each party for presentation of its case and for rebuttal. In setting time limits, the Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible.

9.3 The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. Such conference shall be held promptly after the constitution of the Tribunal, unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Following the initial pre-hearing conference, a schedule for the conduct of the arbitration should be issued as soon thereafter as appropriate. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following

a. Procedural matters (such as setting specific time limits for, and manner of, any required discovery, the desirability of bifurcation or other separation of the issues in the arbitration; the desirability and practicability of consolidating the arbitration with any other proceeding; the scheduling of conferences and hearings; the scheduling of pre-hearing memoranda; the need for and type of record of conferences and hearings, including the need for transcripts; the amount of time allotted to each party for presentation of its case and for rebuttal; the mode, manner and order for presenting proof; the need for expert witnesses and how expert testimony should be presented, and the necessity for any on-site inspection by the Tribunal);

b. The early identification and narrowing of the issues in the arbitration;

c. The possibility of stipulations of fact and admissions by the parties solely for purposes of the arbitration, as well as simplification of document authentication;

d. The possibility of appointment of a neutral expert by the Tribunal, and

e. The possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator.

[redacted]

After the initial conference, further pre-hearing or other conferences may be held as the Tribunal deems appropriate.

9.4 In order to define the issues to be heard and determined, the Tribunal may, *inter alia*, make pre-hearing orders and instruct the parties to file more detailed statements of claim and of defense and pre-hearing memoranda.

9.5 Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix the place of arbitration based upon the contentions of the parties and the circumstances of the arbitration. The award shall be deemed made at such place. The Tribunal may schedule meetings and hold hearings wherever it deems appropriate.

9.6 Except as otherwise provided in these Administered Rules, only electronic copies of filings, communications and other documents shall be sent to CPR; hard copies of filings or other documents sent to the Tribunal and/or the other party should not be sent to CPR in the ordinary course.

Rule 10: Applicable Law(s) and Remedies

10.1 The Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

10.2 Subject to Rule 10.1, in arbitrations involving the application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

10.3 The Tribunal may grant any remedy or relief, including but not limited to specific performance of a contract, which is within the scope of the agreement of the parties and permissible under the law(s) or rules of law applicable to the dispute.

10.4 The Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

Rule 11: Discovery

The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The

[redacted]

Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

Rule 12: Evidence and Hearings

12.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements

a. A statement of facts;

b. A statement of each claim being asserted;

c. A statement of the applicable law and authorities upon which the party relies;

d. A statement of the relief requested, including the basis for any damages claimed; and

e. A statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony.

12.2 If either party so requests or the Tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply any rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

12.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.

12.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

[redacted]

Rule 13: Interim Measures of Protection

13.1 At the request of a party, the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.

13.2 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

Rule 14: Interim Measures of Protection by a Special Arbitrator

14.1 Unless otherwise agreed by the parties, this Rule 14 shall be deemed part of any arbitration clause or agreement that provides for arbitration under these Administered Rules.

14.2 Prior to the constitution of the Tribunal, any party may request that interim measures be granted under this Administered Rule against any other party by a special arbitrator appointed for that purpose.

14.3 Interim measures under this Administered Rule are requested by written application to CPR, entitled "Request for Interim Measures of Protection by a Special Arbitrator," describing in reasonable detail the relief sought, the party against whom the relief is sought, the grounds for the relief, and, if practicable, the evidence and law supporting the request. The request shall be delivered in accordance with Administered Rule 2 1, and shall certify that all other parties affected have been notified of the request or explain the steps taken to notify such parties.

14.4 The request for interim measures by a special arbitrator shall be accompanied by an initial deposit payable to CPR as provided in the Schedule of Administered Arbitration Costs on the CPR website. CPR shall promptly determine whether any further deposit is due to cover the fee of CPR and the remuneration of the special arbitrator, which amount shall be paid within the time period determined by CPR.

14.5 If the parties agree upon a special arbitrator within one business day of the request, that arbitrator shall be appointed by CPR subject to Rule 14.6. If there is no such timely agreement, CPR shall appoint a special arbitrator from a list of arbitrators maintained by CPR for that purpose. To the extent practicable, CPR shall appoint the special arbitrator within one business day of CPR's receipt of the application for interim measures under this Administered Rule. The

special arbitrator's fee shall be determined by CPR in consultation with the special arbitrator. The special arbitrator's fee and reasonable out-of-pocket expenses shall be paid from the deposit made with CPR.

14.6 Prior to appointment, a special arbitrator candidate shall disclose to CPR any circumstances that might give rise to justifiable doubt regarding his or her independence or impartiality within the meaning of Administered Rule 7. Any challenge to the appointment of a special arbitrator must be made within one business day of the challenging party's receipt of CPR's notification of the appointment of the arbitrator and the circumstances disclosed. A special arbitrator may be challenged on any ground for challenging arbitrators generally under Administered Rule 7. To the extent practicable, CPR shall rule on the challenge within one business day after CPR's receipt of the challenge. CPR's ruling on the challenge shall be final.

14.7 In the event of death, resignation or successful challenge of a special arbitrator, CPR shall appoint a replacement forthwith in accordance with the procedures set forth in Administered Rules 14.5 and 14.6.

14.8 The special arbitrator shall determine the procedure to be followed, which shall include, whenever possible, reasonable notice to, and an opportunity for hearing (either in person, by teleconference or other appropriate means) for all affected parties. The special arbitrator shall conduct the proceedings as expeditiously as possible, and shall have the powers vested in the Tribunal under Administered Rule 8, including the power to rule on his or her own jurisdiction and the applicability of this Administered Rule 14.

14.9 The special arbitrator may grant such interim measures as he or she deems necessary, including but not limited to measures for the preservation of assets, the conservation of goods or the sale of perishable goods.

14.10 The ruling on the request for interim measures shall be made by award or order, and the special arbitrator may state in such award or order whether or not the special arbitrator views the award or order as final for purposes of any judicial proceedings in connection therewith. The award or order may be made conditional upon the provision of security or any act or cessation of any act specified in the award or order. The award or order may provide for the payment of a specified amount in case of noncompliance with its terms.

[redacted]

14.11 The award or order shall specify the relief awarded or denied, shall determine the cost of the proceedings, which includes CPR's administrative fees and expenses, the special arbitrator's fee and expenses as determined by CPR, and apportion such costs among the parties as the special arbitrator deems appropriate. The special arbitrator may also apportion the parties' reasonable attorneys' fees and expenses in the award or order or in a supplementary award or order. Unless the parties agree otherwise, the award or order shall state the reasoning on which the award or order rests as the special arbitrator deems appropriate.

14.12 Prior to the execution of any special arbitrator's award, the special arbitrator shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, suggest any corrections to the special arbitrator and the special arbitrator shall as soon as possible thereafter deliver executed copies of the award to CPR, which shall promptly deliver the award to the parties, provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.

14.13 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate, including the agreement to this Administered Rule 14, or as a waiver of that agreement.

14.14 The special arbitrator's award or order shall remain in effect until modified or vacated by the special arbitrator or the Tribunal. The special arbitrator may modify or vacate the award or order for good cause. If the Tribunal is constituted before the special arbitrator has rendered an award or order, the special arbitrator shall retain jurisdiction to render such award or order unless and until the Tribunal directs otherwise. Once the Tribunal has been constituted, the Tribunal may modify or vacate the award or order rendered by the special arbitrator.

14.15 The special arbitrator shall not serve as a member of the Tribunal unless the parties agree otherwise.

Rule 15: The Award

15.1 The Tribunal may make final, interim, interlocutory and partial awards. With respect to any interim,

[redacted]

interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

15.2 All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. The award shall be deemed to be made at the seat of arbitration and shall contain the date on which the award was made. When there are three arbitrators, the award shall be made and signed by at least a majority of the arbitrators.

15.3 A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award.

15.4 Prior to execution of any award, the Tribunal shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, and suggest any corrections to the Tribunal.

15.5 Thereafter as soon as possible, but in no event more than 3 days, the Tribunal shall deliver executed copies of the award and of any dissenting opinion to CPR, which shall promptly deliver the award and any dissenting opinion to the parties provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.

15.6 Within 15 days after receipt of the award, either party, with notice to the other party and CPR, may request the Tribunal to clarify the award; to correct any clerical, typographical or computational errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any clarification, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests a clarification, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All clarifications, corrections, and additional awards shall be in writing, shall be submitted directly to CPR by the Tribunal for delivery by CPR to the parties, and the provisions of this Administered Rule 15 shall apply to them.

15.7 The award shall be final and binding on the parties, and the parties will undertake to carry out the award without delay. If an interpretation, correction or additional award is requested by a party, or a correction or additional award is made by the Tribunal on its own initiative as provided in Administered Rule 15.6, the award shall be final and binding on the parties when such clarification, correction or additional award is issued by CPR or upon the expiration of the time periods provided in Administered Rule 15.6 for such clarification, correction or additional award to be made, whichever is earlier.

15.8 a. The dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference required by Administered Rule 9.3. The final award should in most circumstances be submitted by the Tribunal to CPR within 30 days after the close of the hearing and thereafter CPR should render the award to the parties promptly. The Tribunal and CPR shall use their best efforts to comply with this schedule.

b. CPR must approve any scheduling orders or extensions that would result in a final award being rendered more than 12 months after the initial pre-hearing conference required by Administered Rule 9.3. When such approval is required, CPR in its discretion may convene a call with the parties and arbitrators to discuss factors relevent to such request.

Rule 16. Failure to Comply with Administered Rules

Whenever a party fails to comply with these Administered Rules, or any order of the Tribunal pursuant to these Administered Rules, in a manner deemed material by the Tribunal, the Tribunal, if appropriate, shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

D. RULES WITH RESPECT TO COSTS AND FEES

Rule 17. Arbitrator Fees, Expenses and Deposits

17.1 Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator and shall be reimbursed for any reasonable travel and other expenses. The compensation for each arbitrator should be fully disclosed to all Tribunal members and parties. If there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by CPR and confirmed in writing to the parties. The parties shall be jointly and severally liable for such fees and expenses.

17.2 The Tribunal shall determine the necessary advances on the arbitrator(s) fees and expenses and advise CPR which, unless otherwise agreed by the parties, shall invoice the parties in equal shares. The amount of any advances to cover arbitrator fees and expenses may be subject to readjustment at any time during the arbitration. Such funds shall be held and disbursed in a manner CPR deems appropriate. An accounting will be rendered to the parties and any unexpended balance returned at the conclusion of the arbitration as may be appropriate.

17.3 If the requested advances are not paid in full within 10 days after receipt of the request, CPR shall so inform the parties and the proceeding may be suspended or terminated unless the other party pays the non-paying party's share subject to any award on costs.

Rule 18. CPR Administrative Fees and Expenses

18.1 In addition to the CPR Filing Fee, CPR shall charge a Case Administrative Fee ("Administrative Fee") as set forth in the Schedule of Administered Arbitration Costs on the CPR website. CPR reserves the right to adjust the Administrative Fee based on developments in the proceeding

18.2 Unless otherwise agreed by the parties, CPR shall invoice the parties in equal shares for the Administrative Fees. Payment shall be due on receipt unless other arrangements are authorized by CPR. The parties shall be jointly and severally liable to CPR for the Administrative Fee. In the event a party fails to pay as provided in the invoice, the proceeding shall be suspended or terminated unless the other party pays the non-paying party's share subject to any award on costs.

[redacted]

Rule 19. Fixing and Apportionment of Costs

19.1 The Tribunal shall fix the costs of arbitration in its award. The costs of arbitration include:

a. The fees and expenses of members of the Tribunal;

b. The costs of expert advice and other assistance engaged by the Tribunal;

c. The travel and other expenses of witnesses to such extent as the Tribunal may deem appropriate;

d. The costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate;

e. The CPR Administrative Fee with respect to the arbitration;

f. The costs of a transcript; and

g. The costs of meeting and hearing facilities.

19.2 Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

E. MISCELLANEOUS ADMINISTERED RULES

Rule 20: Confidentiality

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

Rule 21: Settlement and Mediation

21.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.

21.2 With the consent of the parties, the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the

arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure.

21.3 The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.

21.4 If the parties settle the dispute before an award is made, the Tribunal shall terminate the arbitration and so inform CPR. If requested by all parties and accepted by the Tribunal, the Tribunal may record the settlement in the form of an award made by consent of the parties. The Tribunal is not obliged to give reasons for such an award. CPR shall issue the award

Rule 22: Actions Against CPR or Arbitrator(s)

Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Administered Rules.

Rule 23: Waiver

A party knowing of a failure to comply with any provision of these Administered Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto.

Rule 24: Interpretation and Application of Administered Rules

The Tribunal shall interpret and apply these Administered Rules insofar as they relate to the Tribunal's powers and duties When there is more than one member on the Tribunal and a difference arises among them concerning the meaning or application of these Administered Rules, that difference shall be decided by a majority vote. All other Rules shall be interpreted and applied by CPR.

Sample Arbitrator Materials

FORM OF RETAINER LETTER FOR AD HOC CASES
(TO BE ADAPTED TO THE PARTICULAR CASE)

Charles J. Moxley, Jr.
MoxleyADR LLC
850 Third Avenue, 14th Floor
New York, NY 10022
Tel: (212) 329-8553
Cell: (917) 699-8801
E-mail: cmoxley@moxleyadr.com

DATE

VIA E-MAIL and MAIL

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RE: XXXXXXXXXXXXXXX
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XXXXXXXXXXXXXXX

Dear Counsel:

The purpose of this letter is to set forth the basis upon which I will serve as arbitrator ("Arbitrator") in the above arbitration (the "Arbitration").

The Parties hereby appoint me as Arbitrator pursuant to the terms hereof. The Parties will compensate me at the rate of $___ per hour for my services as Arbitrator, including for hearing, study, and administrative time, and will reimburse my reasonable and necessary expenses incurred in connection with the Arbitration, with each side being responsible for one-half of my charges, subject to a possible subsequent reallocation of charges in the course of this arbitration. My statements will be sent to you as counsel. You agree to promptly forward the statements to the Parties, but the payment obligation is solely that of the Parties.

The Parties will make an initial deposit of $_____, *i.e.*, $_____ from each side, due upon delivery of an executed copy of this Retainer Agreement. That deposit will be supplemented, following the Preliminary Hearing/Scheduling Conference in the Arbitration, based upon my estimate at that time as to the amount of time that will likely be needed for the Arbitration. I

the work in question. I may suspend my participation in the Arbitration at any time if the Parties have not timely deposited the funds I have requested.

The deposits will be maintained in a non-interest-bearing escrow account of MoxleyADR LLC. Any deposits remaining at the end of the Arbitration not needed to satisfy my statements will be returned to the Parties.

I will submit my statements to you periodically, depending upon the level of activity, drawing down on the deposits at such times. The statements will necessarily be of a general nature so as not to disclose my thinking concerning the case.

The Parties will not require me to be a party or witness in any judicial or other proceeding arising out of or relating to the Arbitration and will pay me my hourly rate set forth above for time spent in connection with any proceeding in which I might become involved arising out of or relating to the Arbitration.

If the above is acceptable, would you kindly have the enclosed copy of this Retainer Agreement executed by the Parties and returned to me, along with the initial deposits payable to MoxleyADR LLC. I will execute the Arbitrator's Oath annexed hereto upon receipt of an executed copy of the Retainer Agreement.

I look forward to working with you on this matter.

Very truly yours,

Charles J. Moxley, Jr.

CJM:sm

AGREED TO:

XXXXXXXXXXXXXX

By:_____ _____
Date

XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXX
DATE
Page 3

XXXXXXXXXXXXXXX

By:_____ _____
Date

ARBITRATOR'S OATH

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I attest that I have diligently conducted a conflicts check, based upon review of the information provided to me regarding this matter, and have performed my obligations and duties to disclose in accordance with the Code of Ethics for Arbitrators in Commercial Disputes, effective March 1, 2004, issued by the American Arbitration Association and the American Bar Association (the "Code of Ethics").

I understand that my obligation to check for conflicts and make disclosures is ongoing for the length of my service as an arbitrator in this matter.

I, being duly sworn, hereby accept this appointment in accordance with the Moxley Retainer Agreement to which this Arbitrator's Oath is attached. I hereby further undertake, to faithfully and fairly hear and decide the matters in controversy between the Parties in accordance with the Parties' arbitration agreement and the Code of Ethics and to render an Award according to the best of my understanding.

Dated: _____

_____
Charles J. Moxley, Jr.

Sworn to before me
this ____ day of March, 2013.

_____
Notary Public

FORM OF DISCLOSURE STATEMENT, INCLUDING BLOCK DISCLOSURE COVERING BAR ACTIVITIES, PUBLICATIONS, ETC. (TO BE ADAPTED TO THE PARTICULAR CASE)

Charles J. Moxley, Jr.
MoxleyADR LLC
850 Third Avenue, 14th Floor
New York, NY 10022
Tel: (212) 329-8553
Cell: (917) 699-8801
E-mail: cmoxley@moxleyadr.com

DATE

VIA E-MAIL and MAIL

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RE: XXXXXXXXXXXXXXX
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Dear xxxxxx:

Enclosed please find the Notice of Appointment, Arbitrator's Oath, and Notice of Compensation Arrangements in the above matter, signed by me.

Based upon my recollection and conflicts search, I have had the following contacts with Parties, witnesses, attorneys and law firms identified as involved in this case: _____

_____

_____

_____

My conflicts search is conducted based upon my recollection and conflicts system. My conflicts system, which goes back approximately ten years, captures information as to parties and attorneys with whom I have had cases, but not as to witnesses.

I am active in numerous bar associations and other professional organizations and regularly teach, write and participate on panels and other programs in connection with ADR activities, including as follows:

- Bar Association Activities: I am Chair of the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section of the NYSBA and a member of that Section's Executive Committee, and a member of the ADR Committee of the New York City Bar Association. I am a past member of the NYSBA's House of Delegates, a member of the Executive Committee and past Chair of the Dispute Resolution Section of the NYSBA, and was previously a member of the Arbitration Committee of the New York City Bar Association. I am also a member of the Dispute Resolution and International Sections of the American Bar Association and of the Arbitration and Mediation Committees of the Dispute Resolution Section and have in the past been active in the New York County Lawyers' Association.

- Professional Activities: I am a Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators and an ARIAS-U.S. Certified Arbitrator and IMI Certified Mediator. I am also on the Executive Committee of the New York Branch of the Chartered Institute of Arbitrators.

- Publications: I regularly write in the ADR area and have published numerous articles, some of which have been reprinted in books.

- Teaching: I am an Adjunct Professor at Fordham Law School, teaching international and arbitration law, and the Distinguished ADR Practitioner in Residence at the Benjamin N. Cardozo School of Law. In the past, I have taught at St. John's University School of Law and New York Law School.

- Participation on Panels: I have participated on numerous panels in CLE and other programs presented by the American Arbitration Association, the NYSBA, the American Bar Association, the New York City Bar Association, the New York County Lawyers' Association, ARIAS-US, the Fordham and Cardozo Law Schools, and other organizations and regularly engage in such activities. I also regularly provide training to arbitrators in the commercial arbitration field.

I have contact, actual or constructive, with so many attorneys and others in connection with the foregoing activities that there is no practical way for me to conduct an effective conflicts search to ascertain whether I have had any contact with or exposure to participants in this case in connection with such activities, and, accordingly, I have not conducted such a search and make no disclosure as to such matters other than based on knowledge I have as a result of my present recollection without inquiry. Nor have I checked whether any persons associated with this case may have published in the same issue of a journal or in the same books as those in which I have

been published or may have participated in any trainings or other programs in which I have been involved or may be on listservs on which I am included. I am no longer affiliated with any law firm and have not conducted any conflicts check with any of the prior firms with which I have been affiliated.

I make the above disclosures out of completeness. None of the above would in any way affect my impartiality or independence or interfere with my ability to serve fairly as an arbitrator in this case.

If any of the parties, counsel or others associated with this case are aware of any contacts I may have had with any of the case participants, I would appreciate their calling such information to the attention of the AAA and of counsel and the parties involved in this case.

Thank you.

Very truly yours,

Charles J. Moxley, Jr.

CJM:sm
Enclosures

DRAFT: 05/16/13 3:15 PM

FORM OF MEMORANDUM TO BE SENT TO COUNSEL IN ADVANCE OF PRELIMINARY HEARING

[INDIVIDUAL ENTRIES TO BE ADAPTED/ADJUSTED/DELETED/SUPPLEMENTED BASED ON THE NEEDS OF THE PARTICULAR CASE]

Charles J. Moxley, Jr.

XXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXX,	)	
	)	XXXXXXXXXXXXXXX
Claimant,	)	
- and -	)	
	)	
	)	
XXXXXXXXXXXXXXX,	)	
	)	
Respondent.	)	
	)	

DISCUSSION MEMORANDUM FOR PRELIMINARY HEARING

Dear Counsel:

The Panel has conferred and compiled the following list of matters to be covered at our preliminary hearing scheduled for _____ at _____ _.m. at the offices of _____. Party representatives are welcome to attend with counsel.

Purpose of Preliminary Hearing

As you know, the preliminary hearing is the organizational meeting for an arbitration, at which the schedule is established, to the extent possible, for all phases of the case.

The Parties' Acceptance of the Panel

We will confirm the Parties' acceptance of the Panel, as constituted.

Neutrality of Party-Appointed Arbitrators

We will confirm our understanding that the party-appointed Arbitrators are neutral.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

***Ex Parte* Communications**

We will confirm that, while there may have been *ex parte* communications between the Parties and their party-appointed Arbitrator to date, going forward there will be no *ex parte* communications between any Arbitrator and any Party.

Applicable Rules

We will confirm that this arbitration will be conducted pursuant to the _____ of the _____.

Applicable Law

We note that the _____ (the "Agreement") provides in Section ____ that the Agreement shall be governed by _____ law. We further note that Section _____ of the Agreement provides that the arbitration procedures shall be governed by the _____ and applicable provisions of _____ law. We will discuss the meaning of these provisions.

Schedule

We note that Section _____ of the Agreement provides that the Panel shall conduct this arbitration in such a way as to issue its award "as soon as practicable, but in no event later than _____ (___) days after appointment of the independent arbitrator pursuant to this Section ____ nor later than _____ (__) days following completion of the arbitration."

We note that the _____ e-mail of _____, to the Parties set an objections date of _____ for the appointment of the Chair, and, accordingy, subject to hearing from you on the matter if you have a different view, understand that _____ is the "appointment date" from which the arbitration clause's _____ is calculated, meaning that, under this schedule, the Panel's award is due on _____.

We will also want to discuss how the _____ days provision of Section _____ of the Agreement should be interpreted, including whether the ____ days should run from the later of the completion of the evidentiary hearing or the Parties' submission of any post-hearing briefs or other papers.

Arbitrability

We will want to confirm with the Parties that all issues in this case are arbitrable and subject to the jurisdiction of the Arbitrators in the case and that all conditions precedent to arbitration have been satisfied.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Description of the Case

We will invite each side to set forth its views as to what this case is about, what the main factual and legal issues are, and how the case should be best administered to achieve the arbitration benefits of expedition and economy, along with full and fair opportunity for each side to develop and present its claims or defenses.

Our focus will be particularly on encouraging the Parties to identify the real issues in contention and the ones that may be dealt with in a more summary way, whether through stipulation, agreed chronologies, or the like.

Amendments, if Any, to the Pleadings

We will discuss whether any amendments to the pleadings would be helpful to the expeditious preparation of this case for hearing. We note in this regard that Paragraph __ of the Demand refers to other claims that may be asserted and that Respondent has not responded paragraph by paragraph to the Demand.

Substantive Motions

The Parties will be asked if there are any substantive motions contemplated and, if there are, for a description of them and a statement as to why it is believed that any such motion would foster the efficient and fair administration of the case.

Discovery Master

The Parties will be asked whether they wish to have the entire Panel hear discovery and routine procedural matters or to delegate such matters to the Chair as Discovery Master, subject to involving the entire Panel if the Chair or any Party so desires in any particular instance. It is contemplated that, if the Chair is appointed Discovery Master, either of the other Arbitrators may serve as Discovery Master if a discovery or similar issue arises at a time when the Chair is unavailable.

Reliance Documents

We will discuss whether, separately from the ordinary document production procedures, it might be helpful in this case for the Parties to produce early on the documents of which they are presently aware upon which they anticipate relying at the hearing.

Document Production

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

We will establish a schedule for document disclosure, including possibly for such matters as the following: document requests, objections, production, Counsels' meeting and conferring on objections, privilege logs, and the resolution of any remaining discovery disputes by the Panel or Discovery Master.

We request that you inform yourselves in advance of the preliminary hearing as to how your clients' files are maintained and consider how you think we can most efficiently manage discovery, including electronic discovery, in this matter.

Electronic Discovery

This will involve a discussion of how electronic discovery can be most effectively managed in this case, including through the early addressing of such issues as search terms, custodians, hit counts, format, metadata, and the like.

Stipulation of Confidentiality

This will address the process for establishing a stipulation of confidentiality as to sensitive documents, if the Parties so desire.

We will also discuss whether the Parties will be requesting a confidentiality order in this arbitration, with respect to the confidentiality of the arbitration proceedings.

Depositions

We note that the arbitration clause in this matter contemplates depositions of parties and third-parties, as well as document production. We will discuss what particular depositions the Parties believe are needed in this case and how long such depositions should be.

As a general matter, we will encourage the Parties to limit depositions to those that are really necessary, so as to enable this process to achieve the arbitral goals of expedition and economy, to the extent consistent with the Parties' ability to do what they need to do to prepare and present their claims or defenses.

Completion of Discovery

We will want to establish a completion date for discovery.

Cut-off Date for Further Pleadings and Motions

We will address the subject of appropriate cut-off dates for further pleadings and motions.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Non-Party Subpoenas

This will involve a discussion of what, if any, non-parties may need to be subpoenaed and of the schedule and process to be followed with respect to subpoenas.

We will encourage the Parties to get working on non-party subpoenas as promptly as possible and will request that the Parties cooperate with each other in trying to make witnesses available informally.

Experts' Reports

This will involve a discussion of whether the Parties anticipate presenting expert witnesses in the case, and, if so, the schedule for experts' reports, which it is contemplated will serve as the direct testimony of the expert witnesses, subject to an agreed warm-up period.

Status Conferences

We will want to schedule periodic status conferences, either with the entire Panel or with the Discovery Master, as you prefer.

Possible Stipulated Facts

This will involve a discussion of whether it will potentially be productive for the Parties to attempt to agree to stipulated facts in this matter.

Summaries, Chronologies and *Dramatis Personae*

We will encourage the Parties to prepare, either jointy or separately, whatever summaries, chronologies and *dramatis personae* they think might be helpful to the Arbitrators.

It particularly struck us that the facts of record as to the sales of _____ that are a focus of this dispute may efficiently be set forth in summary form, in one way or another, accompanied by the applicable documents, thereby potentially saving the substantial time that might have otherwise been necessary to present such matters. Obviously, the disputed facts as to such sales would be the subject of more detailed evidentiary presentations at the hearing, to the extent necessary.

Identification of Witnesses and of Mode of Testimony

This will involve a discussion of the timing of the Parties' identification of the witnesses they expect to call at the hearing in this matter and also discussion of a schedule for the Parties' discussing whether some witnesses may appear at the hearing by video-conference, conference call, or the like.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

We will also discuss whether the Witness Lists should include descriptions of the areas of testimony of the anticipated witnesses or a summary of such testimony.

Sworn Witness Statements

This will involve a discussion of whether you think it would be helpful to proceed by sworn witness statements for some or all witnesses, with such statements serving as the direct testimony of any such witnesses, subject to an agreed "warm-up period."

Hearing Exhibits

This will involve a discussion of the process and schedule for your identifying and organizing hearing exhibits, including joint exhibits, key exhibits, and disputed exhibits (if any).

Demonstrative Exhibits

This will involve a discussion of the deadlines for your exchanging demonstrative exhibits, including PowerPoints, if any.

Pre-Hearing Memoranda

This will involve a discussion of the pre-hearing memoranda, if any, to be submitted by the Parties.

We will encourage you, to the extent practicable, to do as much of your briefing in advance of the hearing as possible so that we may move to decision quickly after the completion of the hearing.

The Hearing

This will involve a discussion of the length of the hearing, when and where the hearing will be conducted and of how the hearing will be conducted procedurally and as to evidentiary issues. Please have your schedules available as to possible hearing dates, including the schedules of your witnesses.

The Parties will be encouraged to consider agreeing on a maximum amount of time for each side to present its case.

We will also discuss whether a chess clock approach makes sense in this case.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Evidentiary Nature of Designated Hearing Exhibits

This will involve a discussion of how and when designated exhibits will come into evidence.

Copies of Cases and Other Authorities Relied Upon

The Parties will be requested to provide the Arbitrators with hard copies of cases and other authorities relied upon in any memoranda submitted.

Accelerated Exchange Program

We will ask whether the Parties wish to adopt the AAA's Accelerated Exchange Program, whereby submissions are sent directly to the Arbitrators, with a copy to opposing counsel and the AAA, rather than sending them to the AAA for transmittal to the Arbitrators.

Form of the Parties' Submissions to the Arbitrators

The Panel will request that the Parties submit shorter documents electronically and longer documents both electronically and by express mail or other overnight delivery provider.

Electronic Hearing

We will discuss the extent to which the Parties want to conduct the hearing through hard or electronic copies of documents.

Post-Hearing Submissions

We will discuss whether the Parties will want to make closing statements, whether at the end of or some time subsequent to the end of the hearing, and whether they will want to submit post-hearing memoranda, although final decision on this will be left for later in the case.

As mentioned above, we will encourage the Parties to do as much of the briefing as practicable on a pre-hearing basis to optimize getting the case to the Arbitrators as quickly after the hearing as possible.

Form of Award

This will involve a discussion of whether the Parties will want a "standard" or reasoned award in this matter or detailed findings of fact and conclusions of law.

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Court Reporter

The Arbitrators will ask the Parties to advise as to whether they anticipate arranging a court reporter for the hearing.

Costs and Attorneys' fees

We note that the Agreement provides for an allocation of costs and attorneys' fees based on the extent to which the Parties prevail in the arbitration. We will discuss the timing and form of the Parties' submissions in this regard.

Disclosures as to Conflicts

This will involve reference to the fact that the Arbitrators are obligated on a continuing basis to disclose any additional matters that come to their attention that are subject to disclosure under the applicable ethical rules. The Parties will be asked to agree to bring to the attention of each other and the AAA any information that comes to their attention that may require disclosure.

Mediation Window

We will discuss whether the Parties would like to have a "mediation window," built into the schedule. This would be a time when, independently of and without the participation of the Arbitrators, the Parties consider pursuing a mediation process while the arbitration process proceeds.

Other

The Parties will be invited to raise any other questions, issues or concerns they would like to discuss at the preliminary hearing and are invited to propose any such matters in advance as agenda items.

* * * *

We look forward to working with you on this matter.

Thank you.

Charles J. Moxley, Jr., Chair
For the Panel

To Be Adapted to the Particular Case
(Each order is customized; the following sets forth some possible draft language to be considered)

Charles J. Moxley, Jr.

_____
_____

_____,	:	Case No. _____
Claimant,	:	
- and -	:	
_____,	:	
Respondents.	:	

REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Pursuant to the _____ Rules of the _____ (the "____"), a preliminary hearing was held in the above matter by telephonic conference call on _____, before Arbitrators _____, _____, and _____ (the "Arbitrators"). Appearing at the hearing were _____, of _____, attorneys for Claimant _____ ("Claimant"), and _____ of _____, attorneys for Respondent _____ and _____ ("Respondents") (collectively, the "Parties").

Following are the matters agreed to by the Parties and/or directed by the Arbitrators.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Acceptance of Panel

1. All Arbitrators have made disclosures. The Parties acknowledge receipt of same and consent to proceed with the Panel as presently constituted.

***Ex Parte* Communications**

2. There will be no *ex parte* communications between the appointing parties and the party-nominated arbitrators going forward, with the following exception: The party-nominated Arbitrators may submit their statements for arbitration services to their appointing parties, as previously agreed; provided, however, that such statements will be general in nature so as not to disclose the thinking or decision-making processes of the Arbitrators.

Applicable Rules

3. This arbitration will be conducted pursuant to the _____ of the ____, as amended and in effect _____, for individually negotiated contracts (the "_____").

Schedule

4. The Parties confirm that they waive the provisions of Section __ of the _____ relating to the time period within which the Arbitrators must render their award in this proceeding.

Number of Arbitrators

5. The arbitration provision of the Parties' License Agreement (the "Agreement") applicable to this dispute provides for 3 arbitrators. The Parties confirmed that they have agreed to have this dispute heard by one arbitrator, the Arbitrator.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Contract Provision Requiring Hearing to Commence
Within Days of Selection of the Third Arbitrator

6. The arbitration clause in this matter provides for the hearing to commence within __ days of the appointment of the third arbitrator, unless the Parties agree otherwise. The Parties have agreed as follows in this regard: _____.

Possible Status Quo Order

7. The Parties will promptly meet and confer in an effort to agree to a status quo order with respect to this matter. In advance of such discussions, Claimant will provide Respondent will a proposed form of such order. Any status quo order agreed to by the Parties will be submitted to the Arbitrator to be "so ordered."

8. A follow-up conference call with the Arbitrator with respect to a possible status quo order will be held at ____ _.m. on _____, in a conference call to be arranged by the ___, provided, however, that, if the Parties resolve the matter, they will so advise the ___ and the call will be cancelled.

Respondent's Motion to Stay or Limit the Scope of this Arbitration

9. The Parties will meet and confer concerning Respondent's request for a stay of this arbitration or a limitation on its scope.

10. If the Parties are unable to agree on the matter, Respondent may, by _____, serve and file its motion seeking to stay this arbitration or limit its scope. Absent good cause shown or agreement by the Parties, such motion papers, not counting exhibits, will be limited to ten (10) pages.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

11. By _____, Claimant will respond to Respondent's said motion. Absent good cause shown or agreement by the Parties, such response, not counting exhibits, will be limited to ten (10) pages.

12. Oral argument on the motion will be held with the Arbitrators on _____ at ____ _.m., in a conference call to be arranged by the ____.

Acceptance of Arbitrator

13. The Parties agreed that they have accepted Arbitrator _____ as the Arbitrator in this arbitration, notwithstanding that Mr. _____ is not an active or retired official of an insurance or reinsurance company.

Respondent's Motion as to Arbitrability

14. Respondent asserts that, with respect to this matter, Claimant, by _____, waived its right to have this dispute arbitrated and hence that this arbitration should be dismissed. Claimant disputes that any such waiver took place. Respondent intends to make a motion to dismiss on the ground that the Parties' instant dispute is not arbitrable as a result of the alleged waiver.

15. The following schedule will apply with respect to said motion:

- Respondent will interpose its motion and supporting papers by _____;
- Claimant will interpose its opposing papers by _____;
- Respondent will interpose its reply papers, if any, by _____; and
- Oral argument will be heard on the motion on _____ at ____ _.m. New York time, in a conference call to be arranged by the _____.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Conditional Scheduling Order for the Case Going Forward

16. The contemplated motion as to arbitrability raises the question as to whether this arbitration will proceed.

17. Accordingly, the following schedule is set forth provisionally, subject to the Arbitrator's ruling on said motion.

Arbitrability

18. The Parties agree that all claims presently asserted in this arbitration are arbitrable.

Further Pleadings

19. Claimant will serve and file its Amended Demand for Arbitration by _____, setting forth in detail the factual and legal bases of Claimant's claims in this arbitration and attaching the documents upon which Claimant relies for said claims.

20. Respondents will serve and file their Answer to Claimant's Amended Demand for Arbitration by _____, setting forth in detail the factual and legal bases of Respondents' defenses in this arbitration and attaching the documents upon which Respondents rely for said defenses.

Respondents' Answer

21. By _____, Respondents will serve and file their Answer in this arbitration. The Answer will respond with specificity to the particularized allegations of Claimant's Notice of Arbitration and Statement of Claim (the "Statement of Claim"), as well as setting forth Respondents' own allegations as to the matters at issue in this arbitration.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

22. he Answer, when interposed, will be deemed confidential, for use in this arbitration only; provided, however, that within __ days of the discovery master's so ordering a confidentiality order in this matter (discussed below), Respondents will specifically designate the portions of their Answer they deem confidential pursuant to said order.

Amended Pleadings

23. By _____, Claimants will serve and file their Demand for Arbitration and Second Amended Statement of Claim ("Second Amended Statement of Claim"), setting forth their claims with particularity, including their claims as to _____ _____, attaching to said amended pleading the documents upon which Claimants rely for the allegations set forth therein. Except as otherwise provided, the compliance time as to all deadlines set forth herein is _____ on the specified date.

24. By _____, Respondent will serve and file its Written Statement of Defense ("Answer to Claims"), including its counterclaims, if any, setting forth with particularity its response to the allegations set forth in Claimants' Second Amended Statement of Claim and the factual and legal bases for its counterclaims, if any, attaching to said pleading the documents upon which Claimants rely for the allegations set forth therein.

25. By _____, Claimants will serve and file their Written Statement of Defense to any counterclaims asserted by Respondent in this matter, setting forth with particularity their response to the allegations set forth in Respondent's Answer to Claims, attaching to said pleading the documents upon which Respondent relies for the allegations set forth therein.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Pleadings

26. The Parties agreed that the pleadings are closed in this matter. No amendments or further pleadings are contemplated.

Potential Dispositive Motions

27. In the event a Party wishes to make a possible dispositive motion, that Party will, by _____, serve and file a letter of no more than three pages summarizing the contemplated bases for such a motion and explaining why, in that Party's view, the making of the motion would foster the efficient administration and resolution of this case.

28. The other side will thereafter have until _____ to respond to the foregoing letter with its own letter of no more than three pages.

29. Counsel for the Parties will thereafter confer by _____ as to whether, in their respective views, the contemplated motion would contribute to the efficient administration and resolution of the case.

30. If, after the Parties so confer, either side still wants to make such a motion, the side seeking to make the motion will so advise the Arbitrator and a conference call will be held with the Arbitrator on _____ at ____ _.m. to discuss the proposed motion.

31. No dispositive motion may be made after _____.

Substantive Motions

32. No substantive motions are contemplated in this arbitration.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Respondent's Motion for a Stay

33. With respect to Respondent's motion to stay this arbitration based on developments in parallel litigation between the Parties and others in Supreme Court, New York County, the Arbitrators denied said motion, subject to leave to renew, should the applicable facts and circumstances change.

Claimant's Motion for Summary Disposition

34. With respect to Claimant's motion for summary disposition dated _____, Respondents will, by _____, interpose their papers in opposition to said motion.

35. Because of the Arbitrators' familiarity with the case and the issues raised, Respondents' opposing memorandum may consist largely of bullet points without extensive elaboration. Respondents advise that they expect to be able to limit the memorandum to __ pages, double-spaced.

36. By _____, Claimant will submit its reply papers, if any, with such papers being limited to __ pages, double-spaced.

37. Oral argument on this motion will be held before the Arbitrators on _____ at ____ p.m., in a conference call to be arranged by the ____.

Motion to Strike

38. Respondents assert that certain allegations contained in Claimant's Statement of Claim should be stricken. Claimant opposes the striking of any portion of his Statement of Claim.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

39. By _____, Respondents will serve and file their papers in support of their motion to strike in this regard, with such papers being limited to __ pages, double-spaced.

40. By _____, Claimant will serve and file his opposing papers on this motion, with such papers to be limited to __ pages, double-spaced.

41. By _____, Respondents will interpose their reply papers, if any, on this motion, with such papers to be limited to __ pages, single-spaced.

42. This motion will be heard by the Arbitrators in a conference call on _____ at ____ _.m., with __ minutes being allotted to the call. The call will be arranged by the ____.

Respondents' Possible Motion to Disqualify Claimant's Counsel

43. Respondents advised that they are considering a motion to disqualify Claimant's counsel in this arbitration. The Arbitrators reminded Counsel that there is case authority in New York to the effect that a motion to disqualify adversary counsel in an arbitration is for the courts, not arbitrators, to decide.

44. By April _____, Respondents will advise the Arbitrators what, if anything, they intend to do with respect to this possible motion.

45. The Arbitrators have determined that, if the Parties, based on conformed consent, agree to have the Arbitrators hear such a motion, the Arbitrators will hear it.

Confidentiality

46. The Parties have been working on a draft order as to confidentiality. The Parties will continue this effort and will, by _____, submit to the discovery master (discussed below) either a stipulated order or their respective arguments as to their disagreement as to same.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

47. Any dispute between the Parties as to the form of a confidentiality order in the case will be addressed in a conference call with the discovery master, to be scheduled as necessary.

Confidentiality

48. The Parties will consult with each other with respect to entering into a stipulation of confidentiality as to documents in the case and as to this proceeding as a whole.

49. Assuming the Parties decide to enter into such a stipulation, they will, by _____, submit said stipulation to the Tribunal to be so ordered; provided, however, that, if the Parties want to enter into a stipulation along these lines but are unable to agree to the language thereof, they may present the matter to the Arbitrator for conferencing.

Interview of Claimant's Chief Actuary

50. Claimant has advised that Claimant's chief actuary has knowledge as to the calculation of the amount of Claimant's claims in this arbitration. To expedite this arbitration and hopefully lessen the scope of discovery, Claimant has agreed to make its chief actuary available for interview by Respondents in a conference call to be arranged and participated in by Counsel for the Parties in this arbitration.

51. Claimant may, if it chooses, have a consultant or expert participate in the foregoing conference call with Claimant's chief actuary; provided, however, that the identify of any such consultant or expert should be disclosed to Claimant at least 24 hours in advance of the call.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

52. This conference call with Claimant's chief actuary will take place on _____, or such other date as the Parties may agree.

Charts or Diagrams Identifying Relevant Entities and Other Relationships and Events

53. By _____, the parties, either jointly or severally, depending on their ability to agree on the matter, will present charts or diagrams to the arbitrators setting forth the various ownership interests, contractual relationships, transfers, assignments, changes of name or identity, and the like as between the entities and other persons relevant to this matter.

Discovery Master

54. Issues as to discovery and routine administrative and scheduling matters will be heard by the chair, Arbitrator _____, as discovery master; provided, however, that, if any party or the discovery master wants the entire panel to hear any such matter, the entire panel will hear it. In the event of the chair's unavailability to hear any matter intended for the discovery master, the chair may designate either of the other Arbitrators to serve as discovery master. All Arbitrators and the ____ will be copied on communications between the Parties and the discovery master.

Discovery Master

55. By _____, the Parties will advise the Arbitrators whether they want issues as to discovery and routine administrative and scheduling matters to be heard by the chair as discovery master or by the entire Panel; provided, however, that, if the Parties desire generally to have such matters heard by the chair, they may, nonetheless, with respect to any particular matter

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

or issue, thereafter request that said matter or issue be heard by the entire Panel, in which case the entire Panel will hear it.

Reliance Documents

56. By _____, each side will produce the documents upon which it relies in this arbitration for its claims, counterclaims or defenses, except that a side is not required to re-produce any such documents that it has previously produced in this arbitration.

57. It is not contemplated at this time that a separate schedule will be established for production of reliance documents. Rather, we will go through the normal processes of documents requests, objections, and the like, and of the pre-hearing designation of exhibits.

Document Production as to Documents other than Reliance Documents

58. The Parties will exchange document requests as to documents other than reliance documents by _____.

59. The Parties will exchange their responses and objections, if any, to such document requests by _____.

60. The Parties will meet and confer by _____with respect to objections to document requests. In the interest of avoiding undue expense and delay in this arbitration, the Parties are encouraged to work out any discovery disputes they may have.

61. By _____, the Parties will submit letter briefs to the Arbitrator concerning any unresolved disputes as to document production.

62. Oral argument will be held with the Arbitrator on any open discovery issues on _____at ____ _.m., in a conference call to be arranged by the ____.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

63. The Parties will produce all unobjected to documents by _____.

Document Production

64. The parties will exchange document requests by _____.

65. Document requests should generally comply with the following:

- They should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;
- They should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and
- They ordinarily should not include broad phraseology such as "all documents directly or indirectly related to."

66. The Parties will serve and file their responses and objections, if any, to document requests by _____.

67. The parties will meet and confer by _____ with respect to any then-existing objections to document requests.

68. By _____, the Parties will submit letter briefs to the discovery master concerning any remaining disputes as to document production.

69. Oral argument will be held with the discovery master on any open discovery issues on _____ at ____ _.m., in a conference call to be arranged by the ____.

70. The Parties will make their document productions on a rolling basis, starting on _____, with document production to be completed by _____, it being expected that the Parties will produce significant blocks of documents as they become available during the period of rolling production.

71. By _____, the Parties will serve and file their privilege logs in this matter. It is anticipated that counsel will meet and confer by _____ as to the approach to be taken

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

with respect to privilege logs in the case, including the use of categorical objections, in an effort to work out an agreed approach; provided, however, that, if the Parties are unable to agree in this respect, they may schedule a conference with the discovery master as to any such disagreement.

Electronic Discovery

72. E-discovery should generally be consistent with the following:

- There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
- Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
- Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrators will consider either denying such request or ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

73. By _____, the Parties will meet and confer as to the parameters of electronic discovery in this matter, addressing such issues as search terms and the possible testing thereof, time periods, custodians, hit counts, format in which documents will be produced, the possible use of predictive coding, metadata and other points relating to electronic discovery that may arise.

74. By _____, the Parties will submit letter briefs to the discovery master with respect to any disputes as to e-discovery.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

75. Oral argument will be heard on any such discovery disputes as to e-discovery with the discovery master on _____ at ____ p.m., in a conference call to be arranged by the ____. To the extent technical issues are expected to be raised, each side should have its technical experts available for this call.

76. The Parties will make their document productions as to electronic materials on a rolling basis, starting on _____, with document production of such materials to be completed by _____.

Witness Statements

77. It is not contemplated that the Parties will submit witness statements in this arbitration.

Witness Statements and Experts' Reports

78. The Parties agree that it would make sense in this case to have witnesses present their direct testimony by sworn witness statements, so as to provide disclosure by each side of the direct testimony it expects to present at the hearing.

79. The Parties further agree that expert witnesses in the case will present sworn experts' reports and that such reports will serve as the direct testimony of the experts.

80. Except as otherwise agreed by the Parties, the witness statements and experts' reports will have attached to them the documents to which the witnesses make reference in their witness statements or reports.

81. No witness statement or expert's report will be taken into consideration by the Arbitrators unless the witness is presented for cross-examination at the hearing.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

82. Each side will be permitted a warm-up period of approximately __ minutes for the witnesses it presents.

83. Respondents advise that they contemplate presenting expert testimony by an expert in the auditing of legal bills ("Respondents' Auditing Expert").

84. By _____, Claimant will serve and file a witness statement setting forth, with respect to the different phases of the case in the Underlying Litigation, Claimant's testimony as to what it contends to be the need for and reasonableness of the legal services for which it billed Respondents for such phases of the Underlying Litigation.

85. By _____, Respondents will serve and file the report of Respondents' Auditing Expert.

86. By _____, Respondents will also serve and file the witness statement of any other expert witness they intend to offer on the subject of Claimant's bills to Respondents in the Underlying Litigation.

87. By _____, Respondents will also serve and file the witness statement of _____ ("_____").

88. By _____, Claimant will interpose its opposing witness statements or experts' reports, if any.

89. It is contemplated that the above-referenced witness statements and experts' reports will be no more than __ pages, single-spaced, although the Parties may exceed that length if they regard it as necessary to present their claims or defenses.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Expert Witnesses

90. The Parties have not yet decided whether they will want to present expert testimony in the case. To the extent that either side decides that it wants to do so, the following procedures will apply.

91. By _____, each side will serve and file a letter identifying any expert witnesses it expects to call at the hearing in this matter.

92. By _____, each side will serve and file its experts' reports, if any.

93. By _____, each side will serve and file its opposing experts' reports, if any.

94. The reports of the expert witnesses will serve as the direct testimony of the witnesses; provided, however, that the Parties may present their expert witnesses for a "warm up" period of direct testimony lasting approximately __ minutes.

95. The Arbitrators reserve the option of "hot-tubbing" expert witnesses from both sides on particular topics, so the Arbitrators may pose questions to such witnesses at the same time, to the extent it seems helpful. The Parties will arrange the timing of the testimony of their respective expert witnesses accordingly.

96. It is not contemplated that there will be depositions of expert witnesses in the case.

Proceeding on Documents

97. Based on the request of Claimant, this case will proceed based on the submission of documents; provided, however, that, should Respondents request a hearing, whether in person

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

or by telephone, or a preliminary hearing (by telephone), that request will be taken into consideration by the Arbitrators.

98. Specifically, notwithstanding Respondents' failure to appear in this matter to date, Respondents are invited to appear and defend this arbitration going forward, as the Arbitrators would prefer to hear this matter based on hearing both sides' contentions and proofs.

99. So that this matter may proceed expeditiously, Respondents are directed to advise the ____ within five days of the date of this order if they intend to appear and defend the case. If Respondents advise that they intend to appear and defend the case, a further preliminary hearing will be held promptly to discuss how the case will be administered. If Respondents do not appear and defend the case, the case, as set forth herein, will be heard based on documents and a follow-up conference call of the Arbitrators with the Parties.

100. Regardless of whether they appear and defend the case, Respondents are to be served with copies of all papers filed with the ____ in the case simultaneously with such filing.

Documentary Submissions

101. Subject to the above, the following schedule shall apply to this case:

- Claimant shall have until _____, to interpose its documentary case;
- Respondents shall have until _____, to interpose their documentary case;
- Claimant shall have until _____, to interpose its reply documentary case, if any; and
- A conference call will be held with the Parties and the Arbitrators on _____at ____ _.m. for the Parties to submit any final arguments or proof to the Arbitrators with respect to their claims or defenses in the case before the record is closed and the Arbitrators decide it.

102. This schedule is established pursuant to the timeframe dictated by the Parties' arbitration agreement.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Unproduced Documents

103. Any exhibit offered at the hearing that was responsive to a discovery request served upon the offering party, but which was not produced in response thereto on or before the date set for such production, will not be received in evidence at the hearing, absent good cause shown.

Privilege Issue as to_____

104. At their meet and confer with respect to discovery issues on _____, the Parties will discuss the practical criteria for defining what documents associated with _____ will be treated as privileged for purposes of this arbitration.

105. If the Parties are unable to agree on the parameters of such privilege insofar as concerns documents associated with _____, the matter may be raised in the conference call with the discovery master scheduled for _____ at ____ _.m.

Proportionality

106. The Arbitrators are concerned that the amount of time and expense that go into this matter be reasonably proportionate to what is at issue in the case, so the Parties may receive the arbitral advantages of expedition and economy.

107. The Parties are expected to maintain such proportionality in the discovery and other phases of this case.

108. To the extent a party demands discovery beyond that which is proportionate the Arbitrators will, upon request, consider cost-shifting.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Depositions

109. Claimant wants to conduct five or more depositions in this arbitration. Respondents argue that this is too many depositions and that their number and duration should be limited.

110. It is anticipated that the Parties may have a better idea of what depositions are necessary and their appropriate scope after document production has been conducted.

111. The Arbitrators have provisionally ruled that each side may take __ hours of depositions, limited to __ witnesses per side; provided, however, that these parameters are subject to revisiting as document production proceeds in the case.

112. The depositions in the case will be conducted in _____ and are to be completed by _____.

Depositions

113. The Parties will be limited to _____ depositions each, with the total depositions to be taken by each side not to exceed ____ hours.

Fact Discovery Cut-Off

114. All fact discovery in the case will be completed by _____.

Discovery or Testimony from Associated Non-Parties

115. The Arbitrators expect the Parties to cooperate in making reasonably necessary discovery or testimony available from entities or persons whose cooperation they are able to secure, based upon their relationship or influence with such entities or persons; provided, however, that the provision of such discovery or testimony by such entities or persons is

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

understood to be subject to whatever objections such entities or persons might have to individual items of discovery that are sought in the case.

116. The Parties agreed, in this regard, to attempt to make former employees and associated persons available for discovery and testimony.

Related Entities

117. Claimant advised that it will make its affiliates available for testimony or disclosure in this arbitration, to the extent said affiliates may have documents or other information relevant to matters at issue in the arbitration.

Appearance of Messrs. _____ and _____ at the Hearing

118. By _____, Respondent will attempt to ascertain and report back to the arbitrators and to Claimant whether Messrs. _____ and _____ will agree to come to the hearing without the necessity of a subpoena and, assuming they will so appear, whether they will do so in person or by video conference or in some other way.

Discovery from the Entities and

119. The Arbitrator advised that the Tribunal expects the Parties to cooperate in making discovery available from entities or persons whose cooperation they are able to secure based upon their relationship or influence with such entities or persons; provided, however, that the provision of such discovery by such entities or persons is understood to be subject to whatever objections such Parties might have to individual aspects of such production and to the rulings of the Tribunal thereon.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

120. In this connection, Respondent has agreed to make discovery available from the _____ entities, including _____, _____, and _____.

121. Both sides will request of _____ ("_____") that it cooperate in making discovery available to the Parties in this arbitration and will report back to each other and to this Tribunal by _____ as to whether such cooperation from _____will be forthcoming.

Subpoena, If Necessary, to _____

122. If neither side is able to arrange agreement by _____ to provide discovery in this arbitration without the necessity of a subpoena, either side may submit a subpoena to the Arbitrator seeking production of documents by _____, with such subpoena to be submitted to this Tribunal, on notice to the other side, on _____, when the Parties exchange their document requests.

123. The other side will thereafter have three (3) business days, following the submission of such a subpoena to the Arbitrator, to object thereto.

124. Any such subpoena will be submitted to the Arbitrator in Word format and will contain a provision to the effect that any issue or objection the recipient has as to the documents requested may be raised with the Arbitrator in this arbitration, in a conference call with the Arbitrator and counsel for the Parties.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Other Subpoenas

125. If either side wants to subpoena any other entity or person, it will submit its proposed subpoena(s) to the Arbitrator by _____, if the subpoena is for discovery purposes, and by _____, if the subpoena is for the hearing.

126. The other side will thereafter have three (3) business days, following the submission of such a subpoena, to object thereto.

127. Any such subpoena will be submitted to the Arbitrator in Word format and will contain a provision to the effect that any issue or objection the recipient has as to the documents requested may be raised with the Arbitrator in this arbitration, in a conference call with the Arbitrator and counsel for the Parties.

Subpoenas

128. By _____, the Parties will meet and confer as to any non-party witnesses from whom documents or testimony is sought and will submit subpoenas to the discovery master with respect to any such documents or testimony that is not otherwise available.

129. Any requests for documents submitted by subpoena directed to non-parties should be narrowly drawn and should not request documents already in the possession, custody or control of the party seeking such production.

Status Conferences

130. Status conferences will be held with the discovery master on _____ at ____ _.m. and on _____ at ____ _.m., in conference calls to be arranged by the ____.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Stipulated Facts

131. It is not contemplated that the Parties will agree to stipulated facts in this arbitration.

Possible Stipulated Facts

132. The Parties will confer by _____, as to whether they regard it as worthwhile to attempt to agree to stipulated facts, and, if so, will establish a schedule for working out such stipulated facts and will advise the Arbitrators as to said schedule by _____.

Witness Lists

133. By _____, the Parties will exchange lists of witnesses they expect to call at the hearing. As to any such witnesses who are not known to the other side, the side identifying such witness will set forth on the witness list the witnesses' names and current business affiliations and will describe the general areas of the witnesses' expected testimony.

Final Pre-Hearing Status Conference

134. A final pre-hearing status conference will be held with the Arbitrators on _____ at ____ _.m., in a conference call to be arranged by the ____.

Hearing Exhibits

135. By _____, the Parties will identify to one another the exhibits they expect to use at the hearing.

136. By _____, the Parties will meet and confer in an attempt to agree on joint exhibits to be submitted at the hearing. The Parties' stipulation to the inclusion of documents as joint exhibits does not signify agreement with the documents, but rather only that the admission

_____
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of such documents into evidence at the hearing is not disputed. Such exhibits will be organized in binders with tabs.

137. By _____, the Parties will finally establish the binders of joint exhibits and provide to one another binders of any additional exhibits they intend to offer into evidence at the hearing. Subject to the Parties' agreeing on some other approach, as expedient, individual exhibits marked by Claimant will start with the number ___ and those marked by Respondents will start with the number __.

138. The Parties are requested to organize the various exhibits in the tabbed binders in the way that seems most helpful, whether in chronological order or by issue or the like.

139. Except for good cause shown, documents that have not been identified as exhibits will not be admitted into evidence at the hearing. This applies to all documents except those to be used solely for impeachment.

Key Exhibits

140. By _____, each side will serve and file the five to ten exhibits that it believes to be most important in the case. The Parties are encouraged to highlight such exhibits, identifying the portions thereof believed to be of particular importance.

Demonstrative Exhibits

141. The Parties will serve and file their demonstrative exhibits, if any, including all schedules, summaries, diagrams, charts, PowerPoint presentations and the like that they propose to offer at the hearing at least three days in advance of such use, provided, however, that demonstrative exhibits that are prepared on a reactive basis during the hearing will be produced

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as much in advance as reasonably practicable. Notwithstanding the foregoing, the Parties are encouraged to serve and file such materials as much in advance of the hearing as possible to facilitate the Arbitrators' understanding of the matters displayed.

Memorials

142. By _____, Claimant will serve and file its pre-hearing memorial.

143. By _____, Respondent will serve and file its pre-hearing memorial.

144. Each of these memorials will be limited to __ pages, double-spaced, with 1" margins on each side.

Pre-Hearing Memoranda

145. By _____, the Parties will serve and file their pre-hearing memoranda, with such memoranda being limited to __ pages each, double-spaced.

146. By _____, each side may submit a reply pre-hearing memorandum limited to responding to legal issues raised by the other side in its earlier memorandum, with such reply memoranda to be limited to __ pages each, double-spaced.

Motions *In Limine* With Respect to Contested Exhibits or Testimony

147. By _____, the Parties will serve and file their letter briefs addressing any issues with respect to disputed exhibits or testimony.

148. Each side will thereafter have until _____ to serve and file its response to any such motion.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Pre-Hearing Objections to Exhibits or Testimony

149. By _____, the Parties will serve and file their letter briefs addressing any issues with respect to disputed exhibits or testimony or the like. It is contemplated that such motions will generally be limited to issues such as privilege, authenticity, extreme prejudice or the like. Absent good cause, such motions should be no longer than two pages.

150. Each side will thereafter have until _____ to serve and file its response to any such motion made by the other side.

The Hearing

151. The hearing will be held on _____ at _____. Subject to the Parties' preferences, the hearing day will generally run from ____ _.m. to ____ _.m., subject to extending the day as necessary to complete witnesses or keep to schedule. It is anticipated that we will take a mid-morning and a mid-afternoon break of approximately __ minutes each and a midday luncheon break of approximately __ hour.

152. Each side will make opening statements of approximately __ minutes.

153. The Parties are requested to advise the Arbitrators promptly if their estimates as to the amount of time needed for the hearing in this matter change.

154. The Parties will make arrangements to schedule witnesses so that the hearing may proceed expeditiously.

155. The Party presenting evidence will, to the extent practicable, give notice of at least three days to the other Party with respect to the identities of upcoming witnesses and the anticipated order of testimony.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Opening Statements

156. It is contemplated that each side will make opening statements of approximately __ minutes.

Firmness of Hearing Dates

157. The hearing dates set forth herein are firm dates, which will not be rescheduled, absent agreement of the Parties or extraordinary circumstances unrelated to preparedness.

Evidentiary Status of Designated Hearing Exhibits

158. All previously designated hearing exhibits will be deemed admitted into evidence as of the opening of the hearing, except as to contested exhibits that are specifically so designated by the Parties by the opening of the hearing. The Arbitrators will hear argument as to such exhibits in the course of the hearing.

Closing Statements

159. Subject to discussion at the hearing, it is anticipated that the Parties will make closing statements to the Arbitrators on _____ at ____ _.m., at a place to be agreed by the Parties, it being contemplated that the closing statements will run approximately __ hours, with each side to have approximately __ hours.

Closing Statements

160. In lieu of post-hearing memoranda, it is anticipated that the Parties will make closing statements to the Arbitrator at a session to be held on _____ at ____ _.m., at a place to be agreed by the Parties, provided, however, that, if the Parties determine that they want

_____
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to submit post-hearing memoranda or if the Arbitrator requests that issues be briefed, post-hearing memoranda may be submitted.

Summations

161. It is anticipated that, in lieu of post-hearing memorials, the Parties will make summations in a hearing to be held on _____ at ____ _.m., at a location to be agreed by the Parties.

Post-Hearing Memoranda

162. The Parties will decide at the close of the hearing, in consultation with the Arbitrators, what post-hearing briefing, if any, will be submitted.

Post-Hearing Memoranda

163. It is anticipated that the Parties will submit post-hearing memoranda on a simultaneous basis ____ weeks following the completion of the hearing.

Provision of Pre-Hearing Papers to the Arbitrators

164. The Parties will provide copies of motions papers, witness lists, experts' reports, pre-hearing memoranda, and key exhibits to the Arbitrators when served upon the other side. The other exhibits binders may be provided to the Arbitrators at the opening of the hearing.

165. Copies of all legal memoranda will be provided to the Arbitrators in Word as well as PDF format; provided, however, that the Parties need only exchange such materials in PDF format among themselves.

166. The Parties will provide the Arbitrators will copies of all cases and other authorities relied upon in their submissions to the Arbitrators.

_____
_____and _____
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Materials to be Provided to the Arbitrators in Electronic Form Following the Hearing

167. Following the hearing, each side will transmit to the Arbitrators on a DVD, thumb drive, or the like, the following documents that it has previously interposed, submitting them in Word format to the extent convenient:

- pleadings;
- pre-hearing memoranda;
- post-hearing memoranda, if any;
- other significant memoranda;
- experts' reports;
- cases and other authorities referred to in the side's pre-hearing and post-hearing memoranda, assuming the party has made electronic copies of same; and
- exhibits referred to by the party in its post-hearing papers, to the extent the party has made electronic copies of such exhibits.

168. The Parties will also make arrangements, as among themselves, to submit the following materials to the Arbitrators electronically on such DVDs or the like:

- hearing transcripts in searchable format;
- a chart that shows, by witness, the hearing volume and pages at which each witness' testimony appears; and
- exhibits, to the extent the Parties have made electronic copies of them.

Language of Proceeding

169. The language of this proceeding is _____.

170. By _____, the Parties will confer in an effort to agree as to how the case will be administered with respect to documents, if any, which, in the original, are in a language other than _____, including with respect to questions as to responsibility for arranging translations, the identify of appropriate translators, the timing of making and providing translations, and the responsibility for the costs of such matters.

_____
_____and _____

REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

171. The Parties will confer by _____ with respect to questions relating to any necessary arrangements for one or more interpreters of the testimony of witnesses, if any, unable to testify in _____.

172. The Parties will memorialize their agreement with respect to such matters by _____. Should the Parties be unable to reach agreement, in any respect, with respect to such matters, they will so advise the Arbitrator by said date, submitting letter briefs to the Arbitrator setting forth their respective positions and the reasons and the reasons therefor.

Form of Award

173. The Arbitrators will issue a reasoned award.

Court Reporter

174. It is understood that the Parties, at their election, intend to arrange for a court reporter to transcribe the hearing.

Accelerated Exchange Program

175. The Parties have agreed to use the Accelerated Exchange Program of the ____. Pursuant to the Accelerated Exchange Program, the Parties may transmit written materials directly to the Arbitrators, simultaneously providing copies of same to the other side. Direct written communications to the Arbitrators will be directed as follows:

_____
_____
_____
_____
_____
_____

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

_____
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_____
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_____
_____

176. The Parties are to submit such materials to the Arbitrators by e-mail and hard copy; provided, however, that there is no need to provide electronic copies of exhibits and other bulky materials to the Arbitrators or to provide the Arbitrators with hard copies of briefs or other memoranda shorter than ten pages.

177. The Parties will copy the ____ on all e-mails to the Arbitrators and will also send to the ____ copies of cover letters transmitting non-electronic materials to the Arbitrators, but do not need to send the ____ copies of such non-electronic materials.

178. Under no circumstances are oral communications, by telephone or otherwise, to be initiated with the Arbitrators, except as scheduled by the ____ or the Arbitrators on notice to both sides.

Mediation

179. By _____, the Parties will meet and confer as to whether they would like to attempt to resolve this matter through mediation.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

180. If the Parties would like to engage in such an effort, the ____ is available to provide the Parties with lists of potential mediators.

181. If there is any part of the case that the Parties would like the Arbitrators to address sooner rather than later to facilitate settlement, the Parties may request the Arbitrators to do so.

Control Date for the Parties' Deciding Whether to Mediate

182. By _____, the Parties will meet and confer as to whether they would like to attempt to resolve this matter through mediation.

183. If the Parties would like to engage in such an effort, the ____ will be glad to provide them with a list of potential mediators. If the Parties would like to have any issue decided sooner rather than later in the case to facilitate settlement, they may so advise the Arbitrator and the matter will be conferenced.

Disclosures as to Conflicts

184. The Parties are reminded to update their respective conflicts checklists as further information becomes available.

185. The duty to update such checklists continues through the duration of this arbitration.

186. The Parties have agreed that, if there is anything that becomes known to a party that is relevant in the context of arbitrator disclosure, the party will advise the case administrator as soon as it becomes known.

Attorneys' Fees

187. Claimant is seeking attorneys' fees under his Employment Agreements.

_____
_____and _____
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188. The Parties have agreed on the following procedure with respect to Claimant's claim for attorneys' fees: Thirty days after the Arbitrators have issued their award as to the merits of the case, Claimant may submit a statement of costs and attorneys' fees and a supporting memorandum of law with respect to attorneys' fees. Respondents will then have ten days to respond to such papers submitted by Claimant. Claimant will thereafter have five days to reply, following which the matter will be submitted to the Arbitrators for decision.

189. It is contemplated that the Arbitrators will decide any issues as to attorneys' fees on the papers.

Attorneys' Fees

190. The Parties agreed that they are not seeking attorneys' fees in this arbitration and that any requests for attorneys' fees in their respective papers previously submitted in this arbitration are withdrawn.

191. The Arbitrators note that both sides seek to recover attorneys' fees. It will be addressed later in this proceeding how the Parties' applications for attorneys' fees will be administered.

Arranging Conference Calls with the Discovery Master or Arbitrators

192. Should disputes arise between the Parties as to discovery or other preliminary matters in the course of this arbitration, the Parties are urged to arrange a conference call with the discovery master or the Arbitrators promptly, so the matter may be addressed promptly, rather than have it remain unresolved and risk affecting the schedule.

_____
_____and _____

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Adjustment of Individual Dates by the Parties

193. The Parties may by stipulation adjust individual dates between themselves that do not affect the Arbitrators or the hearing, providing notice of such changes to the Arbitrators, but otherwise schedule changes are to be submitted to the Arbitrators.

Attachment A

194. Attached hereto as Attachment A is a chronology of the deadlines set forth in this scheduling order.

Revisions or Additions to this Order

195. If either side believes at this time that any of the deadlines or other matters set forth above need to be changed in any way or that anything needs to be added, it will advise the other side and the Arbitrators within seven days of the date of this Order.

Dated: New York, New York
_____

_____
_____, Arbitrator

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

ATTACHMENT A
CHRONOLOGY OF DATES SET FORTH IN REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER ("THE ORDER")

- _____: Respondents to serve and file their answer, pursuant to paragraph __ of the Order;
- _____: The Parties to submit a proposed order as to confidentiality or any dispute on the subject to the discovery master, pursuant to paragraph __ of the Order;
- _____:
  - Respondents to serve and file their papers in support of their motion to strike, pursuant to paragraph __ of the Order; and
  - The Parties to serve and file document requests, pursuant to paragraph __ of the Order;
- _____: The Parties to exchange their responses and objections to document requests, pursuant to paragraph __ of the Order;
- _____: Claimant to serve and file his papers in opposition to Respondents' motion to strike, pursuant to paragraph __ of the Order;
- _____: Respondents to advise the Arbitrators what, if anything, they intend to do with respect to their possible motion to disqualify Claimant's counsel, pursuant to paragraph __ of the Order;
- _____: Respondents to serve and file their reply papers on their motion to strike, pursuant to paragraph __ of the Order;
- _____at_____.m.: Oral argument before the Arbitrators on Respondents' motion to strike, pursuant to paragraph __ of the Order;
- _____at_____.m.:
  - The Parties to meet and confer with respect to objections to document requests, pursuant to paragraph __ of the Order;
  - The Parties to meet and confer as to the parameters of electronic discovery, pursuant to paragraph __ of the Order; and
  - The Parties to discuss the practical criteria for defining what documents associated with _____ will be treated as privileged for purposes of this arbitration, pursuant to paragraph __ of the Order.
- _____:
  - The Parties to submit letter briefs to the discovery master concerning any disputes as to document production, pursuant to paragraph __ of the Order; and
  - The Parties to submit letter briefs to the discovery master concerning any disputes as to e-discovery, pursuant to paragraph __ of the Order;

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

- _____at_____.m.:
  - Oral argument with the discovery master as to any open discovery issues, pursuant to paragraph __ of the Order;
  - Oral argument with the discovery master as to any disputes as to e-discovery, pursuant to paragraph __ of the Order;
  - Oral argument with the discovery master with respect to any issues the Parties have identified as to the applicability of privilege to documents associated with _____, pursuant to paragraph __ of the Order;
  - The Parties to commence their document production on a rolling basis, pursuant to paragraph __ of the Order; and
  - The Parties to commence their production of electronic materials, pursuant to paragraph __ of the Order;
- _____: The Parties to meet and confer as to the approach to be taken with respect to privilege logs in the case, pursuant to paragraph __ of the Order;
- _____: The Parties to serve and file their privilege logs, pursuant to paragraph __ of the Order;
- _____at_____.m.: Status conference with the discovery master, pursuant to paragraph __ of the Order;
- _____:
  - Completion of document production, pursuant to paragraph __ of the Order; and
  - Completion of production of electronic materials, pursuant to paragraph __ of the Order;
- _____: The Parties to conduct the depositions in the case within this time period, pursuant to paragraph __ of the Order;
- _____at_____.m.: Status conference with the discovery master, pursuant to paragraph __ of the Order;
- _____: Each side to serve and file a letter identifying any expert witnesses it expects to call at the hearing in the matter, pursuant to paragraph __ of the Order;
- _____:
  - The Parties to complete all depositions in the case, pursuant to paragraph __ of the Order; and
  - The Parties to complete all fact discovery in the case, pursuant to paragraph __ of the Order;
- _____: The Parties to meet and confer with respect to non-party discovery and testimony, if any, and to submit subpoenas with respect to any such discovery or testimony that is not otherwise available, pursuant to paragraph __ of the Order;
- _____: Each side to serve and file its experts' reports, if any, pursuant to paragraph __ of the Order;
- _____:
  - The Parties to identify the exhibits they expect to use at the hearing, pursuant to paragraph __ of the Order;

_____
_____and _____
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- _____:
  - The Parties to exchange lists of witnesses they expect to call at the hearing, pursuant to paragraph __ of the Order; and
  - The Parties to meet and confer in an effort to agree on joint exhibits to be submitted at the hearing, pursuant to paragraph __ of the Order;
- _____: The Parties to serve and file their opposing experts' reports, if any, pursuant to paragraph __ of the Order;
- _____:
  - The Parties to finally establish the binder of joint exhibits and provide to one another binders of any additional exhibits they intend to offer into evidence at the hearing, pursuant to paragraph __ of the Order;
  - Each side to serve and file the five to ten exhibits it believes to be most important in the case, pursuant to paragraph __ of the Order; and
  - The Parties to serve and file their pre-hearing memoranda, pursuant to paragraph __ of the Order;
- _____at_____.m.: Final pre-hearing status conference, pursuant to paragraph __ of the Order;
- _____: The Parties to serve and file their letter briefs on any issues with respect to disputed exhibits or testimony or the like, pursuant to paragraph __ of the Order;
- _____: Each side to submit a reply pre-hearing memoranda, pursuant to paragraph __ of the Order;
- _____: Each side to serve and file its response to any motion *in limine* made by the other side, pursuant to paragraph __ of the Order;
- _____: The hearing, pursuant to paragraph __ of the Order; and
- _____at_____.m.: Closing statements, pursuant to paragraph __ of the Order.

CJM DRAFT 5/15/2015 11:01 AM

MISCELLAENOUS SCHEDULING ORDER LANGUAGE OF LESS GENERAL APPLICABILITY

POINTS TO BE COVERED IN PRELIMINARY HEARING

Charles J. Moxley, Jr.
Draft to be Adapted to the Individual Case

Following are some general topics/points to be covered in preliminary hearings, subject to the needs of the particular case:

- **Purpose:**
  - Purpose of preliminary hearing – _____
- **Arbitration speech:**
  - Discussion with counsel about how arbitration is supposed to be different – _____
    - Discovery – _____
    - Motion practice – _____
    - Pre-hearing disputes – _____
- **Proportionality:** – _____
  - Amount at issue in this case – _____
    - Claims – _____
    - Counterclaims – _____
  - Specific discussion of the appropriate limits of this case in light of proportionality – _____
    - Discovery – _____
    - Motion practice – _____
    - Pre-hearing disputes – _____
- **Applicable arbitration rules:**
  - Commercial rules – _____
  - Employment rules – _____
  - ICDR rules – _____
  - Large and complex case rules
- **Applicable law**:
  - Substantive law – _____
  - Arbitration law – _____
- Issues raised by the **arbitration clause:** – _____
  - Special requirements:
    - Step clause
    - ????
  - Any issues as to arbitrability – _____
    - Objecting party's motion as to same – _____
    - Responding party's papers as to same – _____
- The Parties' descriptions of their respective **views of the world** with respect to the case and how it should be administered – _____

- **Amendments tf Pleadings:**
  - Whether amendments of pleadings are indicated, and, if so, whether reliance documents should be attached to them – _____
    - Date for amended pleadings (complaint/answer) – _____
    - Date for opposing papers – _____
    - Date for reply papers – _____
    - Documents to be attached to each – _____
- **Particularizations:**
  - Whether particularizations of alleged claims and/or damages are indicated – _____
  - And, if so:
    - Opening particularization by (Claimant/Respondent) – _____
    - Corresponding particularization by (Claimant/Respondent) – _____
    - Response to particularizations by (Claimant/Respondent) – _____
    - Response to particularization by (Claimant/Respondent) – _____
  - Date for particularizations of claims – _____
  - Date for particularization of damages – _____
  - Whether documents are to be attached– _____
- **Possible substantive motions**: – _____
  - Procedure to be followed:
    - generally, exchanges of letter briefs of 3-5 pages as to why hearing the proposed motion would foster the expeditious, economical, and fair administration of the case
    - generally, with the case proceeding in the ordinary course in the meantime, subject to what makes sense on the facts of the particular case
    - schedule as to same
      - date for initial letter of proponent – _____
      - opposing papers – _____
      - reply papers – _____
      - oral argument as to same – _____
    - cut-off date for substantive motions – _____
- **Confidentiality:**
  - As to documents – _____
  - As to the entire proceeding as a whole – _____
  - Date for submission of proposed stipulation of confidentiality to be so ordered or to submit any dispute concerning same to the Tribunal – _____
  - **Things to avoid in the stip:**
    - Binding the arbitrator – arbitrator is bound under the AAA rules and ethical rules – _____
    - Binding the AAA -- same – _____
- **Discovery Master:**
  - Whether the Chair will serve as Discovery Master or the entire Panel will hear discovery and routine administrative matters – _____
  - Chair to do it – _____

- Entire Panel to do it – _____

- **Reliance Documents:**
  - Whether the production of reliance documents makes sense in place of, in advance of, or along with normal document production – _____
  - Date for submitting reliance documents – _____
  - Date for any responses to reliance documents – _____
- **Witness Statements:**
  - Whether sworn witness statements, with reliance documents attached, will be used in the case, in whole or in part, in lieu of direct testimony – _____
  - Date for the parties' deciding whether they wish to use witness statements – _____
  - Date for submitting witness statements – _____
  - Date for submitting responsive witness statements – _____
- **Document Production:** Schedule for document production, if any, including for the following:
  - Document requests – _____
  - Responses and objections – _____
  - Counsels' meeting and conferring on objections – _____
  - Privilege logs, if any – _____
  - Production of uncontested documents – _____
    - Possibility of use of generic descriptions in the logs – _____
  - Letter briefs to the Discovery Master or the Panel concerning any discovery disputes – _____ and
  - Schedule for argument of any discovery disputes before the Discovery Master or Panel – _____
- **Client Files:** The expectation that Counsel will familiarize themselves as to how their clients' files are maintained and as to how discovery can best be managed, including electronic discovery – _____
- Discussion of how **electronic discovery** can be most effectively managed in the case, including with respect to such matters as:
  - Date for counsel to meet and confer on the subject – _____
  - Date for conference call with the Discovery Master or Panel if it would be helpful – _____
  - Search terms – _____
  - The possible testing of search terms – _____
  - Hit counts – _____
  - Time periods – _____
  - Custodians – _____
  - Format in which documents will be produced – _____
  - The possible use of predictive coding – _____
  - Possible communications among each side's electronic search experts – _____
  - Other points relating to electronic discovery that are of concern on the facts of the particular case – _____

- **General approach as to submissions to the Tribunal**: General procedure to be followed before submitting a detailed letter brief to the other side:
  - Meet and confer first– _____
  - Confirm in any communication to the Tribunal that such meeting and conferring has taken place – _____
- **Timetable for communications among counsel and to the Tribunal:** Turnaround time concerning communications from either side
  - Response by the other side – within 24 hours – _____
  - Response by the Arbitrator – within 24 hours thereafter – _____
  - Subject to faster turnaround, if needed– _____
- **Extensive written application to be avoided as possible:** General point as that many matters may be handled by conference call with the Arbitrator without substantial written submissions
- **Other discovery**, if any – _____
  - **Interrogatories** – _____
  - **Requests to admit** – _____
  - **Offers of Proof** – _____
- **Non-party subpoenas:** – _____
  - Dates for submitting discovery subpoenas to the Tribunal– _____
  - Date for submitting hearing subpoenas to the Tribunal – _____
  - General rule – 3 business days for the other side to respond before the Tribunal will sign – _____
- **Cooperation of parties as to non-party witnesses:** Expectation that parties will exert best efforts to make non-parties over whom they have influence available for discovery or testimony in the case, where such non-parties have relevant and material documents or information – _____
- **Cut-off date for fact discovery** – _____
- **Experts:** – _____
  - Identification of areas of expert testimony on issues as to which a party has the burden of proof – _____
  - Identification of each side's anticipated expert witnesses on issues on which a party has the burden of proof – _____
  - Identification of rebuttal expert testimony – _____
  - Identification of each side's anticipated expert witnesses on other issues – _____
  - Date for experts' reports on issues as to which a party has a burden of proof – _____
  - Date, where applicable, for reply experts' reports – _____
- **Status conferences:** – _____
  - _____
  - _____
  - _____
  - _____
- **Possible Stipulated Facts:** – _____

- **Summaries, Chronologies and *Dramatis Personae*:** – _____
- **Witness lists**: Identification of witnesses, including as follows:
  - Their present business affiliations – _____
  - Their anticipated areas of testimony – _____
  - Mode of testimony – _____
    - In person – _____
    - By videoconference – _____
    - By telephone – _____
    - By deposition testimony, whether videotaped or not – _____
- **Hearing exhibits**, including as follows: – _____
  - Date for the Parties' exchanges of exhibits to be offered – _____
  - Date for counsels' meeting and conferring to agree on joint exhibits and avoid duplication – _____
  - Finalization of joint exhibits and of each side's identification of its other exhibits and – _____
  - Organization of exhibits binders by category or chronology or the like, as makes sense in the case – _____
- **Key Exhibits** – _____
- **Demonstrative exhibits** – _____
- **Pre-hearing memoranda** – _____
- **Motions *in limine*** – _____
- **The hearing:**
  - When – _____
  - Where – _____
  - Hours – _____
  - Particular focus on length of hearing day – _____
  - Panel's approach to evidentiary, administrative, timing, and other matters – _____
- **Evidentiary nature of designated hearing exhibits**, including as follows:
  - The most typical approach: exhibits to be received into evidence as of the opening of hearing, unless objected to in advance thereto or – _____
  - The more restrictive approach, whereby only documents actually used at the hearing are deemed in evidence – _____
  - Clarification that foundations for the admission of documents need not ordinarily be laid and – _____
  - Decision as to whether pre-marking applies to documents used for impeachment only – _____
- Provision to arbitrators of **copies of cases** and other authorities relied upon: – _____
  - Hard copies – _____
  - Electronic copies – _____
- **Accelerated Exchange Program** – _____
- **Form of the Parties' submissions** to the Arbitrators, whether by electronic and/or hard copies – _____
- **Word copies of submissions**, including briefs and experts' reports

- **Use of electronics at hearings** – _____
- **Post-hearing submissions**, including:
  - Post-hearing memoranda and – _____
  - Closing statements and possibly schedule as to same – _____
- **Form of award:** – _____
  - Standard – _____
  - Reasoned – _____
  - Reasoned lite and – _____
  - Findings of fact and conclusions of law – _____
- **Court reporter** – _____
- **Cyber security** – _____
  - Discuss – _____
  - Areas of focus – _____
    -
      -
      -
    - Means of exchanging documents and other materials – _____
      - Paper only – _____
      - Email – _____
      - What requirements as to type of programs – _____
      - What requirements as to whether emails are to be encrypted – _____
  - Means of storing it – _____
  - Means of using it – _____
  - Means of disposing of it – _____
  - What to do with the passwords – _____
    - Need to constantly change the password – _____
- Level of cyber securities sensitivity and whether special measure should be taken.
- _____ --
  - Communications with the Panel
  - Submissions to the Panel
  - Exhibits
  - Transcripts
  - Anything else
- Length of time by which I may destroy the case files
  - Hard copies other than pleadings
  - Exhibits and transcripts from the hearing
  - Electronic copies of same
- Costs and **attorneys' fees**, including: – _____
  - Whether to be handled through post-hearing declarations and computer sheets as to attorney time – _____
  - Or in a separate process after the merits of the case are decided by interim award or the like – _____
- Parties' ongoing duty of **disclosure as to conflicts** – _____

- **Mediation window** – _____
- **Document retention** – _____
- **Parties' expectations** – _____
- **Anything else** either side or any panel member wants to raise – _____

-

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Particularizations by Claimant as to the Trade Secrets and Other Proprietary Information of Claimant that Claimant Contends Respondent Wrongfully Disclosed or Used or the Like

1. By _____, Claimant will serve and file a Particularization, setting forth in reasonable detail the trade secrets or other proprietary information of Claimant that Claimant contends Respondent wrongfully disclosed or used or the like and will produce the documents upon which Claimant relies for such contentions.

2. It is suggested that this Particularization include a chart with numbered boxes, wherein each particular assertion is particularized and the related documents identified, to facilitate Respondent's response to said Particularization.

3. By _____, Respondent will serve and file its Response to Claimant's foregoing Particularization and will produce the documents upon which it relies for such Response.

4. It is requested that Respondent's Response to Claimant's said Particularization include a column that Respondent adds to Claimant's Particularization, setting forth Respondent's response to each individual assertion, box by box, set forth therein and identifying the documents upon which Respondent relies for such Response.

5. It is understood that Respondent will provide its Response to Claimant's said Particularization based on documents then available to Respondent and witnesses who are still employed by Respondent; provided, however, that to the extent Respondent is able, within the foregoing time frame, to also include information from outside sources, including former

employees, and information as to what is available in the public domain, it will do so, but without prejudice to further elaboration on such matters later.

6. A major purpose of this process of Particularization is to enable each side, on an efficient basis, to gain reasonable discovery as to the other side's contentions. It is expected that this process should, to a considerable extent, obviate a more elaborate course of discovery.

Additional Contract Documents

7. By _____, Respondent will provide to the arbitrators copies of the additional contract documents referenced in the pleadings that have not previously been provided to the Arbitrators.

Particularizations as to Respondent's Counterclaim for $_____

8. By _____, Respondent will serve and file a Particularization of its claim for $_____ plus additional monthly accruals and interest, setting forth the bases for that claim with specificity.

9. Said Particularization will list each individual item or similar group of items of work making up said alleged damages with particularity, including as to the following: the identity of the work in question, the dates thereof, and Respondent's bases for contending that Claimant is liable to Respondent for such work.[1]

[1] This Particularization addresses the factual and contractual bases for Respondent's counterclaim for $_____; provided, however, that issues as to the scope of the work under the _____ will be addressed by Respondent in a separate Particularization and need not be addressed in this Particularization, except by general reference to Respondent's position as to the scope of that agreement.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

10. It is expected that this Particularization will include a detailed chart wherein the particular items at issue will be numbered and placed in individual blocks or the like to facilitate Claimant's responsive Particularization on an item by item basis.

11. By _____, Claimant will serve and file its responsive Particularization, setting forth with specificity its response to each item or group of items set forth by Respondent in its Particularization

12. Each side's said Particularization will include as attachments the documents upon which the side relies in support of its Particularization and will identify the particular documents, or parts thereof, upon which the side relies in connection with its description of its position as to each item or group of items of work set forth therein.

Particularizations as to Funding Available in a _____

13. To the extent that items included within Respondent's $_____ counterclaim are for amounts beyond the agreed monthly payments under the _____ (the "_____"), Respondent will, by _____ serve and file a Particularization of its bases for contending that such items are payable under the _____, including the provisions thereof concerning payments through funding available in a _____.

14. By _____, Claimant will serve and file its responsive Particularization, responding to Respondent's said Particularization with specificity.

15. Each side's said Particularization will include as attachments the documents upon which it relies in its Particularization and will identify the particular documents, or parts thereof,

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

upon which the side relies in connection with its description of its position as to the matters in question.

16. These Particularizations will be organized similarly to Respondent's Particularization of its counterclaim for $_____, setting forth the parties' respective contentions in a format whereby such contentions are numbered and placed in individual blocks or the like to facilitate the narrowing of the issues as to the matters in contention.

Particularizations as to the Scope of the _____

17. By _____, Respondent will serve and file a Particularization of its position as to the scope of the _____, identifying with specificity Respondent's bases for contending that the scope of the _____ changed over time and what it contends the final applicable scope is.

18. By _____, Claimant will serve and file its responsive Particularization of its position as to the scope of the _____.

19. Each side's said Particularization will include as attachments the documents upon which it relies in its Particularization and will identify the particular documents, or parts thereof, upon which the side relies in connection with its description of its position as to the matters in contention.

20. These Particularizations will be organized similarly to Respondent's Particularization of its counterclaim for $_____, setting forth the parties' respective contentions in a format whereby such contentions are numbered and placed in individual blocks or the like to facilitate the narrowing of the issues as to the matters in contention.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Particularizations as to Claimant's Claim for $_____

21. By _____, Claimant will serve and file a Particularization of its claim for $_____, setting forth the bases for that claim with specificity.

22. Said Particularization will list each individual payment and related billing and payment documents with particularity.

23. It is expected that this Particularization will include a detailed chart wherein the particular items at issue will be numbered and placed in individual blocks or the like to facilitate Respondent's responsive Particularization on an item by item basis.

24. By _____, Respondent will serve and file its responsive Particularization, setting forth with specificity its response as to each payment identified by Claimant in its Particularization and identifying and attached the documents upon which it relies in response.

Respondent's Counterclaim as to Claimant's Alleged Breach of the Implied Covenant of Good Faith and Fair Dealing

25. Respondent has represented that its counterclaim alleging Claimant's breach of the implied covenant of good faith and fair dealing is a claim in the alternative that does not seek additional relief beyond that demanded in connection with Respondent's other counterclaims, except that Respondent reserves the right to seek its costs and attorneys' fees in this arbitration if, in its view, discovery discloses that Claimant's positions in this arbitration as to its obligations to Respondent under the _____ are asserted in bad faith.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Respondent's Particularization as to Any Compensation it Received Based on Information Provided or Work Done by Claimant

26. By _____, Respondent will serve and file its Particularization, setting forth in reasonable detail the amounts of money, by markup or otherwise, if any, that Respondent received based on information provided or work done by Claimant, along with the documents upon which Respondent relies in support of said Particularization.

27. Respondent is providing this information based on Claimant's request for discovery as to such matters, but is doing so without prejudice to Respondent's position that such information is not relevant or material to Claimant's damages, if any, even assuming, for discovery purposes only, that Claimant is able to establish liability.

28. The Parties agreed that, reasonably in advance of this _____ date, Claimant may elaborate on its damages theory and identify for Respondent different parameters for this Particularization by Respondent, subject to agreement between the Parties as to what those parameters would be for purposes of discovery. In such eventuality, the Parties will work together on the definition of such parameters, failing which the Parties may schedule a conference call with the Discovery Master to discuss the matter.

29. Respondent will further produce representative documents showing how the time of its engineers who worked with Claimant was reported and billed internally within Respondent and used for compensation purposes with the applicable customer(s).

30. A major purpose of this process of particularization is to enable each side, on an efficient basis, to gain reasonable discovery as to the other side's contentions. It is expected that this process should, to a considerable extent, obviate a more elaborate course of discovery.

_____
_____and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Project Files

31. The parties have agreed, in the interests of expedition and economy, that each side will make available to the other its respective "project files," meaning the work files maintained by each side with respect to the work that is the subject of the claims and counterclaims in this arbitration.

32. By _____, each side will have identified to the other the project files that it has available to it and will have made arrangements to make such files available for review by the other side, subject to reasonable protocols to be worked out between the parties as to such document production.

33. The foregoing includes electronically stored documents, to the extent the project files are maintained electronically.

34. The objective of this approach is that each side will have available to it the project files available to the other side and will be able to search them and access whatever it wants from them upon reasonable notice to the other side and under reasonable conditions.

Respondent's Particularization of Its Counterclaim for Damages

35. By _____, Respondent will serve and file a Particularization of its alleged damages on the counterclaims it has asserted in this arbitration, providing reasonable detail as to such alleged damages and producing documents, beyond those already produced, upon which it relies for said damages.

EDNA SUSSMAN'S FOR AD HOC ARBITRATION SAMPLE

TERMS OF APPOINTMENT

Arbitration Concerning _____

_____
Claimants

v.

_____
Respondent

I. Appointment of the Arbitral Tribunal

1. The Parties confirm their acceptance that the Arbitral Tribunal comprising _____ (appointed by Claimants), _____(appointed by Respondent), and _____(appointed as Presiding Arbitrator on the nomination of the co-arbitrators), has been validly established in accordance with the terms of the relevant Arbitration Agreements.

2. Each Arbitrator confirms that he or she is and shall remain impartial and independent of the Parties.

3. The Parties waive any objection to the appointment of the Arbitrators on the ground of any conflict of interest, lack of independence or impartiality in respect of matters known to them at the date of signature of these Terms of Appointment.

4. There shall be no ex parte communication between any Party and any Arbitrator regarding any matter in these proceedings. All written communications by any Party to the Arbitral Tribunal shall be copied simultaneously to the other Parties.

II. Remuneration and Expenses of the Arbitrators

5. Each Arbitrator's remuneration for time spent on the arbitration, including study of submissions, correspondence, hearings, deliberations, travel (at 50% rate) and drafting the award shall be calculated on the basis of US$_____per hour for arbitrator ___, ____ per hour for arbitrator _____ and ____ per hour for arbitrator _____.

6. If the Parties cancel or postpone all or part of any hearing dates with less than 20 days notice the Arbitral Tribunal is entitled to payment at fifty per cent (50 %) of the Arbitrators' hourly rate for the time reserved but not used.

7. The Arbitrators shall be reimbursed in respect of all disbursements and charges incurred in connection with the arbitration, including but not limited to travel, hotel, courier delivery, telephone, facsimile and copying.

III. Advance on Costs

8. The Parties shall establish an initial deposit of $_____from each side, for a total of $_____covering both of the above-captioned cases. Each Arbitrator may draw against such deposit on a monthly basis for fees and expenses. The Presiding Arbitrator may from time to time require the Parties to replenish such deposit in order to maintain an appropriate balance.

9. [Interest shall accrue on the account for the benefit of the Parties.]

10. [Funds should be deposited as follows: :

Account Name:

_____

IV. Confidentiality

11. The arbitral proceedings and any rulings or award shall be kept confidential by the Parties and members of the Arbitral Tribunal except (i) as necessary for enforcement or recognition of the award, (ii) with the consent of all Parties and (iii) as required by law or as necessary to protect legitimate interests of a Party or Arbitrator. For the avoidance of any doubt, it is agreed that in preparing and presenting its case no Party shall be precluded from communicating with prospective witnesses, experts or other sources of information or materials.

V. Immunity from Suit

12. No Arbitrator shall be required by either Party to be a party or witness in any judicial or other proceedings arising out of this arbitration; and

13. No Arbitrator shall be liable to any Party in respect of any act or omission in connections with any matter related to this arbitration, save where that Arbitrator is shown to have been guilty of conscious and deliberate wrongdoing.

VI. Notices

14. All written communications shall be sent to the following addresses.

(1) Claimants

(2) Respondent

(3) Arbitrators

For the Parties:

_____ _____

Claimants Respondent

For the Arbitral Tribunal:

_____ _____ _____

Dated:

Sample Disclosure

Via E-mail

Date:

Addressees

Case name

Dear :

I am returning the Notice of Appointment and Notice of Compensation Arrangements for this matter.

I served as a co-arbitrator in a matter in which ___ represented a party about one year ago in which I was appointed [by agreement of the parties from an AAA list] [by the opposing party] .....I mediated a case in which the respondent ___ appeared as a party five years ago. I serve on a bar association committee which meets once a month of which counsel for plaintiff is also a member and we occasionally attend the same meeting. Etc. _____

I have the following additional disclosures: I am active with various bar associations, have spoken and published extensively and edit a legal publication and so have occasion to interact with many members of the bar. Regarding counsel associated with the firms or parties in this matter, I may be serving or have served on bar association committees with them, I may have been listed as an editor in a publication which published an article by them or had an article or chapter I wrote appear in the same publication as their contribution appeared in, I may have cited them in one of my articles or been cited by them in one of their articles, I may have presented at an educational program at which they also presented, I may be director of an organization of which they are also a director, I may have met them at bar association functions or professional conferences or they may subscribe to an ADR related list serve that I subscribe to or be members of one of my www.Linkedin.com groups or be one of my over 700 "connections" on Linkedin, an on-line network in which I accept all invitations to connect sent to me by anyone in the litigation or alternative dispute resolution field whether I know them or not and which is strictly professional in nature. Fordham Law School has a great many adjunct professors and I have no contact with them arising from our respective responsibilities at Fordham. My practice is not to make inquiries with respect to these various professional activities as there are so many that it is not possible for me to identify all possible points of overlap in such affiliations and they do not constitute a "relationship which might reasonably affect impartiality or independence in the eyes of any of the parties." I therefore make no disclosures with respect to such affiliations

other than with respect to persons directly involved in this matter as to which I have such knowledge based on present recollection without inquiry.

A more comprehensive listing of my activities is found on my website at _____. You are invited to promptly conduct such further review and research online or otherwise and seek responses from me to any further inquiry as you deem appropriate.

My husband is _____ at _____. I have not conducted a conflict check at that firm or at the firms of _____ or _____with which I was previously associated. I am not made aware of the matters handled at any of those firms. I am not receiving and will not receive any payments from the firms with which I was associated.

I believe I can render a fair and unbiased decision and act independently in this matter and make these additional statements in the interest of full disclosure. If there is anything known to a party that is relevant in this context, please advise the case administrator as soon as it becomes known.

Sincerely yours,

Edna Sussman

Caution from Edna Sussman: This is only a SAMPLE preliminary hearing order that is to revised and tailored to suit the specifics of the case

AMERICAN ARBITRATION ASSOCIATION

Claimants)

- and -) Case No.

Respondents.)

PRE-HEARING ORDER NO. 1

A Preliminary Hearing was held [by telephone conference] on _____in connection with the above-entitled proceeding. The hearing was attended by _____on behalf of Claimants and _____on behalf of Respondents and the Arbitrators.

By agreement of the parties and order of the Arbitrators, the parties are directed to comply with the following:

1. The parties stipulated that the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

2. The parties stipulated that the arbitration shall be governed by the Federal Arbitration Act.

3. The parties accepted the arbitration panel as constituted.

If applicable -{4. As certain operative documents in this case do not contain an arbitration clause and certain persons and entities are named as parties in this proceeding that are not party to an arbitration agreement, the parties will prepare a stipulation, to be executed by all parties, identifying the agreements/issues that they are submitting to arbitration in these proceedings and confirming that all parties named are submitting themselves to the jurisdiction of this arbitration with respect to those issues.} **or can be incorporated into the order without a stipulation.**

If applicable - [The parties further confirm that the reference to mediation in _____of the _____ does not constitute a condition precedent to these arbitration proceedings [or has been satisfied].

5. **[List any amendments to pleadings being requested and permitted. Ensure that the nature of the claims is set forth in sufficient particularity that intelligent progress can be made] e.g.** Respondents may amend the counterclaim on or before February 5, 2010.] Leave shall be requested from the Arbitrators for any subsequent amendments to the pleadings on a good-cause-shown basis.

6. No motions, other than discovery motions, shall be filed by any party without first submitting a letter to the Arbitrators setting forth the nature of the motion that the party proposes to file and a brief statement of the factual and legal bases for such motion and obtaining approval from the Arbitrators for such filing.

7. **ADD specific issues to be addressed in particular case. E.g.** On or before _____, the parties will confer as to the desirability of bifurcating the proceedings and/or retaining a joint neutral expert. Any issues in this regard that require the Arbitrators' attention shall be brought to the Arbitrators' attention by letter on or before_____. Responding letters may be submitted on or before _____.

8. On or before _____the parties shall serve written requests for the production of any document or narrow and specific categories of documents which are relevant to the case and material to its outcome.

9. On or before _____ each party shall serve upon the other party written responses to the document requests directed to it.

10. The parties will meet and confer in an effort to resolve any discovery disputes arising out of objections to the requests made. If the parties are unable to resolve any such discovery issues, such disputes shall be presented by the submission of letters setting forth the respective views of the parties on or before_____. Responding letters may be submitted on or before _____At the discretion of the Arbitrators, such dispute(s) shall be resolved on the basis of the exchange of letters or a telephone conference to be held on_____. With respect to subsequent discovery

disputes, if any, the parties shall meet and confer in an effort to resolve any such disputes and shall present any areas of disagreement to the Arbitrators by letter setting forth their positions. The parties are encouraged to consolidate the disputes into as few separate submissions as possible. **(or can request a Redfern schedule]**

11. On or before_____, each party shall produce:
    a. those documents responsive to the requests directed to it as to which no objection was made;
    b. those disputed documents which it has been determined must be disclosed;
    c. those documents on which it relies in support of its case in the arbitration; and
    [d. a privilege log itemizing any withheld privileged documents.]

[Documents shall be produced on a rolling basis in advance of the final date for production]

12. **[If agreed]** With the consent of the parties, the Chair of the Panel of Arbitrators, or at the Chair's designation either of the other Arbitrators (the "Discovery Master"), shall resolve discovery disputes; provided, however, that at the request of either party or the Discovery Master, the other Arbitrators shall participate in the resolution of such discovery disputes.

13. If any party proposes to offer testimony by an expert at the hearing, such expert shall be identified on or before_____. The parties shall confer and advise the panel as to the date upon which parties shall serve a written report with respect to testimony to be offered by any expert at the hearing **[or better to specify date here].** The report shall include a statement of all opinions to be expressed and the basis and reasons therefor, the data which the expert considered in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and the expert's qualifications. **[can add dates for expert rebuttals].**

14. A Preliminary Hearing will be held via telephone conference on _____at _____PM Eastern time to review any outstanding issues. **[may also schedule interim calls here if appropriate]**

15. On or before 14 days prior to the hearings the parties shall exchange the exhibits that they propose to offer at the hearing. The parties may agree to reserve documents which they will only use for cross-examination, rebuttal or impeachment and shall advise the Arbitrators of their agreement in this regard on September 23, 2011 at the scheduled call. Any exhibit offered which was responsive to a discovery request served upon a party but which was not produced to the other parties on or before the time set for the completion of discovery will not be received except for good cause shown.

16. On or before 14 days prior to the hearings the parties shall exchange a list of the persons they anticipate calling as lay witnesses to testify on their behalf. Such list shall reflect the name and address of each witness and a brief description of the subject matter of the testimony to be elicited from each such witness.

[If witness statements are used in lieu of direct testimony:
If any party proposes to adduce testimonial evidence of factual witnesses at the hearing, it shall serve written witness statements on or before _____by way of simultaneous exchange.

Written witness statements shall:

1. be in sufficient detail to stand as the evidence in chief of the witness at the hearing.
2. state the basis of that evidence (own perception or, if on information received, from whom such information was received, when and how);
3. identify in the witness statement and include as exhibits all documents to which the witness refers;
4. contain a statement by the witness confirming the truth of the contents of the witness statement; and
5. be signed by the witness.

No person shall be heard as a witness at the hearing for whom no written witness statement has been served.

Can include a time for rebuttal statements also.

All witnesses whose evidence is relied upon should be available for cross-examination at the hearing, if required by the other party or by the Arbitrators. If a witness who has submitted a witness statement or Expert Report does not appear at the hearing without a valid reason, the Arbitrators shall disregard that evidence unless, in exceptional circumstances, the Arbitrators determine otherwise. Each party shall be responsible to ensure the attendance of the witnesses on whose evidence they rely and, subject always to the Arbitrators power to deal with costs in its Award, for the costs of those witnesses attending the hearing.]

17. The parties shall cooperate in an effort to prepare a statement of stipulated facts to the extent that would be cost effective and will submit that to the Arbitrators on or before 14 days prior to the hearings.

18. On or before 14 days prior to the hearings each party shall provide the Arbitrators and the other parties with its pre-hearing memorandum which will include a discussion of the facts and the applicable law and a copy of any expert reports. The memoranda shall be accompanied by copies of the cases and other authorities upon which the parties rely. Exhibits necessary to understanding the pre-hearing memoranda and not already submitted to the arbitrators may be submitted. [or submit 20 document the parties viewed as most important to their case.]

19. The parties shall cooperate in preparing a joint exhibit book, indexed and pre-numbered, to avoid duplicative documents and an unnecessary number of exhibit books. To the extent necessary, the parties shall prepare a separate exhibit volume, indexed and pre-numbered, consisting of that party's prospective additional hearing exhibits. At the commencement of the

evidentiary hearing, the parties shall provide the Arbitrators with the exhibit volumes, indexed and pre-numbered, shall provide the separate exhibit binder to the other parties and shall have an exhibit set available for use by witnesses.

20. All submissions to the Arbitrators shall be accompanied by copies of any cases and other authorities upon which the parties rely.

21. **[If utilized]**The AAA's Accelerated Exchange Program shall be utilized for transmitting documents to the Arbitrators. Documents shall be delivered to the Arbitrators by e-mail and, if longer than 5 pages, followed by hard copy by overnight service or mail. For purposes of transmitting documents to the Arbitrators, the parties shall utilize the following contact information:

_____

Copies of all documents transmitted to the Arbitrators shall be sent simultaneously to the other parties, and a copy of the transmittal correspondence shall be sent simultaneously to _____, the AAA Case Manager. The Case Manager shall communicate with counsel concerning documents, if any, that may need to be executed to further document this stipulation.

22. The parties will confer as to the requested form of the award to be issued in this case and will advise the panel on or before____. [or the parties have requested a _____award]

23. The evidentiary hearings will commence at 9:30 a.m. on _____with _____to be held in reserve should an additional day prove to be necessary. The parties will confer and advise the panel of the location for the hearing. If the parties choose to use the offices of the American Arbitration Association, they will make the necessary arrangements directly with the case manager. The parties will make arrangements to schedule the attendance of witnesses such that the proceeding can proceed expeditiously and without any unnecessary delay.

24. The party presenting evidence shall give notice to the other party one day before of the names of the witnesses who will be called to testify the next day and the order in which the witnesses will be called.

25. If a court reporter is to be employed to transcribe the evidentiary hearing, the parties will make the necessary arrangements.

[The language of the arbitration will be English.]

[If a translator is to be employed, the parties will make the necessary arrangements.]

26. All deadlines set forth in this order shall be adhered to strictly unless and until amended by the panel. Late submissions may be subject to consequences which may include a refusal by the panel to accept the submission.

27. The evidentiary hearing dates set forth in this Pre-Hearing Order No. 1 will not be rescheduled absent extraordinary circumstances unrelated to preparedness. This Pre-Hearing Order No. 1 shall continue in effect unless and until amended by subsequent order of the Arbitrators. Any request for a modification of the schedule set forth in this Pre-Hearing Order No. 1 will include a statement as to whether the other party consents to the proposed modification and will confirm that the proposed modification will not require a change in the evidentiary hearing dates.

27. The parties are reminded to update their respective conflict checklists as further information becomes available. The duty to update such checklists will continue up to and including the date that the hearings are declared closed by the Arbitrators. If there is anything known to a party that is relevant in the context of arbitrator disclosure or impartiality, please advise the case administrator as soon as it becomes known.

Dated: _____

_____

_____

_____, chair

Arbitrators

Master for procedural call just before the hearing

By Edna Sussman- to be tailored as needed for the case

The panel would like to review procedural matters for the hearing to assure an efficient and fair process.

1. Confirm date, location and time of the hearing. We have June _____commencing at 9:30 and are holding _____if necessary. Please confirm the dates and confirm where the hearing is taking place.

2. We did not set a page limit for the pre-hearing memoranda which shall contain a discussion of the facts and the law. Do counsel want to agree on a page limit? We suggest a page limit of ____ pages. Please be sure to send hard copies of all authorities relied on, cases, statutes, horn books pages, etc. to the arbitrators. (if not set in first order)

3. Will any fact witnesses' direct testimony be presented by affidavit? If there will be affidavits for any direct testimony, the affidavits should be delivered to the tribunal with the pre-hearing memoranda. All witnesses must of course be available for cross examination. {This is likely already established in the first order] If affidavits are to be used for the direct, it should be understood that counsel will be permitted a limited "warm up" direct examination of that witness before cross examination. Any to be presented by deposition? Will cross be limited to the direct or anything relevant to the case?

4. Will all witnesses be available for live testimony; if not, is an agreement and arrangements for video conferencing or telephone testimony necessary for any witnesses? If so, are arrangements to be made to have documents available at the witness' location for the examination? Is there agreement as to the presence of an attorney with the witness?

5. Are any expert witnesses to be presented? How will the experts' testimony be presented? Is consideration being given to having the experts there at the same time so that the panel can pose questions to both in the sequence deemed most useful to the panel?

6. Time allocation: should a "chess clock" approach be used to divide the number of hours evenly between the parties? Is there a concern that without such a mechanism one side will be denied an equal opportunity to present its case within the time frame we have allocated for the hearing in this matter?

7.. Will there be opening statements? How long? Power points to be used?

8. Who will attend the hearing for each party understanding that each party is entitled to one party representative (and any expert witness) but the parties may agree to have others present? Witnesses sequestered?

9. Review exhibit and admission of evidence process. Demonstratives? Rules of evidence- objections – hearing behavior on objections.

10. Stipulated facts?

11. Will there be a court reporter? If so, have arrangements been made for their presence?

12. Is there a need for a translator? Coordination on slelection?

13. Technology needs for the hearing

14. Please advise as to the nature of the award requested by the parties. (If not already established)

15. Review schedule -Daily list of witnesses schedule for next two days

16. Attorney's fees, costs, sanctions [if appropriate to discuss]

17. Ways to shorten the hearing:

a. witness books containing the exhibits to be used with each witness to shorten the time otherwise spent pulling out the relevant exhibit,
b. no opening statements,
c. resolution of any objections to the admission of broad categories documents before the hearing if there is an issue like that
d. delivery to the Tribunal before the hearing of key exhibits as to which there are no objections to admissibility to avoid time spent reading documents into the record with witnesses
e. preparing witnesses to just respond to the questions posed to avoid long non-responsive answers, avoiding duplicative testimony
f. CV of witnesses
g. timeline
h. Witness statements
i. shortening the "warm up periods,"
j. streamlining the experts' testimony through various tools such as no oral direct, having the experts meet alone without counsel and report back to the Tribunal as to the open issues,
k. stipulated facts if cost effective- or limited for facts that Panel asks for as to which there is no dispute but would be helpful, e.g. corporate chart, time line, when transactions took place and in what amount, etc.- tailored to case
l. length of hearing days, weekends

International Arbitration

IBA Rules on the Taking of Evidence in International Arbitration

Adopted by a resolution of
the IBA Council
29 May 2010
International Bar Association

the global voice of
the legal profession

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the global voice of
the legal profession

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About the Arbitration Committee

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

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

Foreword

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

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

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

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

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

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

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

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

The Rules

Preamble

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

Definitions

In the IBA Rules of Evidence:

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

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

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

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

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

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

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

'Party' means a party to the arbitration;

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

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

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

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

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

Article 1 Scope of Application

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

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

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

Article 2 Consultation on Evidentiary Issues

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

Article 3 Documents

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

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

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

steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies.

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

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

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

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

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

Article 4 Witnesses of Fact

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

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

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

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

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

5 Each Witness Statement shall contain:

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

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

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

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

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

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

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

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

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5 Party-Appointed Experts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 6 Tribunal-Appointed Experts

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

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

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

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

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

Article 7 Inspection

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

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

Article 8 Evidentiary Hearing

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

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

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

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

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

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

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

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

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

Article 9 Admissibility and Assessment of Evidence

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

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

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

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

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

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

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

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

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

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES

(Including Mediation and Arbitration Rules)

Rules Amended and Effective June 1, 2014

Fee Schedule Amended and Effective June 1, 2014

available online at icdr.org

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International Dispute Resolution Procedures

(Including Mediation and Arbitration Rules)

Introduction

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

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

International Mediation

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

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

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

The parties should consider adding:

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

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

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

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

International Arbitration

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

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

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

The parties should consider adding:

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

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

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

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

International Expedited Procedures

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

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

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

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

The parties should consider adding:

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

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

Features of the International Expedited Procedures:

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

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

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

How to File a Case with the ICDR

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

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

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

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

International Mediation Rules

1. Agreement of Parties

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

2. Initiation of Mediation

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

3. Representation

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

4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

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

b. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the ICDR. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the ICDR shall invite a mediator to serve

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

5. Mediator's Impartiality and Duty to Disclose

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

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

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

6. Vacancies

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

7. Duties and Responsibilities of the Mediator

1. The mediator shall conduct the mediation based on the principle of party self-determination Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
2. The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person, or otherwise
3. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
4. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
5. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties for a period of time in an ongoing effort to facilitate a complete settlement.
6. The mediator is not a legal representative of any party and has no fiduciary duty to any party

8. Responsibilities of the Parties

1. The parties shall ensure that appropriate representatives of each party having authority to consummate a settlement attend the mediation conference.
2. Prior to and during the scheduled mediation conference(s), the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation

9. Privacy

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

10. Confidentiality

1. Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.
2. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum
3. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:
   a. views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
   b. admissions made by a party or other participant in the course of the mediation proceedings;
   c. proposals made or views expressed by the mediator; or
   d. the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

11. No Stenographic Record

There shall be no stenographic record of the mediation process.

12. Termination of Mediation

The mediation shall be terminated:

- **a.** by the execution of a settlement agreement by the parties; or
- **b.** by a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- **c.** by a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated, or
- **d.** when there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

13. Exclusion of Liability

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

14. Interpretation and Application of Rules

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

15. Deposits

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

16. Expenses

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

17. Cost of Mediation

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

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

18. Language of Mediation

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

Conference Room Rental

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

International Arbitration Rules

Article 1: Scope of These Rules

1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.
2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration. These Rules specify the duties and responsibilities of the ICDR, a division of the AAA, as the Administrator. The Administrator may provide services through any of the ICDR's case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so.
4. Unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD $250,000 exclusive of interest and the costs of arbitration. The parties may also agree to use the International Expedited Procedures in other cases The International Expedited Procedures shall be applied as described in Articles E-1 through E-10 of these Rules, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures. Where no party's claim or counterclaim exceeds USD $100,000 exclusive of interest, attorneys' fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary.

Commencing the Arbitration

Article 2 Notice of Arbitration

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

2. The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.
3. The Notice of Arbitration shall contain the following information:
   a. a demand that the dispute be referred to arbitration;
   b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives,
   c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;
   d. a reference to any contract out of or in relation to which the dispute arises;
   e. a description of the claim and of the facts supporting it,
   f. the relief or remedy sought and any amount claimed; and
   g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.
4. The Notice of Arbitration shall be accompanied by the appropriate filing fee
5. Upon receipt of the Notice of Arbitration, the Administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration

Article 3: Answer and Counterclaim

1. Within 30 days after the commencement of the arbitration, Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.
2. At the time Respondent submits its Answer, Respondent may make any counterclaims covered by the agreement to arbitrate or assert any setoffs and Claimant shall within 30 days submit to Respondent, to any other parties, and to the Administrator a written Answer to the counterclaim or setoffs
3. A counterclaim or setoff shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.
4. Respondent shall within 30 days after the commencement of the arbitration submit to Claimant, to any other parties, and to the Administrator a response to any proposals by Claimant not previously agreed upon, or submit its own proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of the arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.

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

Article 4: Administrative Conference

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

Article 5· Mediation

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

Article 6· Emergency Measures of Protection

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

challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the Administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

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

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

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

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

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

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

Article 7: Joinder

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

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

Article 8: Consolidation

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

c. the progress already made in the arbitrations;

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

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

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

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

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

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

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

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

Article 10: Notices

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

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

The Tribunal

Article 11: Number of Arbitrators

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

Article 12: Appointment of Arbitrators

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

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

Article 13: Impartiality and Independence of Arbitrator

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

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

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

Article 14: Challenge of an Arbitrator

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

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

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

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

Article 15. Replacement of an Arbitrator

1. If an arbitrator resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.
2. If a substitute arbitrator is appointed under this Article, unless the parties otherwise agree, the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.
3. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for reasons other than those identified in Article 15(1), the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order, or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling, order, or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the Administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.

General Conditions

Article 16: Party Representation

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

Article 17: Place of Arbitration

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

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

Article 18: Language of Arbitration

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

Article 19: Arbitral Jurisdiction

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

Article 20: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

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

Article 21: Exchange of Information

1. The arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
2. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority. To the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.
3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.
4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.
6. When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.
7. The tribunal may, on application, require a party to permit inspection on reasonable notice of relevant premises or objects.
8. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs
10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

Article 22: Privilege

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

Article 23: Hearing

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

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

Article 24: Interim Measures

1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.
3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
4. The arbitral tribunal may in its discretion allocate costs associated with applications for interim relief in any interim order or award or in the final award
5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 6.

Article 25: Tribunal-Appointed Expert

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

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

Article 26: Default

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

Article 27: Closure of Hearing

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

Article 28: Waiver

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

Article 29: Awards, Orders, Decisions, and Rulings

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

Article 30: Time, Form, and Effect of Award

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

Article 31: Applicable Laws and Remedies

1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.
2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.
3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so.

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

Article 32: Settlement or Other Reasons for Termination

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

Article 33: Interpretation and Correction of Award

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

Article 34: Costs of Arbitration

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

Such costs may include:

a. the fees and expenses of the arbitrators;

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

c. the fees and expenses of the Administrator;

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

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

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

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

Article 35: Fees and Expenses of Arbitral Tribunal

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

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

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

Article 36: Deposits

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

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

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

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

Article 37: Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.
2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information

Article 38: Exclusion of Liability

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

Article 39: Interpretation of Rules

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

International Expedited Procedures

Article E-1: Scope of Expedited Procedures

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

Article E-2: Detailed Submissions

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

Article E-3: Administrative Conference

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

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

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

Article E-5: Changes of Claim or Counterclaim

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

Article E-6: Appointment and Qualifications of the Arbitrator

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

Article E-7: Procedural Conference and Order

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

Article E-8: Proceedings by Written Submissions

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

Article E-9: Proceedings with an Oral Hearing

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

Article E-10: The Award

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

Administrative Fees

Administrative Fee Schedules (Standard and Flexible Fee)

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

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

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

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

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

Standard Fee Schedule

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

The Standard Fee Schedule begins on the next page.

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

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

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

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

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

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

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

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

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

Refund Schedule for Standard Fee Schedule

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

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

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

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

Flexible Fee Schedule

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

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

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

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

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

The Flexible Fee Schedule begins on the next page.

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

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

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

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

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

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

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

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

There is no Refund Schedule in the Flexible Fee Schedule.

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

Expedited Procedures – Fees and Compensation

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

Hearing Room Rental

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

Notes:

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INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

The New ICDR International Arbitration Rules

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

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

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

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

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

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

Brief History of the ICDR International Arbitration Rules

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

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

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

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

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

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

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

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

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

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

Significant Changes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Significant Changes Considered but Not Made

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

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

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

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

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

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

Additional Changes

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

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

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

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

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

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

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

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

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

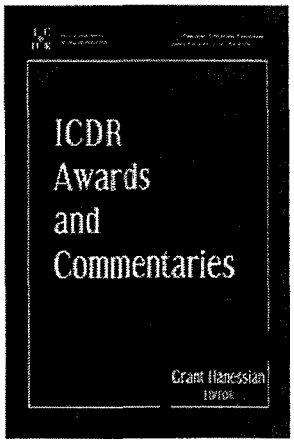
9. **Interpretation and correction of the award (Article 33)**: The new Rules contain several new provisions on interpretation and correction of the award and additional awards. They now state that any interpretation, correction or additional award made by the tribunal shall contain reasoning and shall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

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

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

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

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



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CHAPTER 1
A GUIDE TO ICDR CASE MANAGEMENT

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PART I

ARTICLES ON ICDR ARBITRATION PRACTICE

CHAPTER 1

A GUIDE TO ICDR CASE MANAGEMENT

Luis Manuel Martinez[*]

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

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

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

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

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

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

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

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

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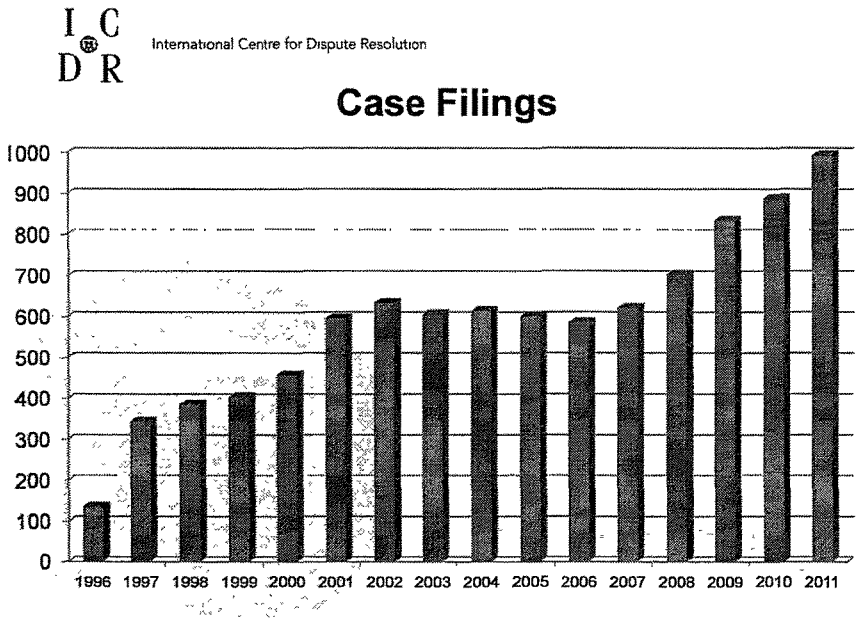
[3] For further reading on whether arbitrators make compromise awards or are cases decided in favor of one party over another, see Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split the Baby", Empirical Evidence from International Business Arbitrations*, 18 J. INT'L ARB. 573 (2001).

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

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



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

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

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

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

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

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

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

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

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

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

I. The ICDR

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The ICDR International Arbitration Rules (IAR)

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

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

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

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

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

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

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

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

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

III. Commencing the Case

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

Article 2 states that the notice of arbitration must contain:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[33] *See* IAR Article 3.

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

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

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

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

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

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

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

IV. Appointing the Arbitrators

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

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

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

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

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

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

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

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

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

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

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Example of the list

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

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

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

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

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

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

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

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

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

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

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

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

V. Clearing Conflicts and Challenges

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

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

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

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

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

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

VI. The Preparatory Conference

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

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

Preparatory Conference Checklist [Suggested]

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

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

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

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

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

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

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

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

For the conduct of the arbitration the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case. This provides the tribunal with the flexibility it needs for an international case. It may

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

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

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

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

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

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

[52] *See* IAR Article 19.

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

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

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

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

VII. Emergency Arbitrator Procedure

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

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

[56] *See* IAR Article 28.

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

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

[59] *See* IAR Article 21.

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

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

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

[60] *See* IAR Article 37.

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

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

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

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

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

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

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

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

I C
D R International Centre for Dispute Resolution

ICDR Guidelines for Arbitrators Concerning Exchanges of Information

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

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

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

IX. Other Rules Administered by the ICDR

The ICDR also administers international cases pursuant to the AAA's Commercial Arbitration Rules.[67] The commercial Rules have a U.S. domestic arbitration focus but are routinely used by international parties with ICDR administration. Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000 and in cases of at least $500,000 the Procedures for Large, Complex Commercial Disputes shall apply. There are a number of differences between the Commercial Rules and the IAR as referenced in the following chart but the Commercial Rules can and are applied in international cases as agreed to by the parties. The ICDR will advise the parties that they will incorporate its Institutional Commercial Arbitration Supplementary Procedures to require a reasoned award and to comply with the enforcement treaties.[68]

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

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

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

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

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

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

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

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

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

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

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

X. International Mediation

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

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

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

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

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

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

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

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

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

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

XI. Conflict Management Efficiencies

Arbitrations do not occur in a vacuum. They exist because the parties have agreed to an arbitration agreement. This agreement reflects the will of the parties and as we continue to see the growth of international trade where attention to all efficiencies is needed to compete, parties are revising their arbitration agreements to focus on these efficiencies.

The ICDR as illustrated offers a range of services and options to achieve greater conflict management efficiencies.[75] Parties knowing the ICDR system and the types of disputes they are likely to face from experience or from past similar cross-border transactions may consider some of the following drafting options to add to the ICDR model clause to maximize efficiencies.

It must be recognized that the best way to maximize these efficiencies has to be with their inclusion in the arbitration clause itself. If the clause lacks provisions such as those suggested below, a problem may arise when one side seeks these efficiencies and the other side objects. At that point the institution and the arbitrators concerned with due process and equality find these issues to be problematic. If these efficiencies are in the clause, which reflects the negotiated agreement of the parties, then the clause will be applied in its entirety and these problems can be avoided.

- Parties may wish to include ICDR mediation as part of their ADR agreement whether a condition precedent or concurrently with the mediation.

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[74] Luis Martinez and Thomas Ventrone. *The ICDR's Mediation Practice, Contemporary Issues in International Arbitration and Mediation:* The Fordham Papers 2010, to be published by Martinus Nijhoff Publishers in 2011.

[75] It starts with the ICDR's model arbitration clause, *"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."*

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or state), country]";

"The language(s) of the arbitration shall be ___."

- Parties may opt for a sole arbitrator and to waiving in-person hearings thereby agreeing to have their dispute decided on the documents alone or perhaps telephonic hearing.
- Parties may wish to explore the various expedited procedures available through the AAA Rules or by reducing the time frames pursuant to the IAR.
- Parties may wish to further limit the document exchange perhaps going beyond the ICDR's Guidelines or the International Bar Association's Rules on the Taking of Evidence in International Arbitration.
- Parties may wish to waive any access to e-discovery at all.
- Parties may wish to adopt a procedure where each side drafts their version of the award and the arbitrators are empowered to select only one version as the final ICDR award, "last best offer or baseball arbitration".
- Parties may wish to have the ICDR make the arbitrator appointments without a list.
- Parties may wish to consider modifications depending upon the transaction of the underlying dispute, for example if it is an international construction dispute incorporate additional ADR mechanisms such as a consolidation provision.

The list is not exhaustive and variations for these ADR efficiencies are extensive. Factor in the additional variations that may be specific to an industry or type of contract and more options arise. In the end the ICDR conflict management team welcomes the opportunity to be considered a resource in examining these clauses and is available to discuss these and other drafting options as needed.[76]

[76] *See* notes 7 and 9 *supra.*

The Fair and Efficient Hearing

What Advocates and Arbitrators Need To Do To Conduct a Fair, Effective and Well-Managed International Arbitration Hearing

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Overview

- Much of what we have said about conducting hearings in domestic arbitrations is applicable to international arbitrations.
- However, there are some distinctive differences between domestic and international arbitration, which are highlighted in this outline. The differences largely flow from differences in how litigation is conducted in different legal systems. A big contrast is between the common law and civil law systems. While domestic arbitration in the United States is heavily reflective of the common law approach followed in the U.S. legal system, international arbitration, to the extent it involves counsel and/or arbitrators from civil law systems, will often consist of an amalgam of the main characteristics of the two systems.
- In recent years, there have been significant convergences of the characteristic features of the litigative approaches of the common law and civil law systems, as such features are carried over into international arbitration. However, significant distinctive features of the two systems are still reflected in contemporary international arbitration practice, making it essential for lawyers and arbitrators making the transition from domestic to international arbitration to have a sensitivity to the differing expectations of participants in international arbitration coming from civil law systems.
- Salient differences between the common law and civil law systems arise, *inter alia*, in the following areas, each of which can have a significant impact on a hearing in an international arbitration:
    - the detailed nature of pleadings and attachments thereto and the continuing importance of such papers in civil law systems, as contrasted with the lesser focus on pleadings in common law systems;
    - the less extensive use of substantive motions in civil law systems;
    - the pervasive use of witness statements in civil law systems;
    - differing overall attitudes towards oral versus written testimony in the two systems;
    - broadly divergent views as to discovery/disclosure in the two systems;
    - the different ways in which expert witnesses are used in the two systems; and
    - the types of cross-examination used in the two systems.
- It is the experience of practitioners and arbitrators in the area that the calibration of the respective use of common law and civil law approaches in a particular

international arbitration will largely depend upon the attitudes of the arbitrators in the particular case.

- The purpose of this outline is to highlight the main distinctive features of hearings in international arbitration that result from the amalgam of common law and civil law approaches that may be used in the particular case, depending on the expectations, attitudes and pre-conceptions of the arbitrators and attorneys involved.

Witness Statements

- In civil law systems, there is a preference for written as opposed to oral testimony. The normal practice is for the direct testimony of witnesses to be presented in detailed sworn witness statements, to which the documents upon which the witness relies are attached. While this practice has become not uncommon in bench trials in some courts in the United States, it is not favored by many common law-based arbitrators, who like to hear the direct testimony orally and be able to assess it as it is presented.
- A main – almost epistemological – point is that, just as common law-oriented advocates and arbitrators tend to regard oral testimony as most persuasive, civil law-oriented practitioners and judges tend to see the written word as more persuasive, essentially believing that "all witnesses lie" and not being particularly enamored with the notion of cross-examination as the "most powerful engine for unearthing truth ever designed."
- The focus on witness statements in international arbitration persists, notwithstanding that everyone understands that witness statements are prepared by the lawyers and, indeed, that, given limitations on lawyers' talking with witnesses in some civil law systems, the lawyers preparing the witness statements have, in some instances, had limited communications at most with the witnesses in question.
- The use of witness statements imposes special burdens on counsel and arbitrators. Obviously, it requires counsel to develop their case and present it in some detail in advance of the hearing, both as to testimony and exhibits.
- For arbitrators from a common law system, there is a risk of overlooking the need to allot and spend whatever time is necessary to really assimilate the witness statements and the exhibits thereto in advance of the hearing, to the extent that, at least theoretically, the arbitrator is as familiar with them as he or she would have been if the witness's testimony and accompanying exhibits had been presented live on direct.
- When witness statements are used in international arbitration, it becomes important, particularly for common law-based arbitrators not that familiar with the civil law approach, to be careful to control the extent of redirect testimony, so

that redirect does not become, in effect, a delayed direct examination. Specifically, within reason, the scope of redirect testimony in international arbitration should be rather strictly limited to that of the cross, subject, obviously, to the needs of the particular case.

- It should be noted that the witness statement approach assumes the availability of the witness for cross-examination at the hearing. However, there are traps for the unwary here, both for counsel and arbitrators, if the opposing party decides not to cross–examine the witness, leading to the situation where the only evidence of record directly from the witness will be the witness statement. Many practitioners and arbitrators believe that, in such circumstances, it is appropriate for arbitrators to permit or even require some direct testimony from the witness, so they can get a sense of the witness's demeanor and the like and have any questions answered.
- It should also be noted that, under the witness statement approach, there will generally be a "warm-up period" of some period of time, typically 15 to 30 minutes or the like, for the witness to summarize his or her testimony very broadly and comment on what the other side's expert witness on the subject has said and other matters that have come up in the case subsequent to the preparation of the witness statement, provided, however, that this warm-up period can be extended for good cause shown.
- It is worth noting that witness statements, if interposed early enough in a case, can serve a purpose akin to discovery, at least to the extent of giving an adversary notice of what the direct testimony of the witness will be – indeed what that testimony is.
- The jury is out on the extent to which arbitrators actually rely on witness statements, as opposed to largely ignoring them and relying almost exclusively on the cross-examination and redirect testimony. Some practitioners and arbitrators believe that arbitrators generally rely fairly heavily on witness statements and others believe that they tend to largely discount them because of the known reality that the witness statements are generally prepared by counsel.
- However, in support of the notion that arbitrators often rely rather heavily on witness statements, it is noteworthy that it is the practice of some arbitrators in international arbitrations to meet after receipt and review of the witness statements, but before the commencement of the hearing, to discuss their preliminary views of the case.

Cross-Examination

- While the opposing side in civil law trials has the opportunity and usually utilizes it to cross-examine witnesses whose witness statements have been offered into evidence, civil law practitioners are not accustomed to the aggressive cross-examination that often occurs in common law systems and are can be offended by

it. It is important both for counsel in international arbitrations and for members of arbitration panels in such cases to be aware of the varying approaches and attitudes of case participants as to the appropriateness of harsh cross-examination.

Underlying Cognitive Issues

- These differing attitudes as to the reliability of written versus oral testimony may affect, if only subliminally, the cognitive styles of advocates and arbitrators from the two systems, leading to the situation where common law-based arbitration practitioners may assimilate witnesses' view of the world more readily from oral testimony and civil law-based practitioners may assimilate such matters more readily from written statements.
- Individual arbitrators will, of course, each have their own particular epistemological and cognitive styles, affecting how they best assimilate evidence, whether from oral or written presentations, and what kinds of evidence they will ultimately find most persuasive.
- A lot of work has also been done in recent years on the subject of heuristics – mental short cuts – that humans typically use in hearing, assimilating, and evaluating information. Such heuristics are made up essentially of unconscious, instantaneous reactions humans have to what is presented to them, based on preconceptions, ways of looking at the world, and even physiological factors, such as the time of day, food one has imbibed, the order of the evidence presented, and the like. Given differences in life experience — perhaps across the entire spectrum of influences based on nature and nurture — between people from different parts of world and cultures, it may be that the heuristics affecting common and civil law practitioners are somewhat different.

Expert Witnesses

- Where, in common law-based domestic arbitration, counsel select expert witnesses and generally expect them to present as strong a case as they can on behalf of the side that retained them, in international arbitrations influenced by civil law systems, the arbitrators will sometimes select the experts and expect them to be truly neutral.
- In international arbitration, the practice of "hot-tubbing" of expert witnesses is often followed, whereby, to one extent or another, such witnesses will be expected to cooperate with one another in narrowing their areas of disagreement and refining their analysis as to such areas.

Secrecy Laws

- Some civil law systems, including notably in Western Europe, have secrecy laws that are very protective of individual witnesses, including of employees of

corporate and other entities. These laws essentially create a zone of privacy that cannot be invaded by the arbitration process, even as to matters at issue in the arbitration that the witnesses were involved in as part of their employment.

- While issues relating to such secrecy laws will typically have been addressed earlier in an arbitration, particularly in the early planning phase of the case, such as at the preliminary hearing and in follow-up preliminary hearings, such issues can come up at the hearing, making it important for counsel and the arbitrators to be prepared to make whatever adjustments to the hearing process are reasonably necessary in light of such privacy laws.
- A most important consideration in this regard is to make sure that the two sides to the case are treated fairly and equally in that they are playing by and subject to the same rules, to the extent practicable.

Party-Appointed Arbitrators

- While in domestic arbitration in the United States, there is still a sense, depending somewhat on the arbitrators, provider institutions, and industries involved in the particular case, that party-appointed arbitrators may be partisan, or somewhat partisan, notwithstanding the default rule under the ABA/AAA Code of Ethics that arbitrators are neutral unless specifically designated as non-neutral, in international arbitration the expectation is much higher and more definite that party-appointed arbitrators will be truly neutral.
- Nonetheless, this expectation in international arbitration is ameliorated somewhat by the preconception, even in international arbitration, at least in the mind of some practitioners and arbitrators in the area, that party-appointed arbitrators are expected to make sure that their appointing party's positions in the case are "understood."
- Accordingly, even in international arbitration, the situation can arise where a party-appointed arbitrator is aggressively asking questions of witnesses designed to elicit or develop the position espoused by his or her appointing-party in the particular case or is overtly partisan in the deliberations in this regard.
- The arbitrators in each case need to make sure the case is being handled appropriately and fairly. The chair will have particular responsibility in this regard.
- Among other things, the chair has to devise and administer a fair approach for communications within the panel and for communications of the arbitrators with counsel and the parties at the hearing.

The Role of Arbitrators in Finding/Developing the Facts

- In civil law systems, judges play an active role in developing the facts at trial, as contrasted with the common law approach, where judges are typically more reliant on counsel to develop and present their case.
- This civil law approach sometimes flows over into the attitude of some civil law-based arbitrators in international arbitration, who sometimes see themselves as having somewhat more of a fact-finding role than arbitrators schooled in the common law system would typically expect.
- This can lead to arbitrators with such a civil law-orientation sometimes taking a somewhat more active role in questioning than U.S. arbitrators are prone to do in domestic arbitration.
- It is important that arbitrators communicate clearly and candidly with one another in this regard to make sure that the particular case is administered in a way that is both fair and has the appearance of being fair. The chair has particular responsibility in this regard.

Absence of Depositions

- Because depositions have historically not been used and are even today rarely used in civil law systems, civil law-based arbitrators in international arbitrations generally believe that depositions are not the norm and should rarely be permitted.
- Nonetheless, as noted above, there has been somewhat of a convergence of common law and civil law practice in international arbitration, to the extent that depositions are occasionally now proposed by counsel in international arbitrations and permitted, at least to some extent, in such arbitrations by arbitrators whose backgrounds are in civil law systems.
- This point as to whether depositions have been permitted can have an impact on the conduct of the hearing in an international arbitration, in terms of whether testimony is presented by deposition and available to counsel for use in cross-examination.

Significance to the Hearing of Potential Issues as to the Enforcement of Awards in International Arbitrations

- Since, by definition, international arbitrations will typically involve parties located in many jurisdictions, awards in international arbitrations will often potentially have to be enforced in multiple jurisdictions, depending on where assets of the losing party are located. Given the overriding importance to arbitrators that their awards be enforceable, this reality as to the need for awards to be enforceable in multiple jurisdictions imposes the burden on counsel and arbitrators in international arbitrations to take whatever steps are reasonably

necessary to assure that the award in the particular case meets the standards of the various jurisdictions in which enforcement might be sought.

- This concern is greatly simplified by the existence of several widely acceded-to multi-national conventions, including, most notably, the New York Convention, to which most of the countries in the world are signatories, making arbitration awards generally enforceable in most countries throughout the world.
- It is obviously quite important for counsel and arbitrators to have a sense of the requirements of such conventions so the award in the particular case will be enforceable. As merely one example, in many countries of the world, unlike in the United States, arbitration awards generally must be of a reasoned nature to be enforced.
- Arbitrators need to be aware of the extent, if any, to which the manner of administration of the hearing may affect the enforceability of the resultant award in the potentially relevant jurisdictions.

Rules Regulating the Conduct of Counsel in International Arbitrations

- To the extent that differences in the ethical regimes applicable to different attorneys and even, possibly, arbitrators in a case can impact on what conduct is permissible in the arbitration, it is obviously important that this matter be focused on early in the case, so everyone is prepared to do whatever is necessary to make the process work smoothly and effectively within the applicable standards.
- The IBA Guidelines on Party Representation in International Arbitration set forth guidelines for the conducting of international arbitrations by advocates, including provisions directly applicable to advocates' performance of their representation of clients at the hearing.
- For example, the Guidelines provide that advocates, who discover that they or a fact or expert witness has made a false statement of fact to the tribunal, should, subject to applicable considerations of privilege and confidentiality, take prompt remedial measures (discussed in the Guidelines) as to the false statement;
- While the Guidelines are merely that, guidelines, they highlight the need for counsel and arbitrators to be aware of whatever legal and ethical regimes may apply in each particular international arbitration.
- While the Guidelines are new and not yet widely followed, they are an invaluable resource for counsel and arbitrators in terms of meeting and managing reasonable expectations in international arbitration.
- Counsel and arbitrators are well advised to familiarize themselves with the Guidelines and refer to them frequently throughout the course of an international arbitration.

Choice of Law

- Because of the multiple jurisdictions from which parties, counsel and arbitrators may come in the typical international arbitration, and the multinational nature of the transactions that are typically involved in such arbitrations, complex issues as to choice of law will often be presented, including as to the law applicable to such matters as the following:
  - arbitrability of claims or defenses asserted in the case;
  - the underlying transactions or matters at issue in the case;
  - the conducting of the hearing;
  - the enforcement of the award in the various – sometimes numerous – jurisdictions in which enforcement may need to be sought; and
  - the ethical and legal obligations of counsel and the arbitrators.
- Advocates and arbitrators need to be aware of the requirements of these various possible legal regimes that may apply in a particular international arbitration.
- Obviously, arbitrators need to conduct the hearing in light of legal considerations applicable to matters being presented in the hearing.

Implication of Need for Reasoned Award

- Arbitrators in international cases will need to consider the need for a reasoned award and take whatever steps are necessary to enable them to prepare such an award.
- Some arbitrator believe that they need a transcript of the hearing to write the award and hence press counsel to arrange for a court reporter for the case. Other arbitrators are more flexible in this regard and are comfortable preparing their awards based on their notes.

Arbitrability

- While issues in an international case as to the arbitrability of the claims presented will typically have been addressed earlier in the case, at times the issue will be left for the hearing and in other instances there will be a separate hearing as to arbitrability, where much of what is said in this outline may be applicable.

Rules of Evidence Applied at the Hearing

- While in international arbitration, as in domestic arbitration, the rules of evidence are not strictly enforceable, nonetheless, since the lawyers and many of the arbitrators will be present or former litigators and sometimes retired judges, the rules of evidence will nonetheless continue to have an impact, or at least a potential impact, on the conducting of international arbitrations.
- This makes the underlying attitudes and expectations of the lawyers and arbitrators involved as to the purpose and usefulness of the rules of evidence

particularly important in the given case, making it crucial that counsel understand the orientation of their arbitrators in this regard and that arbitrators have a sense of the attitudes and expectations of counsel and parties in terms of what is fair and reasonable.

- It is equally important that co-arbitrators consult with one another in advance of the hearing in an effort to get on the same page as to what approach will be taken as to the application of rules of evidence in the hearing.
- Because of the potential for different approaches and expectations in terms of the approach to be taken with respect to the receipt of evidence at hearings in international arbitrators, it is important that this matter and matters of this nature be sorted out as much as possible in advance of the hearing, to avoid undue surprises and potential unfairness at the hearing.

Getting Acknowledgements from Parties at the End of the Hearing that They Had the Opportunity to Offer Whatever Evidence They Wanted to Offer

- Because of the differences in expectations of participants in international as opposed to domestic arbitration, the practice, generally followed in domestic arbitration, of asking parties at the end of the case whether they have had an opportunity to offer any evidence and make any arguments that they want to make, is particularly important in international arbitration.

Interpreters

- Witnesses will often need to testify in different languages at hearings in international arbitrations, requiring the use of interpreters.
- This presents various issues that need to be addressed in advance and worked out, to make the hearing go as smoothly as possible, including such issues as the following: the qualifications of the interpreters; who the interpreters will be; the mode of interpretation, whether sequential or simultaneous; the extent to which questions and comments by the interpreter will be permitted; how it will be handled if the other side wants to have its own interpreter in the room and wants to question interpretations provided by the official interpreter, as the matter proceeds; what the official language of the proceeding is; who bears the cost of the interpreter; and the like.

Translations of Documents

- Similar issues are regularly presented in international arbitration as to the language of exhibits that are presented in the case, including issues as to the official language of the proceeding; the permissible language or languages in which exhibits may be presented to the arbitrators; the handling of the original

documents and the translated versions thereof; proceedings for challenging translations; and the like.

IBA Rules on the Taking of Evidence in International Arbitration

- Approaches to many of the above matters are set forth in the IBA Rules on Taking Evidence. Matters covered in the Rules include hearing the testimony of witnesses, the admission into evidence of exhibits, the use of witness statements, the hearing of experts (both party and tribunal-appointed), the order of testimony at the hearing, and the overall admissibility and assessment of evidence.
- While the Rules are not necessarily binding, they are applied in many international arbitrations, in some cases because the parties have agreed or the arbitrators have directed that they will be applicable, and in other cases because counsel and arbitrators rely on them informally, whether specifically or implicitly.
- It well behooves counsel and arbitrators in international arbitrations to review the Rules throughout the proceeding.

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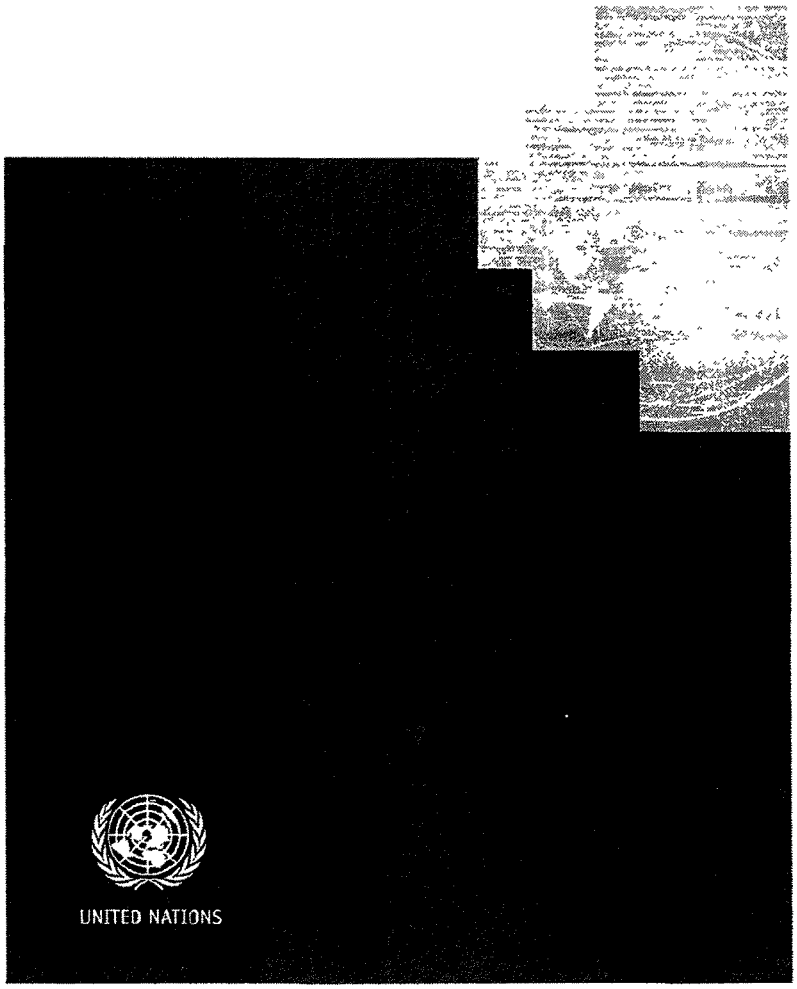
UNCITRAL Notes on Organizing Arbitral Proceedings



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Preface

The United Nations Commission on International Trade Law (UNCITRAL) finalized the Notes at its twenty-ninth session (New York, 28 May–14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993,[1] considered in 1994 a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings".[2] That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.[3] On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared "draft Notes on Organizing Arbitral Proceedings".[4] The Commission considered the draft Notes in 1995,[5] and a revised draft in 1996,[6] when the Notes were finalized.[7]

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[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17) (reproduced in *UNCITRAL Yearbook*, vol XXIV 1993, part one), paras 291-296.

[2] The draft Guidelines have been published as document A/CN.9/396 and Add 1 (reproduced in *UNCITRAL Yearbook*, vol XXV. 1994, part two, IV); the considerations of the Commission are reflected in the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, *Official Records of the General Assembly, Forty-ninth Session Supplement No. 17* (A/49/17) (reproduced in *UNCITRAL Yearbook*, Vol. XXV 1994, part two, IV), paras 111-195

[3] The proceedings of the Congress are published in *Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No 7*, Kluwer Law International, The Hague, 1996

[4] The draft Notes have been published as document A/CN 9/410 (reproduced in *UNCITRAL Yearbook*, vol. XXVI· 1995, part two, III)

[5] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17) (reproduced in *UNCITRAL Yearbook*, vol. XXVI: 1995, part one), paras. 314-373

[6] The revised draft Notes have been published as document A/CN.9/423 (reproduced in *UNCITRAL Yearbook*, vol XXVII: 1996, part two)

[7] Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No 17* (A/51/17) (reproduced in *UNCITRAL Yearbook*, vol XXVII· 1996, part one), paras. 11-54

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INTRODUCTION

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.[8] This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

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[8] A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

Multi-party arbitration

6. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 86-88 (item 18).

Process of making decisions on organizing arbitral proceedings

7. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

8. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls or other electronic means. Meetings may be held at the venue of arbitration or at some other appropriate location.

9. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar

meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

10. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

11. Given that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, it is not attempted in the Notes to describe in detail different arbitral practices or express a preference for any of them.

12. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed.

13. When the Notes are used, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

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1. Set of arbitration rules

If the parties have not agreed on a set of arbitration rules, would they wish to do so

14. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

15. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

16. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted.

2. Language of proceedings

17. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

18. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.

(b) Possible need for interpretation of oral presentations

19 If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

20. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: *(a)* suitability of the law on arbitral procedure of the place of arbitration; *(b)* whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; *(c)* convenience of the parties and the arbitrators, including the travel distances; *(d)* availability and cost of support services needed; and *(e)* location of the subject-matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

24. Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution, some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk,

administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.

5. Deposits in respect of costs

(a) Amount to be deposited

28. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

29. When the arbitration is administered by an institution, the institution's services may include managing and accounting for

the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

30. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

33. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

34. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments

8. Telefax and other electronic means of sending documents

(a) Telefax

35. Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a telefacsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail and magnetic or optical disk)

36. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

37 When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. electronic mail or computer disks) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identification of persons who can be contacted if a problem occurs.

9. Arrangements for the exchange of written submissions

38. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal or rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

39. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral

tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

40. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.

(b) Consecutive or simultaneous submissions

41. Written submissions on an issue may be made consecutively, i.e. the party who receives a submission is given a period of time to react with its counter submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not, thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

42. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- Whether the submissions will be made as paper documents or by electronic means, or both (see paragraphs 35-37);
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- When translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

43. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages, it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute. However, possible disadvantages of preparing such a list include delay, adverse effect on the flexibility of the proceedings, or unnecessary disagreements about whether the arbitral tribunal has decided all issues submitted to it or whether the award contains decisions on matters beyond the scope of the submission to arbitration. The terms of reference required under some arbitration rules, or in agreements of parties, may serve the same purpose as the above-described list of points at issue.

(b) In which order should the points at issue be decided

44 While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them

up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

45. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of a party.

(c) Is there a need to define more precisely the relief or remedy sought

46. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

48. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

49. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

50. Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

51. The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

52. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: *(a)* a document is accepted as having originated from the source indicated in the document; *(b)* a copy of a dispatched communication (e.g. letter, telex, telefax or other electronic message) is accepted without further proof

as having been received by the addressee; and *(c)* a copy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

53. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example, by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

54. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

55. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

56. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

57. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places, other arrangements to provide the opportunity for all parties to be present, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

58. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

59. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

60. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the

content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: *(a)* the subject upon which the witnesses will testify; *(b)* the language in which the witnesses will testify; and *(c)* the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

61. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 67). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

62 If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

63. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions

during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

64. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths

(iii) May witnesses be in the hearing room when they are not testifying

65. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending on what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) The order in which the witnesses will be called

66 When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be

scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

67. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In those legal systems such contacts are usually not permitted once the witness's oral testimony has begun. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

68. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. Experts and expert witnesses

69. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

70. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to

selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

71. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

72. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

73 If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a

hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see paragraphs 60-62).

17. Hearings

(a) Decision whether to hold hearings

74. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

75. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings. The arbitral tribunal may wish to consult the parties on this matter.

(b) Whether one period of hearings should be held or separate periods of hearings

76. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

77. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

78. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: *(a)* making oral statements; *(b)* questioning its witnesses; and *(c)* questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

79. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

80 Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

81. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

82. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one method is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

83 If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

84. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the

other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

85. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

18. Multi-party arbitration

86. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. The Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in multi-party as well as in two-party proceedings.

87. The areas of possibly increased complexity in multi-party arbitration are, for example, the flow of communications among the parties and the arbitral tribunal (see paragraphs 33, 34 and 38-41); if points at issue are to be decided at different points in time, the order of deciding them (paragraphs 44-45); the manner in which the parties will participate in hearing witnesses (paragraph 63); the appointment of experts and the participation of the parties in considering their reports (paragraphs 70-72); the scheduling of hearings (paragraph 76); the order in which the parties will present their arguments and evidence at hearings (paragraph 80).

88 The Notes, which are limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions in multi-party arbitration as compared to two-party arbitration.

19. Possible requirements concerning filing or delivering the award

89. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, for example, invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

90. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

IBA Guidelines on Conflicts of Interest in International Arbitration

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the global voice of
the legal profession®

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IBA Guidelines on Conflicts of Interest in International Arbitration 2014

Since their issuance in 2004, the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the 'Guidelines')[1] have gained wide acceptance within the international arbitration community. Arbitrators commonly use the Guidelines when making decisions about prospective appointments and disclosures. Likewise, parties and their counsel frequently consider the Guidelines in assessing the impartiality and independence of arbitrators, and arbitral institutions and courts also often consult the Guidelines in considering challenges to arbitrators. As contemplated when the Guidelines were first adopted, on the eve of their tenth anniversary it was considered appropriate to reflect on the accumulated experience of using them and to identify areas of possible clarification or improvement. Accordingly, in 2012, the IBA Arbitration Committee initiated a review of the Guidelines, which was conducted by an expanded Conflicts of Interest Subcommittee (the 'Subcommittee'),[2] representing diverse legal

1 The 2004 Guidelines were drafted by a Working Group of 19 experts: Henri Alvarez, Canada; John Beechey, England; Jim Carter, United States; Emmanuel Gaillard, France; Emilio Gonzales de Castilla, Mexico; Bernard Hanotiau, Belgium; Michael Hwang, Singapore; Albert Jan van den Berg, Belgium; Doug Jones, Australia; Gabrielle Kaufmann-Kohler, Switzerland; Arthur Marriott, England; Tore Wiwen Nilsson, Sweden; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Klaus Sachs, Germany; Nathalie Voser, Switzerland (Rapporteur); David Williams, New Zealand; Des Williams, South Africa; and Otto de Witt Wijnen, The Netherlands (Chair).

2 The members of the expanded Subcommittee on Conflicts of Interest were: Habib Almulla, United Arab Emirates; David Arias, Spain (Co-Chair); Julie Bédard,

cultures and a range of perspectives, including counsel, arbitrators and arbitration users. The Subcommittee was chaired by David Arias, later co-chaired by Julie Bédard, and the review process was conducted under the leadership of Pierre Bienvenu and Bernard Hanotiau.

While the Guidelines were originally intended to apply to both commercial and investment arbitration, it was found in the course of the review process that uncertainty lingered as to their application to investment arbitration. Similarly, despite a comment in the original version of the Guidelines that their application extended to non-legal professionals serving as arbitrator, there appeared to remain uncertainty in this regard as well. A consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator.

The Subcommittee has carefully considered a number of issues that have received attention in international arbitration practice since 2004, such as the effects of so-called 'advance waivers', whether the fact of acting concurrently as counsel and arbitrator in unrelated cases raising similar legal issues warrants disclosure, 'issue' conflicts, the independence and impartiality of arbitral or administrative secretaries and third-party funding. The revised Guidelines reflect the Subcommittee's conclusions on these issues.

United States (Co-Chair);José Astigarraga, United States; Pierre Bienvenu, Canada (Review Process Co-Chair); Karl-Heinz Böckstiegel, Germany; Yves Derains, France; Teresa Giovannini, Switzerland; Eduardo Damião Gonçalves, Brazil; Bernard Hanotiau, Belgium (Review Process Co-Chair); Paula Hodges, England; Toby Landau, England; Christian Leathley, England; Carole Malinvaud, France; Ciccu Mukhopadhaya, India; Yoshimi Ohara, Japan; Tinuade Oyekunle, Nigeria; Eun Young Park, Korea; Constantine Partasides, England; Peter Rees, The Netherlands; Anke Sessler, Germany; Guido Tawil, Argentina; Jingzhou Tao, China; Gäetan Verhoosel, England (Rapporteur); Nathalie Voser, Switzerland; Nassib Ziadé, United Arab Emirates; and Alexis Mourre. Assistance was provided by: Niuscha Bassiri, Belgium; Alison Fitzgerald, Canada; Oliver Cojo, Spain; and Ricardo Dalmaso Marques, Brazil.

The Subcommittee has also considered, in view of the evolution of the global practice of international arbitration, whether the revised Guidelines should impose stricter standards in regard to arbitrator disclosure. The revised Guidelines reflect the conclusion that, while the basic approach of the 2004 Guidelines should not be altered, disclosure should be required in certain circumstances not contemplated in the 2004 Guidelines. It is also essential to reaffirm that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the arbitrator. Indeed, the standard for disclosure differs from the standard for challenge. Similarly, the revised Guidelines are not in any way intended to discourage the service as arbitrators of lawyers practising in large firms or legal associations.

The Guidelines were adopted by resolution of the IBA Council on Thursday 23 October 2014. The Guidelines are available for download at: **www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx**

Signed by the Co-Chairs of the Arbitration Committee
Thursday 23 October 2014

Eduardo Zuleta

Paul Friedland

Introduction

1. Arbitrators and party representatives are often unsure about the scope of their disclosure obligations. The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues. Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.

2. Parties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure. In addition, institutions and courts face difficult decisions when an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing.

3. It is in the interest of the international arbitration community that arbitration proceedings are not hindered by ill-founded challenges against arbitrators and that the legitimacy of the process is not affected by uncertainty and a lack of uniformity in the applicable standards for

disclosures, objections and challenges. The 2004 Guidelines reflected the view that the standards existing at the time lacked sufficient clarity and uniformity in their application. The Guidelines, therefore, set forth some 'General Standards and Explanatory Notes on the Standards'. Moreover, in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Such lists, designated 'Red', 'Orange' and 'Green' (the 'Application Lists'), have been updated and appear at the end of these revised Guidelines.

4. The Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Standards below. The General Standards and the Application Lists are based upon statutes and case law in a cross-section of jurisdictions, and upon the judgement and experience of practitioners involved in international arbitration. In reviewing the 2004 Guidelines, the IBA Arbitration Committee updated its analysis of the laws and practices in a number of jurisdictions. The Guidelines seek to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international arbitration. Both the 2004 Working Group and the Subcommittee in 2012/2014 have sought and considered the views of leading arbitration institutions, corporate counsel and other persons involved in international arbitration through public consultations at IBA annual meetings, and at meetings with arbitrators and practitioners. The comments received were reviewed in detail and many were adopted. The IBA Arbitration Committee is grateful for the serious consideration given to its proposals by so many institutions and individuals.

5. The Guidelines apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrators.

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, as was the case for the 2004 Guidelines and other sets of rules and guidelines of the IBA Arbitration Committee, the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation.

7. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be. Nevertheless, the IBA Arbitration Committee is confident that the Application Lists provide concrete guidance that is useful in applying the General Standards. The IBA Arbitration Committee will continue to study the actual use of the Guidelines with a view to furthering their improvement.

8. In 1987, the IBA published *Rules of Ethics for International Arbitrators*. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the *Rules of Ethics* as to the matters treated here.

Part I: General Standards Regarding Impartiality, Independence and Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

Explanation to General Standard 1:

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable.

The question has arisen as to whether this obligation should extend to the period during which the award may be challenged before the relevant courts. The decision taken is that this obligation should not extend in this manner, unless the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law or relevant institutional rules. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been

issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests may be necessary.

(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

Explanation to General Standard 2:

(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle

that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.

(b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment

or, if thereafter, as soon as he or she learns of them.

(b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

(c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. Accordingly, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations that, such as those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator under General Standard 2.

The duty of disclosure under General Standard 3(a) is ongoing in nature.

(b) The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.

(c) A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does

not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

(d) In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.

(e) Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. As a practical matter, arbitration institutions may make a distinction depending on the stage of the arbitration. Courts may likewise apply different standards. Nevertheless, no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) If, within 30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any

objection based on such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.

(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator, or continue to act as an arbitrator, if the following conditions are met:

(i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and

(ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest.

(d) An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if,

as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

Explanation to General Standard 4:

(a) Under General Standard 4(a), a party is deemed to have waived any potential conflict of interest, if such party has not raised an objection in respect of such conflict of interest within 30 days. This time limit should run from the date on which the party learns of the relevant facts or circumstances, including through the disclosure process.

(b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

(c) Notwithstanding a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, the parties may wish to engage such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. Certain jurisdictions may require such

consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.

(5) Scope

(a) These Guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed.

(b) Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

Explanation to General Standard 5:

(a) Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards do not distinguish between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrators appointed by an institution.

(b) Some arbitration institutions require arbitral or administrative secretaries and assistants to sign a declaration of independence and impartiality. Whether or not such a requirement exists, arbitral or administrative secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators, and it is the responsibility of the Arbitral Tribunal to

ensure that such duty is respected at all stages of the arbitration. Furthermore, this duty applies to arbitral or administrative secretaries and assistants to either the Arbitral Tribunal or individual members of the Arbitral Tribunal.

(6) Relationships

(a) The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle,

be considered to bear the identity of his or her law firm, but the activities of the arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case.

(b) When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support,

to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

(7) Duty of the Parties and the Arbitrator

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.

(c) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide any relevant information available to it.

(d) An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.

Explanation to General Standard 7:

(a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

(b) Counsel appearing in the arbitration, namely the persons involved in the representation of the parties in the arbitration, must be identified by the parties at the earliest opportunity. A party's duty to disclose the identity of counsel appearing in the arbitration extends to all members of that party's counsel team and arises from the outset of the proceedings.

(c) In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence.

(d) In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.

Part II: Practical Application of the General Standards

1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today's arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.

2. The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.

5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

6. Situations not listed in the Orange List or falling outside the time limits used in some of the

Orange List situations are generally not subject to disclosure. However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure.

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated

whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as 'significant' and 'relevant'. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or

an affiliate being privately held.

2.2.2 A close family member[3] of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate[4] of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises one of

3 Throughout the Application Lists, the term 'close family member' refers to a: spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.

4 Throughout the Application Lists, the term 'affiliate' encompasses all companies in a group of companies, including the parent company.

the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.[5]

5 It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases,

3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties.

3.2 Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

3.2.3 The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.

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no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.

3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.

3.4 Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person

having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5 Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an

issue that also arises in the arbitration (but this opinion is not focused on the case).

4.2 Current services for one of the parties

4.2.1 A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.

4.3 Contacts with another arbitrator, or with counsel for one of the parties

4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.

4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.

4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.

4.3.4 The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.

4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve,

or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.

4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.

4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.

4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforce-

ment shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive

any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting

State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

I hereby certify that the foregoing text is a true copy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, the original of which is deposited with the Secretary-General of the United Nations, as the said Convention was opened for signature, and that it includes the necessary rectifications of typographical errors, as approved by the Parties.

Je certifie que le texte qui précède est une copie conforme de la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères, conclue à New York le 10 juin 1958 et dont l'original se trouve déposé auprès du Secrétaire général de l'Organisation des Nations Unies telle que ladite Convention a été ouverte à la signature, et que les rectifications matérielles nécessaires, telles qu'approuvées par les Parties, y ont été incorporées.

For the Secretary-General,
The Legal Counsel:

Pour le Secrétaire général,
Le Conseiller juridique :

Carl-August Fleischhauer

United Nations, New York
6 July 1988

Organisation des Nations Unies
New York, le 6 juillet 1988

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006

UNITED NATIONS
Vienna, 2008

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Part Three

"Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958", adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session 39

Resolutions adopted by the General Assembly

40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations,

Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Noting that the Model Law on International Commercial Arbitration[1] was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] and the Arbitration Rules of the United Nations Commission on International Trade Law[3] recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

112th plenary meeting
11 December 1985

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[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38.

[3] United Nations publication, Sales No E.77.V.6.

[*on the report of the Sixth Committee (A/61/453)*]

61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,[1]

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,[3] and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739.

[3] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[3]

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

64th plenary meeting
4 December 2006

Part One

UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17,
annex I and A/61/17, annex I)

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

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[1]Article headings are for reference purposes only and are not to be used for purposes of interpretation.

[2]The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25*(a)* and 32(2) *(a)*, refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)*(d)*, the requirements in paragraphs (1)*(a)* and *(b)* of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)*(a)*, is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement[3]

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)*(a)*(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)*(b)*(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

[3]The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)*(a)* of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[4]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

[4]The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)*(a)*(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Part Two

Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006[1]

1. The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended "that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)".

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

[1]This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E 87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

A. Background to the Model Law

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

1. Inadequacy of domestic laws

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national

laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

2. Disparity between national laws

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

B. Salient features of the Model Law

1. Special procedural regime for international commercial arbitration

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) Substantive and territorial scope of application

11. Article 1 defines the scope of application of the Model Law by reference to the notion of "international commercial arbitration". The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term "commercial", the Model Law provides no strict definition. The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not". The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of "commercial law" that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a "foreign" law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

(b) Delimitation of court assistance and supervision

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

2. Arbitration agreement

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

(a) Definition and form of arbitration agreement

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York

Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*"). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another". It also states that "the reference in a contract to any document" (for example, general conditions) "containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract". It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made "by reference". The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a "Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958" (A/61/17, Annex 2).[2] The General Assembly, in its resolution 61/33 of 4 December 2006 noted that "in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

[2]Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely". The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

(b) Arbitration agreement and the courts

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

3. Composition of arbitral tribunal

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. "*Kompetenz-Kompetenz*" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) Power to order interim measures and preliminary orders

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that "a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested". Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if "it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure". Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case "at the earliest practicable time". In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term "preliminary order" is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts". That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

5. Conduct of arbitral proceedings

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) Fundamental procedural rights of a party

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) Determination of rules of procedure

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

(c) Default of a party

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 *(b)*). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 *(c)*). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 *(a)*).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6. Making of award and termination of proceedings

(a) Rules applicable to substance of dispute

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

(b) Making of award and other decisions

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal "place of arbitration", the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is "on agreed terms" (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

7. Recourse against award

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

(a) Application for setting aside as exclusive recourse

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

(b) Grounds for setting aside

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

8. Recognition and enforcement of awards

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

(a) Towards uniform treatment of all awards irrespective of country of origin

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

(b) Procedural conditions of recognition and enforcement

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

(c) Grounds for refusing recognition or enforcement

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

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Vienna International Centre
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Part Three

Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

---

[1]United Nations, *Treaty Series*, vol. 330, No. 4739

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[6]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

---

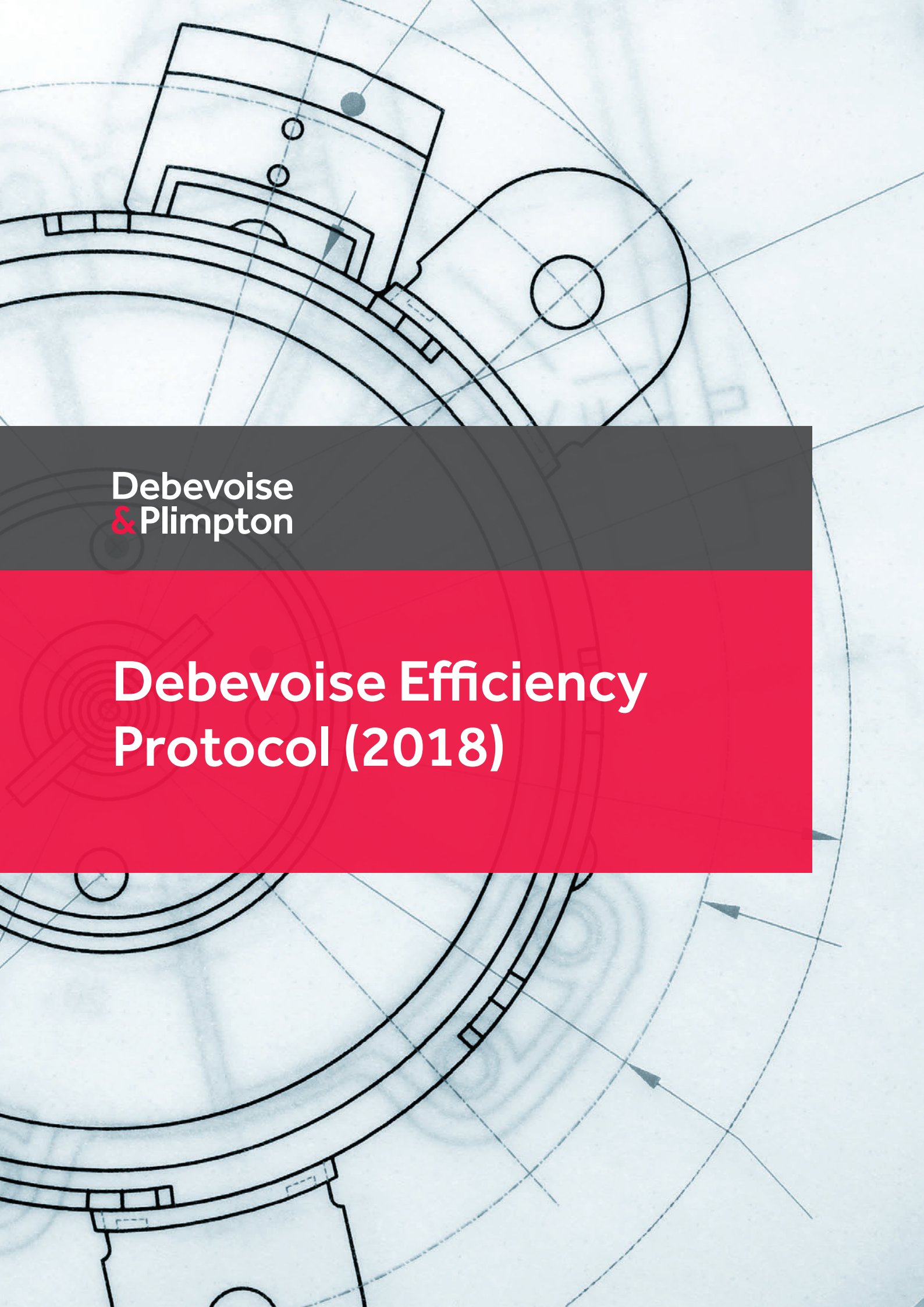
[2]*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18

[3]Ibid., *Sixty-first Session, Supplement No 17* (A/61/17), annex I.

[4]Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5]Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[6]General Assembly resolution 60/21, annex.



Debevoise & Plimpton

Debevoise Efficiency Protocol (2018)

To address concerns about increased length and cost in international arbitration, in 2010 the Debevoise & Plimpton International Dispute Resolution Group issued our Protocol to Promote Efficiency in International Arbitration. We now update our Efficiency Protocol. Through this Protocol, we reiterate our commitment to explore with our clients how, in each case, the participants can take advantage of international arbitration's inherent flexibility to promote efficiency without compromising fairness or our clients' chances of success. The procedures set out here are therefore not meant to be inflexible rules, but instead are considerations that, when appropriate for the case, can improve the arbitration process and thereby enable all parties to enjoy the advantages of international arbitration.

Formation of the Tribunal

1. Before appointing arbitrators, we will ask them to confirm:

   1.1 their availability to administer the case, including hearings, on an efficient and reasonably expeditious schedule;

   1.2 a commitment to conduct the proceedings efficiently and to adopt procedures suitable to the circumstances of the arbitration; and

   1.3 a commitment not to take on new appointments that would reduce the arbitrator's ability to conduct the case efficiently.

2. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators, even if the arbitration clause provides for three arbitrators.

Establishing the Case and the Procedure

3. We will seek to avoid unnecessary multiple proceedings, for example by considering joinder, consolidation, overlapping appointments, stays, and coordinated hearings and briefing schedules.

4. We will request that the arbitral tribunal hold an early procedural conference to establish procedures for the case.

5. We will request our clients and opposing clients to attend procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.

6. We will propose procedures that are appropriate for the particular case, proportionate to its value and complexity, and designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases. We will encourage active participation by the tribunal throughout the case. For example:

   6.1 We will consider including a detailed statement of claim with the request for arbitration so that the tribunal will be able to set the procedures with more knowledge of the issues in dispute.

   6.2 We will consider a fast-track schedule with fixed deadlines.

   6.3 We will request additional procedural conferences following certain submissions to consider whether the procedures could be made more efficient in light of the submissions.

   6.4 We will suggest page limits for memorials in order to ensure that they focus on the most important issues.

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6.5 We will encourage the arbitral tribunal to establish cyberprotocols to protect transfer and use of sensitive information and to disclose cyber incidents, in line with the **Debevoise Protocol to Promote Cybersecurity in International Arbitration**.

7. When acting for claimants, we will seek to use the time between the filing of the arbitration and the initial procedural conference to prepare the first merits submission so that the schedule can commence soon after the conference.

8. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

8.1 For bifurcated proceedings, we will encourage the arbitral tribunal to set deadlines and hearing dates that include all phases of the case. This minimizes delay at a later stage caused by conflicting commitments of the tribunal members or counsel.

8.2 Such a schedule would include a deadline for the arbitral tribunal to indicate whether the proceeding should continue to the next phase. A reasoned decision can follow, but, in the meantime, the parties can be drafting the submissions in the next phase.

9. In order to avoid delays in drafting the award, we will ask the arbitral tribunal to include in the initial procedural schedule:

9.1 the dates on which they will deliberate following the hearing, including at least one day immediately following the hearing; and

9.2 a date by which the award will be issued.

10. We will encourage tribunals to award costs at the time of interim decisions, when appropriate, in order to discourage time-wasting or unmeritorious applications.

Evidence

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules on the Taking of Evidence generally provide an appropriate balance of interests.

11.1 We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.

11.2 We will request the arbitral tribunal (or the Chair) to conduct a telephone conference following the submission of any objections to document requests to the tribunal. Such a conference can lead to a more effective weighing of the need for requested documents compared to the burden of production and potentially narrow the disputes.

12. When possible, we will make filings electronically and encourage paperless arbitrations.

13. We will seek to avoid having multiple witnesses testify about the same facts.

14. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing. Expert conferencing at the hearing, particularly with respect to quantum experts, can also often be time-saving and more effective.

15. We will brief the applicable law, rather than submit expert evidence as proof, except in unusual circumstances.

16. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

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The Hearing

17. In order for the hearing to focus more effectively on the facts and issues that need to be decided, we will ask the arbitral tribunal to set in the initial procedural order:

17.1 a date following the final written submissions on which they will confer regarding the issues in the case and the upcoming hearing, and

17.2 a date for a prehearing conference at which they can discuss with the parties the disputed facts and issues on which they hope the hearing will focus.

18. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.

19. We will generally encourage the use of a chess-clock process (fixed time limits) for hearings.

20. We will not automatically request post-hearing briefs. We will consider in each case whether they would be helpful, and, if so, we will seek to limit the briefing to specific issues identified by the tribunal.

21. We will consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

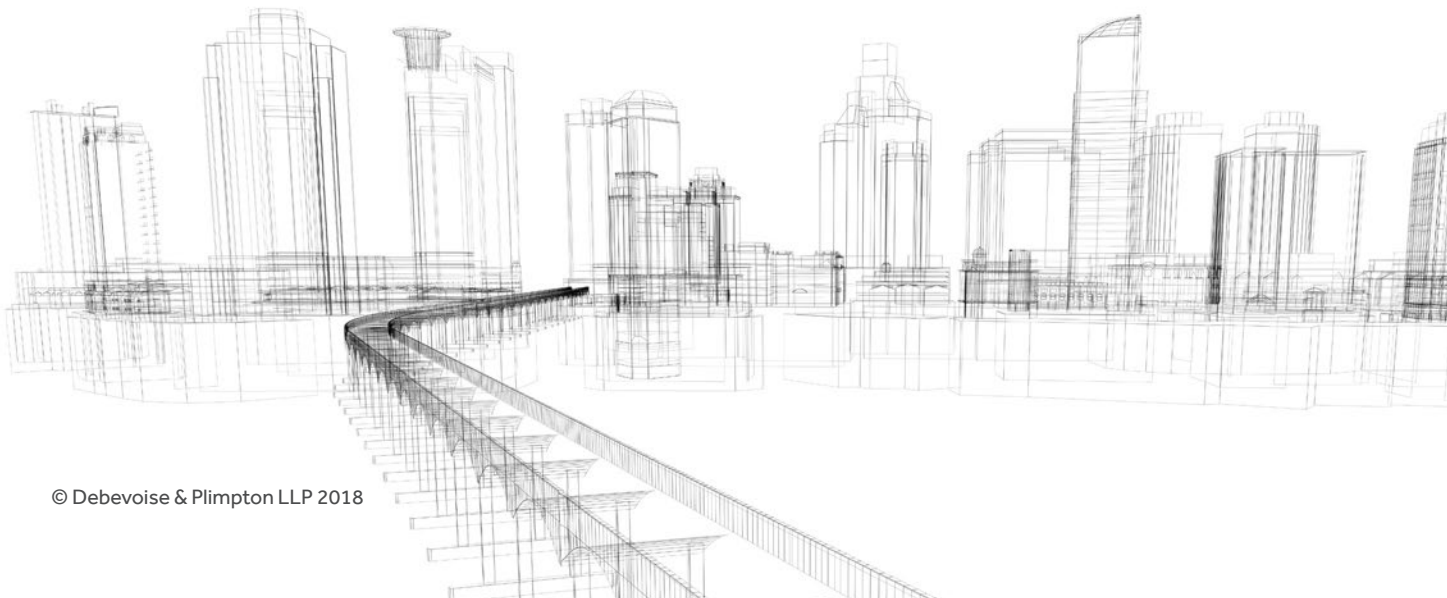
22. We will seek agreement on a common summary format for costs schedules to facilitate the tribunal's comparison and to avoid the expense of removing privileged information from daily time entries. We will also consider whether any argument about entitlement to costs is necessary.

Settlement Consideration

23. We will consider settlement options at the outset of each case and then at appropriate points such as when an exchange of submissions has clarified issues or a preliminary issue has been determined. Routes to settlement could include negotiations or other non-binding ADR such as early neutral evaluation.

24. Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage.

25. We will consider asking arbitrators to provide preliminary views that could facilitate settlement.



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Queen Mary University of London

School of International Arbitration

Pinsent Masons

Pre-empting and Resolving Technology, Media and Telecoms Disputes

International Dispute Resolution Survey

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Introduction

David McIlwaine, Partner and Chair of International Arbitration Committee, Pinsent Masons LLP

The term 'Technology, Media and Telecoms disputes' is a very broad one. This survey asked users and suppliers of technology about the main types of TMT disputes that arise, and also examined a question that is common to all of them: how can they be efficiently resolved?

Technology affects all aspects of business life. It is critical to every organisation in every sector, and many businesses go to great lengths to gain a competitive edge by procuring technology solutions and services; acquiring companies in order to take advantage of their technological capabilities; and working closely with strategic partners, suppliers and even competitors. No surprise then, that business spending on technology continues to rise, but with that comes significant risk.

Businesses face many risks which could undermine their value and threaten their very survival and they are under intense pressure to pre-empt and manage them. Customers, suppliers, collaborators, shareholders, stakeholders, regulators and competitors are watching. When a business encounters threats or failings, how it responds can be critical. It can reveal a strength or weakness. It can affect its market standing, share price and the strength of its hand when doing business across the globe.

In an aggressive market, the businesses that succeed are the ones that can confidently pursue their ambitions. At times, that may mean using the threat of dispute resolution to secure recompense, protect their position or beat their competitors. Businesses that fail to seize these opportunities can suffer real damage to their operations, reputation, and ability to enter new markets quickly. As such, an approach to dispute resolution is a key element of any business development strategy.

For example, recently a client faced a failing major IT programme in a jurisdiction known for delays and problems with its Court system. The client acknowledged that the perceived lack of sanction was affecting the whole delivery of the programme – because it was inconceivable that, if a dispute arose, the parties would progress to the national Court. The situation would have been different if the contract had provided for international arbitration as an effective dispute resolution mechanism, since the threat of appropriate sanction should drive the right business behaviour.

This report's in-depth analysis of attitudes towards TMT disputes will allow business leaders to compare their dispute resolution policies against those of their peers, both suppliers and potential customers. So I am confident that all users and suppliers of technology across the globe will be interested in the results of this study.

Pinsent Masons is very proud to sponsor Queen Mary for the first time. It is very exciting for this firm to use its internationally recognised TMT disputes capability to support the continuation of Queen Mary's pre-eminent surveys. We would like to thank Professor Mistelis and Gustavo Moser (Pinsent Masons Research Fellow) for their dedication to this project. We also thank all the survey respondents and other individuals and institutions who have contributed to the success of this publication.

November 2016

> Business spending on technology continues to rise, but with that comes significant risk

Pinsent Masons

It is my great pleasure to introduce the 2016 International Dispute Resolution Survey. It is the seventh survey released by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. It is the first prepared with the generous and unconditional support of Pinsent Masons, and the first to focus on Technology, Media, and Telecommunications disputes.

Built on 343 questionnaires and 62 personal interviews, the survey assembles the views of a wide range of actors within the dispute resolution community, and provides invaluable insight into stakeholders' perceptions of international arbitration. In fact, it is the largest sector-specific empirical study we have ever conducted in international arbitration.

Given that disputes in a cross-border and cross-cultural context are inevitable, even when it comes to globalised market sectors, having a well defined but flexible policy relating to dispute resolution and becoming dispute-savvy is critical for all businesses. Exploring the views of users of dispute resolution as well as specialist dispute resolution practitioners from all over the world will assist the readers of the survey to have a well-rounded and impartial picture of the current state of affairs in international dispute resolution in the TMT sector.

When we designed the survey, there was much that we wanted to know. TMT has acquired a central role in world economy but has never featured as a major user of international arbitration and ADR. Is this impression correct? What are the main considerations that stakeholders take into account when deciding how to resolve a TMT dispute? Why are certain dispute settlement mechanisms preferred? Does it depend on the context and external factors? And, most importantly, who makes these decisions?

Indeed, the survey provides answers to many of these questions, and sheds some light on how businesses approach TMT disputes – something which until now was rarely explored. We hope that it will help people in the sector to identify weaknesses and strengths, and more effectively to use the various dispute resolution mechanisms that are available. In short, to improve the way they approach dispute resolution. As a corollary one would expect that dispute resolution providers might have to adopt their rules and procedures to better meet the needs of the significant TMT sector and to overall improve the dispute resolution experience businesses have.

Thank you for taking the time to read this survey report. I hope that you find it interesting and useful.

November 2016

Professor Loukas Mistelis, Director, School of International Arbitration, Centre for Commercial Law Studies

> This is the largest industry-sector empirical survey we have ever conducted in international arbitration

Queen Mary University of London

School of International Arbitration

Executive summary

This report identifies and considers critical factors for all businesses (in all sectors) when establishing an effective dispute resolution strategy. The reality is that businesses will need to use, or be prepared to use, different mechanisms to protect their position and to improve their negotiation strategy.

With the ever-increasing internationalisation of the supply chain, it may be appropriate that businesses include an international arbitration provision within their contracts, to ensure that their rights and remedies are enforceable, across multiple jurisdictions. However, business will face non-contractual risk too, for example, IP infringement, regulatory issues, competition/anti-trust matters, cyber-security and data breaches etc. In these situations, the use or threat of litigation may well be the right approach. As such, a business's "dispute resolution toolkit" needs to be broad and flexible, allowing it to deal with disputes with contracting parties, both domestically and internationally, and with third parties.

Furthermore, whilst significant improvements have been made with emergency international arbitration procedures, businesses may need swifter solutions that neither litigation nor arbitration alone can provide. The digital world moves fast, and approaches to risk management and dispute resolution will have to change with it, as they can fundamentally affect a business's ability to operate. This might include an increase in the need for early intervention and the development of commercial leverage for negotiations. Mediation may also be an option. However, success in mediation or negotiation is highly dependent on a party's bargaining position, and its ability to threaten and if necessary, pursue effective sanction if agreement cannot be reached.

For any business, success is a product of many factors. The right approach to dispute resolution is undoubtedly one of them. This report is an excellent reference point for assessing this in the context of the digital economy. It provides insights into ways that dispute resolution is addressed in key industries and jurisdictions. It provides useful statistics on the nature and instances of technology disputes, and the relative merits of the different resolution mechanisms that are available.

This report anticipates which areas may be contentious in future, and how the market may need to respond. This enables businesses to predict and pre-empt future risks and issues.

This survey represents a truly global view of the TMT dispute resolution market. The breakdown of respondents is as follows:

> Businesses may need swifter solutions that neither litigation nor arbitration alone can provide

EU and EEA	22%
Other Europe	9%
North America	15%
Asia	15%
Latin America and the Caribbean	15%
Africa	16%
Oceania	8%

The key findings from the survey are:

Types of TMT dispute

- This year's survey focussed on one area of disputes. However, the results showed a wide variety of potential dispute types related to technology matters. Respondents indicated experience of at least 17 different types of TMT related dispute
- There are a variety of reasons for disputes arising in relation to IP, IT implementation programmes, data related issues, reputation management issues and outsourcing programmes
- TMT disputes are high risk and high-value, particularly in Europe and North America: many involve sums in excess of US$100m
- Predicted future areas for disputes are: IP, collaborations and data/security issues

In-house dispute resolution policies and preferences

- 75% of organisations surveyed had a dispute resolution (DR) policy
- Within DR policies mediation is the most encouraged mechanism, followed by arbitration
- Where a DR policy specifies arbitration, the three most important elements are: institution, seat, and confidentiality
- IT and Telecoms suppliers were less in favour of arbitration, preferring litigation and expert determination respectively
- When assessed at an all-respondents level (i.e. including private practitioners and other dispute resolution practitioners), arbitration is the most preferred DR method for TMT disputes. Court litigation is the least desirable method
- There is a lack of familiarity with mediation, particularly within civil jurisdictions

Dispute resolution mechanisms in practice

- Not all disputes progress to a binding decision. 41% of all disputes were settled via an amicable settlement
- The decision whether to initiate litigation or arbitration is a Board issue
- Whether or not a matter progresses to litigation or arbitration ultimately depends on legal and commercial factors
- Arbitration was most preferred but litigation was the most used
- Decisions are determined primarily by costs and legal merits and the parties' relationship

Suitability of international arbitration for TMT disputes (present and future)

- 92% of respondents indicated that international arbitration is well suited for TMT disputes
- Despite some criticisms and acknowledgement of opportunities for improvements, 82% of respondents believe there will be an increase in the use of international arbitration
- The attractive features are: enforceability, the ability to avoid a foreign jurisdiction, expertise of the decision maker and confidentiality/privacy
- There is a desire to use technology to improve the international arbitration process

Choosing the players

- Expertise in the arbitral process and technical knowledge of the industry are both important to selecting external counsel and arbitrators
- Geography is a determining factor both in selecting the institution and in appointing counsel in the same jurisdiction as the contract governing law
- The most used institutions for TMT disputes are: ICC, WIPO, LCIA and SIAC. WIPO is more favoured in relation to IP matters

The Study

Section 1: TMT disputes

KEY POINTS

- TMT disputes are high risk and high-value, particularly in Europe and North America: many involve sums in excess of $100m
- Predicted future areas for disputes are: IP, collaborations and data/security issues
- For IT suppliers, most disputes relate to delivery of the contracted service. In Telecoms, disputes centre more on the sector's regulatory framework

What is a TMT dispute?

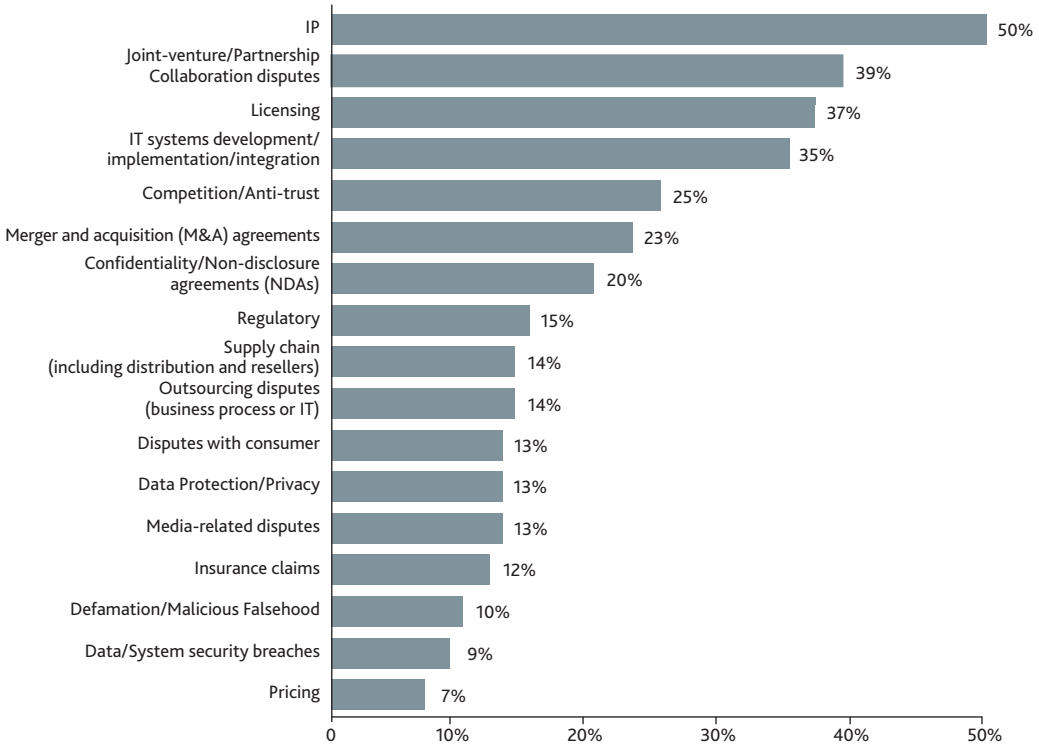
The term 'TMT' encompasses a very wide range of products and services across a broad range of sectors. We asked about the types of dispute that respondents had experienced.

The commonly encountered types of dispute are shown in Chart 1, below.

We expected that IP and licensing matters would feature strongly. Technology necessarily involves protecting the intellectual creativity behind innovations, and owners of such intellectual property will take action to defend and exploit the fruits of their work. Further, with technology moving at a rapid pace, innovation cannot be held back by invalid or wrongly enforced rights and disputes will therefore arise to clear IP rights that are blocking further innovation.

> Innovation cannot be held back by invalid or wrongly enforced rights

Chart 1. Which types of dispute have you encountered in the last 5 years?



It might be surprising to see such a high number of disputes around joint ventures, partnerships and collaboration. However, in the modern age of start-ups, digital disruption and ever-changing technology, for companies to stay ahead of the game (or even just to get in it) they must work with other businesses. That might be through strategic partnering and alliances, or by using a strategy of merger, acquisition or consolidation. For example, telecoms operators often work together to share the heavy costs of developing, installing, maintaining and upgrading the infrastructure required for telecommunications networks.

Disputes about IT systems also feature highly. This work is the core offering of traditional technology service providers. Billions of pounds are spent on such projects by big corporates and the public sector and they are highly dependent on the success and sustainability of their IT infrastructure. The challenges and high instance of project failings are well known.

The high occurrence of competition disputes is a reminder that compliance and regulation are ever present threats to business success, particularly in the Telecoms industry and for IT suppliers who provide services to highly regulated industries.

Do different industries face different challenges?

We were able to analyse the respondents' answer according to their industry. We had good response rates from the following industries: (i) IT (hardware, software and services), (ii) Energy, (iii) Manufacturing, (iv) Telecoms, (v) Financial Services and (vi) Construction. Clear distinctions arose when considering the types of dispute that each industry faces. Let us look specifically at the top five disputes facing the two largest supply industries: IT suppliers and Telecoms providers (Charts 2 and 3 respectively).

This indicates that for the IT industry, many of the problems are caused by the delivery of the actual service (IT development or outsourcing). Whereas in the Telecoms industry the issues are more to do with the sector's regulated business framework.

> In the modern age of start-ups, digital disruption and ever-changing technology, for companies to stay ahead of the game (or even just to get in it) they must work with other businesses

Chart 2. Which types of dispute have you encountered in the last 5 years? (Top 5 IT sector results)

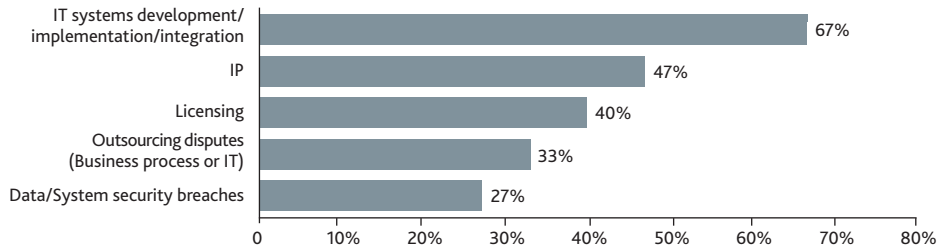
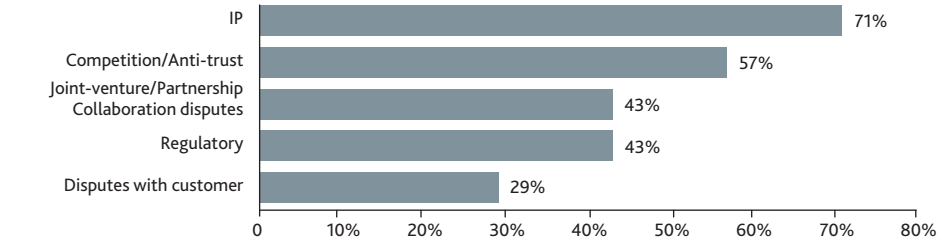


Chart 3. Which types of dispute have you encountered in the last 5 years? (Top 5 Telecoms sector results)



Why do TMT disputes happen?

The survey also sought to understand why disputes might arise, and to identify any common themes. We considered the specific reasons for certain types of disputes.

IP disputes

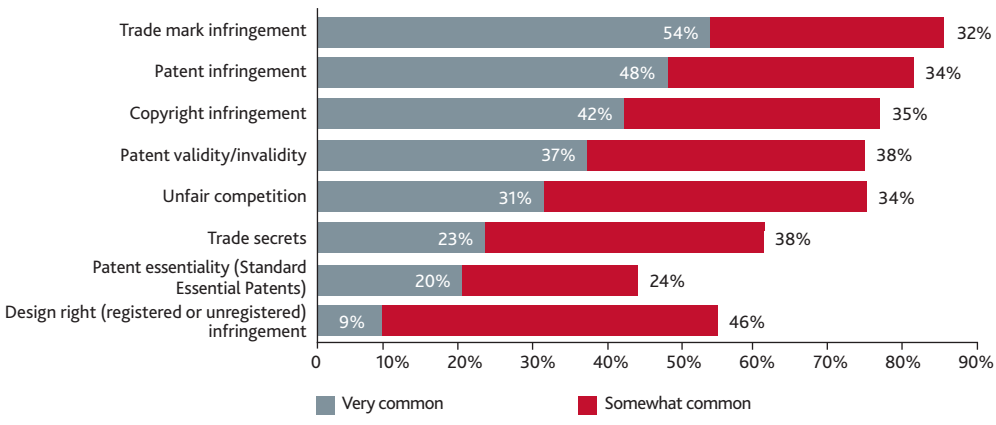
The three most common forms of IP disputes were, in order: trade mark infringement, patent infringement and copyright infringement (Chart 4).

One might have expected copyright infringement to feature higher up the list, given that this is the primary protection offered to software. However, brand protection is an issue facing all businesses, and hence the prominence of trade mark issues.

When looking at individual sectors, Telecoms, IT, Energy and Manufacturing each placed patent infringement as the most common type of IP dispute. This is a powerful illustration of how important this protection is to technical advancement, and of how businesses need to be able to challenge wrongfully granted rights which create blocks to innovation and competition.

One interviewee, an arbitrator and former head of legal for an IT supplier, said that he had seen an "explosion" of patent cases.

Chart 4. How common are the following reasons for IP disputes?



IT systems development/ implementation/integration disputes

Chart 5 considers reasons for IT systems disputes. The most frequently given reason was delays, which may of course be a consequence of other failings rather than an original cause. Other common causes were: requirements, failures to achieve business case or objectives, and delivery or implementation issues.

Do suppliers of technology give the same reasons for problems as their customers? There was some overlap – both saw requirements as the hotbed of disputes. However, the importance of that issue for suppliers was startling: 89% of the IT sector respondents (compared to 51% of respondents generally) identified requirements as a very common reason for dispute. The articulation of the customer's needs will shape the system scope and requirements specification, and this is the biggest single source of problems for suppliers. Linked to this is the issue of change management: 50% of suppliers considered this a common reason for dispute with the usual argument being whether new requirements really constitute true change (as a supplier would say), or whether they are simply a clarification or elaboration of the original project scope (as the customer would say). Only 10% of IT suppliers felt that issues relating to the live service operation of the system were very common reasons for disputes, against 27% of the wider respondents.

Outsourcing

A similar pattern emerged when we analysed disputes about outsourcing (both of business processes and IT) (Chart 6).

Across all respondents, the standout cause of outsourcing disputes was service levels: 51% of respondents identified this as 'very common'. IT suppliers apparently disagreed: the equivalent figure for the IT sector alone was just 25%.

Effecting change through transition or transformation was identified by IT suppliers as the source of most disputes: 60% identified transition (to the new service provider) as a problem area: 51% identified the transformation stage (rationalising the transitioned outsourced service to improve processes, quality and cost-efficiency).

This difference between the customers' perspective and the suppliers' is striking. This may well be because the customer is highly focused on the end-user service, and not on the mechanics of how the service delivery is shaped. For the supplier, executing a smooth handover and an efficient re-modelling of the service delivery will be critical.

Chart 5. How common are the following reasons for IT systems disputes?

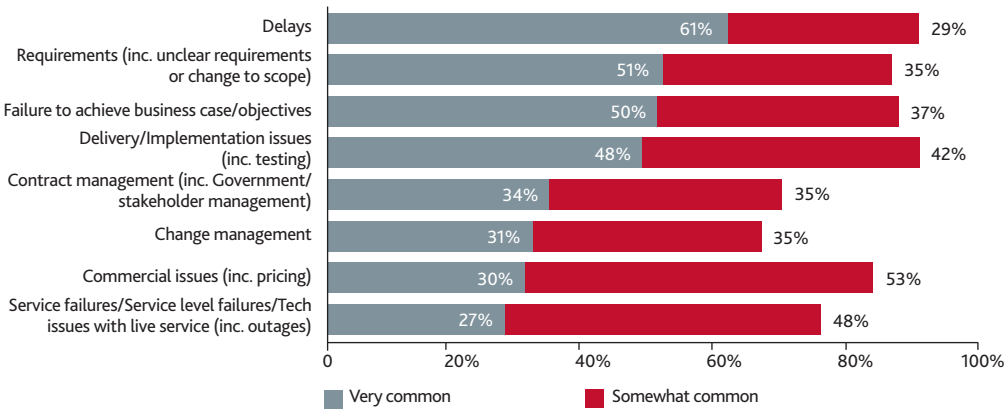
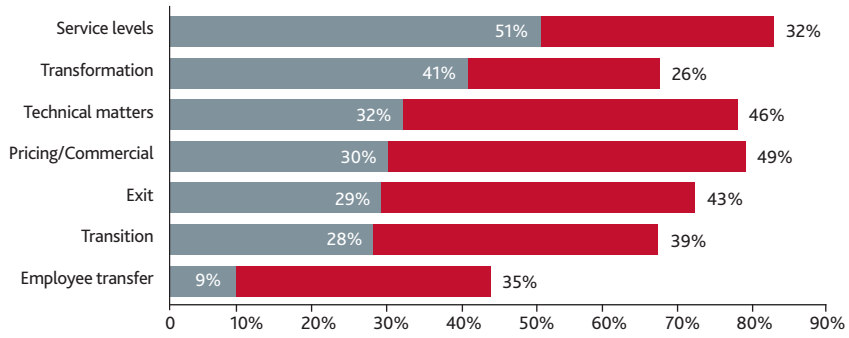


Chart 6. How common are the following reasons for outsourcing disputes?



Reputation management

Companies increasingly recognise the importance of reputation management: how they are perceived and how they respond to threats to their reputation are vital elements of their brand.

29% thought that social media attack and traditional media attack were very common reasons. Adding the somewhat common responses takes the totals to 93% for social media attack and 54% for traditional media attack (Chart 7).

It might be expected that social media would be a much more common cause of defamation/malicious falsehood disputes than traditional media, as it is easy to publish on-line. However, the impact of the two types of threat may be different. Attacks via social media (by disgruntled customers, for example) may be far more frequent than criticism from the traditional media, but the target organisation may be less likely to take legal steps to challenge the content posted by the social media user. "It is worth taking action?" must be a frequently asked question when businesses are faced with social media issues. Even so, social media attack is clearly an issue for most businesses.

Companies increasingly recognise the importance of reputation management: how they are perceived and how they respond to threats to their reputation are vital elements of their brand

Chart 7. How common are the following reasons for reputation disputes?

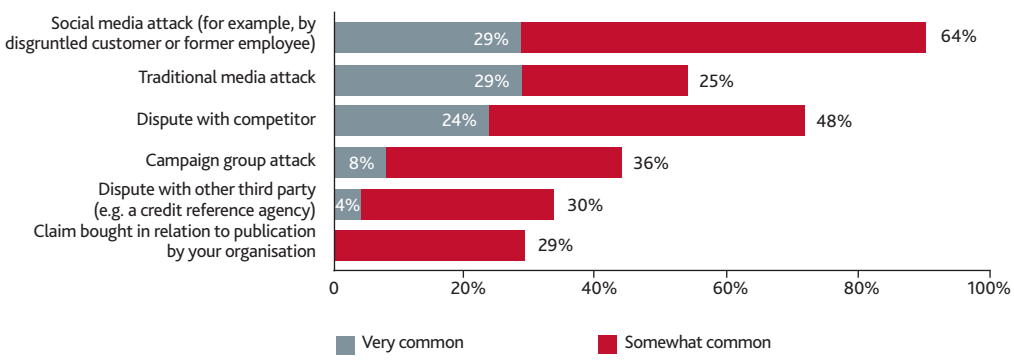
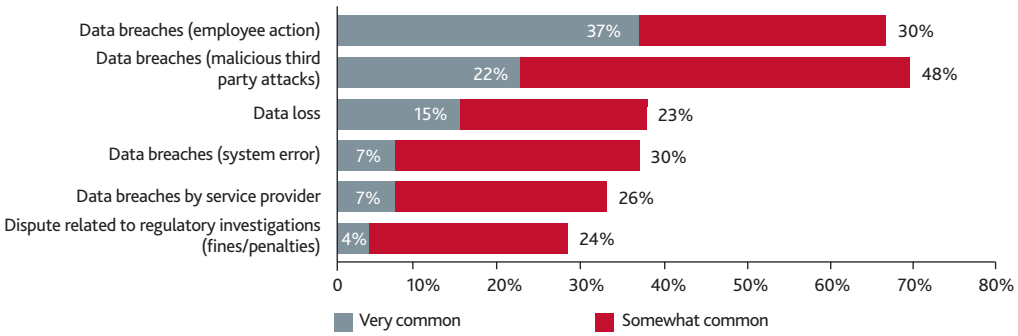


Chart 8. How common are the following reasons for data breaches?



Human risk represents the most common cause of data breaches, significantly more than system failures

Data/system breach

In an increasingly connected world, information and data is a highly valuable commodity. With this comes risk: data is an increasingly common cause of TMT disputes. These results indicate that human risk represents the most common cause of data breaches, significantly more than system failures (Chart 8). While this might appear to be welcome news for suppliers, the reality is that weaknesses in IT systems, or their management, make it much easier for individuals to take the actions which cause the breach. So responsibility may remain with the supplier. While malicious third party attacks and disputes related to regulatory investigations are less common, the potential reputational and financial damage may be very significant for a business.

Number and value of TMT disputes

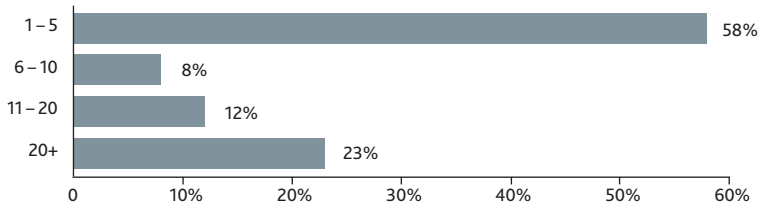
We see the increasing spend and dependency on technology reflected in the size, scale and frequency of TMT disputes. 23% of the in-house lawyer respondents had experienced 20+ TMT disputes (Chart 9).

34% of respondents had been involved in at least one dispute involving a sum in excess of US$100million. Among respondents the highest value disputes were IT disputes (38% more than $100m) and IP disputes (37% more than $100m).

As we might expect, the experience of disputes varies according to the business sector and its cultural norms (Chart 10).

- The Telecoms industry appears to be the most contentious, 71% of respondents had experience of more than 20 disputes and 83% of its respondents said that their largest dispute was at the highest end of the scale (more than $100m).
- For the IT sector 20% of respondents had experience of more than 20 disputes and 20% of its respondents said that their largest dispute was valued at more than $100m.
- In the Energy sector, only 8% of respondents had experience of more than 20 disputes. The majority (69%) had experience of only one to five TMT disputes. 23% of its respondents said that their largest dispute was at the highest end of the scale (more than $100m).

Chart 9. Over the past five years, approximately how many TMT disputes has your organisation been involved in?



This may support the theory that Telecoms disputes tend to relate to the regulated market and business environment, rather than service. As such, we may see more of the 'bet the industry' types of dispute.

Similarly, results varied with geography (Chart 11):

- Asia reported the most experience of disputes: 37% had experience of more than 20 disputes. 25% said that their largest dispute was at the highest end of the scale (more than $100m).
- 31% of North American respondents had experience of more than 20 disputes, and 38% had experienced a dispute of more than $100m.
- Europe was similar. 29% had experience of more than 20 disputes – with 41% (the highest proportion of all geographical areas) having experience of a dispute of more than $100m.
- In Latin America, 14% had experience of more than 20 disputes, and 10% had experienced a dispute of more than $100m.
- No respondents from the Middle East and North Africa had experienced more than 20 disputes, and 25% had experienced a dispute of more than $100m.

So it appears that most high-value disputes occur in Europe and North America. There might be many reasons why: relatively mature commercial and legal markets; many multi-national technology companies are headquartered there; and a more litigious business culture.

> 31% of North American respondents had experience of more than 20 disputes, and 38% had experienced a dispute of more than $100m

Chart 10. High value and high frequency of disputes in the Telecoms, IT and Energy sectors

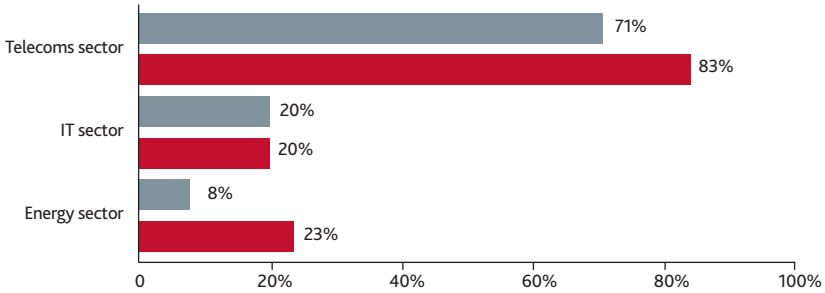
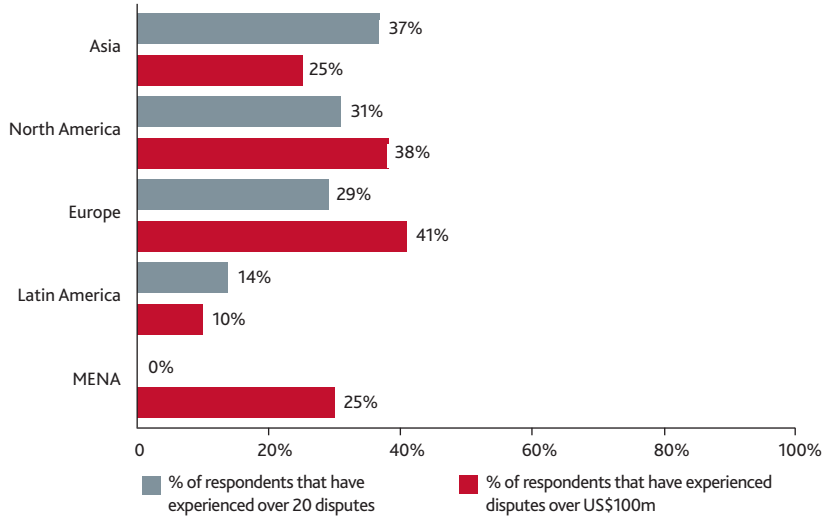


Chart 11. High value and high frequency of disputes by geography



TMT disputes: the future

In an era of fast paced technological innovation, what does the future hold?

Ownership and licensing of technology will continue to be a likely source of disputes: 51% said IP would be the most likely type of dispute in the future, while 44% named licensing.

Two potential future trends stand out: more disputes arising from collaboration, and a greater number of data and system security breaches.

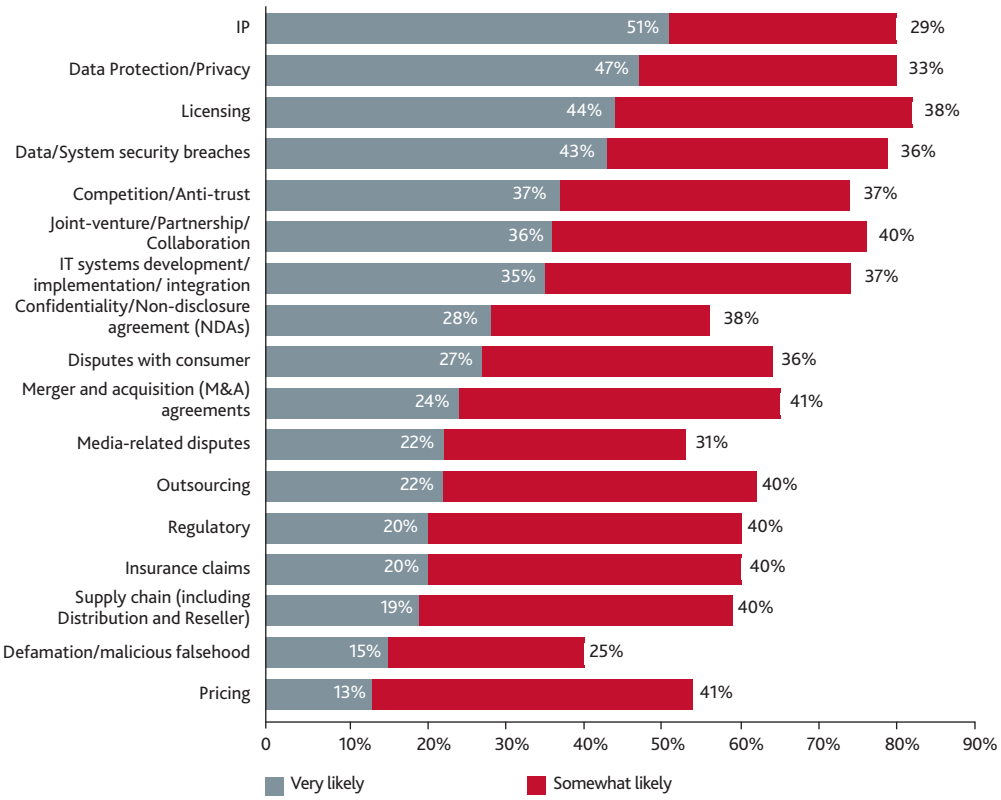
Respondents clearly believed that businesses would continue to collaborate, and that this would lead to disputes. 36% of them thought that such disputes were 'very likely' and a further 40% 'somewhat likely'.

As seen in Chart 1, only 9% of respondents had experience of data and system security breaches, and 13% of data protection issues, which appears low. However, the responses strongly suggest that both types of dispute are likely to occur in the future (Chart 12). 79% of respondents identified data/security system breaches as being either 'very likely' or 'somewhat likely' in the next 5 years, and 80% said this for data protection issues. Disputes around pricing and insurance claims are also on the rise (Chart 13).

Clearly, these issues are troubling both suppliers and users of technology. They are a significant risk area, which will need to be managed and mitigated in the future.

Chart 13. The greatest anticipated increase in the types of TMT dispute

Chart 12. In the next five years, how likely are the following types of TMT dispute to arise?



Section 2: In-house dispute resolution policies and preferences

KEY POINTS

- 75% of organisations surveyed had a dispute resolution policy
- Mediation is the most encouraged mechanism (50%), followed by arbitration (47%)
- IT and Telecoms suppliers were less in favour of arbitration, preferring litigation and expert determination respectively
- There is a lack of familiarity with mediation, particularly within civil jurisdictions

The differing nature of dispute resolution mechanisms

Circumstances can dictate the timing and nature of the dispute resolution mechanism threatened or pursued, and using one of them does not necessarily exclude using one or more of the others.

For example, mediation is a widespread mechanism for dispute resolution but it does not have a fixed form and it is not necessarily a final and binding resolution technique as it will depend on the parties reaching agreement. While adjudication does provide a decision which binds the parties, this may be overturned by a Court. Expert determination is often similar, where it is common to provide in contracts that the decision is binding until it is challenged before the Court.

Consequently, parties may progress through mediation and then, if the matter is still unresolved, progress to either litigation or arbitration.

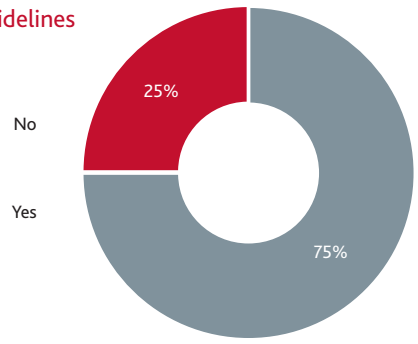
Dispute resolution policies

Dispute resolution (DR) policies take different forms. They may be formal and fully crystallised; or they may be informal, operating more as a recommendation or a basis for negotiation. This is undoubtedly influenced by industry norms, geography and corporate culture.

Across all sectors only 25% of in-house respondents indicated they do not have any kind of DR policy (Chart 14). It may be that many of these organisations have decided not to have one, possibly because they prefer not to impose a standardised process on disputes which are, by their nature, non-standard.

Alternatively, they may simply avoid many contentious situations. Among the 25% who do not have DR written guidelines or policies there is slight consensus that mediation best meets their needs.

Chart 14. Does your organisation have written guidelines or policies for drafting DR clauses in contracts?



DR policies and DR mechanisms

For those in-house respondents who indicated that their organisation had a DR policy we asked what that policy said about different dispute resolution mechanisms. This question relates to disputes in general rather than TMT disputes specifically, as it is likely that organisations have a single generic DR policy.

Chart 15 shows that in DR policies, mediation is the most encouraged form of dispute resolution mechanism, with arbitration following closely behind (50% and 47%, respectively). Litigation was the second least encouraged (32%), and most discouraged (29%).

Responses varied by sector:

- For Telecoms sector respondents, expert determination/adjudication was the most encouraged method, with mediation and litigation falling jointly behind that. No respondent said that arbitration was positively encouraged.
- In the IT sector, litigation was the most encouraged mechanism (50%). Arbitration scored 27%.
- By contrast, respondents from the Energy, Construction and Manufacturing industries all rated arbitration as the most encouraged DR mechanism.

So, remarkably, we may conclude that IT and Telecoms suppliers encourage litigation over arbitration, but the opposite is true of some of their potential customers. This suggests that when customers and suppliers draw up commercial contracts, the drafting of the dispute resolution clause could be a contentious point.

> We may conclude that IT and Telecoms suppliers encourage litigation over arbitration, but the opposite is true of some of their potential customers

Chart 15. Are the following DR mechanisms encouraged or discouraged by your organisation's DR policy?

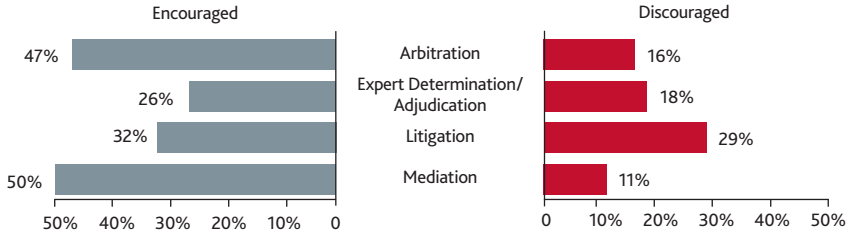
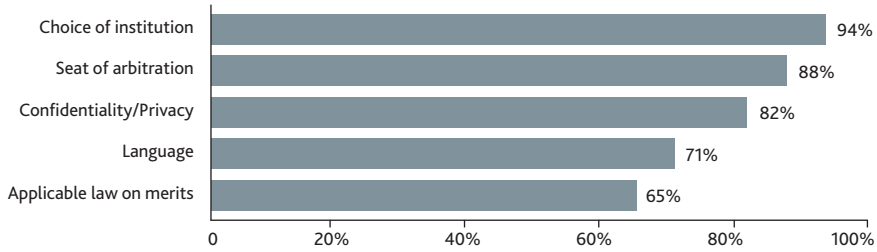


Chart 16. Which of the following considerations are part of your organisation's DR policy in relation to arbitration?



"I am a greater believer in mediation: things are not necessarily 'black and white', especially in the international arena: different interests, cultures…mediation has a lot to offer to that effect"

An experienced arbitrator

Factors affecting the choice of arbitration

Where international arbitration is included within a DR policy, respondents generally try to ensure that a basic arbitration provision is included. Typically they use a standard (model) clause.

The five most important factors are highlighted in the Chart 16.

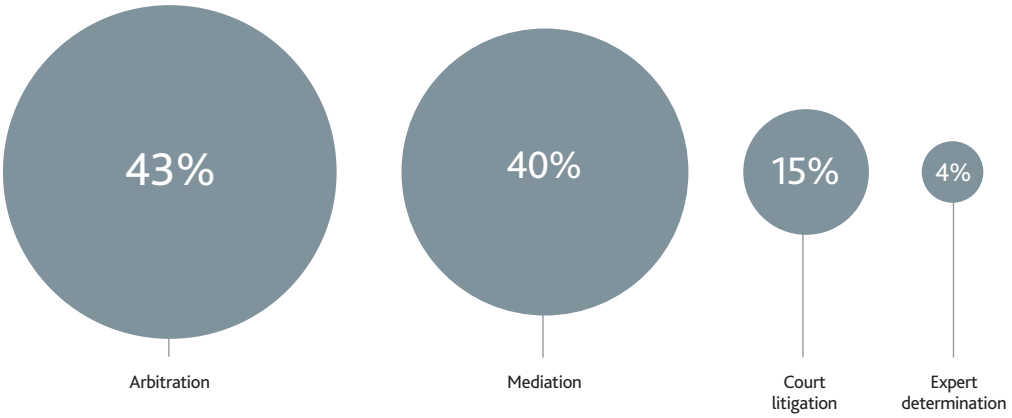
Preferred dispute resolution mechanism

We asked all respondents (not just in-house lawyers) to state their personally preferred dispute resolution mechanism for TMT disputes specifically. This revealed a strong preference for arbitration over litigation (Chart 17).

Thus while in-house DR policies tend to prefer mediation over arbitration, the wider respondents' personal preferences is for arbitration (i.e. when private practitioners and other dispute resolution practitioners are included). In the interviews we conducted we found that people tend to be unfamiliar with mediation – particularly those from a civil law background.

Importantly, there is no common view of what form mediation takes. In some jurisdictions (particularly civil) the process may be more of an evaluative one, with mediators giving opinions on the merits of the case. In other jurisdictions, for example the UK and the US, mediation is essentially a facilitated negotiation. As mentioned above, the lack of binding resolution unless agreement is reached, may also be seen as a disadvantage of mediation. Nevertheless, interviewees acknowledged that mediation is cheaper, less disruptive, can narrow down disputes going forward, and can achieve an early settlement.

Chart 17. Preferred dispute resolution mechanism for TMT disputes (all respondents)



Section 3: TMT disputes: dispute resolution mechanisms in practice

KEY POINTS

- The decision whether to initiate litigation or arbitration is a Board issue
- Arbitration was most preferred, but litigation was the most used
- Decisions are determined primarily by costs and legal merits and the parties' relationship

Having analysed in-house lawyers' views on their dispute resolution policies, and all respondents' personal preferences for dispute resolution mechanism, we then looked at the respondents' actual experiences of dispute resolution mechanisms in practice.

Amicable settlement

We asked: "*Over the past five years, what is the approximate percentage of TMT disputes that you or your organisation have managed to settle amicably, through direct negotiation or mediation, (i.e., before litigation, arbitration, or other formal adjudicative proceedings were started)?*". The answer was 41%.

Some sectors had a higher success rate: in the Telecoms sector 81% of disputes were resolved by amicable settlement, and in the IT sector it was 78%.

The results suggest that suppliers tend to be reluctant to enter formal dispute resolution. Of the 59% of TMT disputes that were not resolved amicably, 48% were pursued to arbitration, expert determination, adjudication or litigation. However, in the Telecoms sector, only 18% of disputes that were not settled were pursued to arbitration, expert determination, adjudication or litigation. In the IT sector, it was 24%.

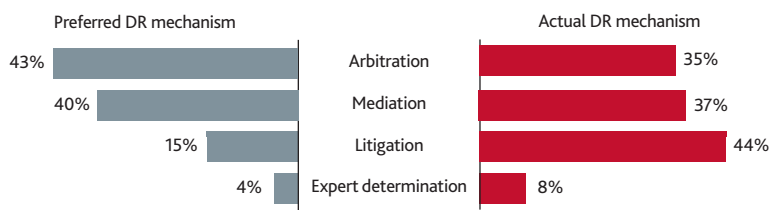
Actual use of different DR mechanisms

One of the most revealing statistics from this year's survey was that although respondents said that arbitration was their preferred mechanism, in reality the mechanism that was most often used over the last five years was litigation (Chart 18).

What are the reasons for this startling difference?

First, international arbitration has become significantly more popular in the last ten years. As many disputes emerge more than five years after the contract is drafted, it is possible that disputes which arose in the last five years may have involved contracts written before this surge, and consequently did not include an arbitration provision within the DR clause.

Chart 18. Preferred and actual dispute resolution mechanisms for TMT disputes



Secondly, it may be that although arbitration is encouraged or preferred, it is not possible to introduce the necessary arbitration provision into the DR clause during the contract negotiation process. The stark difference in attitudes between customers and suppliers identified above (that suppliers are more pro-litigation) may be one reason for this, if suppliers are refusing to accept arbitration.

Thirdly, as we discuss further below, litigation may be the default position, for example for disputes which are not between contracting parties.

Additionally, at the procurement stage when the terms and conditions are being negotiated, the parties may give little or no time to the DR provisions, partly because of time constraints and partly because neither anticipates a major dispute arising. The apparent disconnect between the respondents' preferences for DR and the actual mechanisms used suggests that more attention should be given to this important area when contracts are drafted.

This result also suggests that the parties require greater assurance and confidence in the international arbitration process before their theoretical preference for it can become a reality.

Factors considered before initiation of formal legal proceedings

Given that only a relatively small proportion of TMT disputes ultimately end in formal legal proceedings, it is important to understand the most significant factors driving such a decision. These are set out in Chart 19.

Ease of enforcement (26%) ranks slightly lower than in other business sectors we have surveyed. In our 2013 Industry-focused survey of the Energy, Infrastructure and Financial Services sectors, for example, enforcement was generally ranked in the top three factors.

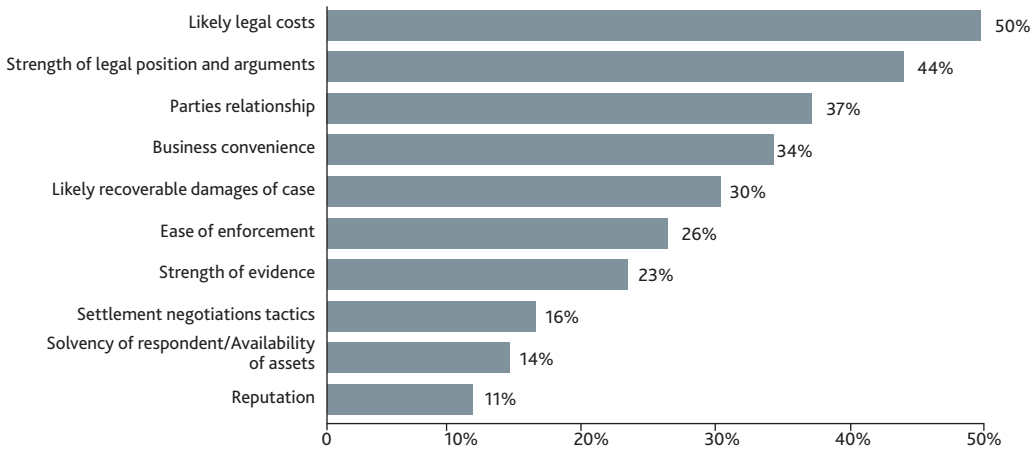
Who makes the decision to pursue legal proceedings?

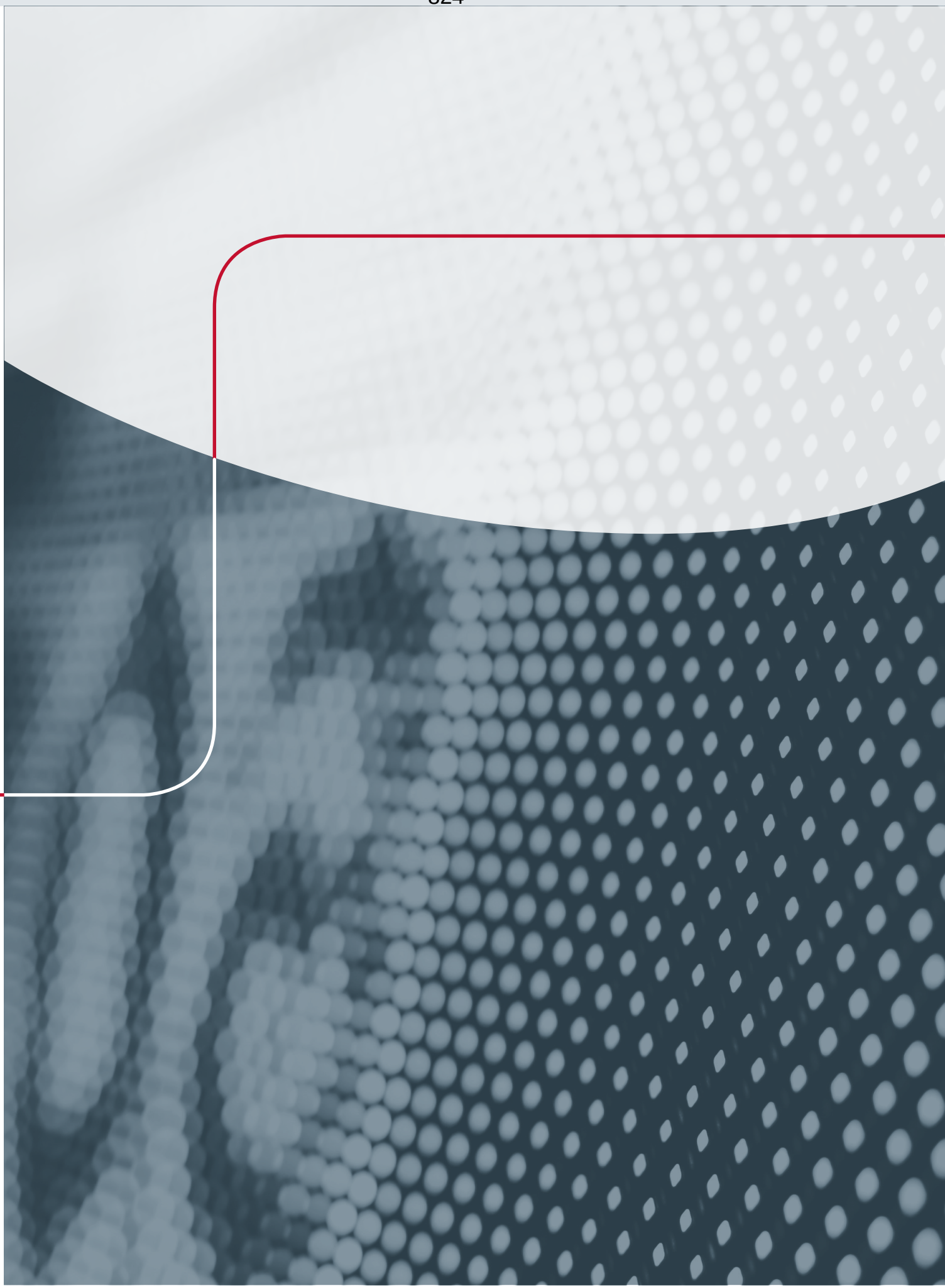
By a very clear margin, the ultimate decision on whether to initiate litigation or arbitration proceedings rests with the Board of Directors, the Senior Executive or the CEO of the Claimant party (57%) with the General Counsel or Head of Legal (36%) as the second most commonly cited option.

This question was answered by in-house lawyers only.

This result suggests that the parties require greater assurance and confidence in the international arbitration process before their theoretical preference for it can become a reality

Chart 19. What are the most significant factors in deciding whether or not to initiate formal proceedings?





Section 4: Suitability of international arbitration for TMT disputes (present and future)

KEY POINTS

- 92% of respondents indicated that international arbitration is well suited for TMT disputes
- Despite some criticisms and acknowledgement of opportunities for improvements, 82% of respondents believe there will be an increase in the use of international arbitration
- The attractive features are: enforceability, the ability to avoid a foreign jurisdiction, expertise of the decision maker and confidentiality/privacy
- There is a desire to use technology to improve the international arbitration process

How effective is international arbitration in resolving TMT disputes, now and in the future?

The survey asked whether respondents thought international arbitration was well suited for TMT disputes, and if so, to what extent. 92%, a striking majority, agreed with the statement *"International arbitration is well suited for TMT disputes"*.

It is salient that, despite the preferences for other types of dispute resolution mechanisms in DR policies indicated by the IT and Telecoms sectors, both sectors indicated that TMT disputes are well suited to the use of international arbitration (73% and 80% respectively).

82% of respondents indicated that it was likely that there will be a general increase in international arbitration to resolve TMT disputes.

92%, a striking majority, agreed with the statement *"International arbitration is well suited for TMT disputes"*

Chart 21.
If international arbitration is not very well suited for TMT disputes, it is because:

81%
More costly than alternatives

57%
Better results achieved via alternatives available

57%
Injunctive relief can be difficult to obtain

52%
A lack of arbitrators with the requisite expertise

52%
Greater delays

"Arbitration brings legal certainty which is not always found in judicial courts"

Head of Legal, Oil & gas company

Why is international arbitration well suited? What makes it attractive?

We asked respondents to say which features of international arbitration make it an appealing mechanism in resolving TMT disputes (Chart 20).

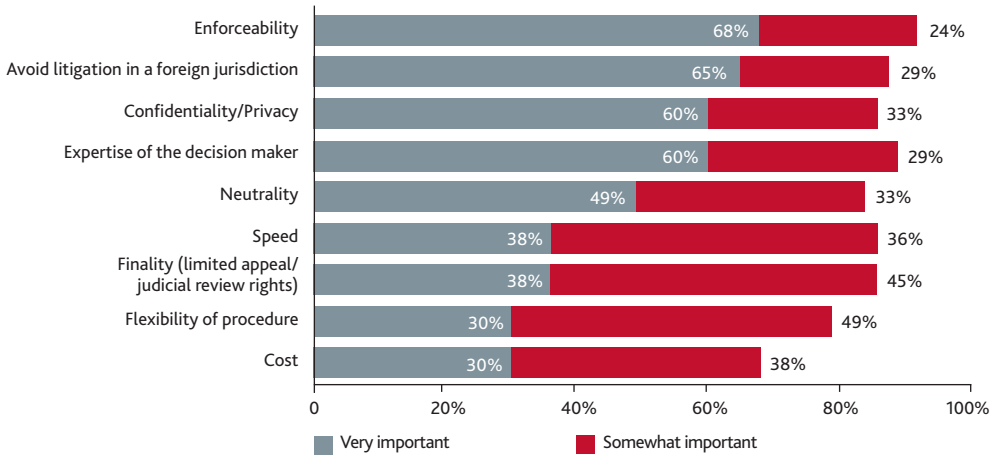
Arbitration was praised by some interviewees as a "go-to" option in TMT disputes. One of the reasons is that such disputes are often complex, and arbitration offers a procedural flexibility that is likely to be unavailable in judicial courts. Interviewees also mentioned confidentiality, and enforceability of the decision in multiple jurisdictions as key advantages.

Investment in IT is usually a strategic business issue for the customer, in which suppliers gain detailed knowledge of the customer's business strategy and procedures. Customers will want to ensure, as best they can, that this information remains confidential and away from any public hearing.

As TMT contracts and supply chains become increasingly international, multi-jurisdictional disputes are likely to arise, and therefore the need for instruments (or tools) that facilitate enforcement in foreign jurisdictions becomes more critical. Enforcement is of course a huge advantage of international arbitration as a result of the 1958 New York Convention. Being able to adopt a common process and forum for dispute resolution whichever jurisdiction is the source of the issue may well be perceived as a benefit, as will the ability to enforce the award in practically every business jurisdiction.

In relation to enforcement, for those with disputes relating to the UK, Brexit may influence the decision to bring proceedings and the choice of DR mechanism. In an uncertain climate, providing for international arbitration has obvious attractions.

Chart 20. How important are the following features of international arbitration in TMT disputes?



Why is international arbitration not well suited?

We note that a high percentage of respondents (57%) think that injunctive reliefs are difficult to obtain or implement in arbitration (Chart 21). It is common in commercial contracts to provide that the parties are not obliged to follow the DR procedure where emergency relief is required. In this situation, going straight to Court may be preferred. In arbitration, the parties would need to opt for emergency arbitrator procedures (which may not be available depending on the arbitration rules chosen), or the expedited formation of tribunals, all of which may take longer than applying to Court. We also expect that the market will demand improved emergency arbitration procedures, so that international arbitration can offer injunctive relief similar to national Courts.

The statement proposed in the survey that *"most TMT disputes are, by operation of law or regulation, not capable of resolution,"* was not strongly supported by the respondents. It may be that the term "most" has influenced the respondents. Many of the types of dispute that were identified as common (Chart 1) are all primarily non-contractual matters (i.e. IP, competition, data protection, data security), which might involve, for example, the national competition authority or industry regulator. It is difficult to see how such disputes could be resolved via arbitration since this mechanism must be agreed between the parties. If the relationship is not created or governed by a contract, then litigation will almost certainly be the default dispute resolution mechanism.

Complaints regarding international arbitration have largely been connected to costs, delays and the arbitrators' behaviour. Some interviewees suggested that arbitration should go back to where it started and not mimic the same *"tricks"* of litigation. There was some scepticism about how arbitration will develop in the near future. In addition, there were suggestions that arbitration proceedings should be less *"judicialised"*.

A key change demanded by respondents was for more specialised arbitrators, in particular with TMT expertise, and a need for greater confidence in the capabilities of arbitrators.

When asked about the future, 87% of respondents thought that it was likely that there would be an increased specialism of arbitrators to deal with TMT disputes in the next 10 years.

38%
Arbitrators tend to "split the baby"

24%
Arbitration does not contribute to the development of the law

19%
Arbitration does not create precedent

19%
Specialised judicial courts are better

19%
Most TMT disputes are not capable of resolution by arbitration

5%
Higher damages in litigation

Chart 22.
What changes would make international arbitration more attractive/better suited for TMT disputes?

58%
Lower costs

43%
Neutral system for the accreditation of specialist arbitrators

42%
Creation of specialised rosters of arbitrators for TMT disputes

40%
Appointment of more industry experts

34%
Creation of specialised arbitration rules

34%
Use of ODR

26%
Rules and guidelines regulating conduct

Improving international arbitration

We asked respondents what changes might make international arbitration a more appealing option (Chart 22).

Unsurprisingly, lower costs took the lead, in keeping with the answers to the previous question. Interviewees suggested a variety of ways to reduce costs:

- Use of technology
- Better disclosure processes
- Having more robust arbitrators who can manage the processes without being concerned of challenge by one of the parties
- Permitting only limited evidence
- Submissions with page limits and a more focused structure
- Limited cross-examination
- Arbitrators highlighting the format of the hearing at the outset and committing to a schedule for delivery of the Award

Respondents also said that it is critical to develop policies, technology and human-based tools which encourage the use of ADR.

The second most important group of suggestions was those connected to arbitrators' abilities, with a focus on increased specialisation. These included: *"the creation of a neutral system for the accreditation of arbitrators specialising in TMT disputes"* (43%); *"specialised roster of arbitrators"* (41%); and *"the appointment of more industry experts"* (40%).

It is clear that there are real concerns that it is challenging to appoint arbitrators with sufficient expertise in TMT matters. Interviewees expressed a desire for more industry-expert arbitrators as opposed to the *"usual suspects"*. Some interviewees confirmed that a roster would be welcomed, especially for highly technical disputes.

Interviewees also said that they would welcome less *"due process paranoia,"* and highlighted a need for better disclosure of an arbitrator's track record in similar matters. Particularly in the area of information technology and outsourcing services disputes, respondents cited a need for arbitrator candidates to have greater expertise in the subject at issue.

Another point addressed by interviewees is the level of engagement between arbitral institutions and TMT players. One person said that *"There is still a sense of unfamiliarity from the TMT users' perspectives towards arbitral institutions."*

The root of the respondents' concerns seems to be the arbitrator's performance. Specific criticisms included lenience towards one party, fear of being unjust, and unwillingness to make the proceedings move forward. Respondents also criticised arbitrators for lack of proactivity and control of case management, in some cases.

When asked how to improve the process, respondents suggested that arbitrators should be more aware of their role, more active in case management, and less inclined to think of arbitration as a *"transition to sophisticated litigation"*. They also recommended giving arbitrators the power to enforce deadlines agreed by the parties, and suggested that more time should be spent on the merits of the case rather than on procedural aspects.

Lastly, respondents said that they would welcome a shift towards more *"professionalisation"* of arbitration, including transparency, accreditation of neutrals, and institutions being more active about the appointment of neutrals.

What role does technology play in international arbitration?

Almost all businesses and industries have changed with the use of technology. As the survey was aimed at respondents with experience of supplying or using technology, it was a good opportunity to investigate the use of technology in international arbitration. First, we asked respondents for their views on online dispute resolution (ODR) tools.

63% of all respondents expected an increase in the use of ODR in TMT disputes in the next ten years. In the EU, the Directive on Consumer ADR and the Regulation on Consumer ODR are now driving forward the use of ODR in the consumer context, particularly for cross-border matters. Similarly, in Canada, and in particular British Columbia, there is the Civil Resolution Tribunal, which is the world's first government-sponsored ODR forum.

Similar initiatives are being progressed in many other jurisdictions. ODR has arrived, and we anticipate widespread adoption in the future.

Technology tackling the challenges of international arbitration

We found that respondents do believe that technology can influence international dispute resolution, largely by making the process more efficient and by helping to avoid unnecessary and costly delays (Chart 23).

Two answers stood out in particular: *"more efficient e-disclosure and document review"* and *"e-case management/resolution software"*. Adopting e-tools may well help too: 45% of respondents thought that ODR mechanisms could improve international dispute resolution.

The answers may also indicate a desire for a move to virtual arbitral hearings and an opportunity for innovation in arbitration.

24%
Creation of specialised arbitration institutions

22%
Award review structure

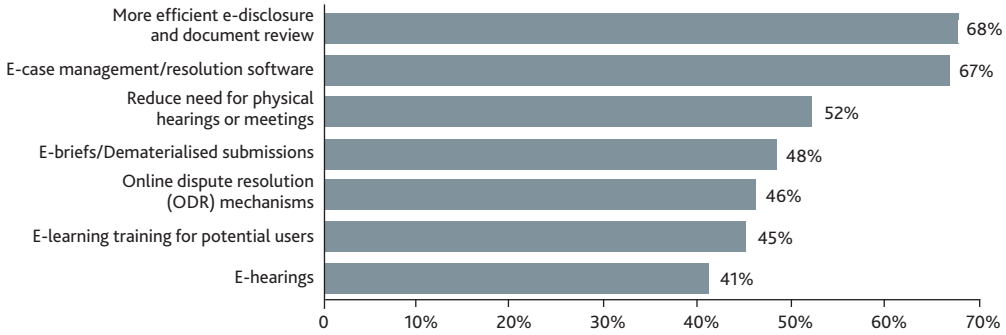
21%
Feedback and rating of the arbitration experience

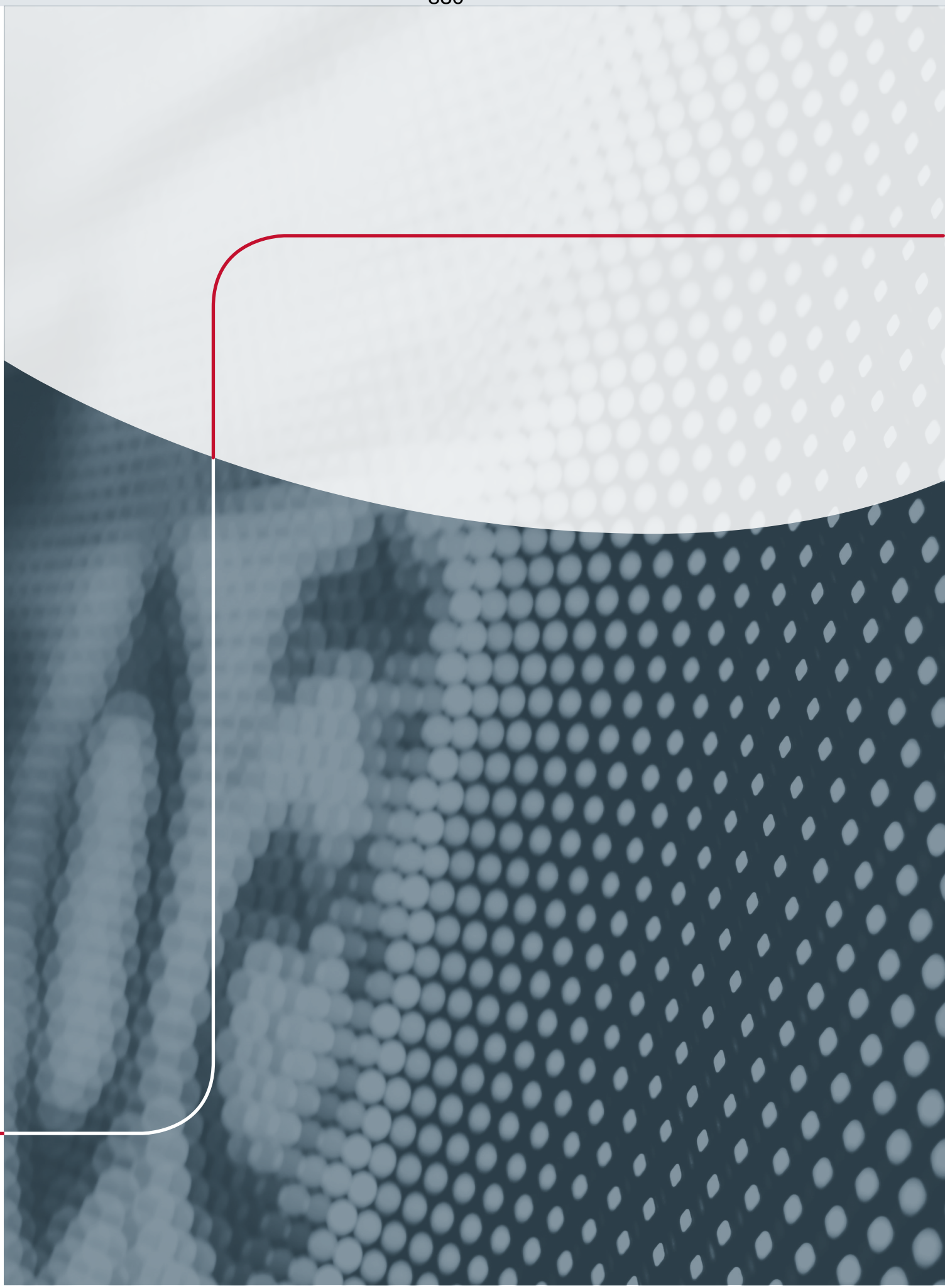
19%
Disciplinary procedure and code of ethics

19%
Rules and guidelines regulating the conduct of party representatives

11%
Arbitrators appointed exclusively by the Arbitration institution

Chart 23. How can technology improve international arbitration?





Section 5: Choosing the players

KEY POINTS

- Expertise in the arbitral process and technical knowledge of the industry are both important to selecting external counsel and arbitrators
- Geography is a determining factor both in selecting the institution and in appointing counsel in the same jurisdiction as the contract governing law
- The most used institutions for TMT disputes are: ICC, WIPO Center, LCIA and SIAC. WIPO is more favoured in relation to IP matters

Counsel: how are they chosen in a TMT arbitration?

80% of respondents' organisations have a panel of pre-approved or preferred law firms. 39% will frequently use panel firms for TMT arbitrations. 22% always will.

Attributes of a TMT counsel

We asked respondents to indicate the most important attributes of an outside counsel for TMT disputes. Chart 24 summarises the most important factors identified.

We also asked whether expertise in the arbitral process or technical knowledge of the industry sector were more important. The scores were close: 54% for expertise in the arbitral process and 46% for technical knowledge of your industry sector. Interviewees confirmed that a good balance between arbitral experience and subject matter expertise is key.

There were some notable sector variations where technical knowledge was valued above arbitral experience. In the Telecoms sector, 60% thought that technical knowledge was more important than expertise in the arbitral process.

> In the Telecoms sector, 60% thought that technical knowledge was more important than expertise in the arbitral process

Chart 24. What are the most important factors when selecting outside counsel?

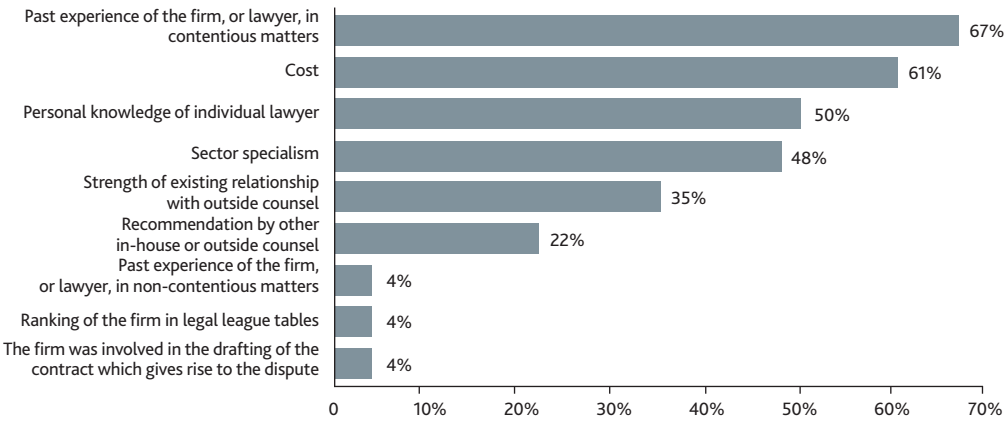
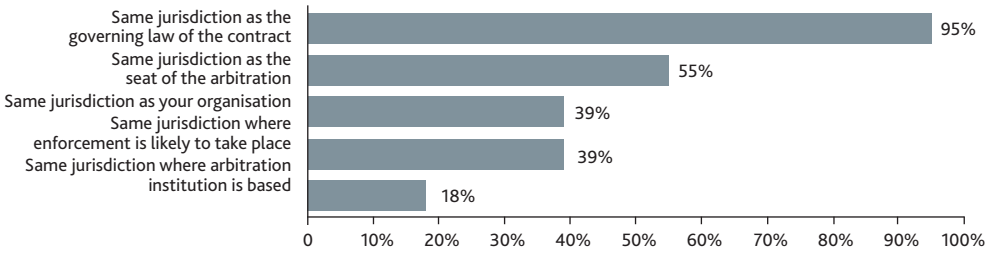


Chart 25. What are the most important factors influencing your choice for the location of outside counsel?



To what extent does location matter?

A striking majority of respondents said that it is absolutely key for counsel to be located in the same jurisdiction as the governing law of the contract (Chart 25). When entering into contracts it is worth factoring this into consideration of how an issue or dispute would be handled should relations between the parties deteriorate.

New technology may change these perceptions in the future, particularly the use of ODR or virtual arbitration hearings.

"In TMT disputes we tend to go for the 'black-belt' arbitrators"

Former General Counsel (Technology sector), experienced arbitration counsel

Arbitrators: how are they chosen in a TMT arbitration?

Respondents were asked to indicate the three most important factors in nominating an arbitrator (Chart 26). Knowledge of the subject matter scored higher than knowledge of the arbitral process.

While there is a desire for specialists, in reality arbitrators are selected based on their arbitration experience, and are not always experts in the subject matter. Those with the benefit of first hand experience of arbitration said that parties need to take greater care to ensure that the arbitrator or some of the tribunal members have sufficient knowledge and expertise to understand the facts within the business context. Some people called for increased transparency as well: revealing not only the expertise and caseload of the arbitrator, but also the results of actual international arbitrations.

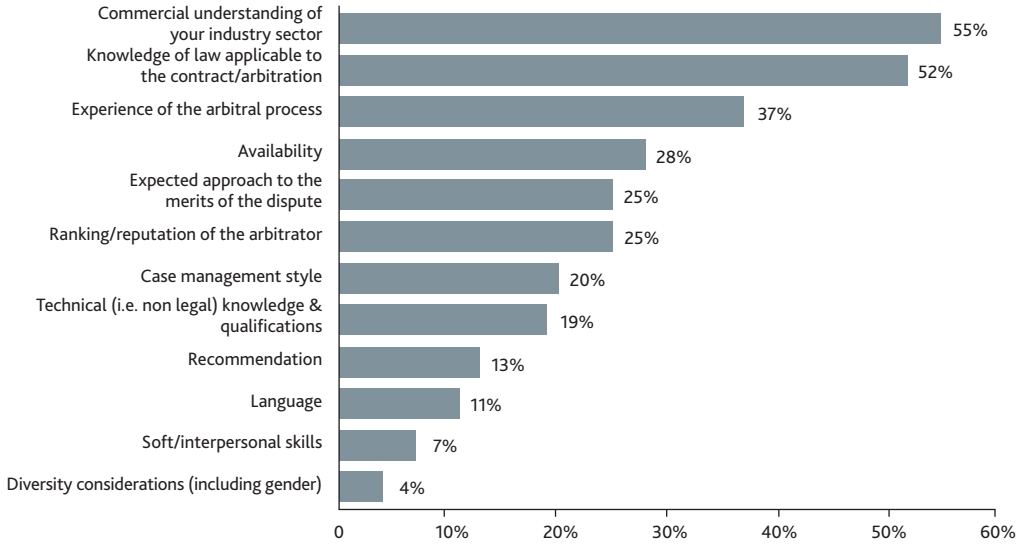
This is a reason why trade practitioners would be welcomed.

It is worth noting that diversity considerations and soft/interpersonal skills were rated as the lowest considerations, with 4% and 6%, respectively. However, in the interviews some people did mention the need to draw users' attention to a pledge for more diversity in arbitration.

The interviews provided an opportunity to gain unfiltered feedback. Some interviewees complained strongly that arbitrators do not use their managerial powers where possible. One said: *"We look for an arbitrator who has a firm wrist, able to say 'no' to a party fearlessly."*

Similar phrases came up repeatedly: *"split the baby"*, *"due process paranoia"*, and *"broken wing syndrome"* – all regarding the arbitrator's behaviours towards parties, including the fear of being challenged and the inclination towards being "pleasant to parties" rather than reaching a merited decision. When these respondents were asked to elaborate further on the underlying reasons for this behaviour, some said that arbitrators *"tend to be more concerned about getting the next appointment"*.

Chart 26. What are the most important factors influencing your choice of arbitrator?



Some said that arbitrators *"tend to be more concerned about getting the next appointment"*

Arbitration institutions: which arbitration institutions are used the most?

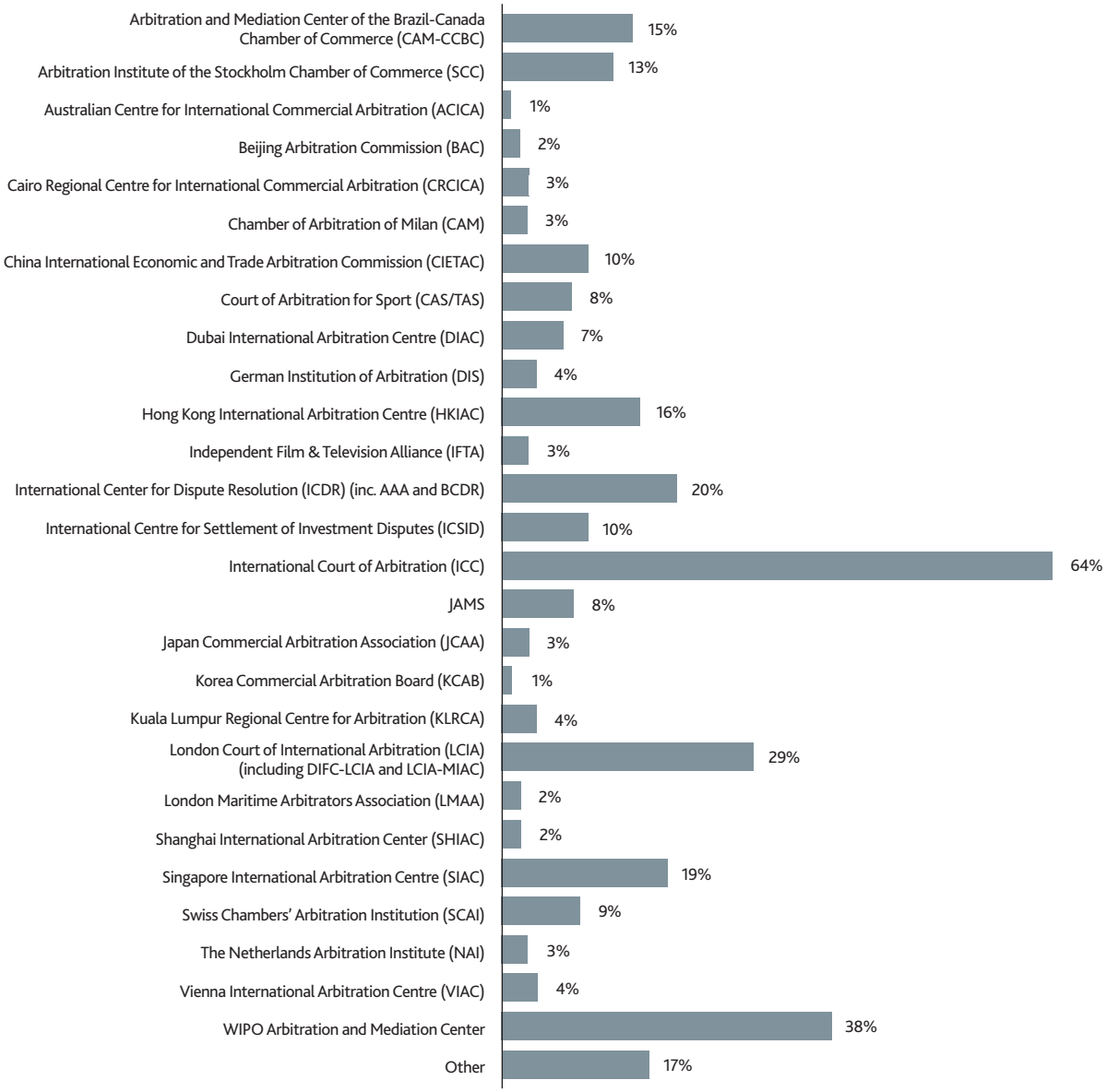
The most used institutions for TMT disputes are the International Court of Arbitration (ICC), the WIPO Arbitration and Mediation Center (WIPO Center), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) and the Singapore International Arbitration Centre (SIAC) (Chart 27).

An examination of the responses from respondents who had experience of IP disputes put ICC at 59% and the WIPO Center close behind at 55%. Thus, the WIPO Center understandably remains a popular forum for IP disputes.

Geography is inevitably important. Looking at different institutions experienced in the last five years, split by the location of the respondent, we find the following:

- The most frequently experienced institution for US-based respondents was the ICDR (55%)
- For EU based respondents the ICC came highest with 74%
- In the Middle East North Africa it was also the ICC with 67%
- For Asia it was close between SIAC (67%) and the ICC (61%)
- For Latin America the ICC and the Arbitration and Mediation Center of the Brazil-Canada Chamber of Commerce (CAM- CCBC) came out joint top with 61%

Chart 27. Which of the following arbitration institutions, or types of arbitration, have you or your organisation used in the past 5 years for TMT disputes?



Are any arbitration institutions preferred?

The majority of respondents did not indicate a preferred arbitration institution (58%) and did not seem to be entirely convinced that any particular institution is more suited to TMT disputes. Of those that expressed a preference for an institution, the top three were WIPO (11%), ICC (9%) and LCIA (6%).

Appendices

Methodology

The research for this study was conducted from March to July 2016 by Gustavo Moser, LLB, LLM (UFRGS), PhD Candidate (Basel) and Pinsent Masons Research Fellow, School of International Arbitration, Queen Mary, University of London, together with Professor Loukas Mistelis, Clive Schmitthoff Professor of Transnational Commercial Law and Arbitration; and Director, School of International Arbitration, Queen Mary, University of London.

The other academic members of the School of International Arbitration have provided generous support through feedback in the questionnaire design. Support was provided by Pinsent Masons transactional and disputes lawyers.

An external focus group comprising senior in-house counsel, senior representatives of arbitral institutions, academics, and arbitrators provided comments on the draft questionnaire.

The research was conducted in two phases: the first quantitative and the second qualitative.

Phase 1

An online questionnaire of 55 questions was completed by 343 respondents between 18 May 2016 and 31 July 2016. The survey sought the views of a wide variety of stakeholders in the resolution of TMT disputes.

The respondent group was made up as shown in Chart 28.

The respondents came from civil law (42%) and common law (32%), with 21% of the respondents combining both legal families.

The respondents' regions of operation were spread around the world, as shown in Chart 29.

Chart 28. What is your primary role?

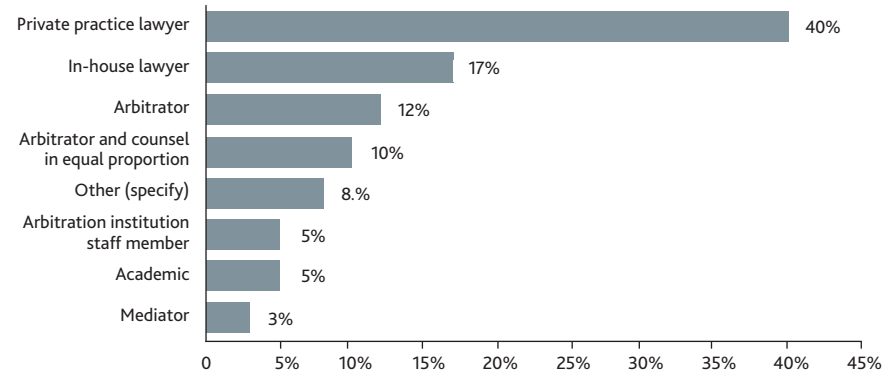
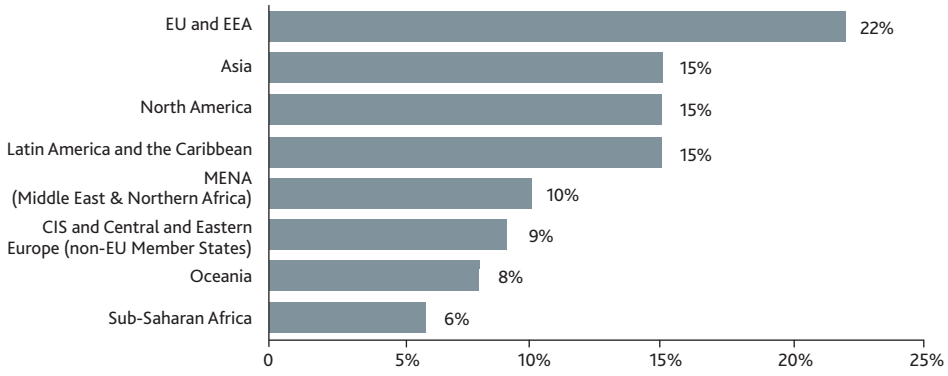


Chart 29. In which geographic regions does your organisation operate?



The majority of the respondent companies had a gross annual turnover of more than US$500million (Chart 30).

The overwhelming majority of the respondent companies had a dedicated legal department (86%). This corroborates the data where the majority of the respondent companies (66%) had stated to be over US$500million in size.

The majority of the respondent companies had a disputes team or department (55%), however a non-negligible number of the respondent companies also did not have one (45%).

As shown in Chart 31, the input provided by the respondents came from a wide range of industry sectors.

Phase 2

62 face-to-face or telephone interviews ranging from 15 to 120 minutes were conducted between 5 June 2016 and 3 August 2016. Interviewees were drawn from a diverse group based on seniority, gender, and experience in international arbitration. Respondents from all continents (excluding Antarctica) were interviewed.

The qualitative information gathered during the interviews was used to supplement the quantitative questionnaire data, to contextualise and explain the findings, and to cast further light on particular issues raised by the survey.

Chart 30. What is the size of your organisation (by gross turnover per year)?

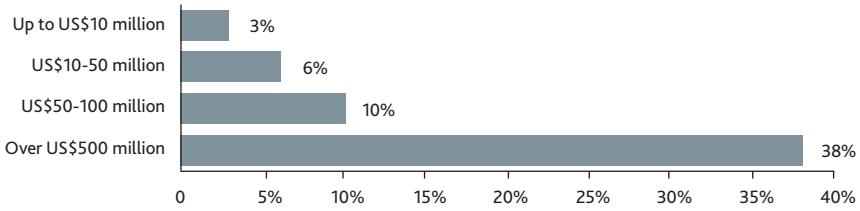
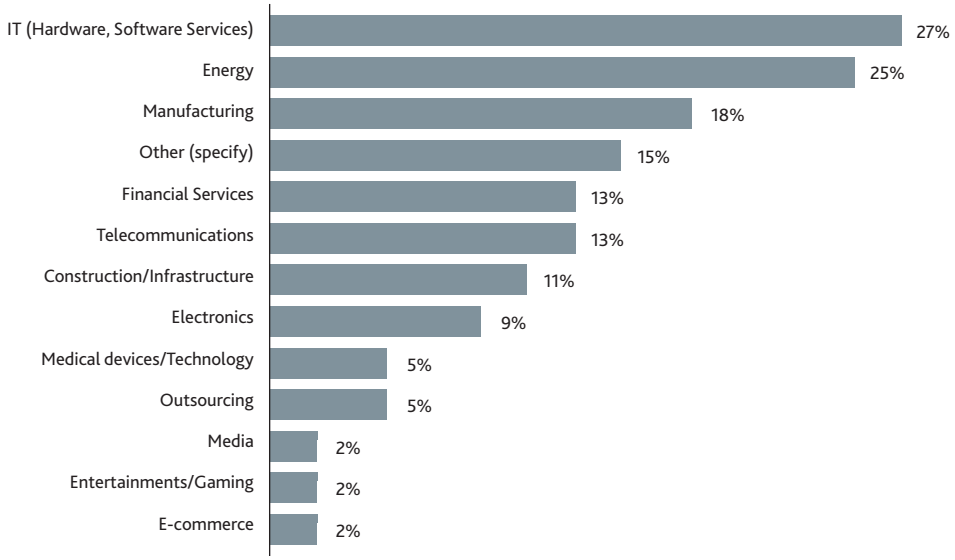


Chart 31. What is your organisation's primary industry sector?



School of International Arbitration, Queen Mary, University of London

It is 32 years since the School of International Arbitration was established under the auspices of the Centre for Commercial Law Studies, Queen Mary University of London.

Its aim was, and remains today, to promote advanced teaching and research in the area of international arbitration and international dispute resolution generally. To achieve these objectives, the School offers a wide range of international arbitration courses including specialist LLM modules, postgraduate diplomas, professional courses and training, and one of the largest specialist PhD programmes in the world. Today the School is widely acknowledged as the world's leading postgraduate teaching and research centre on international arbitration.

Since its establishment, over 3,000 students from more than 100 countries have graduated from the School, and 30 PhD students have successfully completed their doctoral studies there. Many of our graduates are now successfully practising arbitration around the world as advocates, in-house counsel, academics, and arbitrators. Others serve international organisations, including UNCITRAL and the World Bank, or work for major arbitration institutions.

From one academic member at the outset, the School now has three full teaching professors, three senior lecturers, a strong network of part-time and visiting academic members, and campuses in London and Paris. In addition to its academic staff, the School involves high-profile practitioners in its teaching programmes. This adds crucial practical experience to academic knowledge and analysis.

Further, the School has close links with major arbitration institutions and international organisations working in the area of arbitration. It also offers tailored consulting services and advice to governments and non-governmental agencies that wish to develop their knowledge of arbitration, as well as training for lawyers in private practice, in-house counsel, judges, arbitrators, and mediators.

The strength of the School lies in the quality and diversity of its students and the desire of the School's staff to shape our students' academic and professional development. However, the work of the School extends well beyond the classroom and it plays a leading role in the evolution of arbitration as an academic subject.

Arbitration is a dynamic and adaptable process and so is the School in its profile and outlook.

For further information, please visit the School's website:
www.arbitration.qmul.ac.uk

Queen Mary University of London is ranked in the Top 100 Universities Worldwide according to the Times Higher Education World University Rankings, which ranks the world's best 800 universities. Law at Queen Mary is ranked in the Top 35 World Universities for Law according to the QS World University Rankings.
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Pinsent Masons LLP

Pinsent Masons LLP has unrivalled experience in supporting organisations in realising the opportunities and overcoming the challenges technology presents across our five global sectors: Advanced Manufacturing & Technology, Infrastructure, Energy, Financial Services and Real Estate. We have been involved in the success of many of the most high profile, high value and complex technology-enabled programmes and initiatives. We have also acted on many headline international TMT and IP disputes and arbitration cases that have secured successful redress for clients – among them two of the largest technology arbitrations in Europe.

We work with General Counsel and Boards to inform and enable their business strategies in competitive markets where technology has become ever more key to success. We represent companies, financial institutions and governments as they embark on ambitious new ventures and tackle technology challenges, failings and conflict that become business critical issues. Our sector-leading skills and technology experience are invaluable in developing solutions to ensure our clients can realise their business objectives, manage risks, protect their reputation, and resolve issues swiftly. We are specialists in large, complex international disputes and arbitrations.

With more than 70 partners across all of our offices around the world focusing on international arbitration, we have one of the largest international arbitration practices of any firm. We pride ourselves on our sector knowledge as well as on our technical international arbitration expertise.

Our international arbitration lawyers are based in the key international arbitration centres of London, Paris, Dubai, Singapore and Hong Kong. Alongside this we have international arbitration lawyers in our offices in Munich, Dusseldorf, Istanbul, Doha, Beijing, Shanghai, Sydney, Melbourne and (soon to be opening) Johannesburg.

We regularly work with local lawyers, consultants and experts in different languages and across different jurisdictions. Our team is fluent in the main business languages, including French, German, Spanish, Italian, Russian, Turkish, Arabic and Chinese.

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"Pinsent Masons LLP stands out for technology and construction international arbitration, and for IT outsourcing disputes"

International Arbitration Legal500 – 2016

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ALL'S FAIR IN LOVE AND WAR – OR IS IT? REFLECTIONS ON ETHICAL STANDARDS FOR COUNSEL IN INTERNATIONAL ARBITRATION

*Edna Sussman and Solomon Ebere**

While the topic of ethics for arbitrators has been the subject of discussion and debate for many years, recently the subject of ethics for counsel in arbitration has been generating increasing attention. In the past two years the International Bar Association's Arbitration Committee issued a survey regarding counsel ethics;[1] two codes of ethics[2] and a checklist[3] to guide counsel ethics in arbitration were also issued. Arbitral institutions are making rule changes that would further guide counsel conduct. "Guerrilla tactics" by counsel have been the theme of a growing number of scholarly writings[4] and have been the subject of several international arbitration conferences.[5]

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[1] *See* International Bar Association Arbitration Committee, *Counsel Ethics in International Arbitration Survey* [hereinafter IBA Survey], *available at* http://www.surveygizmo.com/s3/331908/IBA-Arbitration-Committee-Counsel-Ethics-in-International-Arbitration-Survey.

[2] *See* Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: International Code of Ethics for Lawyers Practicing Before International Arbitral Tribunals, in* ARBITRATION ADVOCACY IN CHANGING TIMES, ICCA CONGRESS SERIES NO. 15 (Rio 2010) at 408 (Albert Jan van den Berg ed., 2011); International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards* (Sep. 27, 2010) [hereinafter Hague Principles], *available at* www.ucl.ac.uk/laws/ cict/docs/Hague _Sept2010.pdf.

[3] *See* Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78 (Mar. 2009), *available at* www.gibsondunn.com/ publications/Documents/Benson-CanProfessionalEthicsWait.pdf.

[4] *See* Stephan Wilske, *Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough, in* AUSTRIAN Y.B. ON INT'L ARBITRATION 2011 at 315 (Christian Klausegger et al. eds., 2011); *see also* Gunther Horvath, *Guerrilla Tactics in Arbitration, an Ethical Battle· Is There Need for a Universal Code of Ethics?, in id.* at 297.

[5] *See* Vienna Arbitration Days 2010, Feb. 12 and 13, 2010, which dealt with "Guerrilla Tactics in Arbitration and Litigation"; *see also* the ICC Austria Conference,

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While the term "guerrilla" literally means little war in Spanish,[6] "guerrilla warfare" has come to mean a form of irregular warfare and refers to conflicts in which a small group of combatants including, but not limited to, armed civilians (or irregulars) use tactics such as ambush, raids and the element of surprise to harass a traditional army. In his classic *War and Peace*, Tolstoy reports on guerrilla warfare, apparently referring to a group that effectively used guerrilla warfare against Napoleon's army to disrupt supply and communication lines in a war in Spain in the early 1800s. In the international arbitration context, different strategies, methods and tactics, ranging from poor behavior to egregious and even criminal conduct, have together been described as "guerrilla tactics."

To explore whether the use of guerrilla tactics in international arbitration is really a problem of sufficient frequency and moment to warrant the attention it is now receiving with the promulgation of proposed ethical codes and institutional rule changes, we conducted an informal survey. We asked the following two questions:

1. As counsel in an arbitration or as an arbitrator, did you ever feel like one or both parties engaged in what you would call guerrilla tactics, whether technically unethical or not.
2. If your answer was yes, please describe a tactic you regarded as a guerrilla tactic.

I did not define guerrilla tactics on the theory that what needed to be discovered is whether counsel and arbitrators felt such tactics were being used and to learn what kinds of tactics they felt deserved to be labeled "guerrilla tactics." This was not intended to be, and does not pretend to be, a statistically valid survey, but it is a reflection of 81 responses from practitioners around the world involved in arbitration as arbitrators or counsel.

Fifty-five survey responders out of the 81, or 68%, checked off the "yes" box and reported that they had experienced what they felt were guerrilla tactics and provided an example. It is significant that 32% of the survey responders, including many well known international arbitration practitioners, reported that they had not seen such tactics utilized. While this is undoubtedly a result of a different definition being applied to the term guerrilla tactics by different people, perceptions matter, and that 32% number is worthy of note. It was also my sense from reading the many responses, that those who said they had encountered such tactics, had seen them only rarely. The international arbitration bar is perhaps, generally speaking, a quite civilized and ethical bar. Indeed, several respondents volunteered that they saw guerrilla tactics employed to a much greater extent in litigation.

A Fine Line: How to Counter – and Employ Guerrilla Tactics in International Arbitration & Litigation, Nov. 12-13, 2010.

[6] *See* THE COLUMBIA ENCYCLOPEDIA (6th ed. 2008), *available at* http://www.encyclopedia.com/topic/guerrilla_warfare.aspx.

However, attention must be paid to the fact that 68% reported that they had been subjected to or had witnessed guerrilla tactics. Moreover, the use of guerrilla tactics appears to be on the increase. In the past months we have seen reports of the arrest of a successful claimant by a host state,[7] fraudulent overstatement by over one billion dollars in a balance sheet submitted in arbitration,[8] death threats against witnesses,[9] and ex parte meetings of counsel for plaintiffs with the court-appointed "independent" expert to plan and write the expert's report.[10] One must, accordingly, conclude that arbitration tactics are an issue that requires serious exploration.

This article addresses (1) the nature of the activities that might be classified as guerrilla tactics; (2) the recent proposals to guide the ethics of counsel in international arbitration; and (3) the responses from bar associations and institutions.

I. THE SURVEY RESULTS

The results of the survey are best analyzed by breaking down the responses into categories and grouping the behaviors that respondents considered to be guerrilla tactics.

(i) *Document Production/Disclosure*: 19 out of 81 of respondents. Examples: Many respondents to the survey criticized the excessive use of the "leave no stone unturned" approach. Concomitantly, many respondents complained about another practice which consists of producing the requested documents at the last minute and/or burying the relevant documents in a pile of irrelevant ones, often in the midst of many multiple copies of the same document. One complained of the pages of a critical document spread out one page at a time through 18 boxes.

(ii) *Delay Tactics*: 9 out of 81 of respondents. Examples: Instances of counsel advancing client or personal health concerns, when they were in fact perfectly healthy, or of counsel failing to truthfully represent the client's availability for hearing appearances, were recurrent in the survey.

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[7] *See* Sebastian Perry, *ICSID Claimant Behind Bars on Bribery Charge*, GLOBAL ARB. REV. (Oct. 18, 2010).

[8] *See* Venture Global Engineering v. Satyam Computer Services Ltd., No. 9238, August 11, 2010 (Sup. Ct. India).

[9] *See* Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd., 2009 CanLII 51197 (Ont. S.C.), *available at* http://www.canlii.org/en/on/onsc/doc/2009/ 2009canlii51197/2009canlii51197.html.

[10] *See* In re Application of Chevron Corporation et al., 709 F.Supp.2d 283 (S.D.N.Y. 2010) (while this concerns a court action in Ecuador, there is a companion arbitration proceeding; in addition to the conduct cited, the senior executives of the claimant and two of the claimant's lawyers were arrested during the court and arbitration proceedings. It must be noted that this case has an extensive subsequent and related history and the facts are hotly contested).

(iii) *Creating Conflicts*: 7 out of 81 of respondents. Examples: Several respondents reported instances of changing counsel during the arbitration process to create a conflict with an arbitrator. Another reported a motion to disqualify opposing counsel right at the outset of the evidentiary hearing for alleged conflict of interest.

(iv) *Frivolous Challenges of the Arbitrators*: 8 out of 81 of respondents. Examples: Respondents reported frivolous challenges to arbitrators such as on the ground that the arbitrator and one of the counsel attended a class together 25 years ago, or because the arbitrator and the opposing counsel share a bar association professional affiliation. Others reported that, after having sent abusive and inflammatory communications to the arbitrator or after having challenged the arbitrator, counsel then challenged the arbitrator for bias.

(v) *Last-Minute Surprise*: 18 out of 81 of respondents. Examples: A significant number of practitioners who answered the survey recalled some form of last-minute surprise. Introduction of important arguments or affidavits for the first time on the eve of the hearing, or during the hearing or in reply (or post-hearing) submissions; ignoring pre-hearing deadlines for producing documents or witnesses and just showing up at the hearing with the evidence or a witness without any notice; last minute changes of claim; production of documents long sought on the eve of the hearing and the like were tactics frequently reported to destabilize the opposing counsel.

(vi) *Anti-arbitration Injunction and other Approaches to Courts*: 12 out of 81 of respondents. Examples: Respondents reported filings of frivolous anti-arbitration injunctions; the initiation of criminal proceedings against party officers or counsel; litigation leading to fines imposed on the lawyers for the other side if they appeared at the hearing and a fraudulent insolvency filing.

(vii) *Ex-parte Communications*: 5 out of 81 of respondents. Example: A party had secured an anti-arbitration injunction. The party then sent a letter (ex parte) directly to the arbitrator appointed by the opposing party, instructing him not to proceed with the arbitration or he would face contempt proceedings before domestic courts. Other ex parte communications with the arbitrators were reported.

(viii) *Witness Tampering*: 7 out of 81 of respondents. Examples: The respondent party threatened a third-party witness that "he would never work again" if he came to testify in favor of the claimant. Another practitioner was involved in a case delayed for two years because opposing counsel was successful in scaring successive experts appointed in the case, filing different petitions against them before their professional body.

(ix) *Lack of Respect, Courtesy towards Tribunal and Opposing Counsel*: 17 out of 81 of respondents. Examples: Abusing the arbitrators after a bifurcated hearing on liability in order to try to keep down the amount of damages on the quantum hearing; repeatedly complaining to the tribunal of a deprivation of due process every time there is a denial of an application; hyper-aggressive behavior asking for reconsideration of every ruling not in their favor; disparaging adversaries; constantly alerting the arbitrators that they may be overturned on "appeal" unless they are given access to certain information. Several reported abusive behavior towards opposing counsel.

(x) *Frustrating an Orderly and Fair Hearing*: 25 out of 81 of respondents. Examples: Respondents reported many instances of such conduct: "Running out the clock;" raising (too) many objections in order to fluster opposing counsel; pretending to have documents in hand to scare witnesses into testifying as desired but actually holding blank pieces of paper; incorrect translations of pivotal documents; putting witnesses on the witness list whom counsel had no intention of calling to confuse the adversary and cover up who the real witnesses were; withdrawing the claim a day before the hearing, requiring a change in the order of proof and requiring counterclaimant to muster its case overnight; showing up at the hearing with boxes that appeared to be full of exhibits to intimidate the opposing party that were in fact empty; baiting witnesses and calling them liars; insisting upon the existence of supporting documentation but never submitting any.[11]

Which of these would the reader classify as guerilla tactics? All would agree that the tactics identified present different level of reprehensibility.[12] Some are not only unethical, but unlawful acts. Others may not amount to criminal behavior but run counter to ethics rules. Yet other strategies serve to delay the proceedings, confer unfair advantage or obstruct an orderly hearing. Finally, some may reflect cultural differences and may constitute completely acceptable behavior in some jurisdictions. Are these tactics acceptable and appropriate behavior in the vigorous representation of one's client? Is all fair in love and war? Or should guerrilla-like tactics, too, be addressed in any new ethical code for arbitration counsel in international arbitration?

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[11] The number of respondents to all categories adds up to more than the 55 who stated that they had been subjected to guerrilla tactics because some respondents gave more than one example.

[12] *See* Horvath, *supra* note 4, at 297 ("Guerrilla tactics range from the completely illegal and inappropriate, such as witness intimidation and phone tapping, to the merely sly, such as ambushing the opposing party with new evidence or ex-parte conversations with arbitrators").

II. HISTORY OF ETHICS PROPOSALS

While the topic of ethical standards for arbitrators in international arbitration has been the subject of codes and guidelines, major international arbitration providers are silent as to the question of ethics for counsel.[13] It should be noted that a few guidelines exist nevertheless,[14] including the *IBA Rules of Ethics for International Arbitrators (1986)*,[15] the *Union Internationale des Avocats "Turin Principles" of 2005*,[16] *IBA General Principles of the Legal Profession (2006)*,[17] and the *Code of Conduct for European Lawyers*, prepared by the Council of Bars and Law Societies of Europe ("CCBE Code") (2006).[18] However, these efforts do not provide meaningful guidance because they are either not specific to international arbitration, or do not address counsel conduct.

Many are of the view that this "ethical no-man's land,"[19] is unsatisfactory. Consequently, while some commentators believe that there is no workable solution to this problem,[20] an increasing number, on the contrary, believe that the

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[13] *See* Benson, *supra* note 3, at 78 ("[T]here are no 'rules of conduct' applied generally to lawyers before an international arbitration tribunal. The major institutional rules of arbitration, including the ICC and LCIA Rules, are silent as to the conduct of a party's legal representative" (quoting V.V. Veeder, *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18 ARB. INT'L 431, 433 (2002)).

[14] For a review of these ethical codes, see Catherine A. Rogers, *The Ethics of Advocacy in International Arbitration*, Penn State Univ., Dickinson Sch. Of Law, Legal Studies Research Paper No. 18-2010, at 2-3 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1559012 [hereinafter Rogers, *Ethics of Advocacy*]; *see also* Laurel S. Terry et al., *Transnational Legal Practice*, 42 INT'L LAWYER 833 (2008).

[15] *See* International Bar Association, RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS (1986) (providing arbitrators with guidelines on how to behave in international arbitration; these are very broad guidelines, and more importantly, are specific to arbitrators, not counsel), *available at* www.int-bar.org/images/downloads/pubs/Ethics_arbitrators.pdf.

[16] *See* Union Internationale des Avocats *"Turin Principles" of 2005*, (a general initiative, not arbitration specific), *available at* http://www.abanet.org/cpr/gats/misc.html.

[17] *See* International Bar Association, IBA GENERAL PRINCIPLES OF THE LEGAL PROFESSION (2006) (a general initiative, not arbitration specific), *available at* http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx.

[18] *See* Council of Bars and Law Societies of Europe, CODE OF CONDUCT FOR EUROPEAN LAWYERS, *available at* http://www.ccbe.eu/index.php?id=32&L=0 (few provisions relating to conduct in arbitration).

[19] Rogers, *Ethics of Advocacy*, *supra* note 14, at 1.

[20] *See* authorities cited in Rogers, *Ethics of Advocacy*, *supra* note 14, at n. 28. *See also* International Bar Association, NEWSLETTER OF THE INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION, Vol. 14 No. 1, at 11 (Mar. 2009) (recounting Audley Sheppard's opposition to the adoption of a global code, on the ground that it would be impossible to obtain consensus on rules that go beyond general statements of principle because local standards are sometimes fundamentally inconsistent with one another and cannot be

adoption of a code of ethics specific to the conduct of counsel in international arbitration is long overdue.

Michael Reisman and Detlev Vagts recognized the need for uniform ethical guidelines applicable to counsel in international arbitration long ago.[21] Jan Paulsson proposed the idea in 1992.[22] But only recently have "a number of other important scholars added their voices . . . [and the topic become] increasingly popular at international arbitration conferences."[23]

In reviewing this subject one must focus on what evils are sought to be corrected. A new ethics code can address two different areas of concern. The first are the tactics, which under some national codes or rules of professional conduct are unethical, while under other codes are not – a tension referred to as the double deontology problem. Where such conflicts exist counsel are faced with uncertainty as to which ethical code governs, while the parties whose counsel must answer to the more restrictive ethical mandate are at a disadvantage. The most familiar examples used to illustrate these significant divergences include witness preparation, disclosure, and ex parte communications.[24]

The issues raised by conflicting ethical norms and the lack of any overarching ethical code for international arbitration were discussed by Doak Bishop in his keynote address at the ICCA conference in 2010. He concluded that "there is a current, compelling need for the development of a Code of Ethics in International Arbitration and for the adaptation of tribunals and institutions to the adoption of such a Code."[25]

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reconciled). Those presenting at the ICC-YAF roundtable on September 29, 2010 expressed little enthusiasm for an international ethics code for counsel in international arbitration and speakers were of the view that the promulgation of such a code would undermine the effectiveness of existing codes and would represent a step backwards.

[21] *See* Rogers, *Ethics of Advocacy*, *supra* note 14, at 2, *citing* W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 116-17 (1971); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250, 250 (1996) (describing problems in the Iran Claims Tribunal caused by lack of ethical consensus among attorneys).

[22] *See* Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT'L ARB. 214 (1992).

[23] Rogers, *Ethics of Advocacy*, *supra* note 14, at 2.

[24] *Id.* at 3-5. For a discussion of several other areas of difference, *see* Benson, *supra* note 3, at 82-85 (also identifying as areas of difference lawyer communication with employees of an adverse corporate party, statements of fact to the tribunal known to be unsupported by the evidence, the obligation to advise the court of adverse legal authority, the nature of counsel's obligation to assure production of responsive documents, obligation to report perjury). *See also* Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT'L L. 1035, 1038-39 (2009) [hereinafter Rogers, *Lawyers Without Borders*].

[25] Doak Bishop, ICCA, Keynote Address: Advocacy and Ethics in International Arbitration, at 1 (May 26, 2010) [hereinafter Bishop, Keynote Address], *available at* http://www.arbitration-icca.org/conferences-and-congresses/ICCA_RIO_2010/ICCA_RIO_2010_Doak_Bishop.html.

Indeed, practitioners should welcome the promulgation of such a code as it would clarify their obligations: without such an overriding ethical code there is no clear answer to the question of which ethical obligations are applicable – the ethical code of the home jurisdiction of counsel or the seat of the arbitration or some other law based on a conflicts of law analysis. Or are there no ethical obligations at all in this international no-man's land? An internationally applicable code would level the playing field; counsel would know what both he or she could do or could not do as well what ethical obligations adversary counsel would have to adhere to;[26] and clients would more easily understand why certain actions could or could not be taken.

The second area of concern which the ethical codes can address is one directed at assuring a fair, efficient and honorable process. Many of the guerrilla tactics described above do not fall technically afoul of any rules traditionally thought of as governing ethics. This is a time of concern about the disenchantment of many corporate users with arbitration because it no longer delivers on its earlier promise of low cost and speed, attributes still sought for many cases. The promulgation of a code of conduct with provisions that not only resolve problems of conflicting ethical responsibilities but also foster cooperation and efficiency may serve not only to return civility and enhance fairness but also return arbitration to the fulfillment of its promise.

III. RECENT ETHICS PROPOSALS

While numerous efforts have been made recently to address the issues arising out of counsel conduct in international arbitration, this article discusses the three leading new proposed sets of ethical rules and guidelines for counsel:

(i) *The International Code of Ethics for Lawyers*[27]

This proposed code adopts an approach of positing simple, elegant and essential rules in a short-form expression of each ethical duty. It is annotated to explain each proposed code provision, and cross references are provided to prior ethical codes where applicable.

(ii) *The Hague Principles on Ethical Standards*[28]

These principles, the work product of the International Law Association and developed by a working group of approximately 30 experts in the

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[26] It must be noted that there is a serious question as to whether adherence to an international ethics code for arbitration counsel that is not recognized with a provision in counsel's home jurisdiction really protects counsel from being in violation of the ethical code of the home jurisdiction. *See generally* discussion in Rogers, *Lawyers Without Borders*, *supra* note 24.

[27] *See* Bishop & Stevens, *supra* note 2.

[28] *See* Hague Principles, *supra* note 2.

field, provides another proposed set of ethical rules, more specific in some respects and more general in others.

(iii) *The Checklist of Ethical Standards for Counsel in International Arbitration*[29]

This proposal is presented in the form of a checklist to be reviewed at the start of the arbitration by all parties and is subject to the agreement of the parties. Any disagreements would be brought to the arbitrators for resolution. It would serve to level the playing field, as all would agree to the rules governing conduct for that arbitration. It would also serve to curb many of the guerrilla tactics described above, as counsel would be hard pressed not to agree to the "general conduct" provisions included, knowing that the arbitrators would learn of their unwillingness to abide by such mandates as not taking any action merely to delay, cause undue burden or harass another. The checklist is intended to empower the arbitrators to impose sanctions for violations of any agreed standards.

These three recent drafts introduce sets of rules and principles designed to further similar purposes:

(1) *Preserving the Legitimacy of the International Arbitration Process*

The large amounts at stake in modern arbitrations, the lack of transparency of the process, and the involvement of states as parties leading to greater public scrutiny, have created "a certain instability in the system that could result in a future crisis of confidence."[30] The proposed sets of rules aim to remedy that looming crisis and renew the confidence of arbitration users in the arbitral system.[31]

(2) *Promoting Procedural Fairness*

As Detlev Vagts explains, "[I]t would not be workable to allow the counsel for opposing sides in a civil case to enter the courtroom subject to different rules. . . . It would not do to prohibit one lawyer from a civil-law jurisdiction from interviewing a witness before the trial while the American lawyer would not only

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[29] *See* Benson, *supra* note 3.

[30] Bishop Keynote Address, *supra* note 25, at 11.

[31] *See* Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals, in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 488, 491 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) ("The need for uniform rules concerning counsel conduct before international tribunals stems not only from a need to ensure that counsel and parties operate on a *level playing field.* At issue may ultimately be the *legitimacy of the international arbitral system* as a whole.") (emphasis added).

be allowed to do so but would be guilty of professional negligence if he or she presented an un-interviewed witness."[32] While Article 4(3) of the IBA Rules for the Taking of Evidence attempts to reconcile this divergence, there are many other differences which continue to be problematic.

The proposed standards of ethics establish rules and guidelines to ensure a level playing field, where lawyers, irrespective of their home jurisdiction, are subject to the same rules. The rules tackle the most vexing procedural issues, such as witness communication, ex parte communication, and scope of disclosure.

(3) *Fostering an Atmosphere of Cooperation, Courtesy and Respect in Arbitral Proceedings*

The proposed rules also address the issue of civility in arbitral proceeding by policing counsel conduct towards the arbitral tribunal and between counsel.

In addition, these proposals also avoid the potential pitfall of adopting a "one-size-fits-all" approach. On the contrary, these rules encourage cooperation, giving the flexibility needed to accommodate procedural variations and modifications by the parties.

While all of these proposals generally seek to address the same problems, they differ in approach. The Benson Checklist is a radically different approach and can be used immediately without waiting for the resolution of the discussion of ethical codes, a process that will surely take years. It might be worthwhile for a few tribunals to experiment with using the checklist in an appropriate case. Reports on the success of the process, or its lack of success, could be shared with the arbitration community.

Careful thought should be given to how specific any new rules should be and cull from the best of the proposals made to date and refine and improve on them. Both the Bishop & Stevens Code and the Hague Principles provide an excellent foundation for the discussions that must follow. These authors take the position that unless the views of those who gather to assess an international code of ethics for arbitration counsel compel a conclusion that only a simple, short version will gain acceptance, more detailed proscriptions would be preferable. This is not love or war. Measures should be taken to foster a process that is as fair and efficient as possible. Specific guidance and the imposition of clearly articulated duties for counsel would do more to curb guerrilla tactics than loose general mandates. The final provisions should be vetted against the kinds of guerrilla tactics described above and a deliberate decision made as to which ones should be curbed and how best to word the new provisions to accomplish that goal.

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[32] Detlev Vagts, *Professional Responsibility in Transborder Practice· Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 690 (2000).

IV. WHO AND HOW?

Who has the legitimacy to draft a universal code of ethics, and who could enforce a binding code of ethics are important questions. With regard to the drafting of such a code, Doak Bishop suggests that international bar associations, such as the ICCA or the IBA "appoint a working group of lawyers from different legal systems and geographical areas, including representatives of the major arbitral institutions, to consider [their] proposal, perhaps along with others, with a view toward building a consensus around a Code of Ethics that will have widespread support and can be adopted."[33] He then suggests "the major arbitral institutions consider incorporating this Code into their Rules by reference."[34] These are excellent suggestions.

With regard to the enforcement of such a code, as between courts, tribunals and arbitral institutions, Doak Bishop suggests that arbitral institutions adopt that role.[35] Cyrus Benson, however, suggests that tribunals should enforce these provisions, and if necessary impose sanctions.[36]

Incorporation by reference of ethical rules by the arbitral institutions would be useful as an affirmation by parties of their acceptance of those ethical norms. It would enable counsel to move forward on the same footing as their adversaries and would give the arbitrators a yardstick against which to measure counsel's conduct. Addressing these issues with institutional rules has precedent. For example, the ICDR addresses some of the concerns with its provisions; Article 7 of the International Dispute Resolution Procedures bars ex parte communications with the chair altogether and limits communications with the party-appointed arbitrators to the time before the selection of the chair and strictly limits the substance of those communications.[37] The ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which will be incorporated into the ICDR rules when next amended, both seeks to put the parties on the same footing with respect to ethics and privilege and controls much of the document disclosure-related guerrilla tactics described above by establishing a limited scope for disclosure and empowering the arbitrator to exercise firm control.[38]

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[33] Bishop Keynote Address, *supra* note 25, at 15.

[34] *Id.*

[35] *Id.* at 14.

[36] *See* Benson, *supra* note 3, at 89 ("It is intended that violation of mandatory resolution (to the extent adopted) be subject to sanction by the tribunal").

[37] ICDR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, Art. 7, *available at* http://www.adr.org.

[38] *See* ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, *available at* http://www.adr.org.

But the institutions seem ill suited to accept the enforcement role.[39] The arbitrators can impose sanctions, where authorized, in the arbitral award; the institutions can just send a bill. While the nature of the sanctions that would be appropriate merits further consideration, it could include such measures as the drawing of negative inferences where such an inference would logically flow from the conduct in question or the imposition of monetary sanctions. While this is not a task arbitrators relish, they are in the best position to ensure a fair process.

V. OTHER INITIATIVES

There are several other related initiatives that are worth noting:

(1) *The IBA– Counsel Ethics in International Arbitration Survey*

The IBA Survey is intended to help the Task Force on Counsel Conduct in International Arbitration to investigate "the different and often contrasting ethical and cultural norms, standards and disciplinary rules that may apply to counsel in international arbitrations."[40] The Task Force's assessment was that "the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protections of fairness and equality of treatment and the integrity of international arbitration proceedings."[41]

The IBA Survey comprehensively explores the many areas of double deontology, inquires as to whether the responder believes it would be helpful to have guidance on specific issues, and asks how guidance should be provided. The survey deals for the most part with double deontology issues and touches only lightly on other aspects of guerrilla tactics with an inquiry about document disclosure issues. Nonetheless, the results of the IBA Survey will undoubtedly play an important role in determining the international arbitration community's next steps on these important questions.

(2) *The ABA Ethics 20/20 Commission*

The ABA Ethics Commission[42] is reviewing lawyer ethics rules and regulation in the context of a global legal services marketplace. It has not as yet addressed any arbitration-specific problems. The subject of the lack of consistency in ethical codes for counsel engaged in cross-border arbitration was presented for consideration and was reserved for future discussion.

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[39] Domestic courts or local bar associations would not be suitable for enforcement as one of the purposes of international arbitration is to avoid reliance on local courts and local processes.

[40] IBA Survey, *supra* note 1.

[41] *Id.*

[42] For information about the ABA Ethics 20/20 initiative, *see* http://www.americanbar.org.

(3) *The Council of Bars and Law Societies of Europe*

The CCBE had established a working group to prepare recommendations/ guidelines for the use of European lawyers in arbitration but has terminated this initiative.

(4) *The Revisions to the ICC Rules of Arbitration*

The revised arbitration rules issued by the ICC in 2011[43] may serve to limit many of the guerilla tactics identified above. The new rule with respect to the allocation of costs by the arbitrators may prove to be a powerful tool to ensure appropriate conduct. The new ICC Rules provide that:

(i) The arbitral tribunal and the parties are to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[44]

(ii) "In making the decision as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."[45]

VI. CONCLUSION

Seize the moment. The current attention to addressing counsel's ethical dilemma when subjected to conflicting or inconsistent ethical obligations and to assuring a fair and level playing field creates the opportunity to expand the ethical duties or standards of counsel in international arbitration to curb a broad range of guerrilla tactics. The inclusion of such standards would fill the vacuum which counsel happily fill when determined to win and willing to engage in what Stephan Wilske labels the "black arts." The elimination of such tactics would not only reduce cost and expedite the arbitration but would, like the leveling of the other ethical duties, also serve to afford parties a more equitable process. It would also help to preserve arbitration as a dispute resolution mechanism that is respected and utilized with enthusiasm.

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[43] ICC ARBITRATION RULES, *in force as of* Jan. 1, 2012.
[44] *Id.* Art. 22(1).
[45] *Id.* Art. 37(5).

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THE ARBITRATOR SURVEY – PRACTICES, PREFERENCES AND CHANGES ON THE HORIZON

*Edna Sussman**

Arbitration counsel want to win. Understanding how arbitrators think, what they favor, how they make decisions, and how they work together can guide counsel in devising their strategy and developing their presentations. For their part, arbitrators want to provide a fair hearing that meets the parties' needs. Knowing how other arbitrators handle various procedural aspects, what influences their thinking, and what they prefer can inform arbitrators in conducting their own arbitrations most effectively.

Several excellent works have been published in recent years which approach the subject of arbitrator decision-making from the perspective and mindset of many notable arbitration practitioners.[1] However, empirical data based on a pool of arbitrator responses is scarce. In order to inform the arbitration community and advance the knowledge base on arbitrator preferences and decision-making, I conducted a survey. The survey was distributed through various listservs both in the U.S. and to colleagues around the world and drew 401 responses.[2]

This article reports and comments on the survey responses, grouped into six sections: the constitution of the tribunal, fundamentals, narrowing the issues and preliminary views, deliberations, the award, and mediation. It is hoped that the discussion will aid counsel and arbitrators in the conduct of arbitrations and

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[1] *See, e.g.*, INSIDE THE BLACK BOX: HOW TRIBUNALS OPERATE AND REACH DECISIONS, ASA SPECIAL SERIES NO. 42 (Bernhard Berger & Michael Schneider eds., 2014); UGO DRAETTA, BEHIND THE SCENES IN INTERNATIONAL ARBITRATION (2011).

[2] The survey was disseminated from October 2012 to February 2013 by e-mail to several arbitration listservs. Of the 401 respondents, 79% were from the United States, 12% were from Europe, 5% were from North America outside the United States, and the remainder were from Asia, Latin America and Africa. Over 55% of the respondents had served as an arbitrator in over 50 cases, while 20% had served as an arbitrator on between 21 and 50 cases. Seventy-eight percent of the respondents were male and 22% were female. Forty-two percent were born between 1941 and 1950, 20% were born in 1940 or before and the remainder were born after 1951. While this sample may not be completely representative of the overall population of arbitrators, this survey provides a useful benchmark for our review.

provoke consideration of ways to improve the process in the never-ending search for excellence in arbitration.

I. CONSTITUTION OF THE TRIBUNAL

Which do you prefer: sitting in a tribunal with three arbitrators or sitting as a sole arbitrator?
Sole 26.9%
Panel 73.1%

The vast majority of arbitrators prefer sitting with their colleagues. Sitting on a tribunal with others affords the arbitrators the opportunity to discuss difficult legal issues, consider collective reactions to the evidence, hear different insights and gain the benefit of different perspectives, cultural and legal backgrounds and experiences. While the literature on "group think" does not uniformly come to the conclusion that decisions by the group are better than decisions by the individual, noted commentators have concluded that three adjudicators are better than one and therefore "arbitration might yield more accurate determinations than bench trials."[3] So one could similarly conclude that a tribunal is more likely to provide a more accurate outcome than a single arbitrator. Thus, while it may be tempting to entrust a case to one arbitrator to reduce cost and time, and that may in many cases be the right choice, it is a choice to be made after careful consideration. Since the choice as to the number of arbitrators is commonly dictated by the arbitration agreement, care should be taken at the contract drafting stage to analyze the nature of the disputes that might arise, the likely size of any claim, the importance and complexity of the issues that might be decided, the need for different skill sets and expertise on the part of the decision-makers, and the desire for sensitivity to different legal and cultural perspectives.

If sitting on an arbitral panel do you prefer sitting as chair or as a co-arbitrator?
Chair 81.3%
Co-arbitrator 18.7%

Arbitrators are a self-assured lot. Serving as chair enables the arbitrator to exercise considerable control over the process and often to also have significant influence over the outcome. It is that increased control over the process and the ultimate decision that causes the overwhelming majority of arbitrators to state that they prefer to serve as chair (or president) of the tribunal. Arbitrators take the task entrusted to them by the parties seriously as the survey demonstrates, and prefer

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[3] Chris Guthrie, *Misjudging,* 7 NEV. L. J. 420, 453 (2007); *see also* Richard C. Waites & James E. Lawrence, *Psychological Dynamics in International Arbitration, in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 69, 116 (Doak Bishop & Edward G. Kehoe eds., 2010).

the role that increases their ability to ensure that the arbitration is conducted properly, as they would conduct it ,and an outcome achieved that is in accordance with their view of the law and the facts. The survey response, with the overwhelming majority stating that they prefer to chair, suggests that arbitrators appreciate the responsibility with which they are being entrusted and are not looking for what for some may look like an easier ride, relying on the chair to do much of the heavy lifting.

II. FUNDAMENTALS

Do you regard yourself as influenced more by the facts or the law in making your decision?

Law	*3.5%*
Facts	*25.3%*
Both equally	*71.2%*

The more heavily weighted reliance on the facts reflected by the survey responses confirms the emphasis given to the advice that counsel must develop a sympathetic "story" that will resonate with the arbitrators if they want to prevail. The literature on persuasion in the law is evolving from the traditional model based solely on informal or formal models of logic to incorporate the "deeper" logic of narrative structures[4] and provides the theoretical underpinning for this advocacy advice. Narrative, the scholars say, is the "natural mode for understanding human experience,"[5] thus recognizing the nature of the workings of all human minds. Humans are hardwired to think in story terms, making storytelling an effective type of narrative reasoning for legal argumentation.[6] "The law always begins in story: usually in the story the client tells . . . It ends in story, too, with the decision by a court or jury . . . about what happened and what it means."[7]

In recent years, the Applied Legal Storytelling movement has focused on how storytelling, or "narrative theory," affects what lawyers and judges do in actual cases.[8] Narrative reasoning presents the arguments that motivate the decision-maker to want to rule in the party's favor. It is client-centered and fact-oriented. It

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[4] Christopher Rideout, *Storytelling, Narrative Rationality and Legal Persuasion,* 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 60 (2008). *See also* Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules,* 11 LEGAL COMMUNICATION AND RHETORIC: JALWD 51 (Fall 2014).

[5] Rideout, *supra* note 4, at 57.

[6] Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions,* 9 LEGAL COMMUNICATION AND RHETORIC: JALWD 99, 102 (Fall 2012).

[7] Rideout, *supra* note 4, at 53, *quoting* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 168 (1985).

[8] Chestek, *supra* note 6, at 99.

is a motivating argument as opposed to a justifying argument.[9] Scholars have described three features (or properties) of narratives that can be psychologically persuasive: narrative coherence (how well the parts of the story fit together, or narrative probability), narrative correspondence (what the decision-maker knows typically happens in the world and not contradicting that knowledge), and narrative fidelity (the perception that the story rings true with what the decision-maker knows to be true).[10] Counsel would do well to devote considerable attention to the development of the "story" even if they believe they have a strong legal position and keep these three properties in mind in organizing the "story," bearing in mind the particular background and life experiences of the arbitrators appointed in the case.

But the story must fit the legal theory. As Professor Chestek aptly summarized in his discussion of narrative reasoning: "[P]ersuasion is like a double helix: one strand of logos wound tightly with a strand of narrative reasoning. But for this technique to create a viable 'DNA' molecule, the two strands must complement each other in a natural way. If they don't fit together well, the persuasion won't work."[11]

Which do you find more difficult to decide, liability or quantum of damages?
Liability *18.6%*
Damages *43.7%*
Both the same *37.7%*

Most arbitrations are about damages. How much will the claimant or counterclaimant be awarded? As the survey response confirms, this central issue, the determination of damages, can be an enormously complicated process and arbitrators often find it more difficult to determine the quantum of damages than to determine that damages should be awarded. Forty-four percent of the arbitrators surveyed said that quantifying damages was more difficult than assessing liability. Only 19% found liability more difficult.

The decision on damages may require consideration of a host of issues.[12] What standard should be applied to the proof? Are there contractual limitations on the damages that may be awarded? Are damages limited by the applicable law?

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[9] *Id.* at 102.

[10] *See* Rideout, *supra* note 4, for an extensive discussion of the three properties.

[11] Chestek, *supra* note 6, at 129.

[12] For discussions of damages in arbitration, *see, e.g.,* Hilary Heilbron, *Assessing Damages in International Arbitration: Practical Considerations, in* THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 857 (Larry Newman & Richard Hill eds., 3d ed. 2014); MARK KANTOR, VALUATION IN ARBITRATION (2008); HERFRIED WÖSS, ADRIANA SAN ROMAN RIVERA, PABLO T. SPILLER & SANTIAGO DELLEPIANE, DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS (2014). The need for more discussion of the damages issue led to the launching at the end of 2014 of a new *Journal of Damages in International Arbitration* devoted to the subject.

What law governs? Has the claimant demonstrated causation? Has the respondent mitigated sufficiently? If comparative negligence is applicable, how should damages be allocated? Has corruption defeated claimant's right to damages? If there are several respondents, who should be held responsible and for how much? Should there be an award of costs and if so how should it be allocated? What interest rate should be applied and on what basis? And all these and other questions may present themselves before one even considers the unique complexities presented by the damages question. The damages analysis often requires valuations and projections into the future with all of its uncertainties and the application of metrics that can be particularly difficult to assess. What is the most convincing vision of the "but-for" world? What discount rate should be applied? Which multiple is the right one to use? These and many other questions often lead to presentations of complex calculations and computer models with competing experts whose testimony and analysis must be assessed.

While having the experts confer in advance to narrow the issues and hot-tubbing (having them appear at the hearing at the same time) can be of great assistance to the tribunal, the fact remains that damages are often more difficult to assess than liability. Counsel should make every effort to make the presentation as straightforward as possible while still giving the tribunal all the building blocks it needs to understand the analysis. Counsel should invite the tribunal to ask questions and provide the tribunal with whatever tools are necessary to enable it to reach a sound result. The tribunal should make sure it understands all of the presentations and ask for whatever else it needs to make a well grounded decision. The tribunal may, *inter alia,* ask for additional explanations or analysis, request the parties to calculate damages based on specified factual findings or a variety of factual findings, or, in appropriate cases, retain a tribunal expert or request a computer model that can be manipulated by the tribunal.

Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum (rather than take the evidence and give it such weight as you deem appropriate)?

Always	*1.0%*
Usually (i.e., around 75% of the time)	*5.1%*
Often (i.e., around 50% of the time)	*4.8%*
Sometimes (i.e., around 25% of the time)	*55.2%*
Never	*33.9%*

Arbitrators tend not to exclude evidence. As the survey showed, 34% never excluded evidence that would otherwise be inadmissible in court and 55% excluded such evidence only 25% of the time. Since there is essentially no appeal, arbitrators have been especially careful to ensure that not only are the parties afforded a fair hearing but that the parties perceive it to be fair. In addition, arbitrators may feel that they could be jeopardizing the award and risking a

challenge for failure to afford a party a full and fair opportunity to present its case if they exclude evidence. While case law, at least in the United States, has confirmed awards that were challenged on this basis because they were found not to impair the "fundamental fairness" of the proceeding,[13] if the evidence is not time-consuming and does not cause the parties to incur meaningful additional costs, admitting such evidence may well be viewed as creating no harm and averting a challenge, which in and of itself costs time and money. Arbitrators are also comfortable that they can appropriately weigh the evidence and discard evidence that is not trustworthy.

While the current practice may well be the right one, increasing awareness of unconscious influences may begin to shift counsel and arbitrator conduct somewhat.[14] Persuasive studies have been conducted demonstrating that inadmissible evidence can unconsciously and significantly influence decision-making.[15] Will this new awareness cause arbitrators to be more discriminating in what evidence they admit? Will counsel, as they become more cognizant of these influences, take additional steps to avoid the potential impact of such evidence? It seems likely that as arbitration conferences and arbitration publications heighten awareness of the impact of the unconscious,[16] measures will be taken by both arbitrators and counsel to ensure that those impacts are taken into consideration in assessing the evidence.

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[13] *See, e.g.*, LJL 33rd Street Assocs. LLC v. Pitcairn Props. Inc., 725 F.3d 184 (2d Cir. 2013); Doral Financial Corp. v. Garcia-Velez, 725 F.3d 27 (1st Cir. 2013).

[14] For a discussion of the unconscious psychological influences in arbitration, *see, e.g.,* Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 12 AM. REV. INT'L ARB. 487 (2013); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*, 6(4) WORLD ARB. & MED. REV. 801 (2012).

[15] Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1279-81 (2005). (For example, in one experiment half of the judges saw a document claimed to be protected by attorney-client privilege, which was devastating to plaintiff's case. Seventy-five per cent of those judges ruled that the communication was privileged and excluded it. Half of the judges, who constituted the control group, did not see the document. Of the judges who did not see the document, 55% found in favor of plaintiff, while of the judges who saw the document and ruled that it was privileged, 29% found for the plaintiff.).

[16] *E.g.,* 27th Annual ITA workshop entitled *Subconscious Influences in International Arbitration*, sponsored by the Institute for Transnational Arbitration in June of 2015; the forthcoming interdisciplinary book edited by Tony Cole of Brunel Law School on The Roles of Psychology in International Arbitration, both of which follow a series of conferences and programs in recent years on the subject.

III. NARROWING THE ISSUES AND PRELIMINARY VIEWS

Apart from decisions on jurisdiction or damages, how many times have you ruled in favor of a moving party on a preliminary issue that has terminated the case or eliminated a significant claim or defense?

Never	*21.4%*
0-5	*48.7%*
6-10	*21.7%*
11-20	*5.1%*
21-30	*2.3%*
31-40	*0.5%*
more than 40	*0.3%*

The survey results reflect the historical reluctance to grant dispositive motions. Seventy percent of the respondents ruled in favor of the moving party on a preliminary issue that terminated the case or eliminated a significant claim or defense between 0 and 5 times. Notwithstanding the fact that paragraph 3 of the preamble to the IBA Rules on the Taking of Evidence provides that "each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate," dispositive motions on claims and defenses have not traditionally found frequent favor with tribunals. Given the sophistication of the respondent pool, this appears to be an accurate reflection of arbitrator practice. In recent years, however, much attention has been devoted to time and cost in arbitration, users have sought greater utilization of such motions which serve to abbreviate proceedings, and commentators have called for an expanded use of dispositive motions.[17]

While U.S. courts have long recognized the arbitrator's inherent authority to dismiss a claim based on a dispositive motion ruling,[18] the most recent amendments to the American Arbitration Association Commercial Rules added Rule 33, which expressly grants authority to the arbitrator to make rulings on dispositive motions, albeit only if "the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." The rule strikes a balance between considering motions likely to be meritorious but not those which would result only in additional cost and time. Article 20(3) of the recently amended ICDR Rules provides that "the tribunal may direct the parties to focus their presentation on issues whose resolution could dispose of all or part of the case." Time will tell whether the practice gains momentum, but the current pressures to make arbitration more efficient and more responsive to user preferences suggests that the same question posed five years from now may lead to a different result.

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[17] *See, e.g.*, Adam Raviv, *No More Excuses: Toward a Workable System of Dispositive Motions in International Arbitration*, 28 ARB INT'L 487 (2012).

[18] Edna Sussman & Solomon Ebere, *Reflections on the Use of Dispositive Motions in Arbitration*, 4(1) N.Y. DISPUTE RESOL. LAWYER 28 (2011).

Do you confer with your co-arbitrators and advise the parties before the commencement of the hearing as what issues you would like them to be sure to address (or do this yourself if sitting as a sole arbitrator)?

Always	*5.6%*
Usually (i.e., around 75% of the time)	*16.1%*
Often (i.e., around 50% of the time)	*19.4%*
Sometimes (i.e., around 25% of the time)	*39.8%*
Never	*19.1%*

Only 6% always gave advice to the parties before the commencement of the hearing as to what they perceive to be the issues. Roughly 60% of the respondents provided such guidance 25% or less of the time. This, too, is an area that may be evolving.

Recently, leading practitioners have suggested that there be earlier focused exchanges of views by the arbitrators. David Rivkin, speaking as both arbitrator and counsel, has advocated for such a process.[19] Neil Kaplan has proposed the "Kaplan Opening," calling for an oral presentation of the case by counsel after the first round of written submissions and witness statements but well before the hearing, and including perhaps even some expert testimony, enabling the tribunal to work with counsel to craft a bespoke streamlined process for the later submissions and the hearing.[20] Lucy Reed has proposed the "Reed Retreat." This contemplates that a time be scheduled in the procedural timetable for the tribunal to meet in person to study the file well in advance of the hearing, with the goal of arriving together at targeted directions to the parties for the hearing.[21]

Whether counsel will welcome such interventions or view them as impinging on their ability to present their case in the way they believe would be most advantageous to their clients remains to be seen. But these measures, if they gain acceptance, offer the possibility of significant improvements to the arbitration process by ensuring well prepared arbitrators, providing guidance to the parties and narrowing the issues to be presented at the hearing.

Do you form a preliminary view of the merits of the case after receiving the prehearing submissions?

Always	*3.5%*
Usually (i.e. around 75% of the time)	*14.1%*
Often (i.e. around 50% of the time)	*19.3%*
Sometimes (i.e. around 25% of the time)	*50.8%*
Never	*12.3%*

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[19] *See* remarks by David Rivkin in INSIDE THE BLACK BOX, *supra* note 1, at 21-25.

[20] Neil Kaplan, *If It Ain't Broke Don't Change It,* 80(2) ARB. 172-75 (2014).

[21] Lucy Reed, *Arbitral Decision-Making: Art, Science or Sport?* 30(2) J. INT'L ARB. 85, 95-96 (2013).

In what percentage of your cases have you changed your mind and rendered an award that is at variance with your prehearing preliminary view if formed?

0 -10%	*9.8%*
11 -20%	*20.5%*
21 -30%	*31.4%*
31 - 40%	*16.5%*
41 -50%	*13.8%*
Over 50%	*8.0%*

All arbitrators say that they keep "an open mind" until the close of the hearing and surely arbitrators honestly believe that to be true. However, the psychological learning suggests that the unconscious often interferes with the ability to evaluate evidence in a truly open-minded fashion as it is received because of the influence of what has been labeled by the social scientists as "confirmation bias," that is the filtering out of information that does not fit a story already believed to be the correct version.[22] As Francis Bacon stated hundreds of years ago, "The first conclusion colors and brings into conformity with itself all that comes after."[23] A similar conclusion was reached by Waites and Lawrence, noted social psychologists known for their decision-making work, who concluded in their foremost article on the subject of psychology and arbitrators that "[a] typical arbitrator concludes the initial stage of the decision making process with a single dominant story in mind. . . . Arbitrators . . . will make every effort to fit their perceptions of the facts and circumstances of the case into the story they have formed." Waites and Lawrence conclude that "[o]nce a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified.[24]

Eighty-eight percent of the arbitrators formed a preliminary view of the merits of the case at least 25% of the time after only receiving the prehearing submissions, while 37% formed such views at least 50% of the time. Sixty percent of the arbitrators changed their preliminary determination 30% or less of the time. Does this mean that in too many arbitrations a conclusion reached early is substantiated by later evidence as conflicting evidence is filtered out by the arbitrator's unconscious? The law has recognized the impact of confirmation bias in the context of jury trials in the United States. Jurors are admonished not to talk about the case among themselves, to keep an open mind during the presentation of evidence and to form no conclusions until all the evidence has been presented and they have been instructed by the judge. It is not suggested that this be adopted in

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[22] *See, e.g.*, Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2(2) REV. OF GENERAL PSYCHOLOGY 175 (1998).

[23] Francis Bacon, *Novum Organum*, XLVI (1620), *available at* http://intersci.ss.uci.edu/wiki/ebooks/BOOKS/Bacon/Novum%20Orgum%20Bacon.pdf (1620).

[24] Waites & Lawrence, *supra* note 3, at 109-110.

arbitration, as the exchange of views by the arbitrators is invaluable. Without even being aware of this psychological driver arbitrators already take many steps to ensure that they have fully reviewed the evidence and the law from all perspectives. However, a heightened awareness of confirmation bias may lead them to be even more vigilant to override any such unconscious impact with reasoning and deliberation grounded in the facts and the law.[25]

Do you think it is appropriate for the arbitral tribunal to give its preliminary views of the case after the prehearing submissions and before the hearing?
Yes 3.5%
No 72.2%
Sometimes 24.3%

Do you think it is appropriate for the arbitral tribunal to give its preliminary views of the case after all of the evidence has been presented?
Yes 8.0%
No 51.8%
Sometimes 40.2%

While the survey demonstrates that a very small number of arbitrators regularly deliver their preliminary views to the parties, the role of the arbitrator in facilitating settlement is another area of increasing interest. The delivery of preliminary views is an obvious driver to settlement. Structures and procedures are in place for the utilization of such a process which can be agreed to in the arbitration agreement or after the dispute has arisen. The Centre for Effective Dispute Resolution ("CEDR"), a leading London-based mediation and alternative dispute resolution body, issued its Rules for the Facilitation of Settlement in International Arbitration in 2009. Article 5 of those Rules provides, *inter alia,* that "the Arbitral Tribunal may, if it considers it helpful to do so . . . provide all Parties with the Arbitral Tribunal's preliminary views on the issues in dispute in the arbitration and what the Arbitral Tribunal considers will be necessary in terms of evidence from each Party in order to prevail on those issues; . . . provide all parties with preliminary non-binding findings on law or fact on key issues in the arbitration. . . "

Increasing attention is also being given to the Germanic approach to see if there are lessons to be learned from that practice. The German arbitrator's approach, following the practice of the German courts, calls for identifying the legal issues, establishing the burden and standard of proof, categorizing the facts that support each side's position, and streamlining the presentation of the evidence for the hearing to the material disputed facts. Furthermore, preliminary views may

[25] For a discussion of confirmation bias and the steps that arbitrators can take to foster a more robust deliberative process which minimizes the impact of confirmation bias, see Sussman, *Arbitrator Decision-Making, supra* note 14, at 505-508.

be given either before or after the hearing if the parties agree to encourage settlement.[26]

However, preliminary views expressed are likely to generate an even stronger confirmation bias than those that are kept to oneself. Thus, arbitrators need to be even more careful after they have expressed their preliminary view. But this concern should not in and of itself preclude the delivery of preliminary views where sought by the parties since it can, and often does, serve to foster a settlement that leads to greater party satisfaction.

IV. DELIBERATIONS

Which of the following practices do you believe is better?
Share views early in the process and discuss reactions to the merits throughout the proceeding 63.3%
Wait until all the evidence is in before discussions among the arbitrators about the merits of the case 26.9%
No opinion 9.8%

A majority favor an ongoing discussion of the case within the tribunal, but a significant number took the minority view. Since discussions should generally be held with all arbitrators present, the unwillingness of one arbitrator to engage in such discussions often precludes substantive conversations between the others as well.

Ongoing discussions are often said to be favored because they (a) allow the tribunal members to identify issues in advance of the hearing and help them focus on what is important and advise counsel as to where attention should be devoted; (b) enable the tribunal members to discuss pieces of evidence or issues of law that they find significant, troubling, or puzzling as the case evolves; and (c) are more likely to lead to a unanimous award. When party-appointed arbitrators are interviewing prospective tribunal chairs, it may be useful to ask about the prospective chair's preference in this regard. Some arbitrators find it frustrating to sit with a colleague who is not willing to engage in discussions about the case until after the final submissions or argument.

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[26] Klaus Peter Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction – A German Perspective*, 25 ARB. INT'L 217 (2009); Jan K. Schäfer, *Focusing a Dispute on the Dispositive Legal and Factual Issues, or How German Arbitrators Think – An Introduction to a Traditional German Method*, B-ARBITRA 333 (No. 2, 2013).

Do you review the evidentiary record before you prepare the award?

Always	*70.1%*
Usually (i.e. around 75% of the time)	*17.7%*
Often (i.e. around 50% of the time)	*7.2%*
Sometimes (i.e. around 25% of the time)	*5%*
Never	*0%*

When you deliberate as a panel, how often do you review the evidence in favor of what you have preliminarily assessed to be the losing side?

Always	*31.5%*
Usually (i.e. around 75% of the time)	*22.6%*
Often (i.e. around 50% of the time)	*21.0%*
Sometimes (i.e. around 25% of the time)	*19.2%*
Never	*5.7%*

While the response to the first question suggests that arbitrators generally check the record to make sure that the evidence they are relying on is as they remember it and supportive of their conclusions, the response to the second question suggests that perhaps arbitrators are not religiously reviewing the record for the evidence that might drive them to a different conclusion. The learning on confirmation bias suggests that the better practice would be to review the evidence from both perspectives before the issuance of the award to ensure that the correct conclusion has been achieved. The institution of party-appointed arbitrators does serve to ensure that all perspectives are reviewed at all stages and particularly at the time of the final deliberations. However, it should not be necessary to use the unilateral appointment process to ensure that appropriate consideration is given to all arguments. As unconscious influences on decision-making become better known, all arbitrators may pause and rethink the case from other perspectives before coming to their final conclusion.

When you deliberate in the tribunal, how often is a straw poll taken at the outset of the deliberation to determine preliminary views?

Always	*4.7%*
Usually (i.e. around 75% of the time)	*17.5%*
Often (i.e. around 50% of the time)	*20.4%.*
Sometimes (i.e. around 25% of the time)	*26.2%*
Never	*31.2%*

It appears from the survey that it is a slightly less common practice to ask as a preliminary matter what ultimate conclusions each arbitrator has reached at the beginning of the deliberation. This would appear to be the better practice as it would foster a comprehensive review of the disputed material facts and of the applicable questions of law in the most open and collegial manner without anyone feeling like he or she has to defend a position taken. On the other hand, it may be that the response reflects the fact that the continuing discussions during the

hearing have already brought the tribunal to a common preliminary view, subject to reconsideration based on further discussion and review of the evidence and the law and that no such straw poll is necessary.

In what percentage of the cases have you found yourself persuaded to change your views after discussion with your co-arbitrators?
0 - 5% *16.7%*
6 - 15% *26.4%*
15 - 30% *36.9%*
31 - 50% *15.9%*
over 50% *4.1%*

When sitting on an arbitral tribunal how often do you find the final decision heavily influenced by one arbitrator with very strong views?
0 - 10% (of the time) *42.5%*
11 - 20% (of the time) *26.1%*
21 - 40% (of the time) *18.4%*
41 - 60% (of the time) *10.2%*
Over 60% (of the time) *2.8%*

The survey results suggest that in most cases each arbitrator comes independently to the same view of the case. Perhaps many cases aren't as close a call as the losing party thinks or a common view was developed through continuous discussions so the occasion for persuading a fellow arbitrator does not arise. However, the survey results suggest that the arbitrators are listening to one another and can be persuaded that they have come to the wrong conclusion. Arbitrators may change their mind based on a presentation of a factual perspective that they had not considered or a deeper and different analysis of the law. The survey suggests that cogently presented sound positions grounded in the facts and the law can serve to persuade others on the tribunal. They will listen.

In what percentage of your cases have you relied on the burden of proof to resolve a close case?
0 - 5% *12.3%*
6 - 15% *24.2%*
15 - 30% *30.5%*
31 - 50% *17.4%*
Over 50% *15.6%*

At the International Council for Commercial Arbitration ("ICCA") conference in 2014 there was a plea for greater precision in several areas including significantly in the area of proof. That discussion centered on the standard of proof to be applied in assessing whether a party has met its burden of proof, in other words what degree of confidence must the tribunal have in the accuracy of its decisions. The standard of proof is expressed differently in different

jurisdictions and the meaning attributed to even the same or a similarly stated standard differs from jurisdiction to jurisdiction.[27] In common-law jurisdictions the standard of proof is typically stated as (a) a preponderance of the evidence for the ordinary civil claim; (b) clear and convincing or cogent evidence for a more serious claim such as an allegation of fraud; and (c) beyond a reasonable doubt for criminal charges. Civil-law jurisdictions, if they speak to a standard at all, refer to *l'intime conviction du juge* or free assessment.[28]

There is no clear consensus as to whether the substantive law governing the merits of the arbitration, or the law of the seat, or an overriding international norm controls which standard is applicable.[29] There is also no agreement as to whether it makes a significant difference or whether in fact how arbitrators actually assess cases is the same regardless of the stated standard.[30] However, some studies based on empirical psychological research support the view that there may be considerable differences in outcome when people are asked to apply different standards of proof. [31]

Thus the question of burden and standard of proof merits attention. It appears from the survey results that arbitrators generally decide cases without specific reliance on the burden of proof. Many cases are simply not so close that reliance on whether the burden of proof is met, whatever the standard applied, as the basis for the decision is necessary. One side or the other is clearly overwhelmingly right. However, the survey results suggest that the burden of proof is relied on with sufficient frequency to make the question of who bears the burden of proof and what standard of proof is required an important one which should be given due consideration by counsel and arbitrators. As has been suggested, arbitrators should consider raising the issue of the applicable standard of proof along with other substantive and procedural issues that must be addressed and counsel should raise the issue and urge the adoption of the standard that they believe is applicable and most advantageous for their position.[32]

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[27] *See* discussion in Michael Bond, *The Standard of Proof in International Commercial Arbitration,* 77 ARB. 304 (2011).

[28] *Id.*

[29] See discussion in Jennifer Smith & Sara Nadeau-Seguin, *The Illusive Standard of Proof in International Commercial Arbitration, in* LEGITIMACY : MYTHS, REALITIES, CHALLENGES, ICCA CONGRESS SERIES NO. 18 at 134 (Miami 2014) (Albert Jan van den Berg ed., 2015). *See also,* Abhinav Bhushan, *Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line*, 25 AM. REV. INT'L ARB. 601 (2014).

[30] Smith & Nadeau-Seguin, *supra* note 29.

[31] Andreas Glockner & Christoph Engel, *Can We Trust Intuitive Jurors: Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning*, 10(2) J. OF EMPIRICAL LEGAL STUDIES 2030 (June 2013).

[32] Smith & Nadeau-Seguin, *supra* note 29, at 155.

V. THE AWARD

What do you believe is important to accomplish in drafting the award? Check off all that apply.

Getting the award out promptly	*82.8%*
Making sure the award is not subject to a successful challenge	*79.1%*
Making it clear that all arguments are understood	*85.0%*
Clearly setting out the rationale for your decision	*94.5%*
Making a good impression on your fellow arbitrators and counsel (And others, if the award is likely to be viewed by those outside the process)	*25.2%*
Making sure all procedural issues or rulings are mentioned	*47.6%*
Creating a clear basis for the allocation of costs/attorneys fees	*62.6%*
In investor-state arbitration, establishing precedents that you believe are correct and may influence later arbitrations	*9.2%*

The objectives identified most frequently by the arbitrators appropriately look to accomplishing not only the objective of prompt resolution and finality, but also fall into a category that could be classified as making sure that the parties feel heard and understood and that the outcome was rational and based on the evidence. Many who added comments to this question said that they also wanted "to show respect for the parties and their arguments." Several stated that they take great pride in drafting the award and will spend the time necessary, regardless of whether or not they are remunerated for that time. A significant number specifically added that they "write the award for the loser." Writing the award with the loser in mind and seeking especially to have the loser understand the reasons for the result is important, as these arbitrators recognized, so that all feel that they received a fair hearing. This likely has the ancillary benefit of causing the loser to be less inclined to challenge the award. In the words of Aeschylus in the fifth century BC: "the word pacifies the anger."[33]

Do you believe an arbitrator may properly issue an award believed to be in accordance with equity even if that outcome cannot be justified with the application of the law to the facts?

Yes	*21.9%*
No	*78.1%*

This question is often debated as a hypothetical, and strong views have been expressed. The diverging views on the question are reflected in this survey result. However, research has shown that while arbitrators may like to differ in theoretical conversations on the subject, in fact they follow the law in rendering their awards. A study of publicly available reasoned awards in the United States

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[33] *Quoted in* Teresa Giovannini, *Philosophy Can Help Tribunals Draft Awards that Parties Will Accept as Legitimate,* DISPUTE RESOLUTION J. 78, 90 (May-July 2011).

reflects extensive citation by the arbitrators to legal authority in their decisions. Legal citation was used by the author as a proxy for determining if the awards were based on the application of law. The author concluded based on his study that "the evidence provides little support for the view that arbitrators and judges engage in qualitatively different kinds of decision-making or opinion writing."[34]

Arbitrators understand that businesses need predictability in the conduct of their business and in the resolution of their disputes. The application of the law specified to govern the contract provides that predictability and the contract governs the arbitrator's scope of authority. That does not mean that arbitrators cannot do justice. The law has been crafted over the years to do justice and to guide the decision-maker to a just result. Thus the application of the law to the facts achieves a just result in virtually every case. As Justice Scalia pointed out, quoting Chancellor James Kent who said, "I most always found [legal] principles suited to my views of the case."[35] As quoted above, Waites and Lawrence, concluded that "once a narrative has become firmly visualized, arbitrators will rarely change their opinions about what happened although they will occasionally change their minds about how the events in the case should be legally classified," another way of saying that arbitrators will base their final resolution on the principles of law.[36]

In what percentage of your cases did you feel like you had a "Eureka" moment, when all of the various factual and legal arguments fell into place neatly?

0 to 5%	*25.1%*
6 to 15%	*24.3%*
16 to 30%	*27.6%*
31 to 50%	*13.3%*
Over 50%	*9.7%*

This question flowed from the judicial writing on the moment of closure as the decision is reached, described here as a "Eureka" moment, when all the pieces fall into place and the logic of the conclusion becomes clear. Justice Cardozo explained the process most eloquently: "Then suddenly the fog has lifted. I have reached a stage of mental peace . . . the judgment reached with so much pain has become the only possible conclusion, the antecedent doubts merged, and finally

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[34] Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90(4) N .C. L. REV. 1091 (2012).

[35] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 27 (2008). Whether or not an arbitrator can introduce legal theories not raised by the parties, even assuming he or she brings them to the parties' attention for comment, is a subject beyond the scope of this article, and may be subject to differing views.

[36] Waites & Lawrence, *supra* note 3, at 114.

extinguished, in the calmness of conviction."[37] Judge Friendly spoke of the decisional conclusion as "flashes before the shaving mirror in the morning."[38] The survey results suggest that in most cases there is no such moment; and it is only in the occasional case where arbitrators have to wrestle with facts that just won't fit together or legal questions that are so difficult to resolve that such a moment is felt. But when such a moment does occur, the jurists have described it well.

In what percentage of your cases has the chair written the first draft of the entire award?

90 - 100%	*45.0%*
80 -89%	*19.9%*
70-79%	*13.4%*
40 - 60%	*11.9%*
less than 40%	*9.8%*

As can be seen from the survey result, the chair of the tribunal generally takes on the task of doing the first draft of the entire award. The writing of an award by a single individual facilitates the writing of the award in a consistent single voice and can often lead to a more expeditious finalization of the award. The draft should not be written until after the deliberations by the full tribunal so that it reflects the views of all, or at least the majority. There are occasions, especially in complex multi-faceted cases, in which the chair assigns discrete factual or legal issues to the co-arbitrators to prepare the first draft. Or there may be occasions where the chair finds himself or herself too busy to prepare the award in a timely manner and so delegates most or all of the task of preparing the first draft. Or the tribunal may find it impossible to come to a consensus based on its discussions and concludes that the only way to make further progress is to have the differing views written out as a draft of the award and then reconsider which view should prevail. But as the survey shows these are less frequent occurrences.

In approximately what percentage of your cases have you changed your view of the case outcome while writing the award?

0 to 10%	*55.7%*
11 to 20%	*28.2%*
21 to 35%	*10.1%*
36 to 50%	*5.7%*
More than 50%	*0.3%*

It doesn't happen often, but it does happen. As they say, "it's not over until it's over." Sometimes the award just doesn't write or the evidence doesn't stack

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[37] Benjamin N. Cardozo, *The Paradoxes of the Legal Science*, *in* THE SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 80-81 (Margaret E. Hall ed., 1947).

[38] Judge Henry J. Friendly, *Reactions of a Lawyer - Newly Become Judge*, 71 YALE L. J. 218, 230 (1961).

up on review as it is remembered or a deeper analysis of the applicable law dictates a different outcome. The fact that arbitrators do change their views even in the course of writing the award evidences that they continue to keep an open mind and continue to assess the facts and the law in their efforts to arrive at the right conclusion.

Do you write out for yourself the reason for an award (even in outline form) if you are issuing a standard/bare award with no reasons.

Yes	*42.6%*
No	*30.8%*
Sometimes	*26.6%*

While unreasoned or bare awards are rare in international arbitration and are not enforceable in some jurisdictions, there are jurisdictions in which they suffice. Occasionally parties seek an unreasoned award for such reasons as protection of trade secrets, the prevention of any possibility of preclusive consequences or just to save on the fees. As shown in the prior question, decisions can change in the writing of the award, as in the writing the arbitrator discovers the error of his or her initial conclusion. That possibility suggests that it is best for arbitrators to prepare at least an outline of their reasoning in order to verify and confirm the accuracy of the decision reached even in the issuance of an unreasoned or bare award.

On a scale of 1 to 10 with 10 being the most certain, how certain are you that you have reached the correct result by the time you signed the award?

1	*0.3%*
2	*0%*
3	*0.3%*
4	*0%*
5	*0.3%*
6	*0.3%*
7	*3.3%*
8	*16.3%*
9	*52.2%*
10	*27%*

As one arbitrator said when he heard the statistic, if you are not at least at a 9 in terms of certainty, you should continue to think about the case until you achieve that level of certainty. Indeed, that is excellent advice. The parties deserve to have the arbitrators continue their deliberations and their personal reviews until they reach a very high degree of certainty as to the correctness of the outcome. The survey reflects that arbitrators are careful in their decision-making and will continue to work through the issues and think about how to reconcile the facts and how to resolve difficult questions of law until they achieve a high degree of

certainty. The process follows the psychological model which examines the shift from conflict to closure.

During the course of deciding a case the judge's or arbitrator's view of the dispute gradually moves towards a state of coherence so that the arguments that support one result are endorsed and the opposing arguments are rejected. By the end of this process one view of the case emerges as the winning position.[39] Once the state of coherence is reached, certainty, a state the mind strives for, takes hold. Jurists have long commented on the human inclination to reach a state of certainty which leads to conviction as to the accuracy of conclusions reached. Justice Holmes stated, "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind."[40] As Judge Posner similarly remarked, "People hate being in a state of doubt and will do whatever is necessary to move from doubt to belief."[41] What is necessary here is that arbitrators continue to work through the case until they arrive at certainty. The survey reflects that they do so.

In how many cases have you dissented?	
0	*64.7%*
1	*19.3%*
2- 5	*16.0%*
6 or more	*0 %*

The respondents, virtually all of whom I suspect deal with commercial and not investor-state cases, almost never dissent. Much has been written on the subject of whether or not dissents are appropriate in commercial cases. Strong views have been expressed that except in the rare case, they are detrimental to the process in commercial arbitration. Dissents have been said to stifle deliberations, encourage challenges to the award, and provide a roadmap for how to attack it.[42] Whether motivated by these concerns, or simply the result of a consensus typically being achieved among the members of a tribunal after careful and reasoned deliberation, the survey results support the general perception that dissents are indeed rare and further supports the conclusion that party-appointed arbitrators are independent.

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[39] Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L. J. 1, 20 (1998).

[40] Oliver Wendell Holmes Jr., *The Path of the Law,* 10 HARV L. REV. 457, 465 (1897).

[41] Judge Richard Posner, *The Jurisprudence of Skepticism,* 86 MICH. L. REV. 827, 873 (1988).

[42] Mark Baker & Lucy Greenwood, *Dissent – But Only if You Really Feel You Must,* 7(1) DISPUTE RESOL. INT'L 31 (2013).

VI. MEDIATION

Do you think it is appropriate for an arbitral tribunal to discuss or suggest mediation?

Yes	*24.8%*
No	*23.4%*
Sometimes	*51.8%*

Mediation continues to gain attention and increased utilization around the world. A few examples: UNCITRAL's Working Group II is exploring the development of a convention for the cross-border enforcement of mediated settlement agreements.[43] The EU is working to foster the greater adoption of mediation pursuant to the EU Mediation Directive.[44] Pursuant to the most recent amendments in 2013, Rule 9 of the American Arbitration Association Commercial Rules now provides that the parties who have filed an arbitration "shall mediate their dispute" although any party may unilaterally opt out of the rule. Singapore has taken steps to make it easier to mediate and obtain an arbitral award recording the settlement agreement pursuant to the SIAC-SIMC Arb-Med-Arb Protocol.[45] In June of 2015, Brazil passed its first mediation law.[46]

With the growing acceptance of mediation it would not seem inappropriate for arbitrators to suggest mediation. Many arbitrators now inquire at the first procedural hearing whether the parties wish to include a mediation window in the arbitration scheduling order to establish a date on which the parties will discuss whether or not they wish to have a mediation and so eliminate the fear of many counsel that suggesting mediation will be viewed as a sign of weakness. There are some that harbor lingering concerns that having arbitrators raise mediation might intimate in some way how the tribunal is leaning, particularly if the matter is raised later in the process and not at the first conference with the parties. That concern may well fade as having more open discussions with the parties about the issues earlier in the proceeding gains as an emerging best practice. The 23% of the arbitrators who stated that it was never appropriate for the tribunal to discuss or suggest settlement or mediation may well change their views in the coming years.

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[43] *See* UNCITRAL Working Group II documents collected at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html; *See also* Edna Sussman, *A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements*, TRANSNAT'L DISPUTE MANAGEMENT (March 2015).

[44] *See* European Parliament, Directorate General for Internal Policies, Policy Dept. C, Citizens' Rights and Constitutional Affairs, *"Rebooting" the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (2014).

[45] SIAC-SIMC Arb-Med-Arb Protocol is *available at* http://simc.com.sg/siac-simc-arb-med-arb-protocol.

[46] Law No. 13,140, the Brazilian Mediation Law, *enacted on* June 29, 2015.

Would you be willing to mediate a case in which you are sitting as an arbitrator if the parties give you informed consent?
Yes 51.9%
No 48.1%

The ICC in its promotional material for a conference held in Hong Kong in October 2015 entitled *The Use of Med-Arb in the Resolution of Cross-Border Disputes* describes med-arb as a "particularly hot topic" in the international arbitration sphere. Med-arb has been discussed for decades but has, as the ICC notes, become a subject of considerable conversation and debate in recent years as users seek more efficient dispute resolution processes and the perceived practices of the Far East and their mixing of roles have become more influential with the expansion of East-West trade. While the general perception has been that arbitrators schooled in common law and Western traditions are less inclined to view acting as both arbitrator and mediator in the same matter with favor, the survey results demonstrate that over 50% of the arbitrators would be willing to engage in such an exercise if the parties elect it and provide informed consent. Moreover, a study conducted in 2011 comparing Eastern and Western arbitrators on the subject suggests that the common perception is inaccurate and that there is in fact little difference in the willingness of arbitrators across nations to engage in med-arb. In that study, 58% of both Eastern and Western arbitration practitioners stated that it was appropriate for the arbitrator to actively engage in settlement negotiations at both parties' request.[47]

The surveys suggest that the use of med-arb may well finally be on the ascendancy. Indeed, additional empirical research suggests that this process design is being used a great deal more than is suspected.[48] Like all processes, it raises its own unique set of issues and the advantages and disadvantages of utilizing this mixed process must be considered carefully by the parties. Process issues such as, *inter alia*, whether caucus sessions during which the neutral meets separately with the parties should be conducted, whether the parties should be required to reconfirm continuation with the same neutral as he or she switches hats, the enforceability of any resulting resolution, and what is required to constitute informed consent, must all be reviewed with care.[49]

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[47] Shahla F. Ali, *The Morality of Conciliation: An Empirical Examination of Arbitrator "Role Moralities" in East Asia and the West*, 16 HARV. NEG. L. REV. 1 (2011).

[48] Thomas Stipanowich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 PENN STATE Y.B. OF ARB. AND MEDIATION 1, 25-28 (2014) (survey responses by mediators showed that 61.3% had some experience in mixed roles).

[49] For a discussion of these issues, see Edna Sussman, *Developing an Effective Med-arb/Arb-med Process,* 2(1) N.Y. DISPUTE RESOL. LAWYER 71-74 (2009); Edna Sussman, *Med-Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 WORLD ARB. MED. REV. 421 (2013).

The world may well be moving towards a much more nuanced perspective on process design for the resolution of disputes outside the courts. To advance informed choices by parties as to the multiplicity of options available to them, the College of Commercial Arbitrators in cooperation with the International Mediation Institute and the Straus Institute has embarked upon a project to explore the many modalities for dispute resolution facilitated by a third-party outside the courts, and how those various modalities can be combined to maximize party satisfaction.

CONCLUSION

How arbitrators decide and the nature of their internal processes has been described by those who seek to explore them as going "inside the black box" or "behind the curtain." This article has hopefully shed some light on how arbitrators operate and provided some useful guidance to both arbitrators and counsel. The exploration of current practices has also suggested areas in which some changes and refinements may be coming in the future. The continuing evolution of arbitration practices in the coming years will prove or disprove the predicted emergence of some of the trends identified.

Evaluating the Advantages and Drawbacks of Emergency Arbitrators

Edna Sussman and Alexandra Dosman, New York Law Journal

March 30, 2015

Commercial parties choose to resolve their disputes by international arbitration for many reasons, including greater confidentiality, a neutral forum, and increased control over the selection of decision-makers. Until recently, however, parties were required to go to national courts to request interim measures of protection—such as security, asset freezes, or orders for the protection of evidence—before the constitution of an arbitral tribunal.

In response to a perceived need for a mechanism for awarding interim relief within the arbitral system itself (rather than national courts), in 2006 the International Centre for Dispute Resolution (ICDR) incorporated emergency arbitrator proceedings into its rules. In the following nine years, almost every major international arbitration institution has followed suit.[1] Emergency arbitrator provisions are now the norm, including for new entrants in the field.[2] Were these amendments a response to a genuine need for emergency relief in international arbitration? Are emergency arbitrators being used, and are their decisions enforceable?

A review of information from the arbitral institutions reveals that parties are, in fact, using emergency arbitrator mechanisms, and that decisions of emergency arbitrators are generally rendered within very short time frames. The case law from U.S. courts—including the high-profile *Yahoo! v. Microsoft*—indicates decisions by emergency arbitrators are likely to be enforced. Given these factors, in certain circumstances the use of emergency mechanisms within the arbitral system will be preferable to going to a national court for interim relief.

A Trend That Has Become the Norm

The recent proliferation of emergency arbitrator mechanisms has its roots in innovations dating back some time. In 1999, the American Arbitration Association (AAA) made an opt-in emergency arbitrator process available with its Optional Rules for Emergency Measures of Protection. In 1990, the Court of Arbitration of the International Chamber of Commerce (ICC) began offering a similar optional ("opt-in") mechanism for pre-arbitral tribunal proceedings, under its Rules for a Pre-Arbitral Referee Procedure. The ICC Pre-Arbitral Referee Procedures (which are still available) have not proved popular, with only 14 cases in their first 24 years of existence.[3]

In contrast to these precursor mechanisms, the modern wave of emergency arbitrator rules apply by default—they are "opt out" rather than "opt in." Almost all of the emergency arbitrator rules apply prospectively, to arbitration agreements entered into after the relevant rules came into force. One exception is the SCC, which elected to make the emergency arbitrator provisions applicable to all SCC arbitrations *commenced* after Jan. 1, 2010, regardless of when the arbitration agreement was signed.[4]

The most obvious characteristic of emergency arbitrator proceedings is the speed at which they are to be established and completed. The rules surveyed provide for the appointment of an arbitrator by the institution within one day (ICDR, SCC, SIAC, CPR), two days (ICC, HKIAC), or three days (LCIA) of receipt of the application and payment of fees. Under the ICDR, ICC and SIAC Rules, the emergency arbitrator must set a procedural schedule for the arbitration within two days of appointment. The time limits for rendering an award range from five days (SCC) to 14 days (LCIA) to 15 days (ICC, HKIAC). The SIAC, CPR and ICDR Rules do not specify a time limit for rendering an award, but require decisions as expeditiously as possible.

All emergency arbitrator procedures call for the appointment of a sole emergency arbitrator by the institution. (The CPR Rules are unique in also recognizing the possibility that parties may jointly designate an emergency arbitrator.) The institutions appoint either from a list of emergency arbitrators or a non-list method. The ICC, for example, selects emergency arbitrators following discussion between the court and the Secretariat regarding the qualities required for each case; a shortlist is drawn up and an arbitrator is chosen from among those with availability who report no (or de minimus) conflicts. Location is also a factor. In contrast to its normal rule, the ICC Emergency Arbitrator Rules allow for nationals of the same state as one or more of the parties to serve as emergency arbitrator. All of the rules require the same standard of impartiality and independence for emergency arbitrators as for arbitrators in non-emergency proceedings; and all provide for an expedited challenge procedure.

Emergency Arbitration in Action

Information from public sources and from direct inquiries of arbitral institutions indicates that emergency arbitration procedures are being used in a reasonable number of cases. And the original premise has, so far, borne out: Interim relief has been awarded or denied within extraordinarily short time frames. What remains unclear, however, is whether a consensus is forming (or can form) about the legal standards that apply to an emergency arbitrator's deliberations.

Since 2006, the ICDR has registered 49 requests for emergency relief. Of those, the applicant was successful in obtaining full or partial emergency measures in almost half of the cases (24); the applicant was unsuccessful in 14 cases. Eight of the 49 cases settled, two were withdrawn, and one is still pending. At the ICDR, the average time for the rendering of an emergency decision is 21 days. The flexibility afforded by the rules to the arbitrator in not providing for a deadline by which a decision has to be rendered allows the arbitrator to tailor the process to the needs of the particular case.

Under its 2007 Rules for Non-Administered Arbitrations, CPR has received five requests for the appointment of a Special Arbitrator (as emergency arbitrators are denoted by the CPR). Two requests were denied, one request was granted, one request was withdrawn, and one resulted in agreed relief. JAMS has received six applications, only three of which went to a decision. One then settled and two are ongoing.

At the SCC, 13 emergency arbitrator applications had been registered as of Dec. 31, 2014, of which two were in the context of investment treaty claims. All 13 went to a

decision by the emergency arbitrator. One decision was rendered in the form of an award, by request of the parties. Interim relief was granted in three of the 13 cases. The SCC rules require a decision to be rendered within five days of transmission of the file to the emergency arbitrator. The five-day deadline to render a decision has been met in eight of the 13 cases; extensions in five other cases were granted upon request of the arbitrator; and all decisions have been rendered within 12 days.

SIAC has received 42 applications. Of those 42, at least 11 applications were denied, eight were granted, and four were withdrawn. No official data on settlement is available, but the institution is aware of "quite a few" cases in which the matter settled shortly after an emergency arbitrator's award or order. At SIAC, the average time for the issuance of an interim order is 2.5 days; and the average time for an award has been 8.5 days from when the adjudicator first hears from the parties.[5]

The ICC has received 15 applications to date, of which at least four were granted, four were denied, and two were withdrawn or settled (information is lacking on five cases). At least three cases were terminated by agreement before the constitution of the arbitral tribunal and one was terminated shortly after. As of 2014, all emergency orders had been rendered within the 15 day deadline prescribed by the ICC Emergency Arbitrator Rules.[6]

The HKIAC has received two applications under its emergency arbitrator proceedings, but both were withdrawn prior to a determination on whether or not to award interim relief (one proceeded to a costs award).

The AAA has received 15 requests for emergency arbitration under its October 2013 rules. A decision was issued by the emergency arbitrator in four cases; three cases were withdrawn; five settled; six remain pending before a later-constituted tribunal; and one resulted in a final award.

Neither the LCIA nor the CPR has received any applications under the new rules effective as of Oct. 1, 2014 and Dec. 1, 2014, respectively.

Broad Powers

Emergency arbitrators have broad powers to consider and determine their jurisdiction, to establish the procedure of the expedited application, and to order interim relief to the same extent as could a regular arbitral tribunal under the applicable arbitration agreement.[7] Interim measures may include orders to maintain the status quo while an arbitration proceeds, to protect the arbitral process, to preserve assets or to preserve evidence.

The law of the contract is not generally seen as controlling on the question of whether and which interim measures may be granted. Commentators and emergency arbitrators have, to date, preferred the view that interim relief is procedural in nature, and therefore not bound by the constraints of the law applicable to the contract itself.[8] This view has been endorsed by at least one New York court, with the result that an ICDR arbitrator was empowered to order an interim measure that the court itself would not be able to

grant.

In *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, the court considered whether an ICDR arbitrator had the power to order pre-judgment security and a Mareva-style injunction freezing a party's assets during the pendency of the arbitration.[9] New York law does not permit a plaintiff to obtain pre-judgment security in an action for money damages, and under well-established case law neither federal nor state courts are empowered to award Mareva-style freezing orders. The court upheld the arbitrator's award of interim relief on the basis of the arbitral rules chosen by the parties (which allow the tribunal to "take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property") and the public policy favoring the enforcement of arbitration agreements.[10]

Varying Legal Standard

The test to be applied by emergency arbitrators in determining whether interim relief should be awarded is notably absent from most international arbitration rules. Instead, the rules state that emergency arbitrators may grant interim relief that is "urgent" (ICC, HKIAC), "necessary" (ICDR, SIAC, CPR), or "appropriate" (SCC).[11] Rules for domestic U.S. arbitrations provide more guidance. For example, under the AAA's Commercial Rules, the applicant must show that "immediate and irreparable loss or damage shall result in the absence of emergency relief and that such party is entitled to such relief." (Rule 38(e).) Similarly, the JAMS Rules provide that "the Emergency Arbitrator shall determine whether the Party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief …" (Rule 2(c)(iv).)

In determining the legal test, emergency arbitrators have been guided by the applicable arbitration law, standards used in local courts, and international practice. The urgency of the matter, the requirements of irreparable harm and a balancing of the harm among the parties have been widely applied. But the identification of the standard to be applied and the strength of the case on the merits that must be presented have not been uniform among emergency arbitrators.

In SCC decisions alone, emergency arbitrators have referred to the Swedish Arbitration Act and the Swedish judicial code, and have described the standard as "reasonable probability of success on the merits," "prima facie case," "reasonable possibility," "serious claim," and "probable cause." One emergency arbitrator noted that there was a "universal consensus" with respect to the requirements: a prima facie case; urgency; and irreparable harm or serious or actual damage in the absence of interim relief.[12] Similarly, in SIAC cases, the tests applied have ranged from a "real probability" of success to a "good arguable case" test.[13]

In one ICDR case the emergency arbitrator applied a four-part test: a risk of irreparable harm; good prospects of success on the merits, no other remedy would be adequate; and any harm from wrongful injunctive relief could be compensated by damages.[14] In another, the parties agreed that the applicant must show "irreparable harm absent the requested relief, a likelihood of success on the merits of its claims, and a balance of hardships in its

favor."[15]

It is too soon to tell whether a consensus will form as to the legal standard employed by emergency arbitrators in international arbitration. One way forward—reportedly used regularly by ICDR emergency arbitrators in the absence of party agreement—is to apply the standards set out in the UNCITRAL Model Law on International Commercial Arbitration for interim measures issued by the duly appointed tribunal.[16] The Model Law test has three elements: (1) likelihood of irreparable harm (i.e., not reparable by money damages); (2) harm that substantially outweighs the harm to the party against whom the measure is granted; and (3) a "reasonable possibility" of success on the merits. Whether such a standard may also be applied in domestic arbitrations is an open question. In practice, it may yield the same results as the Second Circuit standard, which requires either (a) a likelihood of success on the merits, or (b) a sufficiently serious question going to the merits of the claim to make them fair ground for litigation."[17]

Are Emergency Decisions Enforceable?

Decisions issued by emergency arbitrators are, by their nature, interim. The rules of each arbitral institution are clear that the arbitral tribunal, once constituted, may modify, terminate or annul the decision of the emergency arbitrator.[18] The statistics from the arbitral institutions and anecdotal evidence suggest that parties often voluntarily comply with emergency arbitral awards or orders. But in the case of a recalcitrant party, are decisions by emergency arbitrators enforceable in court?

As a general rule, U.S. courts do not have the power to review interlocutory (non-final) decisions by arbitral tribunals. However, U.S. courts have the power to enforce interim awards to support the integrity of the arbitral process: "Without the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration."[19] U.S. courts have also confirmed interim injunctive awards on the basis that they address issues that are separate, distinct and severable from the resolution of the underlying merits of the dispute.[20] Although these cases have arisen in the context of interim measures issued by regularly-appointed arbitrators, the same rationales apply to interim measures issued by emergency arbitrators.

Indeed, the Southern District of New York recently confirmed an award issued by an emergency arbitrator under the rules of the AAA (the parties had "opted in" to the AAA's 1999 Optional Rules for Emergency Measures of Protection). In *Yahoo! v. Microsoft*,[21] Judge Robert P. Patterson considered Yahoo's motion to vacate an emergency arbitration award that had granted an injunction in Microsoft's favor. After an emergency arbitral proceeding that involved witness testimony, briefing, and an oral hearing, the emergency arbitrator issued an order requiring Yahoo to continue to perform its obligations under the parties' contract. Having reviewed the parties' arbitration agreement, the arbitral rules and applicable law, the court denied the motion to vacate and confirmed the award, even though due to the nature of the case the order was tantamount to final relief, noting that "if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time

it is made."[22]

Other U.S. cases have supported the orders of the emergency arbitrator.[23] Indeed, one court issued a temporary restraining order to preserve the status quo but stayed the action pending arbitration expressly leaving it to an emergency arbitrator to resolve what interim measure was appropriate.[24]

In the one known case in which a U.S. court declined to review a decision of an emergency arbitrator, it did so in support of the arbitral process. In that case, the losing party went to court to seek to vacate a decision of an emergency arbitrator. The court noted that under its circuit law, "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful … are final orders that can be reviewed for confirmation and enforcement by district courts under the [Federal Arbitration Act]."[25] In this case, this rationale did not apply: The party seeking review wished to undo an order, not enforce it. The court declined to review the case for vacatur on the basis that it was not intended to be final and thus in essence left the order in place and effectively enforced it.[26]

Although the case law is sparse, parties to emergency arbitration proceedings in the United States have good reason to believe that the resulting decisions will be enforced.

Courts or Tribunals?

Emergency arbitrator systems appear to be working and provide a useful, and sometimes crucial, alternative, especially in the international context. But they will not be appropriate in all cases. In order to address that concern, all of the rules surveyed maintain the possibility of applications to national courts concurrently with the invocation of emergency arbitrator proceedings.

National courts will be the preferred venue when relief is required ex parte. With few exceptions, the emergency arbitrator rules surveyed do not allow for emergency relief on an ex parte basis: Notice is required to the responding party.[27] While the rationale for this policy is clear—fairness and enforceability concerns—the lack of an ex parte route may obviate the utility of emergency arbitrator proceedings, such as when the initiation of proceedings is itself expected to trigger a dissipation of assets. In addition, where emergency relief requires a third party to be bound (such as a bank), national courts will be the venue of choice.

Emergency arbitration has, in the last 10 years, become a standard feature of international arbitration. It offers key advantages—a neutral forum; a swift decision; increased confidentiality—and the limited data available shows that some parties are using this new tool. Jurisprudence from U.S. courts also shows reason for optimism that decisions of emergency arbitrators will be enforced.

Endnotes:

1. In 2007, the Institute for Conflict Prevention and Resolution (CPR); in 2010, the

Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC); in 2011, the Australian Centre for International Commercial Arbitration; in 2012, the Court of Arbitration of the International Chamber of Commerce (ICC); in 2013, the American Arbitration Association "AAA) and the Hong Kong International Arbitration Centre (HKIAC); in 2014, the London Court of Arbitration (LCIA), the CPR for its international rules, and JAMS; in 2015, the China International Economic and Trade Arbitration Commission (CIETAC). However, the move to include emergency arbitrator procedures is not universal. The Vienna International Arbitration Center made a considered decision not to offer such procedures as part of their rules, in part because of the view that decisions issuing from that process would not be enforceable as arbitral awards.

2. See The rules of the Kuala Lumpur Regional Centre for Arbitration, the Kigali International Arbitration Centre, and the Lagos Court of Arbitration.

3. Andrea Carlevaris and José Ricardo Feris, "Running in the ICC Emergency Arbitrator Rules: The First Ten Cases," ICC International Court of Arbitration Bulletin, Vol. 25, No. 1 (2014).

4. In the domestic U.S. context, the JAMS Rules incorporating emergency arbitrator procedures appear to apply to arbitrations "filed and served after July 1, 2014"—implying that they are not limited to arbitration *agreements* entered into after that date. (Rule 2(c)). The JAMS international rules, last updated in 2011, do not provide for emergency arbitration, but an update is expected shortly that will likely include such a provision.

5. Vivekananda N., "The SIAC Emergency Arbitrator Experience," available at www.siag.org.sg, at 4.

6. Carlevaris and Feris, ICC Emergency Arbitrator, supra note 3.

7. ICDR Rules, Article 6(4); SIAC Rules, Schedule I, 6; ICC Rules, Appendix V, Article 6(3); LCIA Rules, Article 9A, 9.8; CPR Rules, Rule 14.9. The jurisdiction of emergency arbitrators may be more limited than that of the arbitral tribunal. For example, the ICC rules explicitly limit the application of emergency proceedings to the signatories to the arbitration agreement (or their successors).

8. Emergency arbitrators remain subject to mandatory procedural laws of the seat that apply to the issuance of interim relief by arbitrators. For example, several jurisdictions appear to limit or eliminate the powers of arbitrators to issue injunctive relief (Quebec; Italy).

9. *CE International Resources Holdings v. S.A. Mineral Ltd. Partnership*, 2012 WL 6178236 176158 (S.D.N.Y. Dec. 10, 2012). (This was not an emergency arbitrator case.)

10. Id.

11. The HKIAC Rules Article 23(3) and 23(4) set out the type of temporary measure and

the relevant factors to be considered. However, Article 23 applies only to decisions by the "arbitral tribunal," which excludes emergency arbitrators (Article 3.6: "References in the Rules to the "arbitral tribunal" include one or more arbitrators. Such references do not include an Emergency Arbitrator as defined at para. 1 of Schedule 4.")

12. Johan Lundstedt, "SCC Practice: Emergency Arbitrator Decisions, 1 January 2010-31 December 2013."

13. Vivekananda N., "The SIAC Emergency Arbitrator Experience," at 3.

14. Guillaume Lemenez and Paul Quigley, "The ICDR's Emergency Arbitrator Procedure in Action," Dispute Resolution Journal (August/October 2008) at 5.

15. Order of the Emergency Arbitrator dated July 31, 2013 in *Irvine Scientific Sales Company v. Microbix Biosystems*, 986 F. Supp. 2d 1187 (D. Mont. 2013) (order submitted and available on PACER).

16. United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (UNCITRAL Model Law). See Grant Hanessian, "Emergency Arbitrators" in L. Newman & R. Hill, eds., The Leading Arbitrators' Guide to International Arbitration (Juris, 2014).

17. *Otoe-Missouria Tribe of Indians v. New York State Dept. of Financial Services*, 769 F.3d 105, 110 (2d Cir. 2014).

18. Many institutions' rules provide that the decision of the emergency arbitrator may take the form of either an order or an award. Under the ICC Rules, however, the emergency arbitrator is limited to issuing an order; the decision will not undergo scrutiny by the ICC Court of Arbitration.

19. *Companion Property and Casualty Insurance Company v. Allied Provident Insurance*, Case No. 13-cv-7865, 2014 WL 4804466 at *3 (S.D.N.Y. Sept. 26, 2014) (and cases cited therein)

20. *Publicis Communications v. True North Communications*, 206 F.3d 725 (7th Cir. 2000).

21. 983 F. Supp. 2d 310 (S.D.N.Y. 2013).

22. Id., citing *Southern Seas Nav. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985).

23. *Draeger Safety Diagnostics v. New Horizon Interlock*, 2011 WL 653651 (E.D. Mich. Feb. 11, 2011); see also *Blue Cross Blue Shield of Michigan v. Medimpact Healthcare Systems*, 2010 WL 2595340 (E.D. Mich. June 24, 2010).

24. *Pre-Paid Legal Services v. Kidd*, 2011 WL 5079538 (E.D. Okla. Oct. 26, 2011).

25. *Chinmax Medical Systems, Inc. v. Alere San Diego*, 2011 WL 2135350 (S.D. Ca. May 27, 2011) (internal citation omitted).

26. In a similar vein, in 2003 the Paris Court of Appeal declined to review an award granted by a Referee under the ICC's Pre-Arbitral Referee procedures. The losing party there sought to annul decisions of the Referee. The Paris court found that the Referee was not acting as an "arbitrator" and that therefore his decisions did not qualify as arbitration awards, meaning that they could not be subject to set-aside proceedings. Judgment of April 29, 2003, Docket No. 2002 / 05147, Court of Appeal of Paris, First Chamber, §C.

27. Under Article 26(3) of the Swiss Rules of International Arbitration, arbitral tribunals have the power, in "exceptional circumstances," to grant interim relief ex parte.

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Use Of Experts In Arbitration: Alternatives For Improved Efficiency

by
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Park Jensen Bennett LLP
New York, NY

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Commentary

Use Of Experts In Arbitration: Alternatives For Improved Efficiency

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[Editor's Note: Steven C. Bennett is a Partner, Park Jensen Bennett LLP (New York City); Adjunct Professor (Negotiation and Dispute Resolution) in the Manhattan College Business Department. Any commentary or opinions do not reflect the opinions of Park Jensen Bennett or its clients or LexisNexis®, Mealey Publications™. *Copyright © 2018 by Steven C. Bennett. Responses are welcome.]*

Complex, technical disputes in arbitration often require expert analysis, to assist an arbitration tribunal in understanding the issues to be resolved, and to answer specific questions required for a fair and accurate resolution of a dispute. The expense, burden and time commitment required for expert analysis, however, represent potential limits on the efficiency of the arbitration process. This Article addresses some of the alternatives available to parties, their counsel, and the tribunal, in structuring expert analysis to maximize efficiency.[1]

Goals In Expert Analysis

An arbitral tribunal (individual arbitrator or arbitrator panel) often needs help in understanding technical issues in a case (accounting, engineering, valuation and more, depending on the case). The tribunal's mission is to decide the matter, fairly and efficiently. The role of an expert thus generally is not to opine on the ultimate issues in the case (that is the tribunal's function), but to address subsidiary questions (such as the proper accounting for certain transactions; the engineering implications of a particular design; the alternative potential valuations for a particular asset—again depending on the needs of the case). An expert may also perform specific functions (such as review of voluminous data sources, and on-site or laboratory testing of conditions) that are beyond the ken of the tribunal, or otherwise not suited to conventional evidentiary submissions. Experts may also be called upon to explain complex technical issues, or to summarize points of foreign law.[2]

Experts, even if engaged by the parties (or, more often, their counsel) are generally assumed to act with professionalism and independence, for the benefit of the tribunal. An expert opinion that is pure advocacy, with experts in substance serving as mere mouthpieces for the party (or counsel) that hired them, may undermine the search for fair and efficient resolution, in that, with "dueling" experts, a tribunal may be well-informed as to alternative theories, but not necessarily well-equipped to choose one theory over another. The question thus becomes: are there methods that a tribunal can use to discourage a pure clash of expert advocates, or (at very least) to focus the clash on only the points that matter most to a fair and efficient resolution?

An additional element of efficiency in the process of expert submissions concerns the form and timing of such submissions. Lengthy proceedings strain the ability of a tribunal to evaluate expert evidence fairly and completely. Reducing the time required for expert testimony, and focusing such testimony on the most important matters, that are actually in dispute, can enhance the ability of the tribunal to reach a just and accurate result. Further, ensuring that complete expert submissions are provided the tribunal, prior to the close of hearings, avoids the risk that the arbitrators must speculate, due to an incomplete record, or direct post-hearing submissions on open issues, thus extending the time and expense of the hearing process.

Efficiency is a "bang for the buck" question. More time spent in receiving expert submissions does not necessarily yield more useful information (or understanding) for the tribunal. Shaping the process to serve a fair and effective search for truth is the true goal. The tribunal, working with the input of the parties and counsel, must direct the form and manner of expert submissions to accomplish that goal, within the resource limitations (time, expense and burden) that attend to the particular case.

Contrasting Common Law And Civil Law Models

Historically, the practices of arbitrators and advocates, with regard to the use of experts, have tended to mirror the procedures adopted by the national court systems with which they are most familiar. The use of party-appointed experts is common in American civil litigation (and in many other common law jurisdictions). In parallel, American arbitration rules generally provide for the possibility of expert submissions, subject to the control of the tribunal.[3] American arbitration practices generally do not contemplate (although they do not exclude) the appointment, by the tribunal itself, of an expert to aid the tribunal.

By contrast, outside the United States, the appointment by an arbitration tribunal of an independent expert, to produce an expert report on issues identified by the tribunal, is a relatively frequent occurrence. Thus, although it is widely accepted in international arbitration that parties maintain rights to call their own experts in support of their positions,[4] international arbitration rules and norms also generally permit a tribunal (after consultation with the parties), to select its own expert, and to give the expert directions.[5]

These contrasting models essentially represent the differences between a Common Law approach to dispute resolution (party-appointed experts, in support of the advocacy of the parties, with the clash in positions ultimately resolved by the decision-maker) versus a Civil Law model (tribunal-appointed experts, in support of an inquisitorial investigation by the ultimate decision-maker).[6] Taking these two positions as polar opposites (although they are not, *per se*, opposite in all respects), the question becomes whether it is possible to describe circumstances where one or the other model is most efficient, and whether there are circumstances where a "blending" of the two models most serves the cause of fair and efficient dispute resolution. The remainder of this Article addresses those questions.

Party-Appointed Experts

The American system of party-appointed experts embodies, as a principal advantage, relatively little work for the tribunal. The parties decide whether they will proffer experts. They decide what subjects the experts will address. They (often) decide on the forms, and the timing, of disclosures regarding expert opinions (subject to applicable arbitral rules, contract terms—if any—regarding experts, and the direction of the tribunal). And, ultimately, the parties generally decide whether and how they will present their experts' opinions to the tribunal. Since strict rules of evidence (such as the Daubert expert qualification standard)[7] do not usually apply, the role of the tribunal can, in broad terms, be described as passive recipient of whatever the parties choose to present. And, given the possibility (even if distant) of vacatur of an award for refusal to hear evidence,[8] arbitrators may have an incentive to "take the evidence for what it's worth," even where there are serious questions about its provenance or usefulness.[9]

But, to loosely quote a famous phrase: a tribunal is "not a potted plant."[10] It is the task of the arbitration tribunal to exercise its "discretion," to conduct proceedings "with a view toward expediting the resolution of the dispute[.]"[11] A tribunal may direct the order of proof in a proceeding, and may exclude evidence "deemed by the arbitrator to be cumulative or irrelevant."[12] Thus, even though the parties and their counsel may hire and direct the experts in the matter, a tribunal may channel the process, to improve the efficiency of the proceedings.

One simple form of tribunal direction is a request that the parties "focus their presentations on issues the decision of which could dispose of all or part of the case."[13] Such a direction essentially asks that the party-appointed experts answer specific questions, or address specific issues, that the tribunal deems most relevant to a full understanding of the dispute. The tribunal may also give direction on the form of the reports to be provided by experts.[14] The earlier such direction can be given, the more efficient the process. Thus, for example, a tribunal might give directions at a pre-hearing conference, after review of the pleadings in the case. More likely, the tribunal might give directions after review of the expert reports (if produced in advance of the hearings). During the course of the hearings, the tribunal may pose specific questions

to experts, and (if the answer cannot be given immediately), ask that the experts provide additional submissions on the specific issue, prior to the close of hearings.

If the experts are asked to provide additional submissions late in the hearing process, however, the schedule for hearings may need to be extended, to preserve the right of the parties to conduct cross-examination of the witnesses. One solution to that problem might be the conduct of limited cross-examination (if not waived altogether by the parties), through the use of video or telephone conferencing.[15] The tribunal, having already heard the experts testify in live sessions, may have less concern about the ability to gauge the credibility of the experts through live interaction. Alternatively, the parties might waive any further oral testimony of the experts, and have the experts submit responses to the tribunal's questions in the form of written statements, with an opportunity for reply.[16]

Another simple method to improve the efficiency of expert presentations is an agreement (or direction) that the experts' written reports will stand as their direct testimony at the hearing, and that, in effect, their live testimony at the hearing will begin with cross-examination.[17] That solution is not perfect, however, in that issues may arise (between the completion of the report and the conduct of the hearing) that require supplementation of the expert report. A tribunal could permit written supplementation of expert reports, or replies to the main reports of opposing experts, on an agreed schedule; or, the tribunal might permit brief supplementation at the outset of a witness' live appearance to address any last-minute questions. The report-first, then cross-examination method, moreover, generally requires that the tribunal invest some time, in advance of the hearings, to become familiar with the submissions of the experts. In a very complicated case, with many exhibits and experts on multiple subjects, that preparation may be burdensome, and not particularly productive (as tribunal members may have difficulty absorbing the full meaning of complex expert analysis from written submissions). Thus, the parties may agree, or the tribunal may direct, that each expert give some brief overview testimony (essentially summarizing the expert's report) before cross-examination begins. The parties, in consultation with the tribunal, can best determine whether anything in excess of the expert reports is required.

Joint Expert Presentations

Hybrid (blended) forms of expert analysis may proceed from the fundamental Common Law assumption that parties determine when and how experts will be chosen and directed, but with a recognition that the needs of the tribunal can often be best served through modifications of the schedule of expert presentations, and through cooperation between the experts. These hybrid techniques may improve efficiency by reducing hearing time, and focusing expert submissions on the most significant points in dispute.

The simplest hybrid form involves little more than a scheduling modification. Conventional approaches to the presentation of expert witnesses can produce a disconnect, as one set of witnesses and evidence is presented by the claimant, and then days, weeks or even months later, another set is presented by the respondent. The tribunal must attempt to recall the substance of the claimant's earlier expert testimony, and compare it with respondent's expert submission. One increasingly common solution is to set aside an "expert day" (or days), where experts for each side testify, *seriatim*, providing the tribunal an opportunity to compare their methods and conclusions in close temporal proximity. In some instances, the expert portion of the hearings may be conducted at the very end of the process, when the tribunal has heard testimony from lay witnesses, has received other evidence, and is prepared to consider the technical issues in the case. Where there has been some bifurcation of the proceedings (e.g., liability and damages), the process might include essentially two (or more) mini-hearings, capped in each instance by expert testimony.

One potential advantage of this *seriatim* approach to expert testimony is in efficient scheduling of expert testimony. Experts are often busy people, and squeezing them into a hearing calendar may be difficult, especially where the hearings are expected to be lengthy, and the vicissitudes of travel and business conflicts may make the availability of experts uncertain. Setting a specific day (or days) when the experts will testify, *seriatim*, means that the experts can plan to be available and dedicated to the hearing appearance, for that specified period. The expert day(s), moreover, need not necessarily be contiguous with days of hearing lay testimony. Indeed, some separation of time between the main hearing and the expert hearing may avoid the scramble of last-minute adjustment of presentations,

to address unexpected developments during the factual presentations of the hearing. For a concentrated, set period of time, the experts may dedicate themselves to giving testimony, answering questions and responding to each other's opinions.[18]

Another increasingly common form of interaction between expert witnesses is a meet-and-confer process (often called a "conclave"), in advance of the hearings, to determine points on which the experts agree, and to identify actual issues in dispute. Such conclaves could be conducted before the experts prepare their reports, but, most commonly, occur thereafter. The general purpose of a conclave is to have the experts compare their views on the expert issues in the case, with an aim toward reducing the need for duplicative presentations regarding issues on which the experts agree. Such a conclave may be conducted "without prejudice," meaning that communications between the experts during the conclave cannot be used as evidence during any hearings (thus freeing the experts to engage in more candid discussions).[19] The conclave may also be conducted out of the presence of counsel (again, lessening the incentive toward posturing, pure advocacy, or obfuscation).[20] The net result of the conclave, typically, is a form of "joint" report of the experts, noting areas of agreement between them, and (often) outlining the specific issues on which they disagree.[21]

The hoped-for result of the conclave process is a reduction in hearing time, as agreed-points need not be addressed in detail (and certainly not repeated by each expert), and the tribunal can more carefully focus, during the hearings, on the essential disagreements between the experts (and the bases for those differences). At a minimum, the conclave process may avoid the "ships passing in the night" problem, where experts talk past each other, never fairly meeting each other's positions, to the consternation of the tribunal.[22]

Perhaps the most unique form of joint expert presentation is "concurrent expert evidence" (colloquially known as "hot-tubbing").[23] The procedure has been embraced in Australian courts,[24] but is not generally used in the United States.[25] International arbitration service providers and sponsoring associations have begun to experiment with this technique.[26] The essence of the process (which may be combined with the "conclave" process in advance of hearings) is that experts for each side are called to give evidence at the same time; they are sworn in together; they may give explanation of their own opinions, but they may also ask each other questions, may comment on each other's opinions, and may concurrently answer questions from the tribunal. The right of the parties' counsel to conduct cross-examination is preserved, but the focus of the process is interaction between the experts, to highlight areas of agreement, and the bases for any significant disagreements.

Proponents of the hot tub process suggest that it can improve efficiency in a variety of ways.[27] Like the conclave process, it can reduce the need for duplicative testimony on non-controversial points. It can focus the testimony given on points of actual (and significant) disagreement.[28] It can permit the tribunal to hear answers to critical questions contemporaneously, making it possible for the tribunal to compare, in real time (versus through recall or review of transcripts) the conflicting positions of the experts. In writing an award, moreover, the tribunal will have expert testimony available for review in a relatively condensed form.

Critics caution that the hot tub process may take control away from party counsel (who may be best placed to question experts, having extensively prepared for hearings), and that an ill-prepared or inarticulate expert may appear unconvincing (even though the expert's opinion is sound), or that the process may be hijacked by the more aggressive expert (actually re-introducing, and perhaps even increasing, the adversarial bias that may detract from the value of genuinely independent expert analysis). Because the process requires closer control by the tribunal, moreover, some of the efficiency saved in decreased hearing time may be offset by the need for the tribunal to spend substantial time, in advance of hearings, preparing for management of expert testimony.[29] One solution to these kinds of concerns involves a modified form of hot-tubbing, in which the experts provide their direct testimony (either through expert reports or live), and are subject to cross-examination; thereafter, the experts appear jointly for the tribunal to ask any clarifying questions that may have developed from the main presentations of the experts.

Whatever the overall merits (and specific method) of the hot tub process, proponents and critics generally agree that it is a procedure best addressed to more complex, technical disputes, especially those with multiple areas of

expert testimony (such as construction projects, or matters involving sophisticated economic analysis). The increased use of the process, and the increased attention it has gained in dispute resolution literature, however, suggest that hot tubbing remains a viable tool for efficiency enhancement, at least in some cases.[30]

Tribunal-Appointed Experts

On its face, the use of a tribunal-appointed expert may appear inefficient (duplicative), at least in circumstances where party-appointed experts are also to be used.[31] Yet, there is room for a tribunal-appointed expert to perform discrete functions that can enhance the efficiency of the process, even where other experts will appear. And there are occasions where parties and their counsel may recognize that a single, tribunal-appointed expert may most effectively help resolve specific issues in a proceeding.

One role for an expert involves service as a mediator/facilitator, to help the parties work through issues related to the conduct of the arbitration. An expert mediator, for example, might assist the parties in resolving disputes regarding disclosure matters, especially in large-document-volume cases, or in cases where difficult privilege or confidentiality issues might arise. The mediator would be available to guide discussions between the parties, suggest solutions, and encourage cooperation.[32] Discussions with the mediator would be "without prejudice;" and ultimate control of the disclosure process would be at the direction of the tribunal.

The role of the mediator might also involve guiding the conclave process between subject matter experts.[33] Again, on a "without prejudice" basis, the mediator might assist the experts in coming to agreement on issues not in dispute, and in determining the most efficient form for presentation of the experts' analyses. If assumptions are to be built into expert models (algorithms), for example, the tribunal would probably most benefit from a shared list of assumptions, applied by each of the experts, to make comparison of their results more accurate. The mediator might also encourage experts to provide "sensitivity" analyses, making clear how changes in specific assumptions might affect the outcome of the experts' analysis.[34] Where access to specific information is essential to fair and accurate expert reports on all sides, moreover, the mediator's role in guiding the disclosure process could overlap with the facilitation of expert discussions. Ensuring that each expert has access to information may help prevent disruption to the hearing process, if it were to become apparent during the hearing that some additional (previously-undisclosed) information is vital to meaningful expert analysis.

The appointment of a single expert (with no individual party experts), to address a particular task, could save the parties and the tribunal considerable time and burden. Discrete tasks might include: valuation of a specific asset, opinion on a particular issue of foreign law (not otherwise known to the tribunal), site inspection or forensic testing, and many others.

The efficiency of a single tribunal-appointed expert need not be adversely affected by the fact that the parties may have their own experts, even on related issues. Thus, for example, the valuation of a specific asset (by the tribunal expert) might be incorporated into the economic analyses (of the party experts), and that hybrid process could avoid overlap and inefficiency. Alternatively, such as on an issue of foreign law, the parties might determine that, since there probably is just one "right answer" to the specific legal question, there is no need for overlapping party-appointed experts on the same point. The parties, moreover, generally retain the right to pose questions to a tribunal-appointed expert at an evidentiary hearing;[35] thus, if an expert's analysis requires some further explanation or context, the parties may have it, without the need to engage their own experts.

Other Forms Of Expert Analysis

At the far end of the adversarial-inquisitorial spectrum we find systems where the expert effectively becomes a decision-maker in the dispute. One of the more controversial, though highly efficient, processes involves the appointment of an individual arbitrator (or individual member of a three-member arbitral tribunal) with specific expertise in an area relevant to the dispute. At its core, the notion is simple—parties often choose arbitration (at least in part) in order to obtain access to expert decision-makers who do not require tutorials or other background education to understand the context of a specific case. Specialty arbitration-sponsoring institutions (such as the WIPO Arbitration and Mediation Center, or the AIDA Reinsurance and Arbitration Society), offer rosters of specially-trained arbitrators, with extensive background knowledge of issues

and common practices in their industry. So, too, many of the major arbitration centers offer specialty rosters of arbitrators familiar with construction, labor and other particular types of disputes. An arbitrator steeped in the background of a particular industry or professional field may much more quickly absorb the facts of a particular dispute, and may more quickly appreciate the significance of the technical issues presented by the dispute, as compared to a relative novice. In that sense (and more) the expert arbitrator may be highly efficient.[36]

But what of arbitrators who might do more than simply apply their background knowledge related to the dispute? What if an arbitrator applies knowledge, not developed within the confines of the arbitration process, to reject the submissions of one party or another? What if an arbitrator concludes that both parties have failed to adduce essential evidence, and the arbitrator proceeds to conduct an independent investigation (e.g., by visiting a construction site, or consulting professional literature to obtain the "correct" answer)?

In the context of court proceedings, it is generally understood that a judge should not investigate the facts of a case, and that a judge must give parties notice if the judge wishes to take "judicial notice" of a particular fact.[37] So, too, in the context of arbitration. An arbitrator is not necessarily considered "partial" or "prejudiced" by having acquired some knowledge of "the parties, the applicable law or the customs and practices of the business involved" in the dispute.[38] Nor does an arbitrator violate the obligation of impartiality merely by "hav[ing] views on certain general issues likely to arise in the arbitration," so long as the arbitrator does not "prejudge[e] any of the specific factual or legal determinations" to be addressed by arbitration.[39] But an arbitrator may risk the validity of an award by conducting independent factual research, without the knowledge or input of the parties.[40] In broad terms, the obligation of arbitrators to conduct proceedings in a manner "fair to all," affording all parties the "right to be heard," and a "fair opportunity to present evidence,"[41] suggests that, when an arbitrator believes that more information is required to decide the case, the arbitrator may ask questions, or call for additional witness testimony or other evidence, but must do so on notice to the parties.[42]

The arbitration process might, by agreement of the parties, become almost entirely inquisitorial. On consent of the parties, arbitrators may engage in abbreviated forms of dispute resolution.[43] Such abbreviated forms may include paper-only submissions and on-line methods of dispute resolution.[44] More extreme forms of cost-savings might be obtained through the use of expert arbitrators, to review the specific (and limited) forms of information required to resolve a particular matter fairly. In certain trade goods disputes, for example, parties may select an arbitrator with specialized knowledge, providing the arbitrator with background documents (chiefly, on the specifications applicable to the goods) and the arbitrator may inspect the goods (in a process called "look-sniff" or simply "quality" arbitration) in the absence of the parties.[45] The expert arbitrator renders an award, without any further evidentiary hearing.[46] Although such a process surely is an extremely limited form of arbitration,[47] it does at least provide for some input by the parties, and thus might appropriately be termed a form of arbitration.[48] And the process might be expanded, to address other forms of technical disputes that require rapid, cost-effective resolution.[49]

At some extreme point, however, an expert resolution of an issue must lose its potential status as arbitration.[50] Under New York law, for example, an agreement that a "question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected" by parties, may be enforced,[51] but such a process does not have the status of arbitration, and a determination, pursuant to such a process, cannot be enforced as an arbitration award.[52]

Yet, even at this extreme, one can imagine methods to foster the efficiencies of expert determination, and nevertheless maintain the benefits of an arbitration award.[53] Thus, for example, a dispute might be submitted to an expert for resolution (through an inquisitorial process), but subject to potential review by an arbitrator. If the parties were satisfied with the expert's determination, the result might be memorialized in the form of a "consent" arbitration award (by a "backup" arbitrator, appointed for such a purpose).[54] If the parties were in conflict as to the expert determination, then the backup arbitrator could be employed to perform some review of that determination, with the input of the parties. Alternatively, the parties might each appoint experts to examine the particular issue; if the experts agreed, then again a consent award would be entered. If they did not agree, then some further

arbitration process would ensue. The precise form of an expert determination (with or without elements of arbitration) is as flexible as the needs of the parties.[55]

Conclusion

The arbitration world does not divide neatly into Common Law and Civil Law camps. Arbitration, by virtue of its contractual basis, is subject to a wide array of variations, to suit the needs of the parties. Arbitrators, advocates and academics who originate in one or the other camp may benefit greatly from considering alternate procedures derived from other traditions. In the area of expert analysis (often one of the costliest elements of arbitration proceedings) the use of hybrid techniques may greatly enhance the efficiency of proceedings, while maintaining the essential elements of justice prized in both Common Law and Civil Law systems.

Endnotes

1. For additional suggestions (not confined to experts) regarding cost and time-saving procedures in arbitration, see generally Albert Jan van den Berg, Note-Time And Costs: Issues And Initiatives From An Arbitrator's Perspective, 28 ICSID Rev. 218 (2013).

2. See generally Bernd Ehle, Practical Aspects Of Using Expert Evidence In International Arbitration, 2 Y.B. on Int'l Arb. 75 (2012) (summarizing potential uses of experts in arbitration, and procedures for obtaining expert evidence and assistance); Michael Feutrill & Noah Rubins, The Preparation Of Expert Evidence In International Commercial Arbitration: Practical Aspects, 2009 Int'l Bus. L.J. 307 (2009) (same).

3. See, e.g., AAA Commercial Arbitration Rules, P-2(a)(xi) (suggesting subjects for discussion at a preliminary conference with the tribunal to include "whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports"); R-34(a) (parties may offer evidence as is "relevant and material" to the dispute; conformity to "legal rules of evidence shall not be necessary"); R-34(b) (arbitrator shall determine admissibility, relevance and materiality of evidence offered, and may exclude evidence deemed to be cumulative or irrelevant); JAMS Comprehensive Arbitration Rules & Procedures, R-17(c) (as they become aware of new documents or information, parties are obligated to provide documents and "supplement their identification of witnesses and experts"); R-20(a) (pre-hearing submissions to include "a list of witnesses" to be called, "including any experts"); R-22(d) ("Strict conformity to the rules of evidence is not required[.]").

4. See Chartered Institute of Arbitrators, International Arbitration Practice Guideline: Party-Appointed And Tribunal-Appointed Experts, Art. 1, Cmts. (2016), available at http://www.ciarb.org.

5. See, e.g., UNCITRAL Arbitration Rules, Art. 29 (tribunal may appoint expert to report on specific issues determined by tribunal); ICDR International Arb. Rules, Art. 25 (same); JAMS International Arb. Rules, Art. 27.7 (same); ICC Arb. Rules, Art. 25 (tribunal may hear experts appointed by the parties, and tribunal may appoint one or more experts, define their terms of reference and receive their reports); IBA Rules on Taking of Evidence in International Arbitration, Arts. 5-6 (same).

6. See generally Michael McIlwrath & Henri Alvarez, Common And Civil Law Approaches To Procedure: Party And Arbitrator Perspectives, in Paul E. Mason & Horacio A. Gregera Naron (eds.), International Arbitration: 21st Century Perspectives, Chap. 2 (2010); Ruth Fenton, A Civil Matter For A Common Expert: How Should Parties And Tribunals Use Experts In International Commercial Arbitration, 6 Pepperdine Disp. Resol. L.J. 279, 289 (2006) (summarizing differences between civil law and common law traditions regarding dispute resolution).

7. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

8. See George Ruttinger, Joe Meadows & April Ham, Using Experts In Arbitration, Chapter 31 in AAA Handbook On Arbitration Practice (2d ed. 2016) (noting that counsel have flexibility in presenting experts as "failure to admit relevant evidence may be a ground for reversal or modification").

9. Ronald W. Haughton, Running The Hearing, in Arnold Zack (ed), Arbitration In Practice 44 (1994)

(suggesting arbitrator may use the "for what it's worth" ruling on evidence, and that arbitrator should apply "common sense" and remind the parties that the goal of arbitration is to "let the parties have their problem heard and resolved without excessive technicalities").

10. See Iran-Contra Hearings: Note Of Braggadocio Resounds At Hearing, N.Y. Times, July 10, 1987, available at https://www.nytimes.com (quoting lawyer Brendan Sullivan, attorney for Colonel Oliver North, on the attorney's right and obligation to object).

11. AAA Rules, R-32(b); see generally Patricia D. Galloway, Using Experts Effectively & Efficiently In Arbitration, 67 Dispute Resol. J. at 2 (2012) (suggesting that arbitration rules generally give a tribunal "flexibility in handling the proceeding, but the overriding goal is efficiency and lower costs").

12. AAA Rules, R-34(b).

13. AAA Rules, R-32(b).

14. The form may also be specified in the arbitration agreement, or the arbitral rules chosen by the parties. See, e.g., International Bar Association, Rules On The Taking Of Evidence In International Arbitration (2010), Art. 5.2 (listing required contents of expert reports).

15. See AAA Rules, R-32(c) (alternative means of presenting evidence must "afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination").

16. See AAA Rules, R-35(c) (parties may agree, or arbitrator may direct that documents or other evidence be submitted "after the hearing," but "[a]ll parties shall be afforded an opportunity to examine and respond to such documents or other evidence").

17. See AAA Rules, R-35(a) (permitting written witness statements, subject to tribunal's right to "disregard" the statement if the witness does not appear at the hearing, to be questioned).

18. The parties and tribunal may also consider imposing a "chess clock" limitation on expert presentations, to ensure that the time spent is equally allocated between the experts. See Raymond A. Garcia, Nicole Liguori Micklich, & Michael V. Pepe, Chess Clock Arbitration, June 22, 2011, www.americanbar.org.

19. See Bell Gully, Expert Witness Conferencing—How Can We Get The Best Outcomes?, Nov. 1, 2012, available at www.lexology.com (suggesting that experts may seek the ability to communicate with their clients and counsel, so that they "should not worry about drafting precise wording" in any joint statement that may come from the witness conclave).

20. A more elaborate form of conclave would involve the use of a neutral facilitator, who might put the experts at ease during the process, and serve to encourage agreement between the experts. See infra, footnotes 34-35 and accompanying text.

21. The joint report of the experts may be drafted by the experts themselves, or may be drafted with the assistance of counsel.

22. See Issues For Arbitrators To Consider Regarding Experts, Vol. 21 No. 1 ICC International Court of Arbitration Bulletin (2009), available at www.iccwbo.org (noting risk that "experts may differ in the structure of their respective work product, their basic underlying date, or their methodology," which can be "particularly challenging for the tribunal to resolve where the tribunal cannot find flaws in the experts' methodologies or findings that would enable the tribunal to conclude that one expert's conclusions are more likely to be correct than the other's").

23. The image of the "hot tub," where professional colleagues can discuss a subject in an informal, collegial manner, addresses the central impetus for this procedure: to encourage experts to agree on non-controversial points, and to permit a give-and-take process that allows the tribunal to examine the points of difference between the experts with greater understanding and efficiency. See generally Francis P. Kao et al., Into The Hot Tub . . . A Practical Guide To Alternative Witness Procedures In International Arbitration, 44 Int'l Lawyer 1035 (2010).

24. See Hon. Rachel Pepper, 'Hot-Tubbing': The Use Of Concurrent Expert Evidence In The Land And Environment Court Of New South Wales And Beyond (2015), available at www.lec.justice.nsw.gov.au.

25. See Adam Elliott Butt, Concurrent Expert Evidence In U.S. Toxic Harms Cases And Civil Cases More Generally: Is There A Proper Role For Hot Tubbing, 40 Houston J. Int'l Law 1 (2017).

26. See, e.g., International Bar Association, Rules On The Taking Of Evidence In International Arbitration (2010), Art. 8.3(f) (tribunal may "vary" the order of proceeding, "including the arrangement of testimony by particular issues or in such a manner that witnesses may be questioned at the same time and in confrontation with each other (witness conferencing)"); Chartered Institute of Arbitrators, Protocol For The Use Of Party-Appointed Expert Witnesses In International Arbitration (2007), Art. 7.1 ("The manner in which an expert gives testimony shall be as directed by the Arbitral Tribunal. The expert's testimony shall be given with the purpose of assisting the Arbitral Tribunal to narrow the issues between the experts and to understand and efficiently to use the expert evidence."), Art. 7.2 ("The Arbitral Tribunal may at any time, up to and during the hearing, direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.").

27. See generally Kabir Singh, The "Additional Weapon:" Practical Tips For Effective Expert Conferencing In Arbitration, Mar. 28, 2016, available at www.arbitrationblog.kluwerarbitration.com (suggesting that hot tubbing may produce an "increase in the speed of the proceedings," and lead to "substantial savings for the parties," as well as "[m]ore clarity" on technical issues, and may lead to a "higher likelihood that the matter will be settled") (citing authorities).

28. Proponents also suggest that hot-tubbing may help mitigate the problem of "partisan" experts. See David Sonenshein & Charles Fitzpatrick, The Problem Of Partisan Experts And The Potential For Reform Through Concurrent Evidence, 32 Rev. Litig. 1 (2013).

29. See Jeffrey H. Dasteel, Experts In Arbitration (2013), available at www.lacba.org (suggesting that, in witness conferencing, "advocacy may overtake any real attempt to reach agreement," and "counsel may appoint experts based on the expert's willingness to understand and advocate" the party's position; and hot tubbing "may extend the hearing time and make it difficult for counsel to control the examination").

30. See ICC Court of Arbitration Bulletin, Issues For Arbitrators To Consider Regarding Experts (2010), available at www.library.iccwbo.org (witness conferencing method is "increasingly used to resolve the differences between conflicting expert opinions, but requires the tribunal's active participation and supervision" to maintain order at the hearing).

31. Where one of the parties is reluctant to authorize a tribunal-appointed expert, moreover, delays and other uncertainties may adversely affect the usefulness of the process. See Robert Horne & John Mullen, The Expert Witness In Construction, Chapter 4 (2013) (describing uses and limitations of tribunal-appointed experts).

32. See generally Steven C. Bennett, Mediation As A Means To Improve Cooperation In E-Discovery, 24 Albany Law J. of Sci. & Tech. 251 (2014).

33. See Eugene Romaniuk, Bruce Smith & Miiko Kumar, The New Default: Expert Witness Conclaves (June 24, 2016), available at www.lawyersweekly.com (summarizing results of a survey (in Australia), suggesting that the "overwhelming majority" of expert conclaves achieve "sensible results," with the cost of a facilitator for a conclave "more than saved by the efficiency of the process"); but see Karen Stott, Expert Witness Conclaves For Joint Report-5 Tips And Observations By a Facilitator, Apr. 8, 2018, available at www.linkedin.com (cautioning that conclave process can be "extremely" labor intensive, and noting that the process may require "a number of conclaves if the issues are lengthy and complicated").

34. See Richard Boulton, Joe Skilton & Amit Arora, The Function And Role Of Damages Experts, Chapter 2 in John A. Trenor (ed.), The Guide To Damages In International Arbitration (2017) (sensitivity analysis useful in allowing the tribunal to establish which of the experts' assumptions or areas of disagreement have a material effect on the damages calculation).

35. See, e.g., International Centre for Dispute Resolution, International Dispute Resolution Procedures, Art. 25.4 ("At the request of any party, the tribunal shall give the parties an opportunity to question the [tribunal-appointed] expert at a hearing."); IBA Rules, Art. 6.6 ("At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal

may question the Tribunal-Appointed Expert, and he or she may be question by the Parties or by any Party-Appointed Expert").

36. For an argument for the appointment of an economist expert as an arbitrator, in cases involving complicated damages analyses, see J. Gregory Sidak, Economists As Arbitrators, 30 Emory Int'l L. Rev. 2105, 2111, (2016) (suggesting that economist arbitrator may "hold the party economic experts to a higher standard of economic rigor," and more easily detect "error and bias in the economic testimony").

37. See ABA Model Code of Judicial Conduct, Rule 2.9(c) (judge "shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed"); Fed. R. Evid. 201 (allowing court to take judicial notice of facts "not subject to reasonable dispute," but recognizing that "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed"). There is some controversy (at least within the judiciary) as to the authority of judges to conduct independent factual "background" research (and as to what "background" research includes). See Edward K. Cheng, Should Judges Do Independent Research On Scientific Issues? 90 Judicature 58, 61 (2006) ("Judges are deeply divided about the issue of independent research[.] To many judges, doing independent research when confronted with new and unfamiliar material seems the most responsible and natural thing to do. To others, it represents the worst kind of overreaching and a threat to long-cherished adversarial value.").

38. AAA/ABA Code Of Ethics For Arbitrators In Commercial Disputes, Canon I, Cmt. 1 ("Arbitrators may also have special experience or expertise in the areas of business, commerce or technology which are involved in the arbitration.").

39. See id.

40. See Quesada v. City of Tampa, 96 So.3d 924 (Fla. Dist. Ct. App. 2012) (award vacated where arbitrator conducted independent research on diet supplement at issue in proceedings, by reviewing manufacturer's website and contacting a dietician). There is some controversy about the ability of an arbitrator to conduct legal research without the knowledge or approval of the arbitration parties. Compare Paul Bennett Marrow, Can An Arbitrator Conduct Independent Legal Research? If Not, Why Not? N.Y.S.B.A.J. 24 (May 2013) (suggesting that there are "good reasons" for an arbitrator to refrain from "unauthorized" legal research) with M. Ross Shulmister, Attorney Arbitrators Should Research Law: Permission Of The Parties To Do So Is Not Required, 68 Disp. Resol. J. 29 (2013) (responding to, and criticizing, Marrow position; suggesting that attorney arbitrators are "actually under at least a moral obligation" to conduct independent legal research where necessary; yet, suggesting that it is "wise (although not required)" that an arbitrator advise parties of the results of any independent research, and "allow them to respond" to those findings).

41. See AAA/ABA Code of Ethics, Canons I(D) and IV(B).

42. Id., Canon IV(E); see generally Thomas Sonneborn, Conducting Independent Research: Should An Arbitrator Look Beyond The Record Or The Law?, 32 Ill. Pub. Emp. Rel. Rep. Nos. 3-4 (2015).

43. Judge Richard Posner famously stated: "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract." Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994). The precise obligations of arbitrators to pursue a "decision-making process founded on a search for an accurate portrayal of the facts and the law," however, is a matter of some considerable academic debate. See William W. Park, Rectitude In International Arbitration, 27 Arb. Int'l 473, 521 (2011).

44. See Beth Trent & Colin Rule, Moving Arbitration Online: The Next Frontier, Apr. 3, 2013, N.Y.L.J., available at www.cpradr.org.

45. See Sundra Rajoo, Trade Disputes Solving Mechanisms (2009), available at www.sundrarajoo.com (noting use of look-sniff system by commodity exchange organizations).

46. See Sarika Tyagi, International Commercial Arbitration: An Ultimate Remedy In Commercial Obligation, With

Special Reference To India (PhD dissertation, Feb. 2, 2015), available at http://shodhganga.inflibnet.ac.in.

47. See Myles Stilwell, One Law For All, 8 ADR Bull. No. 8, Art. 5 (2006) (noting the "broad gulf" between look-sniff arbitration and more "court-based processes" in conventional arbitration, but noting possibility, "in the hands of agreeing parties," for "lessening" of the scope of procedural steps in arbitration).

48. The liberal provisions of the London Court of International Arbitration Rules (2014), available at www.lcia.org, provide something of a road map for such an extremely abbreviated arbitration. The Rules provide each party a right to an oral hearing, "unless the parties have agreed in writing upon a documents-only arbitration[.]" Rule 19.1. An arbitral tribunal, moreover, has the power "to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute[.]" Rule 22.1(iii). The parties may agree on methods for the conduct of the arbitration, Rule 14.2, and it is the obligation of the tribunal to "adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute[.]" Rule 14.4(ii). And, in the pursuit of these and other general duties, the tribunal "shall have the widest discretion to discharge these general duties[.]" Rule 14.5.

49. See Tying Up Loose Ends, And Dispute Resolution, In ICT Contracts: Quicker, Simpler And Better Solutions? (2004), available at www.wigleylaw.com (presentation to New Zealand Computer Society And Technology Law Society) (suggesting use of similar procedure for resolution of "urgent decisions" on technology projects, "particularly those that are complex and expensive"); but see Adham Kotb, Alternative Dispute Resolution: Arbitration Remains A Better 'Final And Binding' Alternative Than Expert Determination, 8 Queen Mary L.J. 125 (2017) (suggesting that "simplified arbitration can achieve the perceived cost and time benefits of expert determination without the need to jeopardize justice and fairness").

50. See Tomas Kennedy-Grant, Expert Determination And The Enforceability Of ADR Generally (Aug. 2010), available at www.aminz.org.nz (noting distinction between arbitration, as a "more or less formal adjudication," where a court may exercise "a degree of supervision," and an expert determination with "no such safeguards," and the expert deciding "solely by the use of his eyes, his knowledge and his skill") (quotation omitted); see also Frydman v. Cosmair, Inc., 1995 WL 404841 (S.D.N.Y. July 6, 1995) (rejecting enforcement of "award" in French price appraisal, where procedure, rather than resolving a dispute, provided missing term in contract).

51. Such a process is commonly used to resolve questions of business valuation, profit shares and capital account balances. See Daniel Djanogly, Expert Determination: An Attractive ADR Solution For Business Disputes, Oct. 11, 2016, available at www.linkedin.com.

52. See N.Y. Civ. Prac. Law & Rules Sec. 7601; see also Steven H. Reisberg, What Is Expert Determination? The Secret Alternative To Arbitration, Dec. 13, 2013, available at www. NYLJ.com (New York provision "was enacted in order to provide for judicial enforcement of expert determinations as separate and distinct from arbitration;" in an expert determination, "there are very significant differences in procedure," including the fact that "procedural restrictions do not automatically apply" in an expert determination).

53. At the domestic level, an arbitration award can easily be turned into a court judgment, making collection on the award a less difficult process. See Federal Arbitration Act, Section 9. At the international level, one of the principal benefits of an arbitration award is broad enforceability, by virtue of multilateral treaties, such as the New York Arbitration Convention. See Marcin Tustin, Do Awards From Expert Determination And Other Private Summary Dispute Resolution Mechanisms Fall Within The New York Arbitration Convention? (2013), available at www.nysbar.com/blogs.

54. See, e.g., AAA Commercial Rules, R-48 (provision for "consent award" if parties settle their dispute during the course of arbitration).

55. See generally John Kendall, Expert Determination, Introduction (3rd ed. 2001) (noting the "infinitely flexible" nature of expert determination processes). ■

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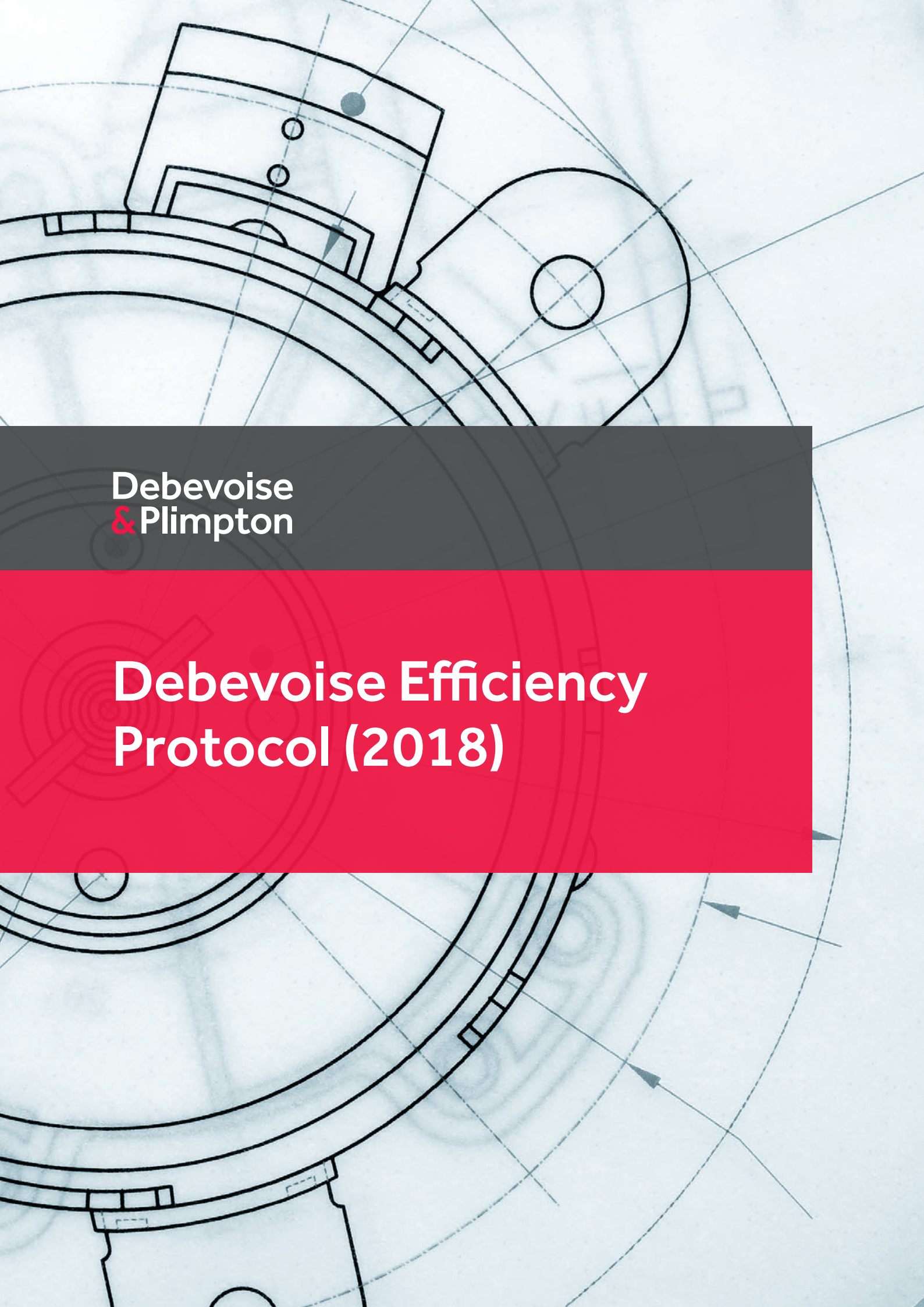

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Debevoise Efficiency Protocol (2018)

To address concerns about increased length and cost in international arbitration, in 2010 the Debevoise & Plimpton International Dispute Resolution Group issued our Protocol to Promote Efficiency in International Arbitration. We now update our Efficiency Protocol. Through this Protocol, we reiterate our commitment to explore with our clients how, in each case, the participants can take advantage of international arbitration's inherent flexibility to promote efficiency without compromising fairness or our clients' chances of success. The procedures set out here are therefore not meant to be inflexible rules, but instead are considerations that, when appropriate for the case, can improve the arbitration process and thereby enable all parties to enjoy the advantages of international arbitration.

Formation of the Tribunal

1. Before appointing arbitrators, we will ask them to confirm:

   1.1 their availability to administer the case, including hearings, on an efficient and reasonably expeditious schedule;

   1.2 a commitment to conduct the proceedings efficiently and to adopt procedures suitable to the circumstances of the arbitration; and

   1.3 a commitment not to take on new appointments that would reduce the arbitrator's ability to conduct the case efficiently.

2. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators, even if the arbitration clause provides for three arbitrators.

Establishing the Case and the Procedure

3. We will seek to avoid unnecessary multiple proceedings, for example by considering joinder, consolidation, overlapping appointments, stays, and coordinated hearings and briefing schedules.

4. We will request that the arbitral tribunal hold an early procedural conference to establish procedures for the case.

5. We will request our clients and opposing clients to attend procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.

6. We will propose procedures that are appropriate for the particular case, proportionate to its value and complexity, and designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases. We will encourage active participation by the tribunal throughout the case. For example:

   6.1 We will consider including a detailed statement of claim with the request for arbitration so that the tribunal will be able to set the procedures with more knowledge of the issues in dispute.

   6.2 We will consider a fast-track schedule with fixed deadlines.

   6.3 We will request additional procedural conferences following certain submissions to consider whether the procedures could be made more efficient in light of the submissions.

   6.4 We will suggest page limits for memorials in order to ensure that they focus on the most important issues.

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6.5 We will encourage the arbitral tribunal to establish cyberprotocols to protect transfer and use of sensitive information and to disclose cyber incidents, in line with the **Debevoise Protocol to Promote Cybersecurity in International Arbitration**.

7. When acting for claimants, we will seek to use the time between the filing of the arbitration and the initial procedural conference to prepare the first merits submission so that the schedule can commence soon after the conference.

8. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

8.1 For bifurcated proceedings, we will encourage the arbitral tribunal to set deadlines and hearing dates that include all phases of the case. This minimizes delay at a later stage caused by conflicting commitments of the tribunal members or counsel.

8.2 Such a schedule would include a deadline for the arbitral tribunal to indicate whether the proceeding should continue to the next phase. A reasoned decision can follow, but, in the meantime, the parties can be drafting the submissions in the next phase.

9. In order to avoid delays in drafting the award, we will ask the arbitral tribunal to include in the initial procedural schedule:

9.1 the dates on which they will deliberate following the hearing, including at least one day immediately following the hearing; and

9.2 a date by which the award will be issued.

10. We will encourage tribunals to award costs at the time of interim decisions, when appropriate, in order to discourage time-wasting or unmeritorious applications.

Evidence

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules on the Taking of Evidence generally provide an appropriate balance of interests.

11.1 We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.

11.2 We will request the arbitral tribunal (or the Chair) to conduct a telephone conference following the submission of any objections to document requests to the tribunal. Such a conference can lead to a more effective weighing of the need for requested documents compared to the burden of production and potentially narrow the disputes.

12. When possible, we will make filings electronically and encourage paperless arbitrations.

13. We will seek to avoid having multiple witnesses testify about the same facts.

14. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing. Expert conferencing at the hearing, particularly with respect to quantum experts, can also often be time-saving and more effective.

15. We will brief the applicable law, rather than submit expert evidence as proof, except in unusual circumstances.

16. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

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The Hearing

17. In order for the hearing to focus more effectively on the facts and issues that need to be decided, we will ask the arbitral tribunal to set in the initial procedural order:

17.1 a date following the final written submissions on which they will confer regarding the issues in the case and the upcoming hearing, and

17.2 a date for a prehearing conference at which they can discuss with the parties the disputed facts and issues on which they hope the hearing will focus.

18. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.

19. We will generally encourage the use of a chess-clock process (fixed time limits) for hearings.

20. We will not automatically request post-hearing briefs. We will consider in each case whether they would be helpful, and, if so, we will seek to limit the briefing to specific issues identified by the tribunal.

21. We will consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

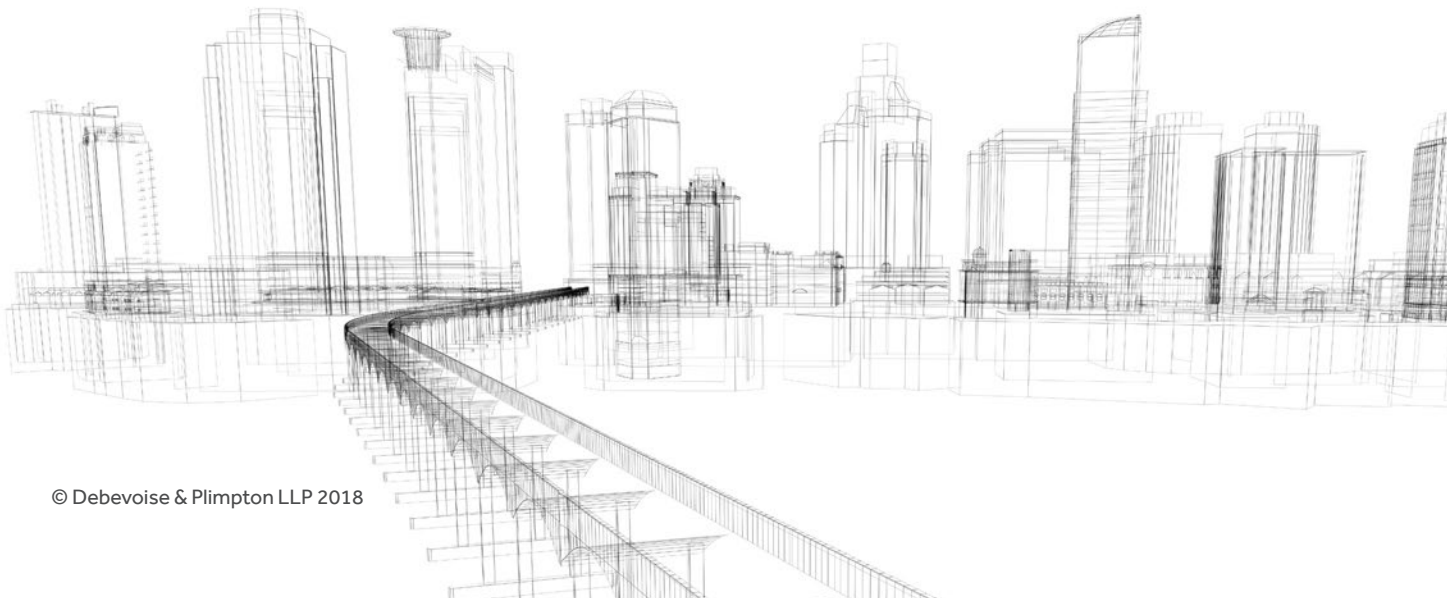
22. We will seek agreement on a common summary format for costs schedules to facilitate the tribunal's comparison and to avoid the expense of removing privileged information from daily time entries. We will also consider whether any argument about entitlement to costs is necessary.

Settlement Consideration

23. We will consider settlement options at the outset of each case and then at appropriate points such as when an exchange of submissions has clarified issues or a preliminary issue has been determined. Routes to settlement could include negotiations or other non-binding ADR such as early neutral evaluation.

24. Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage.

25. We will consider asking arbitrators to provide preliminary views that could facilitate settlement.



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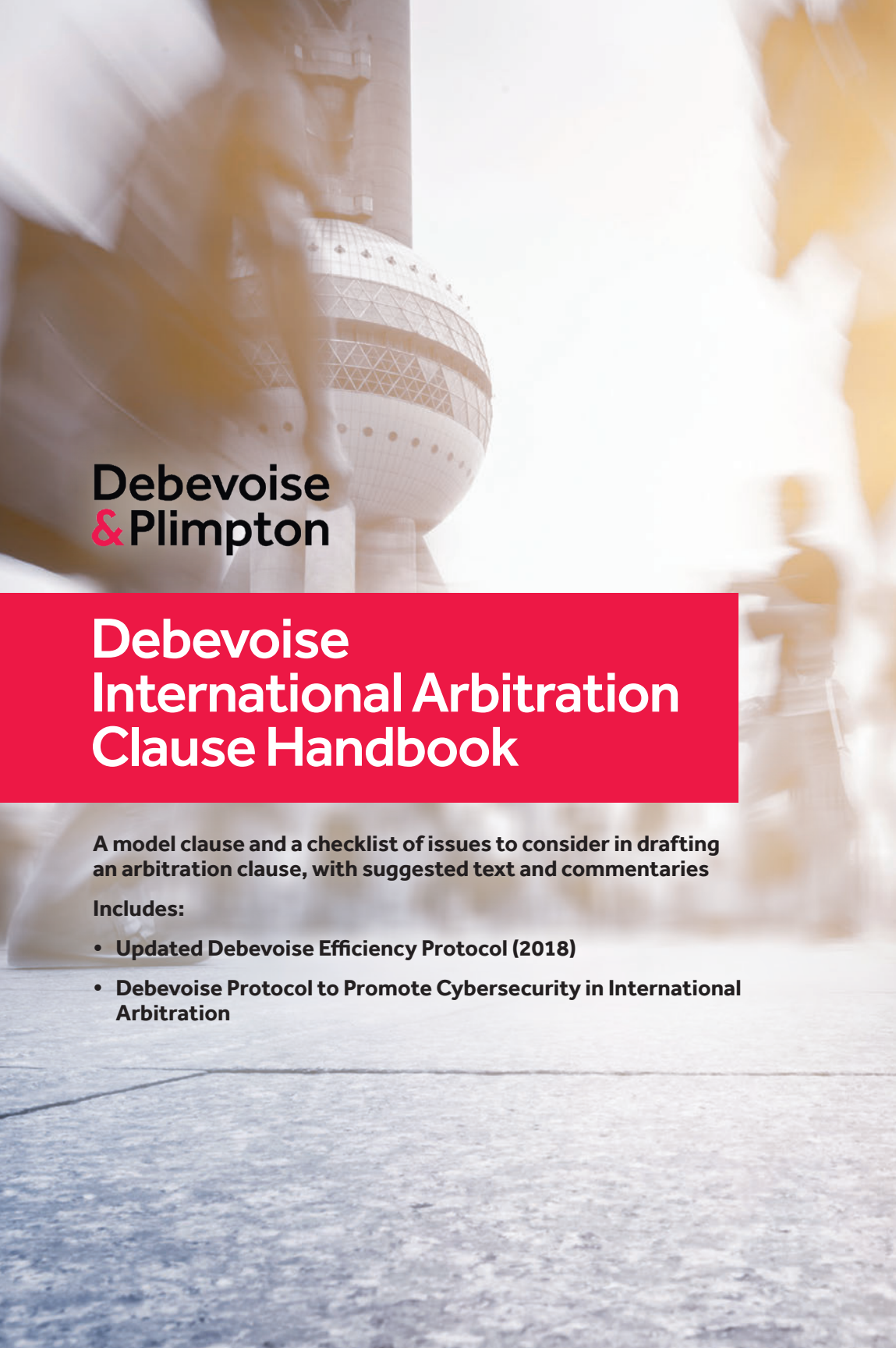

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Debevoise International Arbitration Clause Handbook

A model clause and a checklist of issues to consider in drafting an arbitration clause, with suggested text and commentaries

Includes:

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- **Debevoise Protocol to Promote Cybersecurity in International Arbitration**

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Debevoise International Arbitration Clause Handbook

I. INTRODUCTION

A well-drafted arbitration clause can save costs and time at the inception of a dispute, facilitate a more efficient arbitration, and even deter breaches of the agreement by providing an effective dispute resolution mechanism. An arbitration clause need not be complex to be effective, but it is prudent to think strategically about the parties' likely posture in any dispute and how that posture should translate into an arbitration clause that maximizes the prospect of successful, efficient dispute resolution.

No single arbitration clause is suitable for all contracts. The drafting of an arbitration clause for international contracts should be informed by careful consideration of the nature of the contract, the parties to the contract, the types of disputes that might be expected to arise under the contract and the jurisdictions likely to be involved in any dispute or enforcement procedure. Drafting an appropriate clause also requires an understanding of any circumstances that may call for special provisions, such as provisions addressing interim relief, confidentiality, or joinder and consolidation in a multiparty or multi-contract dispute.

This publication provides a framework for building a clause that is suitable to the specific transaction at issue and suggests language to address some of the common drafting issues that arise in complex arbitration agreements. This publication is divided into two key sections:

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(*i*) the basic **model clause**, which provides a succinct arbitration provision that, in one variation or another, will be sufficient standing alone in a broad range of contracts and should generally be included in every arbitration agreement; and

(*ii*) **optional clauses**, which may or may not be appropriate for a given agreement in light of its specific circumstances.

Both sections are accompanied by relevant annotations and commentary.

In addition, included as appendices to this booklet are:

(*i*) an overview of frequently considered arbitral seats;

(*ii*) an overview of major arbitral rules;

(*iii*) a table comparing the rules of the major institutions;

(*iv*) specific guidance on arbitration clauses for investor-state contracts;

(*v*) Debevoise's *Efficiency Protocol* (2018), reflecting our evolving insights into procedures that can make arbitrations faster and less costly; and

(*vi*) Debevoise's *Protocol to Promote Cybersecurity in International Arbitration*, which provides useful guidance for devising procedures to manage the risk of cybersecurity threats.

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The model clause, while offering a number of specific options, does not exhaust all the possible provisions that may be desirable in particular contracts. This model clause should therefore serve as the beginning, not the end, of the process of drafting an arbitration clause.

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II. MODEL ARBITRATION CLAUSE

Any dispute, controversy, or claim arising out of, relating to, or in connection with this contract, including with respect to the formation, applicability, breach, termination, validity or enforceability thereof,[a] shall be resolved by arbitration. The arbitration shall be conducted by [*one or three*] arbitrators,[b] in accordance with [*identify rules*] in effect at the time of the arbitration,[c] except as they may be modified herein or by mutual agreement of the parties. [*Method of selection of arbitrators.*][d] The seat of the arbitration shall be [*city, country*],[e] and it shall be conducted in the [*specify*] language.[f] The arbitration award shall be final and binding on the parties, and the parties undertake to carry out any award without delay.[g] Judgment upon the award may be entered by any court having jurisdiction of the award or having jurisdiction over the relevant party or its assets.[h]

Annotated Commentary to Model Arbitration Clause

a. Broad/Narrow

In most instances, parties will want to submit *all* disputes to arbitration. It is possible however to agree to arbitrate only specific types or categories of disputes. In that case, the scope of arbitration should be carefully and precisely delineated in the arbitration clause. Even with careful drafting, there is a significant risk that when a dispute arises, one party will claim that the dispute does not fall within the scope of the arbitration clause. Such a preliminary dispute will delay and make eventual resolution of the primary dispute more expensive. For that reason, it is preferable to use a broad clause as the model text proposes.

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When a narrow arbitration clause is used, the clause should explicitly state whether the arbitrability of any particular dispute shall be decided in the first instance, through arbitration or by the courts.

In some instances, arbitration agreements include "split" clauses, which provide for arbitration or court litigation at a party's option. Such clauses must be drafted with caution because they may be unenforceable in certain jurisdictions. For further information on split clauses, see Section III.1.b in the Optional Clauses section below.

b. Number of Arbitrators

The decision to select one or three arbitrators depends on the nature of the contract, the likely amount in dispute, and the complexity of the potential controversies. Having one arbitrator is less expensive and generally more expeditious, so it may be preferred for smaller disputes or disputes raising simple issues. A three-person tribunal may be appropriate for complex factual and legal issues. A three-arbitrator panel also provides the parties with more control over the composition of the tribunal, because each party will normally select one arbitrator, and the parties will also be able to influence the selection of the third arbitrator (who serves as chair of the tribunal). If the dispute is to be heard before a single arbitrator and the parties cannot agree on the identity of the arbitrator, the administering institution will ordinarily appoint the arbitrator. For more information about arbitrator selection methods, see Section II.d below.

Tribunals of more than three arbitrators are rare. It is never advisable to select an even number of arbitrators. In fact, the law in some jurisdictions prohibits the selection of an even number of arbitrators. These include **France** and **Austria** in domestic arbitrations and the **Netherlands**, **Italy** and **Egypt** more generally

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(*see, e.g.,* French Code of Civil Procedure, Article 1453; Austrian Code of Civil Procedure, § 586; Netherlands Code of Civil Procedure, Article 1026(1); Italian Code of Civil Procedure, Article 809; Egyptian Arbitration Law, Article 15(2)).

Applicable arbitration rules will also contain provisions on the number of arbitrators in the event that the parties do not specify the number of arbitrators in their agreement. Some rules provide that one arbitrator is the default, except that the appointing institution may appoint three arbitrators if it determines that the dispute warrants a three-arbitrator tribunal. These include the International Arbitration Rules of the American Arbitration Association's)the "AAA's") International Center for Dispute Resolution (the "ICDR Rules") (Article 11), the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") (Article 12(2)), the Rules of the London Court of International Arbitration (the "LCIA Rules") (Article 5.8) and the Singapore International Arbitration Centre Arbitration Rules (the "SIAC Rules") (Rule 9.1).

Other sets of rules provide for a default of three arbitrators. These include the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") (Article 37(2)(b)) and the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Rules") (Article 7(1)).

The Hong Kong International Arbitration Centre Administered Arbitration Rules (the "HKIAC Rules") (Article 6.1) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules") (Article 16.2) have no default and instead provide that the appointing institution will determine whether one or three arbitrators should be appointed.

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c. Rules

Appendix 2 in this booklet contains suggested language for selecting arbitral rules and considerations for choosing among them. In addition, **Appendix 3** contains a table comparing features of the main sets of arbitral rules. **Unless otherwise noted, the versions of the rules cited throughout this booklet are the versions listed in Appendix 3**. If other rules not mentioned here are being considered for a particular transaction, it is important to obtain the advice of experienced international arbitration counsel.

One of the key choices in selecting a set of arbitration rules is whether to opt for institutional arbitration or *ad hoc* arbitration. In institutional arbitration, an arbitral institution provides administrative assistance with running an arbitration in exchange for a fee. This can include, for example, facilitating communications between the parties and the arbitrators, arranging for hearings, collecting deposits from the parties and paying the arbitrators. In addition to providing these administrative services, administering institutions can assist in ensuring that arbitrators do their job safeguarding the quality of the award.

Ad hoc arbitration requires the parties to attend to the administrative details of the arbitration themselves. Although *ad hoc* rules may provide cost savings in some cases—particularly if the parties are experienced in international arbitration—the relatively low administrative fee charged by administering institutions often provides good value.

Jurisdiction-specific constraints may also apply. For example, *ad hoc* arbitrations seated in mainland **China** generally will not be recognized under China's arbitration law. However, the Supreme People's Court issued a judicial interpretation in January 2017

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indicating that *ad hoc* arbitrations may be recognized if the two parties are both registered in free trade zones and certain other conditions are satisfied. Nonetheless, the safer course is to choose institutional arbitration if a party is unable to avoid agreeing to arbitration in mainland China.

In selecting rules to govern the arbitration, counsel should consider whether the client is more likely to be the claimant or the respondent in any arbitration. Certain rules provide for fee arrangements that require the claimant to bear more up-front costs. Also, if there is some possibility that the other party will refuse to participate in the arbitration, it is important to select one of the arbitration institutions or *ad hoc* rules cited in **Appendix 2**, as each has rules permitting the arbitration to proceed in the absence of a party (*see*, *e.g.*, ICC Rules, Article 6(8); ICDR Rules, Article 26; LCIA Rules, Article 15.8; UNCITRAL Rules, Article 30; SCC Rules, Article 35; SIAC Rules, Rules 20.9, 27(l); HKIAC Rules, Article 26). These rules make it easier to commence arbitration in circumstances in which the other party declines to participate. If the arbitration clause or the applicable rules do not allow the arbitration to proceed in the absence of a party, lengthy and costly court proceedings to compel arbitration may be necessary.

For institutional arbitrations, the ICDR Rules, the ICC Rules or the LCIA Rules are particularly recommended. These institutions operate on a global basis, and their rules can be selected for arbitrations seated anywhere between parties of any nationality in respect of a dispute in any jurisdiction. A number of major regional arbitration centers also offer rules that can be used for arbitration worldwide including the SCC Rules, the SIAC Rules and the HKIAC Rules.

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Because the major arbitration institutions amend their rules from time to time, it is generally desirable to select the version of the rules in effect at the time of the arbitration, except as they may be modified by mutual agreement of the parties, so that the parties may take advantage of rule amendments or revisions introduced between the date the agreement to arbitrate becomes effective and the date on which a dispute is referred to arbitration under such agreement. Most rules provide that, in the absence of agreement to the contrary, the choice of a particular set of rules refers to the rules in effect on the date of commencement of the arbitration (*see, e.g.*, ICDR Rules, Article 1.1; ICC Rules, Article 6(1); LCIA Rules, Preamble; SCC Rules, Preamble; SIAC Rules, Rule 1.2; HKIAC Rules, Article 1.3). Where the parties wish to adopt the rules in existence at the time of contracting, they should do so expressly in the arbitration clause.

For *ad hoc* arbitrations, the Rules for Non-Administered International Arbitration of the CPR International Institute for Conflict Prevention & Resolution ("CPR Rules") or the UNCITRAL Rules are recommended. Arbitration agreements in investor-State contracts are discussed further in **Appendix 4**.

There are potentially significant differences among the major rules, including on important substantive issues such as waiver of certain types of damages. *See* **Appendix 3**. For these reasons, careful attention needs to be paid when selecting the applicable rules.

d. Method of Selecting Arbitrators

In most cases, the default method for selecting arbitrators in the rules is satisfactory, and additional text on the subject in the clause is unnecessary. For other cases, the variants described below should be considered. For the appointment of arbitrators in multiparty or

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multi-contract transactions, see Section III.1.c in the Optional Clauses section below.

The words **"except as they may be modified herein or by mutual agreement of the parties"** may be omitted from the clause if the parties are content to follow the arbitrator selection method in the selected rules and do not otherwise modify the rules in the arbitration clause.

In both institutional and *ad hoc* arbitration, an "appointing authority" is typically responsible for appointing arbitrators when the parties fail to nominate them. The appointing authority may also be responsible for confirming the parties' nominees or considering challenges to party-appointed arbitrators. In administered arbitrations, the arbitration rules usually provide that the administering institution will act as appointing authority (*see, e.g.*, ICDR Rules, Article 12 (ICDR); ICC Rules, Articles 12-15 (ICC International Court of Arbitration); LCIA Rules, Article 5 (LCIA Court); SCC Rules, Article 17 (SCC Board of Directors); SIAC Rules, Rules 9-11 (President of the SIAC Court of Arbitration); HKIAC Rules, Articles 7, 8 (HKIAC Council)). In UNCITRAL or other *ad hoc* arbitrations, the parties should provide for an appointing authority in the arbitration clause. The ICC International Court of Arbitration, the ICDR, the LCIA and the Permanent Court of Arbitration ("PCA") are most often used as appointing authorities and are all highly recommended.

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If the parties are not satisfied with the default appointment method in the applicable rules, the following variants may be considered:

<u>One Arbitrator, Variant 1: Agreement by Parties and Default Appointment by Arbitration Institution</u>

> **"The parties agree to seek to reach agreement on the identity of the sole arbitrator within [*30 days*] after the initiation of arbitration. If the parties do not reach agreement on the sole arbitrator, then [*name of appointing authority*] shall appoint the sole arbitrator within [*30 days*]."**

<u>One Arbitrator, Variant 2: Respondent Chooses from Pre-selected List</u>

> **"The parties agree that the sole arbitrator shall be one of the persons listed on Schedule [*x*] hereto. Within [*30 days*] after receiving the request for arbitration, the respondent shall select one of those persons, and such person shall serve as arbitrator. In the event such person is unable to serve, the respondent shall, within [*10 days*] after receipt from that person of notice of such inability, select another person from the list in Schedule [*x*] hereto, and such person shall serve as arbitrator. If necessary, this process shall continue until the arbitrator is so designated. In the event that none of the arbitrators listed on Schedule [*x*] hereto is able to serve, the sole arbitrator shall be appointed by [*name of institution*]."**

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Three Arbitrators:

> **"The claimant shall nominate an arbitrator in its request for arbitration. The respondent shall nominate an arbitrator within [*30 days*] of the receipt of the request for arbitration. The two arbitrators nominated by the parties shall nominate a third arbitrator within [*30 days*] after the nomination of the later-nominated arbitrator. The third arbitrator shall act as chair of the tribunal. If any of the three arbitrators are not nominated within the time prescribed above, then the [*name of the institution*] shall appoint the arbitrator(s)."**

e. Seat of the Arbitration

The juridical "seat" of an arbitration is the jurisdiction in which the arbitration is legally based. This may be different from the location of any hearings. It may also differ from the law governing the substance of the contract, which should be specified in addition to the arbitration clause. The law of the seat (the "*lex arbitri*") governs a number of aspects of the arbitration procedure and the resulting award. Some considerations regarding selection of a seat are provided in **Appendix 1**.

Before selecting a seat of an arbitration, counsel should carefully review the arbitration law of the proposed seat and the history of court interference with arbitrations at that seat. Mandatory procedural rules, if any, of the legal seat of the arbitration cannot be overcome by agreement of the parties or by rulings of the arbitrators. In addition, national courts in the country of the seat have the power to review and potentially set aside awards on grounds specified in their own national laws. Awards set aside by courts at the seat of the arbitration may not be enforceable elsewhere. For these reasons, it is

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important to choose a seat where the courts are not likely to hinder arbitration of disputes and to ensure that the agreement does not contain provisions inconsistent with the mandatory law of the seat.

f. Language

If the parties are from countries with different languages, it is important to provide for the language of the arbitration. In the absence of such a provision, arbitrators will most often select the language of the contract as the language of the arbitration, but this is not always the case.

It is advisable to select only one language in most cases. Selecting more than one language can add to the cost and length of proceedings because of the need to translate materials and testimony into both languages.

If a party wishes to make clear that it may submit documents or witness testimony in a language other than the selected language of the arbitration, with appropriate translation, the following wording may be added:

> **"but either party may submit testimony or documentary evidence in any other language if it provides [*, upon the request of the other party,*] a translation into [*specify language*] of any such testimony or documentary evidence."**

g. Finality of the Award

Although most rules provide that arbitral awards are final and binding on the parties, it is generally preferable to include this language as a safeguard. In addition, the following language is recommended where the law of the seat is uncertain or unduly broad

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as to the grounds for set-aside or challenging the enforcement of awards:

> **"The parties waive their right to any form of recourse based on grounds other than those contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 insofar as such waiver can validly be made."**

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") provides that a court may refuse to enforce a foreign or international arbitral award only on limited grounds, generally focusing on considerations of basic fairness. The courts of most arbitration-friendly countries have construed the New York Convention's defenses to enforcement narrowly and hold that they represent the exclusive means for challenging the enforcement of a foreign or international award.

For arbitrations seated in **England and Wales**, the Arbitration Act 1996 allows a party to seek judicial determinations of questions of English law, either during the proceeding or on appeal from the award. Parties may exclude such determinations by inserting the following language:

> **"The parties expressly agree that leave to appeal under section 69(1) or an application for the determination of a preliminary point of law under section 45 of the Arbitration Act 1996 may not be sought with respect to any question of law arising out of an award or in the course of the proceedings."**

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Although an express reference to section 69 is not essential, the exclusion of rights of appeal must be clear. Provisions in the arbitration agreement that the award shall be "final, conclusive and binding," for example, have been held by English courts not to be sufficient to exclude this right of appeal. Notably, the English courts have held that an ICC arbitration clause acts as an exclusion clause, since the ICC Rules state that the parties "have waived their right to any form of recourse insofar as such waiver can validly be made" (*see* ICC Rules, Article 35(6)). The LCIA Rules contain a similar provision that states "the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law" (*see* LCIA Rules Article 26.8 and also 29.2, which waives any right of appeal of any determination of the LCIA Court). Therefore, reference to the LCIA Rules also should be interpreted to include an agreement to an exclusion clause. The 2010 revision of the UNCITRAL Rules contains a broad model waiver statement in its Annex, which should also be effective. Reference to the ICDR Rules will probably not be considered a waiver, however, because they do not include such a provision.

National laws at the seat of arbitration may have specific regimes for set-aside and challenge of awards. Legislation in **Russia**, for example, allows the parties to waive the right to challenge an arbitral award in an institutional arbitration but not an *ad hoc* arbitration. Where parties have included such an exclusion in their arbitration agreement, any application to set aside the award will be dismissed by the Russian state court. Before agreeing to a provision waiving *any* right of recourse against an award, parties should carefully consider the consequences of giving up all rights to challenge the award, including on grounds such as corruption of the arbitrators, lack of fair notice of the proceeding, or lack of jurisdiction.

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h. Jurisdiction to Enter Judgment

The language regarding jurisdiction to enter judgment on the award is recommended to avoid collateral litigation over the proper venue for an action to enforce the award.

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III. OPTIONAL CLAUSES

In addition to the issues addressed in the commentary above, the circumstances of each case may also make it appropriate to address other topics within the arbitration clause. These fall into seven broad categories, discussed further below.

1. Structure of the Arbitration

a. Negotiation, Conciliation or Mediation

Parties sometimes want to require that arbitration be preceded by efforts to negotiate a mutually satisfactory result or by conciliation or mediation. Clauses with these provisions are sometimes called "tiered" dispute resolution clauses. Negotiation, conciliation, and mediation may provide a less costly means of resolving a dispute than arbitration and may also be more effective in preserving a continuing relationship among the parties than more adversarial processes.

Including a provision for pre-dispute negotiation, mediation or conciliation in the contract makes it more likely that the parties will make use of one of these procedures. In the absence of such a provision, it may be difficult for either party to suggest resort to one of these procedures in the midst of a dispute because of the concern that to do so may signal a weakness in its position. Such procedures are more likely to be successful if the contract at issue involves an ongoing project or a relationship between the parties. To further increase the likelihood of success, it may be advisable to specify that a senior executive from each party should participate in such negotiations.

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Clauses imposing a negotiation, mediation or conciliation requirement should be used with care, however, because they are subject to abuse by a party wishing to delay arbitration. If such a provision is included, it is important to include the language below (starting with "notwithstanding") to make clear that either party may commence arbitration at any time or after a short specified time period for negotiation, conciliation or mediation, to prevent the risk that the parties will become embroiled in collateral litigation over whether a party failed to meet a condition precedent to the arbitration. It is also wise to specify that any disputes about compliance with such an obligation are themselves subject to arbitration so that a delaying party does not attempt to litigate the question in court.

The following language may be used if the parties wish to agree to mandatory pre-arbitration negotiation, conciliation, or mediation:

> **"In the event of any dispute, controversy or claim arising out of, relating to or in connection with this contract, or the breach, termination or validity thereof, a party wishing to commence arbitration shall first serve notice on the proposed respondent(s) that a dispute has arisen and demand that [*negotiation, conciliation or mediation*] commence."**
>
> ***[Specify procedure of negotiation, conciliation or mediation.]***
>
> **"Notwithstanding anything else contained herein, any party to such [*negotiation, conciliation or mediation*] shall have the right to commence arbitration at any time after the expiration of [*30 days*] after service of**

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> **such demand for [*negotiation, conciliation or mediation*] under this subsection. Any disputes concerning the propriety of the commencement of the arbitration shall be finally settled by the arbitral tribunal."**

Many arbitral institutions have published mediation or conciliation rules and procedures that complement their arbitration rules. Where this is so, it will generally be advisable to adopt the same institution's procedures for mediation. Where this is not possible (*e.g.*, where the arbitration provision calls for UNCITRAL Rules), the mediation procedures promulgated by the ICDR, ICC, LCIA and CPR are preferred.

b. Split Clauses

"Split" or "hybrid" clauses allow one or both parties the right to elect litigation or arbitration once the dispute has arisen. These clauses have the advantage of allowing the most appropriate dispute resolution mechanism to be selected once the nature of the dispute and the location of the respondent's assets are actually known. However, careful consideration needs to be given to the inclusion of such clauses because in some jurisdictions they are not considered to be a proper reference to arbitration and are, therefore, invalid. In other jurisdictions, the validity of split clauses has not yet been tested. Even if split clauses are confirmed to be valid in the seat of arbitration, advice should also be sought on their validity in any jurisdiction of potential enforcement of an award.

Split clauses are of two types: "sole option," where one party has the right of election, and "mutual option," where both parties have the right of election. Mutual option clauses can be very complex and run the risk of parallel proceedings if one party elects to arbitrate and the other elects to litigate.

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If the parties wish to adopt a sole-option provision, the following language may be used:

> **"Notwithstanding [*the initial arbitration clause*], [*Party B*] hereby agrees that [*Party A*], at its sole option and for its benefit, may choose to submit any such dispute, controversy or claim to the courts of [*jurisdiction*], to the jurisdiction of which for the purposes of such dispute [*Party B*] irrevocably submits[*, or to any other court or courts which have jurisdiction to determine such dispute or claim*]. Party A shall exercise this election promptly. If arbitration has been commenced by [*Party B*] at the time that [*Party A*] chooses to submit the matter to a court of competent jurisdiction, then such arbitration shall be discontinued, unless the arbitral tribunal finds that [*Party* A]'s election was untimely so that discontinuing the arbitration would substantially prejudice [*Party B*]."**

Split clauses are enforceable in **England and Wales**, **Australia**, **Hong Kong**, and **Singapore**, among others.

In the **United States**, split clauses are generally enforced. Sole option split clauses may be problematic in some situations, as some courts have found that one-sided arbitration clauses may be unconscionable or otherwise unenforceable (*see, e.g.*, *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 605-11 (E.D. Pa. 2007) (California law); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939-40 (9th Cir. 2001) (Montana law); and *Wolfman v. Herbstritt*, 495 N.Y.S.2d 220 (App. Div. 1985) (New York law)).

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In **Russia**, split clauses that apply symmetrically to both parties are enforced. Sole-option clauses, however, are valid only if they grant the choice between arbitration or litigation to the claimant regardless of which party is the claimant. The Supreme *Arbitrazh* (Commercial) Court of the Russian Federation has ruled that clauses that grant an option only to one party violate the principle of equality and the adversary nature of the arbitral process (Decision of Presidium of Supreme Arbitrazh Court No. 1831/12, case No. A40-49223/11-112-401, June 19, 2012). Recent court practice, however, suggests that the Russian courts will only strike down the asymmetric part of the arbitration agreement rather than invalidate the arbitration agreement as a whole (*see, e.g.*, Ruling of the Supreme Court of the Russian Federation No. 46-KG16-29, Nov. 29, 2016; Ruling of the Supreme Court of the Russian Federation No. 310-EC14-5919, case No. A62-1635/2014, May 27, 2015).

In **China**, courts have often set aside or refused to enforce an award arising from an arbitration agreement with a split clause. A 2006 decision from the Supreme People's Court clarified that while these clauses are disfavored, it is now incumbent on the respondent to object to the split clause before the first arbitration hearing is held. Otherwise, the respondent will be deemed to have accepted arbitration.

c. Multiparty and Multi-contract Transactions

If a contract has more than two parties, the arbitration clause may need to be adapted to account for the rights of the three or more parties. Similarly, if a transaction involves multiple contracts, parties may adapt the arbitration clause(s) to account for consolidated proceedings of any disputes arising under the contracts.

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i. Selection of Three-Member Tribunal

If there are more than two contracting parties, individual selection of arbitrators for a three-member tribunal is impractical. Under most institutional rules, the institution will appoint all three members unless all claimants jointly agree on one nomination and all respondents jointly agree on another (*see, e.g.*, ICC Rules, Articles 12(6)-12(8); ICDR Rules, Article 12(5); LCIA Rules, Article 8.1; UNCITRAL Rules, Article 10; SCC Rules, Article 17(5); SIAC Rules, Rule 12.2; HKIAC Rules, Article 8.2).

The parties are free to vary this procedure by agreement. The following clause may be used where the default rules are insufficiently precise or are otherwise undesirable:

> **"(a) If all parties to this arbitration agree that the alignment of parties as claimants and respondents in the request for arbitration is correct, or if no party objects to such alignment within [*15 days*] after receipt of the request for arbitration, then each side shall nominate one arbitrator within [*30 days*] of receipt of the request for arbitration. The two arbitrators so nominated shall nominate the third arbitrator within [*30 days*] after the nomination of the later-nominated of these two arbitrators. The third arbitrator shall act as chair of the tribunal. If any of the three arbitrators is not nominated within the time prescribed above, then [*name of the administering institution or appointing authority*] shall appoint that arbitrator."**
>
> **"(b) If any one of the parties to this arbitration objects in writing to the alignment of parties in the request for arbitration within [*15 days*] after receipt of the request,**

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> **and if the parties do not agree within [*15 days*] thereafter on an alignment of the parties into two sides each of which shall appoint an arbitrator, then [*name of the administering institution or appointing authority*] shall appoint all three arbitrators."**

In the alternative, the agreement may provide for the immediate selection of all three arbitrators by the institution:

> **"If there are more than two parties to an arbitration, there shall be three arbitrators, who shall be appointed by [*name of the administering institution or appointing authority*]."**

ii. Joinder, Intervention

The parties should also consider whether to include a clause allowing additional contracting parties to be joined to, or voluntarily intervene in, an existing arbitration proceeding. If they do so, they should also ensure that all parties who might participate in a dispute agree to the joinder and intervention provision, even if they are not all parties to the same contract.

To facilitate joinder and intervention of parties to a number of related contracts, financing arrangements or funds agreements (*e.g.*, a share purchase agreement and associated escrow agreement), parties may either (*i*) insert identical arbitration clauses in each contract that expressly cover disputes under all related agreements or (*ii*) draft an umbrella arbitration agreement signed by all parties. In either case, the arbitration clause should specifically list each of the agreements that are covered by the joinder and intervention provisions.

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The following language may be used:

> **"Any contracting party serving a request for arbitration or other document in the arbitration containing a claim, including a notice pursuant to this provision (the "Notice"), shall send a copy of the Notice to every other contracting party. Any contracting party named as a respondent to a claim first set forth in the Notice may join any other contracting party as a party to the arbitration to afford that party an opportunity to defend against the claim or to assert against that party a claim that is substantially related to the claim set forth in the Notice. Any contracting party that is not already a party to the arbitration may intervene as a party to the arbitration to defend against a claim first set forth in the Notice or to assert against any other contracting party a claim that is substantially related to the claim set forth in the Notice.**
>
> **Such joinder or intervention shall be made within [*30 days*] from the receipt of the relevant Notice by a written notice specifying the joinder or intervention and setting forth the new claim or defense asserted. If any party so requests within [*30 days*] after receipt of the notice of joinder or intervention, the tribunal shall decide whether the joinder or intervention is admissible under the terms of this clause and whether and to what extent any related arbitration proceedings between contracting parties shall be discontinued in the interest of efficiency. The tribunal's decision shall be binding.**

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> **For the avoidance of doubt, the term "claim" as used in this clause includes any claim, counterclaim cross-claim, and any claim by or against a joined or intervening party.**
>
> **Any joined or intervening party shall be bound by any award rendered by the arbitration tribunal even if such party chooses not to participate in the arbitration proceedings."**

Where it is possible to join a party after the arbitral tribunal has been nominated or appointed, it is advisable to provide that the administering institution shall appoint all three arbitrators as noted in Section III.1.c.i above. If all arbitrators are appointed by the administering institution, a joined party cannot later complain that it was treated unequally in the selection of arbitrators.

Many of the prominent arbitral rules contain provisions for joinder of third parties but with subtle differences. The HKIAC Rules and SIAC Rules are the most expansive in this respect, and also uniquely allow third parties to apply for intervention.

- The **HKIAC Rules** permit joinder of a third party without its consent where that party is *prima facie* bound by the arbitration agreement (*see* HKIAC Rules, Article 27.1). The HKIAC Rules also give the HKIAC Council power to join an additional party before the arbitral tribunal is confirmed (Article 27.8). Revisions to the HKIAC Rules proposed in August 2017 would further expand its joinder provisions to include (*i*) non-parties to the arbitration agreement with consent of all parties and (*ii*) additional parties "bound by a different arbitration agreement under the Rules, provided that a common question of law or fact

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arises, the rights to relief claimed arise out of the same transaction or a series of related transactions, and the arbitration agreements are compatible" (*see* Proposed Amended HKIAC Administered Arbitration Rules (29 Aug. 2017), Article 27.1(b) and (c)).

- The **SIAC Rules** similarly allow an additional party to be joined to the arbitration without its consent by the tribunal, or prior to the constitution of the tribunal by the SIAC Court, provided that the additional party appears *prima facie* to be bound by the arbitration agreement (*see* SIAC Rules 7.1(a), 7.8(a)). However, even a non-party to the arbitration agreement may be joined with consent of all parties (*see* SIAC Rules 7.1(b), 7.8(b)).
- The **UNCITRAL Rules** allow third parties to be joined in some circumstances, but only if the party to be joined is also a party to the same arbitration agreement that governs the existing arbitration. Under the UNCITRAL Rules, the arbitral tribunal *may* allow joinder unless it finds that allowing joinder would prejudice any of the new or existing parties (*see* UNCITRAL Rules, Article 17(5)).
- The **ICC** and **ICDR Rules** also contain joinder provisions. However, they do not permit joinder after any arbitrator has been confirmed or appointed except with the consent of all parties, including the party to be joined (ICC Rules, Article 7(1); ICDR Rules, Article 7(1)). At the cost of reduced flexibility, this avoids the risk that a later-joined party may challenge the award on the ground that it was unfairly denied an opportunity to participate in the selection of arbitrators. Under the ICDR Rules, any jurisdictional issues are referred to the arbitral tribunal once constituted (ICDR Rules, Articles 7(1) & 19).

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- Under the **ICC Rules**, the ICC Court initially determines whether (*i*) all of the arbitration agreements call for the application of the ICC Rules and (*ii*) the ICC Court is *prima facie* satisfied that the agreements may be "compatible" and that the parties may have agreed that their disputes can be determined together in a single arbitration (ICC Rules, Article 6(4)). Arbitration agreements are not compatible, for instance, where they specify different seats of arbitration or different numbers of arbitrators. If all parties are not signatories to all of the relevant agreements, the ICC Court will evaluate the nature of the relationships and may prohibit joinder if the contracts deal with different legal relationships, even if they are part of the same economic transaction. For example, the ICC Secretariat has indicated that the ICC Court will typically not allow joinder in disputes involving an owner-contractor-subcontractor relationship without the agreement of all parties, whether provided at the time of the arbitration or agreed upon in the arbitration clause itself, because the legal relationships are usually entirely distinct (*see* ICC Secretariat Guide Section 3-249).
- Under the **SCC Rules**, any request for joinder is first considered by the SCC Board, which may reject the request if it determines that the SCC manifestly lacks jurisdiction over the dispute between the parties, including the additional party requested to be joined (SCC Rules, Articles 13(1)-(6)). If the SCC Board decides to grant the request for joinder, any jurisdictional issues are decided by the arbitral tribunal. (SCC Rules, Article 13(7)). The rules allow for joinder to occur after arbitrators have been appointed, but if a joined party does not agree to the already appointed arbitrators, the SCC Board may release the arbitrators and appoint an entirely new arbitral tribunal unless the parties agree otherwise (SCC Rules, Article 13(8)).

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- Unlike the other major institutional rules discussed above, the **LCIA Rules** provide for joinder only with the consent of the party to be joined and therefore may be less effective than the other sets of rules discussed above (*see* LCIA Rules, Article 22.1(viii) (allowing joinder only where the party to be joined has consented in writing)). The provision in the LCIA Rules permits one party to the arbitration, usually the respondent, to add to the proceeding a party that may or may not have been a signatory to the contract underlying the dispute, as long as that additional party agrees even if the other party to the arbitration does not agree.
- The **HKIAC Rules** and **SIAC Rules** are unique among the rules cited here in that they permit a third party to intervene by initiating an application for joinder independently of the parties to the existing arbitration (*see* HKIAC Rules, Article 27.6; SIAC Rules, Rules 7.1 and 7.8).

In any case, if the parties wish to provide for joinder or intervention in circumstances other than those allowed by the selected rules, they should include in their agreement language that expressly provides for joinder and intervention as discussed above.

iii. Consolidation

Parties to multiparty or related contracts should also consider expressly providing for the consolidation of parallel arbitration proceedings. It may be desirable to do so in addition to the joinder provision because the two clauses are not necessarily interchangeable:

- *First*, the model joinder clause provides for notice of claims to be provided to all parties to the agreements at issue, while the model consolidation clause set forth below does not. The

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consolidation clause will therefore be most useful to a party that already has knowledge of the claims and potential claims.

- *Second*, the model joinder provision requires tribunal intervention only if a party objects to the joinder or intervention, while the model consolidation provision requires tribunal approval in every case, which could impose additional costs.
- *Third*, a consolidation provision may be more effective in avoiding duplication where multiple arbitrations have been commenced before a joinder provision can be invoked.

A. Institutional Rules

Many institutional rules, discussed below, have recently been revised to provide a useful framework for consolidations. *See* **Appendix 2**. The ICDR, ICC, SCC, SIAC and HKIAC Rules all permit consolidation at the request of any party to any dispute, even in the absence of consent from all other parties, with some distinctions:

The **ICC** and the **ICDR Rules** allow consolidation where (*i*) the claims arise under the same arbitration agreement or (*ii*) the arbitrations are between the same parties, they relate to claims that arise in connection with the same legal relationship, and the arbitration agreements are compatible (ICC Rules, Article 10; ICDR Rules, Article 8(1)). The **SIAC Rules** are similar except that the arbitrations sought to be consolidated need not be between the same parties (SIAC Rules, Rules 8.1, 8.7).

The **HKIAC Rules** also are similar to the ICC and ICDR Rules except that claims made under different arbitration agreements must have a common question of law or fact and the rights to relief claimed must be in respect of, or arise out of, the same transaction or series of transactions (HKIAC Rules, Article 28.1).

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The **SCC Rules** allow for consolidation at the request of a party if "(*i*) the parties agree to consolidate; (*ii*) all the claims are made under the same arbitration agreement; or (*iii*) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions" and the arbitration agreements are compatible (SCC Rules, Article 15).

The **LCIA Rules** allow a tribunal to consolidate proceedings in two situations: (*i*) when the parties agree to consolidation in writing and when the LCIA Court approves, and (*ii*) when arbitrations have commenced, under either the same or compatible arbitration agreements, between the same parties (LCIA Rules, Articles 22.1(ix)-(x)). If the tribunal has not yet been constituted, the LCIA Rules provide the LCIA Court with similar power to order consolidation (LCIA Rules, Article 22.6).

Under the **ICC**, **SCC** and **HKIAC Rules**, only the relevant institutional body has the authority to consolidate parallel arbitrations. The ICDR Rules allow the ICDR to appoint a consolidation arbitrator to decide on issues of consolidation (ICDR Rules, Article 8). The SIAC Rules empower the arbitral tribunal to decide on applications for consolidation, but in the absence of party consent to the consolidation, consolidation is permitted only if the same tribunal has been constituted or no tribunal has been constituted in the other arbitrations (SIAC Rules, Rule 8.7).

The **HKIAC** and **ICDR Rules** further provide that once the decision to consolidate has been made, the parties to all relevant arbitrations shall be deemed to have waived their right to designate an arbitrator, and the HKIAC or, under the ICDR Rules, the appointed consolidation arbitrator shall instead appoint the arbitral tribunal (HKIAC Rules, Article 28.6; ICDR Rules, Article 8(6)). The SIAC

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Rules contain a similar waiver provision for any party who has not participated in the constitution of the tribunal (SIAC Rules, Rule 8.12).

In cases where the rules permit consolidation of claims between different parties, the waiver of the right to appoint a member of the tribunal avoids the earlier-mentioned issue that a party may challenge the award on the ground that it was unfairly denied an opportunity to participate in the selection of arbitrators on an equal footing with the other parties. Notably, the **HKIAC Rules** also provide that the parties waive any objection, on the basis of the HKIAC's decision to consolidate, to the validity or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, insofar as such waiver can be validly made (HKIAC Rules, Article 28.8).

Consolidation clauses should be tailored to the particular situation presented. If selected rules do not satisfactorily provide for consolidation, the following language may be considered for each related agreement or as part of an umbrella arbitration agreement signed by all parties:

> **"In order to facilitate the comprehensive resolution of related disputes, and upon request of any party to the arbitration proceeding, the arbitration tribunal may consolidate the arbitration proceeding with any other arbitration proceeding relating to this agreement or to [*related agreements*]. The arbitration tribunal shall not consolidate such arbitrations unless it determines that (*i*) there are issues of fact or law common to the two proceedings so that a consolidated proceeding would be more efficient than separate proceedings, and (*ii*) no**

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> **party would be prejudiced as a result of such consolidation through undue delay or otherwise. In the event of different rulings on this question by arbitration tribunal(s) constituted hereunder or under the [*the related agreement(s)*], the ruling of the [*identify one panel*] shall control."**

As an alternative, if the drafter considers that consolidation may be undesirable, it may be appropriate to include language providing that consolidation shall not be made unless parties to all of the disputes consent. Such a clause would make consolidation significantly less likely.

B. National Laws

National laws may also permit or restrict consolidation in certain circumstances. For example, the arbitration law of **the Netherlands** permits, in certain circumstances and unless agreed otherwise, an arbitration seated in the Netherlands to be consolidated with one or more other arbitrations seated within or outside the Netherlands (Article 1046 of the Netherlands Code of Civil Procedure). A request to consolidate can be granted by the tribunal seated in the Netherlands at a party's request even without the consent of the other party. Consolidation may be ordered only if it does not cause unreasonable delay in the pending proceedings and where the arbitral proceedings are so closely connected that good administration of justice renders it expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

In a number of jurisdictions in the **United States**, such as California, Georgia, Massachusetts and New Jersey, state law permits consolidation without the consent of all the parties to an arbitration

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agreement (*see also* Section 10 of the Revised Uniform Arbitration Act, which has been enacted by a number of States). The Federal Arbitration Act ("FAA") (Title 9, United States Code) does not expressly address the issue of consolidation, and courts in the United States have overwhelmingly held that the FAA does not itself authorize consolidation of multiple arbitrations in the absence of the parties' agreement (*e.g.*, *Gov't of U.K. v. Boeing Co.*, 998 F.2d 68, 73-74 (2d Cir. 1993), *overruled on other grounds by Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989)). The availability of state law procedures in international cases seated in the United States remains uncertain, and parties should not rely on the availability or exclusion of such procedures unless expressly specified in the arbitration clause. *See* **Appendix 1**, Section A.4.

C. Selection of Arbitrator(s)

Unless the parties decide on rules under which consolidation leads to waiver of the right to designate an arbitrator such as the HKIAC or ICDR Rules and if consolidation is a real possibility, language should be included in the agreement providing a procedure for the selection of arbitrators. Three options for the consolidated proceedings exist.

First, if one contract is primary (*e.g.*, in a construction situation, the contract between the owner and the general contractor), the parties can provide that the arbitration tribunal constituted under that primary contract will be the one to hear the consolidated proceedings:

> **"In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be the members of the arbitration tribunal that was first filed pursuant to [*name of primary agreement*]."**

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Second, the parties can provide that the arbitration tribunal in the first-filed arbitration pursuant to any of a series of related contracts will be the tribunal for the consolidated arbitration:

> **"In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be the arbitration tribunal that was appointed for the first-filed of the consolidated proceedings pursuant to any one of this agreement or [*name of related agreements*]."**

Third, if the arbitration is institutional, the parties can provide that the institution will appoint all of the arbitrators:

> **"In the case of a consolidated proceeding, the arbitrators in the consolidated proceeding shall be appointed by the [*name of the institution*] at the request of one of the disputing parties."**

A 1992 decision of the highest court of **France**, however, may call into question the validity of the first two methods for selecting arbitrators on the ground that they unfairly deny one or more parties the right to appoint an arbitrator (*Siemens AG & BKMI Industrienlagen GmbH v. Dutco Consortium Constr. Co., Ltd.*, Cass. 1re Civ., 7 Jan. 1992, Nos. 89-18.708 & 89-18.726).

2. Constitution and Powers of the Tribunal

a. Nationality of the Arbitrator(s)

Many arbitration rules contain provisions relevant to the nationality of arbitrators. Some sets of rules provide that the sole arbitrator or chair of the tribunal must be of a nationality different from the parties if the parties are of different nationalities, unless the parties

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agree otherwise or fail to object (*see* LCIA Rules, Article 6; SCC Rules, Article 17(6); HKIAC Rules, Articles 11.2-11.3). The LCIA rules further specify that a party's nationality is deemed to include the nationality of its controlling shareholder (LCIA Rules, Article 6.2). Others provide that the appointing authority, when appointing an arbitrator, should consider the nationality of the arbitrator and the parties (*see* ICC Rules, Article 13(1); ICDR Rules, Rule 12(4); UNCITRAL Rules, Article 6(7)). Depending on the rules adopted, parties may wish to consider providing that the sole arbitrator or the chairman of the tribunal must be a citizen of a country other than those of the parties and, if appropriate, their parent companies or other controlling interests.

Nationality requirements may implicate antidiscrimination rules in the country of the seat of arbitration. In England and Wales, however, the UK Supreme Court has held that arbitrators do not fall within the definition of persons engaged in employment under a contract personally to do work, so that appointing parties are not bound by laws prohibiting discrimination in employment relationships (*see Jivraj v. Hashwani,* [2011] UKSC 40).

By making the nationality requirement subject to the applicable law, parties may minimize the risk that a nationality provision will be used to challenge the validity of an arbitration agreement:

> **"The [*sole arbitrator/chair of the tribunal*] shall not be a citizen of either _____ or _____, to the extent the applicable law permits."**

b. Qualifications of the Arbitrator(s)

In addition, if potential disputes are likely to involve complex business, legal or technical issues, parties may include in their

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agreement a requirement that arbitrators possess specific qualifications. There are risks associated with adopting this approach. In particular, overly stringent qualifications may unduly narrow the pool of potential candidates, making it difficult or impossible to constitute a tribunal. Parties also should take into account the possibility that the qualifications may not be appropriate for every potential dispute that may arise under an agreement.

Administering institutions usually maintain rosters of highly qualified legal and business experts in a wide range of industries. This should obviate the need for such a provision in most cases.

Where parties nevertheless wish to specify criteria for arbitrators, the following language may be used:

> **"Each arbitrator shall [*list qualifications (e.g., "be admitted to practice law in [the jurisdiction selected by the choice-of-law clause]," "be an attorney experienced in oil and gas contracts," "have a degree in civil engineering," "be fluent in both English and Spanish")*]. An arbitrator shall be deemed to meet these qualifications unless a party objects within [*20 days*] after the arbitrator is nominated."**

Any qualifications should be carefully and unambiguously drafted to avoid providing an avenue for a party to delay or frustrate proceedings by arguing that one or more of the arbitrators does not meet the criteria. The final sentence of the model language is important to prevent a losing party from later challenging an award on the ground that an arbitrator did not meet the necessary qualifications and thus that the tribunal was not validly constituted.

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c. Independence and Impartiality

It is generally accepted that all arbitrators in international arbitrations should be independent and impartial.

This standard applies to an arbitrator nominated by a party as well as to a presiding arbitrator and an arbitrator appointed by an institution. If the chosen rules do not expressly provide for this requirement, it is desirable to include a provision in the arbitration clause stating:

"The arbitrator[s] shall be impartial and independent."

The leading international rules and many national laws expressly impose such a duty and mandate that arbitrators disclose any circumstances that might give rise to justifiable doubt concerning their independence or impartiality (*see* ICC Rules, Articles 11(1)–11(3), 13(2); ICDR Article 13; LCIA Rules, Articles 5(3),–5(5); UNCITRAL Rules, Articles 11 and 12(1); SCC Rules, Article 18; SIAC Rules, Rules 13.1–13.5; HKIAC Rules, Articles 11.1, 11.4). In addition, the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") contain general standards of independence and disclosure that may be applied in the selection, appointment and continuing service of an arbitrator. The IBA Guidelines, as updated in 2014, are widely regarded as embodying international best practices on arbitrator impartiality and independence.

d. Jurisdiction to Determine Jurisdiction

It is generally accepted that arbitration tribunals have the authority to determine their own jurisdiction (sometimes known as "*Kompetenz-Kompetenz*" or "*compétence de la compétence*"). Major rules generally state this expressly (*see, e.g.*, ICDR Rules, Article 19(1); ICC Rules, Articles 6(3), (9); LCIA Rules, Article 23.1;

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UNCITRAL Rules, Article 23(1); SIAC Rules, Rule 28.2; HKIAC Rules, Article 19.1). When the rules selected do not explicitly so provide, or if the parties wish to leave no doubt regarding their intention to invest the tribunal with this authority and thus minimize the possibility of protracted litigation in courts over this threshold issue, the following language may be included:

> **"The arbitral tribunal shall determine the scope of its own jurisdiction."**

The tribunal's jurisdiction is generally subject to final review by the court at the seat of arbitration, and lack of jurisdiction is commonly a defense to enforcement elsewhere as well. But courts in some jurisdictions, notably the **United States**, have treated arbitral determinations of jurisdiction as final where the applicable rules state that the arbitral tribunal may determine its own jurisdiction (*see, e.g.*, *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115 (2d Cir. 2003)). If parties wish to ensure that they preserve the right to challenge an award on jurisdictional grounds, they may consider including language along the following lines:

> **"The arbitral tribunal's authority to determine its own jurisdiction pursuant to [*Rule [x]*] does not affect a competent court's authority to determine the tribunal's jurisdiction on an action to vacate, modify, confirm, recognize or enforce the arbitration award."**

In **Russia**, the parties may agree to exclude the right to challenge in court the arbitral tribunal's decisions on jurisdiction only if the arbitration clause provides for institutional arbitration (as opposed to *ad hoc* arbitration).

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e. Freedom to Decide in Equity

The parties may also authorize the tribunal to decide *ex aequo et bono* or as "*amiable compositeur*." This empowers the tribunal to award any remedy or relief which it deems just and equitable without reference to the law governing the contract and may even allow the tribunal to modify the contract. In certain industries, such as reinsurance agreements, there is a practice and custom of authorizing arbitrators not to apply strict rules of law. The custom and practice of particular industries may sufficiently guide or constrain the arbitrators as to make this option a reasonable choice for contracts in those industries. It may be preferable, however, to specify the relevant custom and practice as the governing law for such contracts rather than rely on the inherently ambiguous *ex aequo et bono* standard.

The UNCITRAL Model Law, on which many national arbitration laws are based, and most arbitral rules provide that an arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if expressly authorized to do so by the parties (*see* UNCITRAL Model Law, Article 28; ICDR Rules, Article 31; ICC Rules, Article 21; LCIA Rules, Article 22.4; SIAC Rules, Rule 31; HKIAC Rules, Article 35). Courts may set aside or refuse to enforce an award if the arbitral tribunal decides the dispute *ex aequo et bono* or as *amiables compositeures* without due authorization. This may be difficult to establish in practice absent specific circumstances.

The authority to decide *ex aequo et bono* or as *amiable compositeur* does not necessarily vest an arbitrator with unfettered discretion. Under the UNCITRAL Model Law, even an arbitrator who is empowered to decide *ex aequo et bono* or as *amiable compositeur* must decide in accordance with the terms of the contract and taking into account the relevant trade practice (*see* UNCITRAL Model Law,

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Article 28). In **Canada**, a 2008 decision of the highest court of the province of Quebec held that an arbitrator acting as *amiable compositeur* exceeded his authority by modifying the parties' agreement (*see Holding Tusculum BV v. Louis Dreyfus SAS* (Case No 500-05-017680-966), Decision of the Superior Court of Quebec, Montreal District, December 8, 2008). In addition, certain national laws may be regarded as mandatory, and the arbitrators may remain bound to follow them.

3. Interim Relief

a. Provisional Measures

It is generally accepted that the arbitration tribunal may award interim injunctive relief (*see* ICC Rules, Article 28; ICDR Rules, Article 6; LCIA Rules, Article 25; UNCITRAL Rules, Article 26; SCC Rules, Article 37 & Appendix II; SIAC Rules, Rule 30; HKIAC Rules, Article 23).

If the applicable arbitration law and rules do not clearly make such relief available, the following language may be added:

> **"In addition to the authority conferred on the arbitration tribunal by the rules specified above, the arbitration tribunal shall have the authority to make orders for interim relief necessary to preserve the parties' rights, including pre-arbitration attachments or injunctions. The parties agree that any ruling by the arbitration tribunal on interim measures shall be deemed to be a final award with respect to the subject matter of the ruling and shall be fully enforceable as such."**

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The availability of interim relief from the tribunal may, however, be limited by practical considerations, including the time it takes to constitute an arbitral tribunal and the tribunal's inability to enforce injunctive relief on its own. For that reason, the rules of most arbitration institutions expressly allow parties to seek interim relief from national courts without waiving their right to arbitrate under the agreement (*see* ICC Rules, Article 28(2); ICDR Rules, Article 6(7); LCIA Rules, Article 25.3; UNCITRAL Rules, Article 26(9); SCC Rules, Article 37(5); SIAC Rules, Rule 27.1; HKIAC Rules, Article 23.9). This may be particularly useful if urgent relief is required before the tribunal is constituted and the rules make no provision for an emergency arbitrator. Note, however, that after the constitution of the arbitral tribunal, certain rules only allow parties to seek interim relief from national courts in limited cases (*see* ICC Rules, Article 28(2) ("appropriate circumstances"); LCIA Rules, Article 25.3 ("exceptional circumstances" and with the arbitral tribunal's authorization SIAC Rules, Rule 30.3 ("exceptional circumstances"), etc.).

If no such express provision exists in the chosen rules, parties should include the following language:

> **"A request by a party to a court of competent jurisdiction for interim measures necessary to preserve the parties' rights, including pre-arbitration attachments or injunctions, shall not be deemed incompatible with, or a waiver of, this agreement to arbitrate."**

If the parties wish to specify that they retain the right to seek provisional relief from the courts only until such time as the

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arbitrators are able to order provisional relief, the following clause may be added:

> **"Either party has the right to apply to any court of competent jurisdiction for interim relief necessary to preserve the parties' rights, including pre-arbitration attachments or injunctions, until the arbitrators are appointed. After appointment of the arbitrators, the arbitrators shall have exclusive jurisdiction to consider applications for interim relief."**

In addition, the law of the seat may have specific provisions regarding interim relief. In **Russia**, the parties may also agree that before the constitution of the arbitral tribunal, the permanent arbitral institution can order such interim measures as the institution deems appropriate. However, orders of arbitral tribunals or permanent arbitral institutions cannot be enforced by the state courts (*see* Article 17 of the Federal Law on Arbitration (Arbitration Proceedings) (Russian Federation); Article 17 of the Law of the Russian Federation on International Commercial Arbitration).

b. Emergency Arbitrations

Several institutional rules provide for the appointment of an emergency arbitrator to decide applications for interim relief prior to the appointment of an arbitral tribunal (*see* ICDR Rules, Article 6; ICC Rules, Article 29 & App'x V; SCC Rules, App'x II; SIAC Rules, Rule 30.2, Schedule 1; HKIAC Rules, Article 23.1 & Schedule 4).

Under each of the sets of rules that provide for appointment of an emergency arbitrator, the parties' selection of the general arbitration rules includes access to the emergency arbitrator procedure unless the parties affirmatively opt out (*see, e.g.*, ICC Rules, Article 29(6)(b);

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SIAC Rules, Schedule 1). However, under the **ICC**, **LCIA** and **HKIAC** Rules, the emergency arbitration provisions are not applicable to arbitral agreements that entered into force before the emergency arbitration provisions were added to the rules (*see* ICC Rules, Article 29(6)(a); LCIA Rules, Article 9.14; HKIAC Rules, Article 1.4).

In **England and Wales**, the High Court recently held that that the court's power to grant urgent relief under Section 44(3) of the Arbitration Act 1996 is curtailed in circumstances where effective relief could be granted in a timely manner by a tribunal, arbitral institution or other relevant body (*see Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch)). Some commentators have observed that parties choosing London as their seat might want to opt out of any potential emergency arbitrator provisions in their chosen rules if they want to preserve the power of the English courts to grant urgent relief under Section 44.

Generally, these rules provide that a party with an urgent need for interim relief can apply to the institution for the appointment of an emergency arbitrator and that the institution will appoint the interim arbitrator within 24 hours. Notice must generally be provided to the other party. The emergency arbitrator sets the procedures for a prompt hearing and must issue a decision within a short time period (*see, e.g.*, ICC Rules, Appendix V, Article 6(4) (15 days); SIAC Rules, Schedule 1, Article 9 (14 days); SCC Rules, Appendix II, Article 8 (5 days); HKIAC Rules, Schedule 4, Article 12 (15 days)). The **ICC Rules** provide that the emergency arbitrator's decision takes the form of an order rather than an award so that it is not subject to scrutiny by the ICC Court (ICC Rules, Appendix V, Article 6(1)), while the **ICDR Rules** allow for the decision to take the form of either an order or an award (ICDR Rules, Article 6(4)).

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In some jurisdictions an order of an interim arbitrator (as opposed to an award) may not necessarily be enforceable. If the seat of the arbitration has adopted the 2006 version of the UNCITRAL Model Law, the courts of the seat should be able to enforce the decision of the emergency arbitrator regardless of the form it takes.

Although the parties generally must comply with an emergency arbitrator's decision, such a decision generally does not preclude a subsequently-appointed arbitral tribunal from deciding the issue differently.

4. Conduct of the Proceedings

a. Production of Evidence

The rules of most arbitration institutions grant tribunals the authority to prescribe the procedure for obtaining and submitting evidence (*see* ICC Rules, Article 25(5); ICDR Rules, Articles 20(3), 20(4), and 20(6); LCIA Rules, Article 22.1(iii)–(vi); UNCITRAL Rules, Articles 27(3)–(4); SCC Rules, Article 31; SIAC Rules, Rule 27; HKIAC Rules, Articles 22.2–22.4). Because the rules are typically general and do not describe the mechanisms for the taking of evidence, parties may wish to spell out in the arbitration clause particular rules governing the exchange of documents, the use of experts, or the manner in which the hearing is to be conducted.

The IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") were updated in 2010 and present internationally recognized standards, which most parties will find acceptable. If the parties wish the IBA Rules to govern the proceeding, they may include the following language in the arbitration clause:

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> **"The procedures for the taking of evidence shall be governed by the IBA Rules on the Taking of Evidence in International Arbitration."**

Alternatively, the parties may wish to include certain provisions of the IBA Rules and not others. If so, clauses specifically incorporating the desired provisions can be incorporated in the arbitration agreement, as discussed in the next two subsections.

b. Requests for Documents

Usually, the rules chosen will address the issue of requests for the production of documents (*see* ICC Rules, Articles 25(5), 25(6) & App'x IV; ICDR Article 20(4); LCIA Rules, Article 22.1(v); UNCITRAL Rules, Article 27(3); SCC Rules, Articles 31.2 and 31.3; SIAC Rules, Rule 27(f); HKIAC Rules, Article 22.3). Some of those rules expressly instruct the tribunal to take into account applicable principles of privilege (*see, e.g.*, ICDR Rules, Article 22).

The IBA Rules contain provisions that address the production of documents and valid objections to a production request (Articles 3 and 9). These provisions provide a good balance between the narrower civil law approach and the broader common law approach to document production. Inclusion of these provisions in an arbitration clause gives the parties to an international arbitration sufficient advance knowledge of the procedure that will be followed, of conditions that must be fulfilled before the arbitration tribunal will issue an order for the production of documents, and of valid objections to production requests that are available to protect the legitimate interests of the party from whom documents are requested. If the parties wish to adopt these procedures, the following language may be used:

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> **"The procedure for the exchange of documents shall be governed by Article 3 and Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration."**

In certain circumstances, it may be advantageous to agree specifically to more expansive disclosure of documents than is available under the applicable rules. This may be the case if, for example, the other party will have possession of most of the documents relevant to the dispute. The following language may be used in these circumstances:

> **"In addition to the authority conferred on the arbitration tribunal by the rules specified above, the arbitration tribunal shall have the authority to order such production of documents as may reasonably be requested by either party or by the tribunal itself."**

In other circumstances, the parties may wish to preclude any exchange of documents in order to provide for a more streamlined and less costly proceeding. In that case, the following language may be used:

> **"The parties agree that they shall have no right to seek production of documents or any other discovery in the arbitration proceeding, except that the parties shall exchange the documents on which they intend to rely."**

Depositions (the taking of oral witness testimony before the hearing) and interrogatories are rarely permitted or appropriate in international arbitration. In the unusual event that the drafter believes that pre-hearing depositions may be necessary to prove a party's case, the following language could be added:

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> **"In addition, either party may request a reasonable number of pre-hearing discovery depositions of party witnesses."**

Usually, however, none of these provisions should be necessary, and it is reasonable to rely upon the arbitration tribunal to afford such discovery and document production as it deems appropriate.

As always, any clause providing for the taking of evidence cannot be inconsistent with the law of the seat of the arbitration. In particular, the parties cannot by contract grant the arbitrators authority over third persons unless that law so allows. The laws of many countries, including **England and Wales**, the **United States** and **Hong Kong,** permit courts in limited circumstances to assist arbitrators in obtaining third-party evidence.

For example, under **United States** federal law, a U.S. district court may compel production of evidence from a person found within its jurisdiction "for use in a proceeding in a foreign or international tribunal" (28 U.S.C. § 1782(a)). Such discovery may substantially increase the cost and burden of an arbitration. U.S. courts have reached varying conclusions on whether this provision allows courts to order discovery in support of commercial and investment arbitration proceedings. To preclude this possibility, the following language may be added:

> **"The parties shall not seek discovery for purposes of the arbitration proceeding under 28 U.S.C. § 1782."**

c. Electronic Disclosure

Technology has changed the way information is stored and communicated, with the effect of making large caches of electronic

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information potentially subject to discovery obligations. A few arbitration institutions have adopted guidelines that provide for the management of electronic documents and information, primarily in an effort to mitigate the associated financial and efficiency burdens, and the IBA Rules on the Taking of Evidence in International Arbitration also address the subject. (*see* AAA/ICDR Guidelines for Information Disclosure and Exchange in International Arbitration Proceedings (the "AAA Guidelines"), Articles 4, 20(2); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (the "CPR Protocol"), Section 1(d) & Schedule 2; IBA Rules, Articles 3(3)(a) and 3(12)(b)).

The **IBA Rules** include electronic documents within the scope of their general disclosure framework, which gives tribunals broad latitude to order the production of relevant evidence while at the same time encouraging tribunals to conduct the arbitration in an efficient manner. This includes, for example, ordering parties to identify in any document request specific files, search terms, individuals, or other means of searching for electronic documents in an efficient and economical manner (*see* IBA Rules, Article 3(3)(a)).

The **AAA Guidelines** provide more detailed guidance than the IBA Rules and call on arbitrators to work towards economic efficiency in electronic disclosure. The AAA Guidelines also recommend that arbitrators order testing or other means of narrowing electronic document requests.

The **CPR Protocol** takes an even more detailed approach by providing parties with four "Modes" providing different levels of disclosure of electronically stored information. The narrowest, Mode A, provides for disclosure in non-native format only of those documents presented in support of each parties' case. The broadest,

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Mode D, contemplates full disclosure of electronic evidence concerning non-privileged matters subject only to general limitations of reasonableness, duplication, and undue burden. Modes B and C constrain the scope of disclosure by limiting to different degrees the number of custodians whose records must be searched, the time period covered, and the need to access non-primary sources such as back-up tapes.

If the parties wish to provide in advance for the scope of electronic discovery, they may reference one of these sets of guidelines in their arbitration clause.

d. Expert Testimony

While parties frequently appoint their own experts, the appointment of experts by the arbitration tribunal itself is common in civil law countries. Most arbitration rules make specific provision for the arbitration tribunal to appoint its own expert or experts (*see* ICDR Rules, Article 25; ICC Rules, Article 25(4); LCIA Rules, Article 21; UNCITRAL Rules, Article 29; SCC Rules, Article 34; SIAC Rules, Rule 26; HKIAC Rules, Article 25).

Depending upon the rules used, there may be some question as to the parties' right to examine such expert's report and to question such expert on his or her report. If the selected rules do not provide for tribunal-appointed experts or adequately safeguard the parties' right to examine such experts, the following clause should be considered:

> **"The arbitration tribunal may, at its option, appoint one or more experts to advise it with respect to any issue in the arbitration. If any expert is so appointed, the parties hereto shall have the right to review such expert's**

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> **report(s) to the tribunal and to examine such expert at an oral hearing."**

The parties may also decide to exclude the tribunal's right to appoint experts:

> **"The arbitration tribunal shall not have the authority to appoint experts, and Article [*x*] of the [*selected rules*] shall not apply."**

The **IBA Rules** contain provisions on party-appointed experts (Article 5) and tribunal-appointed experts (Article 6). The IBA Rules outline key elements that should be included in expert reports as well as the various procedural rules by which any expert testimony may be presented, submitted and considered in the arbitration. The IBA Rules also contain an option for the tribunal to order meet-and-confer sessions between party-appointed experts, to narrow the remaining issues of dispute and increase the efficiency of the arbitral proceedings. The IBA Rules provide a good procedural framework for the handling of expert testimony in arbitral proceedings and the parties may choose to include those rules in the arbitration agreement:

> **"Article[s] 5 [*and 6*] of the IBA Rules on the Taking of Evidence in International Arbitration shall apply to expert testimony."**

e. Confidentiality

Most institutional rules contain a specific provision dealing with confidentiality, although these vary considerably in detail and scope and often provide less confidentiality than parties may expect. The **LCIA**, **SIAC** and **HKIAC Rules** contain fairly comprehensive

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confidentiality provisions (*see* LCIA Rules, Article 30; SIAC Rules, Rule 39; HKIAC Rules, Article 42). The **ICDR Rules** and the **SCC Rules**, on the other hand, only impose confidentiality obligations on the tribunal and the institution, not the parties (ICDR Rules, Article 37; SCC Rules, Article 3 & App'x I, Article 9). The **ICC Rules** permit the tribunal, upon request of any party, to make orders concerning the confidentiality of the arbitration (ICC Rules, Article 22(3)).

The approaches of national laws and courts are equally varied. Some national laws, such as that of **Norway**, provide that arbitrations are presumptively not confidential (Norwegian Arbitration Act, Chp. 5, §1). Others establish a strict duty of confidentiality on the parties as an implied term of the arbitration agreement or default statutory rule, qualified by exceptions, which in appropriate circumstances may be waived by a court. That is the case, for instance, in **England and Wales** and **New Zealand**. Even where laws or rules provide for confidentiality, however, the contours and scope of that obligation may not be clear.

The best way to ensure confidentiality of the arbitration is to include express language to this effect in the underlying agreement before any dispute has arisen. In drafting such a clause, a party should consider whether it will need to disclose the existence of, or details about, the arbitration in order to enforce its rights or to comply with other legal obligations. For example, it will need to provide a copy of the award to the court in an enforcement proceeding. It may also need to disclose certain information to its insurance carrier or its auditors, or in public securities filings.

If the contract contains a satisfactory confidentiality provision, the parties could expressly state that the arbitration and information disclosed in the arbitration shall be subject to that provision. In

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other contracts, the parties will find it useful to include a separate confidentiality provision in the arbitration clause itself to clarify the scope of confidentiality or the obligations of parties receiving confidential information. The following language may be used:

> **"The parties agree that the arbitration shall be kept confidential. The existence of the arbitration, any non-public information provided in the arbitration, and any submissions, orders or awards made in the arbitration (together, the "Confidential Information") shall not be disclosed to any non-party except the tribunal, the [*name of relevant institution or appointing authority if applicable*], the parties, their counsel, experts, witnesses, accountants and auditors, insurers and reinsurers, and any other person necessary to the conduct of the arbitration.**
>
> **Notwithstanding the foregoing, a party may disclose Confidential Information to the extent that disclosure may be required to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in *bona fide* legal proceedings. This confidentiality provision survives termination of the contract and of any arbitration brought pursuant to the contract."**

The exceptions to confidentiality track those listed in Article 3(13) of the IBA Rules, which are commonly adopted as guidance. The parties should consider carefully whether any particular disclosures should be further subject to more precisely defined or limited conditions.

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Different considerations apply to investor-State arbitration in light of the public interest in transparency in those kinds of disputes. Those concerns are discussed in the next subsection and in **Appendix 4**.

f. Cybersecurity

Parties to international arbitrations are increasingly concerned about the potential impact of cyberattacks. While some arbitral institutions have adopted best practices and procedures with respect to protecting data stored within their systems, the main institutional rules are silent on this issue. As a result, parties may want to reference best practices for managing cybersecurity threats in the arbitration clause. Debevoise & Plimpton's Protocol to Promote Cybersecurity in International Arbitration is included as **Appendix 6** to this publication. The parties may use the following language to adopt this Protocol:

> **"The parties agree to follow the Debevoise & Plimpton Protocol to Promote Cybersecurity in International Arbitration with respect to the transfer, storage, disclosure and use of sensitive information, as well as potential data breaches."**

5. Relief

a. Costs

There are three main approaches to awarding costs: (*i*) the losing party bears all or a substantial proportion of the prevailing party's costs; (*ii*) each party bears its own costs; or (*iii*) costs are awarded in proportion to the relative success of each claim. In this context, "costs" typically include not only institutional and arbitrator expenses but also each party's attorneys' fees, experts' fees and other

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expenses. In some situations, indemnity provisions that are separate from the arbitration clause may have the effect of imposing the obligation to pay costs on one party or the other.

If parties do not specify standards of cost allocation in the contract, arbitration rules typically afford arbitrators wide discretion in allocating costs and fees between the parties (*see* ICC Rules, Articles 37 and 38, Appendix III, Article 2; ICDR Rules, Article 34; LCIA Rules, Article 28; SIAC Rules, Rule 35; HKIAC Rules, Article 33). The emerging trend has been for arbitral tribunals to award costs to the prevailing party, although tribunals may also take into account a party's conduct throughout the proceedings.

Although the rules of administering institutions almost always permit an award of costs in the tribunal's discretion, parties may choose explicitly to grant arbitrators this authority. They may also choose to stipulate that the losing party shall bear the costs of the prevailing party or that each party shall bear its own costs. In those instances, one of the following variants may be included:

Variant 1: Arbitrators Have Discretion to Apportion Fees and Expenses

> **"The arbitrators shall have the power to make an award allocating the costs and expenses of the arbitration between the parties, including reasonable legal fees and other costs of legal representation."**

Variant 2: Losing Party Pays Prevailing Party's Costs

> **"The arbitrators shall award to the prevailing party its costs and expenses of the arbitration, including its**

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reasonable legal fees and other costs of legal representation, as determined by the arbitrators."

Variant 3: Each Party Bears its Own Costs

"All costs and expenses of the arbitrators and [*name the arbitral institution*] shall be borne by the parties equally. Each party shall bear its own arbitration costs and expenses, including its legal fees and other costs of legal representation."

b. Waiver of Punitive or Exemplary Damages

In some cases, the law governing the parties' substantive dispute may permit recovery of punitive or exemplary damages. These damages, which are meant to punish or deter unconscionable conduct, are in addition to any damages awarded to compensate the injured party for its losses.

In 1995, the **United States** Supreme Court held that arbitrators have the authority to award punitive damages unless the parties expressly agree otherwise (*see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). A choice of law clause selecting a substantive law that permits courts—but not arbitrators—to award punitive damages, such as New York law, may not be sufficient to preclude an award of punitive damages in arbitration (*see Flintlock Constr. Servs., LLC v. Weiss*, 991 N.Y.S.2d 408 (App. Div. 2014)). Parties that wish to preclude the arbitrators from awarding punitive damages are advised to do so expressly, by including language such as the following:

"The parties hereto expressly waive and forgo any right to punitive, exemplary or similar damages as a result of

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> **any controversy or claim arising out of, relating to, or in connection with this agreement or the breach, termination or validity thereof."**

It may be preferable to place this provision in the miscellaneous provisions of the contract or as part of the governing law clause rather than in the arbitration clause to preclude any argument that punitive damages are outside the scope of the arbitrators' authority but are otherwise available in a court proceeding instituted for that sole purpose. Drafters should note, however, that there may be uncertainty in some jurisdictions as to whether such a pre-dispute waiver of punitive damages is enforceable.

The **ICDR Rules** uniquely contain a provision waiving the right to punitive damages in any arbitration pursuant to those rules unless the parties provide otherwise in their contract (ICDR Rules, Article 31(5)). The ICC, LCIA, UNCITRAL, SCC, SIAC, and HKIAC Rules are silent on this issue.

c. Interest

The parties may also consider including a clause that determines the interest to be awarded. Such clauses may be useful to limit the arbitrators' discretion or avoid the possibility that the arbitrators may apply a statutory interest rate established by national law.

The parties may choose a fixed rate or a rate based on a publicly available reference rate (such as LIBOR or Euribor). Where applicable, the tenor (maturity period) of the reference rate (*e.g.*, one-week deposits, one-month deposits, etc.) should be indicated as well.

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In the absence of a contrary agreement by the parties, the AAA, LCIA, and SIAC Rules all allow the tribunal to award interest at any rate it considers appropriate (*see* ICDR Rules, Article 31(4); LCIA Rules, Article 26.4; SIAC Rules, Rule 32(9)). The HKIAC, SCC, and UNCITRAL Rules are silent on this issue.

Many jurisdictions do not allow for the compounding of interest, and some jurisdictions allow the compounding of interest only if the parties specifically agree to compound interest.

The following language may be used:

> **"Notwithstanding [*applicable law clause*], pre-award and post-award interest shall be awarded at [*specify rate including maturity period*]. Interest shall be compounded [*monthly or quarterly*]."**

d. Time Limit for Issuance of Award

In the interest of efficiency and cost control, the parties may wish to stipulate that the tribunal's award must be issued within a specific time period. The following language may be used:

> **"The time limit within which the arbitral tribunal must render its final award is [*60 days, six months, etc.*]. Such time limit shall start to run from the later of the date of the last hearing or the final post-hearing submission. The tribunal shall inform the parties in writing when it considers the proceedings closed. [The tribunal may shorten or extend the time limit pursuant to a joint request from the parties.]"**

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When this type of provision is used or when the selected rules impose similar deadlines, arbitrator candidates should be informed of those requirements and should commit to adhering to them prior to their appointment.

e. Currency of Award

It may sometimes be in the interest of the parties to specify the currency in which the award should be paid. This can be done simply by providing that:

"Any award shall be payable in [*specify currency*]."

The ICDR Rules state that a monetary award shall be in the currency of the contract unless the tribunal considers another currency more appropriate (ICDR Rules, Article 31(4)). The LCIA Rules say that an award may be expressed in any currency unless the parties have agreed otherwise (LCIA Rules, Article 26.6). The ICC, UNCITRAL, SCC, SIAC and HKIAC Rules are all silent on the issue.

6. Finality and Enforcement

a. Appeal

One of the major advantages of international arbitration is that an award is final and binding and may not be annulled except on strictly limited grounds (*see* ICC Rules, Article 35.6; ICDR Rules, Article 30(1); LCIA Rules, Article 26.8; UNCITRAL Rules, Article 34(2) & UNCITRAL Annex, Possible Waiver Statement; SIAC Rules, Rule 32.11; SCC Rules, Article 46; HKIAC Rules, Article 34.2).

In the exceptional circumstance that a party wishes to provide for appeal of the arbitration award to a second arbitration tribunal, it is possible to draft such a clause. Such clauses are complex and should

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be drafted with caution. One variant is to provide for such an appeal only if the award exceeds a certain value. Parties may also opt in to appeals procedures established by arbitral institutions. For example, the CPR Arbitration Appeal Procedure provides an optional framework for the appeal of awards rendered in binding arbitrations conducted in the United States, whether the underlying arbitration is governed by the CPR Arbitration Rules or otherwise. Parties may invoke this procedure by agreement in writing. Similarly, the AAA's Optional Appellate Arbitration Rules provide a framework for the appeal of arbitral awards based on the agreement of the parties.

If the parties want to opt in to one of these procedures, the following language may be used:

> **"Either party may appeal a final arbitral award ordered pursuant to this agreement in accordance with [*the AAA's Optional Appellate Arbitration Rules/the CPR Arbitration Appeal Procedure*]."**

In addition, specific types of recourse to courts beyond the usual limited grounds for review may be possible. For example, in some jurisdictions, such as **England and Wales** and **Hong Kong**, it may be possible to appeal to courts on questions of the relevant national law arising out of awards under certain circumstances (*see* English Arbitration Act, section 69, Hong Kong Arbitration Ordinance, Schedule 2, Section 5). However, clauses providing for remedies such as this should be thoroughly vetted with counsel knowledgeable in the applicable law and otherwise approached with caution, as local-law exceptions and idiosyncrasies abound. For example, the United States Supreme Court has held that parties may not by contract expand the grounds for federal court review of

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arbitration awards beyond those set forth in the Federal Arbitration Act (*Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

b. Sovereign Immunity

Claims of sovereign immunity may be asserted not only by a government and its agencies but also by a company or organization owned or controlled by a State. While arbitration clauses generally effect a waiver of immunity with respect to the arbitration tribunal's jurisdiction, they do not necessarily do so with respect to enforcement by a national court of an award or execution against the foreign entity's assets. For the private party to an arbitration agreement, therefore, it is of particular importance to consider the inclusion of an explicit waiver of immunity respecting judicial enforcement.

Such a waiver of execution may be expressed as follows:

> **"To the fullest extent permitted by law, [*State party or State enterprise*] hereby irrevocably waives any claim to sovereign or any other immunity in regard to any proceedings to enforce an arbitration award rendered by a tribunal constituted pursuant to this Agreement, including without limitation immunity from suit, immunity from service of process, immunity from jurisdiction of any court, and immunity of its property and revenues from execution or from attachment or sequestration before or after judgment."**

Waivers of sovereign immunity are often construed more narrowly than the breadth of their words would suggest. For example, under **United States** law, a general waiver of immunity does not permit prejudgment attachment unless the waiver contains specific

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language to that effect (*see* 28 U.S.C. § 1610(d)(1); *Reading & Bates Corp v. NIOC*, 478 F. Supp. 724 (S.D.N.Y., 1979); *E-System Inc v. Islamic Republic of Iran*, 491 F. Supp. 1294 (N.D. Tex., 1980)). In addition, regardless of waiver, the law of the enforcing jurisdiction may not permit execution or attachment against certain State assets. A State party may wish to draft the waiver clause expressly to exclude certain classes of assets that it may regard as essential to its sovereign operations, such as assets used for diplomatic or military purposes and assets held by its central bank. A private party, on the other hand, may seek an express waiver of immunity from jurisdiction and enforcement by reference to a specific asset, such as the key asset in a given investment. Specifying an asset in this way will make it more difficult for the State party to claim that the private party cannot enforce against the asset.

The ICDR, ICC, LCIA, UNCITRAL, SCC, SIAC and HKIAC Rules are all silent on the issue of waiver of sovereign immunity.

c. *Forum Non Conveniens*

In certain common law jurisdictions, most notably in the **United States**, a party may raise the *forum non conveniens* doctrine as a defense to the recognition or enforcement of a foreign arbitral award. The *forum non conveniens* doctrine, which is generally not recognized in civil law jurisdictions, provides a court with the discretionary power to dismiss or stay a case if another court is better suited to hear the dispute.

Prominent commentators have argued that the application of the *forum non conveniens* doctrine in the recognition and enforcement of foreign arbitral awards is contrary to a State's obligations under the New York Convention, which provides an exhaustive list of the acceptable defenses to enforcement. Nevertheless, several lower

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court decisions in the **United States** have dismissed actions to enforce foreign arbitral awards on the grounds of *forum non conveniens*, reasoning that it is allowed under the New York Convention because it is a procedural rather than substantive rule of the forum state (*see, e.g.*, *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Repub. of Peru*, 665 F.3d 384, 397 (2d Cir. 2011); *Melton v. Oy Nautor Ab*, 161 F.3d 13 (9th Cir. 1998); *Monegasque de Reassurances SAM v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 383 (S.D.N.Y. 2001); *but see TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) (rejecting application of *forum non conveniens* doctrine in proceeding to enforce arbitral award)).

Accordingly, particularly if the parties envision having to enforce a foreign arbitral award in the **United States**, the parties may consider including a provision expressly waiving any defense to the recognition and enforcement of an arbitral award on *forum non conveniens* grounds:

> **"The Parties hereby irrevocably waive any defense on the basis of *forum non conveniens* in any proceedings to enforce an arbitration award rendered by a tribunal constituted pursuant to this Agreement."**

d. Service of Process

In actions to enforce an arbitration award, service of process may become a tricky issue. Service of process outside the jurisdiction where enforcement is sought may require leave of court or compliance with a complex mechanism under a treaty, such as the Inter-American Convention on Letters Rogatory or the Hague Convention on Service of Process. Service through these channels can prove costly and time consuming, in some cases taking a year or more.

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For that reason, parties may wish to consider including in their arbitration clause a designated agent for service of process by first-class mail or courier, with an express waiver of any objection based on service of process. Such a clause may be expressed as follows:

> **"[*Party*] hereby irrevocably appoints, with respect to itself and to its assets, [*Process Agent*] for service of all pleadings, process, requests for discovery and/or other papers in connection with any proceedings, wherever brought, for the recognition and enforcement of any award resulting from an arbitration brought pursuant to this clause or any judgment of any jurisdiction resulting therefrom. Service of process in accordance with this paragraph may be made by delivering a copy of such process to [*Process Agent*] at [*address*] by hand delivery, first-class mail or courier, and [*Party*] irrevocably authorizes [*Process Agent*] to accept such service on its behalf. [*Party*] hereby waives any objection to service of process by service on [*Process Agent*] in accordance with this paragraph. Nothing in this paragraph limits the right to serve legal process in any other manner permitted by law."**

e. Submission to National Courts

It can be useful to select a judicial forum for any necessary court proceedings ancillary to an arbitration, for example, an action to compel arbitration or an application for preliminary measures or court-assisted discovery, particularly if it is not clear that one or both parties are subject to jurisdiction in a suitable and convenient jurisdiction. Because it may be necessary to bring ancillary proceedings in a number of different jurisdictions, the forum selection clause should be non-exclusive.

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> **"The parties irrevocably submit to the non-exclusive jurisdiction of the courts of [name of jurisdiction] solely in respect of any proceeding relating to or in aid of an arbitration under this agreement, [except that a proceeding to vacate or modify the award may be brought solely in a court having jurisdiction at the seat of arbitration]. Each party waives and agrees not to assert as a defense in any such proceeding in the specified court that the venue is not appropriate or that the court lacks jurisdiction over any party. Nothing in this paragraph limits the scope of the parties' agreement to arbitrate or the power of the arbitral tribunal to determine the scope of its own jurisdiction."**

If the specified court is at the seat of arbitration, the bracketed language at the end of the first sentence should be omitted.

If the parties draft a narrow arbitration clause that does not encompass all potential disputes arising under an agreement, they should consider providing an exclusive or non-exclusive forum for the adjudication of disputes not subject to arbitration. The following language can be used either independently or in conjunction with the limited forum selection clause for proceedings ancillary to an arbitration:

> **"The parties irrevocably submit to the [exclusive / non-exclusive] jurisdiction of the courts of [name of jurisdiction] for the purpose of resolving any dispute, controversy, or claim arising out of, relating to, or in connection with this contract that is not subject to arbitration pursuant to this provision. Each party waives and agrees not to assert as a defense in any such**

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action, suit or proceeding in the specified court that the venue is not appropriate or that the court lacks jurisdiction over any party."

7. Particular Procedures

a. Interim Adjudication

In construction contracts, it is common to have provisions for adjudication of certain types of disputes that may arise while construction is ongoing. These provisions aim to facilitate a quicker resolution than is possible in arbitration and to allow the construction to proceed where the existence of the dispute could otherwise suspend the construction work.

Parties also may agree to have a particular issue relevant to their contract decided by a subject-matter expert. For example, parties may agree that accounting disputes will be resolved by an accounting expert or that valuation disputes will be resolved by an investment banker.

Most commonly, these provisions refer disputes regarding technical and operational matters arising during construction to an independent expert or experts for resolution within a predetermined time frame. Normally, the provisions require final adjudication of such disputes by the expert, although it is possible to provide for review of the expert determination in arbitration if the determination has not become moot by the passage of time. The following language may be used:

"If a dispute arises as to [*specify disputes*], such dispute may be referred by either party for determination by an expert agreed between and appointed by the Parties.

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> **[*Specify expert qualifications, if desired.*] If the parties are unable to agree within [*5*] days of the referral, the expert shall be appointed by [*name of institution*]. The expert shall have no authority to resolve or determine any dispute except for those listed in this paragraph. The determination of the expert shall be [*final and*] binding on the Parties [*unless and until an Arbitration Award issued pursuant to this Agreement modifies or annuls the determination*]."**

Two words of caution should be sounded about these interim adjudication procedures. *First*, it is important that a clear differentiation be made between the types of disputes that may be referred to the interim adjudication procedure and the types of disputes referable to arbitration. Otherwise, significant delay to the eventual resolution of the dispute—potentially including litigation in court—may result from a preliminary disagreement as to the proper means of resolution. *Second*, as with clauses that require pre-arbitration negotiation, conciliation, or mediation, the clause should be carefully drafted to avoid unintentionally creating an opportunity for a party to argue that the interim adjudication procedure is a condition precedent to arbitration if such a result was not intended.

b. Dispute Boards

In large, complex construction projects and in construction matters likely to give rise to disputes among multiple parties, the contract may provide for interim dispute resolution by Dispute Review Boards ("DRBs") or Dispute Adjudication Boards ("DABs"). These may be standing boards, which are established at the outset of the project and remain in place until completion, or ad-hoc boards which are constituted only when a dispute arises. DRBs are typically empowered to issue recommendations, which may become binding

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only if there is no objection within a specified time, while DABs issue decisions that are immediately binding unless and until the dispute is finally resolved in litigation or arbitration.

Standing DRBs and DABs are costly but may be beneficial for complex, high-value projects. Anecdotal evidence suggests that the existence of a DAB or DRB encourages cooperation, enables disputes to be addressed early, and reduces the incidence of arbitration or litigation.

The ICC, the American Arbitration Association ("AAA"), and the International Federation of Consulting Engineers ("FIDIC"), among others, provide procedures for the appointment and operation of DRBs and DABs. Most procedures provide that both DRB recommendations and DAB decisions may be subsequently reviewed in an arbitration or litigation. General considerations and suggested language for selecting a set of rules are set forth below.

In general, contracts that provide for a DRB or a DAB should not provide for mandatory negotiation or mediation before the DRB/DAB provisions can be invoked. The principal advantage of a DRB/DAB is its ability to reach a quick resolution. Even limited periods of mandatory negotiation or mediation before a dispute may be submitted to the DRB/DAB can be counterproductive.

Contracts that provide for a DRB/DAB should assign all disputes to the DRB/DAB. This minimizes the likelihood of a protracted dispute over whether an issue is to be referred to the DRB/DAB or the arbitral tribunal, which could significantly delay resolution. Conversely, if the parties identify narrow areas of potential dispute that they do not want to be decided by the DRB/DAB, those should be defined explicitly in the contract.

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The following sets of rules and procedures may be adopted by reference:

- AAA Dispute Resolution Board Specifications, Operating Procedures, and Hearing Rules and Procedures. The AAA procedures provide for a Dispute Resolution Board, the decisions of which (referred to as "Recommendations") are not binding but are admissible in a later proceeding unless the parties otherwise agree. If the parties want to use AAA procedures but also want to have the Board render a binding decision, it will be necessary to specify that in the contract. The AAA procedures set forth detailed timelines for pre-hearing submissions and for the Board's decision, including requiring that a Recommendation be issued within 14 days of the hearing, which will ordinarily be held at the next site visit after the parties' initial submissions.
- ICC Dispute Board Rules. The ICC Rules provide three options: a Dispute Review Board that issues "Recommendations" that become binding only if no party objects within 30 days; a Dispute Adjudication Board that issues binding "Decisions"; and a Combined Dispute Board that may do either, depending on the circumstances. The parties may provide for review of Decisions by the ICC before the DAB issues them. ICC Rules provide timelines for initial submissions, and also require that a Decision or Recommendation be issued within 90 days of referral of the dispute, or 120 days if the agreement provides for ICC review.
- FIDIC. FIDIC's 2017 edition of its contract suite comprises three standard form construction contracts for different procurement methods. Under Clause 21 of each of the standard forms, parties may bring a dispute to a Dispute Avoidance/Adjudication Board (DAAB), which will issue a reasoned decision within 84 days or another period of time as agreed upon by the parties. A DAAB's

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> decision becomes immediately binding on the parties and must be put into immediate effect. Either party may serve a "notice of dissatisfaction" within 28 days of the decision, failing which it will become final. If a notice of dissatisfaction is served timeously, either party may refer the dispute to arbitration. The DAAB may, if the parties agree, provide informal assistance so as to resolve any issue or disagreement which has arisen. The parties are not bound by any such informal advice or assistance.

All three sets of Rules require that a Decision or Recommendation state the reasons for the decision. It is important to note that the AAA Rules allow for counsel to attend Board hearings, but unlike the ICC Rules, they expressly do not permit counsel to participate unless the Board finds that counsel would be helpful in resolving a particular dispute.

The following language may be used to incorporate AAA or ICC dispute board procedures:

> **"The Parties hereby agree to establish a Dispute Adjudication Board ("DAB") [*or a Dispute Review Board ("DRB")*] in accordance with the [*select rules*] ("Rules"), except as they may be modified herein or by mutual agreement of the Parties. During the pendency of the Project that is the subject of this Agreement, any Disputes shall be referred to the [*DRB/DAB*] for determination.**
>
> **The [*DRB/DAB*] will consist of three members, two to be nominated by each Party, with the third selected by the two nominated members in consultation with representatives of the Parties within [*30 days*] after**

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execution of this Agreement by the Parties. The third member shall serve as the Chair. [*Party A*] hereby nominates [*name and/or title*] and [*Party B*] nominates [*name and/or title*] to serve as members of the [*DRB/DAB*]. [If the [*DRB/DAB*] requires a hearing to resolve a Dispute, the full board shall be convened to hear the matter if the amount in controversy exceeds five hundred thousand dollars ($500,000.00); otherwise, the Chair will hear the matter alone.]

The decision of the [*DRB/DAB*] shall be binding on the Parties during the pendency of the [*specify project*] and shall continue to be binding after completion of the [*project*] unless and until an Arbitration Award issued pursuant to Article [*X*] of this Agreement modifies or annuls such decision. An arbitration seeking review of a [*DRB/DAB*] determination may be commenced only after completion of the [*project*]. An arbitration to compel a Party to comply with a determination of the [*DRB/DAB*] may be commenced at any time.

Any costs associated with the [*DRB/DAB*] shall be split equally between the Parties, except that the costs of any arbitration arising from a [*DRB/DAB*] determination shall be [allocated as specified in [*arbitration clause*]/allocated by the arbitral tribunal/borne by the losing party.]"

c. Classwide Arbitration

Arbitration on a "class action" basis, where a party seeks to represent the interests of similarly situated nonparties, is rare in the context of international business contracts. However, disputes involving bonds

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or other securities may raise issues affecting large numbers of parties that could be resolved on a common basis. If a provision for class arbitration is desirable, it must be carefully tailored.

Class claims, where one party seeks to speak for a class of similarly situated persons on a representative basis, should be distinguished from multi-party and "mass" claims, where large numbers of claimants bring individual claims together.

In the **United States**, classwide arbitration is permissible if the agreement of the parties so provides. However, a series of decisions by the Supreme Court has rejected the position that a right to classwide arbitration can be inferred from silence. In 2010, the Supreme Court held that parties who have not agreed to class arbitration may not be compelled to arbitrate on a classwide basis and that a right to classwide arbitration cannot be inferred where the arbitration clause is silent on the point (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010)). In later cases, the Supreme Court held that clauses prohibiting classwide arbitration may not be invalidated on the ground that they are unconscionable under state law or on the ground that the cost of arbitrating an individual claim would exceed the potential recovery (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)). Several of the U.S. Courts of Appeals have held that courts, not arbitrators, must decide the issue of whether an agreement permits class arbitration unless the parties have clearly and unmistakably referred the question to the arbitral tribunal (*see Dell Webb Communities, Inc., v. Carlson*, 817 F.3d 867 (4th Cir. 2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013)).

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In the unusual circumstance where classwide arbitration may be desired, the parties will need to include a clause that clearly and expressly permits class arbitration. None of the main institutional rules discussed include a rule on classwide arbitration. Some institutions, such as the American Arbitration Association, have published supplementary rules for use in classwide arbitration that can be incorporated by reference into an arbitration agreement.

d. Final Offer/Baseball/Pendulum Arbitration

In very specific circumstances, the parties may agree to a "final offer arbitration," also known as "baseball arbitration" or "pendulum arbitration." Under such a clause, each party submits to the arbitrator a single proposed amount to be awarded and presents support for that amount in a summation-style argument. The arbitrator is then bound to select one of the amounts as the more appropriate without the authority to diverge from the amounts proposed by the parties or to select an amount between them. The amount selected by the arbitrator becomes a binding arbitration award.

A final offer arbitration clause may be desirable where the parties expect to dispute only the amount owed and not liability itself. It may also be agreed upon for a damages phase of a bifurcated arbitration after liability has already been determined.

The major rules are silent on this issue, so specific contractual language is required. The following language may be used:

> **"The parties agree that the arbitration shall be a 'final offer arbitration.' Each party shall submit to the arbitrator and exchange with each other in advance of the hearing a single figure representing the amount it**

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> **believes should be awarded. The arbitrator shall be limited to awarding one of the two figures submitted."**

Final offer arbitration forces the parties to submit figures that are reasonable in the hope that the arbitrator will choose that figure. For that reason, the exchange of those figures often facilitates settlement.

An additional variant on final offer arbitration is known as "confidential final offer" or "night baseball" arbitration. Under the rules of confidential final offer arbitration, the parties exchange their own determinations of the value of the case, but the figures are not revealed to the arbitrator. The arbitrator will assign a value to the case, and the parties agree to accept the high or low figure closest to the arbitrator's value. If the parties wish to adopt this variant, the following language may be used:

> **"The parties agree that the arbitration shall be a 'confidential final offer arbitration.' Each party shall exchange with the other in advance of the hearing a single figure representing the amount it believes should be awarded, but these figures shall not be provided to the arbitrator. The award shall be the figure closest to the value determined by the arbitrator."**

The advantage of the confidential final offer variant is that the arbitrator must do more than simply determine the prevailing party. Thus, the arbitrator is likely to be engaged to a greater degree with the details of the positions of the parties. On the other hand, for the same reason, the proceeding may not be as streamlined as under an ordinary final offer arbitration. Like ordinary final offer arbitration, confidential final offer arbitration gives both parties the incentive to

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present reasonable figures in order to increase the likelihood that their figure will be closer to the value assigned to the case by the arbitrator.

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Appendix 1
Overview of Arbitral Seats

General Considerations

A. New York Convention. The seat chosen must be within a State party to the New York Convention to ensure enforceability in other States that are parties to the Convention. Each of the seats below is located in a State party to the New York Convention.

B. Mandatory Procedural Rules. The law of the seat should permit maximum party autonomy in determining the procedure of the arbitration. For example, some countries impose time limits on the length of proceedings. Depending on the matter in dispute, such time limits could be an advantage or disadvantage.

C. Judicial Intervention. The law of the seat should limit opportunity for judicial intervention in the arbitration, particularly with respect to the merits of the dispute, either during the conduct of the arbitration or by way of review of the award.

D. Logistical Considerations. Especially if hearings are taking place at the seat, the chosen seat should:

1. be geographically convenient;
2. have adequate hearing facilities; and
3. have available an adequate pool of local practitioners who can support possible ancillary litigation.

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It is *not* essential that either the seat of the arbitration or the hearing location be in the same place as the administering authority's offices, although this can facilitate logistics. The principal administering bodies routinely administer arbitrations taking place outside their home cities. In addition, there are effective rules designed specifically for non-administered arbitration.

E. Restrictions on Counsel and Arbitrators and Immigration Restrictions. The law of the forum State should not impose restrictions, such as nationality requirements, on the parties' freedom to choose arbitrators or counsel. The immigration regime and professional regulations for the country should also not raise any barriers, to the extent possible, to entry or participation by foreigners as counsel, arbitrators, party representatives or witnesses. In each of the five generally recommended seats listed below, attorneys not admitted in the jurisdiction may represent parties in arbitrations seated in those jurisdictions.

In 2015, the Chartered Institute of Arbitrators published a set of ten principles, officially titled the *CIArb London Centenary Principles*, aimed at helping parties identify "an effective, efficient and 'safe' seat for the conduct of International Arbitration." The Principles, which provide useful guidance on the selection of a seat, can be found on CIArb's website at www.ciarb.org.

Top Five Seats Generally Recommended

While the appropriate seat for a particular transaction will be informed by the circumstances of each case, in our experience five seats are most frequently considered for international contracts:

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New York, **London**, **Paris**, **Singapore** and **Hong Kong**. The foregoing section highlights the key considerations for each of these five seats, some of which may apply to more than one seat.

A. **New York**

1. The United States has a strong policy favoring arbitration. Both the Federal Arbitration Act (Title 9 of the United States Code) and New York's arbitration law (Article 75 of the Civil Practice Law and Rules) are progressive arbitration statutes that recognize party autonomy, discourage judicial intervention and place no nationality restrictions on arbitrators or counsel.

2. The AAA, including its international arm, the ICDR, is headquartered in New York. The ICC also has an office in New York, and the New York International Arbitration Centre ("NYIAC") has hearing facilities in New York.

3. The New York state court system has designated a specialized Commercial Division Justice to hear all proceedings related to international arbitration brought in New York County. Cases related to international arbitration may also be heard in the U.S. District Court for the Southern District of New York, which is the federal court seated in New York.

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4. For any arbitration seated in the United States, the following language should be included in the arbitration clause in order to avoid any uncertainty over the possible application of state law:

   "Notwithstanding [*the choice of law clause*], the arbitration and this agreement to arbitrate shall be governed by Title 9 (Arbitration) of the United States Code."

5. For an arbitration seated in New York, courts may vacate an arbitral award based on the grounds listed in the Federal Arbitration Act, namely, if (*i*) the award was procured by corruption, fraud, or undue means; (*ii*) the arbitrators were evidently partial or corrupt; (*iii*) the arbitrators were guilty of misconduct that prejudiced a party's procedural rights; or (*iv*) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

B. **London**

1. The Arbitration Act 1996 generally confirms party autonomy over procedure and specifically notes that English court procedures need not apply. As discussed in Section II.g above, sections 45 and 69 of the Arbitration Act permit judicial determinations and appeals from awards on points of English law. If parties intend to exclude such determinations, they should include express language to this effect.

2. The English courts are widely recognized as being supportive of arbitration. The Arbitration Act confers

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power on the courts (with the permission of the tribunal or agreement of the parties) to secure the attendance of witnesses before the tribunal to give oral testimony or produce documents or other material evidence. It also provides the courts with the power to enforce peremptory orders of a tribunal and to make a wide range of other orders in aid of arbitration.

3. The courts' power to grant urgent relief under the Arbitration Act is curtailed where timely and effective relief could be granted by an arbitral tribunal or institution.

4. Under the Arbitration Act, an arbitral award may be set aside if English courts find a lack of substantive jurisdiction or serious irregularity affecting the tribunal, proceedings, or the award. Under section 69 of the Arbitration Act, unless excluded by the parties' agreement, parties may also appeal a point of English law if (*i*) they agree or (*ii*) obtain the leave of the court. The court will only grant leave to appeal if (*i*) the court is satisfied that the question of law substantially affects the parties' rights, (*ii*) the question is one which the tribunal had to determine and (*iii*) the arbitral tribunal's decision was either so obviously wrong or addressed a question of general public importance and was at least open to serious doubt. The English court must also find it just and proper in all the circumstances for the court to determine the legal question.

5. The LCIA is headquartered in London and the International Dispute Resolution Centre (the "IDRC") has hearing facilities in London.

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C. **Paris**

1. The French Code of Civil Procedure guarantees party autonomy in establishing the procedures applicable to an international arbitration.

2. In 2011, France undertook a significant reform of its legislative framework on arbitration, adopting a new law on arbitration (*see* Decree No. 2011-48 of Jan. 13, 2011, effective May 1, 2011) with the express purpose of making France even more arbitration-friendly than it previously was. The law amended the Code of Civil Procedure mainly to consolidate and codify well-established French case law relating to international arbitration. For example, the Code now makes explicit the generally accepted principle of severability of the arbitration agreement, according to which the arbitration clause remains unaffected even if the underlying contract is found void (*see* French Code of Civil Procedure, Article 1447).

3. Awards are subject to set-aside only on narrow grounds, such as the improper exercise of jurisdiction by the arbitrators, an award in excess of the arbitrators' authority or a violation of international public policy.

4. A notable innovation in the Code was to permit parties to agree to waive their right to challenge an award (*see* French Code of Civil Procedure, Article 1522). The impact of such a waiver is limited, however, because parties can still appeal an enforcement order (*ordonnance d'exequatur*) on grounds identical to the grounds for setting aside an award.

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5. The ICC, with its International Court of Arbitration, has its headquarters and hearing facilities in Paris.

D. **Singapore**

1. **Singapore** has adopted the UNCITRAL Model Law for international arbitrations with slight modification in its International Arbitration Act ("IAA"). When the IAA was amended in 2012, Singapore reportedly became the first jurisdiction in the world expressly to extend the powers of arbitral tribunals to emergency arbitrators.

2. Foreign counsel may conduct arbitrations under the amended Singapore Legal Profession Act even when the substantive governing law is Singapore law (*see* Legal Profession Act, c. 161, § 35(1)).

3. Case law in Singapore strongly favors arbitration. As described by the Singapore Court of Appeal, Singapore has developed an "unequivocal judicial policy of facilitating and promoting arbitration" (*Tjong Very Sumito v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at 28).

4. Singapore law provides only limited grounds for set-aside of an international arbitral award, which largely track those set out in Article 34(2) of the UNCITRAL Model Law. In addition, Section 24 of the International Arbitration Act (Cap. 143A) provides that the Singapore court may set aside an award if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

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5. In the Civil Law (Amendment) Act 2017, adopted in January 2017, Singapore confirmed that third-party funding may be used in international arbitration and related litigation.

6. SIAC is a popular, experienced regional arbitral institution. As noted in Appendices 2 and 4 below, the SIAC Arbitration Rules were recently amended to include provisions for preliminary dismissal of claims, multiparty and multi-contract cases and expedited procedures, and SIAC also has promulgated specific investment arbitration rules.

7. The SIAC has its headquarters and hearing facilities in Singapore.

E. **Hong Kong**

1. **Hong Kong** remains subject to the New York Convention by virtue of ratification by the People's Republic of China (the "PRC").

2. In November 2010, Hong Kong enacted a new Arbitration Ordinance, which went into force on June 1, 2011. This Ordinance is based on the UNCITRAL Model Law and was adopted with the goal of promoting Hong Kong as a seat for international arbitration. Hong Kong has applied a version of the UNCITRAL Model Law to international arbitrations since 1990 and has substantial experience with international arbitration. The 2011 Ordinance more closely follows the Model Law, including provisions for interim measures and confidentiality. Significantly, the new Ordinance also eliminates the distinction between

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domestic and international arbitration that existed under the earlier law.

3. There is no right to set aside of an arbitral award in Hong Kong based on the merits of the award. Pursuant to Section 81 of the Arbitration Ordinance (Cap. 609), which gives effect to Article 34 of the UNICITRAL Model Law, awards are subject to set-aside only on limited grounds, such as defects pertaining to the jurisdiction or constitution of a tribunal, substantial procedural irregularities, or if the award conflicts with the public policy of the jurisdiction where the supervising court is located. The case law also establishes that, even where a violation of Article 34(2) of the UNICITRAL Model Law is established, the Hong Kong court retains a narrow and limited residual discretion not to set-aside an award.

4. In 1999, Hong Kong and mainland China entered into an Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region. That arrangement allows mutual enforcement of arbitral awards between Hong Kong and mainland China. On December 30, 2009, the PRC's Supreme People's Court published a notice confirming that both *ad hoc* and institutional arbitration awards made in Hong Kong are enforceable in mainland PRC.

5. Hong Kong has expressly provided in its Arbitration Ordinance that restrictions on who can serve as counsel in court proceedings do not apply also to arbitration. In June 2017, Hong Kong amended its Arbitration

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Ordinance to allow third-party funding for international arbitration and related court proceedings.

6. The Hong Kong International Arbitration Centre ("HKIAC") is experienced in administering international arbitration. Its Administered Arbitration Rules were amended effective November 1, 2013. As of the time this handbook is going to press, the HKIAC Rules Revision Committee is considering amendments to the 2013 version of the Administered Arbitration Rules. Any amendments that result from this process are likely to come into effect in 2018.

Other Frequently Used Seats (*in alphabetical order by region*)

A. **Europe and Russia**

1. Geneva or Zurich

a. The Swiss International Arbitration Law, chapter 12 of the Private International Law Act, took effect on January 1, 1989. The Act permits parties to waive the right to set aside an award in limited circumstances as long as the waiver expressly invokes Articles 190 and 192 of the Act. In January 2017, the Swiss Federal Council submitted potential amendments to the Swiss International Arbitration Law that would emphasize party autonomy and clarify the scope of issues open for international arbitration.

b. Under the Private International Law Act, grounds for annulment are limited, and setting-aside proceedings, which are brought directly in the

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Federal Supreme Court, only last four months on average. The Swiss Federal Supreme Court may annul arbitral awards if (*i*) the arbitral tribunal was not properly constituted, (*ii*) the arbitral tribunal wrongly accepted or declined jurisdiction, (*iii*) the arbitral tribunal's decision went beyond or failed to decide the claims submitted to it, (*iv*) the principle of equal treatment of the parties or the parties' right to be heard was violated or (*v*) the award is incompatible with public policy.

c. The Swiss Chambers' Arbitration Institution is based in Geneva and is experienced in conducting international arbitrations under the Swiss Rules of International Arbitration.

2. The Hague

a. The Dutch Arbitration Act was amended, effective January 1, 2015, to give parties greater autonomy in designing arbitration proceedings and to reduce delay in set-aside and enforcement proceedings, among other things. Notably, parties may now agree to refer certain challenge proceedings to an arbitral institution rather than to Dutch courts. Annulment proceedings are also now heard directly by the Court of Appeal, rather than the district courts, thereby limiting the duration and complexity of challenges to awards. If the Court of Appeal finds grounds to set aside an award, it may remand the matter to the arbitral tribunal so that the error may be corrected rather than annulling the award outright. The new law also creates a legal

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framework for so-called "e-arbitration," in which pleadings may be submitted and awards rendered solely in electronic form.

b. Under the Dutch Arbitration Act, an award may only be set aside on the following grounds: (*i*) non-existence of a valid arbitration agreement, (*ii*) the arbitral tribunal was composed in violation of the applicable rules, (*iii*) the arbitral tribunal did not comply with its mandate, (*iv*) the award was not signed or was not properly or sufficiently reasoned and (*v*) the award, or the manner in which it was made, violates public policy. Moreover, the ground for setting aside the award must be sufficiently serious.

c. Several arbitral institutions are located in The Hague, including the Permanent Court of Arbitration ("PCA") (which administers many *ad hoc* arbitrations), the Netherlands Arbitration Institute, and PRIME Finance.

d. The Hague has a long history of international dispute resolution, including as home to the PCA, the International Court of Justice, and several other international tribunals.

3. Milan

a. **Italy** has adopted rules of arbitration procedure, codified in Articles 806 to 840 of the Code of Civil Procedure and last amended in 2006. These provisions are not based on the UNCITRAL Model Law, but include similar provisions on most significant issues.

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b. There are only limited grounds for setting aside an arbitral award under Italian law. There is no basis for challenging an award solely on its merits. Challenges to arbitral awards are brought before the Court of Appeal of the place of the seat of arbitration.

c. The Milan Chamber of Arbitration ("CAM") is often used for the administration of international arbitration proceedings, and has gained an international reputation. The CAM Arbitration Rules entered into force on January 1, 2010.

4. Moscow or St. Petersburg

a. In September 2016 new legislation on arbitration entered into force in **Russia**. Among other changes, the law expands the scope of corporate disputes that can be arbitrated, explicitly states the types of disputes that are considered non-arbitrable, and clarifies that an agreement to arbitrate may be formed by an exchange of electronic communications.

b. The new legislation is based predominantly on the UNCITRAL Model Law and significantly alters the regulatory framework applicable to domestic and international arbitration in Russia. It codifies the rules regarding the arbitrability of various categories of disputes and introduces important changes in the regulation of arbitral institutions administering disputes in Russia. It also creates more favorable rules with respect to the form and general treatment of the arbitration

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agreements, expressly stipulates the (new) ways in which Russian state courts can support the arbitral process, including assisting in obtaining evidence, and streamlines the process for the recognition and enforcement of arbitral awards.

c. The new legislation distinguishes sharply between institutional and *ad hoc* arbitration. The benefits of the former are only available if the arbitral institution obtained a permit to administer arbitration disputes in Russia as a permanent arbitral institution. The new legislation expressly states that the International Commercial Arbitration Court ("ICAC" or "MKAS") and the Maritime Arbitration Commission at the Chamber of Commerce and Industry ("MAC"), Russia's oldest and leading arbitral institutions, are considered permanent arbitral institutions by virtue of law and are exempt from the requirement to obtain a permit. To date, only two arbitral institutions have obtained a permit from the Russian Government: the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs and the Arbitration Center at the Institute of Modern Arbitration. All the aforementioned Russian permanent arbitral institutions adopted new arbitration rules allowing them to administer domestic and international arbitration in order to comply with the new legislation. It is not clear whether any foreign arbitral institutions will apply for, or even obtain, such a permit.

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d. Under the reformed arbitration legislation, most corporate disputes in respect of Russian companies may only be submitted to institutional arbitration with the seat in Russia and must be administered in accordance with the specialized corporate arbitration rules to be adopted by eligible arbitral institutions (general/default arbitration rules of the arbitral institution will not be suitable for the administration of corporate disputes). Certain narrow categories of corporate disputes in respect of Russian companies, such as corporate disputes concerning mandatory tender offer procedures in joint stock companies or exclusion of shareholders, are deemed non-arbitrable and are therefore within the exclusive domain of Russian State courts.

e. Disputes in respect of privatization of State property and public procurement, including concession agreements (notably and for the time being), remain non-arbitrable.

f. The revised arbitration legislation allows the parties to an institutional arbitration (but not an *ad hoc* arbitration) to agree on the finality of the award or waive the right to apply for the setting aside of the award or the right to challenge the tribunal's decision on jurisdiction before the State courts.

g. The grounds for setting aside an award under the Russian arbitration and procedural law are limited and substantively mirror those under the

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UNCITRAL Model Law. Challenges to awards are heard by the court of first instance (by the commercial court or the court of general jurisdiction), and, by default, are to be resolved within a month. Following the proceedings in the court of first instance, the court issues a ruling which enters into force immediately and may be challenged under cassation procedure rules (a challenge in appellate proceedings is not possible).

5. Stockholm

   a. The Swedish Arbitration Act, which came into force in 1999, is based on the UNCITRAL Model Law.

   b. Under Swedish law, an arbitration award can only be challenged on procedural grounds and cannot be reviewed by a court on the merits. The Swedish Arbitration Act is currently under review, and in 2015 a committee issued an extensive report with suggested revisions to the Act.

   c. The Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") is experienced in administering international arbitrations. As noted in **Appendix 2** below, the SCC Rules were revised effective January 1, 2017 to include, among other things, specific provisions for investor-State disputes and expedited procedures.

   d. **Sweden** has become one of the most frequently used venues for international commercial arbitration in recent years, with the SCC

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administering more than 200 arbitrations each year.

6. Vienna

   a. The Austrian Arbitration Act, adopted in 2006, is based largely on the UNCITRAL Model Law. In contrast to the UNCITRAL Model Law, the Austrian Arbitration Act draws no distinctions between domestic and international arbitrations or between commercial and non-commercial disputes.

   b. The Austrian Code of Civil Procedure provides for a limited set of grounds that permit a party to challenge an arbitral award of a tribunal seated in Austria before the Austrian Supreme Court, which is the only instance in these matters (with very limited exceptions).

   c. The grounds largely mirror those in Article 34 of the UNCITRAL Model Law, but for two grounds specifically rooted in Austrian law: (*i*) if the award is either based on evidence that was affected in a criminal manner, including the falsification of documents or testimony in violation of the obligation to tell the truth, or on a criminal verdict that was reversed on appeal, and (*ii*) if the proceedings were conducted in a manner that conflicts with fundamental values of the Austrian legal system (procedural public policy).

   d. The Austrian Arbitration Act was amended effective January 1, 2014. This amendment

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designated the Austrian Supreme Court as the sole court to hear arbitration-related proceedings other than in consumer and labor law arbitrations.

e. The Vienna International Arbitral Centre ("VIAC"), established in 1975, has considerable experience administering arbitrations, particularly in Central and Eastern Europe. VIAC arbitrations commonly apply either the Vienna Rules or the ICC Rules.

B. Asia and the Pacific Rim

The most frequently accepted seats involving Asian and Pacific parties are **Hong Kong** and **Singapore**. If these are not accepted, the alternatives listed below may also be considered.

1. Auckland

a. **New Zealand** has adopted the UNCITRAL Model Law through its Arbitration Act of 1996, which applies to both international and domestic arbitrations. Two amendments that came into force on March 1, 2017 provide for an emergency arbitrator and a body outside of the High Court to resolve arbitrator appointment dilemmas.

b. The Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") and the New Zealand Dispute Resolution Centre administer international arbitrations.

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2. Beijing or Shanghai

   a. Under Chinese law, only "foreign-related" disputes can be arbitrated outside of **China**. Foreign ownership of a Chinese entity may not be sufficient to make a dispute "foreign-related." In recent years Chinese courts have shown a greater willingness to recognize that the involvement of a party that is a Wholly Foreign Owned Enterprise ("WFOE") registered in a designated free trade zone creates a "foreign element" in the dispute.

   b. The PRC is a party to the New York Convention, and has extended the applicability of the Convention to the Special Administrative Regions of Hong Kong and Macau. In addition, mainland China has entered into special arrangements with Hong Kong, Macau and Taiwan for the mutual enforcement of arbitral awards, which largely mirror the Convention.

   c. The China International Economic and Trade Arbitration Commission ("CIETAC") is commonly selected by non-PRC parties as the arbitration institution for arbitrations in mainland China. Other arbitration institutions such as the Beijing Arbitration Commission/Beijing International Arbitration Center ("BAC") have also been steadily increasing their reputation for professionalism and internationalization in recent years. In 2013, the CIETAC sub-commissions in Shanghai and Shenzhen declared their independence from

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CIETAC and are now known as Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center ("SHIAC") and Shenzhen Court of International Arbitration / South China International Economic and Trade Arbitration Commission ("SCIA") respectively. Given the controversies once surrounding the split, it is important for parties arbitrating in mainland China to clearly designate the arbitral institution and, if CIETAC is selected, the sub-commission that should administer the case.

d. The PRC Arbitration Law, introduced in 1995 and amended in 2009, diverges from the UNCITRAL Model Law in several major respects.

   i. An arbitration agreement for arbitrations seated in the PRC must designate an administering institution ("arbitration commission"). As noted below, this institution may need to be a Chinese institution. This leaves no room for *ad hoc* arbitration, although there may now be a limited exception for arbitrations seated in free trade zones. The PRC courts usually recognize and enforce *ad hoc* awards made in New York Convention States or in Hong Kong, but agreements for *ad hoc* arbitration seated in the mainland PRC are generally unenforceable.

   ii. It is unclear whether foreign arbitration institutions may administer arbitration

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cases seated within mainland China. In April 2014, the PRC Supreme People's Court appeared to recognize, for the first time, the validity of an arbitral clause providing for ICC arbitration seated in Shanghai. Some commentators, however, have disputed the applicability of this decision to other cases, and the PRC is a civil law country whose courts are not bound by legal precedent. For that reason, it is advisable that parties wait for greater certainty before using foreign arbitration institutions for arbitrations seated in the PRC.

iii. Mainland PRC law does not fully recognize the principle that arbitral tribunals may decide their own jurisdiction (*Kompetenz-Kompetenz*). Arbitration commissions, rather than arbitral tribunals, are generally empowered to rule on jurisdiction. CIETAC may, where necessary, delegate such power to the arbitral tribunal (CIETAC Rules, Article 6(1)). If one party requests that an arbitration commission determine the validity of an arbitration agreement, the other party may simultaneously apply to a PRC court, and the court's ruling will prevail.

iv. Discovery is likely to be limited in most arbitrations seated in the mainland PRC. Parties that desire a degree of document

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production should incorporate in their arbitration clause evidentiary rules such as the IBA Rules on the Taking of Evidence in International Arbitration.

e. Since 1995, the PRC has adopted a special reporting system that is applicable to court proceedings involving foreign arbitral awards and awards in arbitrations seated in mainland **China** involving foreign-related factors, such as non-PRC parties or subject matter located overseas. Under this system, a lower court may not refuse to enforce a foreign or foreign-related award made in the PRC or invalidate an arbitration agreement involving foreign-related elements without prior examination and confirmation by a higher court. This system has helped facilitate the enforcement of awards against Chinese parties.

3. Kuala Lumpur

a. The Malaysian Arbitration Act 2005, which came into force on March 15, 2006 and was amended in 2011, largely adopted the UNCITRAL Model Law. The law gives parties greater flexibility to select the procedures governing the appointment of arbitrators and the proceedings and allows the arbitral tribunal to determine its own jurisdiction, including on the validity of the arbitration clause. It also provides that the awards of arbitral tribunals are final and binding, with several grounds for setting aside the award, including (*i*) the existence of procedural and jurisdictional

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defects, (*ii*) when the subject-matter of the arbitration is not capable of settlement by arbitration under the laws of Malaysia and (*iii*) when the award is in conflict with Malaysia's public policy.

b. The Act specifies several instances where the courts are given a right to intervene in certain matters, including staying proceedings, granting interim measures of protection, and assistance in taking of evidence. The Act replaced conflicting case law in this regard. **Malaysia** recognizes the doctrine of *Kompetenz-Kompetenz* under section 18(1) of the Arbitration Act.

c. The Kuala Lumpur Regional Centre for Arbitration ("KLRCA") is the primary arbitration institution in the country. KLRCA has seen a rise in its caseload in recent years, and adopted revised rules in 2017.

4. Mumbai or Delhi

a. **India's** Arbitration and Conciliation Act is based largely on the UNCITRAL Model Law with some particularities. The same law applies to domestic arbitrations and to international commercial arbitrations seated in India.

b. An arbitral tribunal seated in India must render an award within a maximum period of 18 months. If the time limit is not met, the tribunal's mandate is considered terminated. Only a court can extend this timeframe by an order which may involve a reduction of the arbitrators' fees.

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c. The grounds for setting aside an award seated in India are limited, and the 2015 amendments clarify that the courts cannot review the merits of the award. The grounds for refusing to enforce a foreign award are limited to those in the New York Convention.

d. In 2012, the Supreme Court clarified that Indian courts cannot interfere in arbitrations seated outside India (*Bharat Aluminium Co v. Kaiser Aluminium Technical Services ('BALCO')*, Supreme Court of India, Civ. App. 3678 of 2007, 6 September 2012). Indian courts may still grant interim relief or assistance in taking evidence even in foreign-seated arbitrations, but application of these provisions can be excluded by agreement of the parties.

e. The Arbitration and Conciliation Act was amended in 2015 with a view to reducing the potential interference of Indian courts in arbitral proceedings, although the prospect of related court proceedings can substantially lengthen the arbitral process.

f. There are several arbitral institutions in India, including the Mumbai Centre for International Arbitration ("MCIA"). When choosing an arbitral institution in **India**, parties should be aware of potential restrictions on choosing arbitrators from beyond the institution's roster.

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5. Seoul

   a. **South Korea's** Arbitration Act is largely based on the UNCITRAL Model Law, and applies to both domestic and international commercial disputes seated in South Korea. As amended effective November 2016, the Arbitration Act now gives arbitral tribunals more control when seeking court-aided discovery, and provides more expeditious enforcement procedures. Unlike the Model Law, the Arbitration Act only allows South Korean courts to enforce interim measures that are issued in arbitrations with a seat in South Korea.

   b. The Korean Commercial Arbitration Board ("KCAB") administers international arbitrations. Its amended rules, which became effective in June 2016, introduced an emergency arbitrator system.

   c. The grounds for set aside under the Arbitration Act largely track the UNCITRAL Model Law, namely: the arbitration agreement was invalid, a party was not given proper notice of the appointment of arbitrators or was unable to present his or her case, the award goes beyond the agreed upon issues in the arbitration agreement, the composition of the arbitral tribunal or proceedings were not in accordance with the parties' agreement, the dispute's subject matter is not arbitrable under South Korean law, or the award conflicts with public policy.

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d. Under South Korea's Arbitration Promotion Act, which entered into force in June 2017, the government and arbitration community will implement short- and long-term plans to promote international arbitration in South Korea, including through the expansion and improvement of international arbitral facilities and the promotion of Seoul as a seat of arbitration in international arbitrations.

6. Sydney or Melbourne

a. **Australia's** International Arbitration Act is based on the UNCITRAL Model Law. It has several default provisions that parties can choose to opt out of, including sections on evidence, costs, and procedure. The 2015 and proposed 2017 amendments to the Act align its language more closely with that of the New York Convention.

b. Within Australia's federal structure, international arbitration matters fall within the jurisdiction of state supreme courts. In 2009, Australia's Parliament gave the Federal Court concurrent jurisdiction over international arbitration. In addition, in January 2010, the Supreme Court of Victoria appointed an "Arbitration Coordinating Judge," creating an arbitration list that centralizes arbitration matters. The list is managed by a judge with international arbitration experience who, along with several other commercial judges, will hear all arbitration-specific cases.

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c. The Australian Center for International Commercial Arbitration ("ACICA"), and the Institute of Arbitrators and Mediators Australia ("IAMA") administer international arbitrations. The revised ACICA Arbitration Rules came into effect in January 2016.

7. Tokyo

a. **Japan's** Arbitration Law is based on the UNCITRAL Model Law and applies to arbitral proceedings with a place of arbitration in Japan, as well as proceedings in Japanese courts related to arbitral proceedings.

b. The Japanese Commercial Arbitration Association ("JCAA") administers international arbitrations. The most recent amendments to the JCAA Rules, in 2014, introduced provisions regarding expedited procedures, emergency arbitrators, interim measures, and joinder of third parties to an arbitration, among others.

c. The grounds for set aside under the Japan Arbitration Law largely track the UNCITRAL Model Law, namely: the arbitration agreement is invalid, a party was not given notice to appoint arbitrators or during the arbitration, a party was not able to present its case in the arbitration, the award covers matters beyond the scope of the arbitration agreement or claims in the arbitration, the composition of the tribunal or the arbitral proceedings were not in accordance with Japanese law or the parties' agreement, the claims

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in the arbitration relate to non-arbitrable subjects under Japanese law, or the content of an arbitral award is in conflict with the public policy or good morals of Japan.

C. **Americas**

The most frequently accepted seats involving Latin American parties are **New York** and **Paris**. If these are not accepted, the alternatives listed below are also regularly used because of geography, convenience, or other factors.

1. Bermuda

a. **Bermuda** is a common seat for arbitration disputes in the insurance industry, as liability insurance policies written on the so-called "Bermuda Form" generally designate either London or Bermuda as the seat of arbitration. As a result, Bermudan courts are experienced in handling commercial arbitration matters.

b. Under the Bermuda International Arbitration and Conciliation Act of 1993, the UNCITRAL Model Law applies to international commercial arbitrations seated in Bermuda. Parties may agree in writing to not apply the Model Law, in which case the Arbitration Act 1986 (based on the UK Arbitration Acts 1950-1979) applies, unless otherwise agreed in writing.

c. The Bermuda Commercial Court, an administrative subdivision of the Supreme Court of Bermuda, hears all court applications in Bermuda relating to arbitral proceedings, except

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that the Court of Appeal of Bermuda has exclusive jurisdiction for challenges against arbitral awards. The Supreme Court of Bermuda can also issue interim measures of protection before or during international arbitrations in order to assist arbitration proceedings seated in Bermuda.

d. The Court of Appeal for Bermuda has exclusive jurisdiction to review arbitration awards. An application to set aside must be brought within three months of the award date. Grounds on which the court can set aside an arbitral award are limited and derived from the New York Convention, including the invalidity of the arbitration agreement, serious due process flaws, an award beyond the scope of matters submitted to arbitration, subject matter not capable of settlement by arbitration under Bermudan law, and an award conflicting with Bermudan public policy (*i.e.* the making of the award was induced or affected by fraud or corruption).

2. British Virgin Islands

a. The UK ratification of the New York Convention was extended to the British Virgin Islands (the "BVI") in 2014.

b. International arbitration in the BVI is governed by the Arbitration Act 2013, which came into force on October 1, 2014. The Act is based on the UNCITRAL Model Law, with some variations. The Act recognizes the doctrine of *Kompetenz-*

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Kompetenz and establishes limited circumstances under which an award may be set aside.

c. The Act also established the BVI International Arbitration Centre, which provides facilities for arbitral proceedings, administrative services, and other support to tribunals seated in the BVI.

d. BVI courts generally take a liberal approach to upholding arbitration agreements and awards, and have experience handling complex international commercial cases.

e. Costs of arbitration in the BVI are considerably lower than in other leading arbitration centers.

3. Mexico City

a. **Mexico** has adopted the UNCITRAL Model Law, with minor modifications.

b. In a pro-arbitration ruling in 2006, Mexico's Supreme Court affirmed the applicability of the principle of *Kompetenz-Kompetenz*. However, parties may resort to the courts to annul an arbitration agreement as void or inoperative.

c. In 2009, the law governing arbitration procedure and the recognition and execution of arbitral awards was made expressly applicable to federal government contracts (*see* Law for Public Works and Services, No. 2748-IV).

d. In Mexico, there is also an additional risk that courts may review the merits of arbitral awards through an *Amparo* proceeding, which is a legal

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mechanism which is meant to protect constitutional rights.

4. Miami and Other U.S. Seats

   a. Many U.S. cities are frequently used and may be appropriate arbitral seats. Because of Miami's location and culture, Latin American parties may consider it a sufficiently "neutral" site.

   b. Miami may afford lower costs than some other seats, including for bilingual professional services, and lower-cost flights and hotels. The ICDR has its south-eastern regional office in Miami.

   c. International arbitration seated in Florida (where Miami is located) will generally be governed by the U.S. Federal Arbitration Act, though it may be supplemented by state law in some instances. See **Appendix 1**, Section A above, for language that can be included in an arbitration clause to avoid ambiguities about the possible application of state procedural law to the arbitration. Florida's legislature adopted the UNCITRAL Model Law as state law in July 2010, replacing the previous Florida International Arbitration Act.

   d. A rule adopted by the Supreme Court of Florida in 2006 removed restrictions on non-Florida lawyers participating in international arbitrations in Florida.

   e. On December 3, 2013, the Florida state court system created the Miami International Commercial Arbitration Court to hear

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arbitration-related applications as part of an effort to promote Miami as a venue for international commercial arbitration. Cases related to international arbitration may also be heard in the U.S. District Court for the Southern District of Florida, which is the federal court seated in Miami.

f. Other U.S cities, including **Washington, D.C.** and **San Francisco** are also suitable and frequently chosen seats of arbitration.

5. Santiago de Chile

a. In 2004, **Chile** adopted the UNCITRAL Model Law to govern international commercial arbitration taking place in **Chile** (*see* Law No. 19,971).

b. Courts in Chile are generally favorable to arbitration and recognize the principle of *Kompetenz-Kompetenz*. Under Chile's International Commercial Arbitration Act, parties may not appeal an arbitration award to the courts.

6. São Paulo or Rio de Janeiro

a. **Brazil's** Arbitration Act, enacted in 1996 and amended in 2015, is based on the UNCITRAL Model Law and the Spanish Arbitration Law of 1988 (*see* Act No. 9,307; Act No. 13,129), with some differences.

b. The number of both domestic and international arbitration cases in Brazil has increased

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significantly in the last few years. Brazilian courts are generally supportive of arbitration as a form of dispute resolution with strong precedents opposing court intervention into arbitration proceedings. Brazilian courts have also recognized the validity of arbitration clauses in government contracts.

c. The ICC, ICDR and LCIA all manage cases with seats in Brazil, and the ICC has most recently opened an office in São Paulo. There are also a number of Brazilian arbitration organizations, the most prominent being the Brazil-Canada Chamber of Commerce ("CAM/CCBC"). The CAM/CCBC has its own arbitration rules, which contemplate an abbreviated briefing and award schedule. In August 2017, the PCA also signed a Host Country Agreement with Brazil that will facilitate the conduct of PCA proceedings within the country.

7. Toronto

a. Each Canadian province has its own international arbitration statute based on the UNCITRAL Model Law. Arbitration in Toronto is governed by Ontario's International Commercial Arbitration Act, 2017. The 2017 version of the Act adopted the 2006 amendments to the UNCITRAL Model Law, incorporated the New York Convention, and extended the limitation period applicable to proceedings for the enforcement and recognition of arbitral awards.

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b. Toronto has three main arbitral institutions: Arbitration Place (which operates under agreement with the International Chamber of Commerce), ADR Chambers and JAMS Canada.

D. **Africa**

1. Casablanca

a. The Moroccan Code on Civil Procedure governs domestic and international arbitrations and is inspired by French law and, in part, by the UNCITRAL Model Law. The Code differs from the Model Law in some respects, including the appointment and challenge of arbitrators and the available reasons for annulling an arbitral award. Under Moroccan law, an arbitral award rendered in Morocco may be set aside on the grounds of jurisdictional or procedural defects, or if the recognition or enforcement of the arbitral award violates domestic or international public policy. All court submissions in Morocco must be in Arabic. A reform is currently underway to modernize the legal framework.

b. The Casablanca International Mediation and Arbitration Centre (CIMAC) opened at the end of 2014, and updated rules came into force on 1 January 2017.

2. Lagos

a. The Nigerian Arbitration and Conciliation Act 1988 ("ACA") governs international arbitration in Nigeria and mirrors the UNCITRAL Model Law.

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In addition, the state of Lagos passed its own arbitration legislation (the Lagos State Arbitration Law of 2009), which also is largely based on the UNCITRAL Model Law.

b. The Lagos Court of Arbitration is based in Lagos. Its Rules include, among others, provisions allowing a party to request interim measures from the LCA Secretariat prior to the constitution of an arbitral tribunal. The articulation of the LCA Rules and the ACA is presently uncertain.

c. Although section 34 of the ACA provides that "a court shall not intervene in any matter governed by this Act except where so provided," in practice Nigerian courts have intervened in arbitration proceedings with greater frequency than in other countries, and court proceedings can take many years to reach final resolution.

3. Mauritius

a. Mauritius's Arbitration Act, adopted in 2008 and amended most recently in 2013, is based on the UNCITRAL Model Law, with a number of innovative pro-arbitration adjustments.

b. Both English and French are widely spoken in Mauritius.

c. A specially designated and trained panel of judges of the Supreme Court hears all applications under the Act with the exception of applications for interim measures, which are first heard by a

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single judge before potentially being returned to the three-judge panel. Appeal from decisions of the panel lies directly, and as of right, to the Privy Council in London.

d. The Permanent Court of Arbitration opened its first overseas office in Mauritius in 2010. The PCA acts as the appointing authority under the Arbitration Act where the parties have not designated another appointing authority.

e. Mauritius is also home to several arbitration institutions. The Mauritius Chamber of Commerce and Industry's Arbitration and Mediation Center ("MARC") was established in 1996. In 2017 it announced a new governance structure reflecting international best practices in arbitration, with a court and an advisory board composed of leading international practitioners. In addition, in 2011, the Mauritius International Arbitration Centre Limited ("MIAC") joined forces with the LCIA to establish a joint arbitration center in Mauritius, known as the LCIA-MIAC Arbitration Centre.

E. **Middle East**

Historically, many Gulf state courts have been hostile to arbitration and some Gulf states are not parties to the New York Convention. Recent pro-arbitration reforms and new arbitral institutions may change the outlook for international commercial arbitration in the Gulf, but it may take some time to see their impact.

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1. Manama

   a. Since 1995, **Bahrain** has hosted the Gulf Cooperation Council Commercial Arbitration Centre ("GCAC"). There are reciprocal arrangements in place between the Gulf Cooperation Council ("GCC") states that provide for enforcement of arbitral awards issued within other member states. As of December 2017, the GCC states consist of the **United Arab Emirates**, **Bahrain**, **Saudi Arabia**, **Oman**, **Qatar** and **Kuwait**.

   b. Bahrain adopted the UNCITRAL Model Law in 2004. In 2015, Bahrain significantly reformed its arbitration regime through Law No. 9/2015 (the "Bahrain Arbitration Law"), which incorporates the UNCITRAL Model Law and vests the Bahraini High Court with authority to hear all arbitration-related applications, including applications to enforce or set aside arbitral awards. It also permits foreign investors to retain their preferred legal counsel, whether local or international, for "international commercial arbitration" proceedings held in Bahrain.

   c. The Bahrain Chamber for Dispute Resolution ("BCDR") was established in 2009 in partnership with the American Arbitration Association. BCDR tribunals are composed of two Bahraini judges and a third member chosen from BCDR's roster of neutrals. Judgments issued by BCDR tribunals are considered final judgments issued by the courts of Bahrain and are subject to

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annulment by the Court of Cassation only on limited grounds. The arbitration rules of the BCDR came into effect in October 2017.

2. Doha

a. In March 2017, Qatari Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law entered into force. This law is based on the UNCITRAL Model Law and applies to international arbitrations seated in Qatar that began after or were ongoing at the time the law entered into force in March 2017.

b. The Qatar International Center for Conciliation and Arbitration and the Qatar International Court and Dispute Resolution Centre are located in Doha.

c. Qatari Law No. 2 of 2018 Does not impose nationality requirements for arbitrators. However, it differs from the Model Law in providing that parties must choose an arbitrator from a list of approved arbitrators registered at the Arbitrators Registry at Qatar's Ministry of Justice, or alternatively may nominate an arbitrator who is of full legal eligibility and capacity, has not been finally convicted of a felony or misdemeanor relating to honesty and character, and is of good reputation and conduct.

d. Unless the parties agree to alternative methods of enforcement, in order to enforce an award in Qatar, parties must bring an application for enforcement of the arbitral award to the

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enforcement judge of the Court of First Instance, once the time for filing an annulment application has expired. The grounds for challenge under Qatari Law No. 2 of 2017 largely track those under the Model Law, and parties may not challenge an arbitral award based on questions of law or fact.

3. Dubai International Financial Centre

   a. The Dubai International Financial Centre (the "DIFC") is a special economic zone in the center of Dubai's financial district where UAE federal and commercial laws do not apply. Parties may choose DIFC as a seat of arbitration regardless of whether the contract has any connection with Dubai or the DIFC.

   b. The DIFC arbitration law, introduced in 2008, governs arbitrations with their seat in the DIFC. The DIFC arbitration law is modeled on the UNCITRAL Model Law and is overseen by independent DIFC courts, which are English-speaking common law courts.

   c. An arbitral award must be confirmed by the DIFC courts before it can be enforced. Arbitral awards made in the DIFC and confirmed by the DIFC courts should be directly enforceable in Dubai and internationally, but there is relatively little precedent.

   d. In 2008, the LCIA and DIFC established the DIFC LCIA Arbitration Centre and adopted rules of arbitration modeled on the LCIA Rules.

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e. Arbitration in Dubai outside of the DIFC is not recommended.

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Appendix 2
Overview of Arbitral Rules

We list below the major institutional, *ad hoc* and specialized arbitral rules that are commonly considered in international transactions. Debevoise partners hold senior leadership roles in many of the major international and regional arbitral bodies, and we are well placed to advise on which rules would be most appropriate for any given transaction.

Major Institutional Rules

International Chamber of Commerce

"the Rules of Arbitration of the International Chamber of Commerce"
The ICC Rules are familiar to many parties around the world. In comparison to other commonly used rules, they provide for substantially more administrative involvement at various stages of the proceeding, including scrutiny of draft awards.

The ICC rules, which were revised effective March 1, 2017, continue the ICC's efforts to improve efficiency and transparency. In particular, the 2017 revision includes the ICC's new Expedited Procedure Rules (Article 30 and Appendix VI). These Rules apply to cases with arbitration agreements entered into after March 1, 2017 if the amount in dispute is less than US$2 million, subject to a few limited exceptions.

Along with the 2017 revision, the ICC also published a "Note to Parties and Arbitral Tribunals on the Conduct of Arbitration," which

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is "intended to provide parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations" under the ICC Rules, as well as the practices of the ICC Court.

In addition to the increased scrutiny of draft awards, the ICC Rules have two unique features not shared by other rules. *First*, the ICC Rules require the preparation of Terms of Reference at an early stage of the arbitration proceeding. The Terms of Reference set out the nature of the claims and defenses and, unless the tribunal decides otherwise, the issues to be resolved. *Second*, the ICC arbitrators' fees are based on the amount in controversy. Depending on the size of the claim, these fee arrangements may result in higher fees and more up-front costs being borne by the claimant than with other institutions. The ICC also requires an advance on costs based on the amount in controversy, which is meant to cover all of the costs of the arbitration and must be paid at an early stage of the arbitration (before the Terms of Reference become operative). If the respondent does not pay its share of this advance, the claimant must either pay the respondent's share or provide a bank guarantee in order for the case to proceed.

The text of the ICC Rules and the Note to Parties can be found on the ICC's website at www.iccwbo.org.

<u>London Court of International Arbitration</u>

"the Rules of the London Court of International Arbitration"
The LCIA Rules also provide administered arbitration but with less institutional involvement than the ICC Rules. The LCIA generally acts through its President, who makes appointments of arbitrators and appoints panels to determine challenges. The LCIA's schedule of costs provides administrative fees based on tasks performed and arbitrators' fees based on a capped daily or hourly rate rather than on

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the amount in controversy. Depending in part on the amount in controversy, this fee schedule may result in lower costs than under some other rules. Detailed statistics on the costs and duration of LCIA cases may be found in the LCIA's Report on Facts and Figures: Costs and Duration: 2013-2016. The LCIA Rules, most recently amended in 2014, include provisions for emergency relief (Article 9B) and other provisions concerning speed and procedure (Articles 5, 14 and 15).

The text of the LCIA Arbitration Rules can be found on the LCIA's website at www.lcia.org.

International Centre for Dispute Resolution

"the International Centre for Dispute Resolution International Arbitration Rules"

The ICDR International Arbitration Rules are based in large part on the 1976 UNCITRAL Rules for *ad hoc* arbitration but provide for administrative involvement in areas where an administrator may be useful, such as the appointment of or challenge to arbitrators. These rules were last amended in 2014.

The ICDR is the international division of the AAA and is charged with the exclusive administration of all of the AAA's international matters. The rules may be used anywhere in the world.

The ICDR offers two administrative fee options for parties filing claims or counterclaims: the Standard Fee Schedule with a two-payment schedule, and the Flexible Fee Schedule with a three-payment schedule that offers lower initial filing fees but potentially higher total administrative fees for cases that proceed to a hearing. The arbitrators' fees are usually based on an hourly or daily rate.

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According to the ICDR Fee Schedule, most recently modified on July 1, 2016, the AAA will retain a portion of the administrative filing fee if a party files a demand for arbitration that is incomplete or otherwise does not meet the filing requirements and the deficiency is not corrected within a reasonable period of time.

The text of the ICDR Rules can be found at www.icdr.org.

Hong Kong International Arbitration Centre

"the HKIAC Administered Arbitration Rules"

The HKIAC released its revised Administered Arbitration Rules in 2013, expanding on its 2008 Rules. These Rules continue the HKIAC's practice of working within a "soft administration" framework, where parties have more flexibility while the HKIAC retains structures to ensure that the arbitration functions smoothly. For example, the new Rules include provisions for emergency relief (Article 23) and multiparty and multi-contract arbitrations (Articles 27-29). The new Rules also include expedited procedures for claims under HKD 25,000,000, or by agreement of the parties or in "cases of exceptional urgency" (Article 41). Under the expedited procedures, the award "shall be made within six months from the date when HKIAC transmitted the file to the arbitral tribunal" (Article 41(f)).

In August 2017, the HKIAC Rules Revision Committee announced that it is considering amendments to the 2013 Rules. Among others, these amendments would provide for a secured online document repository, a provision allowing parties to pursue other means of dispute settlement, such as mediation, after arbitration has commenced, new grounds for joinder and expanded provisions for single arbitration under multiple contracts and concurrent proceedings, and provisions related to third-party funding.

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The text of the HKIAC Administered Arbitration Rules can be found on HKIAC's website at www.hkiac.org.

Singapore International Arbitration Centre

"the Singapore International Arbitration Centre Rules 2016"
The SIAC Rules, initially promulgated in 1991 and most recently updated in 2016, provide a structured format for international arbitration proceedings. An innovative new rule permits the tribunal to dismiss a claim or defense that is "manifestly without legal merit" or "manifestly outside the jurisdiction of the Tribunal" (Rule 29.1). Additionally, the Rules contain specific provisions for multi-contract and multiparty disputes (Rules 6-8) as well as for expedited and emergency procedures (Rule 30, Schedule 1). The revised rules also provide an expedited procedure for cases with a value of S$6 million or less, or by agreement of the parties, or in cases of exceptional urgency. As noted in **Appendix 4** below, SIAC also promulgated rules specific to investor-State arbitrations.

The text of the SIAC Rules can be found on SIAC's website at www.siac.org.sg.

Stockholm Chamber of Commerce

"the Stockholm Chamber of Commerce Arbitration Rules"
The SCC Rules were updated effective January 1, 2017. The SCC Rules strive for flexibility, efficiency, low cost, and minimal administrative interactions. The new Rules also include a summary procedure intended to save time and money (Article 39). Additionally, the 2017 Rules expressly address joinder of parties and claims (Articles 13 & 14) and abandon the default presumption in favor of a three-member arbitral tribunal, instead adopting a more flexible approach (Article 16). An appendix to the SCC Rules deals

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specifically with investor-State disputes (Appendix III; *see also* **Appendix 4** below). The SCC also adopted new Rules for Expedited Arbitrations that may be suitable for smaller or simpler disputes.

The text of the SCC Arbitration Rules can be found on the SCC's website at www.sccinstitute.com.

CPR International Institute for Conflict Prevention & Resolution

"the CPR Rules for Administered Arbitration of International Disputes"

The CPR, which has long maintained rules for non-administered arbitration, first released its CPR Administered Arbitration Rules in 2014. The CPR Administered Rules are intended to increase efficiency and lower costs by providing for a high degree of flexibility while maintaining strong institutional support. The CPR Administered Rules allow the arbitrators to establish time limits for each phase of the proceedings (Article 9.2) and penalize parties attempting to delay (Article 19.2). Proceedings under the Administered Rules are administered from the CPR's offices in New York.

The text of the CPR Administered Rules can be found on the CPR's website at www.cpradr.org.

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Ad Hoc Rules

UNCITRAL

"the UNCITRAL Arbitration Rules"
The UNCITRAL Arbitration Rules were originally adopted in 1976 and were substantially updated and revised in 2010. They are the most commonly used rules for *ad hoc* arbitration and therefore may be preferred by certain parties.

The 2010 UNCITRAL Rules include revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism for arbitration costs, as well as additional provisions dealing with multiparty arbitration, joinder, and interim measures. The Rules also make express reference to the use of modern technologies.

In 2013, the Rules were revised to incorporate the UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration (the "UNCITRAL Transparency Rules"). The UNCITRAL Transparency Rules apply to arbitrations initiated pursuant to an investment treaty that was concluded on or after April 1, 2014, unless the treaty parties agree otherwise.

If the UNCITRAL Arbitration Rules are selected, it is recommended that the parties expressly designate an appointing authority as follows:

> **"The appointing authority shall be [*insert, e.g., the International Chamber of Commerce International Court of Arbitration, the American Arbitration Association, or the London Court of International Arbitration*]."**

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Each institution has its own schedule of fees for acting as the appointing authority under the UNCITRAL Rules, which may be used anywhere in the world. If the parties have not agreed on an appointing authority, the default appointing authority will be the Secretary-General of the Permanent Court of Arbitration.

The text of the UNCITRAL Arbitration Rules can be found at www.uncitral.org.

CPR International Institute for Conflict Prevention & Resolution

"the Rules of the CPR International Institute for Conflict Prevention & Resolution for Non-Administered Arbitration of International Disputes"

The CPR Non-Administered Arbitration Rules, originally released in 1989 and most recently revised in 2007, provide an effective framework for *ad hoc* arbitration. The CPR becomes involved only if necessary in the appointment of, and determination of challenges to, arbitrators. Fees charged by the CPR for performing these services are likely to be minimal. The Rules provide for comparatively broader document exchange than some other rules (*see* CPR Rule 11). CPR also offers rules for administered arbitration of international disputes, as noted above.

The text of the CPR Non-Administered Arbitration Rules can be found at www.cpradr.org.

CIArb Chartered Institute of Arbitrators

"the CIArb Arbitration Rules"

The CIArb Arbitration Rules, effective December 1, 2015 and superseding the CIArb Arbitration Rules 2000, are designed for use in both domestic and international ad hoc arbitrations. The Rules

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are based on the UNCITRAL Arbitration Rules 2010, but are supplemented by optional clauses aimed at providing parties with more choice to tailor the rules to their needs. These additional clauses have principally been made to enable CIArb to act as the appointing authority. Other significant additions include waiver of the parties' right to appeal (Article 34.2), provisions for emergency arbitrators (Appendix I), and a checklist for case management conferences (Appendix II).

The text of the CIArb Arbitration Rules can be found at www.ciarb.org.

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Specialized Rules

PRIME Finance

"the PRIME Finance Arbitration Rules"
The Panel of Recognised International Market Experts in Finance ("PRIME Finance"), established in 2012, provides expert services to help resolve disputes in the financial sector. Arbitration services are a key focus of PRIME Finance, but the panel also offers mediation, judicial training, expert court opinions and recommendations on legal reform for international derivatives markets.

The PRIME Finance Arbitration Rules, which became effective in February 2016, are based on the 2010 UNCITRAL Arbitration Rules. The PRIME Finance Arbitration Rules also include several mechanisms to shorten time frames of arbitral proceedings and address topics such as tax consequences, interest calculation and currency. The PCA administers arbitrations under the PRIME Finance Arbitration Rules.

The text of the PRIME Finance Arbitration Rules can be found at www.primefinancedisputes.org.

World Intellectual Property Organization

"the Rules of the WIPO Arbitration and Mediation Center"
The WIPO Arbitration and Mediation Center, based in Geneva, Switzerland, is part of the World Intellectual Property Organization. The Center provides dispute resolution services designed primarily for disputes arising out of commercial transactions or relationships involving intellectual property. The WIPO Arbitration Rules were originally promulgated in October 1994. The latest revised version became effective on June 1, 2014.

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The text of the WIPO Arbitration Rules can be found on the WIPO ADR website at www.arbiter.wipo.int.

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Appendix 3
Comparative Table of Major Rules

COMPARISON OF THE HKIAC, ICC, ICDR, LCIA, SCC, SIAC AND UNCITRAL ARBITRATION RULES

The table below compares the salient features of the following sets of arbitration rules:

- Hong Kong International Arbitration Centre ("HKIAC") Administered Arbitration Rules (in force November 1, 2013).
- International Chamber of Commerce ("ICC") Rules of Arbitration (in force March 1, 2017).
- International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association ("AAA") International Dispute Resolution Procedures (Including Arbitration Rules) (in force June 1, 2014).
- London Court of International Arbitration ("LCIA") Arbitration Rules (in force October 1, 2014).
- Stockholm Chamber of Commerce ("SCC") Arbitration Rules (in force January 1, 2017).
- Singapore International Arbitration Centre ("SIAC") Arbitration Rules (in force August 1, 2016).
- United Nations Commission on International Trade Law ("UNCITRAL") 2010 Arbitration Rules (as amended in 2013)

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COMPARISON OF THE HKIAC, ICC, ICDR, LCIA, SCC, SIAC AND UNCITRAL ARBITRATION RULES

	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
ARBITRAL TRIBUNAL							
DEFAULT NUMBER OF ARBITRATORS	HKIAC decides. (Article 6.1)	ONE Unless the ICC says three. (Article 12.2)	ONE Unless the ICDR Administrator says three. (Article 11)	ONE Unless the LCIA Court says three. (Article 5.8)	The SCC decides. (Article 16.2)	ONE Unless the SIAC Registrar says three. (Article 9.1)	THREE (Article 7.1)
APPOINTMENT OF THREE-MEMBER TRIBUNAL IN MULTIPARTY DISPUTES	In the absence of joint nomination by claimants or respondents, HKIAC appoints each member of the tribunal. (Article 8.2)	In the absence of joint nomination by claimants or respondents, the ICC Court appoints each member of the tribunal. (Articles 12.6, 12.8)	Administrator appoints each member of the tribunal unless the parties have agreed otherwise within 45 days of start of arbitration. (Article 12.5)	In the absence of agreement on joint nomination by all parties, the LCIA Court appoints each member of the tribunal. (Article 8.1)	In the absence of joint nomination by claimants or respondents, the SCC Board appoints each member of the tribunal. (Article 17.5)	In the absence of joint nomination by claimants or respondents, the SIAC President appoints each member of the tribunal. (Article 12)	In the absence of joint nomination by claimants or respondents, the appointing authority appoints each member of the tribunal. (Articles 10.1, 10.3)

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
DEFAULT RESTRICTIONS ON THE NATIONALITY OF ARBITRATORS	Sole or presiding arbitrator generally shall not be of the same nationality as any party. (Articles 11.2, 11.3)	Sole or presiding arbitrator generally shall not be of the same nationality as any party. (Article 13.5)	No restrictions. (Article 12.4)	Sole or presiding arbitrator shall not be of the same nationality as any party. (Article 6.1)	Sole or presiding arbitrator generally shall not be of the same nationality as any party. (Article 17.6)	No restrictions.	No restrictions. (Article 6.7)
GROUNDS FOR CHALLENGE OF ARBITRATORS	Lack of impartiality or independence; lack of qualifications agreed by the parties; inability to perform his or her functions; or failure to act without undue delay. (Article 11.6)	Lack of impartiality or independence. (Article 14.1)	Lack of impartiality or independence. (Article 14.1)	Lack of impartiality or independence; deliberate violation of arbitration agreement; or failure to conduct or participate in the arbitration with efficiency, diligence and industry. (Articles 10.1–10.2)	Lack of impartiality or independence or qualifications. (Article 19.1)	Lack of impartiality or independence; lack of qualifications agreed by parties. (Article 14.1)	Lack of impartiality or independence. (Article 12.1)
TIMING FOR CHALLENGE OF ARBITRATORS	15 days from notification of appointment or from becoming	30 days from notification of appointment or from becoming	15 days from notification of appointment or from becoming	14 days from formation of the arbitral tribunal or	15 days from becoming aware of grounds for	14 days from notification of appointment or from becoming	15 days from notification of appointment or from

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	aware of grounds for challenge. (Article 11.7)	aware of grounds for challenge. (Article 14.2)	aware of grounds for challenge. (Article 14.1)	from becoming aware of grounds for challenge. (Article 10.3)	challenge. (Article 19.1—19.3)	aware of grounds for challenge. (Article 15.1)	becoming aware of grounds for challenge. (Article 13.1)
JOINDER AND CONSOLIDATION							
JOINDER	A party may apply for joinder if the additional party is *prima facie* bound by the arbitration agreement. Third parties may also request joinder. (Article 27)	A party may apply for joinder of an additional party to ICC Secretariat any time before confirmation/ appointment of arbitrator. (Article 7)	Before appointment of arbitrator, a party may submit notice of arbitration against an additional party. After appointment, consent of all parties and additional party is required. (Article 7.1)	A party may apply for joinder of an additional party provided that any additional party and the applicant party consent to the joinder in writing. (Article 22.1(viii))	A party may apply for joinder of an additional party to the Board. (Article 13)	A party may apply for joinder if the additional party is *prima facie* bound by the arbitration agreement *or* upon consent of all parties. Third parties may also submit a request for joinder. (Article 7)	A party may apply for joinder if the additional party is a party to the arbitration agreement. (Article 17.5)
CONSOLIDATION	HKIAC may consolidate at the request of any party where (a) the parties agree to consolidation;	ICC Court may consolidate at the request of any party where (a) the parties have agreed to	Consolidation arbitrator (appointed by Administrator at request of a party) may consolidate	Tribunal may consolidate with approval of LCIA Court where (a) the parties agree to consolidation	SCC Board may consolidate at the request of any party where (a) the parties have	Prior to the constitution of the tribunal, the Registrar may consolidate where (a) all parties have	N/A

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	(b) all claims are made under the same arbitration agreement; *or* (c) claims made under different arbitration agreements have a common question of law or fact and the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions, provided that the arbitration agreements are compatible. (Article 28.1)	consolidation; (b) all claims are made under the same arbitration agreement; *or* (c) the arbitrations are between the same parties, relate to claims that arise in connection with the same legal relationship, and the arbitration agreements are compatible. (Article 10)	where: (a) the parties have agreed to consolidation; (b) all claims are made under the same arbitration agreement; *or* (c) the arbitrations are between the same parties, relate to claims that arise in connection with the same legal relationship, and the arbitration agreements are compatible. (Article 8.1)	in writing, *or* (b) when arbitrations have commenced between the same parties under either the same or compatible arbitration agreements. The LCIA Court has similar powers prior to the constitution of the tribunal. (Articles 22.1(ix)–(x), 22.6)	agreed to consolidation; (b) all claims are made under the same arbitration agreement; *or* (c) the relief sought arises out of the same transaction or series of transactions, and the arbitration agreements are compatible. (Article 15)	agreed to consolidation; (b) all claims are made under the same arbitration agreement; *or* (c) the disputes arise from the same transaction or series of transactions and the arbitration agreements are compatible. The tribunal may also order consolidation on the same grounds, provided that a different tribunal has not been constituted in the other proceeding. (Article 8).	
PROCEDURAL VARIETY							
EXPEDITED PROCEEDINGS	Upon application if the parties so	If the parties so agree or the	If the parties so agree or if no	Not available.	The separate SCC Rules for	Upon application if the	Not available.

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
	agree, if the amount in dispute does not exceed HKD 25,000,000, or in cases of exceptional urgency. (Article 41.1)	amount in dispute does not exceed US$2,000,000. (Article 30.2)	claim or counterclaim exceeds US$6,000,000. (Article 1.4)		Expedited Arbitrations apply if the parties so agree.	parties so agree, if the amount in dispute does not exceed US$25,000,000, or in cases of exceptional urgency. (Article 5.1)	
TERMS OF REFERENCE REQUIRED?	N/A	Yes, except in proceedings governed by the Expedited Rules. (Article 23)	No.	No.	No.	No.	No.
DEFAULT SEAT	Hong Kong, unless tribunal determines another place is more appropriate. (Article 14.1)	Determined by the ICC Court. (Article 18)	Determined by the ICDR Administrator. (Article 17.1)	London, unless the LCIA determines another place is more appropriate. (Article 16.2)	Determined by the SCC Board. (Article 25.1)	Determined by the tribunal. (Rule 21.1)	Determined by the tribunal. (Article 18.1)
PLACE OF HEARING	No restrictions. (Article 14.2)	No restrictions. (Article 18.2)	No restrictions. (Article 17.2)	No restrictions. (Article 16.3)	No restrictions. (Article 25.2)	No restrictions. (Article 21.2)	No restrictions. (Article 18.2)
DEFAULT LANGUAGE OF THE ARBITRATION	Tribunal decides. (Article 15.1)	Tribunal decides. (Article 20)	Presumption in favor of the language(s) of	Tribunal decides. (Article 17.4)	Tribunal decides. (Article 26.1)	Tribunal decides. (Article 22.1)	Tribunal decides. (Article 19.1)

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
			documents containing the arbitration clause. (Article 18)				
CONFIDENTIALITY THE DEFAULT RULE?	Yes, subject to certain exceptions. (Article 42)	No, but the Tribunal may make orders concerning confidentiality of proceedings or of any other matters and may take measures for protecting trade secrets and confidential information. (Article 22.3)	No, but the Tribunal may make orders concerning confidentiality of proceedings or of any other matters and may take measures for protecting trade secrets and confidential information. (Articles 37.1, 37.2)	Yes, subject to certain exceptions. (Article 30.1)	Yes. (Article 3)	Yes, subject to certain exceptions. (Articles 39.1, 39.2)	Silent.
EMERGENCY ARBITRATOR / INTERIM RELIEF							
EMERGENCY ARBITRATOR	Available before the constitution of the tribunal. (Article 23, Schedule 4)	Available before transmission of the file to the tribunal. (Article 29,	Available before the constitution of the tribunal. (Articles 6.1-	Available before the constitution of the tribunal. (Article 9B)	Available before the file is referred to the tribunal. (Appendix II,	Available before the constitution of the tribunal. (Article 30.2, Schedule 1(1))	N/A

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
		Appendix V)	6.2)		Article 1.1)		
INTERIM RELIEF	At the request of either party, the tribunal may order interim measures it deems appropriate. (Article 23.2)	At the request of either party, the tribunal may order interim measures it deems appropriate. (Article 28)	At the request of either party, the tribunal may order interim measures it deems necessary. (Articles 24.1, 24.2)	At the request of either party, the tribunal may order interim measures it deems appropriate. (Article 25.1)	At the request of either party, the tribunal may order interim measures it deems appropriate. (Articles 37.1, 37.3)	At the request of either party, the tribunal may order interim measures it deems necessary or appropriate. (Article 30.1)	At the request of either party, the tribunal may order interim measures it deems necessary or appropriate. (Article 26)
AWARD							
TIME LIMIT FOR FINAL AWARD (subject to extensions)	Silent.	6 months from the date of terms of reference. (Article 31.1)	60 days from end of final hearing. (Article 30.1)	"Immediately and without any delay." (Article 26.8)	6 months from the date the case was referred to the tribunal. (Article 43)	45 days from the date of the closure of proceedings. (Article 32.3)	Silent.
PUBLICATION OF REDACTED AWARDS PERMITTED?	Yes, unless one of the parties objects. (Article 42.5)	The Rules are silent on this, but the ICC routinely publishes redacted awards and decisions.	Yes, unless parties agree otherwise. (Article 30.3)	No, unless the prior written consent of all parties and the tribunal is obtained. (Article 30.3)	Silent.	No, unless the prior written consent of all parties and the tribunal is obtained. (Article 32.12)	N/A
SCRUTINY OF THE AWARD?	No.	Yes, by ICC Court.	No.	No.	No.	Yes, by Registrar.	No.

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
		(Article 34)				(Article 32.3)	
CAN AWARD BE CORRECTED OR INTERPRETED?	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal. (Articles 37.1–37.3)	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal. (Articles 36.1, 36.2)	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal. (Articles 33.1, 33.3)	Yes, within 30 days of receipt of the award, either by application of a party or on the initiative of the Tribunal. (Articles 27.1, 27.2)	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal. (Articles 47.1, 47.2)	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal. (Articles 33.1, 33.2)	Yes, within 30 days of receipt of the award, either by application of a party, or on the initiative of the Tribunal. (Articles 38)
COST & FEES							
ADMINISTRATION FEE	Ad valorem. (HKIAC Schedule 1, Registration and Administrative Fees, Article 33.1 (f))	Ad valorem. (Article 38, Appendix III)	Ad valorem under both the Standard and Flexible Fee Schedules. (International Arbitration Fee Schedule)	Fixed registration fee and hourly rates. (Article 28.1, LCIA Schedule of Arbitration Costs)	Ad valorem. (Article 49, SCC Schedule of Costs Appendix IV)	Ad valorem. (Article 34, SIAC Schedule of Fees)	N/A

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	HKIAC	ICC	ICDR	LCIA	SCC	SIAC	UNCITRAL
FEES OF THE TRIBUNAL	Hourly rates *or* ad valorem, depending on agreement of the parties. (Articles 10, 33.1, Schedules 2 and 3)	Ad valorem, reflecting relevant circumstances. (Article 38, Appendix III, Article 2)	Appropriate daily or hourly rates determined by Administrator. (Article 35)	Hourly rates, generally not exceeding £450. (Article 28, LCIA Schedule of Arbitration Costs)	Ad valorem. (SCC Schedule of Costs, Appendix IV, Article 2)	Ad valorem. (Article 36, SIAC Schedule of Fees)	Determined by the tribunal. (Articles 40, 41.1)
RESPONSIBILITY FOR LEGAL COSTS	The Tribunal decides allocation between the parties. (Article 33.2)	The Tribunal decides allocation between the parties. (Article 38.4)	The Tribunal decides allocation between the parties. (Article 34)	The Tribunal decides allocation between the parties. (Article 28.3)	The Tribunal decides allocation between the parties. (Article 49.6)	The Tribunal decides allocation between the parties. (Article 35)	Unsuccessful party or parties responsible for costs unless Tribunal decides otherwise. (Article 42.1)

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Appendix 4
Investor-State Contracts

This appendix provides suggestions specific to dispute resolution clauses in investor-State contracts. The unique nature of disputes involving State parties requires careful consideration of specific issues such as transparency, financing, enforcement (including sovereign immunity) and other public interest concerns.

I. General Considerations

A. **Specificity of Rules**. Investor-State contracts need not be subject to specific investment arbitration rules. For instance, the UNCITRAL Rules were originally drafted as general commercial arbitration rules and only later were adopted in investor-State arbitrations. Similarly, the SCC Rules are general commercial arbitration rules but the most recent version includes an appendix with supplemental provisions specific to investor-State disputes. In contrast, the ICSID Convention and Arbitration Rules, the SIAC Investment Arbitration Rules and the PCA Rules were drafted with the presence of a State, State-controlled entity or intergovernmental organization specifically in mind.

B. **Arbitrator Nationality**. All the major investment arbitration rules require arbitrators to be impartial and independent. Some arbitration rules also place specific restrictions on the nationality of the arbitrators. For instance, the SIAC Investment Arbitration Rules require the sole arbitrator or chair of the tribunal to be of a different nationality than the parties unless the parties agree otherwise (Rule 5.7). The ICSID Rules also prevent a party from nominating a national

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of its own country as a party-appointed arbitrator unless the opposing party agrees (Rule 1(3)).

C. **Confidentiality and Transparency**. The recent trend towards greater transparency in arbitrations involving State interests may be welcome news to some, but certain parties may be concerned about the potential loss of confidentiality, especially if non-public business information may be disclosed in the arbitration.

Different sets of rules take different approaches to this issue. While acknowledging the need to safeguard confidential or protected information, the UNCITRAL Transparency Rules provide for the publication of (*i*) information regarding the commencement of the arbitration and (*ii*) documents, including the parties' submissions as well as orders, decisions and awards of the tribunal (Articles 2 & 3). The UNCITRAL Transparency Rules also require hearings to be public, subject to necessary safeguards for the protection of confidential business and government information (Article 6). These Rules apply automatically to arbitrations initiated under the UNCITRAL Rules pursuant to an investment treaty concluded on or after April 1, 2014 (Article 1). For arbitrations under investment treaties concluded prior to that date, the UNCITRAL Transparency Rules will apply only when (*i*) the parties to the arbitration agree; or (*ii*) the State Parties to the relevant treaty (or, in the case of a multilateral treaty, the State of the claimant and the respondent State) have agreed to their application.

In October 2017, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") entered into force for States that have ratified it. As of the date of entry into

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force, only Canada, Mauritius and Switzerland were parties, but a number of other States have signed but not ratified the Convention. Under the Mauritius Convention, States express their consent to apply the UNCITRAL Transparency Rules to investment treaties concluded before 1 April 2014.

The ICSID Convention and associated Rules and Regulations do not contain any general presumption of transparency or confidentiality. The ICSID Secretariat publishes details of arbitral proceedings, including procedural status, on the ICSID website and publishes awards with the consent of the parties. The parties may also agree to allow public access to hearings in person or by video broadcast (ICSID Arbitration Rule 32(2)).

The SCC Rules treat all arbitration-related matters as confidential unless otherwise agreed by the parties, including in investor-State cases (Article 3).

The SIAC Investment Arbitration Rules include a similar provision that presumes confidentiality (Rule 37), although they also permit the publication of limited information about the arbitration—such as the nationality of parties and the legal instrument from which the dispute arose—even without the parties' consent (Rule 38.2).

As noted in Section III.4.e above, the law of the seat may also contain implied duties of confidentiality. These may, however, be subject to exceptions where State interests are involved. Investment treaties may also contain their own transparency provisions.

D. **Third-Party Submissions**. Under certain sets of rules, third parties may make written submissions of relevance to the factual or legal issues in dispute (*see, e.g.*, SIAC Rules, Rule 29;

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SCC Rules, Appendix III, Articles 3-4; ICSID Rules, Rule 37(2); UNCITRAL Transparency Rules, Articles 4-5).

E. **Third-Party Funding**. At present, the SIAC Investment Arbitration Rules are unique among the major rules in expressly addressing third-party funding arrangements. Rule 24 of the SIAC Investment Arbitration Rules states that the arbitral tribunal may order disclosure of third-party funding arrangements, and Rules 33.1 and 35 allow the tribunal to account for such arrangements when apportioning the costs of the arbitration. Third-party funding may also be addressed as part of the ongoing revision to the ICSID Rules. The other major rules are silent on the topic, although the HKIAC is currently considering an amendment to address this issue.

II. Institutional and *Ad Hoc* Rules

International Centre for Settlement of Investment Disputes

"the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the Rules adopted thereunder, or the Arbitration (Additional Facility) Rules of the International Centre for Settlement of Investment Disputes if the Centre lacks jurisdiction under the Convention at the time when any proceeding hereunder is instituted."
ICSID is one of the most commonly selected arbitral institutions in investor-State disputes. While many treaties provide for ICSID arbitration, parties are also free to choose ICSID arbitration for contractual disputes involving a State or State entity.

ICSID arbitration under the regular rules—as opposed to Additional Facility Rules (*see below*)—entails a number of specific requirements, many of which should be addressed in the drafting of the arbitration

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agreement itself. To address these specificities, ICSID has published annotated model clauses, some of which are reproduced here for convenience.

First, for ICSID to have jurisdiction under the regular rules, the dispute must fall within both the arbitration agreement itself and the specific requirements of the Centre established in Article 25 of the ICSID Convention. These jurisdictional requirements include that (*i*) there must be a legal dispute arising out of an investment and (*ii*) the parties must be a Contracting State under the ICSID Convention—or a constituent subdivision or agency designated by a Contracting State—and a national (or company) of another Contracting State.

The ICSID Convention does not define the term "investment," leaving the contracting states to do so, including through the relevant investment treaty provisions. Some tribunals and commentators, however, have interpreted the term "investment" in the ICSID Convention to impose certain minimum requirements independent of those set out in the applicable investment treaty.

Because of these jurisdictional limitations, it may be advisable to stipulate in an ICSID arbitration clause that **"the transaction to which this agreement relates is an investment"** and that **"the investor is a national of [*Contracting State other than respondent State*]."**

If the intended claimant is a company of the respondent State, the parties must have agreed to treat that company as a foreign national because of its foreign control. Specific language should be inserted in the contract to this effect:

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> **"It is agreed that, although the investor is incorporated in [*the respondent State*], it is controlled by nationals of [*Contracting State other than respondent State*] and shall be treated as a national of [*that State*] for the purposes of the Convention."**

In addition, if the counterparty is not the State itself but a subdivision or agency, specific approvals and designation to the Centre are required under Article 25 of the ICSID Convention.

Second, if the parties fail to appoint an arbitrator or cannot agree on a presiding arbitrator, the President of the World Bank must appoint such arbitrator from the approved ICSID Panel of arbitrators and may not appoint an arbitrator of the same nationality as one of the parties. (*See* ICSID Convention Articles 38 and 40.)

Third, ICSID publicizes certain information regarding all requests for arbitration and may publish excerpts of a tribunal's legal reasoning even if the parties do not consent to publication of the award. (*See* ICSID Institution Rule 22.)

Fourth, ICSID awards are not subject to review or challenge in national courts; instead, parties may apply to annul the award on limited grounds set forth in the Convention and determined by a three-member *ad hoc* committee.

While annulment proceedings were extremely rare in ICSID's early years, they have arisen much more frequently since the early 2000s. From 2011 through mid-2017, one or both parties commenced annulment proceedings in 48 cases, compared to 134 total awards (*see* The ICSID Caseload – Statistics, Issue 2017(2)). Of these proceedings, five granted requests for annulment in full or in part, 26

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rejected such requests, and 17 were discontinued. However, even if the incidence of actual annulment remains infrequent, annulment proceedings can delay enforcement and result in further costs to the parties.

Fifth, ICSID awards are subject to a simplified enforcement mechanism under Article 54 of the Convention, which provides that Contracting States "shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." The reference to enforcement of "pecuniary obligations" only, which has been perpetuated in some national laws (including in **England and Wales** and the **United States**), creates the risk that injunctive relief ordered by an ICSID tribunal would not be enforced under the ICSID Convention's simplified enforcement regime.

Sixth, recourse to ICSID arbitration is in principle exclusive of "any other remedy," including diplomatic protection and court proceedings (ICSID Convention, Articles 26-27). It can, however, take some months to constitute an ICSID tribunal, which can be a disadvantage for a party requiring urgent interim relief. Moreover, as noted, only awards of monetary relief will benefit from the simplified enforcement procedure under Article 54 of the ICSID Convention. If the parties wish to preserve their ability to seek interim relief from national courts, they must explicitly say so in their arbitration agreement (*see* ICSID Arbitration Rule 39(6)). To preserve this possibility, the following language is recommended:

> **"Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority**

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> **to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding or during the proceeding for the preservation of its rights and interests."**

Seventh, signature of the ICSID Convention does not in and of itself constitute a waiver of sovereign immunity with respect to enforcement of the award. The following language is recommended to this effect:

> **"[*Host State*] hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement."**

Finally, ICSID Rules require the tribunal to issue a final award within 120 days from the close of proceedings (Article 43). However, ICSID tribunals usually render their awards more than 120 days after the hearing or final post-hearing submissions. Tribunals often wait until they are ready to issue the award to formally close the proceedings.

ICSID also administers investor-State arbitrations not falling within the ICSID Convention under its **Additional Facility Rules** (the "ICSID AF Rules"), with the approval of ICSID's Secretary-General. This most commonly occurs when the host State, the investor's State or both are not parties to the ICSID Convention. To ensure an arbitral forum in the event that a technical objection to ICSID Convention jurisdiction is upheld, the alternative provision for Additional Facility arbitration noted above should be included.

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Since the ICSID Convention does not apply to proceedings under the Additional Facility Rules, the jurisdictional requirements are slightly different and depend largely on the nature of the relevant dispute (*see* ICSID AF Rules, Articles 2-3, 4(2)-(4)). All proceedings under the Additional Facility Rules are subject to the Secretary-General's approval and determination, among other things, that all requirements of the relevant arbitration agreement have been met. (ICSID AF Rules, Article 4). In addition, proceedings under the Additional Facility Rules are subject to national court review in the same manner as a commercial arbitration award instead of annulment proceedings by a tribunal constituted under Article 52 of the ICSID Convention.

In October 2016, ICSID announced the beginning of the fourth amendment process since the enactment of the ICSID Arbitration Rules in 1967. ICSID intends to modernize the Rules by addressing issues of particular public concern, including the arbitrator appointment process (and a corresponding code of conduct), third-party funding arrangements, the publication of decisions and orders, security for costs and issues pertaining to witnesses, experts, and other evidence. ICSID has invited suggestions from the public on areas for reform and expects to publish background papers on proposed amendments in early 2018.

The text of the ICSID Convention, Regulations and Rules, as well as the Additional Facility Rules and model clauses for ICSID arbitration, can be found at icsid.worldbank.org.

UNCITRAL

"the UNCITRAL Arbitration Rules"
As discussed in **Appendix 2** above, the UNCITRAL Rules are commonly used and well recognized. The UNCITRAL Rules have

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some distinctive features as compared to the ICSID Convention that may be relevant in investor-State disputes.

First, the UNCITRAL Rules are not associated with an administering institution and thus may offer greater flexibility. In practice, however, parties to an arbitration under the UNCITRAL Rules often agree to use the services of an administering institution such as the PCA.

Second, the UNCITRAL Rules impose no express restrictions on arbitrator nationality (*see* Articles 7-10), although the appointing authority is required to take into account nationality when making its appointment (*see* Article 6(7)). Under the UNCITRAL Rules, unlike the ICSID Rules, the appointing authority is not limited to a fixed roster of arbitrators.

Third, for arbitrations in which the UNCITRAL Transparency Rules do not apply, UNCITRAL awards "may be made public with the consent of all parties" or to the extent disclosure is required "by legal duty, to protect or pursue a legal right or in relation to legal proceedings" (*see* Article 34(5)). This may provide greater confidentiality than the ICSID Rules. But where the UNCITRAL Transparency Rules do apply, as discussed in Section I.C above, substantial information from the arbitration may become public.

Fourth, unlike the ICSID Rules (*see* ICSID Arbitration Rule 39(6)), the UNCITRAL Rules recourse to national courts for interim relief is available even if the parties have not specifically stipulated to such recourse. Article 26(9) of the UNCITRAL Rules provides that a request for interim measures to a judicial authority "shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

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Finally, unlike ICSID awards but like ICSID Additional Facility awards, UNCITRAL awards are subject to review and enforced in the same manner as international commercial arbitration awards. Like commercial awards, they are subject to set-aside under the law of the seat and must be enforced by reference to the New York Convention or other applicable commercial arbitration treaty (without any distinction as to whether they award pecuniary or non-pecuniary relief). As noted, ICSID awards may only be challenged pursuant to the annulment process specified in the ICSID Convention, are not subject to set-aside by national courts and benefit from the simplified enforcement mechanism in Article 54 of the ICSID Convention with respect to the "pecuniary obligations" awarded therein.

Permanent Court of Arbitration

"the PCA Arbitration Rules 2012"
The PCA was established in 1899 as an intergovernmental organization that provides arbitral services to member states, international organizations and private parties.

The PCA adopted the PCA Arbitration Rules in 2012 as standalone rules specific to disputes involving at least one State, State-controlled entity or intergovernmental organization. While the PCA Rules largely mirror the UNCITRAL Arbitration Rules, they differ in some respects, including the number of arbitrators and provisions related to multiparty disputes. The PCA rules contain several provisions specific to disputes involving states, including a waiver of sovereign immunity from jurisdiction.

The PCA Rules are less often used in practice than the UNCITRAL or ICSID Rules, although parties frequently choose the PCA as appointing or administrating authority under the UNCITRAL Rules.

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The text of the PCA Rules can be found at pca-cpa.org.

Singapore International Arbitration Centre

"the Investment Arbitration Rules of the Singapore International Arbitration Centre"

SIAC is the first major commercial arbitration institution to release a separate set of rules for international investment arbitration. In January 2017, SIAC promulgated the SIAC Investment Arbitration Rules, a specialized set of rules for international investment disputes involving at least one State, State-controlled entity or intergovernmental organization. The Investment Arbitration Rules build on the standard SIAC Rules, thus retaining some of the advantages of commercial arbitration proceedings, but aim to be responsive to issues of specific concern in investor-State cases, including third-party submissions and third-party funding arrangements. Unless the parties agree to greater confidentiality, SIAC will publicize limited information regarding the dispute. The SIAC Rules also require the tribunal to submit a draft award to the Registrar within 90 days from the close of arbitral proceedings (Rule 30.3).

The text of the SIAC Investment Arbitration Rules can be found at www.siac.org.sg.

Stockholm Chamber of Commerce

"the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce"

In recognition of the distinct issues that arise in investor-State disputes, the 2017 SCC Rules include an appendix (Appendix III) with supplemental provisions specific to investor-State arbitration.

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Under Appendix III, non-disputing and third parties may apply to make written submissions to the arbitration. The tribunal may also invite third-party submissions upon consultation with the contracting parties.

SCC Rules require the award to be issued within six months from the case's date of reference to the tribunal, with limited exception (Article 43).

The text of the SCC Rules can be found at www.sccinstitute.com.

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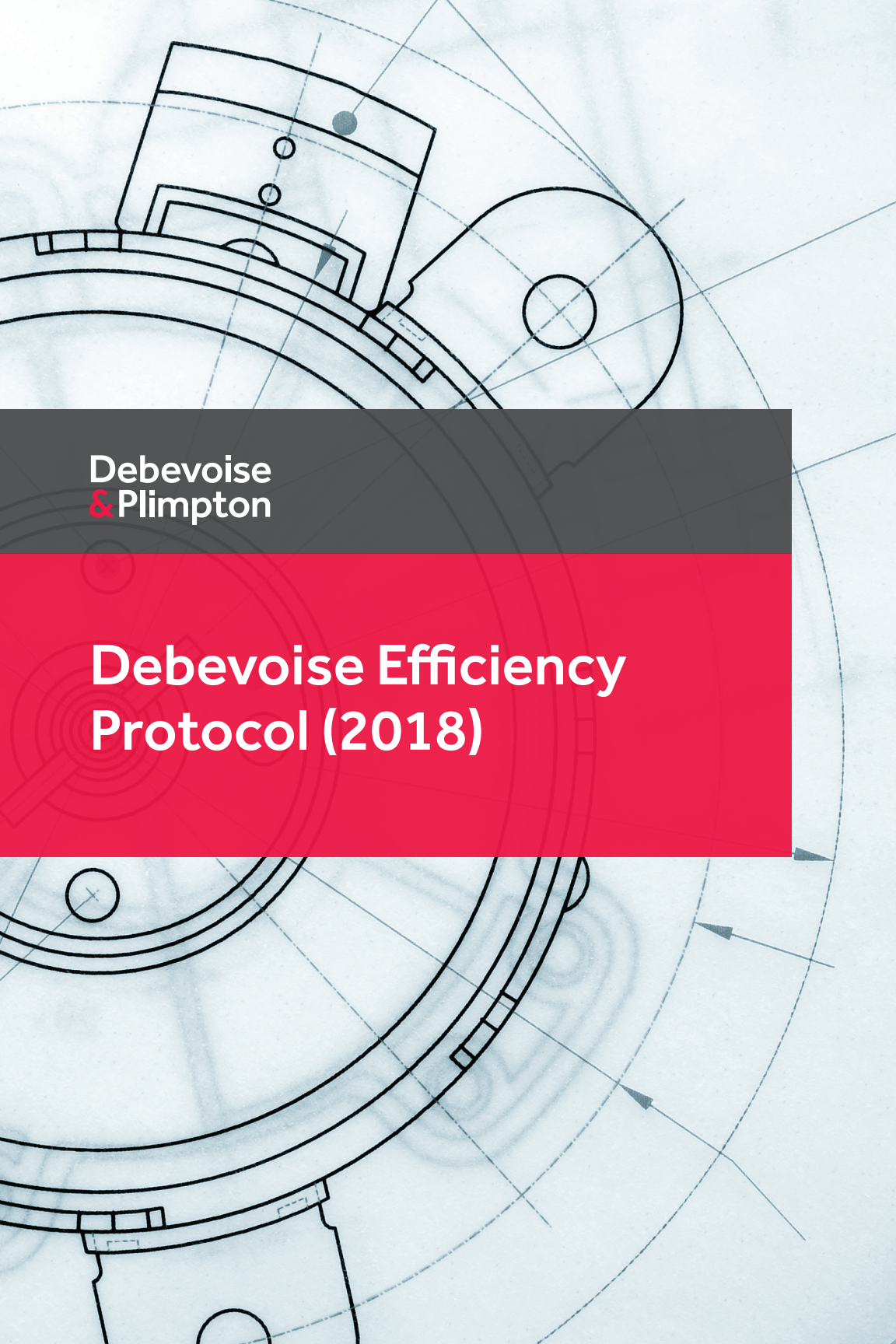

Debevoise Efficiency Protocol (2018)

To address concerns about increased length and cost in international arbitration, in 2010 the Debevoise & Plimpton International Dispute Resolution Group issued our Protocol to Promote Efficiency in International Arbitration. We now update our Efficiency Protocol. Through this Protocol, we reiterate our commitment to explore with our clients how, in each case, the participants can take advantage of international arbitration's inherent flexibility to promote efficiency without compromising fairness or our clients' chances of success. The procedures set out here are therefore not meant to be inflexible rules, but instead are considerations that, when appropriate for the case, can improve the arbitration

Formation of the Tribunal

1. Before appointing arbitrators, we will ask them to confirm:
   - **1.1** their availability to administer the case, including hearings, on an efficient and reasonably expeditious schedule;
   - **1.2** a commitment to conduct the proceedings efficiently and to adopt procedures suitable to the circumstances of the arbitration; and
   - **1.3** a commitment not to take on new appointments that would reduce the arbitrator's ability to conduct the case efficiently.
2. We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators, even if the arbitration clause provides for three arbitrators.

Establishing the Case and the Procedure

3. We will seek to avoid unnecessary multiple proceedings, for example by considering joinder, consolidation, overlapping appointments, stays, and coordinated hearings and briefing schedules.
4. We will request that the arbitral tribunal hold an early procedural conference to establish procedures for the case.
5. We will request our clients and opposing clients to attend procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.
6. We will propose procedures that are appropriate for the particular case, proportionate to its value and complexity, and designed to lead to an efficient resolution. We will use our experience in crafting such procedures,

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and we will not simply adopt procedures that follow the format of prior cases. We will encourage active participation by the tribunal throughout the case. For example:

6.1 We will consider including a detailed statement of claim with the request for arbitration so that the tribunal will be able to set the procedures with more knowledge of the issues in dispute.

6.2 We will consider a fast-track schedule with fixed deadlines.

6.3 We will request additional procedural conferences following certain submissions to consider whether the procedures could be made more efficient in light of the submissions.

6.4 We will suggest page limits for memorials in order to ensure that they focus on the most important issues.

6.5 We will encourage the arbitral tribunal to establish cyberprotocols to protect transfer and use of sensitive information and to disclose cyber incidents, in line with the **Debevoise Protocol to Promote Cybersecurity in International Arbitration**.

7. When acting for claimants, we will seek to use the time between the filing of the arbitration and the initial procedural conference to prepare the first merits submission so that the schedule can commence soon after the conference.

8. We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

8.1 For bifurcated proceedings, we will encourage the arbitral tribunal to set deadlines and hearing dates that include all phases of the case. This minimizes delay at a later stage caused by conflicting commitments of the tribunal members or counsel.

8.2 Such a schedule would include a deadline for the arbitral tribunal to indicate whether the proceeding should continue to the next phase. A reasoned decision can follow, but, in the meantime, the parties can be drafting the submissions in the next phase.

9. In order to avoid delays in drafting the award, we will ask the arbitral tribunal to include in the initial procedural schedule:

9.1 the dates on which they will deliberate following the hearing, including at least one day immediately following the hearing; and

9.2 a date by which the award will be issued.

10. We will encourage tribunals to award costs at the time of interim decisions, when appropriate, in order to discourage time-wasting or unmeritorious applications.

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Evidence

11. We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules on the Taking of Evidence generally provide an appropriate balance of interests.

11.1 We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.

11.2 We will request the arbitral tribunal (or the Chair) to conduct a telephone conference following the submission of any objections to document requests to the tribunal. Such a conference can lead to a more effective weighing of the need for requested documents compared to the burden of production and potentially narrow the disputes.

12. When possible, we will make filings electronically and encourage paperless arbitrations.

13. We will seek to avoid having multiple witnesses testify about the same facts.

14. We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing. Expert conferencing at the hearing, particularly with respect to quantum experts, can also often be time-saving and more effective.

15. We will brief the applicable law, rather than submit expert evidence as proof, except in unusual circumstances.

16. We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

The Hearing

17. In order for the hearing to focus more effectively on the facts and issues that need to be decided, we will ask the arbitral tribunal to set in the initial procedural order:

17.1 a date following the final written submissions on which they will confer regarding the issues in the case and the upcoming hearing, and

17.2 a date for a prehearing conference at which they can discuss with the parties the disputed facts and issues on which they hope the hearing will focus.

18. We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.

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19. We will generally encourage the use of a chess-clock process (fixed time limits) for hearings.

20. We will not automatically request post-hearing briefs. We will consider in each case whether they would be helpful, and, if so, we will seek to limit the briefing to specific issues identified by the tribunal.

21. We will consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

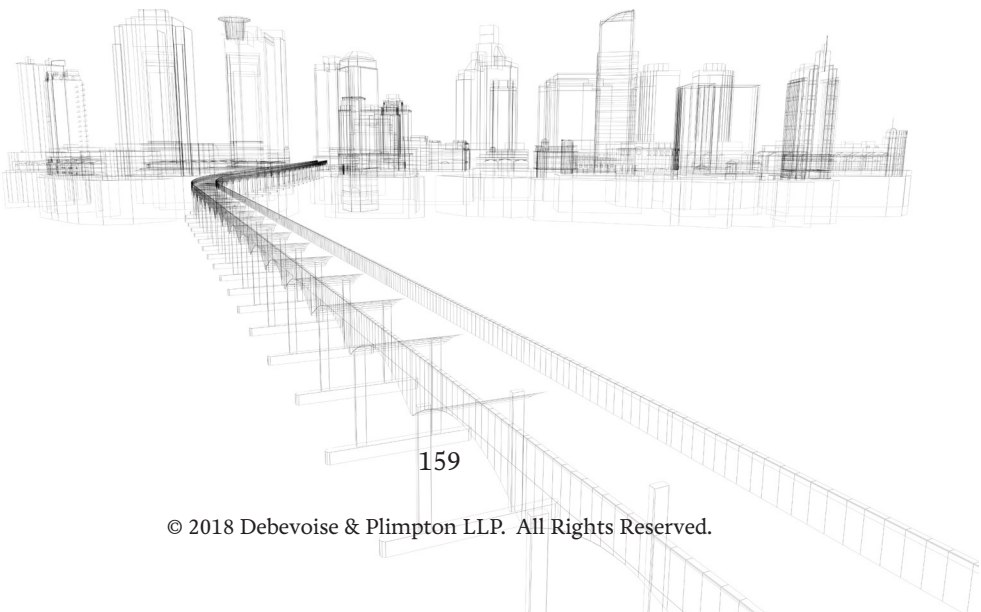
22. We will seek agreement on a common summary format for costs schedules to facilitate the tribunal's comparison and to avoid the expense of removing privileged information from daily time entries. We will also consider whether any argument about entitlement to costs is necessary.

Settlement Consideration

23. We will consider settlement options at the outset of each case and then at appropriate points such as when an exchange of submissions has clarified issues or a preliminary issue has been determined. Routes to settlement could include negotiations or other non-binding ADR such as early neutral evaluation.

24. Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage.

25. We will consider asking arbitrators to provide preliminary views that could facilitate settlement.



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Protocol to Promote Cybersecurity in International Arbitration

Debevoise Protocol to Promote Cybersecurity in International

As the prevalence of malicious cyberactors and cyberattacks on high-profile companies and government organizations grows, parties to commercially or politically sensitive international arbitrations increasingly express concerns with respect to cybersecurity. Cybersecurity threats may create significant operational and legal problems that can compromise the arbitral process, including loss or unauthorized disclosure of sensitive data, breaches of attorney-client confidentiality, adverse media coverage and reputational damage, costs associated with breach notification or data recovery, and legal liability. In addition to the threat cyberattacks pose to the parties to an arbitration, failing to address this problem could ultimately lead to a loss of confidence in the arbitral system.

To respond to these concerns, the practitioners at Debevoise & Plimpton LLP have developed this Protocol to Promote Cybersecurity in International Arbitration. This Protocol operates on three principles: (i) Establishing Secure Protocols for the Transfer of Sensitive Information at the Outset of Proceedings, (ii) Limiting Disclosure and Use of Sensitive Information, and (iii) Developing Procedures for Disclosing Cyber Incidents.

The Protocol reflects our continued commitment to counsel clients on the most critical issues in international arbitration. We believe consideration of the procedures reflected in this Protocol will improve the arbitration process while appropriately managing risks. The procedures reflected in this Protocol are meant to be adaptable, so that parties, counsel and arbitral tribunals can use the flexibility inherent in international arbitration to develop procedures relevant and appropriate for each individual arbitration.

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1. We will request that the arbitral tribunal establish protocols and procedures for the transfer of sensitive information at the outset of proceedings, usually in the first procedural conference. What constitutes such sensitive information should be defined in light of the particular circumstances of a dispute.
    a. These protocols and procedures may include: (i) defining categories of sensitive information, updated as necessary through the course of the proceeding; and (ii) agreeing on processes for the secure transfer of such sensitive information between and among the tribunal and the parties.
    b. This may include barring certain transfer methods (e.g., use of public WiFi to access sensitive information) or adopting certain transfer methods (e.g., use of secure portals instead of email).
2. We will ask the arbitral tribunal and the parties to consider and, if appropriate, agree to specific encryption standards for the transmission of sensitive information.
3. We will propose and encourage arbitral tribunals to disfavor the use of insecure email for the transmission of sensitive information unless additional measures are taken to secure the information. Such additional measures may include applying passwords to documents containing sensitive information that will be transmitted via separate channels (e.g., texting or via a phone call).
4. We will propose that, where possible, email accounts maintained by third party public servers (e.g., Gmail) have additional access protections such as multi-factor authentication (e.g., use of a token or similar mechanism in addition to username and password).
5. If third-party cloud storage is used, we will consider whether the third-party cloud storage incorporates adequate security protocols.
6. We will consider, and ask that the arbitral tribunal and opposing party consider, applicable governmental cross-border restrictions on the transfer of sensitive information and adopt reasonable measures to facilitate compliance with any restrictions.

Limited Disclosure and Use of Sensitive Information

7. Before submitting any sensitive information to the arbitral tribunal or opposing party, we will weigh the sensitivity of that information against the relevance and materiality of that information for that arbitration.
8. We will explore with the arbitral tribunal whether sensitive information may be submitted in a form that is only screen viewable (i.e., not readily downloadable or printable). If sensitive information is permitted to be printed, we will ask the tribunal to establish consistent policies and procedures related to the destruction of printed materials.
9. To the extent practicable, we will limit the persons who have access to sensitive information to those persons having a need-to-know with respect to such information.

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10. To the extent practicable, access to sensitive information on computer systems should be restricted to those using a secure log-in ID and password, with a unique log-in ID and password assigned to each individual. We will consider, and ask that the arbitral tribunal and opposing party consider, the use of multi-factor authentication to access accounts or portals used to transmit and receive sensitive information.
11. We will restrict the ability to transfer sensitive information to mobile devices only if they use encryption or other appropriate security protocols.
12. At the client's request, we will establish procedures for returning or destroying sensitive information upon the conclusion of the arbitration.

Procedure for Disclosing Data Breaches

13. We will take reasonable steps to mitigate any potential breach, including by contracting with third-party vendors as necessary.
14. We will propose and work with the arbitral tribunal to establish policies and procedures related to detecting breaches, determining their scope, and notifying affected parties. Where the existence of the arbitration is itself confidential, we will work with the tribunal to consider means of notifying affected parties that best preserve the confidentiality of the arbitration.
15. We will propose and work with the arbitral tribunal to establish point-persons for each party to the arbitration and the tribunal itself to be responsible for coordinating communications in the event of a data breach or other incident that exposes or affects sensitive information.
16. We will consider whether there are any legal obligations to report the breach to affected parties, regulatory agencies, or other authorities.

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Debevoise's Senior International Disputes Team

Catherine Amirfar

Catherine Amirfar is a partner in the International Dispute Resolution Group and Co-Chair of the firm's Public International Law Group. Her practice focuses on international commercial and treaty arbitration, international litigation, and public international law, and she regularly appears in U.S. courts and before international courts and arbitration tribunals. With over fifteen years of experience, Ms. Amirfar is recognized as a top practitioner in international disputes globally. Prior to rejoining Debevoise in 2016, Ms. Amirfar spent two years as the Counselor on International Law to the Legal Adviser at the U.S. Department of State, and received the State Department's Superior Honor Award in recognition of her contributions to the Department. Ms. Amirfar was one of the youngest lawyers ever to argue before the International Court of Justice.

Ms. Amirfar is admitted to practice in New York.

Donald Donovan

Donald Francis Donovan is Co-Chair of Debevoise's International Dispute Resolution Group and its Public International Law Group, and serves as counsel in international disputes before United States and international courts, as well as international arbitration tribunals. He currently serves as President of the International Council for Commercial Arbitration (ICCA), the leading global organization of international arbitrators and arbitration practitioners, and regularly sits as arbitrator in international cases, including under the auspices of ICSID, the ICC, and the ICDR, as president, chair, sole arbitrator, and co-arbitrator.

Mr. Donovan is widely regarded as one of the leading international arbitration practitioners, international lawyers, and international advocates in the world. He is admitted to practice in New York.

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Tony Dymond is a partner in the International Dispute Resolution Group. His practice focuses on complex, multi-jurisdictional construction and engineering disputes in both litigation and arbitration. He has advised clients in a wide range of jurisdictions, having spent the last 20 years in London, Hong Kong and Seoul. Mr. Dymond has advised on some of the largest and most complex market-shaping disputes in these sectors, and is widely acknowledged as a leading lawyer in energy and infrastructure. He has appeared in arbitrations under the principal arbitration rules and in the English and Hong Kong courts. Mr. Dymond is a regular speaker at construction and arbitration conferences and contributor to construction law journals.

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Lord Peter Goldsmith QC, PC

Lord Peter Goldsmith QC, PC is London Co-Managing Partner, Chair of European and Asian Litigation, and Co-Chair of Debevoise's Caribbean Practice. He regularly appears in European and international courts and tribunals, acting for a variety of clients in both arbitration and litigation. He conducts arbitrations under all the major institutions, including LCIA, ICC and SIAC, and in ad hoc arbitrations. Significant work includes partnership disputes, joint ventures, oil and gas disputes, investment treaties, auditors' liability, insurance and takeover law, banking law, company law, insolvency litigation, public law and public international law, including judicial review and human rights law. He served as the UK's Attorney General from 2001-2007, prior to which he was in private practice as one of the leading barristers in London. He has judicial experience as a Crown Court recorder and Deputy High Court Judge.

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Mr. Kirry is fluent in English as well as his native French. He is admitted to practice in Paris and New York.

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Ms. Popova is fluent in French, Spanish, Italian and Bulgarian, and is proficient in Portuguese. She is admitted to practice in New York and Paris.

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Dr. Prager is fluent in German, English, Spanish, and French, and is proficient in Portuguese. He is admitted to practice in New York.

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Natalie L. Reid is a partner in the International Dispute Resolution Group and Co-Chair of Debevoise's Caribbean Practice. Ms. Reid focuses on international arbitration, public international law, and complex commercial litigation matters. A Jamaican national, she regularly advises and represents states, multinational corporations, international organizations, and non-governmental organizations in proceedings in U.S. courts and international fora. Ms. Reid acts as counsel in commercial and treaty arbitrations conducted under the rules of the major arbitral institutions, where her recent representations include disputes arising under bilateral investment treaties in South Asia and East Asia. She currently serves on the Board of Editors of the American Journal of International Law, and multiple committees of the American Society of International Law (ASIL).

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David W. Rivkin is Co-Chair of Debevoise & Plimpton's International Dispute Resolution Group and Immediate Past President of the International Bar Association. Mr. Rivkin is consistently ranked as one of the world's top international dispute resolution practitioners and international lawyers. He has acted as counsel and as arbitrator in international arbitrations throughout the world and in U.S. courts. He has won some of the largest investment treaty and commercial arbitration awards. Subjects of these arbitrations have included long-term energy concessions, investment treaties, public international law, joint venture agreements, financial issues, insurance coverage, construction contracts, distribution agreements and intellectual property, among others, and they have involved common law, civil law and Islamic law systems. Mr. Rivkin has served in leadership positions in arbitration institutions on five continents and has frequently worked to update their rules. In 2012, the *American Lawyer's Am Law Litigation Daily* named Mr. Rivkin one of two "Global Lawyers of the Year," and in 2011, the *National Law Journal* named him one of the country's "Most Influential Attorneys." He sits on many arbitration panels.

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What Have We Learned From The Global Pound Conferences? (http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/)

Thomas J. Stipanowich (http://mediationblog.kluwerarbitration.com/author/thomasstipanowich/) (**Pepperdine University School of Law (http://law.pepperdine.edu/)**) / **November 27, 2017 (http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/)** / **3 Comments (http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/#comments)**

In the forty years since new visions and challenges for the administration of American justice were offered at the 1976 Pound Conference, a Quiet Revolution has altered the landscape of public and private dispute resolution around the world. (**See Living the Dream of ADR (http://ssrn.com/abstract=2920848)**).

Recently, a series of day-long meetings styled as the Global Pound Conferences, conducted in cities worldwide, offered diverse stakeholders an opportunity to register perspectives on the current state and future of commercial dispute resolution. Each gathering brought together in-house lawyers and clients, external lawyers and consultants, providers of dispute resolution services, educators, government servants and others in order to elicit perspectives and encourage dialogue on dispute resolution, public and private.

The prime artefacts of the “Global Pound” are recorded perceptions of 2,878 individuals polled during conferences at one of twenty-eight venues, or who responded to an online poll. These individuals were mainly dispute resolution professionals, outside counsel, consultants, educators and other individuals who derive a livelihood from the resolution of conflict. However, fifteen percent identified as “parties”—commercial users of dispute resolution services; in reality, they were primarily in-house counsel. Though business clients and corporate counsel are notoriously difficult to convene or poll, their perspectives as users and consumers of dispute resolution services are naturally of exceptional value.

In the interest of efficiency and simplicity, the organizers took some shortcuts in polling. Participants were lumped into five broad groupings, which meant that the responses of public judges were lumped together along with those of private arbitrators and representatives of provider organizations under the umbrella of "adjudicative providers." Those playing multiple roles, including dispute resolution professionals or institutions engaged in adjudicative as well as non-adjudicative activities, were required to self-identify by a single primary activity.

Some of the questions and answers were subject to multiple interpretations, or so broadly framed as to embrace a range of possible circumstances. Respondents were limited to ranking their top three choices among a range of answers, and to rank those choices in order of priority; it was not possible to accord equal rank to selected responses.

Despite these limitations, the Global Pound Conference poll leaves us with a number of general impressions about current dispute resolution practice, and raises several tantalizing prospects for future evolution. As you read the following summary, please be aware that in tabulating results for each question, respondents' top-ranked answers were accorded 3 points, their second-ranked answers were given 2 points, and third choices were given 1 point. The published data for each question lists answers in order of the total number of points they received. In addition, each answer received a "percentage ranking" based on the percent of the total possible points that a particular answer received.

1. Efficiency and cost-effectiveness are a primary concern in commercial dispute resolution, and will drive future policy-making.

According to Pound participants, efficiency—that is, the time and cost entailed in resolving a dispute outcome—was the most influential factor in choosing among dispute resolution processes (with a 61% ranking for the entire group, and 65% for "parties" (mainly in-house counsel). Financial or time constraints were the primary obstacle or challenge faced by parties in the resolution of disputes (with a 59% ranking). In addition, reduced costs and expenses (with a 50% ranking among all respondents and 49% for commercial parties) ranked first among the perceived achievements of mediation or conciliation.

Participants expected demand for increased efficiency of dispute resolution processes, including through technology, to have the most significant impact on future policy-making in commercial dispute resolution. This factor received a 64% ranking among all participants and 65% among parties. (However, reflecting an abiding tension among the priorities of commercial parties, 52% of those polled saw the demand for certainly and enforceability of outcomes as a key influencer in the future.)

2. Party control is a priority.

Next to reducing costs and expenses, permitting parties to retain control over the outcome was viewed as the important result of mediation and conciliation (as reflected in the votes of 46% of all participants, and 38% of business parties / in-house counsel). Control over process and outcome is a common theme of comments by corporate counsel.

3. Improved or restored relationships are often a goal.

Although the poll indicated that parties tend to come to dispute resolution wanting damages or or injunctive relief, a sizable minority (a 28% of all participants, and 33% of parties) indicated that parties may be looking to mend or end a relationship. Relational concerns were sometimes an important factor in selecting dispute resolution processes; thirty-nine percent of participants thought improved or restored relationships were among the most likely achievements of mediation or conciliation.

4. Advice from counsel, guidance from dispute resolution providers and educational programs are all potential sources of information on process choices.

Insufficient knowledge of available options for the resolution of commercial disputes is another primary obstacle or challenge for participants (with a 52% ranking among all those polled). Lawyers, external and in-house, were most often viewed as having responsibility to ensure parties understand process options and their potential consequences; external lawyers received a 59% ranking, in-house lawyers 55%. "Lawyer advice" was also a key factor in the selection of dispute resolution options, with a 58% ranking among all participants, and 46% among parties. More cynically, the group identified the impact on costs and fees lawyers can charge as among the top three influences on lawyer advice-giving (with a 40% ranking). The view that the primary role of lawyers was "working collaboratively with parties to navigate the process" predominated with a 60% ranking.

When asked what role parties involved in commercial disputes envisioned for providers of dispute resolution services, sixty-one percent of participants indicated that parties prefer to "seek guidance from the providers regarding optimal ways of resolving their dispute." The question lacks clarity, however, and the "guidance" referred to might refer to mediators' affirmative directions on dispute resolution options, a "fleshing out" of arbitration procedures facilitated by arbitrators, or even menus of procedural options on websites of institutional providers.

When asked which methods would be most effective in improving parties' understanding of their options for resolving commercial disputes, most participants (64%) pointed to educational programs in business or law schools or the broader business community.

5. Outcomes reflect an interplay between rule of law, consensus/party interests, and general concepts of fairness.

Participants indicated that the top three factors determining the outcome of a commercial dispute were consensus (based on the parties' subjective interests) (63% ranking), findings of fact and legal or other norms (58% ranking), and general principles of fairness (49% ranking). These diverse determinants arguably reflect, or explain the common resort to, approaches in which parties move back and forth between adjudication and negotiation during the course of resolving a dispute—exemplified by Mark Galanter's term "litigotiation."

6. The most effective approaches may rely on multiple processes.

Pound participants viewed combinations of adjudicative and non-adjudicative processes, such as mediation and arbitration or mediation and litigation, as the most effective process option. (It was ranked by 49% of participants and 50% of parties). This is perhaps a reflection of the common practice of negotiating (with or without a mediator) against the backdrop of adjudication. Combinations of approaches were also perceived as one of the highest priorities for the future by 50 percent of commercial parties and 45% of all participants.

7. Pre-dispute or pre-escalation processes, collaboration and conflict prevention are emerging trends in managing commercial conflict.

Along with combinations of adjudicative and non-adjudicative processes, business parties viewed "pre-dispute or pre-escalation processes to prevent disputes" as the most effective process for addressing commercial disputes. (50% of parties identified each approach.) Commercial parties saw these approaches as the top priority for the future (55%), as did participants generally (51%).

Participants expected "greater emphasis on collaborative instead of adversarial processes" and "changes in corporate attitudes to conflict prevention" to be the most significant influences on the future of commercial conflict resolution (with rankings of 57% and 51%, respectively).

8. Governments and ministries of justice have the greatest potential to influence change; outside counsel are most resistant to change.

Participants viewed governments and ministries of justice as most likely to influence change in commercial dispute resolution (41% ranking)—a logical choice given the importance the leading role governments and court systems have played in promoting mediation. Although commercial parties / in-house counsel, outside counsel and adjudicative providers each ranked themselves as potentially the most influential stakeholders, it should be noted that corporate counsel are often in a particularly advantageous position to influence process choices (including consensual private approaches) on the company and transactional level.

Participants perceived external lawyers (67%) and adjudicators (judges and arbitrators) (39%) as most resistant to change.

Conclusion

It remains to be seen how much influence the Global Pound Conferences will have on the pace or direction of change. However, the extant data from GPC polling offer considerable fodder for discussion and debate regarding trends in conflict management.

(http://mediationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/?print=pdf)

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3 comments

Angela Herberholz

NOVEMBER 28, 2017 AT 12:10 AM (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/2017/11/27/LEARNED-GLOBAL-POUND-CONFERENCES/#COMMENT-26867)

Thank you for your insightful blog post sharing the results of the GPC surveys. I would like to know if you could see any country/ regional specific patterns? Thank you in advance Thomas. Best regards, Angela

REPLY (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/2017/11/27/LEARNED-GLOBAL-POUND-CONFERENCES/?REPLYTOCOM=26867#RESPOND)

Tom Stipanowich

DECEMBER 5, 2017 AT 12:11 AM (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/2017/11/27/LEARNED-GLOBAL-POUND-CONFERENCES/#COMMENT-27153)

Dear Angela,
Thanks for your message. I've not taken the time to go through all of the separate city data, although that should be available on the IMI site now or in the near future. It would make sense to examine that for patterns and differences,which I'm sure exist.

Best regards,

Tom

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John Sturrock

NOVEMBER 28, 2017 AT 4:07 PM (HTTP://MEDIATIONBLOG.KLUWERARBITRATION.COM/2017/11/27/LEARNED-GLOBAL-POUND-CONFERENCES/#COMMENT-26896)

Thanks for this Tom. It s very helpful.
John

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GLOBAL POUND CONFERENCE SERIES

HERBERT SMITH FREEHILLS

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GLOBAL POUND CONFERENCE SERIES

Global Data Trends and Regional Differences

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Chairman's Introduction

I am delighted to welcome you to this important report. It analyses, for the first time, the voting data captured at the Global Pound Conference (GPC) Series.

The GPC Series has been unique in terms of scale and ambition. The idea of surveying thousands of stakeholders engaged in dispute resolution in a standardised way at interactive conferences was conceived in 2014 by the International Mediation Institute (IMI). This was developed throughout 2015 and came to reality between March 2016 and July 2017 through 28 conferences at locations across the globe. The conferences were followed by an international online survey.

This project focuses on the needs of Users (both corporate and individual) of civil and commercial dispute resolution services. In doing so, it has prompted a much needed global conversation about how conflict can and should be managed in the 21st Century.

Pervasive disruptors like technology and globalisation have changed the business landscape almost beyond recognition. Yet dispute resolution processes have simply not caught up. This project has generated actionable data to question the status quo. It has armed us with a mandate for change and the outputs are already informing public policy making and private dispute resolution choices around the world.

The GPC Series has rebooted the discussion about dispute resolution and engaged all stakeholders to the debate. It is for this reason that the Global Pound Conference has evolved through its journey to become the Global Pound Conversation. A wealth of online resources continues to evolve to facilitate this ongoing conversation.

I hope you enjoy this report. As an in-house counsel responsible for managing a worldwide docket of disputes, I believe it provides new and practical insights. It is a springboard for more research and conversations over the years to come.

I urge you to visit the website at www.globalpound.org and join the Global Pound Conversation.

Michael McIlwrath
GPC Series Chair
Global Chief Litigation Counsel,
Litigation, GE Oil & Gas, Director of IMI

Executive Summary

The GPC Series convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017. Those delegates – and hundreds more who contributed data online – voted on a series of 20 Core Questions to gather data to inform the future of dispute resolution. This report summarises the results of the first analysis of the global data, and identifies four Key Global Themes and four notable Regional Differences[1]. The GPC provides an opportunity for extensive research in the years to come and conversations between stakeholders. These early insights show the potential of the GPC data to inform those studies and discussions.

The **four Key Global Themes** we identify are:

Efficiency is the key priority of Parties[1] in choice of dispute resolution processes

Efficiency means different things to different stakeholders but this throws down a challenge to the way in which traditional dispute resolution processes meet the needs of the Parties seeking dispute resolution services. Finding the most efficient way to resolve a dispute may not always be the fastest or cheapest but it requires thought and engagement to bring appropriate resolution in acceptable timeframes and at realistic costs.

Parties expect greater collaboration from Advisors in dispute resolution

Parties using dispute resolution services seek greater collaboration from their external lawyers when interacting with them and their opponents. This represents a potential challenge to traditional notions of how lawyers should represent clients in disputes.

Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes)

As global understanding of and interest in non-adjudicative dispute resolution processes grows, there is near universal recognition that Parties to disputes should be encouraged to consider processes like mediation before they commence adjudicative dispute resolution proceedings and that non-adjudicative processes like mediation or conciliation can work effectively in combination with litigation or arbitration.

In-house counsel are the agents to facilitate organisational change. External lawyers are the primary obstacles to change

The data shows a broad consensus that in-house counsel should encourage their organisations to consider their dispute resolution options more carefully, including using non-adjudicative processes like mediation and conciliation. External lawyers are reported to be – and perceive themselves to be – resistant to change, but a new generation of in-house counsel will challenge this resistance.

1 See page 6 for definitions

2 The raw data for these votes as provided by the technology provider, PowerVote, can be found here: http://globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf

The **four Regional Differences** we identify are:

Desire for increased regulation in Asia

Stakeholders in the Asian jurisdictions voted consistently in ways that highlighted the role of legislation or international conventions to promote the enforcement and recognition of settlements. Since practical experience rarely reveals difficulties with enforcement, this regional trend may be an indicator that a more developed regulatory framework would assist acceptance and use of non-adjudicative dispute resolution processes like mediation and conciliation.

Efficiency the priority – except in Asia

When the global data was segmented by regions it was clear that efficiency was the key priority in all regions except Asia, where the key priority was the certainty and enforceability of outcomes. This may indicate an important underlying difference about how stakeholders in Asia perceive non-adjudicative dispute resolution processes.

Continental Europe marches to a different beat

Delegates at the Continental European conferences voted differently to all other regions when it came to the relationship between in-house counsel and external lawyers in changing dispute resolution habits. This revealed a conundrum in Continental Europe where delegates indicated that in-house counsel were looking to drive change in corporate attitudes to conflict prevention while battling with a lack of knowledge of dispute resolution options to effect that change. There was less emphasis on collaboration in this region too.

The legacy of the Woolf Reforms – visible in the UK

Lord Woolf's ground-breaking reforms to the civil justice system in England and Wales in the late 1990s embedded the role of ADR in the case management of civil litigation. Nearly 20 years on, the data from the London GPC Series finale reveals well-informed in-house counsel familiar with dispute resolution processes, focused on collaboration and efficient dispute resolution using non-adjudicative processes in pre-action protocols and mixed-mode dispute resolution.

About the GPC Series

The GPC Series takes its name from the original Pound Conference in St Paul, Minnesota, USA in 1976. Named in honour of Roscoe Pound, the reforming Dean of Harvard Law School in the 1920s and 30s, the theme was "Agenda for 2000 AD – The Need for Systematic Anticipation". This event led to many changes in the US justice system, including the creation of the 'multi-door courthouse' and the advent of alternative dispute resolution processes like mediation.

Forty years on from the original 1976 Pound Conference, dispute resolution has reached an impasse. The stakeholders in the dispute resolution field around the world are fragmented and there is a lack of reliable, comparative and actionable data to enable the supply side of the dispute resolution market to fully meet Parties' needs, both locally and transnationally. The GPC Series represented a timely opportunity to reassess the dispute resolution landscape and ask stakeholders all across the world what they think needs to change.

The entire dispute resolution industry was represented at the conferences including commercial parties, lawyers, experts, chambers of commerce, academics, judges, arbitrators, mediators, conciliators, policy makers and government officials. Using a bespoke voting and feedback App, including multiple choice and open text questions, delegates gave their views on what Users of dispute resolution need and want locally and globally. The series generated considerable data and created an opportunity to identify trends and preferences in a way that has not been possible previously.

The GPC Series was conceived and led by the International Mediation Institute (IMI), a non-profit public interest initiative which seeks to promote and improve the use of mediation worldwide. The GPC Series' Founding Diamond Global sponsors were Herbert Smith Freehills and the Singapore International Dispute Resolution Academy (SIDRA). PwC was a Global Platinum sponsor, with JAMS a Global Gold sponsor, and AkzoNobel, the American Arbitration Association/ICDR, the Beijing Arbitration Commission (BAC), the China International Economic and Trade Arbitration Commission (CIETAC) and Shell all Global Silver sponsors. They were joined by 54 Global Partners and over 100 organisations who supported the GPC Series locally.

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Delegates, the Core Questions and Voting

While the GPC Series was about much more than data gathering, the heart of each conference was the delegates voting on 20 multiple choice Core Questions. These were developed with the assistance of the GPC Academic Committee (see Appendix 1 for its members).

Voting was on a weighted multiple choice basis – most questions offered delegates five or six options and delegates selected up to three choices with their first choice scoring 3 points, their second choice 2 points and their third choice 1 point. As a result, the voting results were expressed as a percentage of the total number of points available to a given answer.

A response with a score of 100% equates to every voting delegate choosing that option as their first choice. In reality, no response achieved this score; the most important responses achieved a score of 60% or more, with a variance of 10% between responses marking a significant difference in opinion across stakeholder groups.

Before voting, delegates were required to identify themselves as coming from one of five stakeholder groups so that their primary professional focus could be captured in the voting preferences.

The five stakeholder groups were:

1) Parties
end-users of dispute resolution, generally in-house counsel and executives

2) Advisors
private practice lawyers and other external consultants

3) Adjudicative Providers
judges, arbitrators and their supporting institutions

4) Non-Adjudicative Providers
mediators, conciliators and their supporting institutions

5) Influencers
academics, government officers, policy makers

Each conference was organised around four interactive sessions looking at both the demand and supply sides of the dispute resolution market. The sessions provided the structure for the voting on the Core Questions and discussion of the results. They were:

- **Access to Justice & Dispute Resolution Systems: What do Parties want, need and expect?**
- **How is the market currently addressing parties' wants, needs and expectations?**
- **How can dispute resolution be improved? Overcoming obstacles and challenges.**
- **Promoting better access to justice: What action items should be considered and by whom?**

The delegates at conferences were self-selecting in that they chose to participate in person or online. As a consequence, the data gathering was never intended to replicate the conditions for the gathering of academic data. Nevertheless, the voting population was truly global, covering all continents, common and civil law systems, jurisdictions well known for highly developed dispute resolution systems, and jurisdictions which are developing ADR procedures to complement existing mechanisms. It provides a fascinating and unique global insight into dispute resolution today.

The voting took place at each conference live among the delegates using the App [3]. The questions were also opened up to online voting after the last event in London in July 2017, until 31 August 2017. In addition to the voting on the Core Questions, a wealth of additional data was collected at each event through:

- Delegate registration questionnaires.
- Responses (via the App) on a series of open text questions in each session, which were discussed by the panels and delegates during the events.
- Input into four Word Clouds which sought to capture the key words reflecting delegates' views. (Selected Word Clouds are highlighted later in this report to give a sense of the differing views and priorities around the world).
- Questions and comments collected in the App as each session unfolded, which other delegates could "like", thus ranking by popularity with other delegates.

Consequently, GPC collected a great deal of data on the thoughts, wishes and perspectives of the delegates. The focus of this report is to review and interpret the key responses that emerge from the multiple choice Core Questions only. There remains a huge body of material still awaiting analysis. It is available for further investigation and research in discussion with IMI and the Academic Committee. Please feel free to contact Jeremy Lack or Barney Jordaan in the first instance to discuss.

3 For France, India, the Netherlands and Spain (Barcelona), there was was some variation in the voting procedure.

"The scale of the GPC is unique and valuable, and the insights it offers merit further analysis and discussion. In terms of geographical reach and scale, there are no comparable academic or other studies in the field of dispute resolution.

Of course, while all care was taken to ensure the integrity of the data gathering process and rigour in the formulation of the survey questions and analysis of data, the project was not intended to be primarily an academic project, nor does the data gathering process represent a pure data collection environment. Any use of the GPC data must therefore be undertaken with this in mind.

Nevertheless, the preliminary analysis of the Core Questions provided by this report shows global trends that offer immediate insights and scope for further detailed local, regional and international analysis. The complete data set is available online on the GPC's website, and all academics and researchers are welcome to analyse, critique and comment on it.

In addition to the quantitative voting data, the qualitative discussion data captured at the events is a further rich source waiting to be mined by academics and others in years to come. We have at this stage only scratched the surface of the research potential of GPC. It has the ability to help shape the future of dispute resolution at both local and international levels."

Prof. Barney Jordaan
GPC Academic Committee Chair
Professor of Management Practice,
Vlerick Business School, Belgium

Global Voting Data – Key Themes and Observations

The global voting data provides a wide range of insights into the topics raised in the Core Questions. Herbert Smith Freehills, PwC and IMI and have analysed the data to draw out some key themes, which can be split into two groups: Key Global Themes emerging from the voting data; and observations on Regional Differences.

Key Global Themes

Efficiency is the key priority of Parties in choice of dispute resolution processes.

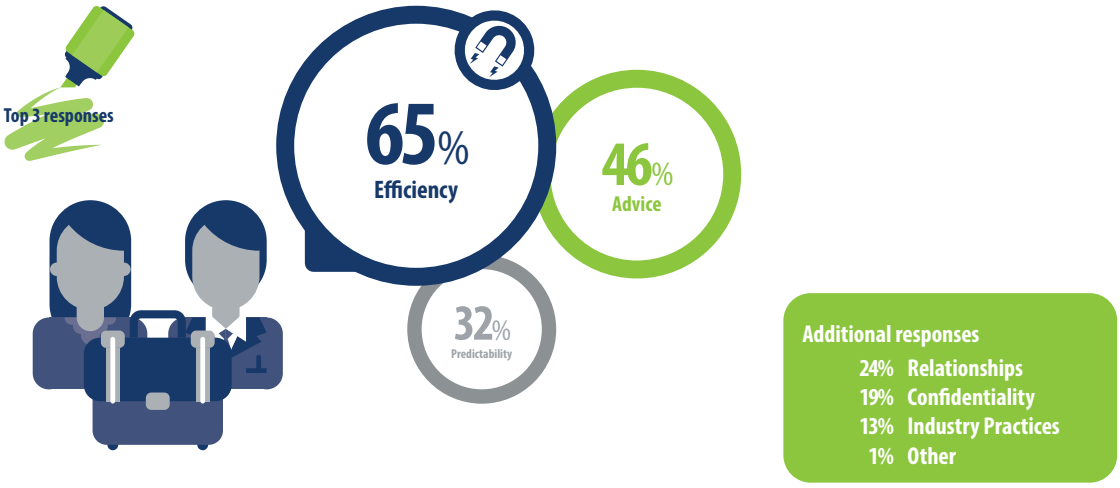
Parties expect greater collaboration from Advisors in dispute resolution.

Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes).

In-house counsel are the agents to facilitate organisational change. External lawyers are the primary obstacles to change.

1. Efficiency is the key priority of Parties in choice of dispute resolution processes

Q1.2 When parties involved in commercial disputes are choosing the type(s) of dispute resolution process(es) to use, which of the following has the most influence?[4]

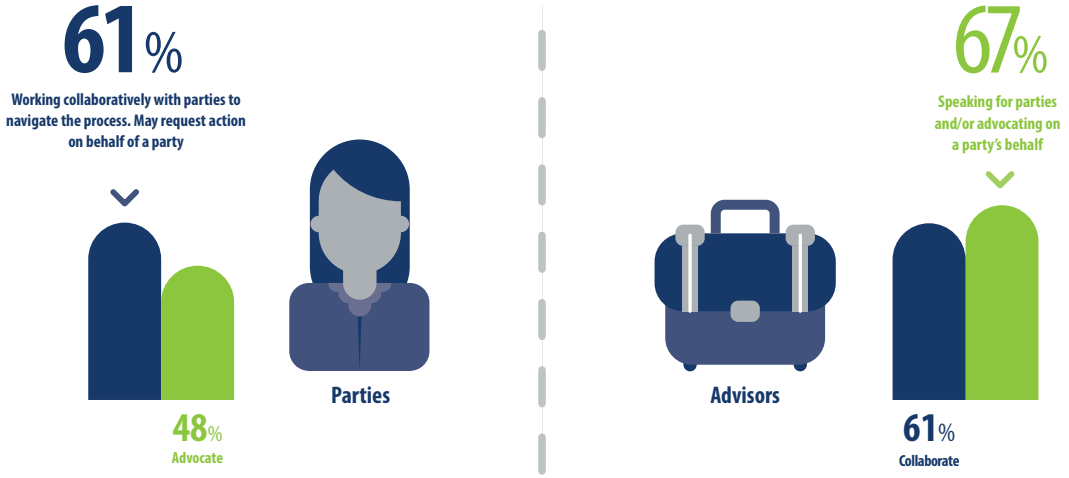


- This represents a challenge to traditional adversarial dispute resolution models, whether public (domestic courts) or private (institutional and ad hoc arbitration). Parties are looking not just for justice and resolution of their disputes, but an efficient journey to resolution.
- Efficiency in the resolution of commercial disputes will not always be as simple as the quickest and cheapest route to resolution (although cost and speed will always be important). Inherent to efficiency is the avoidance of waste, be that time, money, effort or other factors – and avoiding waste requires thought and flexibility among the dispute resolution stakeholders.
- Understanding what efficiency really means in terms of changing the behaviour of stakeholders requires further discussion:
  - Parties may need to communicate their priorities, expectations and underlying interests to Advisors and other stakeholders more clearly.
  - Advisors can challenge themselves to focus relentlessly on their clients' interests, being prepared to initiate or facilitate non-traditional dispute resolution with combinations of adjudicative and non-adjudicative processes.
  - Providers (neutrals) may reflect that arbitration rules and mediation procedures are not ends in themselves but exist among a range of tools to assist parties in resolving disputes. Flexibility, pragmatism and listening to Parties will likely translate to sustainable success. Providers can take more of a role in helping Parties and Advisors to consider routes allowing greater efficiencies.
  - Influencers can acknowledge that the resolution of commercial disputes is a commercial endeavour in which each stakeholder seeks to prosper and exercise (where possible) choice about forum and process to further the ends of Parties. A greater range of issues can also be considered in each case, beyond the merits of the case, the time to outcome or the costs of the process.
- Technology can drive efficiency. This is not limited to electronic discovery and electronic filing in litigation. Dispute management tools and online dispute resolution (ODR) have the capacity to change fundamentally the way disputes are resolved over the next decade. We are already seeing how artificial intelligence (AI) can automate the work of lawyers and adjudicators, paving the way for decision-making robots.

4 Based on the votes of Parties only.

2. Parties expect greater collaboration from Advisors in dispute resolution

Q1.5 What role do parties involved in commercial disputes typically want lawyers (ie in-house or external lawyers) to take in the dispute resolution process?



- One of the key discrepancies to emerge in the voting data was between how Parties said they wanted their lawyers to behave in dispute resolution processes and how those lawyers, the Advisors, saw their own role.
- The key difference in the voting was that Parties indicated that they wanted to see greater collaboration from their Advisors in dispute resolution processes, whereas Advisors consistently reported that they saw their role as advocates for their clients.
- Are these positions inconsistent? Are lawyers out of step with their clients' needs? These are complex issues but some initial perspectives on these data are:
  - The GPC Parties were a sophisticated group of delegates. GPC Parties are more likely than the average disputant to know what they want, and be more familiar with and skilled in the use of ADR processes – all of which informs the expectations and approach of their legal advisors.
  - The Advisors who attended GPC events are, similarly, likely to be a more sophisticated group in terms of ADR knowledge and usage than their peers. But even taking this into account, why were the GPC Advisors' votes so clearly out of step with the GPC Parties' votes? The answer may lie in the fact that most Advisors will have clients reflecting a spectrum of experience, from the most sophisticated to relatively unsophisticated clients who are only rarely involved in disputes and therefore rely heavily on advice from their lawyers as to process choice, behaviour towards counterparties and strategy.
  - Whether or not these differences reflect different experiences between Parties and Advisors, there is a clear challenge to the legal community to listen to clients and discuss whether collaboration is wanted and what that really means in a given situation (particularly when disputes are acrimonious or thought to be unmeritorious). This may be a genuine challenge to the traditional notion of zealous advocacy where every point and position is argued on behalf of the client.
  - Parties will need to speak up and reassure lawyers that they wish them to try a different approach. A rigorous attention to the law, of course, but also an approach to dispute resolution that is flexible and open to using different processes. One that acknowledges risks where they exist and is focused on efficient outcomes, not unnecessarily expensive or drawn out journeys to resolution. If Parties wish to promote efficiency in dispute resolution they may need to encourage their lawyers to focus on the core issues and discourage fighting points for their own sake.

"Greater emphasis on collaboration between in-house and external lawyers, and between disputing parties, will lead the way for more efficient resolution of commercial disputes. Most dispute resolution still has as its frame of reference an adversarial process based on asserted legal rights. But this can be inconsistent with the aspirations of the parties for quick, consensual resolution.

An early case assessment is a good example of how closer collaboration can increase efficiency, with in-house counsel and external lawyers working together to review the wider interests and risks. The results can in turn help inform a more resolution-focused approach with counterparties.

Technology also has a role to play. Social tools and online platforms are making it easier than ever for lawyers to work more closely with each other and with their clients. Advancement in data analysis enables advisors and legal teams to review and investigate large amounts of data quickly and assess risk in more sophisticated ways. Conventional views on the role of confidentiality are being challenged. This should facilitate the earlier use of consensual processes like mediation, in advance of, or in parallel with, or even integrated into litigation or arbitration. The global data indicates a mandate for change in attitudes and approach."

Alexander Oddy
GPC Executive Board Member
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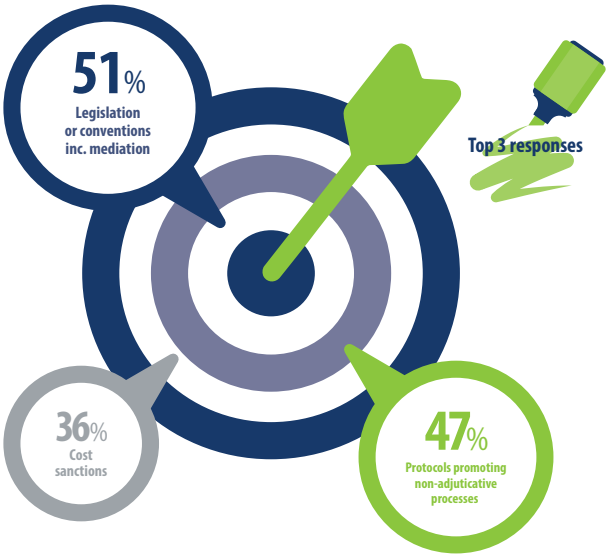
3. Global interest in the use of pre-dispute protocols and mixed-mode dispute resolution (combining adjudicative and non-adjudicative processes)

Q3.2 To improve the future of commercial dispute resolution, which of the following processes and tools should be prioritised?

- One of the striking areas of congruence across the GPC events and all stakeholder groups was the interest in two closely linked phenomena. First, the use of protocols to encourage the use of non-adjudicative dispute resolution processes like mediation or conciliation before adjudicative processes such as litigation or arbitration. Second, the use of non-adjudicative processes in combination with adjudicative processes, whether this is at the encouragement of a court or arbitration body/ tribunal or by agreement of the parties. Such "mixed-modes" of dispute resolution can be done sequentially, in parallel, or integrated with one another.

Q3.3 Which of the following areas would most improve commercial dispute resolution?



Additional responses

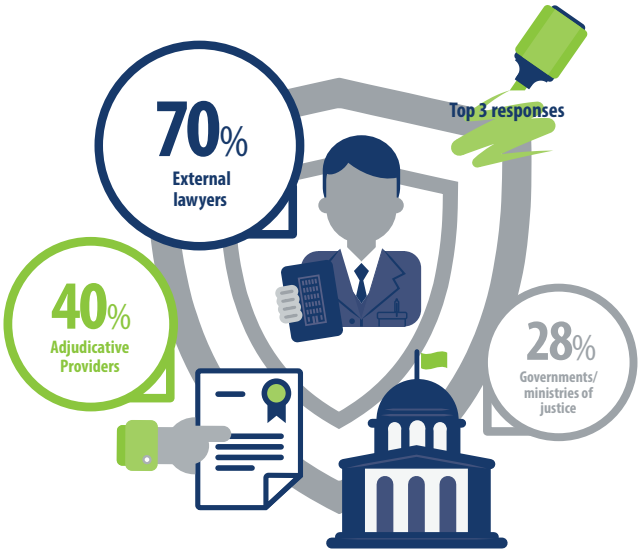
29%	Accreditation or certification systems
28%	Quality control and complaint mechanisms
5%	Third party funding rules
3%	Other

- There seems to be near universal recognition that before parties embark on adjudicative processes – which are typically expensive undertakings of significant duration – they should be at least encouraged (and potentially compelled) to explore less costly non-adjudicative options. This could be achieved through the development of pre-action protocols to be followed before court proceedings can be commenced (save where limitation or tolling periods are required or a particular remedy like an injunction is needed), or through arbitration clauses and rules encouraging parties to consider alternatives before a tribunal is constituted.
- Adjudicative processes also need to provide occasions and opportunities for the disputing parties to step away from the heat of the battle and engage with each other in a different manner (through mediation or another non-adjudicative process). This can be achieved through judicial case management or through changes to domestic rules of civil procedure or to arbitration rules where referrals to non-adjudicative processes exist on an opt-out basis.
- There seems to be a clear consensus that combining processes, or mixed-mode dispute resolution, is the way forward. The challenge is to find ways to achieve this efficiently and quickly, recognising that there will inevitably be resistance to change in many quarters. It is critical in this development that Parties are vocal in their demands and that Advisors, Providers of all types and Influencers are open-minded. Self-interest, familiarity and the comfort zone need to give way to a relentless focus on efficiency, supported by collaboration[5].

5 IMI, the College of Commercial Arbitrators (CCA) and the Straus Institute for Dispute Resolution at Pepperdine School of Law have responded to this data by initiating a tri-partite Mixed-Mode ADR taskforce, involving six different working groups. For more information about this taskforce or to join one of its working groups, see: http://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/.

4. In-house counsel are recognised as the agents to facilitate organisational change. External lawyers are the primary obstacles to change

Q3.4 Which stakeholders are likely to be the most resistant to change in commercial dispute resolution practice?

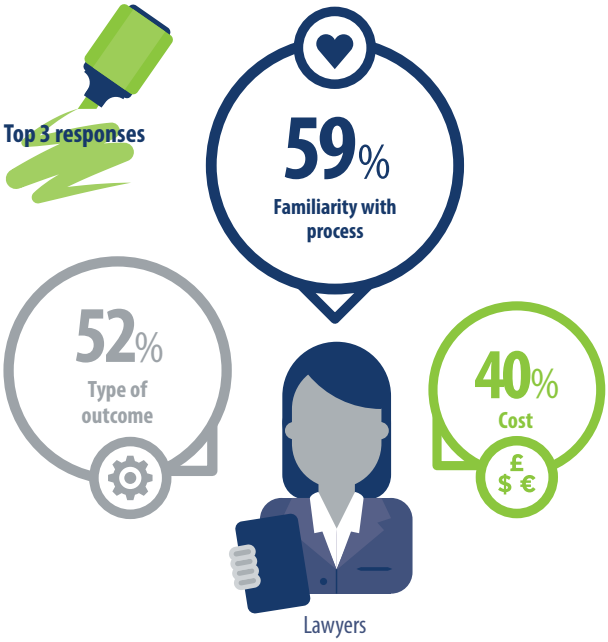


Additional responses

27%	In-house lawyers
25%	Parties
8%	Non-adjudicative Providers
1%	Other

- Recognising that the GPC data and experience throws down a challenge to all stakeholder groups to listen and respond, the voting data reveals some stark messages about the obstacles to and agents of change.
- All stakeholder groups identify Advisors (predominately private practice lawyers) as the primary obstacle to change in commercial dispute resolution practice. The lawyers showed the self-awareness to also identify themselves as the group most resistant to change.
- But why should that be the case? The Core Questions explored whether Advisors might be making recommendations for dispute resolution process choice based on the potential to earn (or not to earn) fees. But the voting data [Session 1, Q3 – see over] suggested that this was not a major factor – or at least it was far less significant than factors like the type of outcome required or familiarity with a dispute resolution process.

Q1.3 When lawyers (whether in-house or external) make recommendations to parties about procedural options for resolving commercial disputes, which of the following has the most influence?

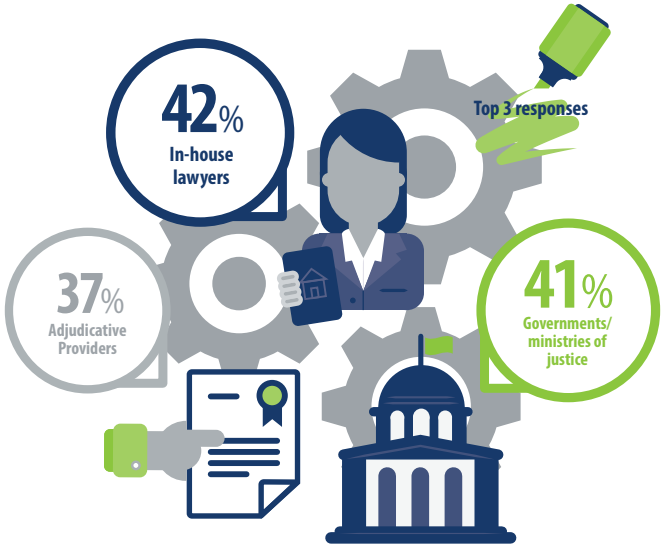


Additional responses

25%	Relationships
25%	Industry Practice
2%	Other

- Rather than rehearsing tired arguments about lawyers not promoting ADR for fear of its impact on their revenues, the data suggests that the underlying issue is more closely linked to something beyond training and education – familiarity. Have law schools and professional training regimes prepared today's dispute resolution lawyers adequately for the role that Parties wish them to perform? Are Providers and Influencers creating sufficient incentives for lawyers to gain real mediation or conciliation experience post qualifying? More fundamentally, what are the cultural expectations around what it is to be a lawyer, advocating for a client?
- This circles back to the discussion about the challenge to traditional notions of the zealous advocate, fighting her client's corner tenaciously. The 21st Century dispute resolution lawyer needs to deliver (or to work with others to deliver) what Parties want: dispute resolution process design, collaboration to pursue efficient outcomes, as well as traditional tough representation when called for.

Q3.5 Which stakeholders have the potential to be most influential in bringing about change in commercial dispute resolution practice?[6]



Additional responses

33% External lawyers
27% Parties
20% Non-adjudicative Providers
1% Other

- Who can facilitate and drive change? Parties are clear that they have a key role to play, identifying in-house lawyers as the group with the potential to be most influential in bringing about change in commercial dispute resolution practice. The stakeholder groups overall are less clear in identifying this opportunity, yet when asked what innovations and trends are going to have the most significant influence on the future of commercial dispute resolution, they are quick to recognise changes in corporate attitudes to conflict prevention.
- How might such changes be effected? An emphasis on the critical role of in-house counsel seems like a sound place to start and research from long before the GPC provides insights into how organisations can change, and the critical role in-house counsel have in driving that change[7].
- Of course many parties to commercial disputes will not have the benefit of in-house legal resources, so they will need to rely on a new generation of lawyers to assist them, trained in the right skills as law school syllabuses evolve. With the lawyers of generation Y, millennials and generation Z growing into positions of influence within corporates and throughout the dispute resolution community, the concept of collaboration in a way that would have been unthinkable to litigators of a generation ago may already be an accessible reality to a community grown up on crowd-funded solutions and sharing through social media.
- For example, traditional notions of confidentiality that underpinned arbitration and ADR processes may have far less significance for generations that have grown up professionally and personally with a technology-driven information-sharing culture. The willingness to engage in formal dispute resolution processes over periods of years (particularly in jurisdictions based on extensive discovery/disclosure) may be challenged by decision-makers who are used to proceeding with business and life at an ever faster pace.

6 Based on the votes of Parties only.

7 "The Inside Track – How blue chips are using ADR", Herbert Smith (legacy), 2007, available at http://hsfnotes.com/adr/key-adr-publications.

"The GPC Series was a fantastic opportunity for us to gather truly global perspectives on what changes need to be made to improve dispute resolution. One of conclusions is that while the need for change is recognised, most people think someone else has to make the change happen. So who is going to make the change happen?

In my view, In-house counsel is best placed to facilitate this change, as they own the problem. Disputes are generally not an academic exercise but are about protecting corporate value. In-house counsel has the right to demand change as custodian of this value and they also have the ability to drive change as they hold the purse strings. They represent a key link between the legal world and the commercial one, balancing the need for effective dispute resolution with the hard-earned experience of how best to get results.

As in-house counsel rethink how they resolve disputes, there is an opportunity to embrace the acceptance that collaboration brings results. That means drawing on the skills, experience and perspectives of different people to design optimal solutions. It also means considering alternative resolution approaches rather than the traditional adversarial one.

Our expectation is that a new generation of lawyers who have grown up in an information sharing culture will embrace such an approach and that dispute resolution will become more cost effective, flexible, faster and fairer."

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Regional Differences

The cumulative global voting data on the Core Questions has already revealed some surprising insights and perspectives. However, the great potential of the GPC has always been to dig deeper into the data and seek to understand whether views are genuinely homogeneous on a global basis or, as intuition might suggest, subject to regional variations.

We identified some regional groupings to see if any trends emerged. Our initial data analysis shows some fascinating differences which provides the platform for more detailed investigations.

The **regional groupings** analysed were:

North America

USA (Baltimore, Austin, Los Angeles, Miami, New York, San Francisco) and Canada (Toronto)

Asia

Singapore, Hong Kong, Thailand (Bangkok) and India (Chandigarh)

UK

London[7]

Oceania

Australia (Sydney) and New Zealand (Auckland)

Continental Europe

France (Paris), Germany (Berlin), Italy (Florence), Netherlands (Amsterdam), Poland (Warsaw), Spain (Barcelona and Madrid) and Switzerland (Geneva)

Africa/ Middle East

Nigeria (Lagos), South Africa (Johannesburg), UAE (Dubai)

Latin America

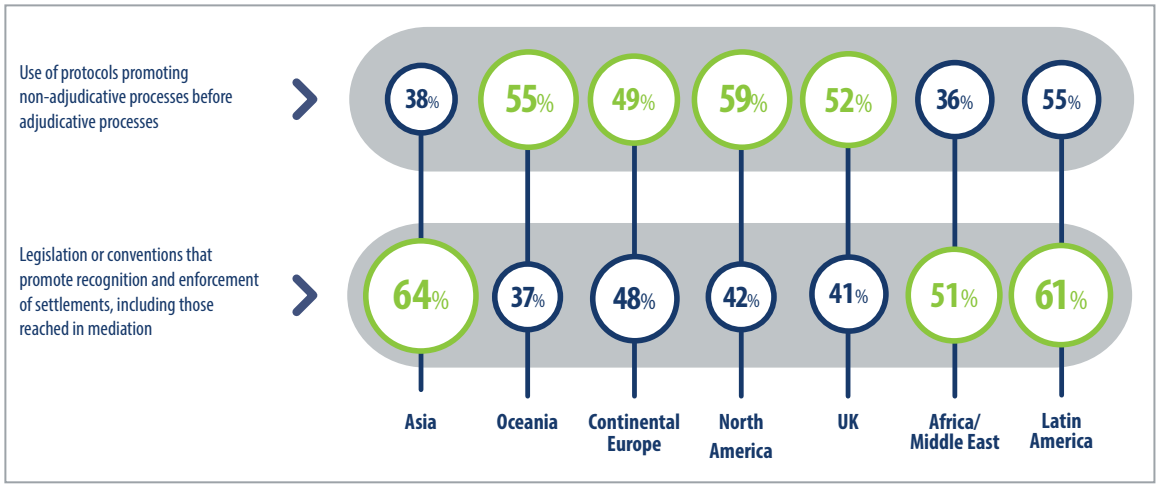
Brazil (Sao Paulo), Guatemala (Guatemala City), Mexico (Mexico City)

7 The UK sits in a unique position as a pro-ADR common law jurisdiction yet (currently) part of the EU and exposed to civil law influences.

1. Desire for increased regulation in Asia

Delegates were asked about the areas which would most improve commercial dispute resolution. Globally, the two top choices (with virtually identically weighted votes) were (i) the use of legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation and (ii) the use of protocols promoting non-adjudicative processes before adjudicative processes.

Q3.3 Which of the following areas would most improve commercial dispute resolution?



- However, when the voting data was segmented along regional lines, some significant differences emerged. The votes in Asia were massively concentrated in favour of legislation or conventions, scoring far higher than the use of protocols promoting non-adjudicative processes. Africa/Middle East and Latin America seemed to also prefer legislation to promote enforcement, but less strikingly. The remaining regions show a starkly different picture, with the use of protocols strongly preferred to legislation (save in Continental Europe, where the votes were about equal).
- This triggers some interesting questions, not least because the near universal experience in practice is that agreements reached at mediation are only exceptionally not performed. If that is the case, why would Asian delegates be in favour of legislation and the need for enforcement of mediated settlements? A possible answer is that the data reveals more about attitudes to ADR, particularly non-adjudicative processes, in Asia, than it does about issues of enforcement. While there have been significant initiatives to promote ADR usage in the region with Hong Kong's Practice Direction 31 of 2010, and major investments in Singapore to develop domestic and international mediation bodies, there may be an underlying question about whether non-adjudicative ADR like mediation has yet become a sufficiently robust way of resolving disputes. That enforcement of mediated settlement agreements could help optically to evidence the status and value of mediation, is perhaps the key point.

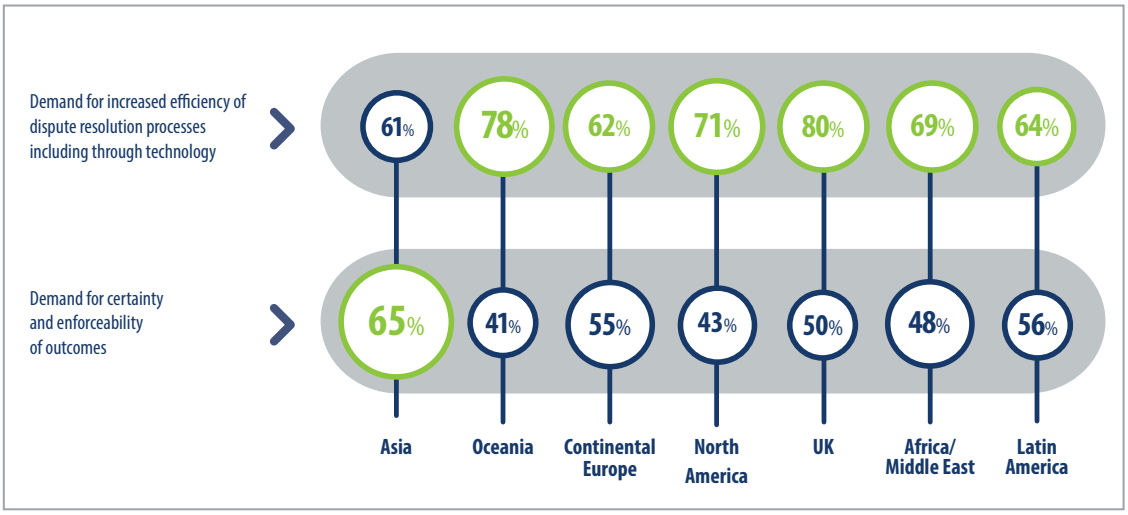
8 ADR in Asia Pacific series (Herbert Smith Freehills 2015-2017) https://www.herbertsmithfreehills.com/latest-thinking/adr-in-asia-pacific-spotlight-series. These explore, through interviews and market surveys, the developing trends in Hong Kong, Singapore and Indonesia.

2. Is efficiency the priority everywhere?

Delegates were asked which of a range of underlying demands will have the most significant impact on future policy-making in commercial dispute resolution.

- On the cumulative global results, there was a clear winner – the demand for increased efficiency of dispute resolution processes including through technology. Yet when the results were sorted regionally, a major difference of priorities emerged. All regions except Asia chose efficiency as their top demand and by a significant margin. This included the common law regions (UK, North America, Oceania) and the civil law region of Continental Europe.
- In Asia, the leading choice was again the demand for certainty and enforceability of outcomes. Is this a reflection of the regional desire for legislation and a convention on enforcement of settlements, identified above? Or is the demand for legislation and a convention a reflection of a deeper regional (and perhaps cultural) preference for a dispute resolution process that gives a clear answer? Do negotiation-based processes like mediation pose particular challenges in Asia where decision-making hierarchies and the desire not to lose 'face' make it culturally and practically more difficult to engage with the flexibility of mediation?
- In reality, consensual processes like mediation and conciliation are commonplace in civil law Asian countries, and they are supported in Asia's key common law jurisdictions too. The premium on enforceability may go more to the credibility and robustness of the process. UNCITRAL's proposed convention on the enforceability of mediated settlement agreements will, it seems, be welcomed in Asia. Systems that recognise outcomes internationally reassure parties embroiled in cross-border disputes that the outcome will be simple to enforce. This is being put in ever sharper focus as China's Belt and Road Initiative gathers pace, where one proposal on the table is for disputes arising under the initiative to be mediated first, before proceeding to arbitration.

Q4.4 Which of the following will have the most significant impact on future policy-making in commercial dispute resolution?



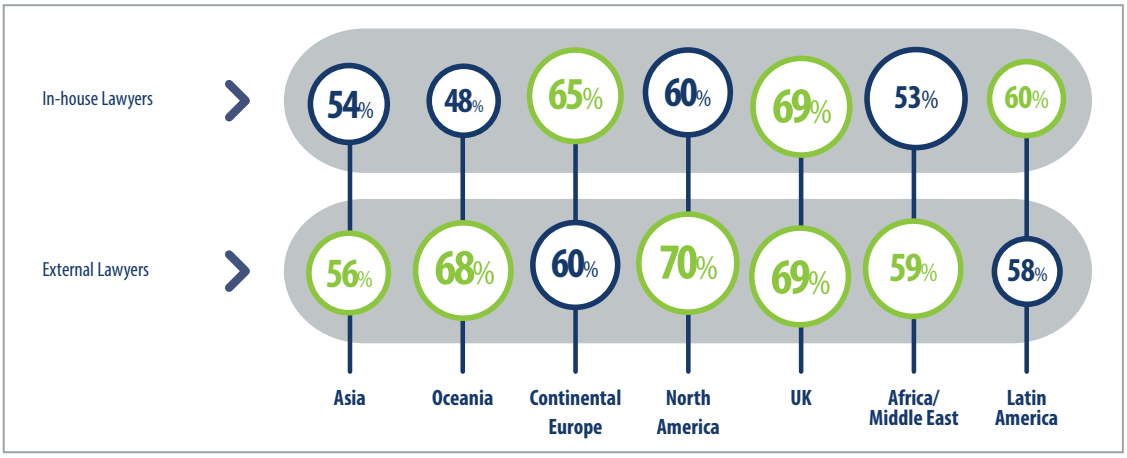
3. Awareness and Attitudes in Continental Europe

A regional analysis of a series of related questions indicate an interesting potential divergence in attitudes to conflict resolution in Continental Europe as compared with other regions.

- Delegates in Continental Europe identified that the stakeholders primarily responsible for ensuring parties involved in commercial disputes understand their dispute resolution process options are in-house lawyers.

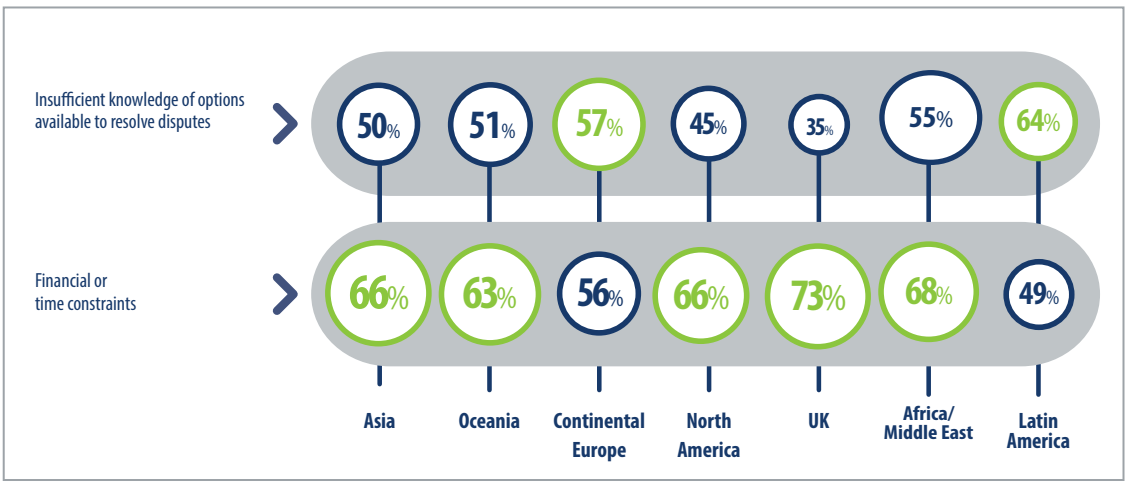
In all other regions, save for Latin America which is also a civil law region, delegates identified external lawyers as equally or more responsible for this critical role.

Q2.4 Who is primarily responsible for ensuring parties involved in commercial disputes understand their process options, and the possible consequences of each process before deciding which one to use?



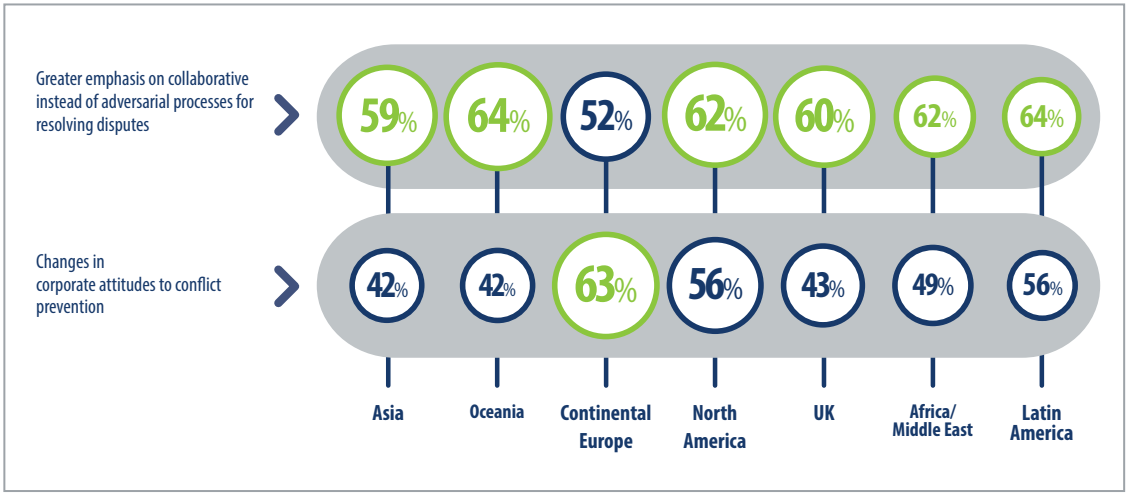
- Building on this, when in **Session 3, Q1** delegates were asked about the main challenges or obstacles parties face when seeking to resolve commercial disputes, the delegates in Continental Europe and Latin America again stood out. They identified insufficient knowledge of options available to resolve disputes as the most significant challenge, where delegates in all other regions were clear that financial or time constraints were the main obstacles. This may reflect the fact that adjudicative dispute resolution in the public courts of civil law jurisdictions is relatively less expensive than in many other jurisdictions (certainly common law jurisdictions).

Q3.1 What are the main obstacles or challenges parties face when seeking to resolve commercial disputes?



- When the delegate responses to **Session 4, Q5** are analysed, (what innovation/trends are going to have the most significant influence on the future of commercial dispute resolution?) the Continental European delegates again stand out. In all regions other than Continental Europe the message is clear: a greater emphasis on collaboration rather than adversarial processes is required. In Continental Europe, however, by far the most significant innovation is identified as changes in corporate attitudes to conflict prevention. The fact that Latin America voted differently to Continental Europe suggests that this is not a civil law versus common law issue.

Q4.5 What innovations/trends are going to have the most significant influence on the future of commercial dispute resolution?



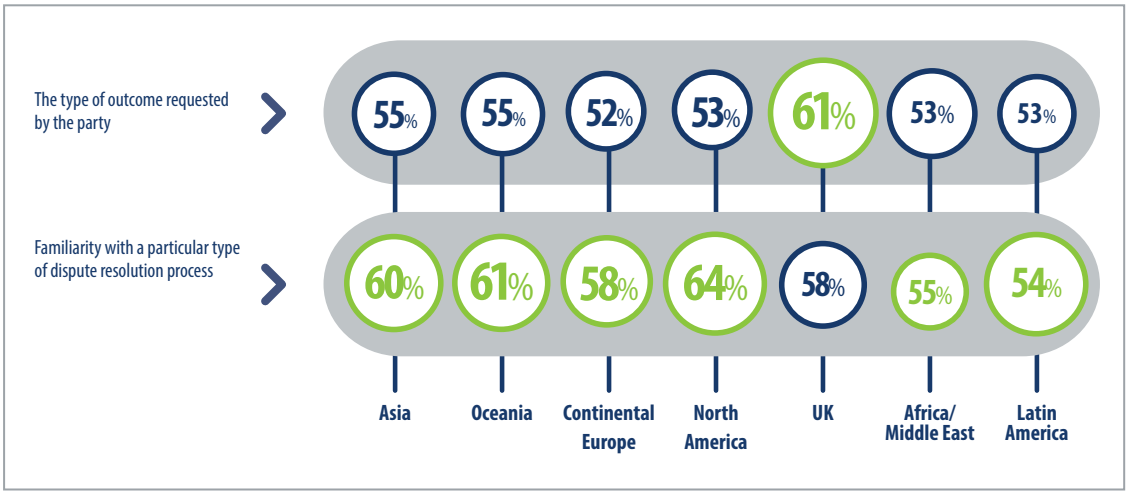
- Pulling these points together, a picture emerges of Continental Europe marching to a different beat to other regions. It seems to be looking for in-house lawyers to drive change in corporate attitudes to conflict prevention. Yet these lawyers are simultaneously battling with a lack of knowledge of dispute resolution process options to effect that change. All the while the global drive for more collaboration seems to be at its weakest in Continental Europe. The experience of relatively cheap (but often slow) litigation in the public courts of civil law jurisdictions in Continental Europe may have driven delegates away from voting for efficiency and collaboration. It may also be a reflection on the different weight given to legal departments in some civil law jurisdictions, where greater emphasis is placed on the difference between jurists and external lawyers.

Perspectives in the UK – the legacy of the Woolf Reforms?

A series of questions showed that the delegates at the GPC series finale in London in July 2017 held some significantly progressive views. It may be that as the 20th anniversary of Lord Woolf's sweeping reforms to the English civil justice system arrives, the effects of a generation of Parties brought up with ADR embedded in the fabric of commercial dispute resolution are in evidence.

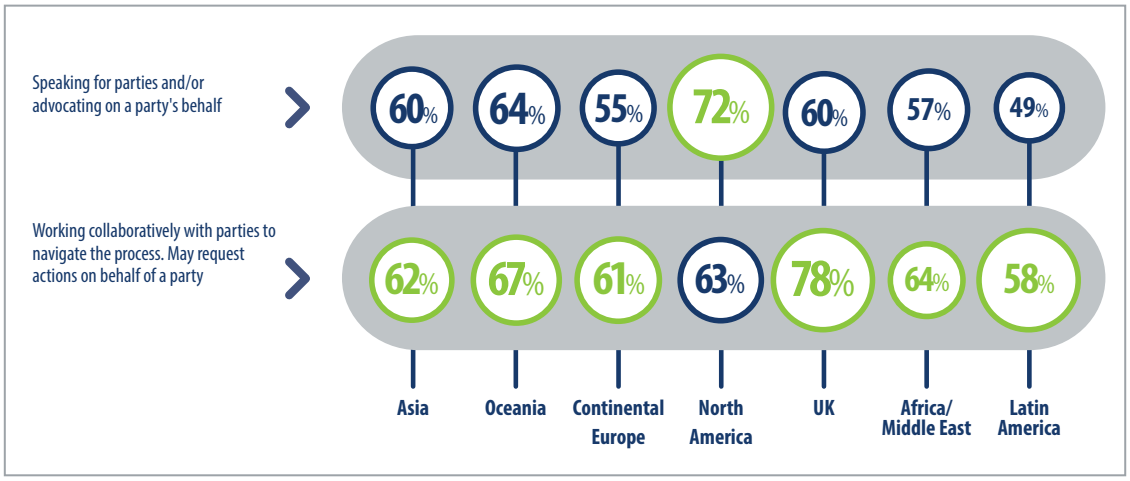
- When lawyers recommend dispute resolution procedural options to parties [Session 1, Q3], London delegates found the type of outcome requested by the party most influential, unlike all other regions which reported familiarity with a particular type of process as the most influential factor.

Q1.3 When lawyers (whether in-house or external) make recommendations to parties about procedural options for resolving commercial disputes, which of the following has the most influence?



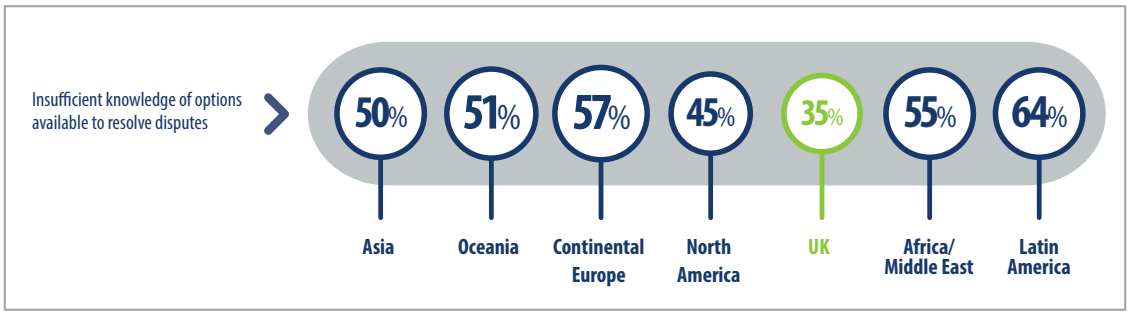
- Delegates in London were by far the clearest in identifying that the parties to commercial disputes typically want lawyers to work collaboratively with parties to navigate the dispute resolution process [Session 1, Q5]. In other regions delegates viewed the role of lawyers as advocates as being of broadly equivalent significance, except for North America where the tradition of zealous advocacy on behalf of clients was readily apparent in the preference for lawyers advocating on behalf of clients.

Q1.5 What role do parties involved in commercial disputes typically want lawyers (i.e., in-house or external lawyers) to take in the dispute resolution process?



- When delegates were asked about the main obstacles or challenges parties face when seeking to resolve commercial disputes, insufficient knowledge of the options available was far lower in the UK than in other regions

Q3.1 What are the main obstacles or challenges parties face when seeking to resolve commercial disputes?

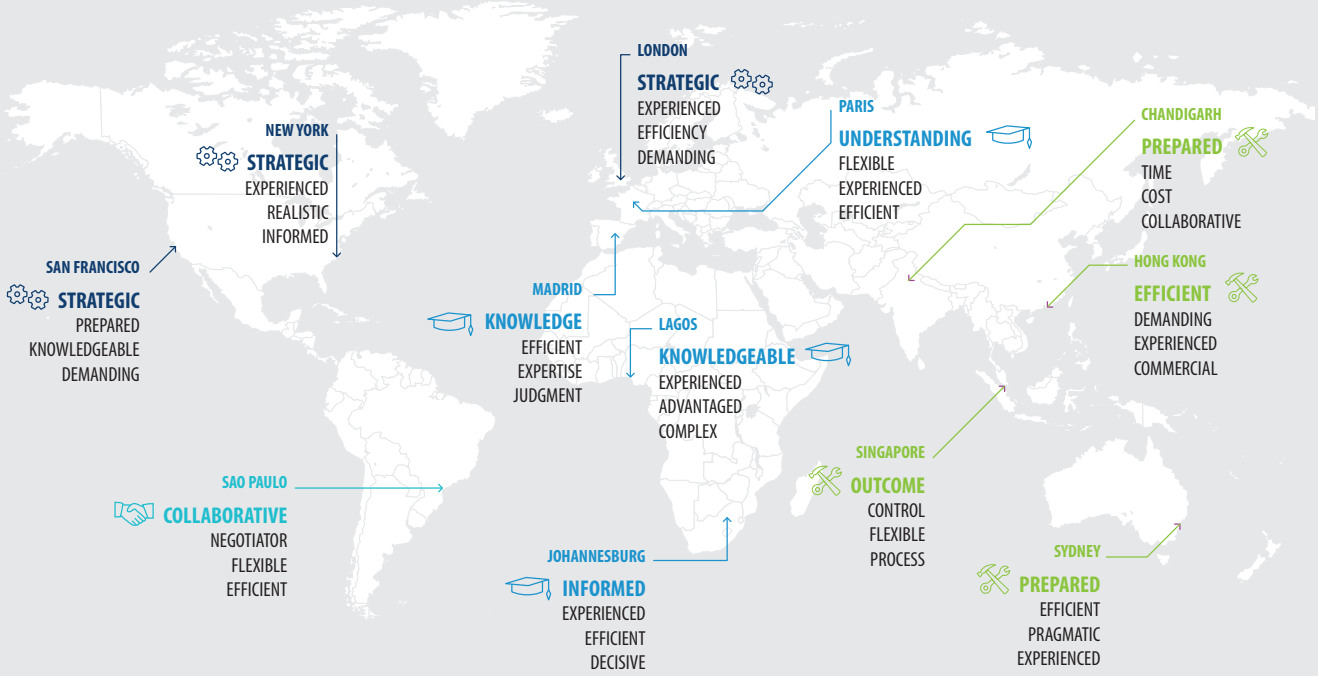


- While the Woolf Reforms have been widely celebrated as an enlightened step forward in the administration of civil justice, it seems the GPC data may be providing some real evidence of how changes in civil procedure to promote ADR can bring about progressive attitudes among a generation of Parties.

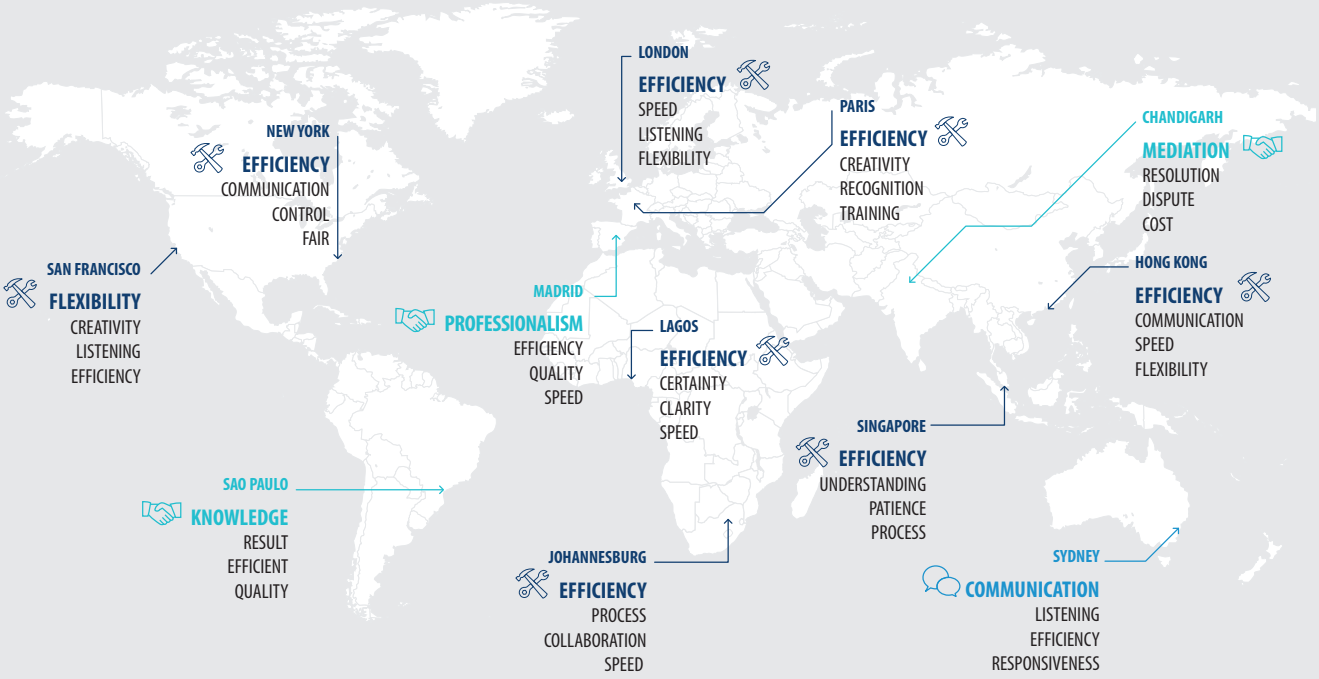
Word Clouds from around the Globe

An analysis of the word clouds generated at selected GPC events gives a sense of the different priorities and moods of the delegates.

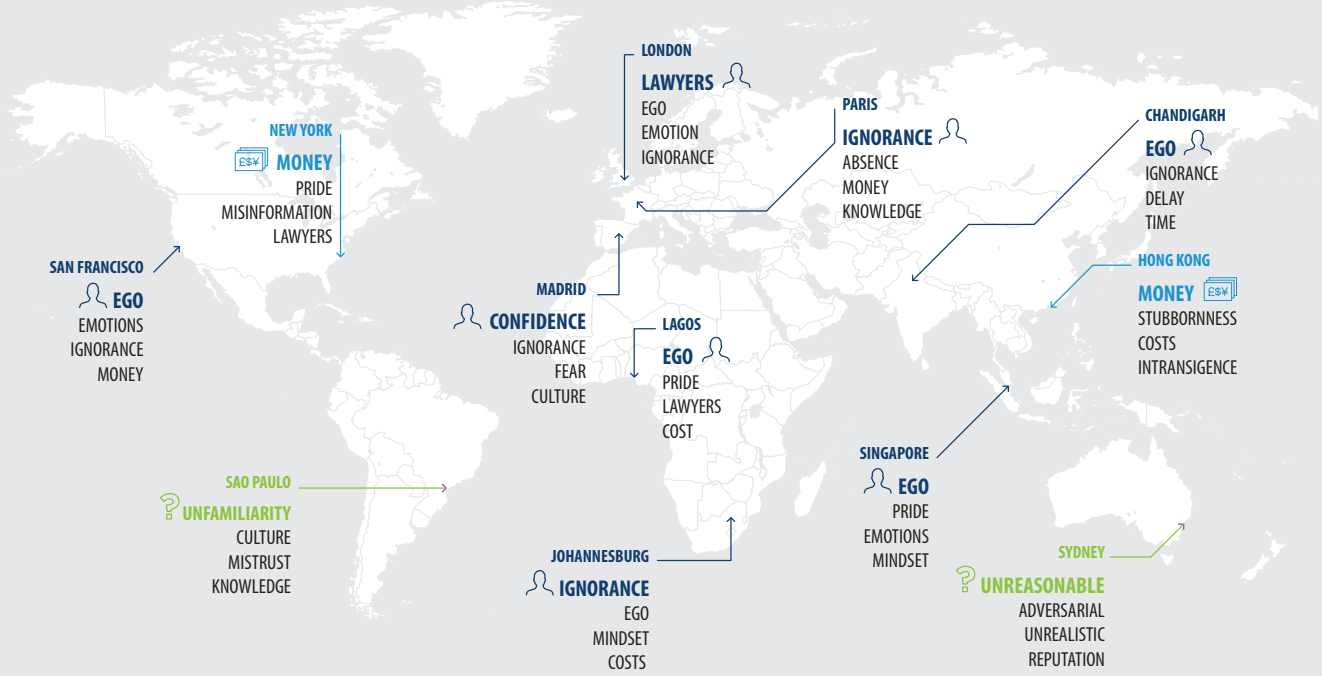
Session 1: What words would you use to describe a sophisticated commercial party?



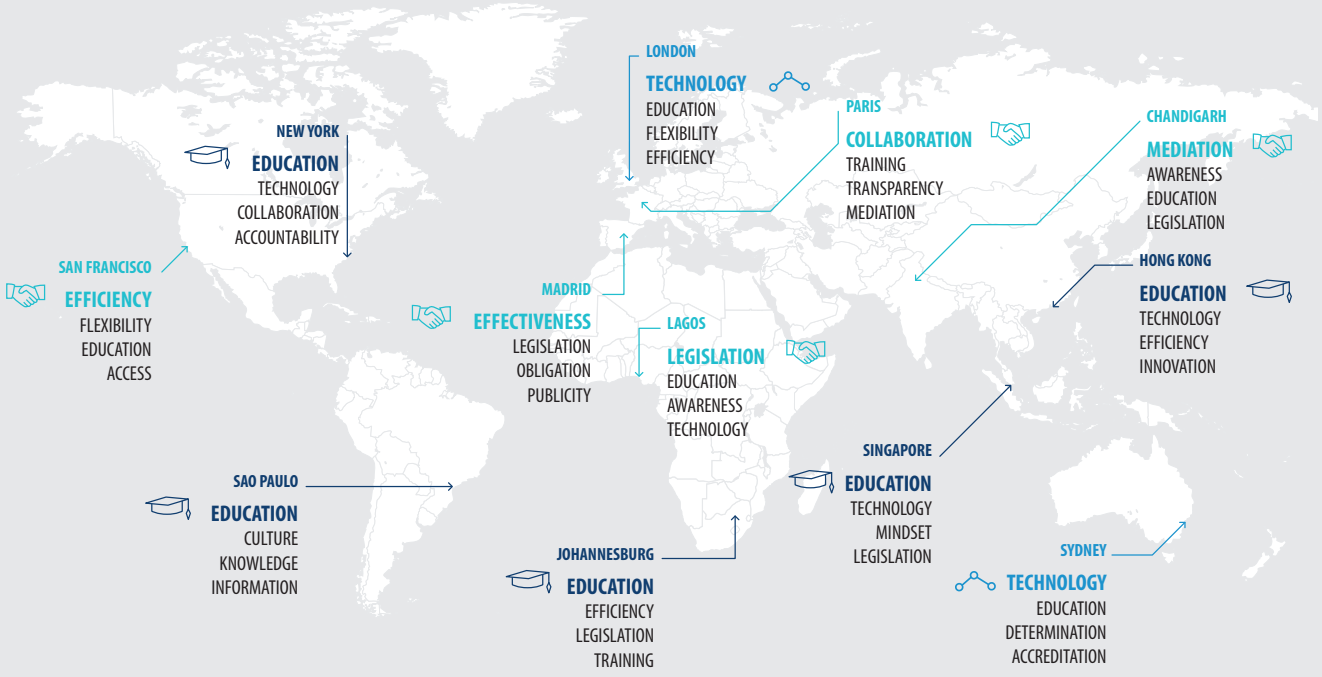
Session 2: What words would you use to describe what can be done to exceed parties' expectations?



Session 3: What words would you use to describe the most common impediments that keep parties from resolving their disputes?



Session 4: What words would you use to describe the changes to focus on in the future?



Appendix 1

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