Local Solutions.
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Conna A. Weiner, Esq., FCIArb JAMS Mediator, Arbitrator and Referee/Special Master
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Conna A. Weiner, Esq., FCIArb brings to her U.S. and international mediation and arbitration practice a unique combination of litigation, transactional and in-house experience after roles with internationally known outside counsel and multinational life sciences (pharmaceuticals, medical device, diagnostics, vaccines and other therapeutics) and health care companies. She has extensive experience mediating and arbitrating (in-person and virtually) complex general commercial cases in the U.S. and internationally, as well as franchise and employment matters, and serves as a sole arbitrator, neutral party-appointed arbitrator on three member panels and as the chair of arbitration tribunals with many of the major ADR providers. Her experience in the pharmaceutical, medical device, diagnostic and other therapeutics industries is particularly unique and sought after in connection with dispute resolution clause requirements requiring therapeutics or related industry experience.

Ms. Weiner has special expertise in the full range of unique, complex legal issues and contractual arrangements prevalent in life sciences (such as intellectual property, licensing and acquisitions, supply agreements and the research, development and commercialization of pharmaceuticals, medical devices and diagnostics), health care (both payors and providers) and other technology arenas. She is a Fellow in the Chartered Institute of Arbitrators and holds a number of leadership positions in legal and dispute resolution organizations.

Ms. Weiner began her career as a general commercial litigator at Paul, Weiss, Rifkind, Wharton & Garrison. She then moved on to leadership roles in-house with multinational firms such as Novartis, where, in addition to all of the work required of an in-house corporate generalist, she gained hands-on experience in the full range of unique legal issues facing life sciences and healthcare companies, including every phase of discovery, research, development and commercialization. She has worked for branded and generic, human and animal pharmaceutical, vaccine and device manufacturers and has collaborated extensively with their business partners, including providers (such as hospitals, physicians, academic medical centers and universities), payors (such as health plans/insurers and managed care entities), contract manufacturers and suppliers, software companies, clinical research organizations and state and federal governmental entities. Available worldwide to resolve disputes in-person or remotely

Bar Admissions

- New York, 1987
- Massachusetts, 2013
- U.S. District Court, Eastern and Southern Districts of New York, 1989

Background and Education

- Independent Mediator, Arbitrator and Consultant, 2013–2018
- General Counsel, North America, Mylan, Inc., 2010–2012
- Vice President and Lead Counsel, Shire Human Genetics Therapy, 2009–2010
- U.S. and global roles, Novartis, 1993–2009
    - Head of Litigation, Ex-Americas, 2009
    - Global General Counsel and Global Compliance Officer, Novartis Animal Health, Inc., 2007-2008
    - Vice President, Legal, Novartis Pharmaceuticals Corporation, 2004–2007; specific roles included U.S. Legal Head of Transplant, U.S. Legal Head of Ophthalmics, Legal Head of U.S. Managed Markets and work in oncology and epilepsy
    - Executive Director and Section Head, 1996–2003
- Litigation Associate, Paul, Weiss, Rifkind, Wharton & Garrison, 1987–1993
- J.D., University of Chicago Law School, 1986
- B.A., With Highest Honors, Oberlin College, 1983

Hon. Garrett E. Brown, Jr. (Ret.)

Retired Chief Judge Garrett E. Brown, Jr. joined JAMS in 2012, after serving more than a quarter-century on the bench of the United States District Court for the District of New Jersey — including six years as Chief Judge. As a JAMS Neutral, Judge Brown facilitates prompt, efficient, and economical resolution of commercial disputes through mediation, arbitration, special mastership and neutral analysis.

Before taking the federal bench in 1985, Judge Brown tried criminal and civil cases to jury verdicts as both an Assistant United States Attorney in the District of New Jersey, and as a litigator in private practice. As a United States District Judge, he presided over criminal and civil cases, which collectively spanned the breadth of federal subject-matter jurisdiction. Chief Judge Brown is renowned for his expertise in complex commercial litigation, particularly within the realm of intellectual property, and notably pharmaceutical patents.

During his service as Chief Judge, in addition to leading a large metropolitan court with more than three-dozen judicial officers, Judge Brown maintained a full civil caseload, assisted other judges with complex cases, and tried numerous cases per year while settling many, many more.

Chief Judge Brown is a graduate of Lafayette College and Duke University School of Law.

Honorable Faith S. Hochberg, Principal, HochbergADR
United States District Judge (ret.)
www.JudgeHochberg.com

Judge Hochberg served many years as a federal judge in the District of New Jersey. In 2015, she founded Hochberg ADR [www.JudgeHochberg.com],to serve as a Mediator, Arbitrator, Special Master, Mock Court Judge and Monitor in complex U.S. and international litigation.

Judge Hochberg has served as a court-appointed Monitor in international cybersecurity cases, and is currently serving as a court-appointed Special Master in many cases in both federal and state courts, including patent, antitrust, trade secrets and multi-district litigation (MDL cases).

Judge Hochberg is a distinguished neutral admitted to the rosters of the AAA, ICDR, ICC, CPR, WIPO and FedArb; she is a Fellow of the College of Commercial Arbitrators and a Fellow of the Chartered Institute of Arbitrators [FCIArb]. Her expertise broadly spans many areas of law: patent and other intellectual property litigation and licensing; class actions; corporate contract; insurance; banking & financial institutions; securities; antitrust; trade secrets; pharmaceutical development and licensing; merger and acquisition transactions; partnership disputes, and many more.

Judge Hochberg previously served as The United States Attorney for the District of New Jersey, and prior to that, she was Deputy Assistant Secretary of the U.S. Treasury Department. Judge Hochberg has also spent many years in the private practice of law; as Legal Assistant to the Chairman of the SEC; and as a top official in a bank regulatory agency.

In her community, Judge Hochberg serves on the Advisory Board of the Innovation Center for Law & Technology, at New York Law School. She takes pride in being inducted into the Nutley, NJ Hall of Fame, her original home town.

Judge Hochberg graduated from Harvard Law School, *magna cum laude*, where she was an Editor of the Harvard Law Review. She earned a B.A., *summa cum laude*, from Tufts University, where she was elected to Phi Beta Kappa. She also attended the London School of Economics.

In her few moments of spare time, Judge Hochberg is an artist whose paintings and wearable art have been shown in galleries, boutiques, and museum stores.

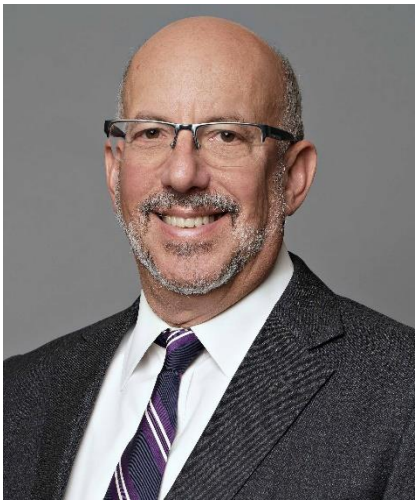
Patrick J. Murphy III, Esq.

Mr. Murphy is a JAMS Neutral based in New York, NY. Widely regarded as a talented and efficient legal writer, Mr. Murphy has garnered a broad tapestry of experience in the contexts of arbitration, mediation, and special mastership since becoming a full-time practitioner in the ADR field nearly a decade ago. Mr. Murphy has been exclusively affiliated with JAMS since 2015, and was invited to join JAMS's New York Panel as a Neutral in 2021.

With respect to arbitration — his primary focus — Mr. Murphy has collaborated with industry-renowned arbitrators in hundreds of arbitrations, and has heavily contributed to scores of reasoned arbitration awards, as well as countless intermediate decisions. Many of those arbitrations involved complex issues related to intellectual property and patent rights. Mr. Murphy has gained intimate familiarity with the procedural rules of not only JAMS, but also the International Chamber of Commerce, the American Arbitration Association, the International Centre for Dispute Resolution, and the CPR Institute. With respect to mediation, Mr. Murphy has helped facilitate the successful resolution of numerous complex commercial disputes for aggregate monetary consideration in the hundreds-of-millions. The matters that Mr. Murphy helped resolve as co-mediator have often sounded in intellectual property, prominently including pharmaceutical licensing disputes and pending litigation under the Hatch-Waxman Act. Mr. Murphy has also contributed to the successful completion of court-appointed special masterships that involved pharmaceutical, software copyright, and Lanham Act cases pending in federal court.

Prior to his career in ADR, Mr. Murphy served in various capacities at the United States District Court for the District of New Jersey, including more than three years as the senior law clerk to then-Chief Judge Garrett E. Brown, Jr. (Ret.), now a JAMS Neutral. Thereafter, Mr. Murphy joined a New Jersey-based law firm where his practice focused on complex federal litigation typically involving intellectual property issues. Mr. Murphy is a graduate of Washington & Lee University and Seton Hall University School of Law. He is admitted to the bars of New York, New Jersey, and the Supreme Court of the United States. On a personal level, Mr. Murphy is an avid sailor, fisherman, and amateur naval historian. He is a lifelong resident of Monmouth County, New Jersey.

Mr. Murphy is available for retention through JAMS as an arbitrator, mediator, special master, or for neutral case evaluation. He can be contacted directly at PMurphy@jamsadr.com, or via his JAMS Case Manager Christine Persaud at CPersuad@jamsadr.com.



Steve is an arbitrator and mediator based in JAMS' Boston office. For more than 40 years, Steve has helped parties resolve disputes relating to technology and life sciences, and particularly, those arising from patents, or license and collaboration agreements. Steve's practice is international -- Steve is Chair of the ADR Committee of AIPPI, the largest international IP law society, and is on the Tech List of the Silicon Valley Arbitration & Mediation Center. He has arbitrated matters throughout the US, as well as in France, Germany, Switzerland and the UK.

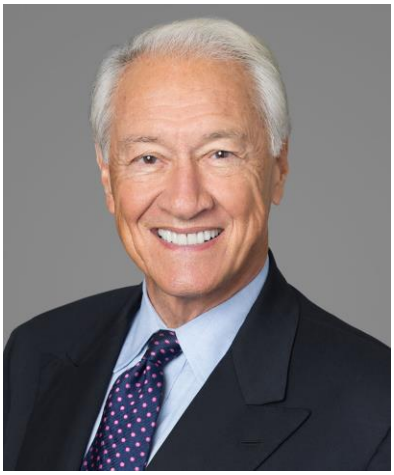
Steve is typically called on to help resolve matters involving complex state-of-the-art technology. By way of example, Steve has handled matters involving gene-based diagnostic tests and therapeutic treatments; medical devices; satellite and wireless communication networks; lithium-ion battery chemistry; computer software and artificial intelligence; and high-temperature superconductors, consumer electronics and semiconductor devices.

Steve joined JAMS in 2020, after a career in private practice (and 35 years on AAA and ICDR panels), including 17 years at Proskauer, where he co-chaired its IP Litigation practice and its 200-person Litigation Department. While in practice, Chambers annually ranked Steve as one of Boston's top-five IP trial lawyers; IAM named Steve an IP Global Leader; and Super Lawyers thrice named Steve one of Boston's Top 100 lawyers.

Until recently, Steve taught MIT's undergraduate course on intellectual property, and Boston University Law School's IP trial advocacy class. Steve currently is on the Board of, and was Counselor (President) to, the Boston IP Inn of Court.

Steve earned undergraduate and graduate degrees from MIT in electrical engineering and computer science, with a biomedical focus. He started his legal career as a law clerk to Judge Philip Nichols, Jr., at the Federal Circuit Court of Appeals in Washington, D.C.

Steve is an IFR-rated pilot.



Tom Creel was head of the Intellectual Property Litigation Practice Area as a partner at the Goodwin law firm and is a former President of the NYIPLA. After leaving law private practice, he joined JAMS as an arbitrator and mediator specializing in intellectual property and technology disputes. Mr. Creel is widely recognized for his expertise in resolving complex patent disputes and has handled dozens of proceedings concerning a broad range of technologies, including biotechnology, computer technology, medical devices, electronics and chemistry.

He also co-taught the basic patent and trade secret course at Columbia University Law School for almost 20 years.

He is the author of the PLI treatise “Patent Claim Construction and Markman Hearings”, which he updates yearly, and is the editor of the book ““Guide to Patent Arbitration” published by the Bureau of National Affairs.

He graduated with a B.S. degree from the University of Kansas and a law degree from the University of Michigan. He is a member of the U.S. Patent & Trademark Office bar.

New York Intellectual Property Law Association
One-Day Patent CLE Seminar
November 9, 2022

Panel Discussion Overview: "From the Arbitrator's Perspective: A Discussion of Best Practices in IP/Patent Arbitration"

Moderator:
Patrick J. Murphy III, Esq.

Panelists:
Hon. Garrett E. Brown, Jr. (Ret.)
Hon. Faith S. Hochberg (Ret.)
Steven M. Bauer, Esq.
Thomas L. Creel, Esq.
Conna A. Weiner, Esq.

I. Introduction

- Brief introduction of the Panelists, including biographical highlights, current professional affiliations, and patent-specific credentials.
- Explanation of the Panel's objective: to discuss best practices in the arbitration of patent disputes, with possible reference to practices that are best avoided.

II. Discussion

- Drafting the Arbitration Agreement/Clause

    - By negotiating an arbitration agreement or contractual arbitration clause (most often prior to the existence of any dispute), parties have the ability to determine myriad critical elements of how any eventual dispute will be resolved, such as: (i) selection of the arbitrator(s) (e.g., sole or panel, independent or party appointed, requisite professional credentials or experience); (ii) what ADR organization, if any, will administer the arbitration (e.g., JAMS, the American Arbitration Association, the International Centre for Dispute Resolution, the International Chamber of Commerce, CPR Institute); (iii) what procedural rules and substantive law will be applied; (iv) the arbitral venue or forum; perhaps (v) the precise scope of issues the arbitrator will resolve, and relief the arbitrator is empowered to grant; or (vi) conversely, excluding the arbitrator from considering addressing/resolving certain issues; and perhaps (vii) election of post-arbitration award review procedures (i.e., affirmative election of the ADR organization's internal appellate processes, if any).

        - Critical importance of forethought and circumspection when drafting agreements and/or contractual arbitration clauses – avoiding use of stock language/clauses in favor of customization.

    - Critical importance of thorough due diligence when considering sole arbitrators and/or arbitration panelists, as well as the background/technical expertise of arbitrators in the context of patent disputes.

- Specifically consider: 35 U.S.C. Section 294, that authorizes voluntary arbitration of patent disputes.

- Further consider: (i) the existence of different ADR organizations; (ii) the adoption of different procedural rules by those ADR organizations, such as generalized commercial arbitration rules, streamlined/expedited arbitration rules, and specialized arbitration rules for specific types of disputes (e.g., international); and (iii) the potential advantages of selecting specific rules and/or expedited rules based upon the nature of a potential dispute, and the presumptively mutual desire to achieve a prompt and efficient resolution thereof.

- See the following appended materials:

    - Mary E. Barkus. Dispute Resolution Provisions in Life Sciences Agreements, 75 Dispute Resolution J. 1 (2020).
    - Richard Chernick. First Things First: Design the Arbitration Process You Want, JAMS.
    - JAMS Arbitration Clause Workbook. 2022, jamsadr.com/clauses/
    - ICC Model Arbitration Clauses. 2022, https://iccwbo.org/dispute-resolution-services/arbitration/
    - CPR Model ADR Clauses. June, 2021, cpradr.org/resource-center/model-clauses/

- Confidentiality in Patent Arbitration

    - Parties generally can agree to maintain confidentiality in arbitration, including relative to: (i) the nature of the dispute itself; (ii) their arguments; (iii) discovery and evidence; (iv) proceedings before the arbitrator, whether in the context of motion practice or during the arbitration hearing; and (v) the outcome of the arbitration, including any monetary or injunctive relief granted.

    - Contrast with: (i) the inherently public nature of litigation in federal court; (ii) the parties' limited ability to seal elements of the record, generally following time-consuming motion practice; and (iii) the virtually inevitable publication of decisions, jury verdicts, and relief granted.

    - However, specifically consider: the reporting requirements of 35 U.S.C. § 294(d) with respect to arbitration awards that impact upon patents.

- See the following appended materials:

    - 35 U.S.C. Section 294
    - David Allgeyer. Commercial Arbitrations: Private, But Not Always Secret, College of Commercial Arbitrators, November 30, 2021, https://www.ccarbitrators.org/articles-by-fellows/commercial-arbitrations-private-but-not-always-secret/

- See also:

    - Thomas L. Creel and Hon. Elizabeth D. Laporte (Ret.). "JAMS Neutrals Discuss the Advantages of ADR in Resolving IP Disputes." JAMS, October 5, 2022, jamsadr.com/blog/2022/podcast-jams-neutrals-discuss-the-advantages-of-adr-in-resolving-ip-disputes
    - Steven M. Bauer. "The Role of ADR in Resolving IP Disputes in the Life Sciences Industry." JAMS, March 31, 2022, jamsadr.com/blog/2022/podcast-the-role-of-adr-in-resolving-ip-disputes-in-the-life-sciences-industry

- Discovery/Pre-Hearing Information Exchange

    - Discovery predominates patent litigation in federal court, and often represents the lengthiest and costliest discrete component of the litigation continuum. Arbitration can reduce both time and expense by, among other things: (i) utilizing procedural rules that limit the scope of discovery, establish firm deadlines, and vest the arbitrator with discretionary authority to limit discovery; and/or (ii) the parties' preemptive agreement to limit the scope of discovery, either in their arbitration agreement or contractual clauses, or by a negotiated agreement after an arbitration has commenced (e.g., through a circumscribed discovery plan).

    - A critical and sometimes complicated issue in arbitration is non-party discovery: specifically, the power of an arbitrator to compel non-parties to produce documents and/or testify in an arbitration. From a practice perspective, the key distinction is whether non-party discovery is sought in advance of the Arbitration Hearing, or as part of it. To that end, Section 7 of the Federal Arbitration Act (which is mirrored by the arbitration laws enacted in roughly half of the states, including New York), has generally been interpreted to: (1) foreclose an arbitrator's ability to order pre-Hearing discovery (i.e., the production of documents or deposition testimony) by a non-party via subpoena; but (2) broadly allow an arbitrator's ability to order the production of documents and/or testimony during the Arbitration Hearing by a non-party via subpoena.

    - The following leading cases provide helpful explanations of the general status quo with respect to non-party discovery in arbitration: Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008); Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 578 (2d Cir. 2005); Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004).

        - NOTE: Both the Supreme Court of the United States and the Ninth Circuit have recently issued opinions that discuss certain metes-and-bounds of non-party discovery in arbitration pursuant to federal statute. See ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S.Ct. 2078 (2022); Day v. Orrick, Herrington & Sutcliffe, LLP, 42 F.4th 1131 (9th Cir. 2022). However, the discrete issues addressed in those decisions are beyond the scope of the Panel's discussion.

- Importantly, the increased use and acceptance of virtual depositions – i.e., via a videographic platform such as Zoom – has materially impacted the discovery/information exchange process in arbitration. Perhaps most significantly, conducting a deposition virtually tends to reduce burden imposed upon the parties, their counsel and the deponent. Accordingly, virtual depositions are particularly well suited for arbitration because they align with the overarching goals of temporal and economic efficiency.

- See the following appended materials:

    - Thomas J. Stipanowich (Editor-in-Chief), Curtis E. von Kann and Deborah Rothman (Associate Editors). Protocols for Expeditious, Cost-Effective Commercial Arbitration, College of Commercial Arbitrators, Sections IV (2010).
    - Thomas J. Stipanowich, Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation), 7 DePaul Bus. & Com. L.J. 383 (2009).
    - JAMS Recommended Arbitration Discovery Protocols (effective January 6, 2010).
    - Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).
    - Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 578 (2d Cir. 2005).
    - Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004).

- See also:

    - The JAMS podcasts cited supra.

- Pre-Hearing Practice

    - Where one or both parties seeks to pursue dispositive motion practice (i.e., a motion to dismiss, a motion for summary judgment, or a hybrid of the two), most procedural rules grant the arbitrator discretionary authority to decide if and when such motions will be filed, what those motions will address, and what form those motions will take (such as limitations on pages and whether exhibits will be submitted).

- Consider using the Local Patent Rules adopted by certain U.S. District Courts as advisory templates for pre-Hearing procedures.

    - NOTE: The prevailing view in complex commercial arbitration is that dispositive motion practice should be discouraged and curtailed if not entirely disallowed. However, a unique exception can exist within the context of patent dispute, namely: claim construction/Markman issues. As in federal court, claim construction/Markman issues are often amenable to pre-Hearing resolution in arbitration via motion practice – which, indeed, may expedite resolution of the parties' dispute.
    - NOTE: That in the unusual scenario where pre-hearing injunctive relief must be addressed, the arbitrator can expedite consideration of that issue with input from the parties regarding structure and scheduling.
    - NOTE: The potential for mediation. At times, parties request during the pre-hearing phase of an arbitration (or possibly later) that the arbitration be stayed pending mediation and/or that the arbitrator actually mediate the dispute. In the latter circumstance, while it is possible for an arbitrator to also mediate a dispute, that unorthodox posture presents inherent ethical and prudential concerns for the arbitrator that could undermine the arbitration proceeding.

- See the following appended materials:

    - D. Mass. Local Rule 16.6.
    - Richard H. Silberberg and Anthony P. Badaracco, Arb-Med: Workable or Worrisome?, 12 NYSBA New York Dispute Resolution Lawyer 33 (2019).
    - Stipanowich et al., Protocols, cited supra.
    - Stipanowich, Arbitration and Choice, cited supra.

- The Arbitration Hearing

    - The Arbitration Hearing is nearly always scheduled by the arbitrator based upon mutual availability; and thus, to a large extent, the parties can influence or even dictate its scheduling and duration. Additionally, the structure of an Arbitration Hearing is often fluid due to the absence of a jury and the formalisms of trial practice. Because of those factors, evidentiary disputes are generally reduced if not eliminated (particularly with regard to relevance, hearsay and Daubert-type objections), many components of the evidentiary record can be stipulated, and the hearing can be structured so that contested evidence is introduced in the most convenient and efficient manner – for instance, by: (i) submitting direct testimony in written format and limiting live testimony to cross-examination; (ii) taking witnesses out of turn to facilitate professional obligations and travel schedules (particularly for experts, high-ranking corporate personnel, or fact-witnesses whose testimony is brief and targeted); and (iii) calling witnesses only once when they are scheduled to be questioned by both (or multiple) parties.

- Consider bifurcation, which in arbitration can be adopted at any point of the procedural continuum, and can be customized to prioritize discrete issues or tranches of issues.

- Also consider more flexible and potentially efficient/efficacious use of expert witnesses during the Arbitration Hearing – e.g., the "hot-tubbing" of dueling subject-matter experts.

- Importantly, the COVID-19 pandemic rapidly impelled the widespread acceptance of conducting Arbitration Hearings virtually via a videographic platform such as Zoom. As noted above with respect to virtual depositions, conducting Arbitration Hearings virtually also tends to reduce the burden imposed upon the parties, their counsel and prospective witnesses, particularly with respect to travel and other costs. Indeed, the increased prevalence of virtual or "hybrid" Arbitration Hearings – e.g., where certain participants appear in person, and others appear virtually – has arguably produced a new paradigm for arbitration.

- Appended hereto are the results and analysis of a recent survey conduced by the College of Commercial Arbitrators that addresses various practical aspects of virtual arbitration: Harry P. Trueheart, Virtual Arbitration: A Two-Year Retrospective Survey of the Fellows of the College of Commercial Arbitrators, College of Commercial Arbitrators (2022).

Index of Materials

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3	Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008)
4	Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 578 (2d Cir. 2005)
5	Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004)
6	JAMS Arbitration Clause Workbook
7	ICC Model Arbitration Clauses
8	CPR Model ADR Clauses
9	JAMS Recommended Arbitration Discovery Protocols (effective January 6, 2010)
10	CCA Protocols for Expeditious, Cost-Effective Commercial Arbitration
11	Richard Chernick. First Things First: Design the Arbitration Process You Want
12	Mary E. Bartkus. Dispute Resolution Provisions in Life Sciences Agreements
13	David Allgeyer. Commercial Arbitrations: Private, But Not Always Secret
14	Thomas J. Stipanowich. Arbitration and Choice: Taking Charge of the "New Litigation"
15	Richard H. Silberberg and Anthony P. Badaracco. Arb-Med: Workable or Worrisome?
16	Harry P. Trueheart. Virtual Arbitration: A Two-Year Retrospective Survey of the Fellows of the College of Commercial Arbitrators
17	D. Mass. Local Rule 16.6

Doc. No. 1

United States Code Annotated
Title 35. Patents (Refs & Annos)
Part III. Patents and Protection of Patent Rights
Chapter 29. Remedies for Infringement of Patent, and Other Actions (Refs & Annos)

35 U.S.C.A. § 294

§ 294. Voluntary arbitration

Effective: September 16, 2012
Currentness

(a) A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract. In the absence of such a provision, the parties to an existing patent validity or infringement dispute may agree in writing to settle such dispute by arbitration. Any such provision or agreement shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.

(b) Arbitration of such disputes, awards by arbitrators and confirmation of awards shall be governed by title 9, to the extent such title is not inconsistent with this section. In any such arbitration proceeding, the defenses provided for under section 282 shall be considered by the arbitrator if raised by any party to the proceeding.

(c) An award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person. The parties to an arbitration may agree that in the event a patent which is the subject matter of an award is subsequently determined to be invalid or unenforceable in a judgment rendered by a court of competent jurisdiction from which no appeal can or has been taken, such award may be modified by any court of competent jurisdiction upon application by any party to the arbitration. Any such modification shall govern the rights and obligations between such parties from the date of such modification.

(d) When an award is made by an arbitrator, the patentee, his assignee or licensee shall give notice thereof in writing to the Director. There shall be a separate notice prepared for each patent involved in such proceeding. Such notice shall set forth the names and addresses of the parties, the name of the inventor, and the name of the patent owner, shall designate the number of the patent, and shall contain a copy of the award. If an award is modified by a court, the party requesting such modification shall give notice of such modification to the Director. The Director shall, upon receipt of either notice, enter the same in the record of the prosecution of such patent. If the required notice is not filed with the Director, any party to the proceeding may provide such notice to the Director.

(e) The award shall be unenforceable until the notice required by subsection (d) is received by the Director.

CREDIT(S)

(Added Pub.L. 97-247, § 17(b)(1), Aug. 27, 1982, 96 Stat. 322; amended Pub.L. 106-113, Div. B, § 1000(a)(9) [Title IV, § 4732(a)(10)(A)], Nov. 29, 1999, 113 Stat. 1536, 1501A-582; Pub.L. 107-273, Div. C, Title III, § 13206(a)(19), (b)(1)(B), Nov. 2, 2002, 116 Stat. 1905, 1906; Pub.L. 112-29, § 20(j)(1), Sept. 16, 2011, 125 Stat. 335.)

Notes of Decisions (2)

35 U.S.C.A. § 294, 35 USCA § 294
Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

End of Document

Doc. No. 2

United States Code Annotated
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

9 U.S.C.A. § 7

§ 7. Witnesses before arbitrators; fees; compelling attendance

Currentness

The arbitrators selected either as prescribed in this title or otherwise, 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 672; Oct. 31, 1951, c. 655, § 14, 65 Stat. 715.)

Notes of Decisions (67)

9 U.S.C.A. § 7, 9 USCA § 7
Current through P.L. 117-214. Some statute sections may be more current, see credits for details.

End of Document

Doc. No. 3

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by International Seaway Trading Corporation v. Target Corporation, D.Minn., February 22, 2021

549 F.3d 210
United States Court of Appeals,
Second Circuit.

LIFE RECEIVABLES TRUST, Claimant,
Life Settlements Corporation, doing business as Peachtree Life Settlements, Movant–Appellant,
v.
SYNDICATE 102 AT LLOYD'S OF LONDON, Respondent–Appellee.

Docket No. 07–1197–cv.
|
Argued: Oct. 23, 2008.
|
Decided: Nov. 25, 2008.

Synopsis

Background: Trust on behalf of which originator obtained contingent cost insurance (CCI) policy with respect to two life insurance policies, which were also acquired by originator on trust's behalf, initiated arbitration proceeding against CCI insurer after it refused payment of trust's claim under CCI policy. After arbitration panel issued subpoena requiring originator to produce its responsive documents, originator brought action and moved to quash subpoena. Insurer cross-moved to compel originator's compliance with subpoena. The United States District Court for the Southern District of New York, Owen, J., granted insurer's motion to enforce subpoena. Originator appealed.

[Holding:] The Court of Appeals, Wesley, Circuit Judge, held that discovery provision of Federal Arbitration Act (FAA) does not authorize arbitrators to compel pre-hearing document discovery from entities that are not parties to arbitration proceedings; abrogating *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402, and *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F.Supp. 69.

Reversed.

West Headnotes (11)

[1] **Alternative Dispute Resolution** Hearing and determination in general

Non-party's intervening compliance with document subpoena issued by arbitration panel did not render "moot" non-party's appeal from district court's order compelling compliance, given that non-party had privacy interest in documents that it produced and would be entitled to their return if subpoena was quashed.

4 Cases that cite this headnote

[2] **Statutes** Giving effect to statute or language; construction as written

When a statute's language is clear, court's only role is to enforce that language according to its terms.

12 Cases that cite this headnote

[3] **Alternative Dispute Resolution** Discovery and depositions

Documents are only discoverable in arbitration governed by Federal Arbitration Act (FAA) when brought before arbitrators by a testifying witness. 9 U.S.C.A. § 7.

12 Cases that cite this headnote

[4] **Statutes** Language

Statutes Language

Court 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.

7 Cases that cite this headnote

[5] **Statutes** Departing from or varying language of statute

A statute's clear language does not morph into something more just because courts think it makes sense for it to do so.

6 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Discovery and depositions

Discovery provision of Federal Arbitration Act (FAA), which provides for compelled document production by testifying witness, does not authorize arbitrators to compel pre-hearing document discovery from entities that are not parties to arbitration proceedings; abrogating *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402, and *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F.Supp. 69. 9 U.S.C.A. § 7.

23 Cases that cite this headnote

[7] **Alternative Dispute Resolution** Discovery and depositions

Insurance Arbitration Proceedings

Federal Arbitration Act (FAA) contained no discovery exception for closely related entities, and thus did not authorize arbitrators to compel pre-hearing document discovery from non-party corporation that acted on behalf of trust, which was special purpose vehicle lacking permanent employees of its own, in acquiring life insurance policies, performing life expectancy calculations, and servicing policies in exchange for contractual fees, even if corporation's documents were essential to arbitration between trust and insurer that issued contingent cost insurance (CCI) policy for two life insurance policies acquired for trust. 9 U.S.C.A. § 7.

4 Cases that cite this headnote

[8] **Alternative Dispute Resolution** Discovery and depositions

Discovery provision of Federal Arbitration Act (FAA) did not authorize arbitrators to compel pre-hearing document discovery from corporation that was not party to arbitration proceeding but was party to underlying arbitration agreement. 9 U.S.C.A. § 7.

39 Cases that cite this headnote

[9] **Alternative Dispute Resolution** Agreement or submission as determinative

Alternative Dispute Resolution Discovery and depositions

An arbitrator's power over parties stems from the arbitration agreement, and when agreement so provides, that authority includes the power to order discovery from the parties in arbitration.

2 Cases that cite this headnote

[10] **Alternative Dispute Resolution** Discovery and depositions

An arbitrator can enforce discovery order through, among other things, drawing a negative inference from a party's refusal to produce, and, ultimately, through rendering a judgment enforceable in federal court. 9 U.S.C.A. § 9.

[11] **Alternative Dispute Resolution** Subpoenas

When a non-party to an arbitration proceeding refuses to comply voluntarily with a pre-hearing document subpoena, party seeking discovery is limited to provision of Federal Arbitration Act (FAA) addressing discovery as a vehicle to enforce subpoena. 9 U.S.C.A. § 7.

10 Cases that cite this headnote

Attorneys and Law Firms

***211** Jesús E. Cuza, (Jeffrey B. Sklaroff, Greenberg Traurig, LLP, New York, NY, Elliot H. Scherker, Greenberg Traurig, P.A., Miami, FL, on the brief), Greenberg Traurig, P.A., Fort Lauderdale, FL, for Appellant.

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***212** Before: WESLEY and HALL, Circuit Judges, and OBERDORFER, District Judge.[1]

Opinion

WESLEY, Circuit Judge:

This appeal places squarely before us a question that has divided the circuits:[2] Does section 7 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 7, authorize arbitrators to compel pre-hearing document discovery from entities not parties to the arbitration proceeding? The Eighth Circuit has held that it does, *see In re Arbitration Between Sec. Life Ins. Co. of Am.,* 228 F.3d 865, 870–71 (8th Cir.2000); the Third Circuit has determined that it does not, *see Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 407 (3d Cir.2004); and the Fourth Circuit has concluded that it may—where there is a special need for the documents, *see COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 275 (4th Cir.1999). Like the Third Circuit, we hold that section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding, and therefore reverse the order of the United States District Court for the Southern District of New York (Owen, *J.*).

BACKGROUND

This case arises from the somewhat macabre market for contingent cost insurance which mitigates the risk in purchasing the life insurance policies of still-living individuals. Life Settlements Corp. d/b/a Peachtree Life Settlements ("Peachtree") purchases life insurance policies from elderly insureds, offering them, while still of this world, a cash payment at a discount to the face value of the policies. Peachtree's purchase price is based on a variety of factors, perhaps the most important of which is its own independent estimate of the insured's life expectancy. Upon purchase, Peachtree becomes the new policy owner and beneficiary, and continues to pay premiums until the insured dies.

Peachtree buys some life insurance policies for its own account, and others for the accounts of related entities, including Life Receivables Trust (the "Trust"), a special purpose vehicle created for this objective. In these instances, after Peachtree performs the actuarial and financial legwork needed to purchase the policy, it transfers its interest in the policy to the Trust, but continues to receive contractual fees, although it does not hold a financial interest in or beneficially own the Trust. The Trust, on the other hand, pays the premiums on the policy while the insured remains alive in order to keep the policies in force. Upon the insured's demise, the Trust is paid the "net death benefit" on the policy.

As a hedge against the possibility that the insured might live past his or her projected life expectancy, Peachtree buys contingent cost insurance ("CCI") policies from Syndicate 102 for the benefit of the Trust. If the insured lives more than two years beyond his or her life expectancy, Syndicate 102 pays the Trust the net death benefit and assumes the policy itself.

This litigation centers around Peachtree's August 1, 2000 purchase of two life insurance policies owned by, and for the benefit of, the daughter of the named insured, Mr. Wang. On February 5, 2001, Peachtree, on behalf of the Trust, obtained ***213** from Syndicate 102 a CCI policy with a $5 million net death benefit. The policy was signed by Syndicate 102 as underwriter, the Trust as assured, and Peachtree as originator and servicer. It contained a mandatory arbitration clause:

> 1. All disputes and differences arising under or in connection with this Insurance shall be referred to arbitration under the American Arbitration Association Rules.
>
> ...
>
> 3. The Arbitration Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute; provided that the parties shall each retain the right to appeal errors of law to a court of law having jurisdiction of the matters addressed herein and, each party executing this Insurance hereby consents and agrees that the state or federal courts located in New York shall have exclusive jurisdiction to hear and determine any such matters. The Arbitration Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

Mr. Wang outlived his calculated life expectancy by more than two years, thereby triggering Syndicate 102's obligation to pay the Trust and assume the policies. When Peachtree requested payment of the net death benefit as provided in the policy, Syndicate 102 refused. In response, the Trust, in accord with the policy, initiated an arbitration claim against Syndicate 102, which withheld payment on the grounds that the Trust had fraudulently misrepresented the date on which

it acquired the Wang policies and had fraudulently calculated Mr. Wang's life expectancy.[3]

Along with its arbitration defense, Syndicate 102 propounded certain discovery requests upon both the Trust *and* Peachtree, the latter of which is at issue on this appeal. The Trust responded by producing the requested documents, but counseled that with respect to Peachtree, it "does not control" Peachtree and "has no ability to compel the production of documents from" it. Nonetheless, the Trust agreed to produce documents in its possession to the extent that they were directed at Peachtree in its role as "servicer," but not in its role as "provider of life settlements or as originator" of the CCI policy. In July 2006, Syndicate 102 served on Peachtree a separate Notice of Arbitration, and requested that Peacthree "join formally in the pending" Syndicate 102–Trust arbitration. Peachtree refused to consent to joinder, and no joinder was ordered.

At the request of Syndicate 102, the arbitration panel ordered the Trust to produce *all* responsive documents in its possession relating to Peachtree in *any* capacity. The Trust argued that Peachtree failed to supply all of these documents, leading to another order from the arbitration panel requiring the Trust to obtain the documents from Peachtree. On August 11, 2006, Peachtree informed the Trust that it "is not a party to the arbitration ... and that the arbitration panel ... has *no power or jurisdiction* over [Peachtree]. Consequently, [Peachtree] is not bound by the arbitration panel's rulings ***214** and orders, and will not consider them." Finally, Syndicate 102 requested that the panel issue a formal subpoena, a step not opposed by the Trust. In December 2006, the arbitration panel issued a subpoena requiring Peachtree to produce its responsive documents.

Facing the panel's subpoena, in January 2007, Peachtree filed suit in federal court and moved to quash the subpoena. Peachtree argued that (1) an arbitration panel cannot compel pre-hearing discovery from a non-party, and (2) the policy's terms precluded Syndicate 102 from raising any defenses in arbitration prior to paying the Trust. Syndicate 102 cross-moved to compel Peachtree's compliance with the subpoena.

[1] Following a hearing, Judge Owen granted Syndicate 102's motion to enforce the subpoena, holding that there was "no reason to disturb the arbitration panel's issuance of such a subpoena to an entity that, while not a party to the specific arbitration at issue, is a party to the arbitration agreement," and that a district court could not disturb the arbitration's non-final order refusing to enforce the policy's "pay first" provision. In light of the district court's order, Peachtree complied with the subpoena.[4] This appeal followed.[5]

DISCUSSION

Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Section 7, the only FAA provision to address discovery, states that:

> The arbitrators selected either as prescribed in this title or otherwise, 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.* The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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 ***215** 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.

9 U.S.C. § 7 (emphasis added).

Although this Court has observed that this "express language" refers only to documents brought before the arbitrators by a testifying witness, *see Nat'l Broadcasting Co.,* 165 F.3d at 187–88, it has not taken a side in the circuit split over whether section 7 "may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties," *id.* at 188.

The Eighth Circuit takes the view that although the statute does not "explicitly authorize the arbitration panel to require the production of documents for inspection by a party ... 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."[6] *In re Security Life Ins. Co.,* 228 F.3d at 870–71. The Fourth Circuit, however, has concluded that arbitral subpoena powers are "limited to those created by the express provisions of the FAA," which do not include "the authority to order non-parties to ... provide the litigating parties with documents during prehearing discovery." *COMSAT Corp.,* 190 F.3d at 275. Nonetheless, because arbitral efficiency would be "degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing," that court has read into the FAA an exception under which a party could petition the district court to compel discovery "upon a showing of special need or hardship."[7] *Id.* at 276.

More recently, the Third Circuit issued its decision in *Hay Group.* Then–Judge Alito wrote that the plain language of section 7 "unambiguously restricts an arbitrator's 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." *Hay Group,* 360 F.3d at 407. When placed in historical context, section 7's narrow subpoena power makes sense, since it largely mirrors the previous version of Federal Rule of Civil Procedure 45. *Id.* "From its adoption in 1937 until its amendment in 1991, Rule 45 did not allow federal courts to issue pre-hearing document subpoenas on non-parties." *Id.* at 407. Like section 7, the old Rule 45 stated that "Every subpoena ... shall command each person to whom it is directed to attend and ***216** give testimony" and "may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein." *Id.* at 407–08 (quoting Fed.R.Civ.P. 45 (1990)) (emphasis in original). With this context in mind, the Third Circuit rejected what it termed the Eighth Circuit's "power-by-implication analysis." *Id.* at 408. "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." *Id.* Indeed, "until its amendment in 1991, Rule 45 ... 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."[8] *Id.* at 409.

Hay Group signaled what one commentator has called an "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." Thomas H. Oehmke, 3 Commercial Arbitration § 91:5 (2008). This growing consensus is evidenced by the wide array of district court decisions—including those within this Circuit—that have adopted *Hay Group*'s holding. *See, e.g., Matria Healthcare, LLC v. Duthie,* No. 08 C 5090, 2008 WL 4500173, at *5 (N.D.Ill. Oct.6, 2008); *Guyden v. Aetna, Inc.,* No. 3:05cv1652, 2006 WL 2772695, at *7 (D.Conn. Sept.25, 2006); *Odfjell ASA v. Celanese AG,* 328 F.Supp.2d 505, 507 (S.D.N.Y.2004).

[2] **[3]** **[4]** **[5]** **[6]** "When a statute's language is clear, our only role is to enforce that language 'according to its terms.' " *Arciniaga v. Gen. Motors Corp.,* 460 F.3d 231, 236 (2d Cir.2006) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006)). The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying 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,[9] 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, 112 S.Ct. 1146, 117 L.Ed.2d 391 (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 ***217** arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings.

[7] Syndicate 102 submits two reasons why this rule should not apply to Peachtree. First, it argues that Peachtree is "intimately related" to the Trust. Because the Trust is a special purpose vehicle lacking any permanent employees of its own, Peachtree acted on its behalf in acquiring the

Wang policies, performing life expectancy calculations, and servicing the Trust's policies in exchange for contractual fees. As a result, Syndicate 102 contends, and the arbitration panel agreed, that Peachtree's documents are "essential" to the arbitration between the Trust and Syndicate 102. But section 7 contains no discovery exception for closely related entities.[10] Moreover, section 7's subpoena power is not restricted to parties—it encompasses "any person" the arbitrators choose to bring before them. The limitation in the statute is expressed in terms of the method and timing of the subpoena. The documents must be produced by a witness at a hearing before the arbitrators.

[8] Second, Syndicate 102 contends that whatever its application to third parties, section 7 authorizes arbitrators to subpoena documents from entities that, like Peachtree, are parties to the arbitration agreement, if not the arbitration proceeding itself. To support its argument, Syndicate 102 correctly points out that the third party ordered to produce documents in *Security Life* was a party to the underlying contract. *See* 228 F.3d at 871. But that fact was hardly determinative; the Eighth Circuit observed that the third party was no "mere bystander" to the arbitration because it was a party to the contract *after* it had already determined that the power to order pre-hearing document discovery is "implicit in an arbitration panel's power." *Id.* at 870–71. More importantly, the plain language of section 7 makes no such distinction.

[9] **[10]** 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. *See Ottley v. Sheepshead Nursing Home,* 688 F.2d 883, 886 (2d Cir.1982). 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." *Hall Street Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 128 S.Ct. 1396, 1404, 170 L.Ed.2d 254 (2008). An arbitrator can enforce his or her discovery order through, among other things, drawing a negative inference from a party's refusal to produce, *see Nat'l Cas. Co. v. First State Ins. Group,* 430 F.3d 492, 498 (1st Cir.2005), and, ultimately, through rendering a judgment enforceable in federal court, *see* 9 U.S.C. § 9. Arbitrators have no such power to compel discovery from third parties—even those (like Peachtree) that signed the underlying arbitration agreements.

[11] Syndicate 102 rightfully does not argue that Peachtree's signature to the CCI policy containing the arbitration ***218** agreement provides an independent basis for enforcing the arbitral subpoena.[11] The parties to the CCI policy, including Peachtree, contractually agreed to abide by "American Arbitration Association Rules," which are incorporated by reference into the contract. *See, e.g.*, *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 211 (2d Cir.2005). AAA Commercial Rule 31(d) governs subpoenas, and states that an "arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." Although this subpoena power can be interpreted as authorizing arbitrators to issue subpoenas to parties to the arbitration proceeding and non-parties alike, its power with regard to non-parties "is best seen ... as nothing more than authorization by the parties—binding only upon the parties—for an arbitrator to order non-party discovery, subject to the willingness of the non-party voluntarily to comply with such order." Paul D. Friedland & Lucy Martinez, "Arbitral Subpoenas Under U.S. Law & Practice," 14 Am. Rev. Int'l Arb. 197, 201 (2003). But when a non-party refuses to comply voluntarily, as Peachtree has here, the party seeking discovery is limited to section 7 as a vehicle to enforce the subpoena.

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. Peachtree concedes as much, admitting that "Syndicate 102 could obtain access to the requested documents by having the arbitration panel subpoena Peachtree to appear before the panel and produce the documents." 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.[12] 430 F.3d at 577–79. 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." *Id.* at 413. 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. Separately, we note that where the non-party

to the arbitration is a party to the arbitration agreement, there may be instances where formal joinder is appropriate, enabling arbitrators to exercise their contractual jurisdiction over parties before them. 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.

***219 CONCLUSION**

For the foregoing reasons, the order of the district court is REVERSED.

All Citations

549 F.3d 210, 45 A.L.R. Fed. 2d 727

Footnotes

1 The Honorable Louis F. Oberdorfer, United States District Court for the District of Columbia, sitting by designation.

2 We have twice deferred decision on this issue. *See Stolt–Nielsen SA v. Celanese AG,* 430 F.3d 567, 569 (2d Cir.2005); *Nat'l Broadcasting Co. v. Bear Stearns & Co., Inc.,* 165 F.3d 184, 187–88 (2d Cir.1999).

3 Among other arguments, the Trust contended that Syndicate 102 violated the "pay first" provision of the CCI policy, which states that "under no circumstances ... shall the Underwriters be entitled to submit any dispute as to the Underwriters' obligation to pay a Claim under this Insurance to arbitration prior to payment of such Claim as set forth in the section entitled Claim Procedures." On October 24, 2006, the arbitration panel denied the Trust's request to enforce the CCI policy's "pay first" provision.

4 As an initial matter, we note that Peachtree's intervening compliance with the subpoena does not render this appeal moot. Peachtree has a privacy interest in the documents, and will be entitled to their return if the subpoena is quashed. Both the Supreme Court and this Court have held that interest is enough to defeat a mootness challenge (although Syndicate 102 raises no such challenge). *See Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12–13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *United States v. Constr. Prods. Research, Inc.,* 73 F.3d 464, 469 (2d Cir.1996).

5 In its brief on appeal to this Court, Peachtree raised two issues: (1) that the arbitration panel lacked the authority to issue a pre-hearing document subpoena to a non-party, and (2) that the panel had no contractual authority to issue the subpoena. However, in its September 15, 2008 letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), Peachtree formally withdrew the second point in its brief, and advised the Court that the Trust had commenced a state court action in the Commercial Division of the Supreme Court, New York County moving to invalidate the arbitration agreement. That motion has since been denied, and Peachtree has been joined as a party to that litigation. *See Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's,* No. 0601244/2008, 2008 N.Y. Slip. Op. 32626(U), 2008 WL 4461446 (Sup.Ct. N.Y. County Sept. 19, 2008).

6 This interpretation of section 7 has been adopted by several courts within our Circuit. *See Atmel Corp. v. LM Ericsson Telefon, AB,* 371 F.Supp.2d 402, 403 (S.D.N.Y.2005); *Integrity Ins. Co. v. Am. Centennial Ins. Co.,* 885 F.Supp. 69, 71 (S.D.N.Y.1995).

7 In addition, the Sixth Circuit has authorized a subpoena to a non-party for pre-hearing documents. *See Am. Fed'n or Television & Radio Artists, AFL–CIO v. WJBK–TV (New World Commc'ns of Detroit, Inc.),* 164 F.3d 1004, 1007 (6th Cir.1999). While that court suggested that it might agree that the FAA implicitly permits the subpoena, it grounded its holding in section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. *Id.* at 1009.

8 The court added that the Eighth and Fourth Circuits' concerns with enhancing arbitral efficiency were unconvincing since "any argument in favor of ignoring the literal meaning of the FAA in the name of efficiency seems to cut against Supreme Court precedent" holding that giving effect to private agreements—rather than encouraging arbitral efficiency—is the central purpose of the FAA. *Hay Group,* 360 F.3d at 410 (citing *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218–19, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)).

9 There are also valid reasons for limited arbitral subpoena authority, since timeliness and efficiency are among the primary reasons to resolve disputes through arbitration. *See Nat'l Broadcasting Co.,* 165 F.3d at 190–91.

10 The district court did not consider ordering compliance on the basis of this argument. In fact, if anything, Peachtree's close relationship with the Trust and the underlying claim is a strong reason why it might have been (and might yet be) joined as a party to the arbitration. However, the panel repeatedly refused Syndicate 102's requests for Peachtree's joinder, and we may not second-guess such interlocutory arbitral orders. *See, e.g., Michaels v. Mariforum Shipping, S.A.,* 624 F.2d 411, 414 (2d Cir.1980).

11 We need not decide whether entities can, by contract, agree to comply with discovery orders in arbitrations to which they are not parties.

12 *Stolt–Nielsen* carefully distinguishes *hearing testimony* from *depositions,* observing that the hearing in question was before all three arbitrators, who ruled on evidentiary issues, and became a part of the arbitration record. 430 F.3d at 578.

Doc. No. 4

430 F.3d 567
United States Court of Appeals, Second Circuit.

STOLT–NIELSEN SA, Stolt–Nielsen Transportation Group Ltd. (SNTG), Stolt–Nielsen Transportation Group, BV, and Stolt–Nielsen Transportation Group, Inc., Appellants,

v.

CELANESE AG, Celanese, Ltd., and Millenium Petrochemicals, Inc., Defendants–Claimants–Appellees, Celanese Chemicals Europe GMBH, Celanese Pte, Ltd, Grupo Celanese SA, and Corporativos Celanese S. de RL de C.V., Claimants–Appellees, Odfjell ASA, Odfjell USA, Inc., Odfjell Seachem as, Jo Tankers as, Jo Tankers, BV, and Jo Tankers, Inc., Plaintiffs.

Docket No. 04–6373 CV
|
Argued: July 14, 2005.
|
Decided: Nov. 21, 2005.

Synopsis

Background: Carrier that was not party to arbitrated dispute involving alleged price-fixing and bid-rigging in shipping of bulk liquid chemicals sought to quash subpoena issued by arbitration panel and directed toward carrier's former counsel. Shipper that was party to arbitration sought to compel compliance with related subpoenas directed toward carrier's records custodians. The United States District Court for the Southern District of New York, Jed S. Rakoff, J., 348 F.Supp.2d 283, denied carrier's motion to quash and granted shipper's motion to compel, and carrier appealed.

Holdings: The Court of Appeals, Kravitz, District Judge sitting by designation, held that:

[1] District Court had jurisdiction to hear motions;

[2] District Court's decisions were appealable; and

[3] subpoenas were valid and enforceable under Federal Arbitration Act, not subterfuge to improperly obtain depositions and pre-hearing discovery from non-party's employees.

Affirmed.

See also 328 F.Supp.2d 505.

West Headnotes (6)

[1] **Federal Courts** Alternative dispute resolution in general

Federal Arbitration Act, standing alone, does not provide basis for federal jurisdiction. 9 U.S.C.A. § 1 et seq.

4 Cases that cite this headnote

[2] **Federal Courts** Alternative dispute resolution in general

Although provision of Federal Arbitration Act explicitly permits aggrieved party to petition district court to enforce arbitration subpoena, that provision does not confer jurisdiction on federal courts; party invoking provision must establish basis for subject matter jurisdiction independent of Act. 9 U.S.C.A. § 7.

19 Cases that cite this headnote

[3] **Admiralty** Rights and controversies in general

Federal Courts Alternative dispute resolution in general

Federal Courts Water

Federal Courts Ancillary and incidental jurisdiction in general

District court had jurisdiction over motion to enforce arbitration panel's subpoena directed

to non-party's employees, filed by party to arbitration in antitrust dispute arising out of shipment of bulk chemicals via parcel tankers; although provision of Federal Arbitration Act under which motion was brought did not itself confer jurisdiction, court had admiralty jurisdiction when parties first came before it on motion to stay arbitration, and, after denying motion, court retained jurisdiction over any later petitions arising out of arbitration. 9 U.S.C.A. § 7; 28 U.S.C.A. § 1333(1).

25 Cases that cite this headnote

[4] Alternative Dispute Resolution Decisions reviewable; finality

District court's order denying motion by non-party to arbitration to quash arbitration panel's subpoena directed to non-party's former counsel was immediately appealable, since former counsel could not be expected to risk contempt citation rather than comply with subpoena and in fact was willing to comply with subpoena immediately; moreover, Court of Appeals had pendent jurisdiction over non-party's accompanying appeal of district court's enforcement of panel's related subpoenas against non-party's records custodians, since it raised identical issue, i.e. panel's authority to issue non-party subpoenas under Federal Arbitration Act. 9 U.S.C.A. §§ 7, 16(a)(3).

26 Cases that cite this headnote

[5] Alternative Dispute Resolution Subpoenas

Arbitration panel's subpoenas to non-party's former counsel and document custodians, to appear before panel to testify and produce certain documents, were valid and enforceable under Federal Arbitration Act, and were not subterfuge to improperly obtain depositions and pre-hearing discovery from non-party, regardless of fact that appearances were scheduled well before date set for hearing on the merits; subpoenaed parties were not ordered to appear for depositions, arbitrators at hearing ruled on evidentiary issues such as admissibility, and testimony provided became part of arbitration record to be used in determination of dispute. 9 U.S.C.A. § 7.

12 Cases that cite this headnote

[6] Alternative Dispute Resolution Scope and standards of review

Court of Appeals reviewed de novo district court's interpretation of Federal Arbitration Act provision permitting arbitration panel to issue non-party subpoena. 9 U.S.C.A. § 7.

13 Cases that cite this headnote

Attorneys and Law Firms

***568** J. Mark Gidley, argued (Christopher M. Curran, Karen M. Asner and Peter J. Carney, on the brief), White & Case, LLP, Washington, DC, for Appellants.

***569** Hector Torres, Kasowitz, Benson, Torres & Friedman, LLP, New York, NY, for Appellees.

Before: STRAUB and SACK, Circuit Judges, and KRAVITZ, District Judge.*

Opinion

KRAVITZ, District Judge.

Stolt–Nielsen SA, Stolt–Nielsen Transportation Group, Ltd., Stolt–Nielsen Transportation Group, BV, and Stolt–Nielsen Transportation Group, Inc. (collectively, "Stolt") appeal from an order of the United States District Court for the Southern District of New York (Jed. S. Rakoff, District Judge) granting a motion to enforce four subpoenas served on Stolt's custodians of records and denying Stolt's request to quash a subpoena served on its former counsel. The subpoenas were issued by an arbitration panel presiding over an arbitral proceeding to which neither Stolt nor its former counsel is a party. Section 7 of the Federal Arbitration Act (FAA) provides that arbitrators "may summon in writing any person to attend before 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. We have previously stated that "open questions remain as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery,

especially where such evidence is sought from non-parties." *Nat'l Broadcasting Co., Inc. v. Bear Stearns & Co.,* 165 F.3d 184, 188 (2d Cir.1999). In this appeal, Stolt asks us to resolve the question left open in *Bear Stearns* and hold that Section 7 does not authorize arbitrators to issue subpoenas to compel pre-hearing depositions and document discovery from non-parties.

We decline to decide whether Section 7 authorizes arbitrators to issue subpoenas to non-parties to compel pre-hearing discovery, because there is no occasion to do so in this case. Contrary to Stolt's claim, the subpoenas in question did not compel pre-hearing depositions or document discovery from non-parties. Instead, the subpoenas compelled non-parties to appear and provide testimony and documents to the arbitration panel itself at a hearing held in connection with the arbitrators' consideration of the dispute before them. The plain language of Section 7 authorizes arbitrators to issue subpoenas in such circumstances. Therefore, the District Court did not err in granting the motion to compel or in denying the motion to quash.

BACKGROUND

The present case arises out of a dispute over alleged anti-competitive behavior in the business of shipping and transporting chemicals by specialized shipping vessels known as parcel tankers. Celanese AG, Celanese Ltd., and Millenium Petrochemicals, Inc. (collectively, "Claimants") develop, produce, and sell chemical products. Between 1990 and 2002, Claimants entered into numerous contracts for the shipment of chemical products by Stolt and by two other groups of companies known in this case as "Odfjell" and "JO Tankers."[1] In 2003 and 2004, certain of the Odfjell and JO Tankers groups of companies (as well as certain individuals) pled guilty to a criminal conspiracy to rig bids and fix prices in the parcel tanker market in violation of the Sherman Act, 15 U.S.C. § 1. Stolt admitted participation in the conspiracy ***570** but was granted conditional amnesty from prosecution under the Sherman Act in connection with its parcel tanker operations.

Pursuant to an arbitration clause contained in the parties' shipping contracts,[2] Claimants instituted arbitration proceedings against Odfjell and JO Tankers for price-fixing, bid-rigging, and other wrongful behavior. Stolt is not a party to Claimants' arbitration with JO Tankers and Odfjell. Claimants' arbitration with Odfjell and JO Tankers is to be conducted in New York under the rules of the Society of Maritime Arbitrators, which provide that the powers and duties of the arbitrators will be governed by the Society's rules and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* The arbitration panel consists of three arbitrators. The parties appointed two arbitrators, who in turn chose the Honorable John J. Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit, as chairman of the panel.

In April 2004, the arbitration panel, at Claimants' request, issued a subpoena *ad testificandum* and subpoena *duces tecum* directing non-party Hendrikus van Westenbrugge, a former executive of JO Tankers then incarcerated at a federal correctional facility in New Jersey, to appear for a pre-hearing deposition before Claimants and to produce at that time various documents sought by Claimants. After Mr. van Westenbrugge failed to comply with the subpoena, Claimants moved the District Court to compel compliance with the arbitration panel's subpoena. The District Court declined. After considering the language of Section 7 and case law interpreting that provision, the court held that Section 7 grants arbitrators the power to compel non-parties to provide testimony and documents before the arbitrators themselves, but it does not authorize arbitrators "to compel a *pre-hearing* deposition of or *pre-hearing* document production from a non-party." *Odfjell ASA v. Celanese AG,* 328 F.Supp.2d 505, 507 (S.D.N.Y.2004) (emphasis in original).

In August 2004, the arbitration panel issued five more subpoenas, four of them directed to Stolt custodians of records and one to Stolt's former general counsel, Paul O'Brien. The subpoenas directed the recipients to "appear and testify in an arbitration proceeding" and to bring certain documents with them. Stolt moved the District Court to quash the subpoena directed to Mr. O'Brien (the "O'Brien subpoena"), and after Stolt indicated its intention not to comply with the custodians of records' subpoenas (the "Stolt subpoenas"), Claimants moved the District Court to compel compliance with the Stolt subpoenas.

On December 7, 2004, the District Court issued an order granting Claimants' motion to compel compliance with the Stolt subpoenas and denying Stolt's motion to quash the O'Brien subpoena. Having been apprised of the court's order, the arbitration panel informed Stolt that the subpoenas would be returnable on December 21, 2004. Stolt then appealed the December 7 ***571** order to this Court, and after the arbitration panel rejected Stolt's request for a continuance,

Stolt asked the District Court to stay the arbitration hearing pending this appeal.

On December 18, 2004, the District Court denied Stolt's motion for a stay pending appeal and provided the parties with a written explanation for its December 7 order. *Odfjell ASA v. Celanese AG,* 348 F.Supp.2d 283 (S.D.N.Y.2004). The District Court rejected Stolt's argument that the subpoenas were "thinly disguised attempt[s] to obtain the pre-hearing discovery" that the court had previously prohibited. *Id.* at 286. The District Court explained that in contrast to the van Westenbrugge subpoenas, "the instant subpoenas ... call for the non-party to appear before the arbitrators themselves." *Id.* According to the court, "[t]his difference is dispositive" because Section 7 authorizes arbitrators to summon witnesses to testify "before them" and to bring documents, and that "is precisely what the instant subpoenas require." *Id.* at 287. Finally, the court rejected Stolt's argument that the subpoenas were unenforceable on grounds of inadmissibility and privilege, concluding that the arbitration panel was the proper venue to raise such arguments in the first instance. *Id.* at 287–88.

On December 21, 2004, a panel of this Court denied Stolt's motion for an emergency stay pending the present appeal. That same day, Mr. O'Brien and Stolt's custodians of records appeared before the arbitration panel in accordance with the subpoenas. Stolt's custodians of records brought with them more than 300 boxes of documents in response to the subpoenas. Due to the logistical difficulties in having the witnesses authenticate 300 boxes of documents, the parties agreed to continue compliance with the Stolt subpoenas, pending Claimants' review of the documents Stolt had produced.

Mr. O'Brien, however, did testify before the arbitration panel and also provided documents to the panel, in accordance with the subpoena. Stolt's counsel asserted attorney-client privilege at several points during the hearing in objection to questions asked of Mr. O'Brien.[3] Based on Stolt's assertion of privilege, Mr. O'Brien refused to answer thirty-two questions that the panel directed him to answer; Stolt also objected to Mr. O'Brien's production of several documents. *See Odfjell ASA v. Celanese,* 380 F.Supp.2d 297, 300 (S.D.N.Y.2005). After the hearing was adjourned, Claimants moved the District Court to compel Mr. O'Brien to answer the thirty-two questions and to produce the requested documents. *Id.* The District Court denied the motion, ruling that Stolt first should be allowed to produce evidence establishing the validity of its claim of attorney-client privilege. The court remanded the matter to the arbitration panel for further proceedings consistent with its opinion. *Id.* at 303.

DISCUSSION

I.

[1] At the outset, we address the issues of subject matter and appellate jurisdiction, although the parties themselves do not question the existence of either. In their opening briefs, both parties presumed that the FAA provided a basis for subject-matter jurisdiction. However, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the Supreme ***572** Court explained that the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331." *Id.* at 25 n. 32, 103 S.Ct. 927. We have similarly stated that "[i]t is well-established ... that the FAA, standing alone, does not provide a basis for federal jurisdiction." *Westmoreland Capital Corp. v. Findlay,* 100 F.3d 263, 267 (2d Cir.1996). Thus, we have held that a party invoking various provisions of the FAA in federal court must first establish a basis for subject matter jurisdiction independent of the FAA itself. *See Perpetual Sec., Inc. v. Tang,* 290 F.3d 132, 136–40 (2d Cir.2002) (considering petitions brought under Sections 9 and 10); *Westmoreland Capital Corp.,* 100 F.3d at 267–68; (Section four) *Harry Hoffman Printing, Inc. v. Graphic Commc'ns, International Union, Local 261,* 912 F.2d 608, 611 (2d Cir.1990) (Section 10).

[2] This Court has not previously considered whether Section 7 requires an independent basis for subject matter jurisdiction. Section 7 does explicitly permit an aggrieved party to bring a petition before a district court to enforce an arbitration subpoena. *See* 9 U.S.C. § 7. But so do other provisions of the FAA that we have already determined require an independent basis of subject matter jurisdiction. *See Westmoreland Capital Corp.,* 100 F.3d at 268; *Harry Hoffman Printing,* 912 F.2d at 611. There is no reason to reach a different conclusion for a party invoking Section 7. *See Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.,* 95 F.3d 562, 567 (7th Cir.1996) (holding that Section 7, like other provisions of the FAA, does not create subject matter jurisdiction); *see also Westmoreland Capital Corp.,* 100 F.3d at 268 ("[A]lthough a number of provisions in

the FAA refer to the 'United States court' in a manner that suggests a bestowal of jurisdiction (e.g., FAA §§ 7, 9, 10, 11), these provisions have not been interpreted to confer jurisdiction on the federal courts."). Therefore, parties invoking Section 7 must establish a basis for subject matter jurisdiction independent of the FAA.

[3] We are satisfied that the parties in this case have done so, since maritime jurisdiction provides an ample basis for subject matter jurisdiction. District courts have original jurisdiction under 28 U.S.C. § 1333(1) over "[a]ny civil case of admiralty or maritime jurisdiction," including cases involving maritime contracts. *See CTI–Container Leasing Corp. v. Oceanic Operations Corp.,* 682 F.2d 377, 379 (2d Cir.1982) ("If the contract is a 'maritime contract,' it is within the federal court's admiralty jurisdiction."). "Traditional texts have defined a 'maritime' contract as one that, for example, relat[es] to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment ...." *Id.* (alteration in original) (internal quotation marks). The shipping contracts at issue in the underlying arbitration—contracts between chemical producers and parcel tanker companies for the global shipment of chemical products—fit squarely within the definition of a maritime contract. *See The Gothland,* 64 U.S. (23 How.) 491, 493–94, 16 L.Ed. 516 (1859) ("[C]ontracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and act of Congress ....").

Those maritime contracts provided the basis for subject matter jurisdiction when this case originally arrived in the District Court. At that time, Odfjell and JO Tankers asked the District Court to stay the arbitration that Claimants had filed under ***573** the terms of their maritime contracts. *See Odfjell ASA v. Celanese AG,* No. 04 Civ. 1758, 2004 WL 1574728, at *1 (S.D.N.Y. July 14, 2004). Emphasizing the existence of "substantial reasons in favor of arbitrability," *id.* at *3, the court rejected the stay request, an order that "was essentially the equivalent of an order ... to compel arbitration." *Smiga v. Dean Witter Reynolds, Inc.,* 766 F.2d 698, 705 (2d Cir.1985). We have previously explained that "a court which orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate." *Id.; see also Amgen, Inc. v. Kidney Ctr. of Delaware County, Ltd.,* 95 F.3d 562, 566 (7th Cir.1996) ("Once the court orders arbitration, it may, of course, also order compliance with summonses from the arbitrator."). Therefore, in this case, the District Court properly retained subject matter jurisdiction under 28 U.S.C. § 1333(1) over any later applications or petitions arising out of the parties' arbitration, including the motions to compel and quash that form the basis of this appeal.[4]

[4] Satisfied that subject matter jurisdiction exists, we next turn to this Court's jurisdiction over the present appeal. *See Arnold v. Lucks,* 392 F.3d 512, 517 (2d Cir.2004) ("[E]very federal appellate court has a special obligation to satisfy itself ... of its own jurisdiction ...." (internal quotation marks omitted)). Section 16(a)(3) of the FAA confers a right to an appeal from a "final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). The Seventh Circuit has previously held that a district court order compelling compliance with arbitration subpoenas "is final and appealable for the purposes of § 16(a)(3)." *Amgen,* 95 F.3d at 567. According to the Seventh Circuit, the district court's order was immediately appealable because it was the "final" product of an "independent" proceeding, rather than an interlocutory order from an "embedded proceeding [that] is a constituent part of a more comprehensive litigation." *Id.* at 566. *Amgen* is the only circuit court decision directly addressing appellate jurisdiction in the context of a district court order regarding enforcement of an arbitration subpoena, though other circuits have assumed jurisdiction in that context without discussion. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 406 (3d Cir.2004); *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 274 (4th Cir.1999).

However, the Seventh Circuit's reliance in *Amgen* on the dichotomy between so-called "independent proceedings" and "embedded proceedings" was cast into considerable doubt by the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). *See Salim Oleochemicals v. M/V SHROPSHIRE,* 278 F.3d 90, 92 (2d Cir.2002) (recognizing that the "analysis prescribed in *Green Tree* displaces [an] approach which turn[s] on the independent/embedded distinction"). There, the Supreme Court rejected the notion that "Congress intended to incorporate the rather complex independent/embedded distinction, and its consequences for finality, into § 16(a)(3)." *Green Tree Fin.,* 531 U.S. at 88–89, 121 S.Ct. 513. Instead, the Supreme Court instructed lower courts that the phrase "final decision" in ***574** Section 16(a)(3) is to be construed in accordance with that term's "consistent and longstanding interpretation." *Id.* at 88, 121 S.Ct. 513.

Under traditional finality principles, a district court's decision to compel compliance with a subpoena or to deny a motion

to quash a subpoena is generally not a "final decision" and therefore is not immediately appealable. Thus, in *United States v. Construction Products Research, Inc.,* 73 F.3d 464 (2d Cir.1996), we observed that "[t]he general rule is that orders enforcing subpoenas issued in connection with civil and criminal actions ... are *not* final, and therefore *not* appealable." *Id.* at 468 (emphasis in original). *See, e.g., United States v. Ryan,* 402 U.S. 530, 532–33, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *Cobbledick v. United States,* 309 U.S. 323, 328, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *In re DG Acquisition Corp.,* 151 F.3d 75, 85 (2d Cir.1998). *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2466, at 87 (2d ed.1995). Instead, in a criminal or civil proceeding, a witness wishing to contest a subpoena must usually disobey the subpoena, be held in civil or criminal contempt, and then appeal the contempt order. *See Constr. Prods. Research,* 73 F.3d at 469 ("To obtain appellate review, the subpoenaed party must defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under [28 U.S.C.] § 1291."). And this is true whether the witness attempting to quash a subpoena is a party to the litigation in which the subpoena was issued or merely a non-party witness. *See Dove v. Atl. Capital Corp.,* 963 F.2d 15, 17 (2d Cir.1992) ("A non-party witness ordinarily may not appeal directly from an order compelling discovery but must instead defy the order and be found in contempt in order to obtain review of the court's initial order."); *see also United States v. Nixon,* 418 U.S. 683, 690–92, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.,* 591 F.2d 174, 177 (2d Cir.1979).[5]

There is a different rule in administrative proceedings. "A district court order enforcing a subpoena issued by a government agency in connection with an administrative proceeding may be appealed immediately without first performing the ritual of obtaining a contempt order." *Constr. Prods. Research,* 73 F.3d at 469; *see, e.g., RNR Enter., Inc. v. S.E.C.,* 122 F.3d 93 (2d Cir.1997) (considering an appeal from a district court's enforcement of administrative subpoenas); *In re Gimbel,* 77 F.3d 593 (2d Cir.1996) (same). As this Court has explained, "The rationale is that, at least from the district court's perspective, the court's enforcement of a agency subpoena arises out of a proceeding that 'may be deemed self-contained, ***575** so far as the judiciary is concerned.... [T]here is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending [subpoenaed party] permitted to appeal.' " *Constr. Prods. Research,* 73 F.3d at 469 (alterations in original) (quoting *Cobbledick,* 309 U.S. at 330, 60 S.Ct. 540).

One could certainly argue that enforcement of an arbitration subpoena presents a situation closer to that of an administrative agency subpoena than enforcement of a subpoena in a ordinary civil or criminal proceeding. On the other hand, Section 7 itself explicitly states that if a witness neglects a summons to appear at an arbitration hearing, a district court may "punish said person ... 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. This language might suggest that the usual rules governing challenges to court subpoenas (including the rules governing appellate jurisdiction) should also apply to subpoenas issued by arbitrators. Furthermore, courts have a well-recognized interest in preventing arbitrations from being slowed down by, or burdened by the expense of, piecemeal appeals of every subpoena issued by an arbitration panel. *See Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 90 (2d Cir.2005) (describing the "twin goals of arbitration" to be "settling disputes efficiently and avoiding long and expensive litigation" (internal quotation marks omitted)). As the Supreme Court and this Court have often observed, in enacting the FAA Congress sought to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone,* 460 U.S. at 22, 103 S.Ct. 927.

Having set forth the competing interests, we find that in this case we need not choose between them. For there is another, well-recognized basis for appellate jurisdiction in this particular case that permits us to leave undecided the issue addressed by the Seventh Circuit in *Amgen.* This Court has previously recognized that where a subpoenaed third-party witness does not object to testifying, but someone else does—often on grounds of privilege—a district court's refusal to quash the subpoena is immediately appealable by the objecting party. *See In re Grand Jury Proceedings,* 219 F.3d 175, 182 n. 3 (2d Cir.2000) (permitting a company to immediately appeal a district court's enforcement of subpoenas issued to its counsel and founder). "The theory of immediate appealability ... is that the third party [witness] will not be expected to risk a contempt citation and will surrender the documents sought, thereby letting the 'cat out of the bag' and precluding effective appellate review at a later stage." *In re Katz,* 623 F.2d 122, 124 (2d Cir.1980). Here, Stolt objects to the District Court's denial of its motion

to quash the O'Brien subpoena. Like the third-party witness in *In re Katz,* Mr. O'Brien cannot be expected to risk a contempt citation rather than comply with the subpoena. Indeed, he has demonstrated that he is more than willing to comply with the subpoena without any additional prompting. Therefore, under traditional finality principles, the District Court's order refusing to quash the O'Brien subpoena is immediately appealable.

Appellate jurisdiction over the order enforcing the Stolt subpoenas is less clear under traditional finality principles, for the reasons discussed above. However, because we have clear jurisdiction over Stolt's appeal involving the O'Brien subpoena, we may exercise pendent jurisdiction over the appeal involving the related ***576** Stolt subpoena. Pendent appellate jurisdiction allows an appeals court to exercise jurisdiction over a non-final claim "where [the] issue is 'inextricably intertwined' with an issue over which the court properly has appellate jurisdiction." *Lamar Adver. of Penn, LLC v. Town of Orchard Park, New York,* 356 F.3d 365, 371 (2d Cir.2004) (quoting *Swint v. Chambers County Comm'n,* 514 U.S. 35, 50–51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995)). This Court has exercised pendent appellate jurisdiction where the same specific question underlay both the appealable order and the non-appealable order, or where resolution of the non-appealable order was subsidiary to resolution of the appealable order. *See, e.g., Luna v. Pico,* 356 F.3d 481, 486–87 (2d Cir.2004) (exercising pendent jurisdiction over the denial of plaintiff's motion for summary judgment on liability because whether plaintiff's constitutional rights were violated was inextricably intertwined with the immediately appealable issue of defendants' qualified immunity); *Pathways, Inc. v. Dunne,* 329 F.3d 108, 113 (2d Cir.2003) (finding that denial of a preliminary injunction was inextricably intertwined with an otherwise-non-appealable dismissal of claims for injunctive and declaratory relief based on the *Younger* abstention doctrine); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.,* 199 F.3d 94, 97 (2d Cir.1999) (explaining that, where a party appeals a finding of subject matter jurisdiction based on the "commercial activity exception" in the Foreign Sovereign Immunities Act ("FSIA"), pendent jurisdiction will exist over a finding of personal jurisdiction to the extent that "questions regarding minimum contacts for personal jurisdiction purposes and commercial contacts for FSIA purposes [are] inextricably intertwined.").

In this appeal, the issue is identical for both the Stolt subpoenas and the O'Brien subpoena, as Stolt asks us to quash both sets of subpoenas "as beyond the scope of Section 7 of the Federal Arbitration Act." Moreover, the District Court recognized that a motion to compel compliance with the O'Brien subpoena would have to be granted "for the same reasons ... as requires the Court to grant claimants' motion to compel compliance with the Stolt–Nielsen subpoena." *Odfjell ASA v. Celanese AG,* 348 F.Supp.2d 283, 288 (S.D.N.Y.2004); *cf. Lamar Adver.,* 356 F.3d at 372 (exercising pendent jurisdiction where the district court denied plaintiff's "request for a preliminary injunction for the very same reasons it denied [his] motion for summary judgment"). Therefore, under the circumstances of this case, we find that an exercise of our pendent jurisdiction is proper over Stolt's appeal from the District Court's order enforcing the Stolt subpoenas.[6]

II.

[5] **[6]** Turning to the merits of Stolt's appeal, we note at the outset that we review the District Court's interpretation ***577** of Section 7, as we review other questions of statutory interpretation, *de novo. See Lander v. Hartford Life & Annuity Ins. Co.,* 251 F.3d 101, 107 (2d Cir.2001); *United States v. Koh,* 199 F.3d 632, 636 (2d Cir.1999). Section 7 provides in relevant part that "[t]he 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." 9 U.S.C. § 7.[7] The subpoenas at issue in this appeal directed Mr. O'Brien and the Stolt custodians to appear and testify, and also provide documents, at a hearing convened before the arbitration panel. No party to this appeal contests the materiality of the evidence sought by the subpoenas. Therefore, as the District Court rightly recognized, in issuing the O'Brien and Stolt subpoenas, the arbitration panel invoked precisely the authority that Section 7 unambiguously grants them.

Stolt does not dispute the power of arbitrators to subpoena non-parties for testimony and documents at what Stolt calls a "trial-like arbitration hearing on the merits." What fuels Stolt's objection, and what Stolt devotes its entire brief to arguing, is that Section 7 does not empower arbitrators to summon non-parties for the purpose of compelling testimonial and documentary discovery in advance of a "merits hearing," and that the subpoenas in question were "a thinly disguised effort to obtain pre-hearing discovery." Evidencing this subterfuge, according to Stolt, is a letter from Claimants to the arbitration panel explaining the

need—in light of the District Court's ruling on the van Westenbrugge subpoena—to convene a hearing so that non-party evidence and documents could be obtained. Stolt also makes much of the fact that the subpoena was returnable on December 21, 2004, during the period that the arbitration panel had scheduled for fact depositions and months in advance of October 17, 2005, the date set by the panel for commencement of the "Arbitration hearing on the merits." In sum, Stolt alleges that Claimants and the arbitration panel have conspired to "circumvent Section 7's limitations through the contrivance of conducting its discovery in the presence of the arbitrators."

Like the District Court, we are not persuaded that the December 21 hearing was the ruse Stolt claims it to be. Therefore, we have no occasion to rule on the authority of arbitrators to order non-parties to participate in discovery. Any rule there may be against compelling non-parties to ***578** participate in discovery cannot apply to situations, as presented here, in which the non-party is "summon[ed] in writing ... to attend before [the arbitrators] or any of them as a witness and ... to bring with him ... [documents] which may be deemed material as evidence in the case." 9 U.S.C. § 7.

Several factors convince us that the subpoenas were well within the authority provided arbitrators under Section 7, although we hasten to add that we do not suggest that all of these factors need be present in every case in order to justify arbitration subpoenas under Section 7. First, the custodians and Mr. O'Brien were not ordered to appear for depositions. Depositions usually take place outside the presence of the decision maker, and they are designed to allow parties to prepare for the eventual presentation of evidence or examination of witnesses before the decision maker at trial or a hearing. *See Black's Law Dictionary* 451 (7th ed.1999) (defining "deposition" as "[a] witness's *out-of-court* testimony that is reduced to writing ... for later use in court or for discovery purposes" (emphasis added)). Here, by contrast, the custodians and Mr. O'Brien were directed to appear at a hearing before the arbitrators, and all three arbitrators were present at that hearing. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 407 (3d Cir.2004) (noting that while Section 7 does not permit a subpoena to compel production from a non-party in absence of a hearing, it does permit subpoenas 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").

Second, the arbitrators heard testimony directly from Mr. O'Brien, and unlike a deposition, the panel ruled at the hearing on evidentiary issues such as admissibility and privilege and reserved on other evidentiary issues. Indeed, the hearing transcript reveals that the hearing was primarily devoted to resolving evidentiary issues, especially the issue of whether and to what extent attorney-client privilege foreclosed Mr. O'Brien's testimony. While the custodians were not required to testify, that was the result of a consensual agreement between Stolt and Claimants and not a function of the arbitration subpoena or the hearing process itself.

Third, the testimony provided at the hearing became part of the arbitration record, to be used by the arbitrators in their determination of the dispute before them. Finally, we note that if Judge Rakoff had been of the view that the arbitrators and Claimants were attempting by artifice to undermine his prior order forbidding the use of Section 7 to take discovery of non-parties, there is every reason to believe he would have so found. But, in fact, he concluded based upon the record before him and the representations of the parties that the December 21 hearing was convened by the arbitrators in good faith and that it complied with Section 7, as well as the spirit and terms of his prior ruling. Section 7 does not deny arbitrators the power to summon witnesses to a hearing under such circumstances.

Contrary to Stolt's assertions, the mere fact that the session before the arbitration panel on December 21 was preliminary to later hearings that the panel intended to hold does not transform the December 21 hearing into a discovery device. As Judge Rakoff rightly recognized, "Nothing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing." *Odfjell ASA,* 348 F.Supp.2d at 287. To the contrary, the language of Section 7 is broad, limited only ***579** by the requirement that the witness be summoned to appear "before [the arbitrators] or any of them" and that any evidence requested be material to the case. *See* 9 U.S.C. § 7.

According to Stolt, that "Section 7 speaks of a 'witness' providing 'evidence' " suggests that the provision applies only to a merits hearing akin to a full-blown trial. Yet, often witnesses are called and evidence is adduced in contexts other than trials. For instance, courts hear evidence and testimony at preliminary hearings on issues such as the admissibility of evidence or on a motion for interim relief. *See, e.g., New York*

ex rel. Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 199 (2d Cir.2001) (noting that a district court heard testimony at a preliminary injunction hearing); *Frank v. Plaza Constr. Corp.,* 186 F.Supp.2d 420, 425 (S.D.N.Y.2002) (noting that the court held an "evidentiary hearing" before trial to determine the authenticity and admissibility of a document).

So, too, arbitrators may need to hear testimony or receive evidence on preliminary issues—such as whether an arbitration clause is enforceable or whether a claim is barred by relevant statutes of limitations—in advance of an ultimate hearing on the substantive merits of the underlying claims in the arbitration. *See, e.g., Tellium, Inc. v. Corning Inc.,* No. 03 Civ. 8487, 2004 WL 307238, at *1 (S.D.N.Y. Feb.13, 2004) (noting that an arbitration panel "[found] disputed issues of fact regarding" plaintiff's claim that it was not a proper party to the arbitration and "grant[ed it] the right to present evidence on the matter at an early hearing in advance of the plenary hearing"); *Echeverri v. Starrett City, Inc.,* No. 96–CV–1006, 1998 WL 903482, at *2 (E.D.N.Y. Dec. 7, 1998) (noting that "consideration of [plaintiff's] claim on the merits" was to follow an "initial hearing" on the issue of arbitrability). Arbitrators may also need to hold a preliminary hearing to decide whether to preserve the status quo, as well as to decide issues of privilege, authenticity, and admissibility. *See Am. Express Fin. Advisors Inc. v. Thorley,* 147 F.3d 229, 230–31 (2d Cir.1998) (recognizing that arbitrators can grant preliminary injunctive relief); American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, at R–31(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."); *id.* at R–34(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."). In any case, we doubt that arbitrators are prohibited from making use of their powers under Section 7 to hear testimony and gather evidence as to the merits of a dispute so long as they do so by summoning witnesses and evidence before them.

Just as a subpoena can issue under Rule 45 of the *Federal Rules of Procedure* to compel witnesses "to attend and give testimony" and "produce ... books, documents or tangible things" at a "trial *or hearing,*" Section 7 authorizes arbitrators to subpoena witnesses "to attend before them ... and ... bring with him or them any [relevant] book, record, document, or paper ... *in the same manner as subpoenas to appear and testify before the court.*" 9 U.S.C. § 7 (emphasis added). Moreover, as the District Court correctly observed, Section 7's reference to hearings "before [the arbitrators] *or any of them* " suggests that the provision authorizes the use of subpoenas at preliminary proceedings even in front of a single arbitrator, before the full panel "hears the more central issues." *Odfjell,* 348 F.Supp.2d at 287. Thus, there ***580** is nothing in the language of Section 7 that requires, or even suggests, the limitation that Stolt advances.

Furthermore, the present case demonstrates the usefulness of employing subpoenas at a preliminary hearing before the arbitration panel. Because Stolt's interests and those of Mr. O'Brien were not aligned, Mr. O'Brien did not object to appearing before the arbitrators. In view of Stolt's assertion of privilege, however, issues remained as to which questions Mr. O'Brien would be permitted to answer, even if he were willing to provide answers. Rather than be forced to deal with thorny issues of privilege at the "final" hearing, the arbitrators were instead able to subpoena Mr. O'Brien for a preliminary session in which those issues could be resolved. Similarly, even though the parties dispensed with the testimony of the Stolt custodians, the hearing could also have usefully resolved issues of foundation and admissibility regarding the Stolt documents in advance of a final hearing.

Stolt objects that if non-party witnesses may be summoned to hearings other than the final "merits hearing," witnesses will face the burdensome prospect of being recalled to testify at multiple sessions. In that regard, however, it is worth noting that Claimants assured the District Court before it decided to enforce the subpoenas that Claimants would not recall Stolt's custodians of records for multiple hearings. *Id.* at 287 n. 2. Nor should we lightly assume that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 414 (3d Cir.2004) (Chertoff, J., concurring) (noting that Section 7's "procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own" when they subpoena third-party witnesses). Arbitrators issuing subpoenas and district courts asked to enforce them can, and should, take steps to minimize the burden on non-party witnesses. Indeed, that is precisely what happened here.[8]

Finally, there is an artificiality about Stolt's argument that further confirms the wisdom of rejecting it. Arbitration hearings, even "trial-like merits hearings," are often

continued, frequently with many months elapsing between hearing sessions. If the arbitrators had summoned Mr. O'Brien or the Stolt custodians for the first day of the scheduled hearings on the merits on October 17, 2005, heard their testimony, and then adjourned for ten months, before reconvening, even Stolt would concede that Section 7 would authorize the subpoenas. Yet, according to Stolt, the ten-month gap here between the December 21, 2004, hearing and the beginning of the "merits" hearing somehow rendered the subpoenas invalid. Nothing in the language of Section 7 or common sense dictates such a result. Here, as noted above, all three arbitrators participated in a hearing in which they received testimony and documents, took evidence, and considered matters of admissibility and privilege, resolving many of them. Preliminary or not, what occurred on December 21, 2004, was the sort of hearing to which Section 7 authorizes arbitrators to summon non-party witnesses.

*581 CONCLUSION

In sum, we again leave to another day the question whether Section 7 authorizes arbitrators to issue discovery-type subpoenas to those who are not parties to the arbitration. We decide only that Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel, and that is precisely what occurred in this case. Accordingly, the O'Brien and Stolt subpoenas were authorized by Section 7, and the District Court's judgment is affirmed.

All Citations

430 F.3d 567, 2005 A.M.C. 2777, 2005-2 Trade Cases P 75,049

Footnotes

* The Honorable Mark R. Kravitz of the United States District Court for the District of Connecticut, sitting by designation.

1 "Odfjell" refers collectively to Odfjell ASA, Odfjell USA, Inc., and Odfjell Seachem AS. "JO Tankers" refers collectively to JO Tankers AS, JO Tankers BV, and JO Tankers, Inc.

2 The shipping contracts incorporated by reference a set of standardized industry charter party terms commonly known as "ASBATANKVOY." The ASBATANKVOY contains an arbitration clause, which provides, in pertinent part, as follows:

> 24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen.

3 After leaving Stolt but prior to being subpoenaed, Mr. O'Brien had sued Stolt "to remedy the career damages he ... suffered as a result of [Stolt's] criminal activity." Therefore, Stolt's interests and Mr. O'Brien's interests were not necessarily aligned.

4 Because we conclude that the District Court had subject matter jurisdiction under 28 U.S.C. § 1333(1), we need not consider the alternative grounds of subject matter jurisdiction proffered by the parties—namely, jurisdiction under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 201 *et seq.*) and diversity jurisdiction (28 U.S.C. § 1332).

5 When one district court denies a motion to compel a third-party subpoena issued by another court in the same circuit, the denial is not immediately appealable, even though it may represent the only issue pending before the court asked to compel the third-party subpoena. *See Barrick Group, Inc. v. Mosse,* 849 F.2d 70 (2d Cir.1988). In *Barrick Group,* we noted that when both the court issuing the subpoena and the court considering the motion to compel are in the same circuit, "a circuit court can consider any appeal on discovery issues at the same time as the appeal from the judgment in the underlying action. This approach avoids piecemeal proceedings, strengthens the rule of finality and provides ultimately for the effective review of all issues." *Id.* at 73. However, where the principal action and ancillary proceeding are pending in different circuits, we allow an immediate appeal of discovery decisions on the ground that "there can be no effective review of the determination under such circumstances unless the interlocutory appeal is allowed." *Id.; see Baker v. F*

& F Investment, 470 F.2d 778, 780 n. 3 (2d Cir.1972); *Republic Gear Co. v. Borg–Warner Corp.,* 381 F.2d 551, 554 (2d Cir.1967).

6 One further jurisdictional issue deserves mention. Even though there has been partial compliance with the subpoenas, this dispute is not moot because the full scope of Mr. O'Brien's testimony before the arbitration panel has not yet been resolved. *See Odfjell,* 380 F.Supp.2d at 303 (remanding to the arbitration panel for reconsideration of Stolt's attorney-client privilege claims). Similarly, whether the custodians have properly complied with the Stolt subpoenas also has not yet been decided. "[S]o long as the appellant retains some interest in the case, so that a decision in its favor will inure to its benefit, its appeal is not moot." *New England Health Care Employees Union v. Mount Sinai Hosp.,* 65 F.3d 1024, 1029 (2d Cir.1995); *see Constr. Prods. Research,* 73 F.3d at 469 ("[A]lthough Respondents have largely complied with the subpoena, they have not surrendered the allegedly privileged documents. Thus, this case is not moot ....").

7 Section 7, in its entirety, provides as follows:

> The arbitrators selected either as prescribed in this title or otherwise, 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. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. 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.

9 U.S.C. § 7.

8 Stolt also argues that affirming the District Court's order would "permit[ ] [Claimants] to call an *unlimited* number of Stolt–Nielsen employees." Yet, the risk that Claimants might subpoena a large number of Stolt employees would remain even if we were to agree with Stolt that Section 7 limits the summoning of non-party witnesses to the merits hearing. Nor is there any evidence that Claimants intend to call a litany of Stolt witnesses.

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Doc. No. 5

360 F.3d 404
United States Court of Appeals, Third Circuit.

HAY GROUP, INC.
v.
E.B.S. ACQUISITION CORP. et al,
PriceWaterhouseCoopers L.L.P. Appellants.

No. 03–1161, 03–1162
|
Argued Sept. 15, 2003.
|
March 12, 2004.

Synopsis

Background: Former employer commenced an arbitration proceeding against former employee, alleging that employee violated non-solicitation clause in his separation agreement. Former employer moved to enforce subpoenas issued to non-party current employer prior to arbitration hearing. The United States District Court for the Eastern District of Pennsylvania, Mary A. McLaughlin, J., issued order enforcing subpoenas. Non-party current employer appealed.

Holdings: The Court of Appeals, Alito, Circuit Judge, held that:

[1] Federal Arbitration Act (FAA) did not confer authority on arbitrators to subpoena production of documentary evidence held by non-party without summoning non-party to appear as witness, and

[2] issuance of subpoena duces tecum to non-party was not prohibited by rule of civil procedure.

Reversed.

Chertoff, Circuit Judge, filed concurring opinion.

West Headnotes (5)

[1] **Alternative Dispute Resolution** Nature and Extent of Authority

An arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

20 Cases that cite this headnote

[2] **Statutes** Language

In interpreting a statute, the Court of Appeals must begin with the text.

4 Cases that cite this headnote

[3] **Statutes** Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

A court's policy preferences cannot override the clear meaning of a statute's text, in construing a statute.

6 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Subpoenas

Provision of Federal Arbitration Act (FAA), conferring power on arbitrators to summon 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" did not authorize arbitrators to subpoena production of documentary evidence held by non-party without summoning non-party to appear as witness; FAA provision did not expressly state that arbitrators had power to compel production of documentary evidence without summoning custodian to testify, literal interpretation of provision furthered FAA's goals of resolving disputes in timely and cost efficient manner and giving effect to private arbitration agreements, and requirement was consistent with

limiting FAA jurisdiction over parties which did not consent to arbitration. 9 U.S.C.A. § 7.

64 Cases that cite this headnote

[5] Alternative Dispute Resolution Subpoenas

Federal rule of civil procedure, providing that subpoenas commanding attendance of a person issued separately from subpoenas for production or inspection were required to be issued from the court for the district in which the production or inspection was made, did not prohibit issuance of subpoena duces tecum to non-party in arbitration proceeding for documentary evidence located outside the territory within which subpoena could be served on non-party; rule applied only to subpoena duces tecum separate from subpoena commanding attendance, which could not be issued in arbitration proceeding, and term "production" in rule referred to delivery of documents and not their retrieval. 9 U.S.C.A. § 7; Fed.Rules Civ.Proc.Rule 45(a)(2), 28 U.S.C.A.

66 Cases that cite this headnote

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Before ALITO, AMBRO, and CHERTOFF, Circuit Judges.

OPINION OF THE COURT

ALITO, Circuit Judge.

PriceWaterhouseCoopers ("PwC") and E.B.S., non-parties to an arbitration, seek to avoid compliance with an arbitration panel's subpoena requiring them to turn over documents prior to the panel's hearing. The District Court enforced the subpoena. We reverse.

I.

Hay Group ("Hay") is a management consulting firm. David A. Hoffrichter left Hay's employment and joined PwC in September 1999. In early 2002, PwC sold the division employing Hoffrichter to E.B.S.

Hoffrichter's separation agreement from Hay contained a clause that forbade him from soliciting any of Hay's employees or clients for one year. The agreement further provided for arbitration to resolve any dispute arising under the agreement. In February 2000, Hay commenced such an arbitration proceeding in Philadelphia, Pennsylvania, against Hoffrichter, claiming that he had violated the non-solicitation clause.

In an attempt to obtain information for the arbitration, Hay served subpoenas for documents on E.B.S. at its Pittsburgh office and on PwC at its Philadelphia office. Hay sought to have the documents produced prior to the panel's arbitration hearing. PwC and E.B.S. objected to these subpoenas, but the arbitration panel disagreed. When PwC and E.B.S. still refused to comply with the subpoenas, Hay asked the United States District Court for the Eastern District of Pennsylvania to enforce the subpoenas. PwC and E.B.S. again objected, claiming, among other ***406** things, that the Federal Arbitration Act ("FAA") did not authorize the panel to issue subpoenas to non-parties for pre-hearing document production and that the Federal Rules of Civil Procedure prohibited the District Court from enforcing a subpoena on a non-party for documents outside the Court's territorial jurisdiction.

In November 2002, the District Court issued a decision enforcing the subpoenas and ordering the parties to resolve any remaining differences. In doing so, the District Court accepted the view of the Eighth Circuit and several district courts that the FAA authorizes arbitration panels to issue subpoenas on non-parties for pre-hearing document production. The District Court also held that even under the view of the Fourth Circuit, which permits such production only when there is a "special need," the panel's subpoenas

would be valid. In addition, the District Court held that it had the power to enforce subpoenas on non-parties for document production even if the documents were located outside the territory within which the court's subpoenas could be served.

PwC and E.B.S. then filed the present appeal. The District Court denied their motion to stay its order pending appeal, but our Court granted their emergency motion for a stay.

II.

A.

On appeal, PwC and E.B.S. first argue that, under Section 7 of the FAA, 9 U.S.C. § 7, a non-party witness may be compelled to bring documents to an arbitration proceeding but may not simply be subpoenaed to produce documents. We agree.

[1] An arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act. *See, e.g., Legion Insurance Company v. John Hancock Mutual Life Ins. Co.,* No. 01–162, 2001 WL 1159852 at *1, 2001 U.S. Dist. LEXIS 15911 at *3 (E.D.Pa. Sept.5, 2001)("It is clear, and undisputed, that the cited statute is the only source of the authority for the validity and enforceability of the arbitrators' subpoena [over a nonparty]"); *Integrity Ins. Co., in Liquidation, v. Am. Centennial Ins. Co.,* 885 F.Supp. 69, 71 (S.D.N.Y.1995)("Because the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator's power over nonparties derives solely from the FAA."). Accordingly, we must look to the FAA to determine whether an arbitrator may issue a subpoena requiring pre-hearing document production by a person or entity that is not bound by the arbitration agreement (hereinafter a "non-party").

[2] **[3]** In interpreting a statute, we must, of course, begin with the text. "The Supreme Court has repeatedly explained that recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result." *United States ex rel. Mistick PBT v. Housing Authority of City of Pittsburgh,* 186 F.3d 376, 395 (3d Cir.1999). Furthermore, a court's policy preferences cannot override the clear meaning of a statute's text. *See Eaves v. County of Cape May,* 239 F.3d 527, 531–32 (3d Cir.2000)("We do not find the reasoning of the courts adopting the 'majority view' persuasive, because they ignore a textual analysis of § 1961(a) and, instead, base their result on policies they find to underlie post-judgment interest and attorney's fee awards.")

Section 7 of the FAA provides as follows:

> ***407** The arbitrators selected either as prescribed in this title [9 U.S.C. §§ 1 et seq.] or otherwise, 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.*** The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or 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 to 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 as 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 (emphasis added).

[4] This language speaks unambiguously to the issue before us. 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 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.[1]

This interpretation is supported by the interpretation of similar language in a previous version of Federal Rule of Civil Procedure 45. From its adoption in 1937 until its amendment in 1991, Rule 45 did not allow federal courts to issue pre-hearing document subpoenas on non-parties. This restriction was based on a reading of the first two paragraphs of the rule, which provided as follows:

> **(a) For Attendance of Witnesses; Form; Issuance.** *Every subpoena* shall be issued by the clerk under the seal of the court, shall state the name of the ***408** court and the title of the action, and *shall command each person to whom it is directed to attend and give testimony* at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.
>
> **(b) For Production of Documentary Evidence.** *A subpoena may* also *command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein;* but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Fed. R. Civ. Proc. 45 (1990)(emphasis added).

Under this version of Rule 45(a), a subpoena was required to command the person to whom it was directed "to attend and give testimony." The court could then add a requirement that the subpoenaed witness bring documents with him. *See* Fed. R. Civ. Proc. 45(b). The accepted view was that nothing in Rule 45 gave the court the power to issue documents-only subpoenas to non-parties. *See* Fed.R.Civ.P. 45, Committee Notes, 1991 Amendment Subdivision (a)("Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a nonparty to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced."); *Turner v. Parsons,* 596 F.Supp. 185, 186 (E.D.Pa.1984)("Certainly, this rule permits a non-party to be subpoenaed for a deposition. Additionally, this non-party can be required to bring certain documents to a deposition. Nowhere in the rule is it stated that documents can be subpoenaed alone, that is, without requesting their production in conjunction with a deposition or trial"); 139 F.R.D. 197, 205–206 ("Under the new Rule 45, a subpoena duces tecum seeking the production of documents (or other materials) from a nonparty may be used independently of the regular testimonial subpoena; the two are no longer wedded, as they were under the prior version of Rule 45.").

Some courts have argued that the language of Section 7 implies the power to issue such pre-hearing subpoenas. *See In re Security Life Insurance Co. of America,* 228 F.3d 865, 870–71 (8th Cir.2000)("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."); *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.,* 157 F.R.D. 42, 45 (M.D.Tenn.1994)("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.").

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 ***409** witness to bring items 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.

Since the text of Section 7 of the FAA is straightforward, we must see if the result is absurd. *See United States ex rel. Mistick PBT,* 186 F.3d at 395. We conclude that it is not. Indeed, we believe that a reasonable argument can be made that a literal reading of Section 7 actually furthers arbitration's goal of "resolving disputes in a timely and cost efficient manner." *Painewebber Inc. v. Hofmann,* 984 F.2d 1372, 1380 (3d Cir.1993). First, as noted above, until 1991 the Federal Rules of Civil Procedure themselves did not permit a federal court to compel pre-hearing document production by non-parties. That the federal courts were left for decades

to operate with this limitation of their subpoena power strongly suggests that the result produced by interpreting Section 7 of the FAA as embodying a similar limitation is not absurd. Second, it is not absurd to read the FAA as circumscribing an arbitration panel's power to affect those who did not agree to its jurisdiction. *See Legion Ins. Co.,* at *1, 2001 U.S. Dist. LEXIS 15911 at *4 ("the authority of arbitrators with respect to non-parties who have never agreed to be involved in arbitration is severely limited"). The requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration. *See COMSAT Corp. v. Natl. Science Foundation,* 190 F.3d at 269, 276 (4th Cir.1999)("The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their dispute. A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process."). Thus, contrary to Hay's claim, heeding the clear language of Section 7 does not lead to absurd or even unreasonable results.

Of course, one may well think that it would be preferable on policy grounds for arbitrators to be able to require non-parties to produce documents without also subpoenaing them to appear in person before the panel. But if it is desirable for arbitrators to possess that power, the way to give it to them is by amending Section 7 of the FAA, just as Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to confer such a power on district courts.

The Fourth Circuit has interpreted Section 7 in a way that is largely consistent with our reading. In *COMSAT Corp. v. Natl. Science Foundation, supra,* the court held that the plain meaning of Section 7 did not empower an arbitrator to issue pre-hearing discovery subpoenas to nonparties:

> ***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. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing.

190 F.3d at 275. In dicta, however, the *COMSAT* court suggested that an arbitration panel might be able to subpoena a non-party for pre-hearing discovery "under unusual circumstances" and "upon a showing of special need or hardship." *Id.* at 276. While we agree with *COMSAT*' s holding, we cannot agree with this dicta because there is simply no textual basis for allowing any "special need" exception. Again, while such a power might be desirable, we have no authority to confer it.

We have carefully considered but must respectfully disagree with the Eighth Circuit's holding in *Security Life* that Section 7 authorizes arbitrators to issue pre-hearing document-production subpoenas on non-parties. In *Security Life,* the Eighth Circuit reasoned that the "the interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing." *Security Life,* 228 F.3d at 870. In our view, however, this policy argument cannot supersede the statutory text.[2]

Even if we were to look outside the statutory text to make our decision, any argument in favor of ignoring the literal meaning of the FAA in the name of efficiency seems to cut against Supreme Court precedent regarding the role of efficiency considerations in interpreting the Act. Although efficiency is certainly an objective of parties who favor arbitration over litigation, *see, e.g., Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 58, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Painewebber Inc. v. Hofmann,* 984 F.2d 1372, 1380 (3d Cir.1993), efficiency is not the principal goal of the FAA. Rather, the central purpose of the FAA is to give effect to private agreements. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218–19, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (*"Byrd"*)("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.").

In *Byrd,* the Supreme Court addressed the argument that considerations of efficiency should control the interpretation of the provisions of the FAA relating to the enforcement of arbitration agreements. The complaint in that case asserted

a federal claim that was not going to be arbitrated, as well as pendent state claims that were covered by a mandatory arbitration agreement. The Supreme Court was presented with the argument that the District Court had the authority to refuse to compel arbitration of the pendent claims because this would have resulted in wasteful bifurcated proceedings and because the drafters of the FAA had not explicitly ***411** considered the prospect of such proceedings. *See* 470 U.S. at 219, 105 S.Ct. 1238.

Rejecting this argument, the Supreme Court noted that the terms of Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3 and 4, required the District Court to compel arbitration of the pendent claims. *See* 470 U.S. at 218, 105 S.Ct. 1238. The Court then examined the legislative history of the FAA and "reject [ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." *Id.* Instead, the Court concluded, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which the parties had entered." *Id.* at 221, 105 S.Ct. 1238. This concern, the Court held, required rigorous enforcement of agreements to arbitrate. *Id.* We take from *Byrd* the lesson that Congress's failure explicitly to consider an inefficient byproduct of the Arbitration Act does not render the text ambiguous.

Under *Byrd'* s reasoning, efficiency considerations clearly cannot override the terms of Section 7. Indeed, since the efficiency interest was far stronger in *Byrd* than it is in this case, the result here follows a fortiori. In a case such as the one before us, convening and adjourning an arbitration panel will hardly prove an insurmountable obstacle; the costs will be slight in comparison to amassing and transporting a huge volume of documents. Interpreting Section 7 as we do shifts the balance of power slightly from the party that seeks the documents to the non-party that is subpoenaed. Under our interpretation, the party seeking the documents cannot simply obtain a subpoena requiring the documents to be shipped from one warehouse to another; instead, the party will be forced to appear at a proceeding during which the documents are produced. This slight redistribution of bargaining power is unlikely to have any substantial effect on the efficiency of arbitration. Moreover, as we noted in the previous section, the rule we adopt in this case may in fact facilitate efficiency by reducing overall discovery in arbitration. In any event, if patent inefficiency, such as that resulting from the bifurcated proceedings at issue in *Byrd,* is insufficient to overcome a textual command, an ambiguous efficiency effect certainly cannot do so.

In sum, we hold that the FAA did not authorize the panel to issue a pre-hearing discovery subpoena to PwC and E.B.S. We further reject any "special needs exception" to this rule. If Hay wants to access the documents, the panel must subpoena PwC and E.B.S. to appear before it and bring the documents with them.

B.

We now turn to the PwC's argument[3] that the subpoenas at issue in this case were improper for an additional reason, namely, because they sought the production of documents that were located outside the territorial jurisdiction of the District Court. Although it is not strictly necessary for us to decide this issue at this time, we believe that it is appropriate for us to do so because of the potential that Hay will obtain a new subpoena calling on a PwC representative to appear at an arbitration proceeding and to bring the documents at issue to that proceeding. If that occurs, PwC may renew the argument in question, and the likely result would then be another appeal. In order to avoid unnecessary litigation, we address PwC's argument now.

PwC contends that ***412** Fed. R. Civ. Proc. 45(a)(2)[4] prohibits subpoenas duces tecum for documents located outside the territory within which a subpoena may be served under Fed. R. Civ. Proc. 45(b)(2). PwC relies on the following language in Rule 45(a)(2):

> If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

As applied to the situation that we have postulated (the subsequent service on PwC of a subpoena calling for both an appearance before the arbitration panel and the production of documents), PwC's argument has several flaws. We will mention two.

[5] First, the portion of Rule 45(a)(2) on which PwC's argument is based applies only to a subpoena duces tecum that is "separate from a subpoena commanding the attendance of a person." We have held, however, that the FAA does not permit such subpoenas. The portion of Rule 45(a)(2) that applies when a witness is subpoenaed to appear contains no similar language. Rather, that portion of the Rule states only that a

subpoena for attendance at a trial, hearing, or deposition shall issue from the court for the district "in which the hearing or trial or hearing is to be held" or from "the court for the district designated in the notice of deposition as the district in which the deposition is to be taken." Nothing in this language suggests that a witness who is subpoenaed to testify may not also be directed to bring documents that are not located within the territorial limits set out in Rule 45(b)(2).

Second, PwC misinterprets the language in Rule 45(a)(2) on which it relies. As noted, that provision states that a subpoena calling only for the "production or inspection" of documents "shall issue from the court for the district in which the production or inspection is to be made." "Production" refers to the delivery of documents, not their retrieval, and therefore "the district in which the production ... is to be made" is not the district in which the documents are housed but the district in which the subpoenaed party is required to turn them over.

The Notes to the 1991 Amendment reflect the same understanding of this language. The Notes state: "Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control *whether or not the materials are located within the District or within the territory within which the subpoena can be served."* Fed. R. Civ. Proc. 45, Committee Notes, 1991 Amendment Subdivision (a)(emphasis added); *see also* 9 James Wm. Moore et al., Moore's Federal Practice para. 45.03 (3d ed. 2000) ("The subpoena should issue from the Court where the production of documents is to occur, regardless of where the documents are located."); 9A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2456 at 31 (1995 & 2003 Supp.)("Even records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction.").

***413** PwC's belief that a subpoena cannot reach extraterritorial documents seems to arise out of a misreading of *Legion Ins. Co. v. John Hancock Mutual Life Ins. Co.,* 33 Fed. Appx. 26 (3d Cir.2002). In *Legion,* the United States District Court for the Eastern District of Pennsylvania held that it lacked personal jurisdiction over a party, CSIS, on whom an arbitrator's subpoena had been served, and the Court therefore refused to enforce the subpoena. Affirming, a panel of our Court wrote that "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 [the] motion to enforce the arbitration subpoena against CSIS, which, as a nonparty located in Florida, lies beyond the scope of the court's subpoena enforcement powers." *Legion,* 33 Fed. Appx. at 28. PwC cites language in the opinion that it interprets as supporting its argument, but PwC takes that language out of context. The other cases on which and PwC relies are either unpersuasive or inapposite.[5]

We have considered all of the arguments made by PwC regarding the location of the documents, but we find them unconvincing.

III.

For the reasons set out above, the order of the District Court is reversed.

CHERTOFF, Circuit Judge, concurring:
I join Judge Alito's opinion in full. But I appreciate the reason that a number of courts have been motivated to read a pre-hearing discovery power into the arbitration rules. I write separately to observe that our opinion does not leave arbitrators powerless to require advance production of documents when necessary to allow fair and efficient proceedings.

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, 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. *See* David M. Heilbron, ***414** *The Arbitration Clause, the Preliminary Conference, and the Big Case,* 45 Arb. J. 38, 43–44 (1990).

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. And the availability of this procedure within the existing statutory language should satisfy the desire that there be

some mechanism "to compel pre-arbitration discovery upon a showing of special need or hardship." *COMSAT Corp. v. Nat'l Sci. Found.,* 190 F.3d 269, 276 (4th Cir.1999).

All Citations

360 F.3d 404, 21 IER Cases 18

Footnotes

1 Some states have recently adopted versions of the Uniform Arbitration Act, which differs from the Federal Arbitration Act. Some of these state statutes explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties. *See, e.g.,* 10 Del.Code § 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."); 42 Pa.C.S.A. § 7309 ("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.") 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.

2 We have also considered the District Court decisions that have reached similar results. *See In re Arbiration Between Douglas Brazell and America Color Graphics, Inc.,* 2000 WL 364997, 2000 U.S. Dist. Lexis 4482 (S.D.N.Y. April 6, 2000); *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.,* 157 F.R.D. 42, 45 (M.D.Tenn.1994); *Stanton v. Paine Webber,* 685 F.Supp. 1241, 1242 (S.D.Fla.1988). None of these cases provides an adequate justification for disregarding the plain meaning of Section 7's text.

3 E.B.S. does not join in this argument.

4 Fed. R. Civ. Proc. 54(b)(2) provides in relevant part as follows:

> [A] subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place without the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena.

5 PwC relies on the statement in *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.,* 2 F.3d 1397, 1406 (5th Cir.1993), that "a federal court sitting in one district cannot issue a subpoena *duces tecum* to a non-party for the production of documents located in another district." However, this statement was dictum; the basis for the statement is unclear; and it appears that both the subpoena recipient and the documents in that case may have been located beyond the reach of Fed. R. Civ. Proc. 45(b)(2)(the court was in Houston, Texas, and the non-party and the records were in Mississippi).

In *Cates v. LTV Aerospace Corp.,* 480 F.2d 620 (5th Cir.1973), Navy regulations specified that the documents in question could be obtained only from the Secretary of the Navy in Washington, but a party attempted to obtain the documents by serving a subpoena on the commanding officer of a naval facility in Texas. The court held that the regulations could not be circumvented in this way. The critical factor in *Cates* was not the location of the documents but the location of the officer from whom they had to be sought.

In *Ariel v. Jones,* 693 F.2d 1058 (11th Cir.1982), a district court in Florida quashed a subpoena duces tecum for documents stored in Colorado on the ground that the agent served in Florida did not have effective control of the documents. In affirming, the court of appeals did not endorse the principle advocated by PwC that a non-party may not be subpoenaed to produce documents located outside the district court's territorial jurisdiction. Rather, the court of appeals held that the trial court had not abused its discretion in quashing the subpoena as unreasonable and oppressive.

Doc. No. 6

Local Solutions. Global Reach.™

JAMS Clause Workbook

A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts

EFFECTIVE JUNE 1, 2018

In today's competitive marketplace, most companies either cannot afford or do not wish to incur the time, expense and adverse business consequences of traditional litigation. Unfortunately, in every business relationship there is the potential for conflict over contractual agreements or business operations. When such conflicts arise, there is no need to incur the onerous expense and delays involved in traditional litigation. There are readily available alternative dispute resolution procedures that will enable you to resolve your disputes relatively quickly, fairly and cost-effectively.

Planning is the key to avoiding the adverse effects of litigation. The optimal time for businesses to implement strategies for avoidance of those adverse effects is before any dispute arises. We at JAMS recommend, therefore, that whenever you negotiate or enter into a contract, you should carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship. By doing this before any dispute arises, you avoid the difficulties of attempting to negotiate dispute resolution procedures when you are already in the midst of a substantive dispute that may have engendered a lack of trust on both sides.

JAMS offers sample dispute resolution clauses that may be inserted into a contract prior to any dispute ever arising. These sample dispute resolution clauses are set forth and, in some cases, briefly discussed inside.

JAMS successfully resolves and manages business and legal disputes by providing efficient, cost-effective and impartial ways of overcoming barriers at any stage of conflict. JAMS offers customized dispute resolution services locally and globally through a combination of industry-specific experience, first-class client service, top-notch facilities and highly trained panelists.

JAMS Clauses for Commercial Contracts can be downloaded in Word or PDF format. For more information on using such clauses, please contact your JAMS Case Manager or call 1.800.352.5267 to reach the JAMS Resolution Center nearest you. Also, if you incorporate any of these clauses into a contract that applies to a number of contracting parties (such as, for example, in a standard employment agreement or in a consumer agreement), please advise JAMS at 949.224.1810 as special requirements may be applicable.

By suggesting the contract language contained in this Guide, JAMS is in no way offering legal advice. Rather, the legal effect of the clauses in question should be weighed by the parties in the specific context of whatever law is applicable.

Standard Arbitration Clauses

JAMS has standard clauses separately providing for submission of domestic and international disputes to arbitration. While these clauses set forth no details as to procedures to be followed in connection with any such arbitrations, they provide a simple means of assuring that any future dispute will be arbitrated. An additional benefit is that it is sometimes easier for contracting parties to agree to simple, straightforward clauses than to some of the more complex provisions that are set forth in subsequent sections of this Guide. The standard JAMS clauses are set forth below.

JAMS Standard Arbitration Clause for Domestic Commercial Contracts

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

JAMS Standard Arbitration Clause for International Commercial Contracts

Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The Tribunal will consist of [three arbitrators/one arbitrator]. The place of arbitration will be [location]. The language to be used in the arbitral proceedings will be [language]. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Resolution Prior to Arbitration

It is common practice for a contract clause to provide for negotiation and/or mediation in advance of arbitration. Such clauses represent the most cost-effective means of resolving a dispute because they often lead to an early settlement. Unless drafted with care, however, such clauses can also have negative side effects since they can be a vehicle for delay and can result in required but empty negotiations where one or all parties have no intention of moving toward a settlement. In JAMS' experience, such downsides can be greatly minimized by setting strict deadlines marking the early ends of the negotiation and mediation periods.

Clause Providing for Negotiation in Advance of Arbitration

1. *The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include with reasonable particularity (a) a statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 30 days*

after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place.

2. *Unless otherwise agreed in writing by the negotiating parties, the above-described negotiation shall end at the close of the first meeting of executives described above ("First Meeting"). Such closure shall not preclude continuing or later negotiations, if desired.*
3. *All offers, promises, conduct and statements, whether oral or written, made in the course of the negotiation by any of the parties, their agents, employees, experts and attorneys are confidential, privileged and inadmissible for any purpose, including impeachment, in arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation.*
4. *At no time prior to the First Meeting shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 1 above.*
5. *All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in Paragraphs 1 and 2 above are pending and for 15 calendar days thereafter. The parties will take such action, if any, required to effectuate such tolling.*

Clause Providing for Mediation in Advance of Arbitration

If the matter is not resolved by negotiation pursuant to paragraphs___above, then the matter will proceed to mediation as set forth below.

Or in the Alternative

If the parties do not wish to negotiate in advance of arbitration, but do wish to mediate before proceeding to arbitration, they may accomplish this through use of the following language:

1. *The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration pursuant to the clause set forth in Paragraph 5 below.*
2. *Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested.*
3. *The parties will cooperate with JAMS and with one another in selecting a mediator from the JAMS panel of neutrals and in scheduling the mediation proceedings. The parties agree that they will participate in the mediation in good faith and that they will share equally in its costs.*
4. *All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.*
5. *Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or at any time following 45 days from the date of filing the written request for mediation, whichever occurs first ("Earliest Initiation Date"). The mediation may continue after the commencement of arbitration if the parties so desire.*
6. *At no time prior to the Earliest Initiation Date shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 3 above.*
7. *All applicable statutes of limitation and defenses based upon the passage of time shall be tolled until 15 days after the Earliest Initiation Date. The parties will take such action, if any, required to effectuate such tolling.*

Appointment of an Emergency Arbitrator

JAMS Comprehensive Rules provide for the appointment of an Emergency Arbitrator to address and decide a request for emergency relief. (See Comprehensive Rule 2(c).) If the parties to the Agreement do not wish to have this procedure available, they must opt out in their arbitration agreement or by written agreement later.

Arbitrator Qualifications

It is common for a contract clause to require that one or more of the arbitrators have certain specified qualifications. In drafting such a provision, care should be taken that such necessary qualifications not be too detailed and specific since a highly detailed list of required qualifications can significantly narrow the number of available, competent and qualified arbitrators.

Specification of arbitrator qualifications often works best in the context of a three-arbitrator panel since it is possible in that setting to require that one of the panelists have a certain technical expertise without limiting the entire panel to so narrow an area of experience. In this way, it is possible to ensure that the desired technical expertise is represented on the panel while at the same time assuring that the chair of the panel has extensive experience in the entire arbitration process.

If the arbitration is to be conducted by a sole arbitrator, the contract clause might provide that the arbitrator must be:

1. **A retired judge from a particular court; or**
2. **A lawyer with 10 years of active practice in a specified area, such as construction or computer technology.**

If the arbitration is to be handled by a three-arbitrator panel, the contract clause might provide:

1. **That the Chair be an attorney with at least 20 years of active litigation experience; or**
2. **That the Chair be a retired judge from a particular court; or**
3. **That one of the wing arbitrators be an expert in an area such as construction or be an accountant or a particular type of engineer; or**
4. **That the Chair must previously have served as Chair or sole arbitrator in at least 10 arbitrations where an award was rendered following a hearing on the merits.**

Note: The foregoing are just examples. The point is that the qualifications of the arbitrator(s) should be considered at the time when the contract clause is drafted.

Diversity and Inclusion

Businesses increasingly recognize that diverse workforces produce better results, and many have robust initiatives to promote inclusivity in terms of gender, ethnicity and sexual orientation. Parties may choose to include diversity as a consideration when selecting an arbitrator or arbitration panel. The following clause, modeled after the **Equal Representation in Arbitration** pledge, attempts to promote diversity while recognizing that other qualifications are also important when selecting an arbitrator.

The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.

Party-Appointed Arbitrators

It is a common practice for each side to appoint an arbitrator and for the two party-appointed arbitrators to then appoint the Chair of the panel. Rule 7(c) of the JAMS Comprehensive Arbitration Rules and Procedures ("JAMS Arbitration Rules") requires that party-appointed arbitrators "shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral." Set forth below is a clause that effectively provides for party-appointed arbitrators:

Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two so selected shall select a third arbitrator within 30 days of the commencement of the arbitration. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator within the allotted time, the third arbitrator shall be appointed by JAMS in accordance with its rules. All arbitrators shall serve as neutral, independent and impartial arbitrators.

Optional

Each party shall communicate its choice of a party-appointed arbitrator only to the JAMS Case Manager in charge of the filing. Neither party is to inform any of the arbitrators as to which of the parties may have appointed them.

Confidentiality

Rule 26 of the JAMS Arbitration Rules provides that JAMS and the arbitrator(s) must maintain the confidentiality of the arbitration proceeding. If it is desired that the parties should also maintain the confidentiality of the proceeding, this can be accomplished with the following language:

> *The parties shall maintain the confidential nature of the arbitration proceeding and the Award, including the Hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision.*

Governing Law

In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University,* 489 U.S. 468 (1989), the U.S. Supreme Court held that the Federal Arbitration Act ("FAA") did not preempt the California Arbitration Act in an interstate dispute where the parties agreed that their contract would be governed by California law. Thus, if the parties wish to ensure that the FAA will apply, regardless of the law that they have specified to govern on substantive issues, the arbitration clause should so provide as follows:

> *This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of _____, exclusive of conflict or choice of law rules.*
>
> *The parties acknowledge that this Agreement evidences a transaction involving interstate commerce. Notwithstanding the provision in the preceding paragraph with respect to applicable substantive law, any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act (9 U.S.C., Secs. 1-16).*

Punitive Damages

It is not entirely clear whether punitive damages can or cannot be awarded where the dispute resolution clause makes no mention of such damages. See *Garity v. Lyle Stuart, Inc.,* 40 N.Y.2d 354 (1976); *Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52 (1995). Thus, if the parties wish to preclude the arbitrator(s) from awarding punitive damages, they should include specific language to that effect in the dispute resolution clause. The following language accomplishes that purpose:

> *In any arbitration arising out of or related to this Agreement, the arbitrator(s) are not empowered to award punitive or exemplary damages, except where permitted by statute, and the parties waive any right to recover any such damages*[1]

Limitation of Liability

> *In any arbitration arising out of or related to this Agreement, the arbitrator(s) may not award any incidental, indirect or consequential damages, including damages for lost profits.*[2]

Fees and Costs to Prevailing Party

A "prevailing party" clause such as the following tends to discourage frivolous claims, counterclaims and defenses, as well as scorched earth discovery, in an arbitration:

> *In any arbitration arising out of or related to this Agreement, the arbitrator(s) shall award to the prevailing party, if any, the costs and attorneys' fees reasonably incurred by the prevailing party in connection with the arbitration.*
>
> *If the arbitrator(s) determine a party to be the prevailing party under circumstances where the prevailing party won on some but not all of the claims and counterclaims, the arbitrator(s) may award the prevailing party an appropriate percentage of the costs and attorneys' fees reasonably incurred by the prevailing party in connection with the arbitration.*

1. *Article 30.2 of the JAMS International Arbitration Rules and Procedures already precludes an award of punitive damages "unless the parties agree otherwise…[or] unless a statute requires that compensatory damages be increased in a specified manner."*
2. *The law related to limitation of liability clauses varies significantly from jurisdiction to jurisdiction. Parties wishing to include such a clause in a contract should check the applicable law before doing so.*

Appeal

In *Hall Street Associates v. Mattel Inc.,* the U.S. Supreme Court held that grounds for a court's vacating an arbitration award under the Federal Arbitration Act ("FAA") are limited to the unlikely occurrences specified in the FAA, such as "evident partiality," "fraud," "corruption," refusing to hear "pertinent and material" evidence, and acts exceeding the powers of the arbitrators.

Despite *Hall Street,* the option still remains for parties to appeal to a second panel of arbitrators (as opposed to a court) on the basis of traditional legal principles. One such approach that achieves this goal is set forth in the JAMS Optional Appeal Procedure ("Appeal Procedure"), which permits a meaningful, cost-effective, expeditious appeal based on the same legal principles as would have pertained in an appeal following a trial before a court or jury. More particularly, the Appeal Procedure provides

- That an appeal may be taken to a separate panel of three JAMS arbitrators (or a single arbitrator if the parties so agree).
- That the standard of review will be the "same standard…that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."
- That a decision will be rendered within 21 days of oral argument or service of final briefs, which will not exceed 25 double-spaced pages.

In order to incorporate the above-described appeal into an arbitration, one need only provide in the dispute resolution clause of a commercial contract that:

> *The Parties adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure (as it exists on the effective date of this Agreement) with respect to any final award in an arbitration arising out of or related to this Agreement.*

Measures to Enhance Arbitration Efficiency–JAMS Optional Expedited Arbitration Procedures

In recent years, there has been mounting criticism that arbitration has become so costly and time-consuming that the distinction between arbitration and court litigation has become blurred. In response, JAMS acted on January 6, 2010 to adopt **Recommended Arbitration Discovery Protocols for Domestic Commercial Cases** ("JAMS Discovery Protocols"), and on October 1, 2010, it amended the JAMS Arbitration Rules to add Rules 16.1 and 16.2.

Rules 16.1 and 16.2 set forth expedited arbitration procedures that may be incorporated in the dispute resolution clause in the parties' commercial contract or in a post-dispute submission to Arbitration. Many of the changes effected by the expedited procedures are based on the JAMS Discovery Protocols. They include:

- A requirement that prior to the first preliminary conference, the parties produce documents pursuant to Rule 17(a) of the JAMS Arbitration Rules.
- Limiting document requests to documents that: (i) are directly relevant to the matters in issue in the case or to the case's outcome; (ii) are reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (iii) do not include broad phraseology, such as "all documents directly or indirectly related to."
- Limiting E-Discovery as suggested in the JAMS Discovery Protocols.
- Limiting depositions of percipient witnesses to one per side unless it is determined, based on the factual context of the arbitration, that more depositions are warranted. In making any such determination, the Arbitrator shall apply the criteria set forth in the JAMS Discovery Protocols.
- Limiting expert depositions, if any, as follows: Where expert reports are produced to the other side in advance of the hearing on the merits, expert depositions may be allowed only by agreement of the parties or by order of the Arbitrator for good cause shown.
- Requiring the resolution of discovery disputes on an expedited basis.
- Setting a discovery cutoff not to exceed 90 days after the first preliminary conference for percipient discovery and not to exceed 105 days for expert discovery, if any.
- Eliminating the use of dispositive motions except as allowed by the Arbitrator applying the criteria set forth in the JAMS Discovery Protocols.
- Mandating that the hearing on the merits be held on consecutive business days unless otherwise agreed by the parties or ordered by the Arbitrator

- Requiring the hearing to commence within 60 days after the cutoff for percipient discovery. This will typically get a case to hearing no more than 135 days after the first preliminary conference.

A complete copy of Rules 16.1 and 16.2 can be found at **www.jamsadr.com/rules-comprehensive-arbitration.**

If parties wish the complete benefit of Rules 16.1 and 16.2, they can accomplish this by including the following language in the dispute resolution clause of their contract:

Any arbitration arising out of or related to this Agreement shall be conducted in accordance with the expedited procedures set forth in the JAMS Comprehensive Arbitration Rules and Procedures as those Rules exist on the effective date of this Agreement, including Rules 16.1 and 16.2 of those Rules.

More Limited Efficiency-Enhancing Provisions

In certain instances, parties may wish to include in their dispute resolution clauses language that is not as comprehensive as that suggested in Rules 16.1 and 16.2, but that will nonetheless facilitate the efficient conduct of any arbitration arising under the Agreement. Examples of such efficiency-enhancing clauses are set forth below.

Document Requests

In any arbitration arising out of or related to this Agreement, requests for documents:

1. *Shall be limited to documents which are directly relevant to significant issues in the case or to the case's outcome;*
2. *Shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and*
3. *Shall not include broad phraseology such as "all documents directly or indirectly related to." (See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2).*

E-Discovery

In any arbitration arising out of or related to this Agreement:

1. *There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.*
2. *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.*
3. *The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.*
4. *Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award. (See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2).*

Interrogatories and Requests to Admit

In any arbitration arising out of or related to this Agreement, there shall be no interrogatories or requests to admit.

Depositions

In international arbitrations, the prevailing practice is that depositions are not permitted. But it also is true in international arbitrations that written witness statements are normally used in lieu of oral direct testimony and that these written statements are exchanged well in advance of the hearing on the merits. This procedure can go far in obviating any need for depositions.

In domestic commercial arbitrations, limited depositions of key witnesses can significantly shorten cross-examination and shorten the hearing on the merits. This is the reason why JAMS Comprehensive Arbitration Rule 17(a) provides that each party may take one deposition of another party and may apply to take additional depositions, if deemed necessary.

If not carefully controlled, however, depositions in domestic arbitration can become extremely expensive, wasteful and time-consuming. The following language in a dispute resolution clause of a domestic agreement can enable the parties to enjoy the benefits of depositions while at the same time keeping them well under control:

In any arbitration arising out of or related to this Agreement, each side may take three (3) discovery depositions. Each side's depositions are to consume no more than a total of fifteen (15)* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed six (6)* weeks.*

Note: The asterisked numbers can of course be changed to comport with the particular circumstances of each case.

See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2.

Dispositive Motions

In arbitration, "dispositive" motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the grounds that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues, such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time-consuming discovery.

The issue of dispositive motions can be effectively addressed in the dispute resolution clause by inclusion of the following language:

In any arbitration arising out of or related to this Agreement:

1. *Any party wishing to make a dispositive motion shall first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side shall have a brief period within which to respond.*
2. *Based on the letters, the arbitrator will decide whether to proceed with more comprehensive briefing and argument on the proposed motion.*
3. *If the arbitrator decides to go forward with the motion, he/she will place page limits on the briefs and set an accelerated schedule for the disposition of the motion.*
4. *Under ordinary circumstances, the pendency of such a motion will not serve to stay any aspect of the arbitration or adjourn any pending deadlines.*

Deadlines for Completion of Arbitration and Interim Phases

The following time limits are to apply to any arbitration arising out of or related to this Agreement:

- *Discovery is to be completed within ___ days of the service of the arbitration demand.*
- *The evidentiary hearing on the merits ("Hearing") is to commence within ___ days of the service of the arbitration demand.*
- *At the Hearing, each side is to be allotted ___ days for presentation of direct evidence and for cross examination.*
- *A brief, reasoned award is to be rendered within 45 days of the close of the Hearing or within 45 days of service of post-hearing briefs if the arbitrator(s) direct the service of such briefs.*

The arbitrator(s) must agree to the foregoing deadlines before accepting appointment.

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.

Doc. No. 7

Arbitration Clause

If ICC Arbitration is chosen as the preferred dispute resolution method, it should be decided when negotiating contracts, treaties or separate arbitration agreements. However, if both parties consent, this can be included after a dispute has arisen as well.

It is recommended that parties wishing to make reference to ICC Arbitration in their contracts use the standard clause below.

Standard ICC Arbitration Clause

> **All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.**

Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator. Also, it may be desirable for them to stipulate the place and language of the arbitration and the law applicable to the merits. The ICC Arbitration Rules do not limit the parties' free choice of the place and language of the arbitration or the law governing the contract.

When adapting the clause, care must be taken to avoid any risk of ambiguity. Unclear wording in the clause will cause uncertainty and delay and can hinder or even compromise the dispute resolution process.

Parties should also take account of any factors that may affect the enforceability of the clause under applicable law. These include any mandatory requirements that may exist at the place of arbitration and the expected place or places of enforcement.

ICC Arbitration without Emergency Arbitrator

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the clause above:

> **The Emergency Arbitrator Provisions shall not apply.**

Expedited Arbitration

The ICC Arbitration Rules provide for use of an expedited procedure in lower-value cases. If parties wish to exclude the application of the Expedited Procedure Provisions, they must expressly opt out by adding the following wording to the clause above:

> **The Expedited Procedure Provisions shall not apply.**

Parties wishing to avail themselves of the expedited procedure in higher-value cases should expressly opt in by adding the following wording to the clause above:

> **The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute.**

If parties wish the ceiling for the application of the Expedited Procedure Rules to be higher than that specified in those Rules, the following wording should be added to the clause above:

> **The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US$ [specify amount] at the time of the communication referred to in Article 1(3) of the Expedited Procedure Rules.**

Standard ICC Arbitration Clause without Publication of Awards

> **All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. No award or procedural order made in the arbitration shall be published.**

Multi-tiered Clauses

ICC Arbitration may be used as the forum for final determination of a dispute following an attempt at settlement by other means such as mediation. Parties wishing to include in their contracts a tiered dispute resolution clause combining ICC Arbitration with ICC Mediation should refer to the standard clauses relating to the ICC Mediation Rules.

Other combinations of services are also possible. For instance, arbitration may be used as a fallback to expertise or dispute boards. Also, parties who resort to ICC Arbitration may wish to provide for recourse to the ICC International Centre for ADR for the proposal of an expert if an expert opinion is required in the course of the arbitration.

Other recommendations

The parties may also wish to stipulate in the arbitration clause:

- the law governing the contract;
- the number of arbitrators;
- the place of arbitration; and/or
- the language of the arbitration.

The standard clause can be modified in order to take account of the requirements of national laws and any other special requirements that the parties may have. In particular, parties should always check for any mandatory arbitration. For example, it is prudent for parties wishing to have an ICC Arbitration in Mainland China to include in their arbitration clause an explicit reference to the ICC International Court of Arbitration.

The following language is suggested for this purpose:

“All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Make special arrangements where the contract or transaction involves more than two parties.

Doc. No. 8

CPR
International Institute for
Conflict Prevention & Resolution

LESS CONFLICT. MORE PURPOSE.

Model Clauses

Specialty Areas

June 2021

This publication is intended as a guide to using dispute management clauses in general and cannot cover every type of transaction or specific situation. Readers should take legal advice before applying the information covered in this publication to specific issues or transactions. CPR accepts no liability for any issue arising out of a dispute over the usage of these clauses.

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ABOUT CPR

Established in 1977, CPR is an independent nonprofit organization that promotes the prevention and resolution of conflict to better enable purpose.

The **CPR Institute** drives a global prevention and dispute resolution culture through the ***thought leadership*** of its diverse member companies, leading mediators and arbitrators, law firms, individual practitioners, and academics. It ***convenes*** Committees to ***share*** best practices and develop innovative tools. It ***connects*** thought leaders through global, regional and smaller events. It ***publishes*** a monthly journal on related topics and ***advocates*** for expanding the capacity for dispute prevention and resolution globally through a variety of initiatives.

CPR Dispute Resolution provides leading edge ***dispute management services*** – mediation, arbitration, early neutral evaluation, dispute review boards and others -- as well as ***training and education***. It is uniquely positioned to resolve disputes by leveraging the resources generated by the leaders who participate in the CPR Institute. It has deep experience in dispute management, a deep bench on its global ***Panel of Distinguished Neutrals***, and deep expertise across a variety of subject areas.

ABOUT THIS GUIDE:

This publication is intended as a guide to using dispute management clauses in general and cannot cover every type of transaction or specific situation. Readers should take legal advice before applying the information covered in this publication to specific issues or transactions. CPR accepts no liability for any issue arising out of a dispute over the usage of these clauses.

In commercial contracts it is now common practice to include dispute management clauses. An efficient and effective dispute management clause will facilitate dispute prevention and resolution, save users time and cost, provide better confidentiality protection, and help preserve the relationship amongst parties. Furthermore, it allows parties to establish ground rules of any future dispute, to submit current disputes for more efficient resolution, and allows neutrals with subject matter expertise to assist in resolving these disputes.

This guide is designed to assist users in choosing the most suitable dispute management clause for their situation and covers the whole spectrum of ADR, including arbitration, mediation, multistep clauses, as well as other lesser-known processes. It is broken up into 3 different documents to ensure each document is as concise as possible: (1) domestic disputes, (2) international disputes, and (3) specialty areas, including construction, patent, franchise, and employment disputes as well as dispute prevention provisions and clauses for other proceedings like minitrials, early neutral evaluation and DRBs.

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I. GENERALLY APPLICABLE PROCEDURES

1. Appellate Procedure

An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.

2. Concurrent Arbitration-Mediation

Following the commencement of any arbitration, the parties shall endeavor to settle the dispute by confidential mediation under the CPR Mediation Procedure in effect on the date of this Agreement (the "CPR Mediation Procedure")[as modified by the CPR Streamlined Mediator Selection Procedure]. [Unless they otherwise agree, the parties shall select a mediator from the CPR Panels of Distinguished Neutrals. If a mediation has already been initiated prior to the commencement of the arbitration pursuant to a CPR Mediation Model Clause, and if all parties consent, the previously appointed mediator may serve as the mediator under this Concurrent Mediation-Arbitration Clause.] The mediation initiated under this Clause will continue until a written settlement agreement is reached, an award is delivered to the parties, or the procedure is terminated by agreement of the parties. Notwithstanding the foregoing, any party may withdraw at any time after attending the first substantive mediation conference, as provided in paragraph 3(b) of the CPR Mediation Procedure. The mediation shall be conducted in accordance with the CPR Protocol for Concurrent Mediation–Arbitration (CMA)l [currently in effect OR in effect on the date of this Agreement] (the "CMA Protocol") and the CPR Mediation Procedure, to the extent that Procedure is not inconsistent with this Clause or the CMA Protocol. Any settlement reached in the course of the mediation and before an award is made, shall be referred to the Arbitral Tribunal and, if the parties so agree, may be reflected in a consent award under Rule 21.5 of the CPR Rules for Administered Arbitration.

OPTIONAL CLAUSE:

In the event the parties have also adopted the CPR Negotiation-Mediation Clause, and if the dispute has not been resolved by negotiation within the period specified therein, the parties shall confer to determine whether they consent to conducting a mediation prior to the commencement of the arbitration. Absent the consent of all parties within 7 days after the end of the period specified for negotiation, the mediation shall occur after, and not before, the commencement of the arbitration.

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3. CPR Model Clauses for Allocating Responsibility for Determining Arbitrability

"[The parties further agree that] the arbitral tribunal, and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral tribunal."

OR

"[The parties further agree that] the court, and not the arbitral tribunal, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral tribunal."

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II. SPECIALTY MATTERS

1. Construction

A. PRE-DISPUTE CLAUSE (ARBITRATION)

Any dispute arising out of or relating to this contract, including the making, breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention & Resolution Rules for Expedited Arbitration of Construction Disputes (the "Rules"), in the form in effect on the date of this agreement, by three neutral arbitrators, of whom each party shall appoint one with the third to be selected by agreement or appointment by the International Institute for Conflict Prevention & Resolution ("CPR") [unless the parties select one of the following options by affirmatively placing an "x" in the appropriate box below:

- ☐ one neutral arbitrator to be appointed by the CPR Institute; or
- ☐ three neutral arbitrators to be appointed by the CPR Institute].

[The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of 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 the arbitration shall be [city, state].

B. EXISTING DISPUTE SUBMISSION AGREEMENT (ARBITRATION)

We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention & Resolution Rules for Expedited Arbitration of Construction Disputes (the "Rules"), in effect on the date of this agreement, the following dispute:

[Describe briefly]

We further agree that the above dispute shall be submitted to three neutral arbitrators, of whom each party shall appoint one with the third to be selected by agreement or appointment by the CPR Institute [unless the parties select one of the following options by affirmatively placing an "x" in the appropriate box below:

- ☐ one neutral arbitrator to be appointed by the CPR Institute; or
- ☐ three neutral arbitrators to be appointed by the CPR Institute].

[The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s).] We further agree that we shall faithfully observe this agreement and the 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 may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state].

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C. APPEAL PROCEDURE

Unless otherwise agreed by the parties, within 30 days of receipt by the parties of a final arbitration award in any arbitration arising out of or related to this agreement, an appeal may be taken from such final award under the CPR Institute Arbitration Appeal Procedure, currently in effect. Pursuant to such Procedure, the appeal shall be heard by three former federal judges who will apply the following grounds for appeal:

i. the award contains material and prejudicial errors of law of such nature that it does not rest on any appropriate legal basis;

ii. the award contains factual findings clearly unsupported by the record; or

iii. the award is subject to any of the enumerated grounds contained in Section 10 of the Federal Arbitration Act for vacating awards.

No appeal may be filed unless the arbitrators in the original arbitration were required by the parties to reach a decision in compliance with applicable law and issue a written award setting forth the factual and legal bases; and a record was made of all hearings and evidence in such original arbitration proceeding.

Unless otherwise agreed to by the parties and the appeal Tribunal, the appeal shall be conducted at the place of the original arbitration.

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2. Employment

A. PRE-DISPUTE CLAUSE (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") Administered Employment Arbitration 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 in accordance with the screened appointment procedure provided in Rule 5.3]. [The parties further agree that the arbitral tribunal, and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral tribunal. OR The parties further agree that the court, and not the arbitral tribunal, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral tribunal.*] [The parties further agree that, if applicable, the procedures of the CPR Employment-Related Mass Claims Protocol shall also govern the arbitration. The Protocol may be found here. {Contract must provide access to the Protocol via a link or otherwise.}] 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) (no more than 50 miles from employee's hometown).

B. EXISTING DISPUTE SUBMISSION AGREEMENT (ARBITRATION)

We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Administered Employment Arbitration Rules (the "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 in accordance with the screened appointment procedure provided in Rule 5.3]. [We further agree that the arbitral tribunal, and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral tribunal. OR The parties further agree that the court, and not the arbitral tribunal, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitral tribunal.*] We further agree that we shall faithfully observe this agreement and the 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) (no more than 50 miles from employee's hometown).

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C. MEDIATION SUBMISSION AGREEMENT

AGREEMENT made _____, 20__ by and between _____of _____ ("Employee"), represented by_____; and _____of _____ ("Company"), represented by _____.

In brief, the Employee's claim is as follows

_____.

The Employee seeks _____.

The Company's response_____.

The Employee and the Company both wish to dispose expeditiously of their differences. The parties hereby agree to private and confidential mediation of their dispute pursuant to the CPR Employment Dispute Mediation Procedure (the "Procedure") [as modified by the CPR Streamlined Mediator Selection Procedure], a copy of which is attached to this Agreement. Both parties and their representatives (if any) have read and understand the Procedure. The parties hereby agree to all provisions of the Procedure, except as expressly modified in an exhibit appended to this Submission Agreement and initialed by the parties.

The procedure shall be conducted before _____, who shall serve as Mediator and who has agreed to so serve. The Mediator shall be compensated at the rate of $ _____ per hour, plus out-of-pocket expenses. The parties have agreed to be responsible for the fees as follows:

_____.

Neither party knows of any circumstances that would cause reasonable doubt regarding the impartiality of the person named as Mediator.

The Employee hereby affirms that he/she is entering into this Submission Agreement voluntarily, knowingly, and after the opportunity for full consultation with a representative or counsel of his/her own choosing.

Signed by: _____ Date: _____
Employee

Signed by: _____ Date: _____
Representative of or Counsel for Employee

(if applicable)
Signed by: _____ Date: _____
For Company

Signed by: _____ Date: _____
Representative of or Counsel for Company

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3. Franchise Mediation Procedure

A. PRE-DISPUTE CLAUSE (MEDIATION)

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the CPR Franchise Mediation Program [as modified by the CPR Streamlined Mediator Selection Procedure], before resorting to arbitration or litigation.

B. PRE-DISPUTE CLAUSE (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 Rules for Non-Administered Arbitration of Franchise Disputes by [a sole arbitrator] [three arbitrators, of whom each party shall appoint one pursuant to Rules 5.1 and 5.2] [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 appointed by either party]. [The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of 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 the arbitration shall be (city, state).

C. EXISTING DISPUTE SUBMISSION AGREEMENT (ARBITRATION)

We, the undersigned parties, here by agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration of Franchise Disputes (the "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 appoint one pursuant to Rules 5.1 and 5.2] [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 appointed by either party]. [The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s).] We further agree that we shall faithfully observe this agreement and the 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 may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state].

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4. Patent Disputes

A. MULTI STEP CLAUSE

Negotiation

If a dispute arises out of or relates to this Agreement, or its breach, the disputing party may give the other party written notice of any dispute not resolved in the normal course of business. Within [30] days after delivery of the written notice, executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement shall meet at a mutually acceptable time and place and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute.

Mediation

If the dispute has not been resolved by negotiation within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within]30[days after delivery], the parties agree to resolve the dispute through mediation by a sole mediator selected by the parties or, at any time at the option of a party, to mediation by the CPR Mediation Procedure [as modified by the CPR Streamlined Mediator Selection Procedure].

B. PRE-DISPUTE CLAUSE (ARBITRATION)

If not thus resolved, any controversy or claim arising out of or relating to this contract, or the enforcement, breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the [current] CPR Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes [in effect on the date of this contract], by (a sole arbitrator) (three neutral arbitrators, none of whom shall be appointed by either party) (three arbitrators, of whom each party shall appoint one). [The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of 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 the arbitration shall be (city, state). Insofar as the proceeding relates to patents, it shall also be governed by 35 U.S.C. §294, to the extent applicable.

C. EXISTING DISPUTE SUBMISSION AGREEMENT (ARBITRATION)

We, the undersigned parties, hereby agree to submit to arbitration in accordance with the CPR Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes (the "Rules") in effect on the date of this agreement the following controversy:

[Describe briefly]

We further agree that the above controversy shall be submitted to [a sole arbitrator] [three neutral arbitrators, none of whom shall be appointed by either party] [three arbitrators, of whom each party shall appoint one]. [The arbitrator(s), and not the court, shall have primary responsibility to hear and determine challenges to the jurisdiction

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of the arbitrator(s). OR The court, and not the arbitrator(s), shall have primary responsibility to hear and determine challenges to the jurisdiction of the arbitrator(s).] We further agree that we shall faithfully observe this agreement and the Rules and that we shall abide by and perform any award rendered by the arbitrator(s). The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§1 et seq., and judgment upon the award may be entered by any court having jurisdiction thereof. The place of the arbitration shall be [city, state]. Insofar as the proceeding relates to patents, it shall also be governed by 35 U.S.C. §294, to the extent applicable.

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III. SPECIAL SERVICES AND DISPUTE PREVENTION

1. Minitrial

The parties will attempt to resolve any dispute arising out of or relating to this Agreement in accordance with the CPR Minitrial Procedure [currently in effect OR in effect on the date of this Agreement] and will enter into an initiating agreement in the form annexed to such Procedure.

2. Early Neutral Evaluation

At the request of either party, the parties submit the dispute between them to Early Neutral Evaluation. The Early Neutral Evaluator shall be appointed through the International Institute for Conflict Prevention & Resolution.

3. Dispute Resolution Boards (DRBs)

The parties agree to create a Dispute Resolution Board ("DRB") consisting of three members. The DRB shall consist of one member designated by _____, one member designated by _____ and a third member designated by the two appointed members and shall serve as the chairperson of the DRB. [If within ___ days the parties are unable to appoint any such member of the DRB, they will reach out to CPR to assist with the appointment of any such member]. Thereafter, the DRB shall administer any DRB-related proceeding.

4. Dispute Prevention Provisions

Despite the general acceptance of alternative dispute resolution provisions in contractual arrangements, to date, there has been little attention given to contractual dispute prevention protocols. In an effort to shift the paradigm, CPR has developed Model Dispute Prevention and Resolution provisions, which parties can modify to utilize in their business arrangements. The primary goals of the model provisions are to establish a framework to identify potential conflicts early and to implement dispute prevention mechanisms to avoid the conflict turning into a value-depleting dispute.

On the CPR website, you can find a memo describing the Model Dispute Prevention and Resolution provisions, a term sheet that outlines the nature of the provisions and three model agreements for a “Standing Neutral,” “Standby Neutral” and “No Neutral” provisions. For full commentary on these provisions, please consult the document in the “related” section.

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Doc. No. 9

JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases

Effective January 6, 2010

JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES

JAMS provides arbitration and mediation services worldwide. We resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Introduction

JAMS is committed to providing the most efficient, cost-effective arbitration process that is possible in the particular circumstances of each case. Its experienced, trained and highly qualified arbitrators are committed to: (1) being sufficiently assertive to ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court; and (2) at the same time, being sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

The JAMS Recommended Arbitration Discovery Protocols ("Protocols"), which are set forth below, provide JAMS arbitrators with an effective tool that will help them exercise their sound judgment in furtherance of achieving an efficient, cost-effective process that affords the parties a fair opportunity to be heard.

The Key Element: Good Judgment of the Arbitrator

- JAMS arbitrators understand that while some commercial arbitrations may have similarities, for the most part each case involves unique facts and circumstances. As a result, JAMS arbitrators adapt arbitration discovery to meet the unique characteristics of the particular case, understanding that there is no set of objective rules that, if followed, would result in one "correct" approach for all commercial cases.

- JAMS appreciates that the experience, talent and preferences brought to arbitration will vary with the arbitrator. It follows that the framework of arbitration discovery will always be based on the judgment of the arbitrator, brought to bear in the context of variables such as the applicable rules, the custom and practice for arbitrations in the industry in question and the expectations and preferences of the parties and their counsel.

- Attached as Exhibit A is a list of factors that JAMS arbitrators take into consideration when addressing the type and breadth of arbitration discovery.

Early Attention to Discovery by the Arbitrator

- JAMS understands the importance of establishing the ground rules governing an arbitration in the period immediately following the initiation of the arbitration.

Therefore, following appointment, JAMS arbitrators promptly study the facts and the issues and become prepared to preside effectively over the early stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

- Depending upon the provisions of the parties' agreement, JAMS arbitrations may be governed by the JAMS Comprehensive Arbitration Rules and Procedures or by the arbitration rules of another provider organization. Such rules, for good reason, lack the specificity that one finds, for example, in the Federal Rules of Civil Procedure. That being so, JAMS arbitrators seek to avoid uncertainty and surprise by ensuring that the parties understand at an early stage the basic ground rules for discovery. This early attention to the scope of discovery increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in concrete discovery disputes.

- JAMS arbitrators place the type and breadth of arbitration discovery high on the agenda for the first pre-hearing conference at the start of the case. If at all possible, in-house counsel should attend the pre-hearing conference at which discovery will be discussed.

- JAMS arbitrators strive to enhance the chances for limited, efficient discovery by acting at the first pre-hearing conference to set hearing dates and interim deadlines that, the parties are told, will be strictly enforced and that, in fact, are thereafter strictly enforced.

- Where appropriate, JAMS arbitrators explain at the first pre-hearing conference that document requests:
  - should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;
  - should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and
  - should not include broad phraseology such as "all documents directly or indirectly related to."

Party Preferences

- Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is com-

monly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since arbitration is governed by the agreement of the parties.

- Where one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations.

E-Discovery

- The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

- To be able to appropriately address issues pertaining to e-discovery, JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data.

- While there can be no objective standard for the appropriate scope of e-discovery in all cases, JAMS arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:

    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup 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 that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

- Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

Artfully Drafted Arbitration Clauses

- JAMS recognizes that there is significant potential for dealing with time and other limitations on discovery in the arbitration clauses of commercial contracts. An advantage of such drafting is that it is much easier for parties to agree on such limitations before a dispute has arisen. A drawback, however, is the difficulty of rationally providing for how best to arbitrate a dispute that has not yet surfaced. Thus, the use of such clauses may be most productive in circumstances in which parties have a good idea from the outset as to the nature and scope of disputes that might thereafter arise.

- JAMS understands that in order for rational time and other discovery limitations to be effectively included in an arbitration clause, it is necessary that an attorney with a good understanding of arbitration be involved in the drafting process.

Depositions

- Rule 17(c) of the JAMS Rules provides that in a domestic arbitration, each party is entitled to one deposition of an opposing party or an individual under the control of an opposing party and that each side may apply for the taking of additional depositions, if necessary.

- JAMS recognizes that the size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances. Depositions in a complex arbitration, for example, can significantly shorten the cross-examination of key witnesses and shorten the hearing on the merits.

- If not carefully regulated, however, deposition discovery in arbitration can become extremely expensive, wasteful and time-consuming. In determining what scope of depositions may be appropriate in a given case, a JAMS arbitrator balances these considerations, considers the factors set forth in Exhibit A and confers with counsel for the parties. If a JAMS arbitrator determines that it is appropriate to permit multiple depositions, he/she may attempt to solicit agreement at the first pre-hearing conference on language such as the following:

  > Each side may take 3* discovery depositions. Each side's depositions are to consume no more than a total of 15* hours. There are to be no speaking objections at the depositions, except to preserve

privilege. The total period for the taking of depositions shall not exceed 6* weeks.[1]

Discovery Disputes

- Discovery disputes must be resolved promptly and efficiently. In addressing discovery disputes, JAMS arbitrators consider use of the following practices, which can increase the speed and cost-effectiveness of the arbitration:
  - Where there is a panel of three arbitrators, the parties may agree, by rule or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.
  - Lengthy briefs on discovery matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.
  - The parties should negotiate discovery differences in good faith before presenting any remaining issues for the arbitrator's decision.
  - The existence of discovery issues should not impede the progress of discovery where there are no discovery differences.

Discovery and Other Procedural Aspects of Arbitration

Other aspects of arbitration have interplay with, and impact on, discovery in arbitration, as discussed below.

Requests for Adjournments

- Where parties encounter discovery difficulties, this circumstance often leads to a request for adjournment and the possible delay of the hearing. While the arbitrator may not reject a joint application of all parties to adjourn the hearing, the fact is that such adjournments can cause inordinate disruption and delay by needlessly extending unnecessary discovery and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further discovery (as opposed to personal considerations), a JAMS arbitrator ensures that the parties understand the implications in time and cost of the adjournment they seek.

[1] *The asterisked numbers can of course be changed to comport with the particular circumstances of each case.*

- If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Factors that affect the exercise of such discretion include the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

Discovery and Dispositive Motions

- In arbitration, "dispositive" motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time-consuming discovery. On balance, a JAMS arbitrator will consider the following procedure with regard to dispositive motions:
    - Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.
    - Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.
    - If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
    - Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

Note: These Protocols are adapted from the April 4, 2009, Report on Arbitration Discovery by the New York Bar Association.

EXHIBIT A

Relevant Factors Considered by JAMS Arbitrators in Determining the Appropriate Scope of Domestic Arbitration Discovery

Nature of the Dispute

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about discovery.
- The amount in controversy.
- The complexity of the factual issues.
- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery.
- Whether there are public policy or ethical issues that give rise to the need for an in-depth probe through relatively comprehensive discovery.
- Whether it might be productive to initially address a potentially dispositive issue that does not require extensive discovery.

Agreement of the Parties

- Agreement of the parties, if any, with respect to the scope of discovery.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties' choice of substantive and procedural law and the expectations under that legal regime with respect to arbitration discovery.

Relevance and Reasonable Need for Requested Discovery

- Relevance of the requested discovery to the material issues in dispute or the outcome of the case.
- Whether the requested discovery appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal's subpoena power.

- Whether denial of the requested discovery would, in the arbitrator's judgment (after appropriate scrutinizing of the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the discovery is requested.
- To what extent the discovery sought is likely to lead, as a practical matter, to a case-changing "smoking gun" or to a fairer result.
- Whether broad discovery is being sought as part of a litigation tactic to put the other side to great expense and thus coerce some sort of result on grounds other than the merits.
- The time and expense that would be required for a comprehensive discovery program.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking expansive discovery is willing to advance the other side's reasonable costs and attorneys' fees in connection with furnishing the requested materials and information.
- Whether a limited deposition program would be likely to (i) streamline the hearing and make it more cost-effective, (ii) lead to the disclosure of important documents not otherwise available or (iii) result in expense and delay without assisting in the determination of the merits.

Privilege and Confidentiality

- Whether the requested discovery is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.
- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys' eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

Characteristics and Needs of the Parties

- The financial and human resources the parties have at their disposal to support discovery, viewed both in absolute terms and relative to one another.
- The financial burden that would be imposed by a broad discovery program and whether the extent of the burden outweighs the likely benefit of the discovery.
- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.
- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

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Doc. No. 10

The College of Commercial Arbitrators

Protocols

for

Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for

Business Users, Counsel, Arbitrators

& Arbitration Provider Institutions

Thomas J. Stipanowich, Editor-in-Chief

Curtis E. von Kann and Deborah Rothman, Associate Editors

Additional copies of this document may be downloaded at www.thecca.net.

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

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

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Foreword

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

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

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

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

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

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

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

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

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

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

Bruce W. Belding
President of the College 2008-2009

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

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

About the Editors

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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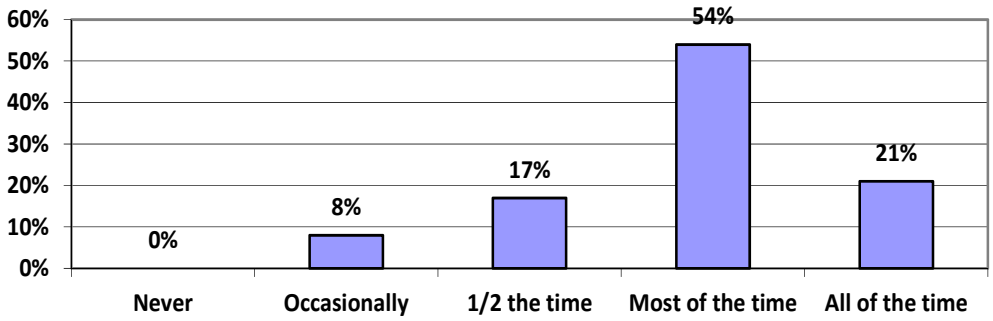
[8] The latest edition of the American Institute of Architects construction forms, the nation's most widely used template for building contracts, eliminates the default binding arbitration provision, long a *sine qua non* of construction contracts; parties must henceforth affirmatively agree to arbitration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

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

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

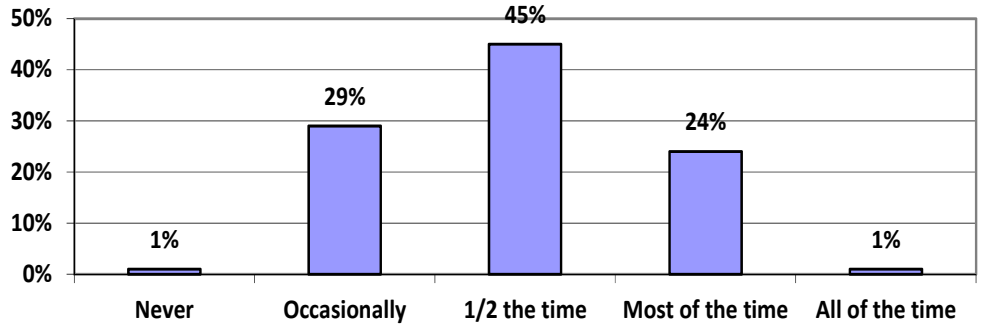
Summit participants overwhelmingly believed that relative speed, efficiency and economy tend to be important to business users of arbitration.

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



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

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



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

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

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

A. Reduced Use of Trial; Growth of Commercial Arbitration

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

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

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

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

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

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

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

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

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

B. Importation of Trial Practices into Arbitration

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

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

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

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

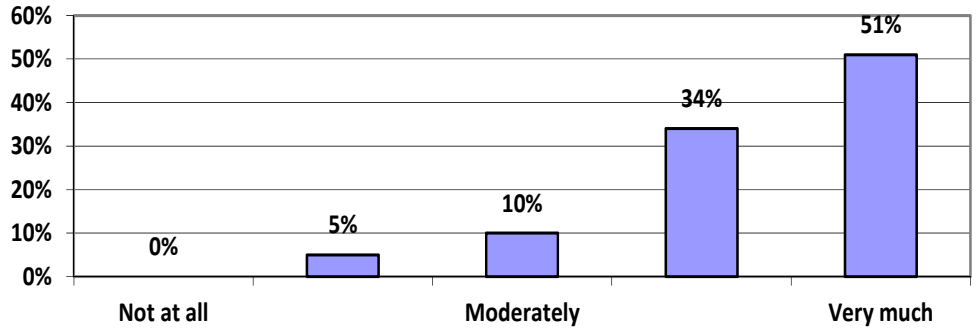
[16] Celeste M. Hammond, *A Real Estate Focus: The (Pre)(As)summed "Consent" of Commercial Binding Arbitration Contracts—An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 591 (2003) (commenting on the widespread use of arbitration provisions in commercial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

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

1. Discovery

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

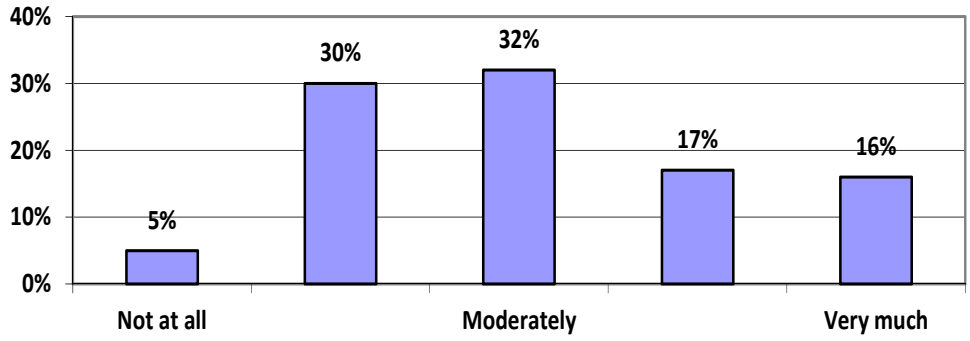
All too often, lamented another corporate lawyer at the National Summit, this expensive, "overblown" process results in little or no useful information, let alone the proverbial "smoking gun."

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

2. Motion practice

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

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



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

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

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

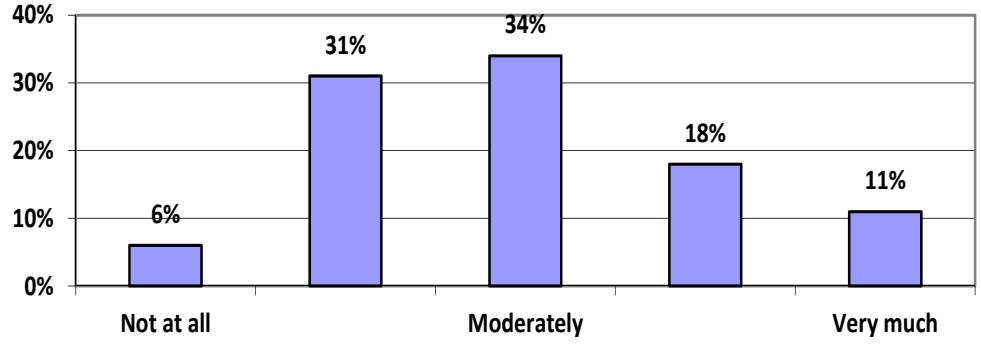
[30] FINAL REPORT ON LITIGATION REFORM, *supra* note 12, at 14.

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

3. Other concerns

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

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



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

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

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

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

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

C. Looking Beyond Litigation-Style Arbitration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The Need for a Mutual Effort

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

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

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

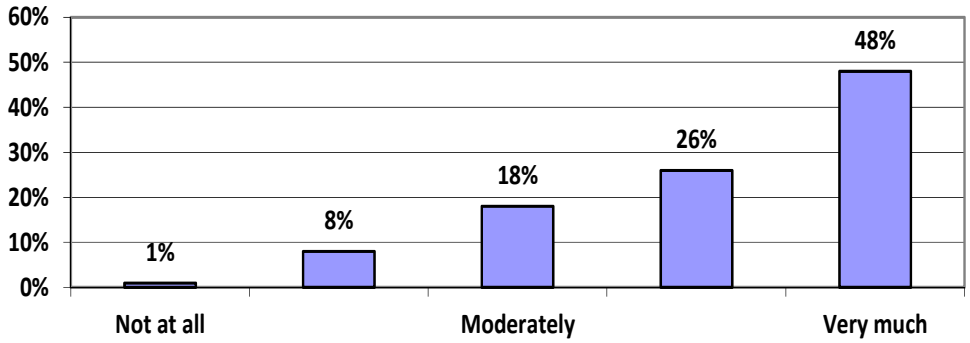
Finally, efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables.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

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

B. The Role of Business Clients and Counsel

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

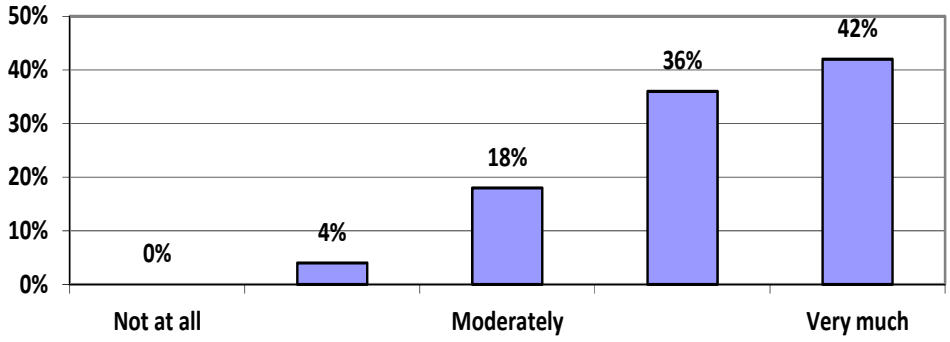
> *When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?*



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

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

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



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

1. The Importance of Effective Choice-Making

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

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

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

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

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

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

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

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

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

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

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

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

3. Business Clients and Counsel Must Change These Realities

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

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[44] *See id.*

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

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

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

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

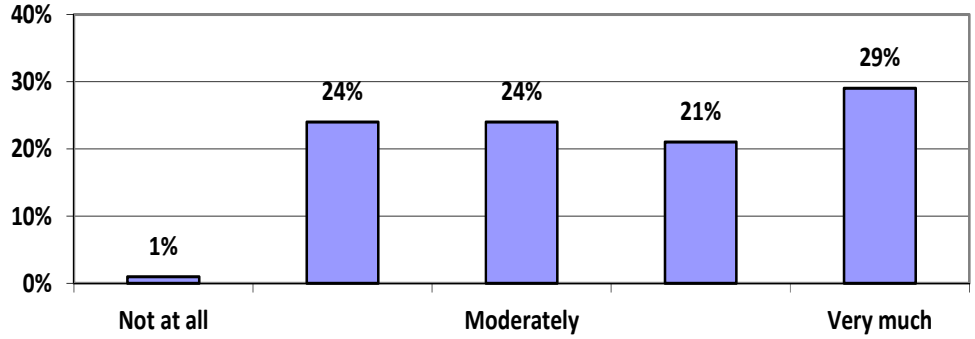
Selecting the right "template" is the first critical choice point for business users and in-house counsel. It is, however, essential to make other good choices after disputes arise. The selection of the right advocates and arbitrators can reinforce earlier process choices by ensuring adherence to the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

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

C. The Role of Provider Organizations

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

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



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

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

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

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

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

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

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

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

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

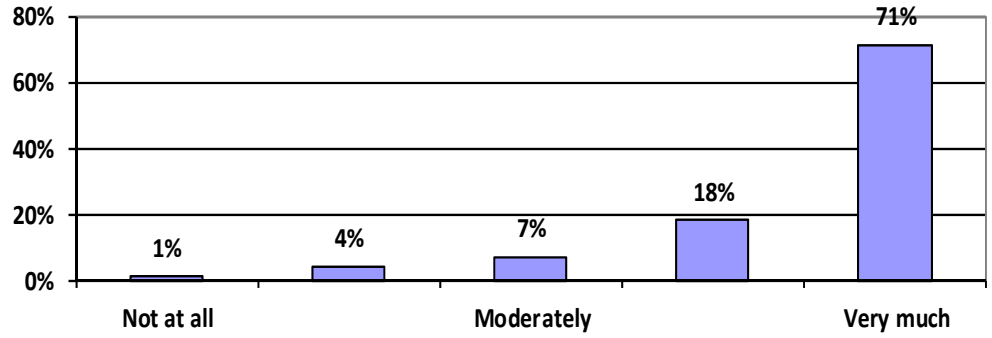
Moreover, providers are ideally positioned to collect and share information about the experience of users with streamlined procedures or other economy- and efficiency-focused devices. Such information is likely to be of critical importance to business clients and counsel as they consider the relative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

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

D. The Role of Outside Counsel

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

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



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

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

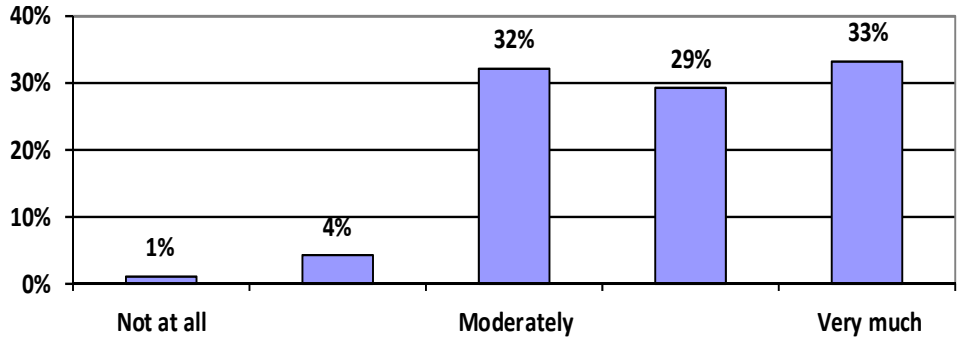
Thoughtful, experienced lawyers who understand arbitration and appreciate the significant differences between arbitration and litigation are in the best position to navigate through the arbitration process in a way that most effectively promotes client goals such as economy and efficiency. At each stage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

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

E. The Role of Arbitrators

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

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



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

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

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

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

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

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

F. The Central Lesson

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

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

IV
Protocols for Expeditious, Cost-Effective Commercial Arbitration

General Principles

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

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

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

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

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

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

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

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

A Protocol for Business Users and In-House Counsel

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

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

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

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

Comments:

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

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

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

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

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

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

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

[59] *Id*.

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

Comments:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments:

See comments under Action 3 above.

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

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

Comments:

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

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

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

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

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

Comments:[73]

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Select arbitrators with strong case management skills.

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

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

Comments:[77]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[85] *Id.*, Ch. 6 § V(L).

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

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

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

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

Comments:[93]

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

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

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

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

[89] *Id.,* Ch. 6 §§ II(D), IV, V(L).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Control motion practice.

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

Comments:[99]

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

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

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

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

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

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

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

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

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

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

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

10. Use a single arbitrator in appropriate circumstances.

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

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

Comments:

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

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

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

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

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

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

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

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

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

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

Comments:

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

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

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

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

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

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

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

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

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

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

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

[112] *Id.*

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

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

itself, declaring that enforcing expanded review provisions such as those before it would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[115]

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

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

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[115] *Kyocera*, 341 F.3d at 998.

[116] Hall Street Associates LLC v. Mattel Inc., 128 S.Ct. 1396, 1404-1405 (2008).

[117] *Id.* at 1403.

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

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

[120] 128 S. Ct. at 1406.

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

[122] Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Ca. 2008).

The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the risks and uncertainties confronting those who would seek to include such provisions in their arbitration agreements. In some cases contract planners may come to the conclusion that the difficulties of securing judicial oversight of arbitration awards require them to forego arbitration entirely, at least for certain classes of cases.

2. Alternatives to expanded judicial review; appellate arbitration processes

There are other, less radical choices for those concerned about protection from "off the wall" arbitration awards. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, placing limits on awards of monetary damages (including upper and lower limits for the award), a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages.[123] For those who seek a close analogue to judicial review, however, an appellate arbitration procedure may afford the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while avoiding the delays and legal uncertainties associated with expanded judicial review, since properly constituted agreements for "second-tier" arbitration are just as enforceable as any other arbitration agreements, as are resulting awards.[124] Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,[125] the International Institute for Conflict Prevention & Resolution (CPR) and JAMS, have published appellate arbitration rules that may be utilized in commercial cases.[126]

Crafting an appropriate arbitral appeal process involves consideration of numerous procedural issues, including the qualifications of the appellate arbitrator(s) and method of selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing, and transmitted to the appellate arbitrator(s); the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate arbitrator(s); the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.[127] Given the transaction

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[123] *See id*. at 277-281.

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

[125] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 299-300.

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

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

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

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

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

Comments:

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

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

A Protocol for Arbitration Providers

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

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

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

Comments:

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

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

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

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

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

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

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

Comments:

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

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

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

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

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

An option to consider is that of an "arbitration reset button." Contained in tiered dispute resolution clause, this clause provides that if the parties' dispute is not first resolved through the prerequisite executive negotiation and/or mediation, "then, within ___ days [or immediately] following the executive discussions and/or mediation, the parties shall confer and determine whether they wish to mutually renegotiate the default arbitration provision contained herein."[129]

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

- Facilitate agreement on exchange of document and other information;
- Help clarify which issues have been resolved in mediation and frame issues to be resolved in arbitration;
- Encourage parties to jointly submit the one or two most significant questions of law or fact to the arbitrator for speedy resolution, and then return to mediation.
- Assist in selection of an arbitrator;
- Help the parties define or refine any provided arbitration procedures;
- Remain available during the arbitration process itself as a resource to resolve issues informally.[130]

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

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

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

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

[130] *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, at 18.

often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their pre-dispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

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

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

Comments:[131]

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

[131] These comments are drawn in large part from Stipanowich, *Arbitration and Choice*, *supra* note 58, 414-425.

evidence is truly material to the outcome of the case.[132] This approach, coupled with lack of focus at the outset of discovery, means that "discovery costs far too much and becomes an end in itself."[133] Thus, the recent *Final Report on Litigation Reform* calls for dramatic overhauling of the court discovery process based on a "principle of proportionality."[134]

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

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

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

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[132] THE FEDERAL RULES OF CIVIL PROCEDURE, for example, state:

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

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

[133] FINAL REPORT ON LITIGATION REFORM, *supra* note 60, at 2.

[134] *Id.* at 7-16.

[135] CPR RULES, *supra* note 62, Commentary to CPR Rule 11.

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

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

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

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

1. Emerging discovery templates

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

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

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

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

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[138] Alternatively, some arbitrators require principals of the clients to sign-off on any discovery plan submitted by outside counsel.

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

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

[141] JAMS STREAMLINED RULES, *supra* note 94, R. 13.

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

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

2. Document exchange and discovery

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

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

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

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

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

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

[146] IBA Rules, *supra* note 139.

[147] *Id.*, Article 3, Section 1.

[148] The IBA Rules call for Requests to Produce to contain

> (a)(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.

Id. at 5.

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

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

3. Limits on depositions

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

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The IBA RULES appear to have influenced the recent ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, which empower the arbitrators,

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

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

[149] *Compare* JAMS STREAMLINED RULES, *supra* note 94, *with* CPR EXPEDITED ARBITRATION, *supra* note 65.

[150] *See* AAA CONSTRUCTION INDUSTRY FAST TRACK RULE, *supra* note 64, F-9.

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

[152] *Id.*, Schedule 1.

[153] *See, e.g.,* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-227 (Spring 1997).

arbitration.[154] A variant of this approach, used by some arbitrators, is to provide each party with a maximum number of hours for deposing persons within the other party's employ or control. Such limitations may be tempered by giving arbitrators discretion to allow additional depositions in exceptional circumstances where justice requires.[155] A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the *JAMS Comprehensive Arbitration Rules*, which permits each party to take a single deposition; [t]he necessity of additional depositions is to be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing parties and the witness.[156]

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination.[157] Such statements, provided to all participants in advance of the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, might be necessary to provide comfort to American lawyers and arbitrators. The new draft *CPR Protocol on Disclosure* offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.[158]

4. Guiding and empowering arbitrators.

Another approach to controlling discovery hinges on and provides a useful framework for the "good judgment of the arbitrator." A set of guidelines for arbitrator-supervised discovery developed by the New York State Bar Association (and subsequently adopted in summary form by JAMS) offers tools for arbitrators to manage discovery and other procedural aspects of arbitration.[159] Such guidelines operate on the presumption that parties have not yet established strict guidelines for discovery, and therefore depend upon the arbitrator(s) to control discovery by giving early and active attention to the process, using persuasion and other methods to achieve results appropriate to the specific circumstances and the parties' indicated preferences (see *Protocol for Arbitrators*, Action 6).

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

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

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

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

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

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

Should arbitrators or counsel have the last word on the scope of discovery? In this respect, expert opinion and current standards vary, although under most standards arbitrators must respect and adhere to party agreements regarding discovery. The *AAA Rules for Large, Complex Cases* authorize the arbitrator(s) to override party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate."[160] Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery;[161] however, the *JAMS Arbitration Discovery Protocol* recognizes that, while party agreements regarding the scope of discovery should be respected by arbitrators,"[w]here one side wants broad arbitration discovery and the other wants narrow discovery, the arbitrator will set meaningful limitations."[162]

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

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[160] AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2009) [hereinafter AAA COMMERCIAL RULES], L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the ICDR GUIDELINES:

> 1. a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
>
> b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, *but the tribunal retains final authority to apply the above standard.* To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal. (Emphasis added.)

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

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

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

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

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

5. E-discovery

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

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

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

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

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

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

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

[165] *See generally* THE SEDONA GUIDELINES, *supra* note 163.

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

[167] Warshauer, *supra* note 164, at 12-15.

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

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

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

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[168] ICDR GUIDELINES, *supra* note 140, Section 4.

[169] *Id.*

[170] Warshauer, *supra* note 164, at 11.

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

[172] *See* Newman & Zaslowsky, *supra* note 81.

[173] *See* CPR PROTOCOL ON DISCLOSURE, *supra* note 142, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

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

6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.[174] It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.[175]

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

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

Comments:

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

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

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

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

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

Id., Section 4(a).

[174] *See supra* note 89.

[175] *See* JAMS COMPREHENSIVE RULES, *supra* note 104, Rule 17(b).

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

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

Comments:

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

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

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

Comments:

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

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

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

Comments:

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

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

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

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

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

Comments:

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

9. Provide for electronic service of submissions and orders.

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

Comments:

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

[176] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 61, Ch. 4.

10. Obtain and make available information on arbitrator effectiveness.

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

Comments:

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

11. Provide for expedited appointment of arbitrators.

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

Comments:

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

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

- AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES R. 4 (June 1, 2009), *available at* http://www.adr.org /sp.asp?id=22440. ("If the parties are unable to agree… each party may strike two names from the list [of arbitrators] and return it to the AAA within seven days

[177] *Cf.* Donald P. Crane & John B. Miner, *Labor Arbitrators' Performance: Views from Union and Management Perspectives*, 9 J. LAB. RES. 1 (Mar. 1988) (discussing a study of performance evaluations of labor arbitrators by union representatives and management representatives that found the arbitrators' awards to so color the evaluation results that the results were either unrelated or negatively related).

from the date of the AAA's mailing... If the appointment… cannot be made from the list, the AAA may make the appointment...")

- AMERICAN ARBITRATION ASSOCIATION, SECURITIES ARBITRATION SUPPLEMENTARY PROCEDURES R. 3(a) (June 1, 2009), *available at* http://www.adr.org/sp.asp?id=22009 ("The list [of proposed arbitrators] must be returned to the AAA within 10 days from the date of the AAA's transmittal to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment . . .").
- ADR CHAMBERS, EXPEDITED ARBITRATION RULES R. 5 (2010), *available at* http://adrchambers.com/ca/expedited-arbitration/expedited-arbitration-rules/ ("If ADR Chambers is not notified of the selection of an arbitrator… within 5 business days after the Response has been delivered . . . ADR Chambers will select the arbitrator . . .").
- AMERICAN DISPUTE RESOLUTION CENTER, INC., RULES OF EXPEDITED CONSTRUCTION ARBITRATION R. E-4 (Sept. 11, 2009), *available at* http://www.adrcenter.net/pdf/Construction/ExpRules.pdf ("The parties must return their selections to ADR Center within ten calendar days. If ADR Center is unable to appoint the arbitrator from the parties' selections, the Case Manager will appoint the arbitrator.").

12. Require arbitrators to confirm availability.

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

Comments:

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

Similarly, the *CPR Expedited Arbitration Rules* provide:

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

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

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

[179] CPR EXPEDITED ARBITRATION RULES, *supra* note 65, Rule 7.2.

electronic calendars, the day is not far off when parties will be able to view prospective arbitrators' calendars to determine for themselves if candidates have sufficient time available in the relevant time frame.

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

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

Comments:

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

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

14. Offer process orientation for inexperienced users.

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

Comments:

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

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

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[180] ERIC BRAHM & JULIAN OUELLET, DESIGNING NEW DISPUTE RESOLUTION SYSTEMS (Sept. 2003), *available at* http://www.beyond intractability.org/essay/designing_dispute_systems/.

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

A Protocol for Outside Counsel

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

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

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

Comments:

Rules of professional responsibility in nearly all jurisdictions make it unethical for attorneys to accept an engagement which they are not competent to perform.[182] While that provision has generally been thought to require knowledge and experience in the type of substantive work the attorney is being asked to carry out, the recent client focus on reducing excessive cost and delay in commercial arbitration suggests that the ethical obligation may well extent to knowledge of how to conduct an arbitration efficiently and expeditiously. Arbitration is quite different from litigation in many respects, and techniques that work well in one process may be ineffective, even harmful in the other. Counsel who agree to represent parties in commercial arbitrations need to have a solid understanding of the arbitration rules that will apply, the practices of the provider that is administering the arbitration, and the growing body of state and federal arbitration law. They should know how to navigate the arbitration process in an economical yet effective way. Since arbitrations frequently require or precipitate negotiations and/or mediation between the parties, whoever will serve as lead counsel at the arbitration hearing should be certain that he or she or a partner has the skill needed to effectively conduct such adjunct activities.

[182] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 Competence (2010), *available at* http://www.abanet.org /cpr/mrpc/ rule_1_1.html; CA RULES OF PROFESSIONAL CONDUCT Rule 3-110 (Sept. 2009) *available at* http://rules.calbar .ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx; NY STATE UNIFIED COURT SYSTEM, PART1200 – RULES OF PROFESSIONAL CONDUCT Rule 1.1: Competence (2009) , *available at* http://www.nysba.org/Content/Navigation Menu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf; ARTICLE VII: ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 1.1. Competence (2010), *available at* http://www.state.il.us/court/ supremecourt/rules/ art_viii/artviii.htm.

2. Memorialize early assessment and client understandings.

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

Comments:

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

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

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

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

[183] 2007 LAWYER-CLIENT FEE ARBITRATION REPORT CARD: HALT REPORT CARD FINDS LAWYER-CLIENT FEE DISPUTE PROGRAMS NOT MAKING THE GRADE (Sep. 17, 2007), *available at* http://www.halt.org/reform_projects/lawyer_accountability/lawyer-client_fee_arbitration/report_card.php.

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

Comments:

One of the most important functions of outside arbitration counsel is selecting, in consultation with in-house counsel, the arbitrator(s) for the case. In addition to the traditional considerations such as intelligence, integrity, familiarity with the subject matter, and availability, outside counsel these days also need to determine whether the arbitrator candidates have the knowledge, skill and temperament to manage the arbitration efficiently. Much can be learned on this score by talking with lawyers who have participated in other cases the candidates have arbitrated and by interviewing the candidates concerning the procedures and practices they follow in conducting arbitrations.[184] Counsel should advise the candidates of their client's expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations. It is not inappropriate to ask prospective arbitrators, through the case manager, about their availability to conduct the hearing during a specific time frame.[185] Counsel may also wish to explore with the candidates alternative billing arrangements that may encourage them to manage the arbitration efficiently.

4. Cooperate with opposing counsel on procedural matters.

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

Comments:

Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side.[186] This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one's opponent, frequently impels counsel in arbitration and litigation

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

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

[186] Ross, L. and C. Stillinger, *Barriers to Conflict Resolution*, 8 NEG. J. 389-404 (1991).

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

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

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

Comments:

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

6. Periodically discuss settlement opportunities with your client.

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

Comments:

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

7. Offer clients alternative billing models.

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

Comments:

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

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

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

[187] Ian Meredith & Sarah Aspinall, *Do Alternative Fee Arrangements Have a Place in International Arbitration?*, 72 ARBITRATION 22, 22-26 (2006).

advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility (see *Protocol for Arbitrators*, Actions 6, 7, 9).

Comments:

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

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

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

Comments:

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

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

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize

lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies (see *Protocol for Business Users*, Action 12).

Comments:

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

11. Work with providers to improve arbitration processes.

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

Comments:

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

12. Encourage better arbitration education and training.

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

Comments:

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

A Protocol for Arbitrators

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

1. Get training in managing commercial arbitrations.

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

Comments:

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

2. Insist on cooperation and professionalism.

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and

affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like (see *Protocol for Outside Counsel*, Actions 4, 5, 8).

Comments:

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

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

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

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

Comments:

A recurrent plea from National Summit participants was that arbitrators take active control of commercial arbitrations. Even when counsel are cooperating with one another, there are inevitably many points during an arbitration when someone needs to make a decision or take other action to keep the proceeding "on time and under budget." All arbitration rules give arbitrators considerable discretion in managing the arbitration process. Business users, in-house counsel, and outside counsel want arbitrators who will accept that responsibility and act. Especially if they have set a collegial tone at the outset and thoughtfully consider the views of

counsel on process issues that arise, arbitrators will find that parties welcome pro-active management by the neutral person(s) to whom they have entrusted the resolution of their dispute. With input from counsel, arbitrators must announce clear procedures and deadlines and must enforce them absent exceptional circumstances. In the commercial arbitration world of today, it is no longer up to arbitrators to decide whether to be pro-active or laissez faire. Thoughtful, well-informed and active management of the arbitration is now a critical part of the service parties are paying arbitrators to deliver. Just as Harry Truman reminded us that those who can't stand the heat should get out of the kitchen, those who are unwilling to devote serious attention to managing their cases should not serve as commercial arbitrators.

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

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

Comments:

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

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

A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the

arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective positions on points of disagreement. How best to conduct a preliminary conference could be a course in itself. *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* devotes thirty single-spaced pages to the topic. While that discussion should be consulted in full, here is a summary checklist of the matters that ought to be determined at the preliminary conference:

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

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

5. Schedule consecutive hearing days.

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

Comments:

Arbitration hearings that do not run on consecutive days involve much greater expense than those that do.[188] Apart from the possibility of repetitive travel expenses, there is duplicative deployment, preparation and refreshing tasks for all participants and added work that people think to do in the time between sessions. Spreading the hearing out over a period of weeks or months obviously protracts the arbitration. Arbitrators should attempt to schedule consecutive hearing days whenever possible.[189] Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendars of busy lawyers and arbitrators, additional, mutually available time for completing the hearing.

6. Streamline discovery; supervise pre-hearing activities.

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

Comments:

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

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

[189] When a hearing may require multiple weeks, it may be appropriate to have one week day off per week so that counsel and arbitrators can keep up with their other cases.

equally essential for arbitrators to monitor the parties' progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution have failed. Whichever approach is taken, arbitrators need to "stay on top of the case" from preliminary conference to hearing to make sure that the parties' expectations about the length of the arbitration are met.[190]

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

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

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

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

Comments:

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

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

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

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

8. Be readily available to counsel.

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

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

9. Conduct fair but expeditious hearings.

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

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

Comments:

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

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

- Encourage the parties to employ a “chess clock” that limits the total number of ours available to counsel for examination and argumentation.
- At the close of each hearing day (NOT the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more weekend sessions.
- Don't hesitate to tell counsel when a point has been understood and they may move on, or when a point was not understood and requires clarification.
- Make sure, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of power point or other equipment, etc.
- Freely take witnesses out of turn when necessary to accommodate scheduling conflicts.
- Prohibit parties from running out of witnesses on any given day. "Call your next witness" is a powerful tool for keeping a hearing moving.[193]

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

10. Issue timely and careful awards.

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

Comments:

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

[193] *Id.* at Ch. 9.

[194] *Id.* at Ch. 11.

Appendices

Appendix A: Bibliography/Helpful Sources

Helpful General Sources

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Appendix B: Summit Sponsors

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FIRST THINGS FIRST: DESIGN THE ARBITRATION PROCESS YOU WANT

By Richard Chernick, Esq.

The principles for drafting a pre-dispute arbitration clause are straightforward. They do require an understanding of the legal relationship, which will be the subject of the clause, some sense of the nature of disputes that are likely to arise and a basic understanding of arbitration process.

Following are the top 10 rules:

1. Identify the scope of arbitration with precision. The gold standard is "all disputes arising out of or relating to this Agreement . . ." This is a "broad form" clause that is invariably interpreted by courts to encompass related tort and statutory claims. Anything less may limit the arbitrators' power to determining only contractual disputes.
2. Decide whether determining arbitrability shall be delegated to the arbitrators or left with the court. Typical delegation language: "any controversy, claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate . . ." Courts will enforce such delegations.
3. State who will administer the arbitration. "The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures." If neither an institution nor institutional rules are mentioned, the arbitration will be non-administered (ad hoc).
4. Choose rules to govern the arbitration in the case of a non-administered clause: "The arbitration shall be governed by the UNCITRAL Rules."
5. Decide between a sole arbitrator and a tripartite panel and specify the method of selection of the arbitrator(s), mindful of the default process contained in the designated rules in the event of a failure to agree: "Each party shall select an arbitrator (who shall serve as a neutral arbitrator as that term is used in the Revised Code of Ethics for Arbitrators in Commercial Disputes); the party-appointed arbitrators shall jointly select the presiding arbitrator."
6. Specify the governing (substantive) law: "shall be determined by arbitration in Los Angeles, California, in accordance with the laws of the State of California for agreements made in and to be performed in California."
7. Address the scope of discovery unless the (default) rules are acceptable to the parties.
8. Choose a venue for the arbitration: "shall be determined by arbitration in Los Angeles, California . . ."
9. Decide on fee and cost allocation; if none, the rules will determine the extent to which cost shifting is permitted: "The arbitrators shall, in the Award, allocate all of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail."
10. Specify the form of award and that it shall be subject to confirmation by a court: "The Award shall be in writing and shall specify the factual and legal bases for the Award. Judgment on the Award may be entered in any court having jurisdiction."

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The complete clause might look like this:

Any controversy, claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Los Angeles, California, in accordance with the laws of the State of California for agreements made in and to be performed in California. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures ("Rules"). Each party shall select an arbitrator (who shall serve as a neutral arbitrator as that term is used in the Revised Code of Ethics for Arbitrators in Commercial Disputes (2004)). The party-appointed arbitrators shall jointly select the Presiding Arbitrator. The Award shall be in writing and shall specify the factual and legal bases for the Award. The arbitrators shall, in the Award, allocate all of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party, against the party who did not prevail. Judgment on the Award may be entered in any court having jurisdiction.

Of course, there are many additional possible provisions, such as:

- A non-binding step prior to arbitration (e.g., mediation)
- The power of the arbitrators to grant provisional relief
- Limitations on the remedial power of the arbitrators (e.g., no punitive damages)
- Special timing requirements for the arbitration (e.g., "the hearing shall commence not later than 90 days after the formation of the Panel, shall not exceed 10 consecutive business days and the award shall be issued within 30 days of the conclusion of the hearing")
- Specific formats for the award such as final offer ("baseball") arbitration or bracketed ("high-low") arbitration
- Internal appeals (such as the JAMS Optional Appeal Procedure)
- Enhanced review of the award by a court where that is permitted (*see Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008))

Clarity and simplicity are most likely to result in an enforceable agreement and a process that will not engender disputes about contractual intent; the clause can always be refined after the dispute arises and the parties have more information about the nature of the dispute.

By keeping these rules in mind, parties can design the process they deserve. ■

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Dispute Resolution Provisions in Life Sciences Agreements

Mary E. Bartkus*

I. Introduction

This paper surveys the dispute resolution provisions of 15 life sciences research and development collaboration and license agreements that are non-confidential exhibits to reports filed with the United States Securities and Exchange Commission during the first seven months of 2020 (the "Agreements"). Part II provides an overview of the Agreements, including the governance provisions. Part III reviews the dispute resolution provisions, and describes the disputes the parties have agreed to submit to internal resolution procedures, the disputes they have agreed to exclude from any form of external resolution, and the disputes they have agreed to submit to expert determination, mediation, arbitration, or litigation, or some combination of these procedures. Part IV describes the parties' approaches to the substantive law governing their disputes. For disputes the parties have agreed to submit to arbitration, Part V describes the arbitration agreements, focusing on scope, choice of seat, and arbitrator selection. Finally, Part VI concludes that the complex dispute resolution provisions in these Agreements can lead to litigation on scope and exercise of decision rights, jurisdictional disputes, parallel arbitration and litigation proceedings, and inconsistent judgments.

II. The Agreements

The Agreements are between biopharmaceutical firms for the development of pre-clinical or clinical stage assets, and the commercialization worldwide of one or more approved drugs developed from those assets, for the treatment of

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specified diseases or conditions. There is an upfront payment from one party to the other, sometimes paid out in stages over time. Additional payments are made contingent upon achieving specified development, regulatory, and other milestones. There may be fees to reserve manufacturing capacity. One party may fund the other's early stage research. Royalties may be paid on net sales, or the parties may share equally, or in some other proportion, the costs of development and commercialization and the profits from sales. There may be an equity investment, or payments to exercise options on an equity investment or on future in-licensed assets. An option to participate in projects may be exercised at different points along a project's timeline. Sometimes one of the parties solely is responsible worldwide, or in specified territories, for registering a drug product with regulatory authorities, for manufacturing and supply, or for product marketing, distribution, and sales.

One party, or each party, grants to the other, one or more licenses under patents, know-how, and other intellectual property covering background technology, collaboration technology, and in-licensed third party technology, to research, develop, and commercialize one or more jointly developed products, in accordance with detailed development and commercialization budgets and plans that may involve material and technology transfers. There are detailed rules on the development and ownership of know-how and inventions, and on the prosecution, maintenance, enforcement, and defense of patent and other intellectual property rights. The licenses may be exclusive, co-exclusive, non-exclusive for some purposes, or exclusive in specified fields of use, for specified indications or conditions, or as to specified research platforms or programs. Sometimes one or more rights may be retained (e.g. to sell worldwide "except in Japan, where [Company] will [retain] exclusive rights [to sell the product].").

Some Agreements contain exclusivity provisions. The Agreements contain lengthy representations and warranties, and detailed provisions on confidentiality, publication, and publicity; regulatory responsibilities; compliance; and termination and its consequences. Most provide for good faith negotiation of ancillary agreements, outline terms for those agreements, or provide templates for future agreements, such as supply and manufacturing, distribution, marketing, promotion, and sales agreements.

Each Agreement is a collaboration agreement with an internal governance and dispute resolution structure that includes a joint steering committee responsible for strategic alignment, drug development plans and budgets, manufacturing and supply plans, marketing and other commercialization plans, and relationship management, including dispute resolution. The joint steering committee may establish and oversee joint subcommittees, including a joint development committee, a joint manufacturing committee, and a joint commercialization committee, or these may be stand-alone committees. There may be joint working groups, working with joint subcommittees or joint stand-alone committees. A joint intellectual property committee may be advisory only, or have limited decision rights. Alliance managers facilitate communications, coordinate and track meetings, and support the parties in managing their relationship. The joint steering committees, and the research and development, manufacturing, and commercialization stand-alone committees and subcommittees, have well-defined responsibilities, including decision-making responsibilities. All decisions are made by consensus. Each party has one vote.

III. The Dispute Resolution Provisions

The Agreements define or list the matters that come before the joint committees for decision. If there is no consensus on a matter, the joint committee "escalates" the deadlocked matter to the joint steering committee for resolution. The joint steering committee, in turn, escalates a deadlocked matter to the parties' executive officers for negotiation and resolution. If the executives do not resolve the escalated committee dispute, the dispute may remain deadlocked under certain conditions or, more often, is escalated to a party for unilateral decision, or proceeds to expert determination, mediation, arbitration, or litigation, or some combination of these dispute resolution procedures. Some Agreements also require escalation of deadlocks on non-committee matters to the parties' executives for negotiation and resolution. In these cases, unresolved disputes proceed to arbitration or litigation.

A. Dispute Definition

Each Agreement includes provisions for different methods of dispute resolution for different types of disputes and defines or uses the term "dispute" differently for different purposes. For example, for purposes of internal dispute resolution procedures, one Agreement lists the matters before the joint committees, and defines disputes as any decision on a matter before it about which a joint committee is incapable of reaching unanimous agreement. For purposes of submission to arbitration, this Agreement defines a dispute as "any dispute arising out of or in connection with" the Agreement, except for disputes at the joint committees, and those "relating to the scope, validity, enforceability or infringement" of patents. For purposes of choice of governing law, the same Agreement provides that "the Agreement and any dispute arising from [its] performance or breach" are governed by the substantive law of New York.

Other Agreements take a similar approach in defining disputes differently for different purposes, e.g., for purposes of submission to arbitration, "except as otherwise [provided in the section on joint committee dispute resolution] or with respect to any matter for which a Party has final decision-making authority as expressly provided herein, any dispute arising out of or relating to the Agreement, or the breach, termination or validity thereof."

These Agreements do not discuss disputes about whether a dispute escalated to a party for its unilateral decision should have been so escalated or, if so, whether the party properly exercised its unilateral decision rights considering the contractual limitations on the exercise of those rights. This raises the issue whether these categories of disputes were intended to remain joint steering committee matters for internal resolution or a party's unilateral decision, or were intended to be arbitrated, or litigated.

Some Agreements, however, aiming to cover most disputes and most methods of dispute resolution required by the Agreement, define or use the term "dispute" more broadly, e.g., for purposes of submission to arbitration, "any dispute arising out of or in connection with this Agreement, including any alleged breach under this Agreement or any dispute relating to the validity, performance, construction or interpretation of this Agreement," if

any such dispute, including any patent-related dispute, has not been resolved by the parties' executives following escalation from the joint steering committee.

B. Disputes Submitted to Internal Resolution

Matters before the joint steering committee include, in addition to supervising and directing subcommittees and deciding deadlocked matters escalated by subcommittees or stand-alone committees, the review and approval of research, development, manufacturing, and commercialization plans and budgets, whether or not to terminate a particular project; whether and how to prioritize particular projects, "and such other functions expressly set forth or allocated to it by the Parties' written agreement." In addition to listing matters properly before a joint steering committee, some Agreements list matters excluded from joint steering committee jurisdiction, such as the authority to modify or amend the terms and conditions of the Agreement, to waive or determine a party's compliance with the terms and conditions, or to decide an issue "in a manner that would conflict with the express terms and conditions" of the Agreement.

Disputes about whether or not a matter is properly before a committee, and therefore capable of committee deadlock and escalation to the parties' executives, are rare during the period when the matter is pending before the committee. After the executives do not resolve an escalated dispute, however, there may be disputes about whether the dispute was properly before the committee; whether it should have been escalated to a party for decision; whether the party properly exercised its discretion in making its decision; and whether the dispute should have been litigated, or arbitrated.

As one example, an Agreement expressly excludes from internal resolution any dispute regarding the scope or validity of patents, requiring that all such disputes be litigated. This raises the issue whether a dispute before the joint steering committee involving a factually complex scientific or technical matter bearing on patent scope or validity should be escalated to a party for its unilateral decision, or litigated.

C. Disputes Excluded from External Resolution

If the executives do not resolve a deadlocked joint steering committee dispute, the Agreements aspire to exclude certain types of deadlocked disputes from any form of external resolution whatsoever. In general, these types of deadlocked disputes may involve narrowly defined, factually complex scientific or technical information; details about the conduct or direction of a research project or program; details leading to decisions about whether to continue a particular research project or program; or the terms of a future ancillary agreement, such as an in-license agreement or a supply and manufacturing agreement. The parties have redacted the details of these categories of disputes from the non-confidential versions of their Agreements filed with the Securities and Exchange Commission.[1]

If the parties' executive officers do not resolve these categories of deadlocked disputes, some Agreements provide that a specified dispute nevertheless "must be decided by unanimous agreement," or that it will remain deadlocked under certain conditions. Most Agreements, however, provide that the unresolved deadlocked dispute is "escalated to a party" i.e., it is escalated to one party, which unilaterally and finally decides the deadlocked dispute. In most Agreements, each party has unilateral decision rights on one or more of these categories of escalated disputes, reflecting each party's contributions to the collaboration conducted under the Agreement. Exceptionally, one party may have all of the escalated unilateral decision rights, which it must exercise "in good faith."

There are, however, contractual limitations on the exercise of unilateral decision rights under these Agreements. For example, a party with unilateral decision rights "shall not unilaterally reduce its diligence obligations" or "make material amendments" to a research and development plan that would "have an adverse impact" on the other party, or "unilaterally decide on any matter concerning" joint inventions and joint patent rights, or "unilaterally alter or amend the terms and conditions" of the Agreement, and "shall have no jurisdiction over any dispute relating to the validity, performance, construction or interpretation" of the Agreement. Nor may it

[1] See Rule 246-2 of the Securities and Exchange Act of 1934, as amended.

"take any action" that the other party "reasonably believes" would cause it to violate applicable law, regulatory requirements, or an agreement with a third party, including any third party in-license agreement, or infringe or misappropriate any third party intellectual property rights.

These provisions invite litigation or arbitration, or both, about whether a party is entitled to exercise a unilateral decision right and, if so, whether it did so in good faith, and in a manner consistent with the contractual limitations on the exercise of that right.

D. Disputes Submitted to Expert Determination

Under three Agreements, if the parties' executives do not resolve an escalated deadlocked issue, certain disputes are referred to "expert determination."

One Agreement refers deadlocked regulatory matters to a "regulatory expert," a regulatory consulting firm which, after receiving the parties' written submissions, renders a written decision "which will be conclusive and binding" on the parties. To select that regulatory expert, each party lists proposed "regulatory consulting firms," each of which "must have sufficient expertise and experience and not have been engaged by such Party previously." If the parties' lists name one or more of the same consulting firms, "then [redacted] will select" one of those common firms to serve as the regulatory expert. If the parties' lists do not name at least one of the same consulting firms, "then [redacted] will have the right to select the regulatory consulting firm" to serve as the expert. The Agreement does not state whether there is any limitation on that right.

Another Agreement refers certain deadlocked research and development disputes to expert determination. It provides that if the dispute "arises out of any of [redacted subject]" the parties will submit the matter "for resolution in accordance with" a [redacted] schedule to the Agreement; "the determination of the [R&D expert] will be binding" on the parties; and neither a party nor the joint steering committee "will have authority to modify or amend the finding of the [expert]." The parties redacted the details of the procedure, including those related to expert selection, from the version of the Agreement filed with the Securities and Exchange Commission.

A third Agreement refers certain deadlocked disputes, including disputes about the fair market value of certain products and compounds, and whether or not a particular milestone has been achieved, to a third party expert. It provides that the parties "will mutually identify a Third Party expert to resolve such dispute" and who (or which) "will be instructed to provide its resolution of such dispute . . . and the determination of such expert will be binding" on the parties. The Agreement does not state what happens if the parties do not agree on an expert.

The three Agreements, as filed with the Securities and Exchange Commission, do not state what happens if a party does not agree that a matter should be referred to expert determination, if a party declines to comply with an expert determination, or if a party objects to an expert's appointment or challenges the expert's impartiality. Under two of these Agreements, all disputes are litigated, except those escalated to a party or referred to expert determination. Under the third Agreement, all disputes are litigated except those escalated to a party, referred to expert determination or, on two different subjects, submitted to arbitration. Under these circumstances, these disputes can lead to litigation on scope of dispute submitted, expert selection or removal, and to set aside or enforce an expert determination.

E. Disputes Submitted to Litigation

Under four of the 15 Agreements, the dispute resolution default is litigation. Two provide that all deadlocked disputes other than disputes escalated to a party or referred to expert determination, are litigated. A third provides that all deadlocked disputes other than disputes escalated to a party, referred to expert determination, or submitted to arbitration on two discrete subjects, are litigated. The fourth Agreement provides that all deadlocked disputes are litigated.

Under 11 of the 15 Agreements, the dispute resolution default is arbitration. Most of these Agreements provide, however, that certain categories of disputes must be litigated, not arbitrated, for example, patent disputes, e.g. "Any dispute, controversy or claim relating to the scope, validity, enforceability or infringement of any Patents . . . shall be submitted to a court of competent jurisdiction in the country in which such Patents were

granted or arose." One Agreement also excludes antitrust claims from arbitration, and provides that all antitrust and intellectual property claims must be litigated. These dispute resolution provisions can lead to parallel litigation and arbitration, and inconsistent judgments.

The Agreements contain a savings clause providing that "notwithstanding" an agreement's dispute resolution procedures, a party "may seek provisional equitable relief" from a court, including restraining orders, "specific performance," and other injunctive relief "without first submitting" to the dispute resolution procedures specified in the agreement, e.g. "each Party shall have the right to seek interim injunctive relief in any court of competent jurisdiction as such Party deems necessary to preserve its rights and to protect its interests."

Upon the failure of their executives to resolve a dispute, these savings provisions could lead to an immediate application to a court for specific performance or other injunctive relief directed to the scope and exercise of a party's unilateral decision rights.

F. Disputes Submitted to Mediation and Arbitration

11 of the 15 Agreements provide that defined disputes shall be finally resolved by arbitration. These Agreements are discussed in Part V. One of the 15 Agreements requires non-binding mediation of a dispute as a precondition to arbitration of the dispute. The scope of this dispute to be submitted is "any dispute, controversy or claim . . . arising out of or relating to the Agreement," except "as otherwise provided" in the Agreement, and except for disputes "pertaining to the validity, construction, scope, enforceability, infringement or other violations" of defined patent rights or other intellectual property rights ("no such claim will be subject to mediation or arbitration"). The mediation is conducted by a mediator appointed by an arbitral institution in New York. If the dispute is not resolved through mediation, it is submitted to arbitration administered by the same institution.

IV. Governing Substantive Law

In 13 Agreements, including eight in which the parties are incorporated in different countries, the parties have chosen the substantive law of a state of

the United States to govern an Agreement, i.e., New York (ten Agreements), Delaware (two Agreements), and Massachusetts (one Agreement), "without reference to conflicts of laws principles," or "exclusive of its [the state's] conflicts of laws principles." One Agreement, between parties incorporated in European countries, is "exclusively governed by, and interpreted and enforced in accordance with Belgian law." The parties to one Agreement redacted the governing law from the non-confidential version filed with the Securities and Exchange Commission.

Five of the 15 Agreements, including the Agreement from which the parties redacted their choice of governing law, expressly exclude application of The United Nations Convention of International Contracts on the Sale of Goods (the Vienna Convention). The parties to six of the 15 Agreements, each choosing the substantive law of New York, make an "exception," or include an additional provision, for law applicable to certain intellectual property rights. Two of these six Agreements provide "with respect to matters involving the enforcement of intellectual property rights" the laws of "the applicable country" shall apply, without defining the "applicable country." One of the six provides that "any issue which depends upon the validity, scope or enforceability" of a patent "shall be determined in accordance with the laws of the country in which such patent was issued." Another applies the laws of "New York and the patent laws of the United States without giving effect to any law that would result in the application of a different body of law."

The governing substantive law provisions in these Agreements vary in scope, e.g., the governing law applies to the "Agreement and any dispute arising from [its] performance or breach"; the Agreement "and all disputes arising" under the Agreement; and the Agreement "and any Dispute" are "governed by and construed and enforced in accordance with" the chosen substantive law.

V. Arbitration Agreement

11 of the 15 Agreements include agreements to arbitrate (the "Arbitration Agreements"), i.e., agreements that defined disputes shall be finally resolved by arbitration. The parties to six of these Arbitration Agreements have

redacted some or all provisions of their Arbitration Agreements from the non-confidential versions of their Agreements filed with the Securities and Exchange Commission, as discussed in this Part V.

At least eight of these 11 Arbitration Agreements provide for administration by an arbitral institution in accordance with that institution's rules.[2] The parties to most of these Arbitration Agreements have not expressly chosen the law governing their Arbitration Agreement, or the procedural law applicable to the arbitration. One Agreement provides, however, in its governing law provision, "notwithstanding the applicable [state of the United States] substantive law, any arbitration, decision, or award . . . and the validity, effect, and interpretation of the arbitration provision shall be governed by the Federal Arbitration Act." Another Agreement provides that the "arbitration will be governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16 [Chapter One of the FAA], to the exclusion of any inconsistent state Law."

A. Scope

In defining the categories of disputes to be arbitrated, the parties to these Agreements did not adopt the model clauses provided by arbitral institutions.[3] Instead, they define the scope of disputes to be submitted to arbitration as those arising out of or relating to the Agreement except for disputes to be escalated to a party for its unilateral decision, to be referred to expert determination, or to be litigated. For example, one Arbitration Agreement provides for the submission to arbitration of "any dispute, claim or controversy of any nature arising out of or relating to" the Agreement, "including

[2]The parties to three Arbitration Agreements have redacted this information from the versions of their Agreements filed with the Securities and Exchange Commission. The institutions named in eight Arbitration Agreements are: the American Arbitration Association (AAA-ICDR), the International Chamber of Commerce (ICC), the International Institute of Conflict Prevention and Resolution (CPR), the Judicial Arbitration and Mediation Services, Inc. (JAMS), and the World Intellectual Property Organization (WIPO). The Arbitration Agreements choose the institutions' rules in effect on the date of commencement of proceedings.

[3]For example: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration . . . ." (International Centre for Dispute Resolution).

any action or claim based on tort, contract or statute, or concerning the interpretation, effect, termination, validity, performance or breach" of the Agreement, except for disputes "for which a Party has final decision-making" rights, and "any dispute, controversy or claim that concerns" the "validity, enforceability, or infringement of any patent, trademark, or copyright" or "any antitrust, anti-monopoly or competition law or regulation, whether or not statutory." This approach can lead to parallel litigation and arbitration proceedings, jurisdictional disputes, and inconsistent judgments.

B. Seat

These are global research, development, and commercialization agreements between parties organized under the laws of different countries (nine Agreements), or that involve property located abroad (e.g., intellectual property, factories), envisage performance or enforcement abroad (e.g. regulatory filings and regulatory activities worldwide), or have some other reasonable relation with one or more foreign countries (all Agreements). It is assumed, for purposes of this paper, that these Agreements fall under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[4] enforced in United States federal courts in accordance with Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208.[5]

[4]Article 1(1) of the New York Convention provides that it "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." Article 1(3) provides "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."

[5]Of interest to litigators in this field defending an action first brought in state court are provisions in Chapter 2 of the FAA on federal subject matter jurisdiction, removal, and venue, among others. *See also*, Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 132 (2018) (arguing that Articles II through VI of the New York Convention "are best considered as self-executing treaty provisions, directly applicable in United States and other domestic courts," and, at 148-50, demonstrating that the phrase "enforced in United States courts" in § 202 of the FAA refers to United States federal courts).

With that in mind, the place, or legal seat, of arbitration, is the jurisdiction where the arbitration award is "made" for purposes of the New York Convention, and should be chosen carefully, because it is the only jurisdiction in which an action to annul the award may be brought,[6] and usually determines the procedural law of the arbitration, generally the seat's arbitration legislation, applied by the courts of the seat in exercising supervisory authority over the arbitration.[7]

In three of the 11 Agreements in which the parties have chosen arbitration, the parties have chosen New York, New York, as the seat, using a model clause, e.g., "The seat [or place] of the arbitration shall be [city, (province or state), country]." In three other Agreements, the parties appear to have confused the seat, or legal jurisdiction of the arbitration with the physical location of the hearings, i.e., disputes "submitted to [arbitral institution] in New York, New York for arbitration"; any arbitration "will be held in New York, New York, United States, unless another location is mutually agreed by the Parties"; and the "location of the arbitration will be Zurich, Switzerland." In five Agreements, the parties redacted the seat of arbitration from the non-confidential versions of their Agreements filed with the Securities and Exchange Commission.

C. Arbitrators

Nine of the 11 Arbitration Agreements provide that disputes submitted to arbitration will be heard and determined by a panel of three arbitrators. Two provide that one arbitrator will hear and determine the dispute, unless the parties agree to a panel of three arbitrators. Six of 11 Agreements expressly state that each of the arbitrators shall have qualifications specific to the biopharmaceutical industry, i.e., three arbitrators "experienced in

[6] Under article V(1)(e) of the Convention, recognition and enforcement of the award may be refused only if the party against whom it is invoked proves to the competent authority where recognition and enforcement is sought that 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."

[7] *See* Gary B. Born, *International Arbitration: Law and Practice* 118-19 (2d ed. 2016) ("The procedural law of the arbitration is distinguishable from the law governing the arbitration agreement and the law governing the underlying contract.").

the biopharmaceutical industry"; three arbitrators "with at least [redacted] of relevant experience in the pharmaceutical and biotechnology industry"; three arbitrators who "shall have experience in pharmaceutical licensing disputes"; three arbitrators who are "experienced in the business of pharmaceuticals"; three arbitrators with "expertise with respect to development in the pharmaceutical and biotechnology industries"; and one or three arbitrators "knowledgeable in the subject matter at issue in the dispute and acceptable to both parties."

One Agreement contains a lengthy definition of the term "Arbitrator" in its definition section, stating, for purposes of certain disputes, that the arbitrator must be " a qualified attorney in private practice or a retired judge . . . admitted to practice law in the United States, with expertise in intellectual property matters in the pharmaceutical or biotechnology industry, . . . [who] is not from academia, . . . has not worked for or been engaged by either Party or its Affiliates, or any other portfolio companies of its material investors, in the [redacted] period immediately prior to selection of [the arbitrator or who] does not own equity or debt in either Party or its Affiliates (other than equity or debt owned through a broad based mutual fund or exchange traded fund)." For disputes of a financial nature, this definition specifies that the qualified attorney or retired judge must have "relevant experience in financial disputes pertaining [to] [the] pharmaceutical products."

Another Agreement, specifying three arbitrators "experienced in the business of pharmaceuticals," adds that "if the issues in dispute involve scientific, technical, or commercial matters," the arbitrators "shall engage experts" with "educational training or industry experience sufficient to demonstrate a reasonable level of relevant scientific, medical and industry knowledge, as necessary to resolve the dispute."

Perhaps anticipating disputes about arbitrator qualification, one Agreement, specifying that three arbitrators must have experience in pharmaceutical licensing disputes, adds that an arbitrator "shall be deemed to meet this qualification unless a party objects within [redacted] after the arbitrator is nominated."

Most agreements also provide that each party will appoint one arbitrator, and the two party-appointed arbitrators will select the third arbitrator within a specified period, or else the designated arbitral institution will appoint the third arbitrator from its panel. Some agreements simply provide that each party will appoint one arbitrator, and the institution will appoint the third arbitrator, e.g. "with one arbitrator being appointed by each party and the third arbitrator being appointed by the [institution]."

D. Other Provisions

The Arbitration Agreements reference, and may incorporate, the rules of arbitral institutions in effect as of the date of submission of the claim to arbitration. They provide that the language of the arbitration shall be English, and include provisions on confidentiality of the proceedings (subject to superseding obligations to disclose in court, to the Securities and Exchange Commission, or to other authorities); limiting damages that may be awarded (compensatory, not punitive, special, or consequential); waiving appeal from any decision of the arbitrators or from an award; suspending cure and limitations periods pending arbitration; and consolidating any related arbitrations. Several Agreements provide for "baseball arbitration" of discrete issues, in which the parties submit competing terms of decision, and the arbitrator must select one party's submissions, or the parties submit competing financial offers and the arbitrator must award the amount of one party's offer.

The Arbitration Agreements take different positions on the scope of discovery. One provides that, unless the parties agree on rules governing discovery and evidence, the United States Federal Rules of Civil Procedure will govern discovery, and the United States Federal Rules of Evidence will govern evidence, in the arbitration. In contrast, another Agreement provides that "[u]nless the arbitrators expressly determine otherwise, neither Party shall be required to give general discovery of documents, but may be required only to produce specific, identified documents that are relevant to the Dispute."

VI. Conclusion

If escalated disputes are not resolved by the parties' executives, the complex dispute resolution provisions of these Agreements can lead to disputes about the scope and exercise of a joint committee's decision rights; the scope and exercise of a party's unilateral decision rights; whether these types of disputes are to be resolved by a court or an arbitrator; and whether a court or an arbitrator decides the threshold jurisdictional dispute. The provisions dividing disputes into those for a party's decision, expert determination, arbitration, or litigation, or some combination of those procedures, complicated by provisions excluding certain disputes from arbitration, can lead to, or exacerbate, disputes about the scope of a dispute; whether the dispute should be referred to expert determination, arbitrated, or litigated; and whether a court or an arbitrator should decide the threshold jurisdictional dispute. Finally, the provisions excluding certain patent and antitrust disputes from arbitration can lead to parallel arbitration and litigation proceedings, and inconsistent judgments.

Doc. No. 13

Commercial Arbitrations: Private, But Not Always Secret

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An advantage of commercial arbitration is that it is private. The dispute is resolved in a private proceeding. Unlike court, the public is not allowed in.

Arbitrators must keep secrets

Under the rules of most arbitral organizations and under ethics rules for arbitrators, the arbitrator must keep things confidential. *E.g.*, AAA Comm'l Rule 25 ("The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."); Code of Ethics for Arbitrators in Commercial Disputes, Canon VI B ("The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.")

Private, but not secret

But that doesn't mean arbitration proceedings will remain secret. Enforcing an award may necessarily render the award public. A recent case illustrates the point.

Enforcing the award

An insurance company, Pennsylvania National Mutual Casualty Insurance Group, arbitrated and won a contractual dispute with its reinsurers. It filed a petition in U.S. District Court to confirm the award. Remember, arbitrators can't enforce their decisions. Only courts can do that. They do that under the Federal Arbitration Act – or in some cases a state arbitration act – by enforcing a judgment confirming the award.

Of course, to petition the court, Penn National had to provide the award to the court. It wanted to keep things confidential, so it petitioned to have the award filed under seal. But before the court could act on the case, the parties settled.

One of Penn National's reinsurers, which wasn't involved in the arbitration, wanted to see the award. It argued to the District Court that the award, having been filed with the court, was a judicial record. The public, it said, had the right to access judicial proceedings and records. The District Court at first disagreed. But, after an appeal to and remand from the Third Circuit, the District Court decided it should not have been sealed. Penn National then appealed to the Third Circuit.

The Third Circuit decided that any document that makes its way into the clerk's file is presumed to be available to the public. A party can overcome that presumption only by demonstrating a "clearly defined and serious injury" that would result from public access. The evidence Penn National submitted was mostly that it believed "other reinsurers might choose to forego paying Penn National and contest their contractual obligation to pay if they learned of the contents in the arbitration award." That wasn't a "clearly defined" injury because the court couldn't determine "how many possible relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful." The award would be made public.

So, in this case, the arbitration was private, but it wasn't secret. To enforce the award, it had to be filed. After filing, it was presumed to be public.

The parties may not need to keep secrets

Let's assume a new set of facts. Buoyed by a large award in their client's favor, your opposing counsel announces the victory on their firm's marketing website. "Our firm, Bigs and Winners, has the experience to win big in breach of contract arbitration, as proven by the recent big award we secured for our client." It then has a summary of the case, the names of your client, the charges made against your client (in great detail and making it

names of your client, the charges made against your client (in great detail and making it look as bad as possible), and a large award. The local press picks this up, and interviews opposing counsel, who provide a copy of the award. The front page of the paper includes an excerpt of the award, including the amount.

Furious, your client exclaims, "I thought this was a private proceeding. Do something!" What can you do? Probably nothing.

While arbitrators and arbitral organizations must keep arbitration matters confidential, your opponent is under no such constraint. The parties need not keep the award or anything else about he arbitration confidential absent some agreement or order to do so.

But they can agree to keep secrets – to a point

Of course, arbitrators can enter protective orders to forbid disclosure of confidential information or, in fact, any information the parties can agree to keep secret. This is routinely done in commercial arbitrations. There is no presumption of public access to worry about.

But what about the award itself? Again, arbitrators in commercial matters will keep things confidential. But your opponent needs to do so only to the extent the parties have agreed to or have been ordered to keep it confidential.

Keeping the award secret

This suggests a way to keep the award secret, at least for a time. Enter into a confidentiality agreement or seek one from the arbitrator to keep the proceedings and award confidential. As to documents that are, in fact, confidential this is routine.

Arbitrators do not, however, routinely order that the parties keep awards confidential. The parties, though, can agree to keep the proceedings and the award confidential, and arbitrators may agree to enter an order enforcing that agreement.

At the courthouse

But, if a party seeks a court's help to enforce the award, it is no longer up to the parties, as illustrated by the *Penn National* case. Still, as the *Penn National* court noted, other circuits have different tests for keeping information confidential. So, you may fare better in your court than Penn National did.

The place to start, though, is to find out whether you really need to petition to enforce the award at all. Often, parties will simply pay an award, recognizing the high standard for

attacking an award. Try that first.

Also, your case may not have parties as interested in your arbitration award as the reinsurers were in Penn National's case. It may well be that, if you have a confidentiality agreement, only your client, your opponents, and the arbitrator even know about the dispute. Chances may be slim that someone will challenge an attempt to keep the award confidential.

And yet, courts are sensitive to the public's right of access, and so well may not simply agree to keep filings confidential just because the parties want it that way. You need to recognize that, if you need go to court to enforce an award, it may not stay secret.

Still more private

Still, arbitration remains much more private than court. And it can and be even more so if the parties enter into agreements to keep it as confidential as possible.

**The views expressed are those of the author and do not necessarily reflect the views of CCA or any other organization.*

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Article 3

Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation)

Thomas J. Stipanowich

Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation)

*Thomas J. Stipanowich**

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I. INTRODUCTION

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American arbitration is at a crescendo.[1] Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy,

1. *See generally* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (forthcoming Jan. 2010) *available at* http://ssrn.com/abstract=1297526 [hereinafter Stipanowich, *New Litigation*] (analyzing current trends affecting perception and practice in commercial arbitration).

long cycle time and high cost.[2] While many—perhaps most—business users still prefer arbitration to court trial because of other procedural advantages,[3] cost and time concerns usually head the list of complaints about arbitration;[4] clients and counsel wonder aloud what happened to the economical and efficient alternative to the courtroom of popular lore.[5] Paradoxically, concerns about the absence of appeal on the merits in arbitration—a fundamental distinction between arbitration and court trial—have caused some to go so far as to craft provisions calling for judicial review for errors of law or fact in awards.[6]

Ironically, even as arbitration is taking on more of the trappings of court trial, court trial itself may change dramatically. A recent study co-sponsored by the American College of Trial Lawyers calls for sweeping reforms in discovery, motion practice, and other contributors to the expense and delay that have crippled the U.S. legal system.[7]

It is time to return to fundamentals in American arbitration. Those seeking economy, efficiency, and a true alternative to the courthouse may need more than good arbitrators. Real change must begin with the commitment of business users to thoughtful, informed consideration of *discrete process choices* that lay the groundwork for a particular kind of arbitration—whether they seek a highly streamlined, short, and sharp process with tight time frames and firmly bounded discovery, a private version of federal court litigation or something in between. Absent specific user guidance, arbitration under modern, broadly discretionary procedures is primarily a product of the interac-

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2. *Id.* at 6-27.

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

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

5. Stipanowich, *New Litigation*, *supra* note 1, at 9.

6. *See infra* Part III.D.

7. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009) [hereinafter FINAL REPORT ON LITIGATION REFORM].

tion of advocates (who are often occupationally prone to see only their conflicting agendas) and arbitrators, the best of whom have limited ability to blend efficiency and economy with fundamental fairness without the cooperation of the parties.[8]

For most business users, process choice is an illusion in the absence of appropriate alternative models from arbitration provider institutions.[9] Clients and counsel tend to have neither the time nor the expertise to craft their own process templates, and usually need straightforward, dependable guidance from those that develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.[10]

Finally, users require arbitrators and advocates capable of and willing to promote the goals underpinning the agreement to arbitrate. Among those who promote themselves to business clients, wide variations exist in personal philosophy, approach, pertinent knowledge, and ability.[11] Users must practice greater discernment in their selection.

To help users establish and effectively realize goals in arbitration and dispute resolution, the American College of Commercial Arbitrators established a task force to promulgate simple protocols for business users and other key stakeholder groups.[12] These protocols are not intended as a substitute for the development of appropriate rules or detailed practice guides, nor are they a proxy for the hard business of real choice-making by business clients and counsel. They are, however, an essential first step in refocusing on the fundamentals. This article suggests a possible blueprint for a Protocol for Business Users of Arbitration.

II. WHY BUSINESS USERS COMPLAIN ABOUT ARBITRATION

A. *Arbitration Has Become the "New Litigation"*

In the realm of commercial arbitration, perception, practice, and experience have been shaped by several trends.[13] The most important of

8. *See infra* Part II.B.5.

9. *See id.*

10. *See infra* Parts III.B., C. (discussing emerging templates for streamlined processes and controlling discovery); Part III.E.1 (discussing selection of institution to provide arbitration services).

11. *See infra* Part III.E.2 (discussing selection of arbitrators and advocates).

12. The author and former judge Curtis E. von Kann are co-chairs of the effort, which will lay the groundwork for a Summit on Commercial Arbitration in Washington, D.C. in October, 2009.

13. *See generally* Stipanowich, *New Litigation*, *supra* note 1.

these is the expansion of arbitration into the role of full-blown surrogate for civil trial. As a consequence, current practice under modern arbitration procedures is often a close private analogue to civil trial.[14] Among many aspects of this phenomenon, two elements—the expansion of motion practice and discovery—stand out as primary contributors to greater expense and longer cycle time, which are themselves leading causes of complaint by business users of arbitration.[15]

The urgency of these concerns was brought home by the publication of a final report co-sponsored by a task force of the American College of Trial Lawyers, which found that "because of expense and delay, both civil bench trials and civil jury trials are disappearing."[16] The report recommends a wide range of critical changes in the landscape of American litigation, including an end to the "'one size fits all' approach of the current federal and most state rules."[17]

It is truly ironic that similar concerns exist in the context of arbitration, which is first and foremost a creature of contract and therefore inherently highly flexible. Expanded arbitral motion practice and discovery have developed within the framework of leading commercial arbitration rules, which typically afford arbitrators and parties considerable "wiggle room" on matters of procedure. While many business clients may be perfectly comfortable with this status quo, in which the character, length and cost of the arbitration process are heavily dependent on the interaction of arbitrators and advocates, others may desire a higher degree of control—or discrete modes of arbitration for different circumstances. For the latter clients, accepting without question a one-size-fits-all set of arbitration rules is tantamount to a forfeiture of their best chance to achieve harmony between process and business priorities.

Let us consider the practical realities causing this state of affairs, and the gap users perceive between expectation and experience.

14. *Id. See supra* Part I. Parallel trends include the "quiet revolution" in informal dispute resolution spearheaded by the explosive growth of mediation, which now aggressively competes with arbitration in the dispute resolution marketplace; and the widespread use (and, sometimes, abuse) of arbitration in adhesion contracts binding employees and consumers, and legislative, judicial and scholarly responses that have a "spillover" effect on business arbitration. *Id. See supra* Part I.; Part II.

15. *Id. See supra* Parts I.B.1., 2.

16. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 3.

17. *See generally id.*

B. *Why Business Users Fail to Take Advantage of the Choice Inherent in Arbitration, Leading to a Gap between Expectations and Experience*

Since arbitration is a creature of contract, and therefore wholly subject to the will of business users, one may reasonably wonder why parties should ever perceive a dissonance between their expectations and their actual experience. The reasons are several.

1. Failure to plan with specific business goals in mind

Dissatisfaction with arbitration is, among other things, a reflection of the failure of companies to apply effective business management principles to the handling of business disputes. Arbitration and other dispute resolution approaches are seldom employed in the context of a systematic effort to manage conflict pursuant to clearly defined business goals and priorities. Recent studies of the ways businesses handle conflict make clear that most companies have not embraced this challenge strategically; instead, they are reactive and *ad hoc* in their approach to "legal problems."[18]

Such realities represent a significant missed opportunity for businesses—a failure to procure an important advantage not only for the legal department but for business relationships and, ultimately, the bottom line. Legal issues are a significant factor in the environment of business, demanding around one-fifth of the working hours of leading executives.[19] Yet business managers may not see the strategic implications of conflict and other "legal" matters, instead viewing them as distinct from business operations.[20] Similarly, legal counsel may not see how legal disputes impact business operations and strategies.

2. Difficulty of designing an appropriate system prospectively, before disputes arise

Timing is another significant barrier to the exercise of effective choice regarding arbitration. The time to begin laying the groundwork for managing conflict within a contractual relationship is *before* the contract is negotiated and drafted. Because such provisions are usu-

18. *See* DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES—A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 9-14 (1998); David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 144-45 (1998). *See also* Thomas J. Stipanowich, *ADR and the 'Vanishing Trial': The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 893 (2004) [hereinafter Stipanowich, *Vanishing Trial*].

19. GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE 3 (2002).

20. *Id.* at 6.

ally fashioned at the outset, before any disputes have arisen, however, tailoring the "right" process involves a considerable degree of guesswork. Looking ahead to a long-term relationship, one might anticipate conflicts of varying character, size, and complexity; crafting, at the outset, procedures that will prove effective across a range of very different dispute scenarios is a challenging proposition.[21] Such difficulties often discourage contract drafters from trying to develop tailored arbitration provisions, and encourage reliance on generic boilerplate that postpones many decisions about process until the time of arbitration. Of necessity, such provisions tend to give arbitrators and parties considerable discretion to deal with circumstances as they find them.[22]

3. Inexperience of transaction counsel

Yet another obstacle to maximizing the benefits of arbitration is lack of experience among many of those chiefly responsible for contract planning and drafting. Most legal advocates representing business clients now have at least some experience with arbitration, mediation, and other contract-based approaches for resolving conflict, and many of them possess important insights about what kinds of procedures should find their way into commercial contracts.[23] Usually, however, it is not the "advocates" or "dispute resolution specialists" but transactional lawyers who negotiate and draft contracts and establish the template for resolving business conflicts. While one might expect business lawyers' superior understanding of the business agenda and of the dynamics of commercial relationships to translate into creative contractual provisions governing the management of conflict, this is seldom the case. Although notable exceptions exist, many transactional lawyers have little or no experience in mediation, arbitration, or other forms of dispute resolution.[24] This inexperience may be reflected at the drafting stage.

In addition to causing counsel to miss opportunities to take a strong hand in making process choices, lack of pertinent experience and good judgment contribute to bad process choices. Some drafters, fearful that the absence of appeal on the merits will leave their arbitrating client helpless in the wake of an "irrational" award, insert provisions

21. *See* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 35-62 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST] (delineating the issues the drafter of an arbitration clause should consider in crafting effective arbitration procedures).

22. *Id.*

23. LIPSKY & SEEBER, *supra* note 18, at 9-14.

24. John M. Townsend, *Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins*, 58 APR DISP. RESOL. J. 28, 30 (2003).

for judicial review for errors of law or fact.[25] This costly and potentially perilous "cure" may end up being worse than the perceived malady,[26] which is doubly unfortunate since less costly and risky alternatives exist.[27]

4. Realities of the negotiating process; parties' differing goals and priorities

While negotiating and drafting business contracts, lawyers and clients often have limited time to address the myriad legal issues surrounding a transaction and tend to give relatively little attention to provisions for managing conflict between contracting partners. Another reason that dispute resolution provisions are usually accorded low priority in negotiations is that parties intent on sealing a deal are reluctant to dwell on the subject of relational conflict.[28] Such discussions are usually left until the eleventh hour, with slight emphasis on details.

Getting into the details, of course, raises the possibility that parties' very different goals and priorities will surface, enhancing the difficulty of completing the present deal or at least complicating the discussion. Under the circumstances, it is only natural that counsel tend to circumvent such discussions by falling back on the most convenient alternative—standard published procedures of leading institutional providers of dispute resolution services.

5. Limited guidance, range of models from arbitral institutions

The published commercial arbitration procedures of major provider institutions offer a number of perceived advantages. For busy lawyers, they offer a seemingly "tried and true" alternative to the minefield of customized drafting combined with an administrative support system and access to lists of neutrals. Unless a client is entering into a significant commercial relationship or preparing a contract template that will be used multiple times,[29] it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements. Even in circumstances where more attention is appropriate, drafting dispute resolution agreements from whole cloth without reliance on published templates can be a dicey proposition. It therefore makes

25. *See infra* Part III.D.
26. *See infra* Part III.D.1.
27. See *infra* Part III.D.2.
28. *Id.*
29. *See infra* Part III.A.3 (discussing options for "tailoring" arbitration provisions).

sense to examine and compare what different administrative institutions have to offer.

A reference to standard boilerplate is also much less likely to raise the eyebrows of those on the other side of the negotiating table. To the extent organizations such as JAMS, the American Arbitration Association (AAA), the International Institute for Conflict Prevention & Resolution (CPR) or other national or regional entities are known and respected in the marketplace, incorporating their rules is less likely to entail a drain on negotiators' time or an expenditure of a party's "negotiating points."

But while drafters seeking guidance from the websites of institutions sponsoring arbitration have a seemingly wide variety of choices, few readily available and reliable guideposts exist that dependably link specific process alternatives to the varying goals and expectations parties may bring to arbitration.[30] Moreover, despite devoting much time and effort to developing and promoting institutional rules, most organizations offer a limited range of process templates for commercial arbitration. For example, some institutions heavily emphasize a single set of commercial arbitration rules which may be excellent for certain purposes but less advantageous for others (such as small and medium cases); by incorporating that institution's rules in an arbitration agreement, however, parties will be bound to employ those rules for whatever disputes arise.[31]

Recently, more attention is being given to the diverse needs of business users of arbitration. For example, there has been a trend among leading U.S. arbitration institutions to create discrete templates for expedited or streamlined arbitration.[32] Moreover, in light of growing concerns about the scope and cost of arbitration-related discovery, va-

30. Leading arbitration institutions provide some basic guidance for drafters about ways of incorporating their own rules in the contract. *See, e.g.*, JAMS, JAMS GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (2006), http://www.jamsadr.com/images/PDF/Commercial_Arbitration_Clauses-2006.PDF. One relatively comprehensive set of guideposts for business users is the product of the CPR Commission on the Future of Arbitration. *See generally* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21. Even this extensive guide, however, does not approach process questions from the standpoint of various specific user goals. A more recent CPR publication does, however, address many key drafting issues. CPR INST. FOR DISPUTE RESOL., CPR DRAFTER'S DESKBOOK (Kathleen Scanlon, ed. 2002) [hereinafter DRAFTER'S DESKBOOK].

31. *See generally* Thomas J. Stipanowich, *At the Cutting Edge: Conflict Avoidance and Resolution in the Construction Industry,* ADR & THE LAW 65-86 (1997) (describing rationale for tiered construction procedures) [hereinafter Stipanowich, *Cutting Edge*].

32. *See infra* Part III.B.

rious institutions have devoted attention to that subject, and choices may now be discerned among existing procedures.[33]

6. Post-dispute realities; the arbitration spiral

When disputes arise, the expectation of an efficient and economical process may be undermined by the interplay of several factors that cause arbitration proceedings to spiral out of control. Corporate counsel often avoid active responsibility for managing conflict, relying instead on outside advocates. If the latter are not in tune with the client's goals, the consequences may be unfortunate, as reflected in the conclusion of one corporate general counsel:

> Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.[34]

As the quote makes clear, some attorneys disserve their clients by failing to appreciate and make appropriate allowances for the significant differences between arbitration and litigation. Of course, the problem may spring from a client's failure to make its needs and expectations plain. It may also reflect the differing interests of the client and outside counsel, especially when the latter is engaged to bill by the hour and is pressured to maximize hours and resulting profits for his law firm.

The most notable impact of a trial-like approach in arbitration involves discovery. Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery,[35] it is not unusual for legal advocates to agree to trial-like procedures for discovery, even to

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33. *See infra* Part III.C.

34. Stipanowich, *Vanishing Trial*, *supra* note 18, at 895 (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.). *See also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation,* 14 OHIO ST. J. DISP. RESOL. 1 (1998); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions* 3 HARV. NEGOTIATION L. REV. 51 (1998).

35. *See, e.g.,* INT'L INST. FOR CONFLICT PREVENTION & RESOL. RULES FOR NON-ADMINISTERED ARBITRATION R. 11 (2007) ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate. . .taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."), *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx [hereinafter CPR RULES]. *See also* JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 22 (2007), *available at* http://www.jamsadr.com/rules/comprehensive.asp [hereinafter JAMS RULES]; AM. ARBITRATION ASS'N COMMERCIAL RULES & MEDIATION PROCEDURES R. R-30 (2007), *available at* http://www.adr.org/sp.asp?id=22440 [hereinafter AAA COMMERCIAL RULES].

the extent of employing standard civil procedural rules.[36] Trial practice, with its heavy emphasis on pre-hearing motion practice and intensive discovery, is reinforced by ethical rules enshrining the model of zealous advocacy.[37] For lawyers accustomed to full-fledged discovery, sufficing with anything less may seem tantamount to malpractice. Again, the heavy-discovery bias tends to be reinforced by the prospect of hefty hourly fees generated by extensive discovery.

Arbitrators, intent upon striking a balance between court-like due process and efficiency, may be reluctant to push parties to limit such practices or to keep to a schedule.[38] These tendencies may be strengthened by concerns about having their award subjected to a motion to vacate. The reluctance to limit discovery may also reflect an arbitrator's desire to avoid offending anyone in the hope of securing favorable word-of-mouth and future appointments.[39]

C. *Choice Imperatives*

Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and the kind of arbitration process to be employed.[40] If business parties want arbitration to be a truly expeditious and efficient alternative to court, then they have to assume control of the process and not abdicate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals.[41] This must include not only making choices after disputes arise, but also when contracting. Ideally, choice-making begins even earlier with strategic discussions regarding conflict management, in which arbitration is considered among a variety of tools and approaches.[42]

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36. As arbitrator, the author has in past cases been confronted by a prior agreement of counsel for arbitrating parties to utilize the discovery provisions of the Federal Rules of Civil Procedure in arbitration. It is often possible to persuade the parties to forego requests for admission and interrogatories and to strictly limit the number of depositions, and also to closely supervise the discovery process to avoid unnecessary delays.

37. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2007) [hereinafter MODEL RULES].

38. *See id.* (discovery has been used as a tactical weapon to impose excessive costs on the opposing party).

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

40. This paragraph is a close paraphrase of a paragraph in Stipanowich, *New Litigation*, *supra* note 1, at 8.

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

42. *See generally* SIEDEL, *supra* note 19.

In the effort to define client goals and translate these goals into meaningful process choices, counsel plays a critical role. As "gatekeeper[s] to legal institutions and facilitator[s] of . . . transactions,"[43] lawyers "exercise considerable power over their clients . . . [and] maintain control over the course of [dispute resolution]."[44]

Despite the often daunting obstacles confronting client and counsel in making better choices regarding arbitration and dispute resolution, legal advisors should devote more time and energy to overcoming current obstacles, and business clients should take heed and support these efforts. Effective process choices provide tangible benefits for businesses and avoid costly and delay-producing legal consequences. These realities underpin lawyers' ethical obligations to actively promote consideration of choices regarding arbitration.

1. Business imperatives

When utilized by a legal department as part of a strategic effort to serve broader business goals, arbitration and other forms of dispute resolution may benefit a company. A 2003 AAA-sponsored market study involving telephone interviews with 254 corporate counsel sought to segregate and compare companies based on indices of several key characteristics.[45] The study analyzed companies in which legal staff is more closely integrated into the corporate planning process, where senior management is focused on preserving relationships and settling cases instead of adopting aggressive approaches, and litigation is downplayed in favor of alternative dispute resolution approaches.[46] It concluded such companies are likely to enjoy strengthened relationships with suppliers and business partners and have legal departments that perceive themselves as less "stretched" to accomplish their role within a given budget.[47] A strategic approach that effectively integrates arbitration processes into a larger matrix of approaches to manage and resolve conflict in accordance with broader business goals is arguably an effective way of ensuring that goals and expectations are achieved.

Several recent surveys of corporate counsel demonstrate that while many corporate counsel perceive arbitration as presenting key advan-

43. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC. REV. 631, 645 (1980-81).

44. *Id.*

45. AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT—IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 4 (2003).

46. *Id.* at 8.

47. *Id.*

tages over litigation, many corporate lawyers are dissatisfied with arbitration, often because of related costs and delays.[48] Sophisticated guidance is needed on how and when to resort to arbitration, and what procedures are best for specific circumstances. Without such direction, a client risks, among other things, unforeseen legal consequences.

2. Legal imperatives

Choices regarding arbitration—whether made consciously or by default—have potentially significant legal consequences for clients. The published cases and literature are replete with examples of parties experiencing disappointment, delay, or disruption prior to, during, or after arbitration as the result of:

- a lack of precision in describing the process, and confusion about whether a particular agreement is enforceable under arbitration statutes;[49]
- uncertainty about the consequences of a failure to follow prescribed steps in a dispute resolution process;[50]
- a lack of clarity about whether various issues are to be resolved by courts or arbitrators;[51]
- a multi-party dispute in which some of the parties in interest are not subject to an arbitration clause;[52]

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48. *See* Stipanowich, *New Litigation*, *supra* note 1, Part I.D. *See also* FULBRIGHT 2004 SURVEY, *supra* note 3, at 18. FULBRIGHT & JAWORSKI L.L.P., FOURTH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 18, 30 (2007), *available at* http://www.fulbright.com/mediaroom/files/2007/FJ6438-LitTrends-v13.pdf; Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RES. J., Feb.-Apr. 2003, at 37, 38 (noting that arbitration has become a legalistic method of adjudication); Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?* 14 CORP. LEGAL TIMES 44, 45 (2004). *See generally* QUEEN MARY, UNIV. OF LONDON, SCH. OF INT'L ARBITRATION & PRICEWATERHOUSE COOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 22 (2006) (expense and time were seen as the leading disadvantages of international arbitration); QUEEN MARY, UNIV. OF LONDON, SCH. OF INT'L ARBITRATION & PRICEWATERHOUSE COOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 5 (2008) (5% of counsel were "rather or very disappointed" with international arbitration, based on their experience of increased costs of arbitration and delays to proceedings).

49. Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L. J. 427, 450-56 (2007) (discussing basis for enforcement of non-binding arbitration and one-off dispute resolution provisions).

50. *Id.* at 457-62 (discussing multi-step processes and "interface" issues).

51. *Id. See also* IAN R. MACNEIL, et al., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 36.5.5 (1996) (discussing jurisdictional issues that come into play with ongoing contracts concerning relief).

52. Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes*, 35 FORDHAM URB. L.J. 83, 84-89 (2008) (providing an overview of the consolidation issue as treated across the circuit courts); Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580 (3d Cir. 2007) (Petitioner argued demands for arbitration against it should be stayed, as six separate contracts, each with its own arbitration clause, did not provide for the consolidation of arbitra-

- a lack of understanding about the roles of party-appointed arbitrators and their obligations to disclose conflicts of interest;[53]
- a concern about the amount and form of discovery;
- a failure to provide effective protection for trade secrets and other proprietary information;[54]
- a failure to foresee the potentially negative consequences of a customized provision for expanded or contracted judicial review of an award.[55]

In all of these situations, unanticipated litigation or other complications may be avoided by careful planning, which in some cases means looking beyond the standard procedures provided by arbitration institutions.[56] However, we are not to the point where even a sizable minority of practitioners have the knowledge and experience to offer effective guidance on such issues.[57] Whether or not arbitration would be judicially denominated a "specialty,"[58] it has become a relatively complex and specialized area of practice. An effective counselor

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tion proceedings, or for consolidation with proceedings under other contracts. In light of the parties' agreement to arbitrate their disputes, contractual silence as to the consolidation issue, and "longstanding federal policy favoring arbitration" the court held that the decision whether to consolidate was a procedural issue to be resolved by the arbitrator) (citing Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)). *See also* Employers Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573 (7th Cir. 2006) (holding that the question of whether an arbitration agreement between reinsurer and reinsured prohibited consolidated arbitration with other reinsurers was a procedural issue for the arbitrator and not a question of arbitrability for the court).

53. Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815 (8th Cir. 2001), *cert. denied*, 123 S. Ct. 87 (2002); Merit Ins. Co. v. Leatherby Ins. Co. 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983) (standards of disclosure applied to party-appointed arbitrators depend on the tradeoff between expertise and impartiality).

54. *See* Merrill Lynch v. McCollum, 469 U.S. 1127, 1129 (1985); Anahit Tagvoryan, *A Secret in One District Is No Secret in Another: The Cases of Merrill Lynch and Preliminary Injunctions under the FAA*, 6 PEPP. DISP. RESOL. 147 (2006) ("Because jurisdictions are split as to whether courts have authority under the FAA to grant injunctive relief in a dispute that is subject to arbitration, Merrill Lynch has experienced unnecessary confusion as to where, when, and how its trade secrets are protected."); *but cf. IBM & Gartner Group Settle Trade Secret Suit by Creating Future Arbitration Panel*, ALTERNATIVES TO THE HIGH COST OF LITIG., Sept. 1984, at 8.

55. *See infra* Part III.D. *See also* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 168 nn.269 & 270 (2002) [hereinafter Schmitz, *Mud Bowl*].

56. *See* Howard J. Aibel & George H. Friedman, *Drafting Dispute Resolution Clauses in Complex Business Transactions*, 51 DISP. RESOL. J. 17, 68 (1996).

57. *See generally* Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29 (1999); Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitration in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271 (2003).

58. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE 2:32 (2008 ed.) (legal specialization is a significant factor in malpractice litigation, usually requiring a higher standard of care and expert testimony).

should draw upon a well of direct experience and an understanding of current case law, procedural options, and applicable standards.[59]

3. Ethical imperatives

To help their clients achieve legitimate business goals and avoid unfortunate legal consequences, lawyers have ethical obligations to competently counsel their clients about the range of appropriate methods of managing and resolving conflict in particular transactions or relational settings.[60] This requires not only the requisite "legal knowledge, skill, thoroughness and preparation,"[61] but also an understanding of the client's objectives[62] and how arbitration and dispute resolution tools may serve them.

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59. Modern listserves are becoming an important source of information for neutrals and practitioners in arenas such as arbitration and dispute resolution. Every day, the author receives multiple messages regarding new decisions, new or changing practice standards and other important developments.

60. *See* MODEL RULES, *supra* note 37, at R. 1.1; *See* Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in DEBORAH L. RHODE, ETHICS IN PRACTICE 136 (2000). Some legislation and bar opinions have established a specific predicate for lawyer consultations regarding dispute resolution options. Some establish an affirmative duty to provide clients with information regarding alternatives to litigation. A Michigan Bar opinion states:

> [A] [l]awyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests, or if the lawyer has any reason to think that the client would find the alternative desirable . . . . While not all options which are theoretically available need be discussed, any doubts about whether a possible option is reasonably likely to promote the clients (sic) interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision.

Mich. Comm. on Ethics and Professional Responsibility, Formal Op. RI-262 (1996).

The Texas Lawyer's Creed provides: "I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes." TEXAS LAWYER'S CREED § 2(11) (1989). The Georgia State Bar Rules and Regulations state:

> A lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.

Ga. Rules & Regulations for the Org. and Gov't of the State Bar of Ga. R. 3-107, EC 7-5 (1999). *See generally* Robert F. Cochran, *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 188 (1999) [hereinafter Cochran, *ADR*].

61. According the Model Rules of Professional Conduct,

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MODEL RULES, *supra* note 37, at R. 1.1.

62. MODEL RULES, *supra* note 37, at R. 1.2(a) (requiring lawyers to "consult with the client as to the means by which . . . [client objectives] are pursued").

Today, contractual provisions for the resolution of disputes, including terms for binding arbitration, are a regular feature of all kinds of contracts. If the objective of representation is to negotiate or draft a contractual agreement in furtherance of business goals, the management of disputes may be an important element, although it is unlikely to be uppermost in a client's mind during the negotiation. Indeed, clients tend to shove it into the background of discussions, postpone its treatment until the very last moment, or avoid discussing it entirely.[63] It is incumbent upon the legal advisor to draw the subject to the client's attention in a timely manner (meaning, if at all possible, prior to the negotiation) for "reasonable consultation" as to the means by which the client's objectives will be accomplished.[64]

Moreover, it is unreasonable to expect business clients to have the specialized knowledge and skill required to craft such provisions, and they should be able to rely upon legal counsel when making decisions about how disputes should be handled.[65] Although a basic understanding of dispute resolution choices may be straightforward,[66] a knowledgeable appraisal of choices in binding arbitration is beyond most clients' ability and requires counsel's interpretation and guidance.

To provide competent representation to their clients, counsel representing clients in the negotiation and drafting of agreements must come equipped with knowledge of a wide variety of conflict resolution

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63. *See supra* Part II.B.4.

64. ABA Model Rule 1.4 provides:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . .
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULES, *supra* note 37, at R. 1.4 The Rules further explain,

> As used above, "informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

MODEL RULES, *supra* note 37, at R. 1.0(e).

65. Comment 2 to Model Rule 1.2 provides:

> Clients normally defer to the special knowledge and skill of their lawyer with respect to. . . technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

MODEL RULES, *supra* note 37, at R. 1.2 cmt.

66. *See, e.g.*, Cochran, *ADR*, *supra* note 60, at 186.

mechanisms including stepped negotiation, mediation, and arbitration. This should include not only an appreciation of the array of different processes and their appropriate uses, but also thorough preparation to ensure that a dispute resolution provision (which today is likely to include multiple elements) is tailored to the client's particular needs and circumstances. Competent representation requires more than just grabbing boilerplate provisions from the website of an institutional provider. To the extent that the negotiator/drafter lacks the background or skills necessary to make a wise and judicious choice, he or she should seek assistance from a more experienced colleague[67] or other appropriate source.

Lawyer-counselors are also encouraged to look beyond the legal issues and consider "other factors that may be relevant to the client's situation."[68] In crafting appropriate dispute resolution provisions, or in some cases whole "systems" for the resolution of disputes, one has the opportunity to look beyond the narrow resolution of legal or factual disputes and the remedial shortcomings of litigation. An attorney can craft frameworks that permit conflict to become the impetus for a consideration of business and personal objectives and relational issues that both underpin and transcend "mere" legal or factual disputes. Within and beyond the realm of arbitration, parties have a variety of process choices that serve various goals and priorities—subjects that should be addressed in advance by lawyer and client. Failure to allow the client the opportunity to consider these factors is a breach of ethical duty.[69]

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67. Thomas J. Stipanowich, *Vanishing Trial, supra* note 18, at 893 n.195 (quoting CPR Commission member Harold Hestnes).

68. The Model Rules provide:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

MODEL RULES, *supra* note 37, at R. 2.1.

Comment 5 to Model Rule 2.1 provides:

> [W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

MODEL RULES, *supra* note 37, at R. 2.1. cmt.

69. *See generally* Robert F. Cochran, *Professional Rules and ADR: Control of Alternative Dispute Resolution under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L .J. 895, 898-901 (2001). In the absence of contractual agreements for managing disputes, it is increasingly likely that parties will end up in some form

III. FIRST PRINCIPLES: A PROTOCOL FOR ARBITRATION REFORM THROUGH CHOICE

Business users perceive a gap between expectation and experience in arbitration. In particular, because practice under prevailing general commercial arbitration procedures has become much more "court-like,"[70] some business users complain about high costs and delays. For this and other reasons, users would be better off if they made better choices—and especially by more effectively tailoring arbitration to their own goals and priorities—at the outset, when the template for dispute resolution is usually established. While this path is strewn with a number of daunting practical obstacles, there are also strong business, legal, and ethical imperatives for pursuing it. The challenge is to encourage and facilitate more affirmative, beneficial choice-making by business users in a pragmatic and realistic way. The following Protocol is a first effort in that direction. Due to space limitations, the following discussion is aimed primarily at addressing concerns about the loss of economy and efficiency in arbitration.[71]

A. *Move Beyond "One-Size-Fits-All Arbitration" to Fit Process to Priorities*

1. Identifying client goals and priorities

Experts in the development of integrated programs for managing and resolving conflict maintain that organizations should begin efforts to manage conflict by articulating the goals the program will serve.[72] This approach underpins leading corporate employment programs.[73] As discussed above, however, such thinking is not often carried over

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of court-connected mediation or ADR process. In such cases key decisions about the scope and shape of the process may be out of the parties' hands.

70. Benjamin J.C. Wolf, *On-line But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (describing the disadvantages of arbitration to include costs similar to litigation and lengthy discovery process and hearings); *see also* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?* 19 OHIO ST. J. ON DISP. RESOL. 35 (2003) (discussing perceptions of the American influence on international arbitration); Amr A. Shalakany, *Arbitration and the Third Work: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L. J. 419, 434-435 (2000) (observing that international arbitration is no longer quicker than adjudication; suggesting that "American law model" is a cause).

71. A more extensive protocol would include guideposts and detailed discussion of third party discovery, multi-party practice, the protection of confidentiality, and other topics that would require many more pages than are available here. Some of these subjects are alluded to briefly in the text accompanying notes 75-79 *infra*.

72. *See, e.g.*, CATHY A. COSTANTINO & CHRISTINA S. MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 168-71 (1996).

73. *Id.*

into the management of commercial disputes. In that arena, dispute resolution is typically given short shrift, and gaps are filled by incorporating the standard arbitration procedures of leading provider institutions.

Although prevailing commercial arbitration procedures are usually the product of considerable thought and discussion by very bright, experienced, and thoughtful people (including leading lawyers and, in some organizations, non-lawyers), no single set of commercial arbitration procedures can effectuate all of the goals that are important to business users in different kinds of cases. Consider the following list of ends that may be sought by businesses in dispute resolution: low cost or cost efficiencies; a speedy outcome or the avoidance of undue delay; the ability to choose decision makers; court-like due process or results comporting with legal standards; application of pertinent commercial, technical or professional standards; a final and binding resolution; predictability; limited risks; consistency of outcomes; privacy; confidentiality; and preservation of a relationship or continuing performance. In addition, the ability to exert control over the process and the flexibility to address different circumstances is important.

As previously discussed, "one-size-fits-all" arbitration rules are (of necessity) designed to accommodate a wide range of possible circumstances, and therefore afford arbitrators and parties a considerable degree of "wiggle room." Advocates and arbitrators determine the shape and pace of the process, the degree of protection to be afforded sensitive information, and other specific contours of arbitration. This approach necessarily heightens uncertainties and enhances the risk that particular user goals may be frustrated. It often, moreover, results in an experience that closely resembles litigation.[74]

A recent final report on litigation reform recognizes that the "one-size–fits-all" approach embodied in federal and state court procedures has contributed significantly to costs and delays, and says "rulemakers should have the flexibility to create different sets of rules for certain types of cases so [the cases] can be resolved more expeditiously and efficiently."[75] If trial lawyers recognize the need for new models of court trial to promote economy and efficiency, why are business users not taking advantage of the choice inherent in arbitration to adopt streamlined procedures?

To exert greater control over their destiny in arbitration, business clients and counsel need to recognize and address critical "forks in the

74. *See supra* Part II.B.

75. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 4.

road" through clear process choices. For example, in making choices about arbitration, users might ask themselves at least a few key questions:

- Is low cost and a speedy outcome more important than court-like due process, justifying expedited, or streamlined procedures in certain categories of cases?[76]
- Is it possible to generally limit arbitration-related discovery? Can we set narrow bounds for discovery in certain types of cases?[77]
- Is an arbitrator other than a legal professional more appropriate in certain kinds of disputes?
- If there is a serious concern about the impact of a final award and the absence of judicial scrutiny, what are the most cost-effective and beneficial ways of addressing the concern?[78]
- Is there a need to ensure that three or more parties are included in (and bound by) the results of the dispute resolution process, and will special provisions need to be made for consolidated arbitration or joinder of parties?
- Are certain categories of proprietary information likely to be relevant to disputes under the contract? If so, what confidentiality protections should be included in the initial dispute resolution clause?[79]
- If preservation of a relationship or maintenance of contract performance is a priority, how should the arbitration process be tailored to reflect that concern?[80]

Questions such as these (several of which will be discussed at greater length below) are critical to translating client priorities into effective approaches to conflict. Planners without dispute resolution experience should draw upon more knowledgeable colleagues or outside counsel with broad conflict management experience.

2. Considering arbitration as part of a systematic approach to conflict management

A number of companies have embraced systematic approaches to handling conflict. They have articulated business goals to be achieved in their program, developed effective mechanisms for the early assessment and affirmative management of conflict,[81] and promoted various

76. *See infra* Part III.B.

77. *See infra* Part III.C.

78. *See infra* Part III.D.

79. *See infra* text accompanying notes 193-200 (briefly discussing confidentiality concerns and potential need for affirmative protection of sensitive information in arbitration).

80. *See, e.g., infra* text accompanying notes 81-92 (discussing Abbott Labs procedure for distribution contracts).

81. *See* Stipanowich, *Vanishing Trial, supra* note 18, at 883-93 (discussing sophisticated corporate conflict management programs).

appropriate dispute resolution tools (including negotiation, mediation, and arbitration).[82] Approached in this way, as part of a thoughtful and multi-faceted approach to resolving conflict, binding arbitration is more likely to prove its particular value as a response to business needs and priorities.

3. Custom-tailoring arbitration

a. customization at the contract level

In order to ensure that arbitration is most effectively employed as part of a systematic approach to conflict, counselors should take time to consider what kind of arbitration procedure will best serve the goals of a client. The result may be the adoption or adaptation of standard arbitration and dispute resolution procedures (including national models published by JAMS, CPR, or AAA). Some businesses, however, may find it worthwhile to develop their own "dedicated" dispute resolution models. This latter approach is cost-effective in the context of a high-stakes commercial relationship, a repeatedly used contract template, or a stream of prospective disputes.

A form of expedited arbitration[83] emphasizing speed and certainty for the resolution of disputes arising under long-term distributorship contracts was pioneered by Abbott Labs, a Chicago-based corporation. The mechanism was embodied in an "Alternative Dispute Resolution" program, a stepped program analogous to those featured in many other business contracts.[84] However, for the Abbott business clients, the critical goals and expectations were speed, certainty, and the maintenance of continuing business relationships. It was essential for the parties to have guidance respecting the basis of their ongoing relationship under the distributorship contract, and they needed a decision "sooner rather than later." Abbott planners concluded that substantial time could be saved by eliminating discovery, since, as one of the program architects observed, "ninety-nine percent of the time you will not find something as a result of time-consuming and expensive

82. *See id.* at 884. *See also* Stipanowich, *New Litigation*, *supra* note 1, at Part II.E. (discussing the "movement upstream" in corporate conflict management). By way of comparison, the Final Report on Litigation Reform calls to courts to "raise the possibility of mediation or other forms of alternative dispute resolution early in appropriate cases," including mediation of individual issues FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 21.

83. The "ADR" procedure nowhere specifically identifies the adjudicative process as "arbitration," but the latter fulfills all the requisites of "classic" binding arbitration. *See* Stipanowich, *Arbitration Penumbra*, *supra* note 49, at 435-36.

84. Abbott Labs, Dispute Resolution Program [hereinafter Abbott Program] (on file with author).

discovery—a real waste."[85] Therefore, the Abbott model was aimed at "thin-slicing"[86] by limiting adjudication largely to the information at hand. As such, the procedure was a dramatic departure from the instinct of many advocates in the professional legal culture who seek "perfect information" before deciding how to dispose of the case. The Abbott program is characterized by (a) a very short period before arbitration hearings, (b) a prohibition on discovery, (c) a requirement that each party have no more than five hours to present its case in the arbitration hearing, and (d) a baseball arbitration-type format in which the arbitrator's award must be based upon the proposal of one or the other of the disputants.[87]

Following the submission of written notice of a dispute, the Abbott procedure requires "good faith negotiations" between the "presidents (or their designees) of the affected subsidiaries, divisions, or business units" within twenty-eight days. Failing resolution through negotiation (including the failure of the principals to negotiate), the procedure calls for the appointment of a neutral "to preside in the resolution of disputes."[88] Between twenty-eight and fifty-six days after selection, the neutral must "hold a hearing to resolve each of the issues identified."[89] The parties then submit lists of exhibits and witnesses, a proposed ruling on each issue to be resolved, and a brief of no more than twenty pages in support of their proposals. No discovery is "required or permitted by any means."[90] The hearing is to be "conducted on two consecutive days," with five hours allotted to each party for presentation. The award must be published within fourteen days after completion of the hearing, and must "adopt in its entirety the proposed ruling

85. Lara Levitan, Senior Counsel, Abbott Labs, Presentation at the CPR Institute for Dispute Resolution Annual Meeting: Corporate Counsel Roundtable on Commercial Arbitration (Jan. 2005) (notes on file with author). *See also* Russ Bleemer, *High Quality Results, High Quality Processes: Top In-House Counsel Discuss the Continuing Challenges In Commercial Arbitration*, 24 ALTERNATIVES TO THE HIGH COST OF LITIG. 182 (2006) (discussing the roundtable).

86. Bleemer, *supra* note 85, at 183.

87. In other words, the arbitrator must choose the more "just" proposal and incorporate it in his or her decision, which will be legally binding.

88. Bleemer, *supra* note 85, at 183. The neutral selection process is required to begin within 21 days of the notice of dispute, and, in the absence of mutual agreement on a neutral, is to be conducted under the auspices of the CPR Institute for Dispute Resolution [now the International Institute for Dispute Resolution]. In 2007, Abbott further refined its standard provision to keep the selection of the neutrals squarely in the hands of the parties, i.e. if the parties cannot agree to one mutually acceptable independent, impartial and conflicts-free neutral, each party chooses one independent, impartial and conflicts-free arbitrator and those two arbitrators choose a third such neutral for the panel.

89. Bleemer, *supra* note 85, at 183.

90. Bleemer, *supra* note 85, at 183.

and remedy of one of the parties on each disputed issue."[91] If all rulings are in favor of the same party, the losing party must pay all fees and expenses of the proceeding, including the reasonable legal fees of the prevailing party.[92] Although enforceable in court, the rulings of the neutral and allocation of fees and expenses are "binding, non-reviewable, and non-appealable."[93]

While the foregoing procedure is particularly draconian and therefore not a suitable template for general purposes, the process served its particular purpose well. Although Abbott was not always successful in persuading distributorship contract partners to agree to the expedited process, the program has been successfully employed in contractual relationships.[94]

Several points are worth stressing about the Abbott Labs procedure:

1) the program was narrowly tailored for a specific, common transaction type—distributorship contracts;
2) Abbott designed the program in advance of any specific negotiations with contracting partners;
3) Abbott first identified key corporate goals and priorities (speed, economy, a quick answer, a preserved relationship), and then tailored the process to those ends;
4) although this was a highly abbreviated process, Abbott considered and incorporated multiple dispute resolution steps; and
5) Abbott made limited use of an appropriate "provider organization"—in this case the CPR Institute—to assist with arbitrator selection.

b. customization by industry, trade, or professional group

Another form of customized program is that developed by and for a specific industry, mercantile group, or professional association.[95]

91. Bleemer, *supra* note 85, at 183.

92. Bleemer, *supra* note 85, at 183.

93. It should be noted that there is a division of judicial opinion regarding the enforceability of agreements to *limit* or *avoid* judicial review. Some courts have enforced such agreements. *See, e.g.,* Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003) (contractual limitation of bases for vacatur to exclude "manifest disregard" was unenforceable; "Judicial standards of review, like judicial precedents, are not the property of private litigants."). Others courts have denied enforcement. *See, e.g.,* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001) (noting in dicta that "parties to an arbitration agreement may eliminate judicial review by contract").

94. Levitan, *supra* note 85. (Lara Levitan, senior counsel at Abbott Laboratories, makes recommendations based on her company's arbitration program); *see also* Bleemer, *supra* note 85.

95. *See* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 431 n.24, 453-77 (1988) [hereinafter Stipanowich, *Rethinking*] (discussing construction industry arbitration procedures and summarizing other studies on trade and industry arbitration programs).

These programs, many of which have long historical roots, incorporate a diverse array of arbitration processes tailored to particular kinds of disputes. For example, in the sale of thoroughbreds, bidding disputes might be adjudicated by the decision of an auctioneer,[96] and warranty-related controversies by a panel of veterinarians.[97]

The AAA Construction Rules, which were developed with input from design and construction professionals as well as attorneys, offer three "tiers" of procedure corresponding to the amount in controversy.[98] The AAA framework provides that claims of no more than $75,000 will be addressed through Fast Track Procedures featuring a single arbitrator, a presumption of no discovery, and tight timetables.[99] At the other end of the spectrum are Rules for Large, Complex Cases, which are triggered whenever claims exceed $500,000.[100] Again, the arbitration provisions are published with mediation procedures, encouraging planners and drafters to consider both processes.[101]

B. *Make Clear Choices Regarding Limits on Cycle Time and Process*

1. The tension between economy and other goals

The conventional expectation is that arbitration proceedings will be conducted without unnecessary delay or expense.[102] There is abiding tension between these prospects and the expectations of "due process"—particularly when the measuring stick for the latter is litigation. Accommodating these competing expectations in discrete cases is per-

96. *See, e.g.,* CANADIAN THOROUGHBRED HORSE SOCIETY (ONTARIO DIVISION), CANADIAN-BRED YEARLING SALE (Sept. 2, 2008), http://www.cthsont.com/docs/sales/13168_YearlingSaleIntro.pdf.

97. *See id.* By way of contrast, the Bloodstock Agent Code of Conduct Dispute Resolution Process provides for arbitration under the rules of the American Arbitration Association. *See* Sales Integrity Program, http://www.salesintegrity.org/bloodstock-agent-code-buyer.html (last visited Apr. 27, 2009).

98. AM. ARBITRATION ASS'N CONSTR. INDUS. ARBITRATION RULES AND MEDIATION PROCEDURES (2007) [hereinafter AAA CONSTR. RULES], *available at* http://www.adr.org/sp.asp?id=22004.

99. *Id.* at R. F-1-F-13.

100. *Id.* at R. L-1-L-4.

101. *Id.* at R. M-1-M-17. *See* Stipanowich, *Cutting Edge,* supra note 31, 75.

102. *See* Stipanowich, *Rethinking, supra* note 95, at 429. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies."); Curtis E. von Kann, *Not So Quick, Not So Cheap*, 27 LEGAL TIMES 38 (2004) (describing "rough justice" of traditional commercial arbitration).

haps the greatest challenge for drafters of arbitration and dispute resolution provisions, since the balance will be struck differently depending on the circumstances. Unless they are content to leave the matter to the discretion and interaction of arbitrators and counsel, however, parties desiring to promote efficiency and economy in arbitration should consider including specific provisions for the purpose.

2. Expedited or streamlined rules and their key features

Mounting concerns about arbitration costs and delays have triggered efforts to develop templates for expedited or "streamlined" forms of arbitration. A forerunner of current efforts to produce "tighter packaging and earlier resolution" was the Expedited Arbitration Procedures published as a part of the American Arbitration Association's multi-tiered procedures for construction disputes;[103] similar rules were later developed for commercial disputes.[104] JAMS now publishes Streamlined Arbitration Procedures alongside its Comprehensive Arbitration Procedures[105] (with specialized streamlined procedures for construction cases[106]). The International Institute for Conflict Prevention & Resolution (CPR) recently published Expedited Construction Arbitration Procedures[107] and is developing "Global Rules for Expedited Arbitration."[108] Although all of these procedures place heavy emphasis on speed, they also exhibit significant differences.

a. Scope of application

Given general concerns about procedural fairness and the strong emphasis on court-like due process, it is hard to imagine business users agreeing to tightly circumscribed procedures for all disputes arising under or relating to a commercial contract, regardless of size, complexity and subject matter. With this in mind, the AAA Expedited

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103. *See* AAA CONSTR. RULES, *supra* note 98, at R. F-1-F-13.

104. AAA COMMERCIAL RULES, *supra* note 35, at R. E-1-E-10.

105. JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (2007) [hereinafter JAMS STREAMLINED RULES], *available at* http://www.jamsadr.com/rules/streamlined.asp.

106. JAMS ENG'G & CONSTR. ARBITRATION RULES & PROCEDURES FOR EXPEDITED ARBITRATION (2008) [hereinafter JAMS ENG'G/CONSTR. EXPEDITED RULES] (on file with author).

107. INT'L INST. FOR CONFLICT PREVENTION & RESOL. EXPEDITED ARBITRATION OF CONSTR. DISPUTES (2006) [hereinafter CPR EXPEDITED ARBITRATION], *available at* http://www.cpradr.org/ClausesRules/ExpeditedArbitrationofConstructionDisputes/tabid/82/Default.aspx. *See also* IAMA ARBITRATION RULES INCORPORATING THE IAMA FAST TRACK ARBITRATION RULES (2007), *available at* http://www.iama.org.au/pdf/IAMAAR_FastTrack07.pdf; NAI ARBITRATION RULES § 4A (2008) (addressing "Summary Arbitral Proceedings").

108. INT'L INST. FOR CONFLICT PREVENTION & RESOL. GLOBAL RULES FOR EXPEDITED COMMERCIAL ARBITRATION (draft on file with author).

Procedures are aimed at cases in which "no disclosed . . . counterclaim exceeds $75,000."[109] The original JAMS Streamlined Arbitration Rules and Procedures, less procedurally spare than their AAA counterpart, were designed to govern arbitrations in which "no disputed claim or counterclaim exceeds $250,000."[110]

Of late, however, inventive attorneys have been contemplating broader applications for time-bounded arbitration. English QC and scholar John Uff opined that to avoid "the enormously wasteful and costly process of preparing volumes of documentation" associated with disputes under engineering and construction contracts, it would be appropriate to "channel" controversies into narrow issues capable of being precisely defined and resolved on the basis of limited materials.[111] Similar logic inspired CPR's Expedited Construction Arbitration Procedures, which include no specific dollar limits.[112] JAMS also published expedited rules for construction disputes of general applicability.[113] It is too early to tell whether these models, or Uff's concept of "smaller claim packages, quickly adjudicated," will be broadly embraced. While the concept is similar to the "dispute review board (DRB)" mechanisms widely used on major infrastructure projects, decisions by DRB panels are non-binding or only "preliminarily binding;"[114] attorneys are likely to be far more wary of a short, sharp process that produces a fully binding decision—at least where the stakes are high.[115]

While many counselors will be hesitant to embrace expedited models as all-purpose arbitration rules, they may, of course, contractually limit their application to claims or disputes below a certain dollar fig-

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109. *See* AAA COMMERCIAL RULES, *supra* note 35, at R. R-1(b).

110. *See* JAMS STREAMLINED RULES, *supra* note 105, at R. 1.

111. John Uff, *Are We All in the Wrong Job?: Reflections on Construction Dispute Resolution,* SOC'Y OF CONSTRUCTION L. PAPERS, July 2001, at 7.

112. *See* CPR EXPEDITED ARBITRATION, *supra* note 107.

113. *See* JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106.

114. The CPR procedures specifically state that they were "propelled" by "[t]he United Kingdom's speedier construction adjudication process." CPR EXPEDITED ARBITRATION, *supra* note 107. This statutorily-mandated procedure for resolving payment disputes on construction projects in the UK has dramatically affected the landscape of construction dispute resolution. Importantly, however, adjudicated results are not permanently binding unless the parties fail later to arbitrate or adjudicate the dispute. *See* Stipanowich, *New Litigation*, *supra* note 1, at Part II.D.

115. In light of such concerns it should be noted that the drafters of the CPR procedures included a specific reference to the possibility of a "second look" in the form of CPR's private Arbitration Appeal Procedure. *See* CPR EXPEDITED ARBITRATION, *supra* note 107. The JAMS Engineering/Construction Expedited Rules also make reference to the option of using that organization's appeal procedure. *See* JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, R. 34. The subject of appellate arbitration is discussed below. *See infra* text accompanying notes 226-30.

ure or to specific categories. Claims or disputes not covered by the expedited or streamlined procedures could be addressed by "regular" arbitration rules. In such cases, a drafter using the CPR or JAMS models must produce a customized clause incorporating multiple sets of rules.

b. Time limits

All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these time limits vary considerably in detail. The AAA Expedited Procedures, aimed at small-dollar claims, contemplate the shortest cycle time, with an anticipated time horizon of around sixty days.[116] CPR's procedures embody a conceptual hundred-day time frame, including a maximum of sixty days to the hearing, thirty days for hearings, and ten days for deliberation and preparation of an award.[117] (Importantly, the hundred-day period does not begin until the date set by the arbitrators at an initial prehearing conference; thus, it does not include critical early procedures governing the selection of arbitrators and detailed statements submitted by both parties.)[118] JAMS's models also include shortened procedural stages.[119]

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

c. Number of arbitrators, appointment process

Using a single arbitrator instead of a panel is an obvious choice for those seeking economy and efficiency; it simplifies every stage of arbitration, from appointment to award-writing. Thus, some expedited procedures assume a single arbitrator will be appointed unless the parties agree otherwise.[120]

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116. The hearing is "to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment." AAA COMMERCIAL RULES, *supra* note 35, at R. E-7. Awards are to be rendered within 14 days of the close of hearing. *Id.* at R. E-9. In the absence of a showing of good cause, the hearing itself is limited to a day. *Id.* at R. E-8(a). *Cf.* AAA CONSTR. RULES, *supra* note 102.

117. CPR EXPEDITED ARBITRATION, *supra* note 107, R. 1.3.

118. *See id.* at R. 3, 5, 9.3.

119. *See, e.g., infra* text accompanying note 164 (comparing rules).

120. *See, e.g.,* AAA COMMERCIAL RULES, *supra* note 35, at R. E-4; JAMS STREAMLINED RULES, *supra* note 105, at R. 12(a). *But see* CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 5.1 (providing for three neutral arbitrators).

While employing a multi-member tribunal may make some lawyers more sanguine about streamlined arbitration of larger claims, it increases costs and the likelihood of delay. If drafters are truly serious about maintaining timelines, they should require each tribunal appointee to expressly represent to the parties that he or she has the time available to achieve an expedited timetable.[121]

d. Getting detailed information up front

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

> Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . , copies of all documents that Claimant intends to rely upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.[122]

Respondents are then required to prepare a Submission of Response of similar substance and form within twenty days of service of the Submission, and so forth.[123] These requirements represent a dramatic departure from the current norm in arbitration practice and demand significant adjustment in the expectations of advocates. However, these requirements are a critical element of any efficient process, as recognized by the new Final Report on Litigation Reform, which concludes that the failure to effectively identify issues early-on "often leads to a lack of focus in discovery."[124]

Of course, the onus of these rules is likely to fall disproportionately on respondents since claimants will have the opportunity to make preparations in advance of making an initial demand. For this reason, current procedures emphasize arbitrator discretion to give respon-

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

122. JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, at R. 9. *See also* CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 3.4 ("Statement of Claim" is to include a detailed statement of all facts to be proved, legal authorities relied upon, copies of all documents Claimant intends to rely on, and names, CV and summary opinion testimonies of expert witnesses Claimant intends to present.).

123. CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 3.4.

124. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 2. The Report calls for notice pleading to "be replaced by fact-based pleading . . . [that sets] forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." *Id.* at 5.

dents reasonable time extensions.[125] Moreover, where arbitration is preceded by negotiation or mediation, both parties will be on notice that claims will likely be brought to arbitration.

In expedited processes, the pre-hearing conference assumes special significance as a tool for process planning and guidance.[126] Arbitrators may also find it necessary or appropriate to conduct frequent telephonic status meetings to ensure proper progress toward meeting deadlines.

e. Limiting discovery

Effective limitations on discovery are another critical element of any streamlined process. The most draconian approach is reflected in the absolute prohibition on discovery employed in the Abbott Labs procedures.[127] Most drafters would want to leave the door to discovery at least slightly ajar; thus, the AAA Construction Industry Fast-Track Rules aimed at smaller dollar claims, contemplate no discovery beyond exhibits to be used at the arbitration hearing "except . . . as ordered by the arbitrator in extraordinary cases when the demands of justice require it."[128] Other rules tend to be less restrictive, relying primarily on admonitory language intended to guide parties and limit arbitral discretion. The JAMS Engineering & Construction Expedited Rules, for example, call for the "voluntary and informal" exchange of all relevant, non-privileged documents and other information, but admonish parties to limit requests to "material issues in dispute" and to make such requests "as narrow as reasonably possible." Depositions are not permissible "except upon a showing of exceptional need" and with arbitrator approval. Electronic data may be furnished in the form most convenient for the producing party, and broad requests for email discovery are not permitted.[129] The subject of discovery is treated more extensively in Section II.C.

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125. *See, e.g.,* CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 3.6 (permitting the Tribunal to extend the time for the Respondent to deliver its Statement of Defense); *id.* at R. 11(e) (permitting Arbitrator to extend deadlines).

126. *See* CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 9. A pre-hearing conference held before the arbitration may be necessary to deal with difficult preliminary issues, such as specifying issues to be resolved or stipulating uncontested facts. Joseph L. Daly, *Arbitration: The Basics*, 5 J. OF AM. ARB. 1, 40 (2006); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 176-78.

127. *See supra* text accompanying note 89.

128. *See* AAA COMMERCIAL RULES, *supra* note 35, at R. F-7.

129. JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, at R. 17. *Cf.* CPR EXPEDITED ARBITRATION, *supra* note 107, at R. 11.

f. Limits on awards

Another method for facilitating streamlined arbitration is to limit the scope of arbitral discretion in award-making. The Abbott Labs procedure required arbitrators to choose "the proposed ruling and remedy of one of the parties on each disputed issue," a creative "either/or" variant on traditional "baseball arbitration."[130] Parties might also consider precluding arbitrators from granting certain kinds of remedies, such as punitive damages.[131] Yet another possibility is the use of upper and lower limits on awards of monetary damages, although few parties would resort to this option except in the wake of negotiation.[132]

3. Other considerations for more efficient arbitration

a. Provisions for dispositive motions

The use of dispositive motions in arbitration—now contemplated even by some expedited rules[133]—is, practically speaking, a double-edged sword.[134] This import from the court system, prudently employed, is a potentially critical tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. Filing of motions often leads to the establishment of schedules for briefing and arguments entailing considerable effort by advocates, only to have arbitrators postpone decisions on

130. *See* DRAFTER'S DESKBOOK, *supra* note 30, at 43; JAMS Arbitration Defined, *available at* http://www.jamsadr.com/arbitration/defined.asp (for additional discussion on either/or arbitration).

131. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 53-55, 272-73 (noting that an exclusion of punitive damages from arbitration does not necessarily amount to a waiver of the right to bring punitives in court); Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages – Where is the State Action?* 2007 J. DISP. RESOL. 417, 437 (2007).

132. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 53-55. There is also the possibility of tying limits on arbitral award-making authority to trial *de novo*, as illustrated by consumer dispute resolution programs under state lemon laws. *See, e.g.,* WASH. REV. CODE § 19.118.100 (2009). It is doubtful, however, that business clients would see a benefit in preserving the option of court trial for the resolution of disputes involving commercial contracts. The subject of contractual provisions for judicial review of awards on the merits is addressed in a later section. *See infra* Part II.D.

133. *See, e.g.*, JAMS ENG'G/CONSTR. EXPEDITED RULES, *supra* note 106, at R. 18.

134. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 203-06; Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 186 (2008). *See also* Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 DISP. RESOL. J. 17 (2007).

the motions until the close of hearings.[135] While arbitrators are properly chary of summarily disposing of matters implicating factual issues, certain matters (such as contractual limitations on damages, statutory remedies, or statutes of limitations and other legal limitations on causes of action) may be forthrightly addressed early on with little or no discovery.[136] If dispositive action is foreseen as a useful element in arbitration, an appropriate provision should be included in the arbitration procedure.[137]

At the time of appointment, moreover, parties should assess whether potential arbitrators are temperamentally and philosophically capable of rendering dispositive awards. Indeed, some leading arbitrators insist that motions should be addressed directly and energetically, since a prompt telephonic discussion may avoid the need for extensive briefing.[138]

b. Other elements

Recent guideposts for arbitrators and advocates suggest other ways of achieving economy and efficiency in arbitration.[139] These include the use of electronic document management and retrieval options;[140] employing witness statements in lieu of direct testimony;[141] joint examination of expert witnesses;[142] chess clocks;[143] and "virtual" hear-

135. For a discussion of deposition handling in arbitrations, *see* Romaine L. Gardner, *Depositions in Arbitration: Thinking the Unthinkable*, 1131 PRACTISING LAW INST. CORP. LAW & PRAC. COURSE HANDBOOK 379, 389-97 (1999).

136. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 48, 53-55. The new Final Report on Litigation Reform states that "parties and the courts should give greater priority to the resolution of motions that will advance the case more quickly to trial or resolution." FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 22. It also calls for a "new summary procedure . . . by which parties can submit applications for [the] determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials." *Id.* at 6.

137. *See, e.g.*, JAMS RULES, *supra* note 35, at R. 18.

138. *See* Louis L. C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 DISP. RESOL. J. 15, 16 (2006).

139. *Id. See also* Claiborne, *supra* note 134. *See generally* THE COLLEGE OF COMMERCIAL ARBITRATORS: GUIDE TO THE BEST PRACTICES IN COMMERCIAL ARBITRATION (Curtis E. von Kann, ed.) (2006) [hereinafter CCA GUIDE TO BEST PRACTICES].

140. *See* William A. Tanenbaum, *Arbitration of Outsourcing, IP and Technology Disputes*, 914 PRACTISING LAW INST. PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROP. COURSE HANDBOOK SERIES 11 (2007) (discussing what to include in the arbitration clause when electronic documents are likely to be involved in a dispute).

141. *See* James J. Myers, *10 Techniques for Managing Arbitration Hearings*, 51 DISP. RESOL. J. 28 (1996); Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1 (2008).

142. *See* Terry F. Peppard, *New International Evidence Rules Advance Arbitration Process*, 73 WIS. LAWYER 18, 21 (2000) ("[joint examination] allows the arbitrators to make instant comparisons of contending views [and] encourages the witnesses to explain themselves to their collegial

ings.[144] If legally permissible, limited judicial review of arbitration awards may also be appropriate.[145]

As discussed below, the best-drafted procedures may fail to produce desired results with arbitrators who are not good process managers.[146] Similarly, if an outside advocate is employed, the client (or in-house counsel) needs to be present at key decision points to ensure the client's goals are furthered.[147]

C. *Make Clear Choices Regarding Discovery*

No aspect of modern commercial arbitration is more redolent of litigation than discovery practice, and no element of arbitration practice more neatly embodies the fundamental tension between economy and due process. Legal counselors should be aware, however, that the old "no discovery in arbitration" maxim is generally inaccurate and some amount of discovery usually takes place under standard arbitration rules. In the absence of agreement, considerable discretion may be reposed in arbitrators respecting discovery issues.[148] Given the costs and potential delays associated with discovery, counsel should consider specific procedural options during the drafting process.

In litigation, parties have broad rights to discover any evidence that may be reasonably calculated to lead to the discovery of admissible evidence regardless of the actual materiality or relevance of that evidence to the outcome of the case.[149] This approach, coupled with lack

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peers and to make concessions of uncontested matters, thus . . . sharpen[ing] the issues to be decided.").

143. Chang, *supra* note 138, at 20.

144. For a discussion of the cost of face-to-face hearings in online arbitration, *see* Nicolas de Witt, *Online International Arbitration: Nine Issues Crucial to Its Success*, 12 AM. REV. OF INT'L ARB. 441, 456-58 (2001). *See also* ADR News, *AAA Establishes E-Commerce Panel, Forms E-Commerce Strategic Alliance,* 57 DISP. RESOL. J. 5 (2002) (electronic documents-only, telephonic and in-person arbitrations).

145. For a detailed, practical discussion of judicial review and arbitration, *see* notes and cases in COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 269-304.

146. *Id.*

147. *See* Kevin R. Casey & Marissa Parker, *Strategies for Achieving an Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Awards Scrutiny*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 167 (2008) (discussing steps advocates and clients can take to achieve client goals in arbitration).

148. For example, CPR Rule 11 provides:

> The Tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other information disclosed [in discovery].

CPR RULES, *supra* note 35, at R. 11.

149. The Federal Rules of Civil Procedure, for example, state:

of focus at the outset of discovery, mean that "discovery can cost far too much and can become an end in itself."[150] Thus, the recent Final Report on Litigation Reform calls for dramatic overhauling of the court discovery process based on the "principle of proportionality."[151]

Parties choosing to arbitrate presumably do so with the expectation of attenuated discovery. As observed in the Commentary to the CPR Rules,

> Arbitration is not for the litigator who will 'leave no stone unturned.' Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items [for] which a party has a substantial, demonstrable need.[152]

Yet such admonitions, relegated to commentary, may not be enough to persuade arbitrators to rigorously supervise and limit discovery. In cases of any size or complexity, cogent arguments may be framed in support of document discovery and for many depositions.[153] If documents are not exchanged and major witnesses are not deposed, parties will argue that it will be necessary to devote considerably more time to cross examination during the arbitration hearing. The danger of surprise should also be considered: if a witness's testimony produces new information, there is a possibility that the hearing will have to be adjourned pending further investigation and information exchange.[154] Moreover, since arbitrators are subject to vacatur for refusal to admit relevant and material evidence,[155] some may draw the inference—not established by law—that a failure to grant court-like discovery is an inherent ground for vacatur.[156] While parties (including those who regard depositions as wholly inimical to the arbitration process and therefore inappropriate absent specific agreement)[157] may draw firm

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

FED. R. CIV. P. 26(b)(1). *See* Stipanowich, *New Litigation*, *supra* note 1, at Part I.B.

150. FINAL REPORT ON LITIGATION REFORM, *supra* note 7, at 2.

151. *Id.* at 7-16.

152. CPR RULES, *supra* note 35, at R. 11 cmt., *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary.

153. Stipanowich, *New Litigation, supra* note 1, at Part I.B.2.a.

154. Stipanowich, *Rethinking, supra* note 95, at 444.

155. 9 U.S.C. § 10(a) (2000).

156. Letter from Curtis E. von Kann, Co-Chair, College of Commercial Arbitrators Summit on the Future of Arbitration (Oct. 2008) (on file with author).

157. *See, e.g,* Email from Joseph T. McLaughlin, Arbitrator and Former Partner, Heller Ehrman LLP (June 18, 2008) (on file with author); Revised Draft CPR Guidelines (June 19, 2008) (on file with author) ("Depositions are an integral part of the litigation process in the United States which the parties who have chosen arbitration have rejected.").

lines, the response will vary with the arbitrator. Arbitrators may be especially reluctant to draw lines in the face of a broad litigation-style discovery plan embraced by counsel for both parties.[158] Because arbitration is ultimately a consensual process, even arbitrators who suspect that business parties would have preferred a more attenuated process will tend to bow to a mutual agreement of the parties' counsel in the absence of (1) clear guidance regarding the parties' intent to circumscribe discovery, and (2) clear arbitral authority to modify the agreement of counsel regarding discovery.[159]

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

1. Making discrete choices

As discussed above in connection with expedited hearings, sponsors of leading arbitration procedures have begun to incorporate specific provisions setting clear limits on discovery or establishing standards to guide arbitral discretion in addressing discovery disputes.[160] Other general guidelines on discovery are also emerging.

The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration is an effort to offer counselors and drafters clear choices regarding information exchange and discovery.[161] It gives parties the opportunity to select among several alternative standards regarding pre-hearing exchange of documents and witness information. Counsel for parties to domestic commercial arbitration agreements may also wish to consult and consider incorporating elements of other standards, including the IBA Rules on the

158. The CPR Commentary encourages parties' counsel "to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval." CPR RULES, *supra* note 35, at R. 11 cmt.

159. Where there are concerns that parties may be ill-served by a discovery plan, an arbitration tribunal might require principals or house counsel to participate in the preliminary hearing(s) at which the discovery plan is discussed, and to sign-off on the discovery plan. The author is aware of this practice by some arbitrators.

160. *See supra* text accompanying notes 127-29.

161. *See* INT'L INST. FOR CONFLICT PREVENTION & RESOL. CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION, *Preamble* (2008), *available at* http://www.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx [hereainafter CPR PROTOCOL] (designed in part "to afford to parties to an arbitration agreement the opportunity to adopt certain modes of dealing with pre-hearing disclosures of documents and with the presentation of witnesses, pursuant to Schedules.").

Taking of Evidence in International Commercial Arbitration[162] or the ICDR Guidelines for Arbitrators Concerning Exchanges of Information.[163] Both standards were designed for proceedings involving parties and practitioners from civil law countries and sovereign states applying common law.

In addition, emerging standards may enhance the ability of arbitrators to effectively address information exchange issues by encouraging the explicit weighing of burdens and benefits. Emerging standards may also offer arbitrators other tools, including explicit authority to condition production on the payment by the requesting party of associated reasonable costs.[164] These templates may be employed in various ways.

2. Document exchange and discovery

Standard procedures often provide for some exchange of documents, at least to the extent they are non-privileged and relevant to the dispute.[165] In some cases, such production occurs within a fairly short timeframe.[166] Some parties, however, may want to narrow (or expand) this framework or establish more specific standards for document exchange.

A straightforward template for limited information exchange/discovery is found in the leading international standard on the subject, the IBA Rules on the Taking of Evidence in International Commercial Arbitration.[167] This standard, a compromise in which U.S.-style

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162. *See* INT'L BAR ASS'N IBA RULES ON THE TAKING OF EVIDENCE IN INT'L COMMERCIAL ARBITRATION (1999), *available at* http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf [hereinafter IBA RULES].

163. *See* INT'L CTR. FOR DISPUTE RESOL. ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFO. (2008), *available at* http://www.adr.org/si.asp?id=5288 [hereinafter ICDR GUIDELINES].

164. *See, e.g.*, CPR PROTOCOL, *supra* note 161, § 1(e)(2). *See also* ICDR GUIDELINES, *supra* note 163, at R. 8.a., which provides:

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

165. *See, e.g.*, JAMS RULES, *supra* note 35, at R. 17(a) (providing for the parties to "cooperate in . . . the voluntary and informal exchange of all . . . relevant, non-privileged documents, including, but without limitation, copies of all documents in their possession or control on which they rely in support of their positions.").

166. The JAMS Comprehensive Rules call for document exchange "within twenty-one (21) calendar days after all pleadings or notice of claims have been received." JAMS RULES, *supra* note 35, at R. 17(a). Under the JAMS Streamlined Arbitration Rules, this period is reduced to 14 days. JAMS STREAMLINED RULES, *supra* note 105, at R. 13(a).

167. *See* IBA Rules, *supra* note 162.

discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."[168] It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents, and make clear why they believe the other party has possession or control of the documents.[169]

A further step toward variegation is the recent publication of the CPR Protocol on Disclosure,[170] which offers parties a choice of four discrete "modes" for document disclosure. These include: (Mode A) No disclosure save for documents to be presented at the hearing; (Mode B) Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need;" (Mode C) Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure;" and (Mode D) Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication, and undue burden.[171] Although the CPR Protocol is admirable in intent, it is not an exhaustive list of creative

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168. *Id.* at art. 3, § 1.

169. The IBA Rules call for Requests to Produce to contain

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

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

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

Id. at art. 3, § 5.

The IBA Rules appear to have influenced the recent ICDR Guidelines for Arbitrators Concerning Exchanges of Information, which empower the arbitrators, "upon application, [to] require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Request for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case."

ICDR GUIDELINES, *supra* note 163, at guideline 3(a).

170. CPR PROTOCOL, *supra* note 161, § 1. *Cf.* Lawrence W. Newman & David Zaslowsky, *Predictability in International Arbitration*, 100 N.Y. L. J. 3 (2004).

171. CPR PROTOCOL, *supra* note 161, at sched. 1.

approaches to discovery in arbitration. For example, some arbitrators limit each party to a certain number of document requests, including subparts.[172]

3. Limits on depositions

In the interest of economy or certainty, some parties may want to provide that no depositions, or a limited number of depositions, will be conducted in anticipation of arbitration.[173] Such limitations may be tempered by giving arbitrators discretion to allow depositions in exceptional circumstances where justice requires.[174] A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the JAMS Comprehensive Arbitration Rules, which permits each party to take a single deposition;

> [t]he necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.[175]

Another proposed response to the burgeoning discovery problem is the adoption of the international arbitration practice of substituting detailed sworn witness statements for direct examination.[176] Such statements, provided to all participants prior to the hearing, might provide a rough surrogate for depositions and save hearing time. Adjustments to the international practice, such as abbreviated direct examination, may be necessary to provide comfort to American lawyers and arbitrators. The new draft CPR Protocol on Disclosure offers parties the choice of embracing such an approach in their arbitration agreement, possibly in lieu of depositions.[177]

4. Giving arbitrators the "last word"

An issue related to limitations on depositions is the primacy of the arbitrator's authority respecting pre-hearing disclosure. Specifically,

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172. *See, e.g.*, Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-27 (1997).

173. The ICDR Guidelines note that "[d]epositions, . . . as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration." ICDR GUIDELINES, *supra* note 163, at guideline 6.b. A variant of this approach used by some arbitrators is to provide each party with a maximum number of hours of depositions of persons within the other party's employ or control.

174. *See supra* note 129 (discussing discretionary authority of arbitrator under JAMS Engineering/Construction Expedited Rules).

175. JAMS RULES, *supra* note 35, at R. 17(b).

176. The witness statement concept is embodied in the IBA Rules. IBA RULES, *supra* note 162, art. 4, §§ 4-9.

177. CPR PROTOCOL, *supra* note 161, §§ 2-3, 5, 8-9.

parties should consider whether they wish arbitrators or counsel to have the last word on limiting the scope of discovery. In this respect, current standards vary. The AAA Rules for Large, Complex Cases apparently authorize the arbitrator(s) to police party agreements and "place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate."[178] Although both the JAMS and CPR Rules give arbitrators considerable authority regarding exchange of information, neither set of procedures is explicit regarding the authority of arbitrators to "trump" or modify agreements regarding discovery.[179]

5. E-discovery

As one leading participant in the development of guidelines for the management and discovery of electronic information explains,

> If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world.[180]

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178. AAA COMMERCIAL RULES, *supra* note 35, at R. L-4(c). An even stronger statement of the "final authority" of arbitrators regarding discovery is set forth in the ICDR Guidelines:

> 1.a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.
>
> b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, *but the tribunal retains final authority to apply the above standard.* To the extent the Parties wish to depart from this standard, they may do so only on the basis of an express agreement in writing and in consultation with the tribunal.

ICDR GUIDELINES, *supra* note 163, at guideline 1.a-b (emphasis added).

179. The JAMS Comprehensive Rules grant each party one deposition as of right, and call for "the necessity of additional depositions . . . [to] be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." JAMS RULES, *supra* note 35, at R. 17(b). The JAMS Comprehensive Rules do not give any indication about what happens when the parties have agreed to multiple depositions.

While empowering the Tribunal to "require and facilitate such discovery as it shall determine is appropriate" taking into account parties' needs, expeditiousness and cost-effectiveness, the CPR Rules also do not address the impact of mutual agreement on discovery issues by the parties. CPR RULES, *supra* note 35, at R. 11. However, the CPR Protocol on Disclosure appears to anticipate that "[w]here the parties have agreed on discovery depositions, the Tribunal should exercise its authority to scrutinize and regulated the process . . . [and possibly impose] strict limits on the length and number of depositions consistent with the demonstrated needs of the parties." CPR PROTOCOL, *supra* note 161, § 5.

180. The Sedona Conference, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (The Sedona Conference Working Group Series, Sept. 2005).

The challenge for arbitrators and arbitration processes is addressing these concerns effectively in the context of a highly discretionary system (without uniform rules or precedents) that is conventionally aimed at efficiency and expediency in conflict resolution.[181] Issues include the scope or limits of e-discovery and its corresponding burdens and benefits;[182] handling of the costs of retrieval;[183] and the duty to preserve electronic information, spoliation issues, and related sanctions.[184] Will it be possible for arbitrators to effectively meet the challenges of e-discovery in an efficient and relatively economical manner? The answer depends on the effectiveness of choices made by counselors and drafters.

Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in the ICDR Guidelines, which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form."[185] Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The Guidelines conclude by permitting arbitrators to "direct testing or other means of focusing and limiting any search."[186] The use of "test batch production" is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may avoid many of the costs—if not all the risks—of the revelation of privileged material in electronic data by agreeing to have

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181. *See* Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, 61 DISP. RESOL. J. 9, 10 (2006-07); Jennifer E. Lacroix, *Practical Guidelines for Managing e-Discovery Without Breaking the Bank*, 2 PLI PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROP. COURSE HANDBOOK SERIES 645-65 (2008); Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?* 13 RICH. J. L. & TECH. 12 (2007); Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(B)(2)(B) Fulfilled its Promise?* 14 RICH. J. L. & TECH. 7 (2008).

182. *See generally* Sedona Conference, *supra* note 180.

183. For a discussion of these and other issues, *see* John B. Tieder, *Electronic Discovery and its Implications for International Arbitration* (2007) in 29 THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS (Dennis Campbell ed., Kluwer Law International, 2007).

Jessica L. Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test is Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, Comment, 54 AM. U. L. REV. 257 (2004); Warshauer, *supra* note 180, at 11 (discussing the development of "claw-back" agreements, which permit a party to produce all of its relevant documents for review without waiving privilege).

184. Warshauer, *supra* note 181, at 12-15.

185. ICDR GUIDELINES, *supra* note 163, § 4.

186. ICDR GUIDELINES, *supra* note 163, § 4.

the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production review of all electronic documents for privilege, and ordering that attorney-client and work product privileges are not waived by production of documents that have not been thus reviewed.[187] Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.[188]

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the CPR Protocol on Disclosure.[189] The Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permitted under the Federal Rules of Civil Procedure." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (such as primary storage, back-up servers, back-up tapes, cell phones, and voicemails) from which production will be made, and to determine whether information may be obtained by forensic means.[190]

6. Other considerations

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators ex-

187. Warshauer, *supra* note 181, at 11.

188. *See* Sedona Conference, *supra* note 180, at 11-20, 31-43; William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (2007).

189. *See* Newman & Zaslowsky, *supra* note 170.

190. *See* CPR PROTOCOL, *supra* note 161, at sched. 2, modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents. It provides:

> In making rulings on pre-hearing disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the production 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.

Id § 4(a).

plicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production.[191] It may serve efficiency to appoint the chair of the tribunal to serve as discovery master; in cases in which confidentiality of sensitive information is a primary concern, a provision for the use of a special master to supervise certain aspects of discovery may be adopted.[192]

Drafters should also be aware that discovery relating to third parties may be problematic for parties operating under the aegis of the Federal Arbitration Act.[193] However, some state laws are more amenable to judicial enforcement of third party subpoenas.[194] If its application is otherwise acceptable, parties may wish to consider a choice of law provision referencing state law for the purpose of the arbitration agreement.

Finally, it should be kept in mind that although arbitration hearings are relatively private, neither standard procedures nor applicable laws provide a cloak of confidentiality for arbitration-related communications or events.[195] While arbitrators and arbitral institutions have obligations to preserve the privacy of the process under applicable procedural rules[196] and ethical standards,[197] and public policies pro-

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191. *See* CPR PROTOCOL, *supra* note 161, § 1(e)(2).

192. *See* JAMS RULES, *supra* note 35, at R. 17(b).

193. *Compare* Security Life Ins. Co. of America v. Duncanson & Holt, 228 F.3d 865, 872 (8th Cir. 2000) (allowing arbitrators to issue pre-hearing document subpoenas to third parties); *with* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) (not allowing arbitrators to issue pre-hearing subpoenas, but finding that arbitrators could subpoena non-parties to appear before them for a pre-merit hearing and bring the documents with them) *and* Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567 (2d Cir. 2005) (following Hay Group) *cited in* Leslie Trager, *The Use of Subpoenas in Arbitration*, 62 DISP. RESOL. J. 14 (2007-08).

194. *See, e.g.*, REVISED UNIF. ARB. ACT § 17(b) (2000), *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm.

195. *See generally* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at ch. 6. *See also* Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 129-31 (2003).

196. For example, the AAA Commercial Rules say, "The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." AAA COMMERCIAL RULES, *supra* note 35, at R. R-23. A more expansive, detailed provision is found in the JAMS Comprehensive Rules:

> JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

JAMS RULES, *supra* note 35, at R. 26(a).

197. *See, e.g.*, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2005), *available at* http://cpr-prod.ibelongnetworks.com/ClausesRules/ArbitrationEthics/tabid/80/Default.aspx; CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2002), *available at* http://www.

tect arbitrators from having to testify,[198] parties must contract for confidentiality if they want to ensure the arbitration remains confidential.[199]

Absent a specific agreement, parties and their agents have no obligation to preserve the confidentiality of exchanged documents or arbitration-related communications or events. In fact, the latter may be disclosed to third parties (including the media), and could be the subject of third-party discovery in a collateral lawsuit.[200] Therefore, parties seeking to protect sensitive or proprietary information usually request the arbitrators to issue appropriate protective orders or, if mutually acceptable, enter into a post-dispute confidentiality agreement.[201] In transactions involving key intellectual property or other sensitive proprietary information, however, the best course is to take

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cpradr.org/Portals/0/finalProvider.pdf; CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL (2002), *available at* http://www.cpradr.org/Portals/0/CPR George-ModelRule.pdf.

198. *See* Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449 (2004); *See* Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 Indus. Rel. L.J. 228 (1989).

199. Schmitz, *supra* note 57, at 1218-19.

200. *See, e.g.,* Lawrence E. Jaffe Pension Plan v. Household Int'l Inc., No. 04-N-1228, 2004 U.S. Dist. LEXIS 16174 (D. Colo. Aug. 12, 2004) (permitting third party discovery because there was no showing that production would result in unduly harmful disclosures); Industrotech Constructors, Inc. v. Duke Univ., 314 S.E.2d 272 (N.C. Ct. App. 1984) (permitting third party discovery of transcripts of arbitration proceeding). *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 253, 255; *but see* Group Health Plan Inc. v. BJC Healthcare Systems, Inc., 30 S.W.3d 198 (Mo. Ct. App. 2000) (finding it was improper for an arbitrator to require a nonparty to an arbitration to turn over confidential documents from an earlier arbitration).

One set of standard rules that attempts to place non-disclosure obligations on parties is the CPR Arbitration rules, which provide:

> 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 the legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

CPR RULES, *supra* note 35, at R. 18. However, parties truly concerned about disclosure of trade secrets or other sensitive information will want to consider more specific provisions. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 254-63.

201. The JAMS Comprehensive Rules provide, "The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information." JAMS RULES, *supra* note 35, at R. 26(b). The AAA Commercial Arbitration Rules empower arbitrators to "take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property." AAA COMMERCIAL RULES, *supra* note 35, at R. R-34(a). The CPR Rules provide that "[t]he Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery." CPR RULES, *supra* note 35, at R. 11.

specific affirmative steps to ensure confidentiality in arbitration as a part of initial contract planning.[202]

D. *Avoid Unnecessary Judicial Intrusion*

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

Although increased costs and delays are often a result of business users' failures to plan for arbitration by making appropriate process choices, contract planners may only exacerbate these problems if they make the wrong choices. A classic example of the latter is a contractual provision providing for judicial review and vacatur of arbitration awards for errors of law or fact.[203]

Consistent with the understanding that arbitration offered businesses the opportunity to avoid the "needless contention that [is] incidental to the atmosphere of trials in court,"[204] Congress in the Federal Arbitration Act produced a spare legal framework for the judicial enforcement of arbitration agreements and awards.[205] A keystone of this structure is the rigorously restrained template for judicial confirmation, modification, or vacatur of arbitration awards.[206] This template includes a narrow statutory imprimatur for vacating awards, limited in essence to situations where due process was not accorded or where arbitrators clearly acted in excess of their contractually-defined authority.[207] These strictures imbue arbitration awards with a meaningful—or, depending on one's point of view, an awful—finality. The fear of being saddled with a truly bad award gives some business lawyers pause—especially when the potential business consequences are dire. In recent years, this fear of finality has led to the emergence of a species of arbitration agreements calling for more searching judicial scru-

202. *See, e.g.*, INT'L INST. FOR CONFLICT PREVENTION & RESOL CPR RULES FOR NON-ADMINISTERED ARBITRATION OF PATENT AND TRADE SECRET DISPUTES R. 17 (2005), *available at* http://www.cpradr.org/ClausesRules/PatentRules/tabid/303/Default.aspx; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 259-63 (offering templates including CPR Model Arbitration Confidentiality Agreement and CPR Model Non-Party Confidentiality Agreement).

203. *See* Stipanowich, *New Litigation*, *supra* note 1, at Part I.A.4.

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

205. *See* Stipanowich, *Arbitration Penumbra, supra* note 49, at 430-34.

206. *See* Schmitz, *Mud Bowl, supra* note 55, 189-90.

207. *See* 9 U.S.C. § 10 (West Supp. 1994). *See* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. W. L. REV. 443 (1998); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Arbitration Awards*, 30 GA. L. REV. 731 (1996).

tiny of awards, including review of awards for errors of law or fact.[208] Conceptually, one supposes the result would be a hybrid in which the benefits of private arbitration would be coupled with the checks and balances of the civil appellate process. But the sword is double-edged, and the pitfalls for unwary drafters multiple.

While recent emphasis is on the legalities of contractually expanded judicial review,[209] considerably less attention has been given a more fundamental question—namely, do contract planners do their clients a favor by including such provisions in commercial arbitration agreements? The one gathering of experts that directly addressed the issue, the CPR Commission on the Future of Arbitration, an aggregation of leading arbitrators and attorneys specializing in arbitration, responded with a resounding "No!"[210] They viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency, economy, and expert decision making.[211] Such provisions would, they believed, increase costs and delay the ultimate resolution of conflict without commensurate countervailing benefits.[212] Moreover, such provisions pose particular challenges for drafters, both from the standpoint of creating practical, workable standards for review and addressing all of the pre- and post-award procedures required to implement enhanced review.[213] This includes: dollar or subject matter limits on review; the creation of an adequate record; the making of a

208. *See* Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 183-84 (2003); Dan C. Hulea, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 351 (2003); Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards,* 52 U. KAN. L. REV. 429, 430-31 (2004); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 230-31 (1997); *but see* Schmitz, *Mud Bowl, supra* note 55, 189-90; Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997).

209. *See* Schmitz, *Mud Bowl, supra* note 55, 150.

210. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 291 (summarizing conclusions of CPR Commission).

211. *Id.*

212. Such provisions were also deemed likely to discourage arbitrators from considering "creative solutions" that might be questioned by a court. *Id.* at 288-89. *Cf.* David Company v. Jim Miller Constr., Inc., 444 N.W.2d 836 (Minn. 1989). However, one would assume that rational drafters would only use such provisions in circumstances where a client places a premium on court-like due process and strict application of the law – in other words, in circumstances where arbitrators should eschew creativity in favor of doing what a court would do. Moreover, in the author's experience commercial arbitration panels—especially those with lawyer members—tend to be highly sensitive to and guided by legal standards and rarely seek "creative" solutions.

213. *See, e.g.,* Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring against a Failure of Professional Responsibility*, 8 HARV. NEG. L. REV. 271, 278 (2003); Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 548-59 (2002). *See also* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 297.

sufficiently specific award, with an accompanying statement of rationale and findings of fact or conclusions of law; notice requirements; the possibility of remand to the original arbitrator(s); and the handling of related costs.[214]

The extreme downside of contracting for expanded review in an atmosphere of uncertainty regarding the legal propriety and enforceability of such provisions was famously exemplified by the nine-year battle between LaPine Technology Corporation and Kyocera, over a 1994 award in an International Chamber of Commerce (ICC) arbitration proceeding, a parade of horrors punctuated by two decisions of the Ninth Circuit. In *LaPine Technology Corp. v. Kyocera*,[215] the court concluded that it was obliged to honor the parties' agreement that any arbitration award would be subject to judicial review for errors of fact or law since controlling Supreme Court precedents made "it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreement's terms."[216] After six more years of legal maneuvering before the district court and the original arbitration panel, the Ninth Circuit reconsidered its original decision *en banc,* and reversed itself, declaring that enforcing expanded review provisions (such as those before it) would "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[217]

Compounding the drafter's dilemma is the fact that such provisions have not been uniformly embraced by federal and state courts. The federal circuits split regarding whether expansion of the FAA grounds for judicial review was permissible.[218] State court decisions also reflect a divergence of authority.[219]

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214. *Id.*

215. 130 F.3d 884 (9th Cir. 1997) (attorneys were able to provide for expanded judicial review in the arbitration clause that they drafted), *overruled by* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (2003).

216. *Kyocera*, 130 F.3d at 888.

217. *Id.* at 998.

218. Five circuit courts came down in favor of enforcement. *See* Puerto Rico Tele. Co., Inc. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 30-31 (1st Cir. 2005); Rodway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001); Syncor Int'l Corp. v. McLeland, 120 F.3d 262 (4th Cir. 1997); Gateway Technologies, Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995); Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 710-12 (6th Cir. 2005). Four circuits reached a contrary conclusion. *See* Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991); UHC Management Co., Inc. v. Computer Scis. Corp., 148 F.3d 992, 997-98 (8th Cir. 1998); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003), *overruling* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935-37 (10th Cir. 2001).

219. Decisions favoring enforcement include Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. Ct. App. 2008); NAB Constr. Corp. v. Metropolitan Transp. Auth.,579 N.Y.S.2d

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[220] the U.S. Supreme Court held that the Federal Arbitration Act (FAA) does not permit parties to expand the scope of judicial review of arbitration awards by agreement. In Justice Souter's written opinion, which was joined by five other justices, he declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute.[221] Moreover, the FAA's provisions for confirmation (vacatur and modification) should be viewed as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[222]

Having strained mightily to nail down the coffin-lid on contractually expanded review under the FAA, the Court affirmatively invited consideration of other avenues to the same ends,[223] such as where parties "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."[224] Although the

375, 375 (N.Y. App. Div. 1992) (enforcing contractual provision permitting judicial review of an arbitration award "limited to the question of whether or not the [designated decision maker under an alternative dispute resolution procedure] is arbitrary, capricious or so grossly erroneous to evidence bad faith."). Other state courts have found no room under arbitration statutes for expanded review. Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1994) (contractual opt-in provision permitting appeal to the courts of "substantive issues" relating to the award attempted to create "a hybrid form of arbitration" that ["did] not comport with the requirements of the [Michigan] arbitration statute."); Chi. Southshore & South Bend Railroad v. Northern Ind. Commuter Transp. Dist., 682 N.E.2d 156, 159 (Ill. App. 3d 1997), *rev'd*, 184 Ill. 151 (1998) (denying effect to term permitting a party claiming that arbitrator's award was based upon an error of law "to initiate an action at law . . . to determine such legal issue"; concluding that "[t]he subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute.").

New Jersey has addressed the issue by statute, providing for parties to arbitration agreements to "opt in" to a heightened standard of review established by the statute. New Jersey Alternative Dispute Resolution Act, N.J. STAT. ANN. 2A §§ 23A-12 (1999). The drafters of the Revised Uniform Arbitration Act (RUAA) considered and rejected such an approach, declining to establish any explicit basis for expanded review under that uniform act. *See* REVISED UNIF. ARB. ACT § 23 cmt. B (2000).

220. 128 S. Ct. 1396, 1404-05 (2008).

221. *Id.* at 1403.

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

223. In a highly unusual move, the Court had requested additional briefing on these issues after the initial arguments; its March decision concluded that the supplemental arguments raised new points which required a remand for the development of the issues. The Ninth Circuit subsequently issued a remand order to the district court, concluding that the High Court decision "preserved the issue of sources of authority, other than the Federal Arbitration Act, through which a court may enforce an arbitration award." Hall Street Assocs. LLC v. Mattel Inc., 531 F.3d 1019 (9th Cir. 2008).

224. *Mattel*, 128 S. Ct. at 1406.

full import of this invitation is yet to be clarified, state statutes or controlling judicial decisions promoting contractually expanded review will likely become "safe harbors" for such activity. New Jersey is perhaps the sole example of a statutory template for parties that wish to "opt in" to the legislative framework for elevated scrutiny of awards.[225] In *Cable Connection, Inc. v. DIRECTV, Inc.*,[226] California's highest court recognized a more general "safe harbor" for contractually expanded judicial review under that state's arbitration law.

The foregoing survey of the complex legal landscape surrounding contractually expanded judicial review illustrates the uncertainties confronting those seeking to include such provisions in their arbitration agreements.[227] In some types of cases, contract planners may conclude that the difficulty of securing judicial oversight of arbitration awards requires them to forego arbitration entirely.

2. Alternatives to expanded judicial review; appellate arbitration processes

However, there are other less radical alternatives to expanded judicial review. These include identifying arbitrators who are likely to deliver an authoritative and rational decision, requiring the arbitrators to produce a detailed rationale for their awards, and placing limits on awards of monetary damages (including upper and lower limits for the award, a baseball arbitration format requiring arbitrators to make a choice between two alternative monetary awards, and a prohibition on certain kinds of relief, such as punitive damages).[228] For those seeking a close analogue to judicial review, however, an appellate arbitration procedure may be the most suitable alternative.

Appellate arbitration procedures afford parties the opportunity of a "second look" at an arbitration award in a controlled setting while

225. *See supra* note 218.

226. 190 P.3d at 586.

227. In addition to addressing the impact of federal and state law respecting the enforceability of provisions for expanded review, parties should pay close attention to scope and procedural issues. If provisions of this kind are ever to provide benefit, it is probably in high-dollar or "bet-the-company" disputes. Usually, the focus will be on addressing errors of law where legal issues play a prominent part in the dispute. Drafters are well advised to choose very carefully among standards for judicial review for legal error. A separate determination should be made regarding the need for judicial review of findings of fact. Consideration should also be give to all of the other pre- and post-award procedures required to implement enhanced review, including the nature of the record of arbitration proceedings, the format of the award, notice requirements, the possibility of remand to the original arbitrator(s) or the empanelling of new arbitrators, and the handling of costs (including possible cost-shifting). *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 291-304.

228. *See id.* at 277-81.

avoiding the delays and legal uncertainties associated with expanded judicial review. Since properly constituted agreements for "second-tier" arbitration are as enforceable as any other arbitration agreements, so are the resulting awards.[229] Appellate arbitration procedures have been utilized in a variety of commercial contexts, and at least two major institutions,[230] the International Institute for Conflict Prevention & Resolution and JAMS, have published appellate arbitration rules for utilization in commercial cases.[231]

Crafting an appropriate arbitral appeal process involves the consideration of numerous procedural issues, including the qualifications of the appellate panel and method of its selection; scope limits on appealable disputes; filing requirements; administrative fees; time limits on filing and appellate procedures; applicable standards of review; the type of record that will be maintained of the original arbitration hearing and transmitted to the appellate panel; the format of the original arbitration award; the form of argument on appeal (written, oral, or both); the remedial authority of the appellate panel; the possibility of remand of the award to the original panel or to a different panel; and the handling of costs, including the potential shifting of costs if an appeal is unsuccessful.[232] Given the transaction costs associated with their formulation, fully customized appellate rules are probably feasible only in exceptional cases (such as long-term relationships or large-scale business transactions). In most cases, parties will probably want to rely on existing institutional models.[233]

E. *Select Service Providers that "Get It"*

1. Dispute resolution institutions

An administrative framework for arbitration (as well as preliminary steps, notably mediation) is among the most critical choices made by parties drafting dispute resolution agreements. While arbitration need not be "administered," many business parties prefer to incorporate the rules of an administering institution or "provider organization" in their agreement. Whether to seek administration and the selection of

229. *See, e.g*, Cummings v. Future Nissan, 128 Cal.App.4th 321 (Cal. Ct. App. 2005) (affirming lower court order confirming award by appellate arbitrator).

230. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 299-300.

231. *See* INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION CPR ARBITRATION APPEAL PROCEDURE (1999); JAMS ARBITRATION APPEAL PROCEDURE (2003), *available at* http://www.jamsadr.com/rules/optional.asp.

232. *See* COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 298-304. *See also* Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (2005).

233. *See supra* Part II.B.5.

an administrative framework should depend on the client's needs and specific circumstances.

By incorporating institutional arbitration rules in their agreement, parties establish guidelines for conduct of the processes: a "safety net" of default rules that come into play in the absence of a contrary agreement. Rules plug users into an administrative framework that normally includes support staff to help select arbitrators and facilitate other aspects of arbitration, and a panel or stable of neutrals from which arbitrators can be selected for specific cases. Rules normally establish a right to, and mechanism for, payment of service providers, and tend to reinforce arbitral immunities. The scope of administrative support, however, varies greatly among institutions, from very limited support (as in the CPR Rules, which limit CPR involvement to appointing arbitrators where required) to ICC-style administration.[234]

Although administrative services typically entail fees and costs, at least two elements are probably indispensable for most parties: a ready-made set of procedures (obviating the need to draft) and an authority designated to appoint arbitrators in the absence of agreement.[235] Beyond this, not all parties need the same level or kind of administrative support. Depending on a party's goals, different questions should be considered when selecting an administering institution.

Parties seeking cost savings, efficiency, and avoidance of undue delay might consider the following:

- Does the institution offer mediation services, or other ADR services (such as nonbinding advisory opinions), that might be useful in settling disputes before resorting to binding arbitration?
- If the size and complexity of possible disputes under a contract is likely to vary, is more than one set of arbitration procedures necessary? Would expedited arbitration procedures be beneficial for certain classes of disputes? Does the institution publish such rules? What other procedures, such as provisions for a prehearing conference, may promote economy and efficiency?[236]
- If, as is usually the case, the parties need assistance in selecting arbitrators, does the institution sponsor a panel or list of arbitrators? If so, does the list include competent arbitrators who are nearby? Are the people on the panel noted for their ability to manage hearings quickly and efficiently? If a mix of expertise is appropriate, are arbitrators of relevant expertise available through the institution?

234. CPR RULES, *supra* note 35, at R. 6.

235. *See id.*; UNCITRAL MODEL LAW ON INT'L COMMERCIAL CONCILIATION (2002), *available at* www.uncitral.org [hereinafter UNICITRAL MODEL LAW].

236. *See infra* Part II.E.5.

- Will efficiency be best served by having minimal administration (in which the administering institution's functions are limited to providing a set of procedures and serving as an appointing authority), thereby relying on arbitrators to manage the proceeding unaided? Alternatively, is a separate administrative entity necessary to: set up initial meetings; handle correspondence; supervise the reimbursement of arbitrator fees and expenses; and ensure the award is final, complete, and in proper form? What functions does the administering institution offer, and what is the reputation of its staff for providing prompt and competent service?

2. Individual neutrals

It has been said that "the arbitrator *is* the process."[237] This is not mere hyperbole. While the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is the most important choice confronting parties in arbitration.[238] A misstep in the choice of arbitrators may undermine many other good choices.

An arbitral institution should never be chosen without ascertaining whether the institution's panel or list of neutrals have the requisite experience, abilities, and skills. To inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutrals for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial, or technical background; notability;[239] hearing management experience and skills, attitudes about arbitration; and current schedule and availability.

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

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237. *See, e.g.,* Stipanowich, *Rethinking, supra* note 95, at 478.

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

239. Notability may be especially desirable if familiarity with the norms and practices of the industry is needed. Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2d Cir. 1981) ("The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose."); Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 60 DISP. RESOL. J. 24, 27 (2005) (prominence of arbitrator increases confidence in the process).

- Would a single arbitrator be sufficient for select classes or kinds of disputes?[240]
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on that arbitrator's ability to supervise an efficient, economical process?
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?
- Is the prospect available for expedited hearings or for hearings over the coming months?

It is reasonable for parties to expect arbitrators to give them what they bargained for.[241] While arbitrators should always seek to promote efficiency and economy in the absence of a contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part.[242]

Arbitrators may promote economy and efficiency in many ways, including:

- Making expectations about speed and cost-saving clear at the outset of the process by emphasizing the firmness of the schedule and granting continuances only for good cause;[243]
- Functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts whenever possible);[244]
- Actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;[245]
- Simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;[246]
- Simplifying, clarifying, and prioritizing issues;[247]
- Addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;[248]
- Facilitating and actively monitoring information exchange/ discovery;[249]

240. H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts?* 59 DISP. RESOL. J. 34, 37 (2004); COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 46.

241. *See* John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, SOC'Y OF CONSTRUCTION L. PAPERS, May 2002, at 3.

242. *See supra* text Part III.B., III.C.

243. *See* Chang, *supra* note 138; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 215-20.

244. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 6-8.

245. CCA GUIDE TO BEST PRACTICES, *supra* note 139, at 8, 17, 33-37.

246. *Id.* at 88.

247. *Id.*

248. *Id.* at 82, 104, 106.

249. *Id.* at 87.

- Employing electronic means of communication and document management as appropriate;[250]
- Scheduling hearings with as few interruptions as possible;[251]
- Planning and actively managing the hearings (beginning and ending each hearing day with housekeeping sessions);[252] and
- Anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.[253]

3. Dispute resolution counsel

An international organization recently sponsored a competition among major law firms with the aim of identifying a firm whose practice embodied effective methods of managing and resolving business-related disputes.[254] The entries revealed very different conceptions of what constitutes effective dispute resolution. Some firms simply touted big court victories and others focused on their expertise in commercial arbitration. Still others portrayed a varied practice employing different approaches, including early case assessment, negotiation, mediation, arbitration, and litigation to address particular client needs.

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

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel—the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal

250. CCA GUIDE TO BEST PRACTICE, *supra* note 139, at 121.

251. *Id.* at 153.

252. *Id.* at 133.

253. *Id.* at 94.

254. The author was among the judges.

dispute resolution.[255] With that in mind, counsel should ensure they are capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. Consider the following list of questions that might be asked before retaining counsel to resolve a dispute:

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- Do you undertake such analyses prior to commencing discovery?
- What is your experience with, and attitude toward, negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework?[256] Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules, if any?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What experience have you had negotiating, arbitrating, or litigating with opposing counsel? What is the nature of your relationship?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early settlement?

Even after vouchsafing the role of advocate to appropriate outside counsel, a prudent client or inside counsel will continue to be involved in the conflict resolution process. This means being present at key decision points before and during arbitration, including pre-hearing conferences, during which the timetable and format for the arbitration are discussed and established.[257]

255. COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 5-6, 10-33, 39-41.

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

257. *See* Casey & Parker, *supra* note 147; COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 21, at 183-90.

IV. CONCLUSION

Choice—the opportunity to tailor procedures to business goals and priorities—is the fundamental advantage of arbitration over litigation. The freedom to choose, and key resulting differences between contract-based arbitration and court trial, explain why most business users prefer arbitration when resolving commercial disputes.[258] For the same reason, it is hard to understand why many users are so vocal in their criticism of arbitration.

Business users who have reason to complain about the arbitration experience should look first and foremost to the choices they made—or failed to make—from the inception of contract planning through the arbitration process. For those who place high value on economy and efficiency in arbitration, the return to fundamentals should begin with identification of key client goals and priorities, and seeking or formulating a process amenable to those ends. Choice-making should also take into account emerging templates for streamlined processes, and for limitations on the scope of discovery. Those concerned about limitations on the judicial scrutiny of awards should carefully consider their options, and forego the problematic and costly avenue of expanded judicial review in favor of alternatives such as appellate arbitration. Finally, users should employ greater discernment in selecting those service providers who are primary determinants of the arbitration experience: administering institutions, arbitrators, and advocates. For in the increasingly sophisticated world of conflict management choices, knowledge, experience, and sound judgment are more critical than ever.

258. *See supra* note 3.

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Arb-Med: Workable or Worrisome?

By Richard H. Silberberg and Anthony P. Badaracco

You are the sole arbitrator in a vigorously contested proceeding. You have heard four days of testimony during an evidentiary hearing anticipated to last 10 days. At the outset of the fifth day, the parties' attorneys advise you that their clients would like to try to settle. You respond by offering to contact the tribunal administrator to request a list from which the parties can choose a suitable facilitator to assist them in resolving the dispute. The parties' counsel inform you that is not what their clients had in mind. Rather, the parties have asked that you suspend the taking of testimony so that *you* can assume the role of mediator, with the understanding that if the case is not settled, you will put your arbitrator hat back on and decide the case.

You politely but firmly inform the parties' counsel of the significant risks associated with the process that their clients have proposed, and you strongly recommend that they select another neutral as their mediator. But the parties are steadfast. They do not want to spend the time or the fees that would be necessary to get another neutral "up to speed"; they tell you that your knowledge of the facts and your familiarity with the dynamics of the parties' relationship uniquely qualifies you to assist them in settling the case. And they express confidence in your ability to decide the case fairly and without bias if the mediation is unsuccessful.

What should you do? Should you (i) reject the parties' request out of hand; (ii) offer to serve as their mediator, but only after first resigning from your position as arbitrator; or (iii) honor their request and initiate mediation discussions, but only after having the parties and their counsel execute a suitable consent and waiver? The thesis of this article is that the correct answer is: "It depends." In our view, how a neutral responds to the parties' request that she serve in a dual capacity should be guided in the first instance by the neutral's overall approach to ADR processes and her determination as to whether she is comfortable undertaking the role envisioned by the parties.

Strategic decisions about models are often not as simple as choosing to mediate or arbitrate. Mixed-mode dispute resolution is becoming more common as parties endeavor to structure processes that provide optimal (and sometimes multiple) opportunities to resolve disputes. There are many different ways to structure mixed-mode dispute resolution processes.[1]

The use of the "Med-Arb" model has been prevalent for some time.[2] In this model, the parties first engage in mediation. If the mediation is successful and the dispute is resolved, that is the end of the process. If the mediation fails to produce a settlement, the parties proceed to arbitration before a different neutral who has not been privy to the mediation proceedings.[3]

Much rarer, at least in the United States,[4] is "Arb-Med" (or "Arb-Med-Arb," with the mediation stage sometimes referred to as the "mediation window"). The "Arb-Med" model generally involves the same neutral serving in both roles. The arbitration commences and proceeds to a point at which the parties wish to mediate; if the mediation discussions do not produce a settlement, the neutral resumes her role as arbitrator and decides the case.

Unlike "Med-Arb," for which the procedures are generally agreed to in advance and memorialized in the parties' dispute resolution agreement, "Arb-Med" is typically an ad hoc procedure. The parties may seek to suspend the arbitration and proceed to mediate any time before the final arbitration award is issued, provided that the arbitrator is agreeable to switching hats mid-stream. Parties that incorporate "Med-Arb" in their dispute resolution protocols have made a conscious decision to include arbitration as their "Plan B" in the event that mediation proves to be unsuccessful. By contrast, parties that resort to "Arb-Med" generally enter the process with every expectation that arbitration will lead to a final and binding resolution of the dispute, and only turn to mediation in the event that unforeseen circumstances arise during the arbitration.

There are a number of reasons why parties engaged in arbitration may wish to switch to mediation mode before the arbitration is concluded. One such reason is the prospect of reducing the parties' costs by asking a neutral already familiar with the relevant facts and evidence

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to attempt to facilitate a settlement. Another is that the "Arb-Med" procedure allows each party "to evaluate its arbitration case compared to that presented by the opponents, possibly recognizing strengths or weakness that could allow common ground during mediation"—but without needing to start the process from scratch with another neutral.[5] If it turns out that the dispute cannot be settled in mediation, "the neutral is presumably already educated as to the facts and circumstances involved in the case."[6]

Risks Associated with "Arb-Med"

To be sure, there are risks associated with having an arbitrator pause the arbitral proceedings for the purpose of participating in mediation discussions. If the mediated negotiations result in a settlement, the arbitrator turned mediator is a hero. By facilitating a mutually acceptable settlement, the neutral has, at a minimum, saved the parties significant expense, which will be manifest when the parties receive a pro rata refund of the arbitrator compensation deposits that they previously advanced. But what if the mediation discussions do not produce a settlement? That can cause headaches.

The risks of having the same neutral act in the dual capacity of adjudicator and neutral facilitator arise from the concept that "[t]he principles underlying the legal system's protection for confidentiality in mediation are undermined if the neutral learns information in mediation that she carries over to affect her decision in arbitration . . . cognitive psychology teaches that even when a neutral thinks that she is setting aside this information it becomes incorporated into her thinking."[7] That is a very real concern and goes a long way toward explaining the reluctance of many, if not most, neutrals to perform both roles in an "Arb-Med" process.

In our view, regardless of the enthusiasm that the parties may have for turning from arbitration to mediation prior to the conclusion of the arbitral process, the arbitrator should carefully consider whether she is comfortable doing so. If the arbitrator concludes that she could not resume her arbitral duties if mediation were to fail without being biased or otherwise influenced by information she learned during the mediation discussions, the arbitrator should respectfully decline to participate.

Minimizing the Risks of "Arb-Med"

Given the risks associated with the same neutral serving as both arbitrator and mediator, why should an arbitrator even consider agreeing to participate? Attorneys are well known to be risk averse, and those serving as arbitrators likely would not characterize Arb-Med as a "safe" course of action.

One response is that arbitration is the *parties'* process and is a creature of contract. If the parties agree that a particular dispute resolution protocol (in this case "Arb-Med") will make it more likely than not that they will achieve a mutually-desirable result, and the parties are prepared to expressly waive any known and unknown risks associated with that process, the arbitrator should, in our view, at least explore the possibility of carrying out the parties' wishes. As stated earlier, if the arbitrator is not comfortable with performing dual roles in an "Arb-Med" protocol, that should be the end of the inquiry.

If, however, the arbitrator is confident in her ability to resume her arbitral duties following a failed mediation without being biased or otherwise influenced by information she learned during the settlement negotiations, the arbitrator should inquire of the dispute resolution provider selected by the parties whether the provider will continue to administer the case under such circumstances.[8] If the provider is willing to do so, the arbitrator should proceed to consider, with input from the parties, steps that could be taken to ameliorate the risks presented by "Arb-Med." Not surprisingly, these risk-minimizing steps involve trade-offs that could potentially impair the effectiveness of the mediation process, or jeopardize the potential for significant cost savings that may have motivated the parties' desire to pivot from arbitration to mediation.

Such steps should be carefully vetted to ensure that the parties have had the opportunity to craft an "Arb-Med" process that is fundamentally fair and that satisfies their mutual needs and expectations. Even if one accepts the threshold premise that the same neutral can serve in the dual roles of arbitrator and mediator, the details of the process matter. If the procedure appears one-sided or otherwise procedurally unfair, the parties are not likely to come away from the process feeling satisfied.[9]

Among the procedural choices to be considered by the parties, with the input of the arbitrator, are the following:

> Deferring mediation discussions until after the arbitral proceedings have been completed and the arbitration award has been written and executed. The signed award can be placed in a sealed envelope, only to be issued in the event that the ensuing mediation fails to produce a settlement. While this procedure prevents the arbitrator's decision from being influenced by information she learned during the mediation discussions, it requires that the arbitration be completed before the mediation can begin, thus sacrificing the cost savings that could be realized by engaging in an "Arb-Med" process.
>
> Conducting all mediation discussions with all participants present, eliminating private caucusing from the mediation process. While this procedure similarly

obviates the possibility that the arbitrator's decision will be influenced by information she learned in circumstances where some participants were absent, eliminating private caucuses during which the neutral can speak candidly with each side deprives the neutral of an important tool for facilitating a settlement.[10]

Conducting private caucuses, but requiring that information elicited by the neutral during a caucus with one party be shared by the neutral with the other party. While this procedure would maintain a level playing field, it would also have a chilling effect upon the parties' candor with the neutral, thereby jeopardizing the effectiveness of the mediation discussions.

Documenting the "Arb-Med" Process

Regardless of what specific steps are taken to minimize the risks of "Arb-Med," it is essential that full disclosure of those risks, and the parties' decision to proceed with full knowledge of such risks, either be (i) memorialized in a writing executed by the parties, their counsel, and the neutral, or (ii) otherwise stated on the record in the arbitration and expressly consented to by all participants.[11] Our standard protocol for documenting the parties' agreement to pursue an "Arb-Med" process involves having all participants sign a written Consent and Waiver, following a full explanation of its terms and conditions. The essential elements of that Consent and Waiver consist of the following explicit acknowledgments:

With an arbitration hearing underway, the parties have requested a pause in the arbitral proceedings to pursue mediation.

The parties have specifically requested that the arbitrator act as the mediator.

If the mediation phase does not result in a settlement, the neutral will resume the arbitration (assuming that it has not been completed) and proceed to decide the case and issue an arbitration award.

During the mediation phase, the neutral may meet privately with each party and its counsel, and may receive confidential information that the absent party believes to be false (assuming that the parties have agreed to private caucuses). The parties understand that in an arbitration hearing, it would be improper for an arbitrator to receive such information in the absence of the other party.

The parties waive their right to have the arbitrator's decision be based solely upon information received in the presence of the other party (again, assuming that the parties have agreed to private caucuses).

The parties have been informed of the disadvantages of having the same neutral serve as arbitrator and mediator, including that the parties may reveal to the neutral their respective settlement positions and their views of the strengths and weaknesses of their positions on the merits.

The parties understand that, if at any point during or following mediation the neutral no longer feels able decide the case impartially, the neutral may step down.[12]

The parties have had an opportunity to consult with independent counsel of their choice concerning the process and to appoint another neutral to serve as the mediator of the dispute.

The parties' counsel attest that they have fully informed their clients of the risks associated with the process.

Neither the dispute resolution provider nor the arbitrator shall be liable for any act or omission arising out of the arbitrator's service as the mediator of the parties' dispute. No claim against the provider or the arbitrator can be made based upon the arbitrator's dual service, and no challenge to the arbitration award can be predicated upon such dual service.

Conclusion

With full disclosure, express consent, and implementation of steps to minimize risks, "Arb-Med" can be an effective procedure for the resolution of disputes.

Endnotes

1. *See* Barbara A. Reeves, *Hybrid Proceedings: Resolving Disputes by Integrating Arbitration and Mediation*, 11 N.Y. Dispute Resolution Lawyer No. 2 (Fall 2018) at 36–37 (highlighting four examples of disputes successfully resolved in mixed-mode proceedings, each of which was structured differently from the others).

2. *See*, *e.g.*, Thomas J. Stipanowich and J. Ryan Lamare, *Living With "ADR": Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 Harv. Negot. L. Rev. 1 (2014) (reporting that more than half of in-house counsel at large companies responded that their company had used "Med-Arb" in the previous three years); *see also* David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63-Oct. Disp. Resol. J. 28, 30 (Aug.-Oct. 2008) (noting expanded use of "Med-Arb").

3. "Med-Arb" is often found in contractual dispute resolution provisions as part of a three-step process. The first step consists of negotiations between the parties (sometimes explicitly stated to be at the executive-to-executive level) followed, if necessary, by mediation and then arbitration.

4. "In China, arb-med is widely used in local and international arbitration cases. At least twenty to thirty percent of arbitral awards are based on disputing parties' settlement agreements," Stipanowich, Yang, Welsh, Qiming, Robinson, Jinghui, Guang, Kichaven, Madigan, Hongsong, and Jianhua, *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 Pepperdine Dispute Resolution L.J. 2 at 398 (2009).

5. Richard Fullerton, *The Ethics of Mediation-Arbitration*, 38 The Colorado Lawyer 31, 36 (2009).

6. Kristen M. Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63:2 Baylor L. Rev. 317, 326 (2011).

7. Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Arb. L. Rev. 218, 220 (2013); *see also* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Dispute Resolution Lawyer 71, 72 (2009).

8. The American Arbitration Association will continue to administer a case in which an arbitrator suspends the arbitration to serve as a mediator and then re-assumes her role as arbitrator if the mediation discussions are unsuccessful provided that (i) the parties have agreed that the case should proceed in that manner, and (ii) there has been full disclosure and waiver, in a signed writing or on the record of the hearing, of the risks associated with allowing the arbitrator to mediate the dispute.

9. *See* Mark Goodrich, *Arb-Med: Ideal Solution or Dangerous Heresy?*, Alert (2012), *available at* https://www.whitecase.com/sites/whitecase/files/files/download/publications/articles-IALR-2012-Arb-med-solution-or-dangerous-heresay.pdf (tracing extensive litigation over the enforceability of an arbitral award in the case of *Gao Hai Yan & Another v. Keeneye Holdings Ltd & Others* (2011), HKEC 514 and HKEC 1626), where allegedly unfair and coercive mediation procedures were employed after an arbitration hearing had begun).

10. One tool that is not available during the mediation discussions where the same neutral serves as both arbitrator and mediator is the neutral's ability to comment on the types of arguments that an arbitrator is likely to find persuasive or not persuasive. The neutral loses that tool because she cannot reveal how she is likely to rule on the dispute if the mediation discussions fail to produce a settlement and she must decide the case. *See* comments of Jay Welsh in Stipanowich *et al.*, 9 Pepperdine Dispute Resolution L.J. 2, at 408.

11. In one case, after mediation failed and the neutral pivoted back to arbitration and entered an arbitral award, a court concluded that in issuing the award the neutral had improperly relied upon information he obtained in his role as mediator. The court invalidated the award as "arbitrary and capricious" on its face. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Dispute Resolution Lawyer 71, 72 (2009). There is no indication in the opinion that the parties had executed a consent and waiver before embarking upon mediation discussions with the neutral's participation.

12. *See* Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 W. Arb & Med. R. 421 (2013).

Doc. No. 16

Virtual Arbitration
A Two -Year Retrospective Survey
of the
Fellows of the College of Commercial Arbitrators
April 2022

By Harry P. Trueheart

In connection with a presentation by a panel of Fellows of the College of Commercial Arbitrators at the Spring Meeting of the ABA Dispute Resolution Section, the College surveyed its membership seeking the individual and collective experiences and opinions of the Fellows regarding arbitrations conducted in whole or in part through remote video technology ('virtual arbitrations'). This is a preliminary summary of the results of that survey. In interpreting survey results any summary necessarily reflects the views of the author. This report is no exception. (The complete survey results appear in Appendix A, *infra.)*

The Responding Cohort.

The College membership includes more than 250 arbitrators who become members by invitation based on their experience and reputation in the field. The survey went to all Fellows and 137 completed the survey. Their responses were based on their actual experiences in more than 500 remote video arbitrations, of which the majority were fully virtual.

The Remote Participants in Virtual Arbitrations

For the partially virtual arbitrations, the remote participants ranged, in rough order of frequency, from witnesses, to parties and party representatives, to counsel, to members of the arbitration panels. In some cases the panel convened in person while other participants appeared by video. In other cases, apparently some sessions were held fully live while other sessions in the same arbitration were held virtually.

Overall, virtual proceedings were used in whole or in part in every aspect of the arbitration process including in rough order of frequency, witness testimony, preliminary hearings, closing arguments and plenary hearings.

Who Decided to Conduct Virtual Proceedings

In general, it appears that the decisions to conduct fully remote virtual proceedings were made more often by agreement of the parties but with a significant number made by the arbitrators. It can be inferred from the responses that the decision process was collaborative and dynamic as between the parties and the arbitrators in many cases, but where there was disagreement the arbitrators decided the issue.

The Reasons for Conducting Virtual Proceedings

In the vast majority of cases the reason for conducting virtual proceedings was the pandemic, with witness availability and cost running second and third in importance. Various convenience factors played a role in some cases. The reasons for conducting partially remote proceedings followed a similar pattern.

Barriers to Conducting Virtual Proceedings

The survey explored the question of possible barriers to conducting virtual proceedings. Only fifteen percent of the respondents viewed the arbitration clause as presenting any difficult. Where there was a perceived barrier, the most frequent reasons cited were the apparent requirement of in person hearings, hearings required to be in a specific location and lack of explicit authorization. The other eighty-five percent of responders said the arbitration clauses were not a problem.

Over ninety percent of respondents did not view arbitral institution rules as presenting a barrier to virtual proceedings. For those arbitrators who thought the rules presented a problem, it was the lack of specific authorization in the rules for virtual proceedings.

Very few respondents saw the law of the seat of the arbitration as presenting a barrier. Those that did noted the lack of specific authorization as the primary issue.

Who Should Decide If Arbitral Proceedings Should Be Held Virtually

The survey asked the questions: if arbitration clauses, institutional rules and the law were to authorize virtual proceedings as an option, how should the decision to conduct virtual proceedings be made? In order of frequency of the responses, in all cases the responses were: by agreement of the parties, by decision of the arbitrators, by decision of the arbitral institution, by the courts, with the last three options increasingly distant third, fourth and fifth choices. There was a distinct preference for keeping the issue out of the courts.

How Do Virtual Proceedings Impact the Performance of the Participants

Much has been said based on experience and / or opinion or both about how virtual proceedings affect the arbitration process. The survey asked a number of questions probing the Fellows' view based on their actual experiences. In each case the question was how did virtual proceedings affect the particular aspect of the proceedings compared to in person proceedings. Here are the results in terms of general responses and representative comments.

- **Degree and Quality of Party Participation:** Forty percent said virtual hearings had a significantly positive impact. Sixty percent said it had no impact either way. The comments noted positives such as permitting cases to proceed in face of pandemic restrictions; significantly reducing costs; significantly improved efficiency and increased scheduling options.
- **Witness Participation:** The question of the effect of virtual proceedings on assessing witness testimony drew mixed responses. Some respondents felt that their ability to hear and see the witness close-up improved with video. The effect of video on credibility assessment drew mixed views. Some felt it was improved by close-up video which others preferred in person testimony.

assessing credibility grounds and effectiveness of cross examination and felt video appearances were not as effective.

- **Performance of Counsel:** Seventeen percent thought virtual proceedings improved performance of counsel. Eighty- two percent said it did not make a difference either way. One respondent said it was a negative. One comment may have summed up the overall impacts as follows: "Good lawyers were better and bad lawyers were worse." More specific positives were perceptions that counsel were better prepared and focused and in general virtual hearings encouraged to make more efficient use of hearing time. The negatives focused on counsel who were not comfortable with the technology and he issue of cross-examination and witness assessment where both sets of views were expressed.

Best Practices in Virtual Arbitration Proceedings

The survey asked the responders for their views on the best practices employed by counsel in virtual proceedings. The following were most frequently mentioned:

- Familiarity with quality technology by counsel and witnesses.
- Use of an experienced hosting firm to run the technology.
- Efficient document/exhibit handling.
- Cooperative planning among counsel for all parties in terms of hearing arrangements, documents handling, scheduling, and process matters in general.
- Witness training to increase familiarity with the technology.
- Use of virtual break out rooms.
- Adapting speaking style to the technology.
- Close camera placement.

Significant Mistakes By Counsel Related to Virtual Proceedings

The survey asked the responders for their views on the significant mistakes counsel made. Some of the responses paralleled the types of mistakes counsel make in live hearings. Others were specific to virtual proceedings.

- Technology: lack of familiarity by counsel; lack of training provided by counsel for witnesses; apparent lack of trial runs to assure effectiveness.
- Document handling within the virtual world. The mistakes noted were around lack of skills in presenting exhibits using the technology.
- Poor facilities: lighting, microphones, camera positioning; inadequate connection speeds.
- Not leveraging the technology to enliven the proceedings with visuals, etc.
- Some tendency to inappropriate informality displayed by counsel.

Effects on Possible or Actual Settlement.

Eighty-five percent of responders said there was no impact. The positive and negative comments, as opposed to the conclusions, were equally divided. The comments reported what would be expected: in general arbitrators are not involved in or privy to settlement discussions; and speculation that lack of personal contact among counsel might inhibit settlement discussions in connection with the hearings.

Effect on the Performance of the Arbitrators.

The question presented was how do virtual proceedings affect your performance as an arbitrator?

- Twenty-one percent said it helped.
- Six percent said it hindered performance.
- Seventy-three percent said it had no impact.
- The comments frequently mentioned that the responder missed the opportunity for personal interactions with panel members and counsel. In some comments this was noted as negative to the process, in as many others it was noted as just a recognition of

reduction in collegial interactions.

- Zoom fatigue was mentioned.
- Some saw a negative in the reduction of arbitrator time to interact and deliberate. Others saw the technology as enabling deliberations, particularly when the arbitrators would otherwise not have been able to do effectively connect.
- Positives included efficiency in scheduling, timely hearings and ability to make prompt decisions.
- Overall the consensus view is of a neutral to positive impact on arbitrator performance.

Preliminary Conclusions

Overall, virtual proceedings were viewed very positively. The reasons for and benefits of virtual proceedings go well beyond avoiding pandemic related risks and problems and include efficiency, cost savings, and more expeditious scheduling. In general, there were few if any major negative impacts on the process or participants of conducting virtual proceedings with the exception of a minority but consistent view that virtual hearings impacted the assessment of witnesses. It is a reasonable inference from the survey that arbitration clause, institutional rules and laws should be revised where necessary to explicitly authorize virtual hearings where the parties agree or where the arbitrators order them.

If the responding cohort of arbitrators views are representative of the broader community of arbitrators, we can expect the arbitration community to encourage virtual proceedings into the future and that virtual arbitrations will continue to be an attractive choice even after the end of the pandemic.

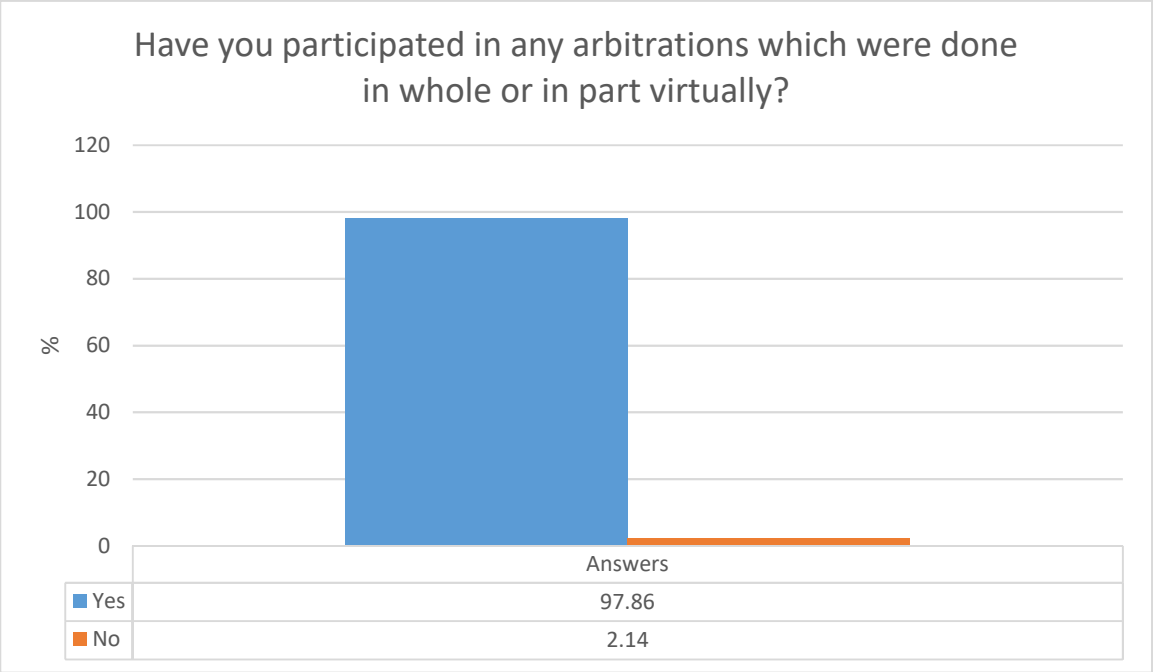
Acknowledgements

I would like to acknowledge the very helpful input from a number of our Fellows, Cecelia Flores Rueda, David Evans, Roy De Barbieri, Jonathan Fitch, and John Holsinger, and Bill Seward for assisting with the survey technology.

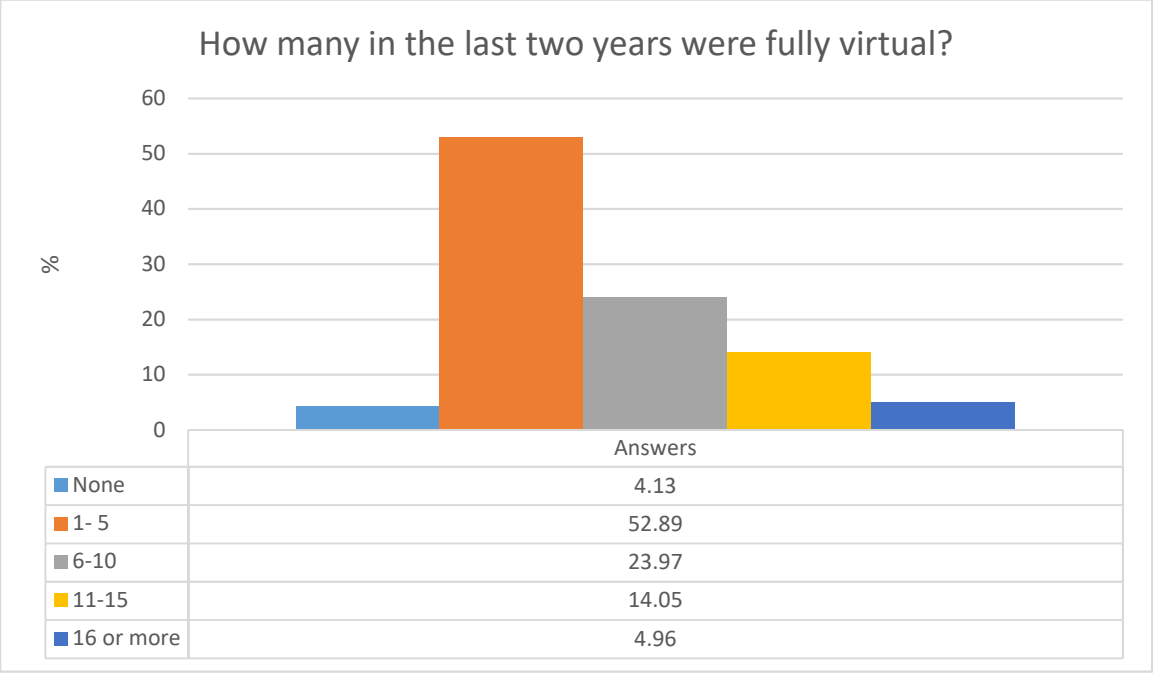
Appendix A

Survey results

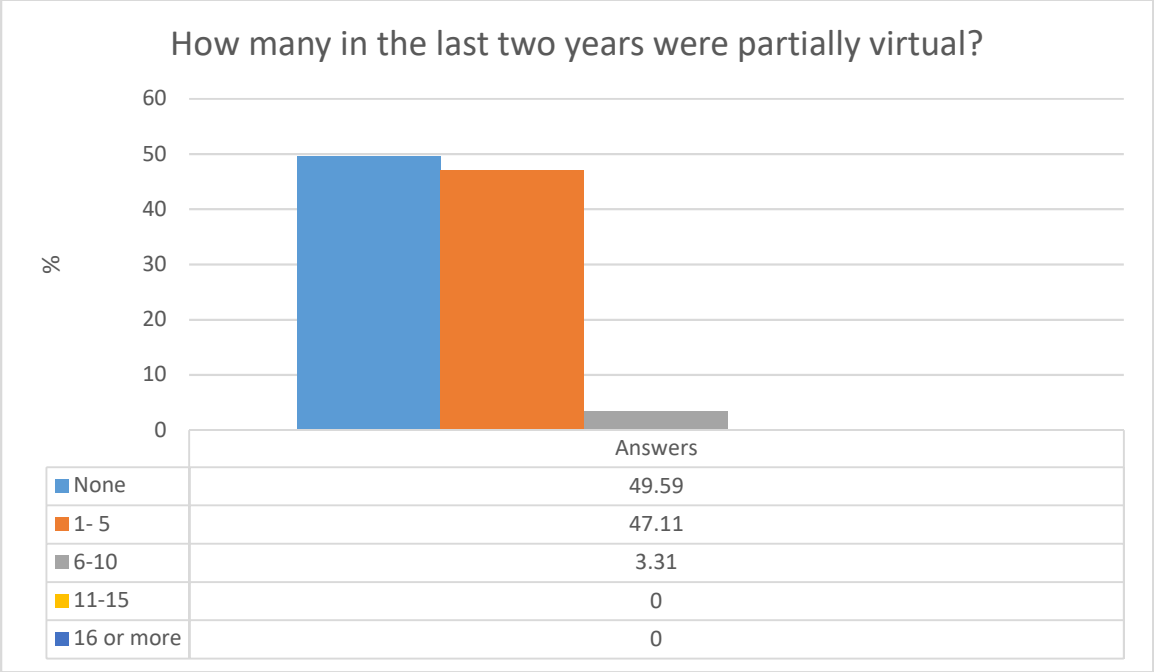
I. **Question 1** (140 answers)



II. **Question 2** (121 answers)

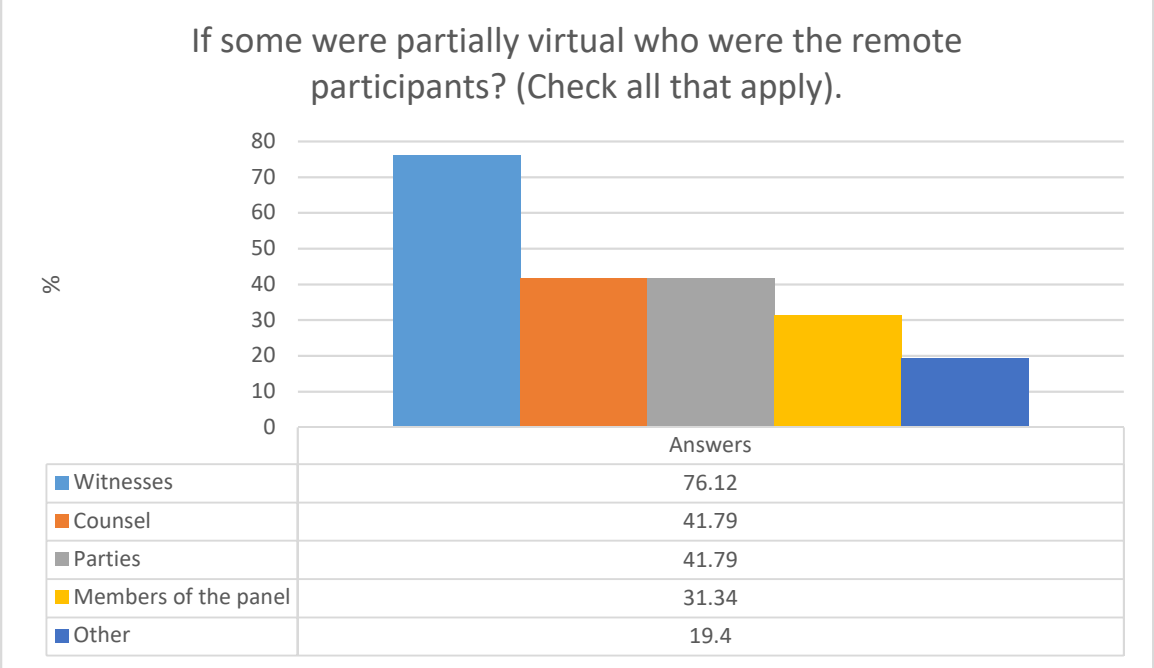


III. Question 3 (121 answers)



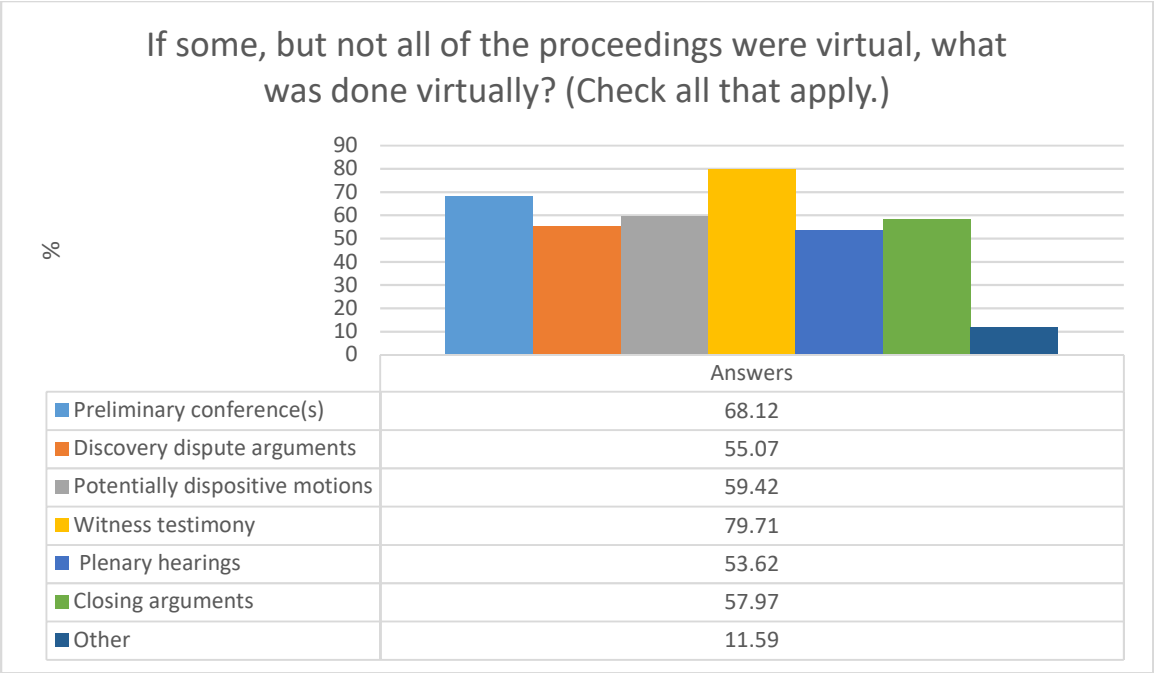
	Answers
None	49.59
1- 5	47.11
6-10	3.31
11-15	0
16 or more	0

IV. Question 4 (67 answers)



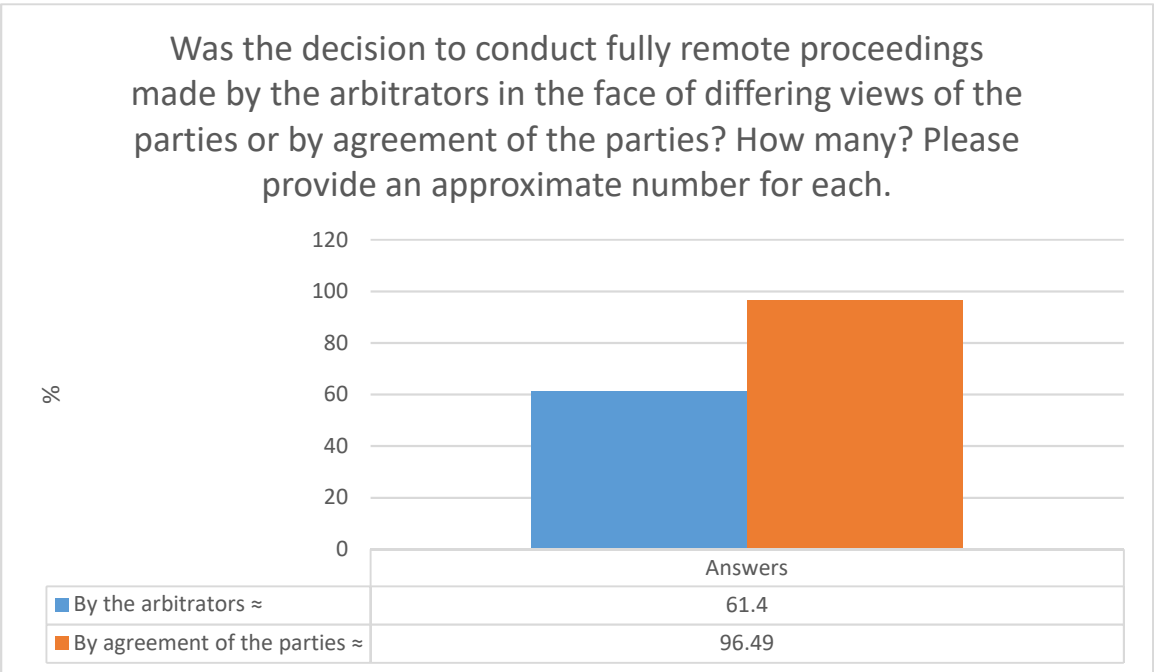
	Answers
Witnesses	76.12
Counsel	41.79
Parties	41.79
Members of the panel	31.34
Other	19.4

V. **Question 5** (69 answers)



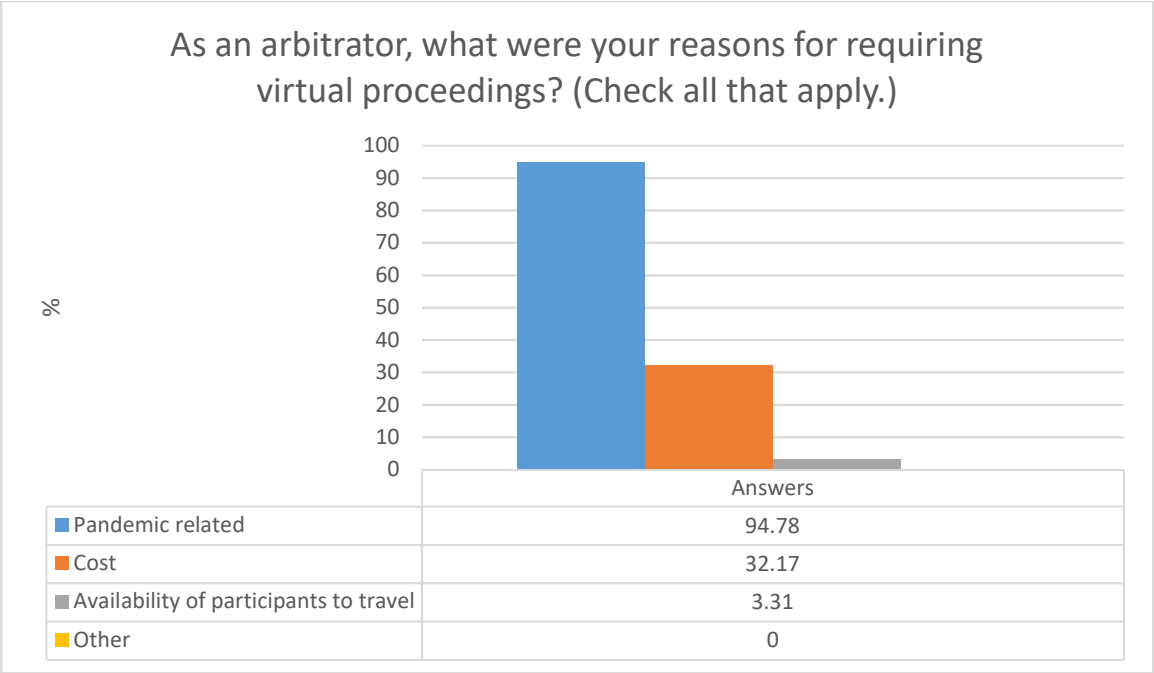
	Answers
Preliminary conference(s)	68.12
Discovery dispute arguments	55.07
Potentially dispositive motions	59.42
Witness testimony	79.71
Plenary hearings	53.62
Closing arguments	57.97
Other	11.59

VI. **Question 6** (114 answers)

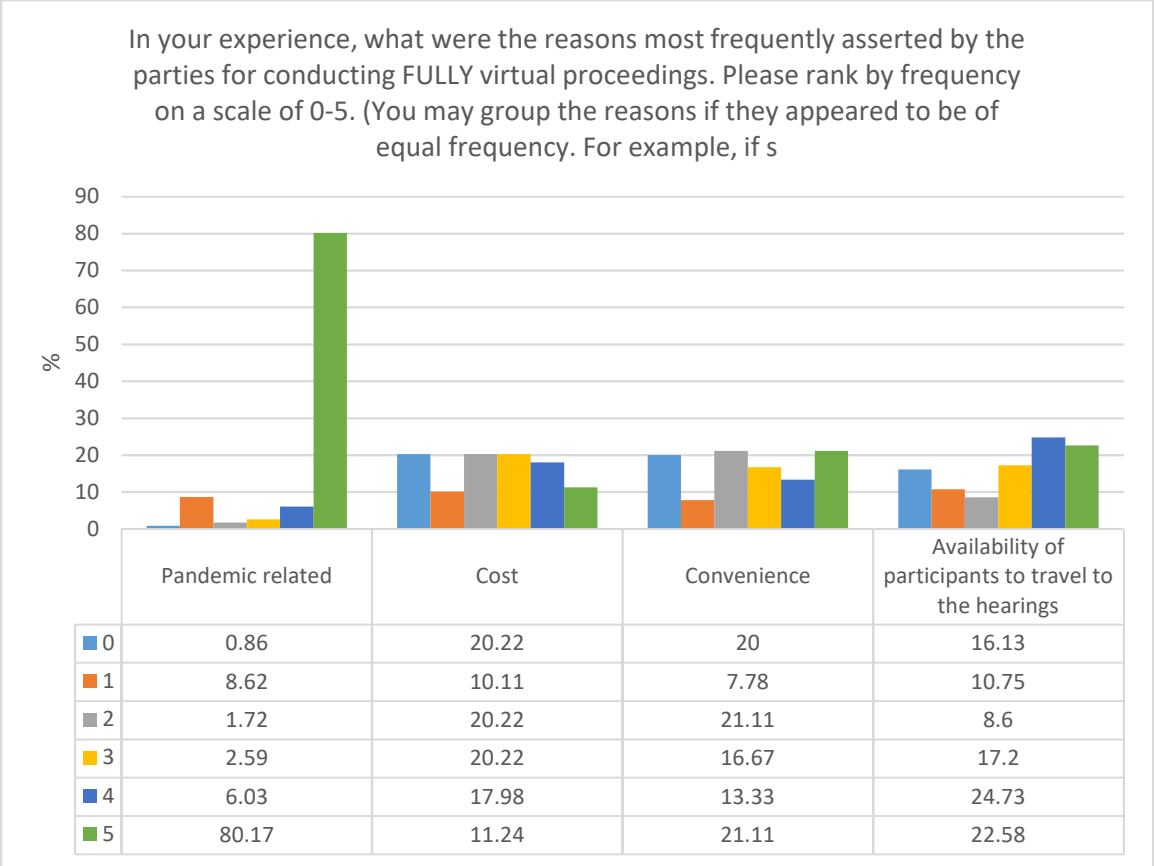


	Answers
By the arbitrators ≈	61.4
By agreement of the parties ≈	96.49

VII. **Question 7** (115 answers)

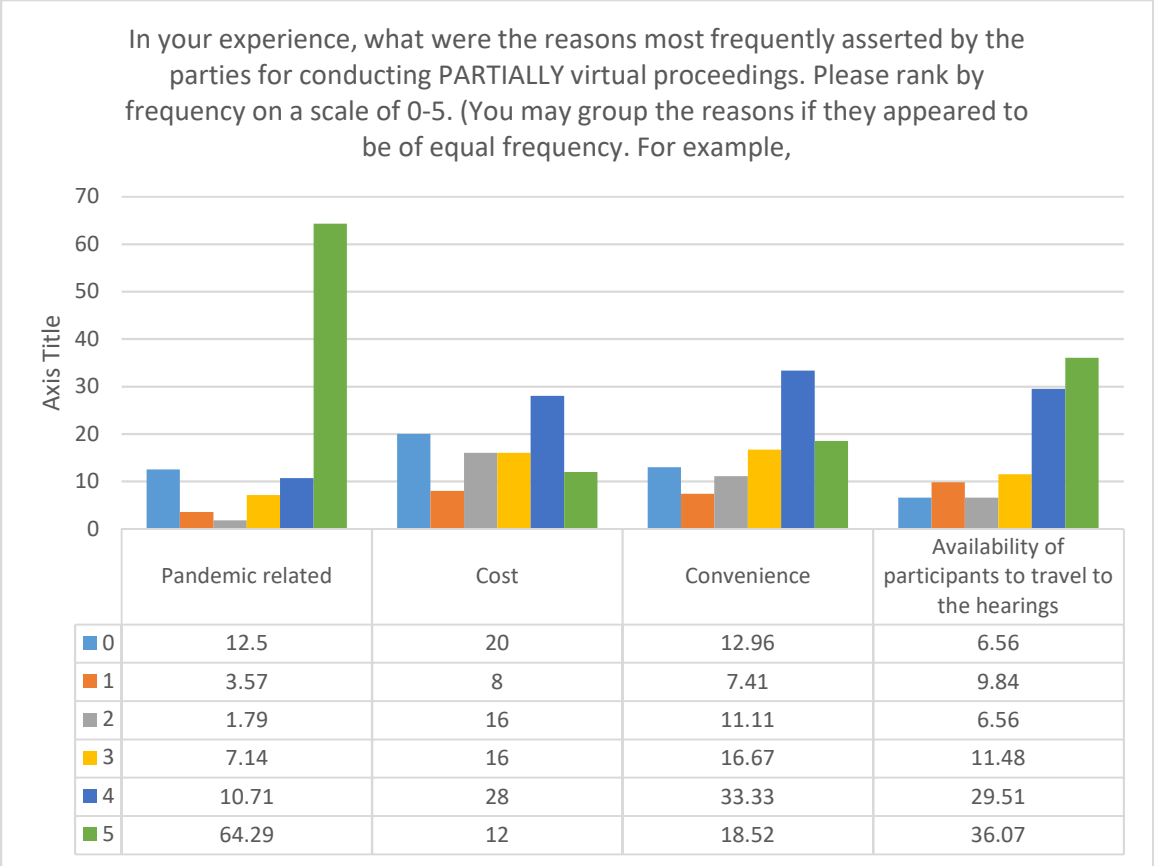


VIII. **Question 8** (119 answers)



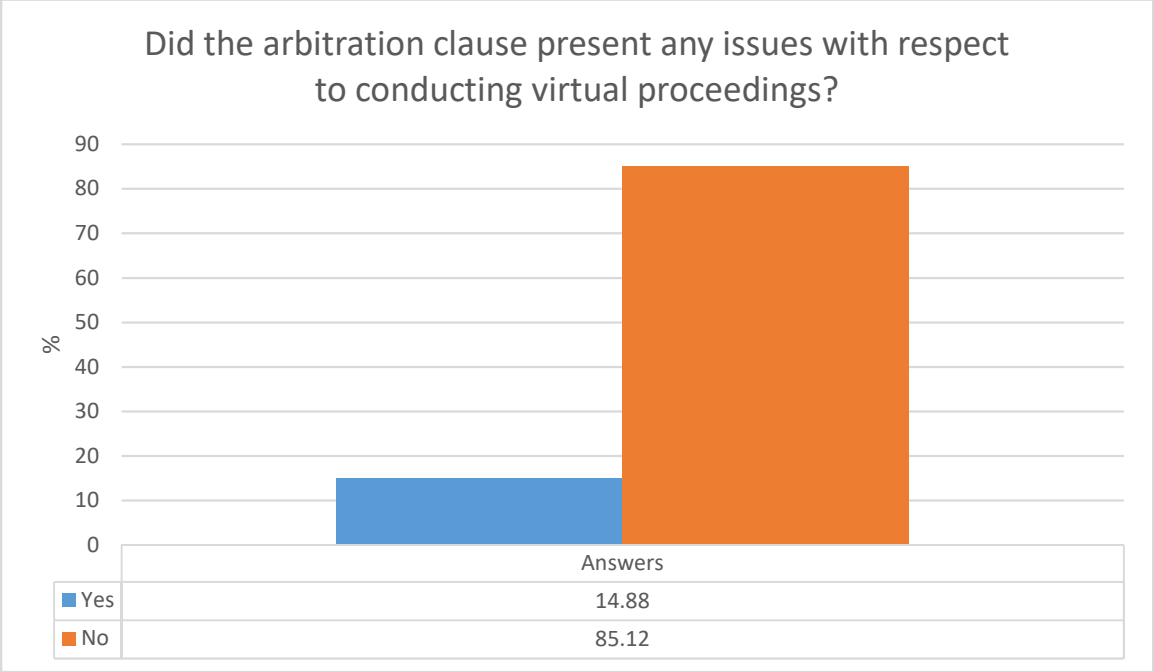
	Pandemic related	Cost	Convenience	Availability of participants to travel to the hearings
0	0.86	20.22	20	16.13
1	8.62	10.11	7.78	10.75
2	1.72	20.22	21.11	8.6
3	2.59	20.22	16.67	17.2
4	6.03	17.98	13.33	24.73
5	80.17	11.24	21.11	22.58

IX. **Question 9** (68 answers)



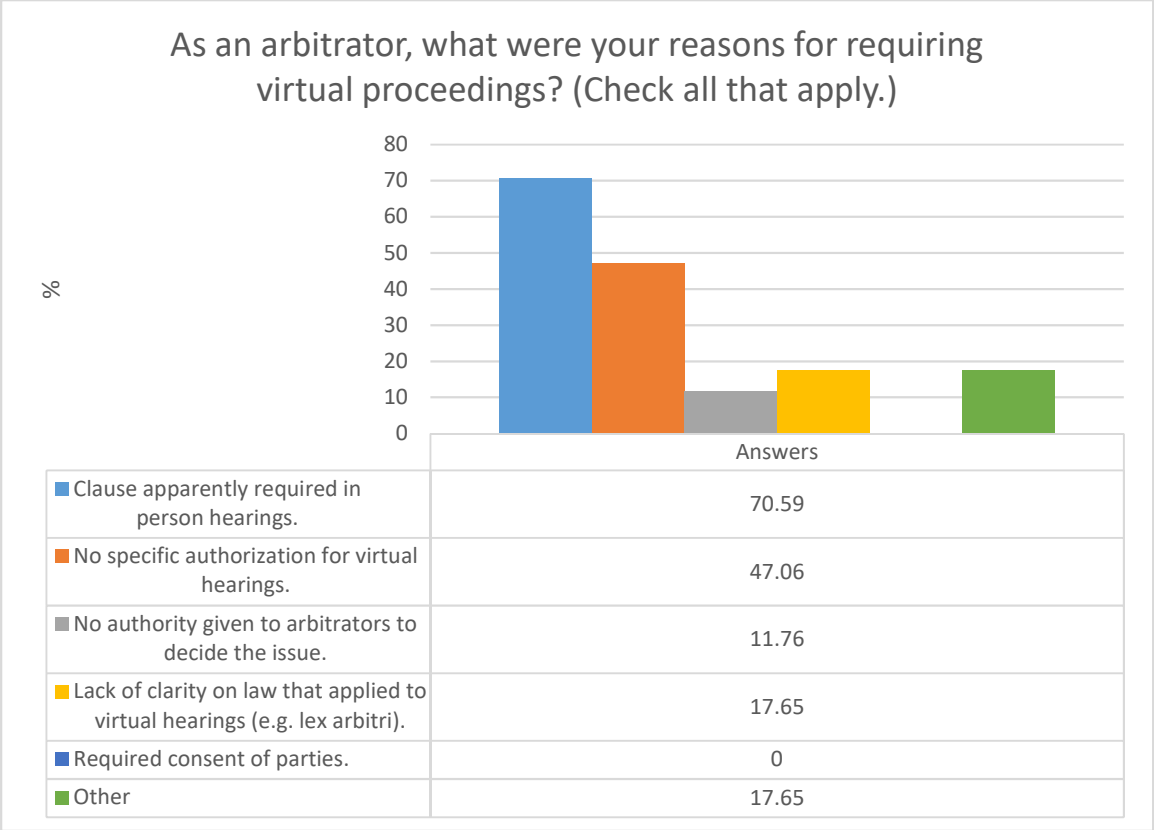
	Pandemic related	Cost	Convenience	Availability of participants to travel to the hearings
0	12.5	20	12.96	6.56
1	3.57	8	7.41	9.84
2	1.79	16	11.11	6.56
3	7.14	16	16.67	11.48
4	10.71	28	33.33	29.51
5	64.29	12	18.52	36.07

X. **Question 10** (121 answers)



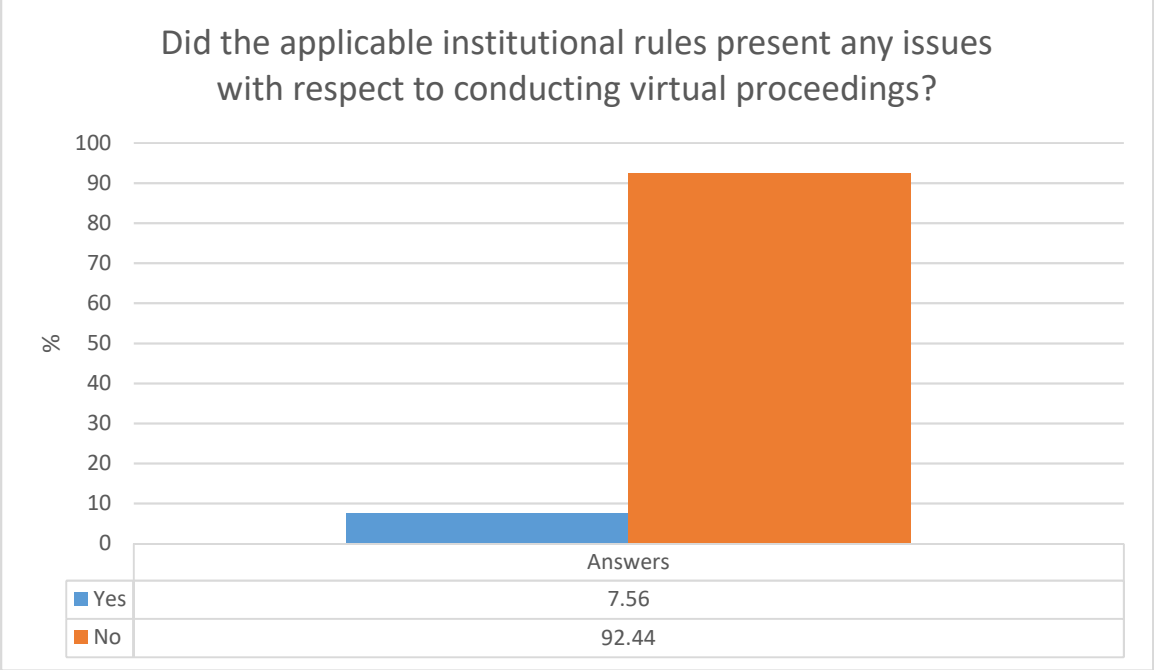
	Answers
Yes	14.88
No	85.12

XI. **Question 11** (17 answers)



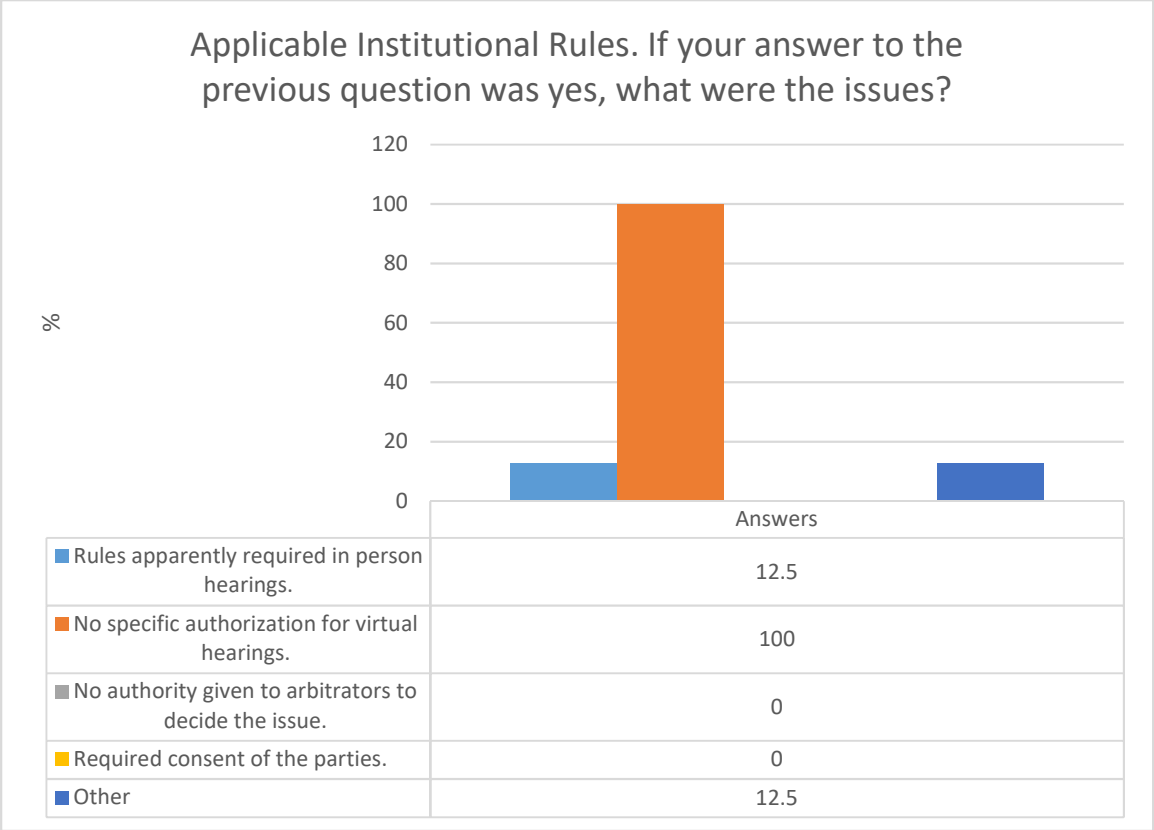
	Answers
Clause apparently required in person hearings.	70.59
No specific authorization for virtual hearings.	47.06
No authority given to arbitrators to decide the issue.	11.76
Lack of clarity on law that applied to virtual hearings (e.g. lex arbitri).	17.65
Required consent of parties.	0
Other	17.65

XII. Question 12 (119 answers)

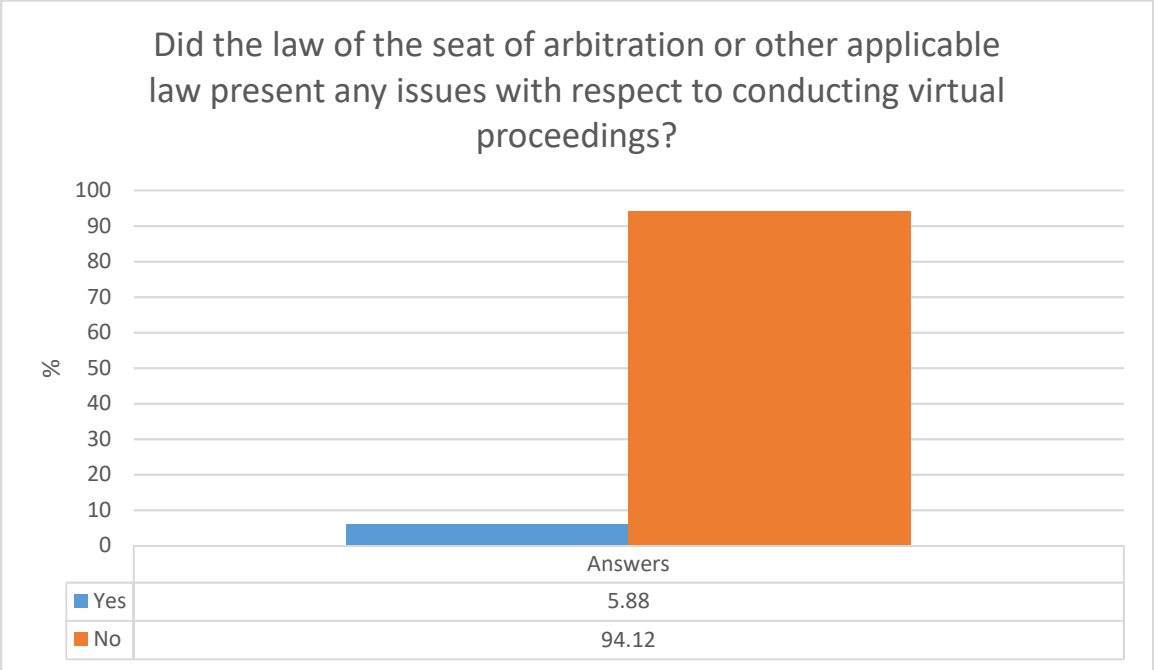


	Answers
Yes	7.56
No	92.44

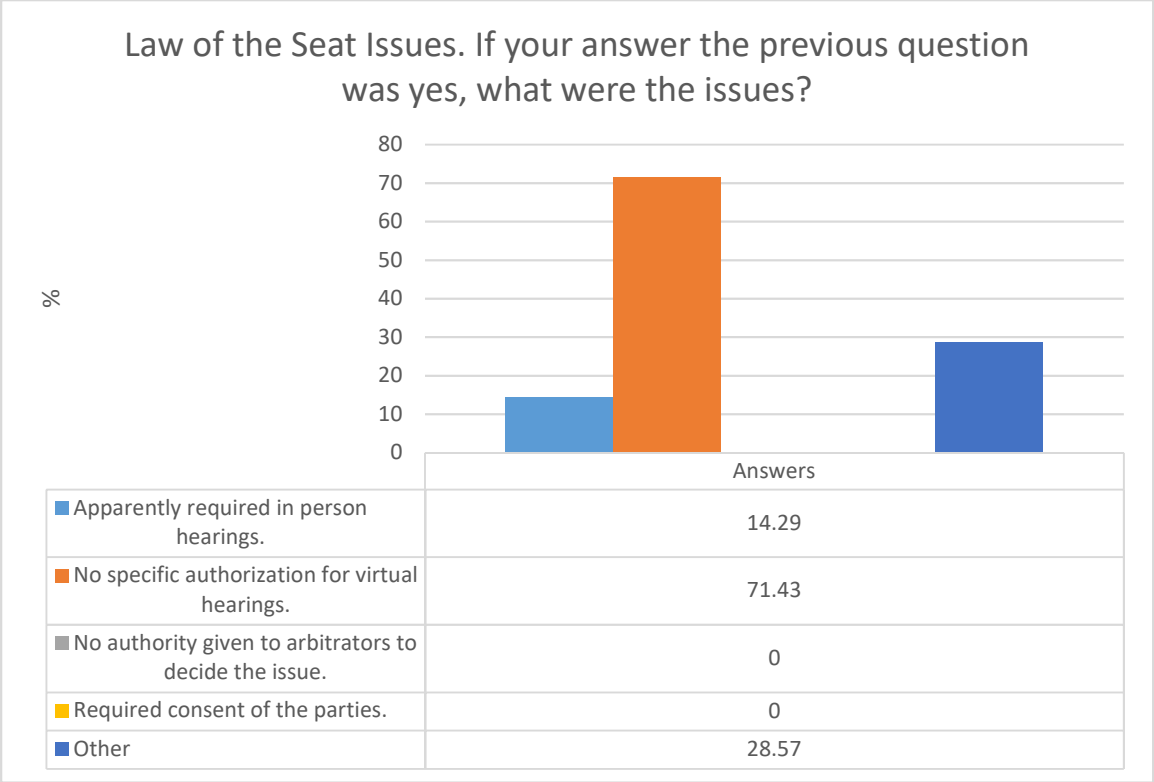
XIII. Question 13 (8 answers)



XIV. **Question 14** (119 answers)

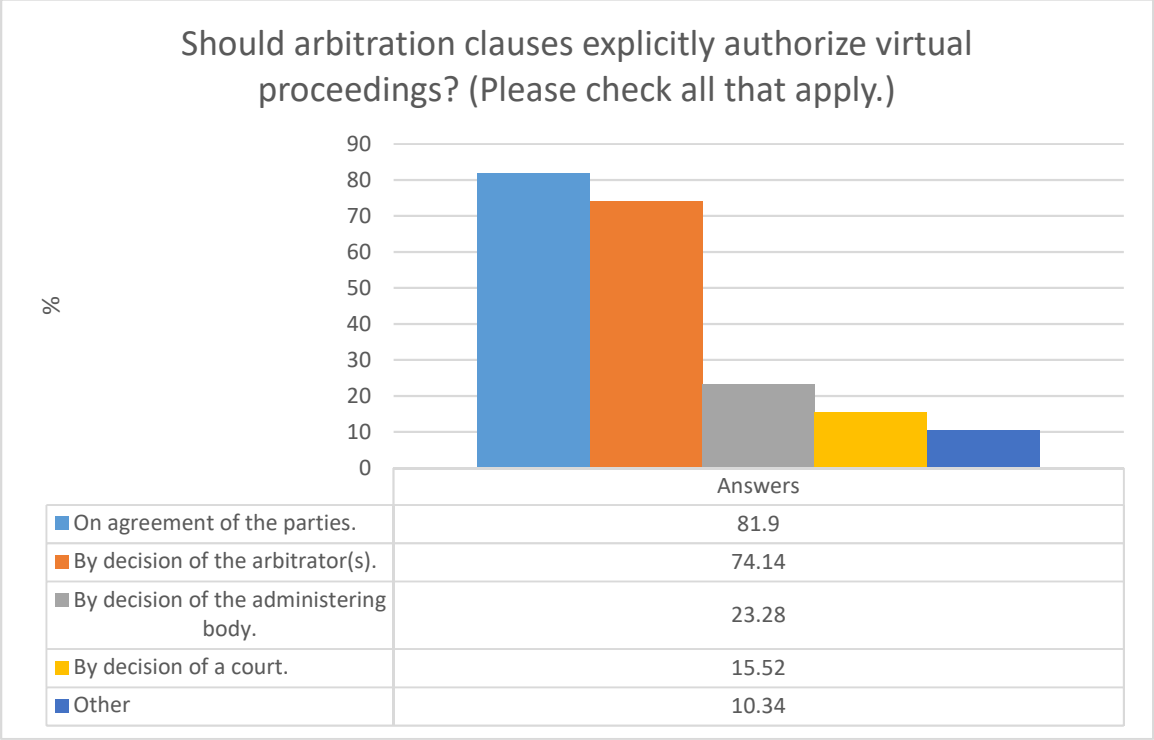


XV. **Question 15** (7 answers)



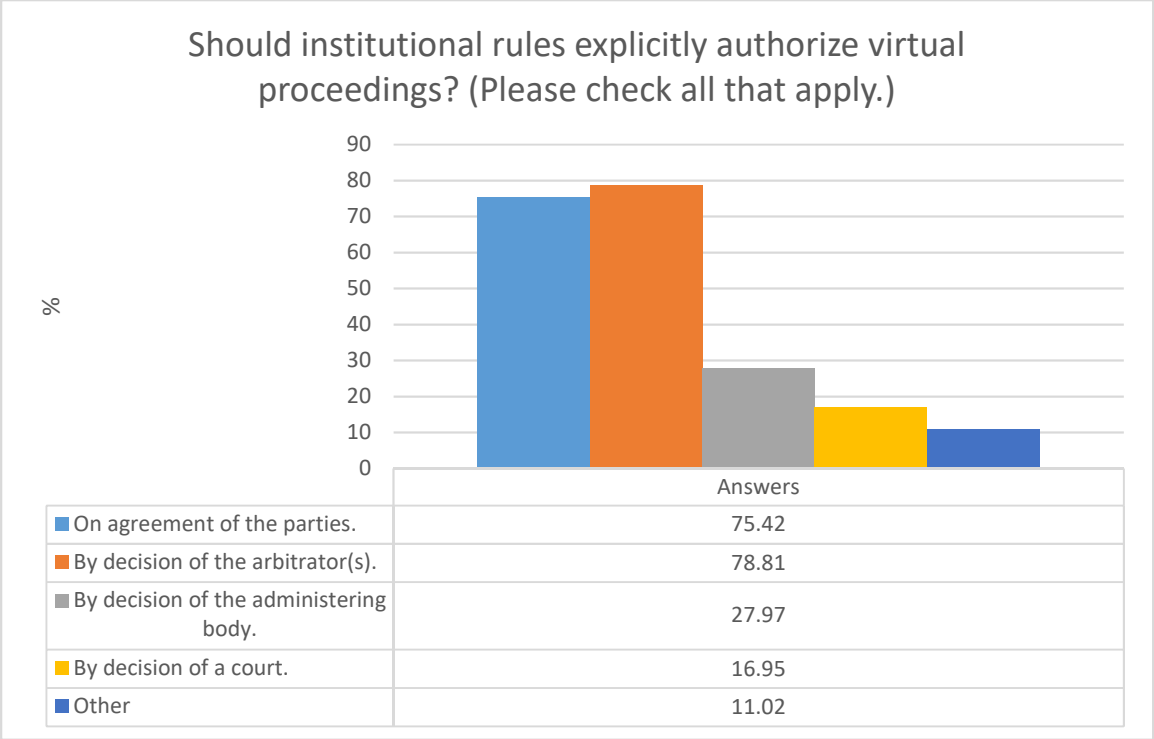
	Answers
Apparently required in person hearings.	14.29
No specific authorization for virtual hearings.	71.43
No authority given to arbitrators to decide the issue.	0
Required consent of the parties.	0
Other	28.57

XVI. Question 16 (116 answers)



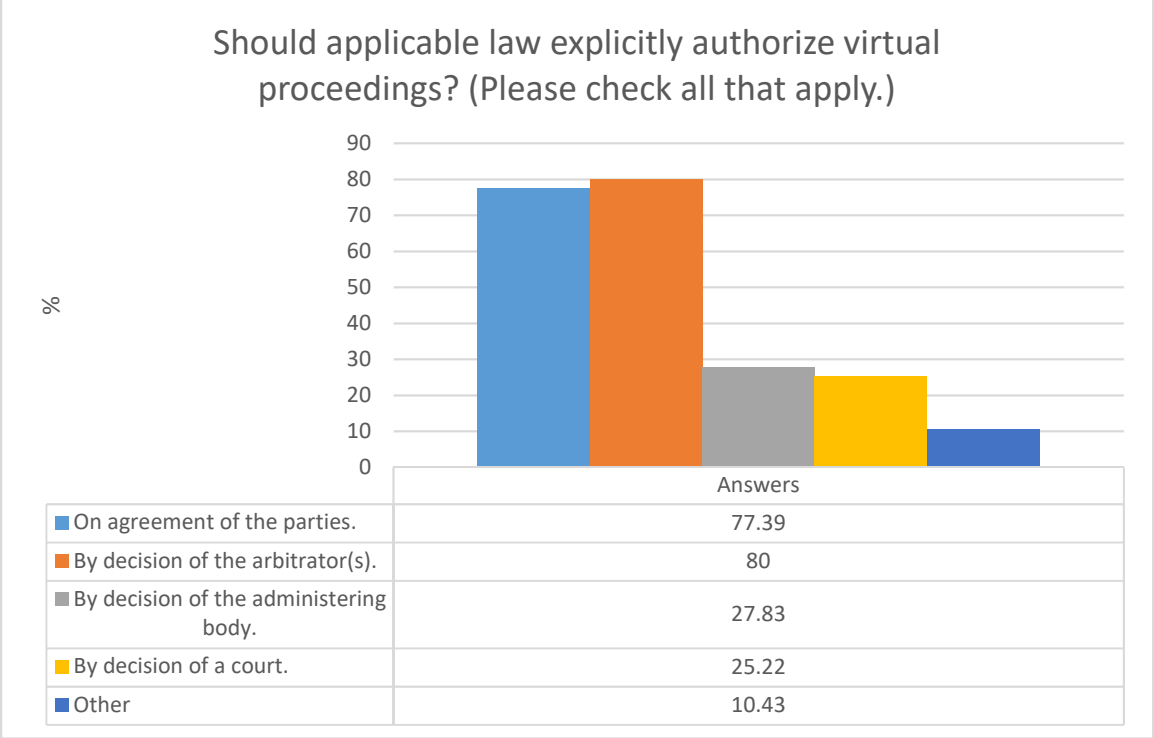
	Answers
On agreement of the parties.	81.9
By decision of the arbitrator(s).	74.14
By decision of the administering body.	23.28
By decision of a court.	15.52
Other	10.34

XVII. Question 17 (118 answers)



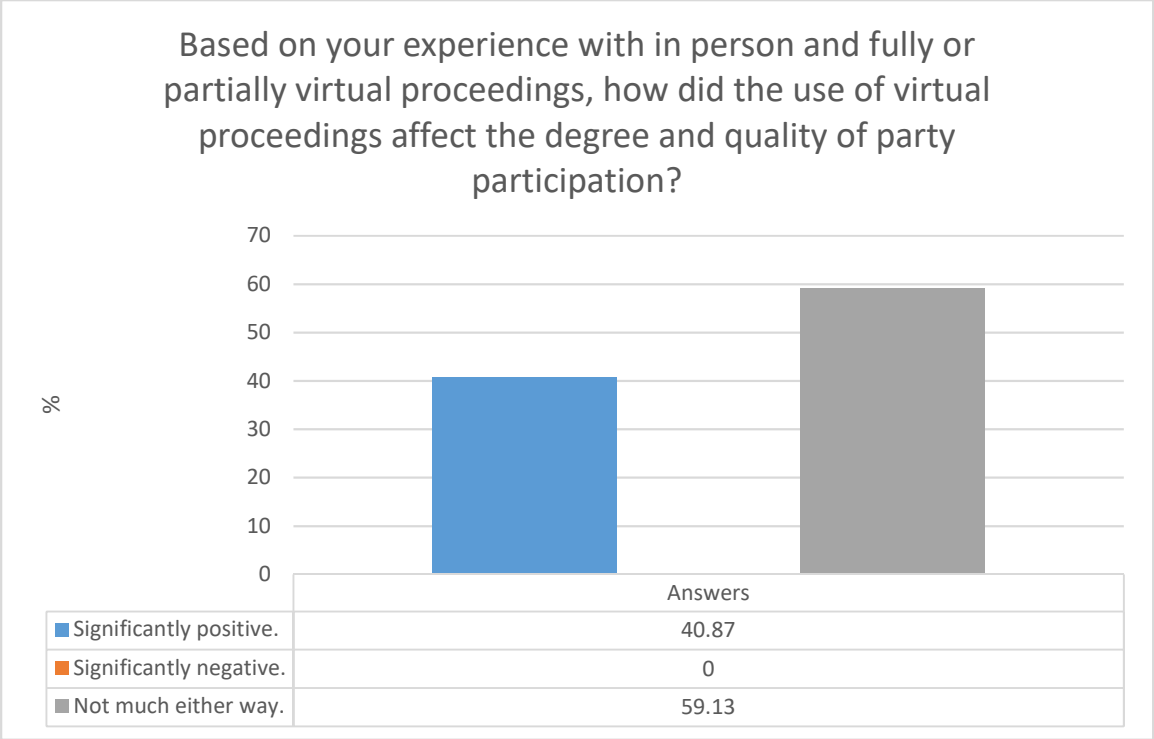
	Answers
On agreement of the parties.	75.42
By decision of the arbitrator(s).	78.81
By decision of the administering body.	27.97
By decision of a court.	16.95
Other	11.02

XVIII. Question 18 (115 answers)

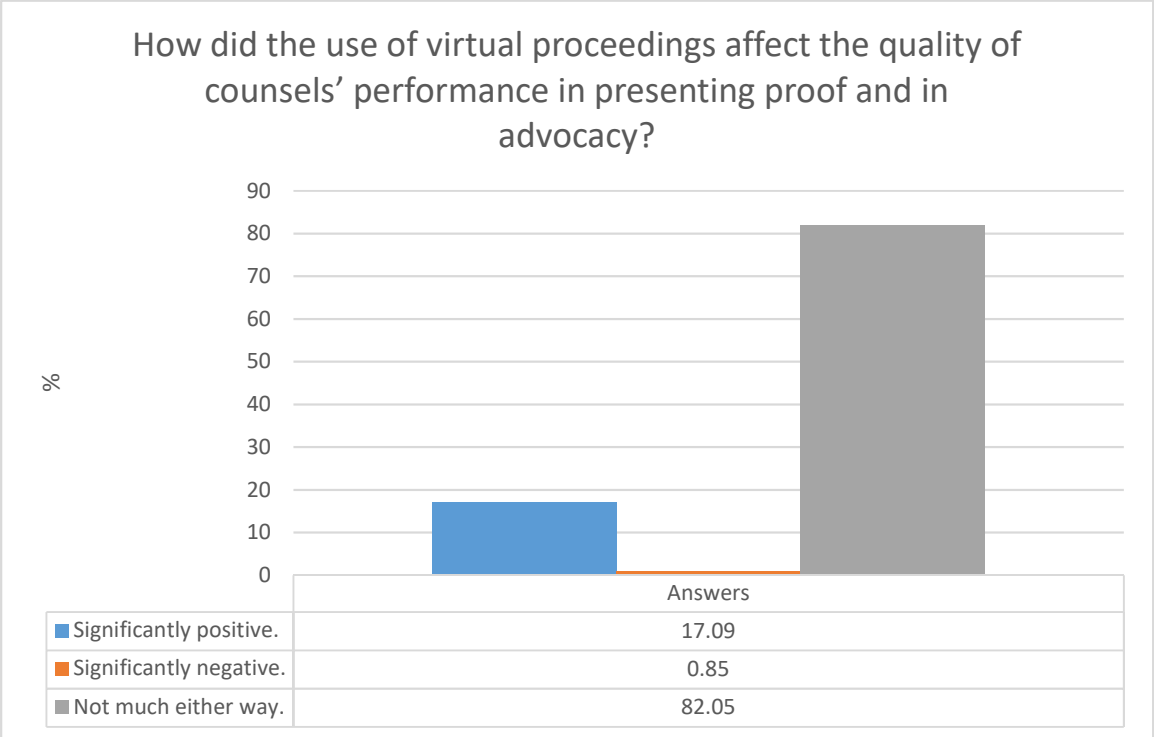


	Answers
On agreement of the parties.	77.39
By decision of the arbitrator(s).	80
By decision of the administering body.	27.83
By decision of a court.	25.22
Other	10.43

XIX. Question 19 (115 answers)



XX. Question 20 (117 answers)



XXI. Question 21

What were the best practices you observed in how counsel handled virtual proceedings? (Please list separately and in a few words if possible.)

A (93 answers)	B (53 answers)	C (32 answers)
• Same as live • Accommodating technology video, audio, pace • Use of a technical assistant • They prepared witnesses for the technology challenges of virtual hearings • Handling of exhibits with screen share • Respectful Communication • Having a technician involved to handle hearing mechanics • Efficiency • Screen sharing • Varied • Great demonstrative aids • Good use of screen sharing. • Agreement with opposing counsel on detailed schedule • Greater Cooperation in advance of hearing • Organization of materials • Independent host to handle document presentation • Handled exhibits efficiently • Had a technician manage document presentation • Control of exhibits • Speaking clearly and one person at one time.	• Using tech that best facilitates document handling • They practiced the presentation of digital evidence beforehand • Making sure their witnesses had good video and audio • Well organized in presentation of evidence • Counsel not talking over one another • Document presentation • Integration of case manager's operation of virtual platform • Skillful use of exhibits. • Use of Document Management Platforms • Promptness of start/stop times • Important clauses in documents called out through highlighting • Availability of witnesses • Using 3rd parties to administer tech issues. • Use of document consultants to aid with exhibits • Pretty much have it down by now • They tended to reach agreements on process matters • Cross examination of witnesses who had the chance to review	• The tested the technology beforehand • Speaking clearly while looking at the camera • No theatrics • Courtesies extended more readily • Time • Arbitrator ‘s ability to use the virtual platform • They were able to be more flexible with scheduling witness examination and other scheduling issues • Using headsets or dedicated microphones to improve sound quality • More efficient • Cooperation re screen sharing and exchange of exhibits • More prepared arguments • Arbitrator ‘s ability to use the virtual platform • Joint exhibits • Using a 3rd party tech firm • Experienced platform operator • Had emergency tech number to deal with tech issues • Some had practiced using the technology to become familiar with it. • Close-up instead of entire room • More efficient use of cross examination • Agreeing to shorter days

• Increased cooperation pre-hearing led to better hearings • Efficient handling of exhibits • Preparation • They tended to be well prepared, perhaps based on concern for the unknown • Presentation of testimony. • Advance technology testing and training • All on time • Developing a workable protocol for virtual hearings • Screen share for exhibits • Ensured in advance that witnesses have the exhibits • Nothing in particular • Screen share • Gather client reps and witnesses in one location to extent possible. • Prepared and not doing as much on the fly • Use of screen sharing • Use of virtual demonstratives • Cooperation in use of service providers to handle technical aspects including breakout rooms, exhibits and witnesses • Using tech assistants to display exhibits • Being organized and prepared • Copies of exhibits in advance of the hearing. • Skill in sharing screens to show exhibits	documents, even got-you documents. • Not late after breaks • Sharing a common bundle or file of documents to be used • Assistance of IT professionals • More succinct • Advance agreements re admissibility of documents • More fluid with exhibits • Integration of case manager's operation of virtual platform • Attention to technical aspects of witness presentation • Practicing with the video platform • Practice run • No down time waiting for witnesses; witnesses always available by a simple text or email • Tested each witnesses' tech support • Use of private "rooms" for conferring with clients/witnesses. • Good camera • All exhibits organized and available on encrypted thumb drives to panel • Enhanced vitality • Exhibits given to panel in advance • Sequestering of witnesses • Proficient use of screen share feature • Less inclined to try to intimidate witnesses or the arbitrator	• Easier to avoid personality disputes • Presenting witnesses only once, with cross not limited to direct; ease of presenting foreign witnesses • "Single use" of remote connection • Using a reputable third-party platform provider • Work w/opposing counsel re: rules for presentation • Understanding how break out rooms work • Timely submittal of exhibits. • Effectively cross-examining on a video platform. • Counsel were prepared • Good technology protocol • Good knowledge/ use of technology • Documents

• Skillful use of screen-sharing for highlighting documents • Screen sharing to display exhibits • Used independent providers to handle video • Had specific tech person to deal with document sharing • Flexibility in scheduling international witnesses in different time zones. • Counsel in some cases were clearly comfortable with videoconference platforms, probably because of sufficient practice, so PRACTICE, PRACTICE, PRACTICE. • Prepared with appropriate equipment and software/app • Showed flexibility in scheduling witnesses to appear • Good lighting • Close connection with computer and information there available. • Recording live • Efficient use of exhibits • Counsel were less likely to ask irrelevant questions demanded by clients because they were not in the same room as the client in most of the cases • Focus on panel • Established order when each witness would appear • Exhibit software • Document handling • Working out in advance the efficient presentation	• Making sure technical issues were resolved in advance. • Developing good "remote hearing protocols" so that they knew precisely how to present documents on cross x to adverse witnesses • Succinct presentations • Effective use of "share my screen" interactive exhibits such as spreadsheets for experts • Pared down presentations • Planning for possible technology issues • Hiring court reporting services with experience or expertise relative to video proceedings • Being capable of screen sharing with minimal fuss • IT people at the hearing to help with logistics and getting docs on screen • Making sure witnesses had proper access. • Learning how to make their oral arguments as effective as a newscaster or persuasive politician. • Increased the speed of the proceeding • Training and provision of equipment to witnesses if necessary • More succinct. • Skilled use of exhibits • Translations/interpreters	

of documents at the hearing • Being skilled at presentation of evidence remotely • Better prepared and organized • Witness alone in room while testifying • Counsel decided the needed witnesses • Exhibit display on screen in real time • Document sharing • Deft use of technology (e.g., shared screens) • Being familiar with the process • Counsel who dressed and acted with formality. • Gathering their own teams in separate conference rooms, with different counsel presenting different witnesses • Shared exhibits on screen • Use of documents • Timeliness • Effective use of highlighted exhibits for direct and cross • Demonstrative Exhibits • Planning ahead for use of exhibits and ppts • Hiring 3rd party to organize and present documentary evidence • Being careful with camera and audio setup • Exhibits circulated in advance and in order of order • Professional technical assistance		

• Sharing screen facilitates document handling and presentation • Not significantly different from in person hearings • Not speaking at the same time. • Making sure that the arbitrator had the exhibits • Their listening to and following the direction of the Panel/Arbitrator. • Learning how to use the video/audio technology to get their presentation across effectively. • Brevity • Use of court reporter to control the proceedings • Use of electronic, i.e. graphic, renderings to present evidence • More polite. • Efficient time use • Practice technology		

XXII. Question 22

What were the most significant mistakes you saw counsel make in relation to the virtual proceedings? (Please list separately and in a few words if possible.)

A (76)	B (39)	C (15)
• Failure to properly identify exhibits • To interrupt each other. • Too many people in counsel room, so hard to see counsel • No mistakes • They didn't prepare witnesses for the technology challenges of virtual hearings	• They DIDN'T practice the presentation of digital evidence beforehand • Fumbling with exhibits, audio or video • Handling of exhibits. • Counsel talking over one another • Lack of formality • Inattention to technological matters	• They DIDN'T test the technology beforehand • Poor lighting, not looking at the camera • Lack of discipline in questioning witnesses. • Failing to apologize upon making a forgivable mistake • Poor camera position • Not paying attention and staying focused

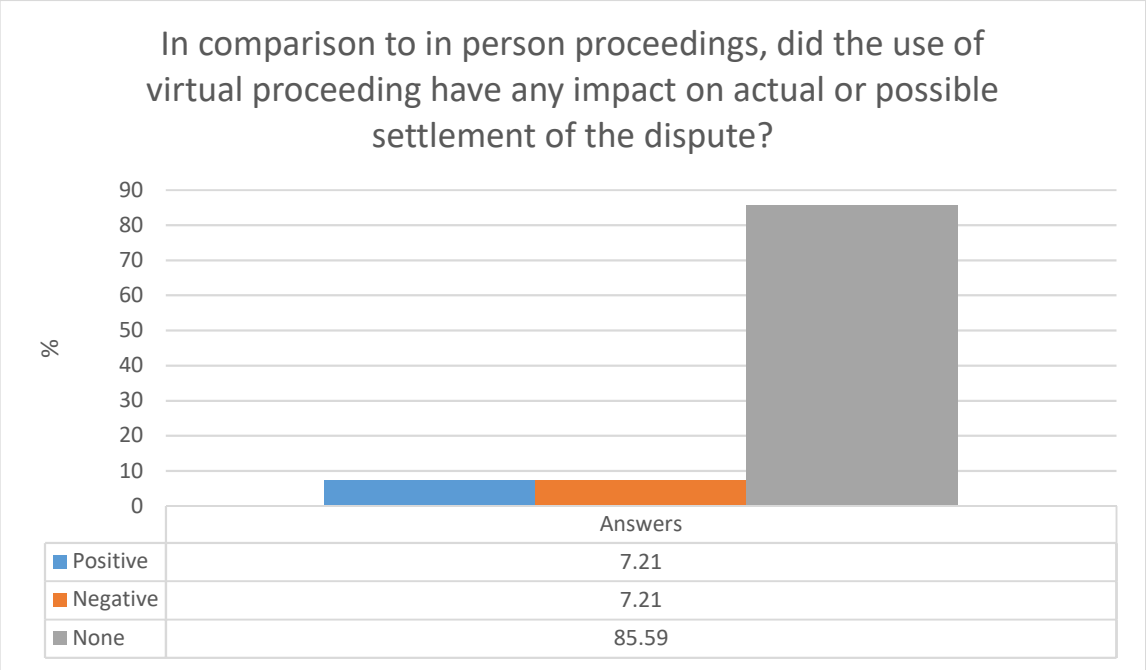
• Not prepping their witnesses on zoom • Technical confusion. • Assuming arbitrator would not give full opportunity to make points • Unprepared or unfamiliar with medium • Not ensuring that client wasn't texting answers to a witness • Varied. • Nothing new. Just amplified the typical mistakes • The wrong slide it document • Bad use of time • Inattention to witness availability to access documents • None, really • None • N/a • Lack of familiarity with presentation of documents virtually • N/a • Inadequate attention to how documents would be introduced • Poor handling and designation of exhibits • Technical trouble • Time management • Not doing the items listed above • Poor lighting • Didn't arrange for witness to have exhibits • Nothing in particular • Lack of familiarity with tech • Unfamiliarity with virtual platform	• Connection issues resulting in delays • Poor sound quality on counsel's end. • Cannot view entire room • Poor camera quality • Poor technical setup - either witness and counsel not visible or too far away • Discomfort due to lack of familiarity with tech • Witnesses inadequately prepared in advance • Harder to coordinate witnesses on zoom • Lack of formality • Tendency by some counsel to treat the proceedings with less decorum because of the absence of physical facility and personnel, including arbitrators • Having inadequate facilities (microphones, lighting, etc.) • Witnesses who had not practiced • Not knowing how to use zoom, particularly screen sharing • Occasional distraction of home environment • Document confusions • Some appeared uncomfortable with the platform. • Inept use of Zoom features • Technology issues • There seemed to be more leading questions on direct • Doing too little to relieve tedium • Document handling • Use of a conference room with multiple people but	• Inadequate preparation of witnesses for virtual proceeding • Connectivity • Some occasionally forgot that their microphones were live.... • Failure to prepare witnesses for the technology • Difficulty with handling of exhibits • Excessive reliance on verbal explanations where an exhibit would have been more effective. • Trying to handle the platform themselves • Inability to use screen sharing • Mumbling, inaudible commentary.

• Witnesses not familiar with technology • The wrong slide it document • Loss of control of experts, who tend to cross the line between expert testimony and advocacy. • Disorganization with exhibits • Witnesses without exhibits • None • Allowing clients to speak with witness during cross • Ineffective and cumbersome use of separate web-based repository for exhibits • Hadn't considered difficulty or ease of conferring with client • None • Failure to prepare witnesses • Some were unfamiliar with the technology. • Not being familiar enough with using videoconference platform. • None • Bad lighting; bad camera • None related to virtual format • Time lapse in getting next witness up before panel • Counsel seemed less prone to return to the hearing "locale" on a timely basis • Failing to focus on panel • Witness not ready at scheduled time • None • Equipment malfunctions • Inefficient handling of exhibits via videoconference	only one camera and microphone • Interpretation of foreign language • Not preparing witnesses properly for this format • Not agreeing on how to handle whether counsel can speak to his/her own witness on “cross” if called for direct by an adverse party • Aggressive cross-examination came across as bullying • Not planning ahead for technology issues • Failure to properly prepare for video proceedings • Poor camera placement • Interruptions • Late submittal of hard copy exhibits. • Whining about virtual technology. • Boring, stilted oral arguments.	

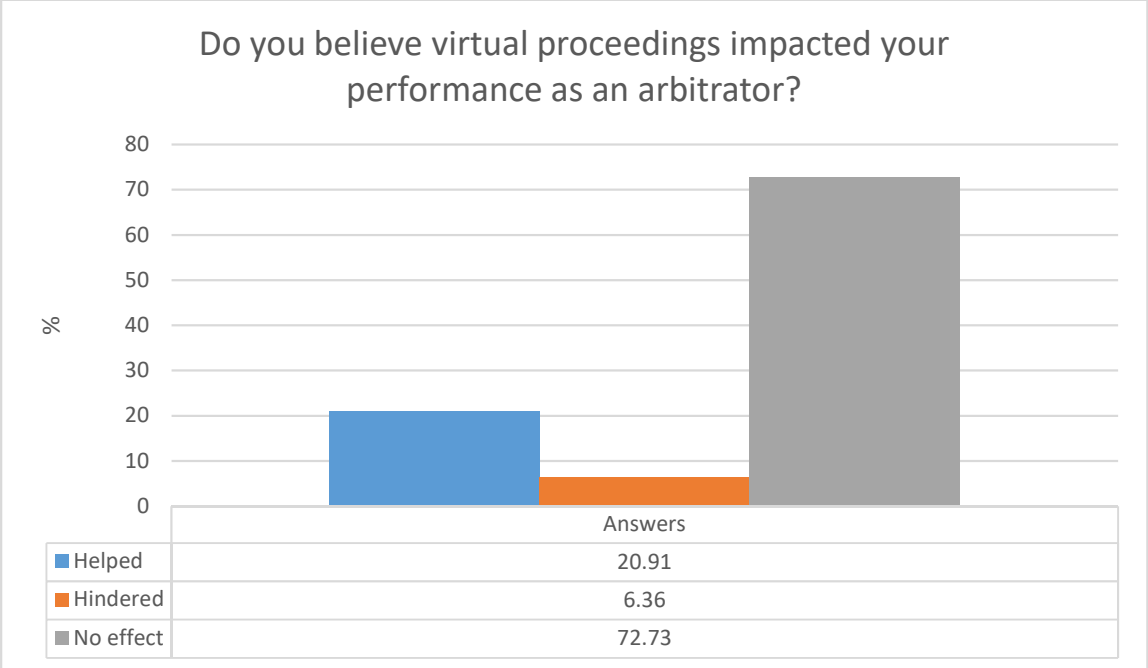
• Not making eye contact with arbitrator • Ineffective cross examination • Single monitor • Cross examination • Awkward use of technology • Not understanding the process • Relying too much on “pre-canned” power point scripts and not having the actual documents in front of them when they were referred to and parts shown on screen share • Poor use of available time • More than one person using the same remote connection • Demeanor (whispering, not paying attention when he/she wasn't the speaker • Not planning ahead • Poor or faulty equipment • Audio problems, especially echo or varying volumes • Unable to locate exhibits, putting the wrong ones on the screen • Even with tech help, tech problems are inevitable • None • Speaking at the same time. • Lack of experience with virtual technology. • Lack of focus in putting forth case. Not looking directly into camera. • Technical issues • Concise organized presentations matter more • Unsophisticated technology.		

• Documents		

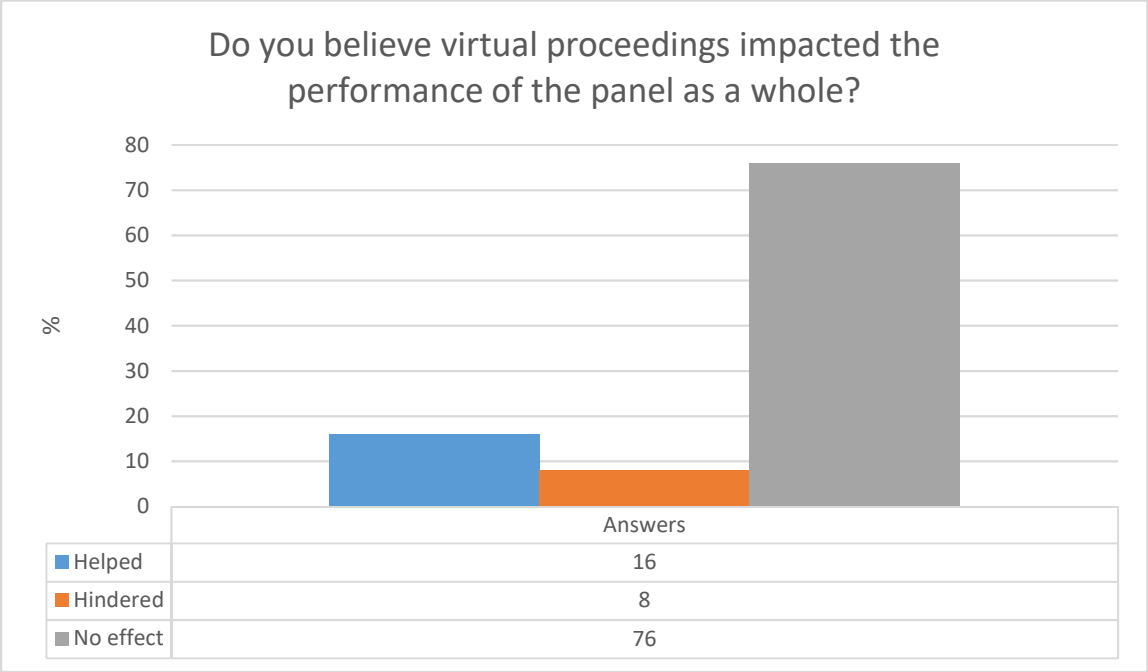
XXIII. Question 23 (111 answers)



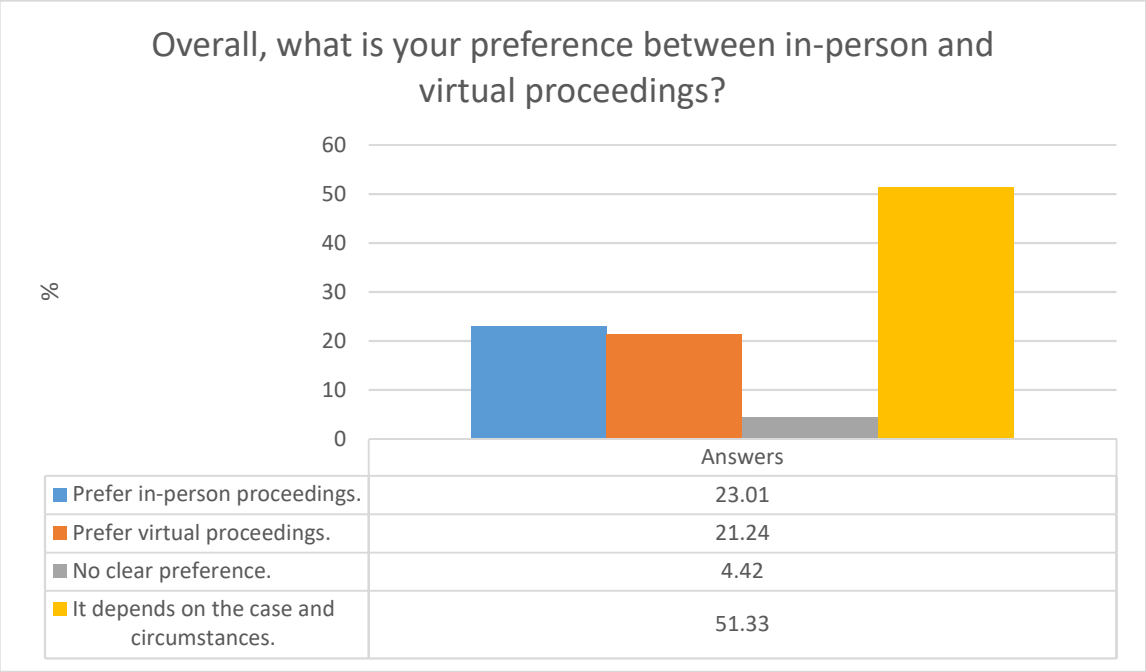
XXIV. Question 24 (110 answers)



XXV. **Question 25** (100 answers)



XXVI. **Question 26** (113 answers)



XXVII. Question 27 (40 answers)

Have you had a bad experience/horror story from a remote arbitration that you are willing to share? If so, please enter your name and provide a quick summary of the experience in your response.

- One side had a camera placement that made the witness look miles away. This was rectified but reluctantly by the offending party.
- None
- I learned the hard way to create a separate room for the arbitrators to "lounge in" during virtual arbitration hearings when one of the arbitrators began a seemingly innocuous discussion with a witness during a break. The witness reminded the arbitrator that the witness had appeared before him years earlier and the arbitrator then said "Let's do drinks when this is over...", which caused ALL KINDS of problems, disclosures, etc. Best to sequester arbitrators during breaks to avoid these kinds of spontaneous interactions.
- Carol Heckman - A witness testified from her bed using a cell phone zoom connection, with an unsteady camera and dressed in pajamas
- None.
- None.
- No
- Had no bad experience.
- Bill Crosby- The only downside is that it is easier for counsel to be discourteous in a virtual proceeding. I had once case where I had to threaten to mute the mic of one counsel because he kept interrupting. With that said, the fact that I could mute his mic was a powerful tool that kept counsel in check.
- Not really
- All good so far.
- Aside from a few issues with the presentation of documents and a few connectivity issues, I haven't had any really bad experiences with virtual hearings.
- No
- N/a
- No.
- None
- No
- Not applicable
- None.
- No
- No, and I'll wager all "horrors" were preventable and fixable.
- None
- No
- Just technological mishaps of various sorts
- No horror stories. All my remote arbitrations have proceeded smoothly and without negative incidents.
- No.

- Third party witness in a restaurant franchise case testifying from the restaurant kitchen while cooks are working in the background
- No
- Nothing really that bad
- None.
- None. I am a big proponent of remote hearings as a way to save costs and arbitrator time, with no loss of ability to decide the case fully and fairly
- No
- Just tech problems
- One witness had to use his cell phone to join because the set up in his office was not working. The cell phone is a great backup.
- Tech difficulties are inevitable and disruptive/ annoying
- No.
- None; zero; bupkis.
- No
- None
- NA

XXVIII. **Question 28** (41 answers)

Tell us what you want us to know on the general topic of virtual proceedings that we have not asked you about?

- I would like feedback from the litigants as to the level of performance by the arbitrator.
- They should be an option if both parties agree.
- They should be a commonly used option, easily accessible under relevant rules and laws. Practitioners should have reasonable training/ experience and access to reliable tech. Use should be based on practical choices related to cost, availability and related rather than simply "preference" without substantive reasons. Where parties cannot agree, the arbitrator, administrative body or in worst case court should make the decision on the above standards.
- Arbitration Organizations like the AAA need to update their rules to expressly allow virtual hearings. In ad hoc arbitrations, arbitrators need to know how to handle the technology on their own, especially if it will be digitally recorded to create a record. You don't want parties, their counsel or their IT staff responsible for taking and preserving the record. If a hearing is recorded to create a record, then serious consideration needs to be given to cyber-security issues.
- Some lawyers think that cross examination is less effective in virtual proceedings. I would ask if arbitrators they agree or disagree with that view
- Change is inevitable.
- When all counsel choose virtual, for whatever reason, they will make the format work smoothly

- Partially "virtual" arbitrations are not new. Arbitrators have been hearing testimony via videoconference from witnesses in countries outside the seat for years. Fully virtual hearings could be difficult in many respects for lawyers and panel members. Issues include that fatigue and stress may be higher because there are no interludes of social downtime. Technical staff is more likely to be necessary, increasing cost. Some physical exhibits cannot be effectively presented and a real site visit is impossible.
- Overall, I strongly believe all arbitrations, particularly international arbitrations should tilt towards or be virtual arbitrations. As virtual proceedings are a GREAT EQUALIZER and COST REDUCER.
- I think they are very useful and should continue to be used now that lawyers and arbitrators have become accustomed to them.
- Saves money, time. Easy to use.
- Nothing beyond what you have already asked about.
- During the pandemic and as it recedes, virtual proceedings have the potential to massively increase access to dispute resolution processes to many more disputing partners. It needs to be evaluated as an access to justice issue because it has the potential to significantly reduce the cost of the process and increase diverse participation.
- You've covered things from my perspective.
- It's here to stay, whether total or partial virtual proceedings
- How virtual proceedings affect, benefit, or detract from the parties or public
- The economic cost savings are gargantuan. I believe that they are here to stay for that reason, and because there is little degradation in quality, if any.
- The institutional rules should be adapted to encourage hybrid hearings where appropriate and develop guidelines for their conduct.
- Should be encouraged if only for the economy to the parties.
- A recent law review article cites statistics purporting to show that individual claimants win fewer cases in virtual than in-person proceedings, but the article appears deeply flawed. (David Horton, "Forced Remote Arbitration," 108 Cornell L. Rev. [upcoming])
- Did absence of geographic considerations expand the pool of potential arbitrators such that we may have more diversity in selection of arbitrators
- Not applicable
- They are here to stay and may be more common than in person in future
- No more anecdotal stories about being able to judge the credibility of witnesses better in person. Let's see data and research over the last three -5 years
- They have their time and circumstances; probably the "best" solution in many cases is the hybrid model, combining virtual for pre-hearing activities, and then in-person hearings where feasible, supplemented by including some witnesses remotely, where necessary or helpful.
- Nothing
- None
- Virtual proceedings now are more likely to be used as a useful alternative, especially for remote witnesses or for cost reasons.
- In my opinion virtual hearings offer the arbitrators at least as good a way to assess witness credibility as in person hearings.
- Virtual proceedings are very intense and it is important to have regular breaks.

- I think it would be good to have specific courses on how to manage and conduct virtual proceedings, including the use of various remote platforms, tips for handling exhibits, break-out rooms, etc.
- How can we convince more counsel and parties to continue to use remote access hearings even after the pandemic ends? And, absent a pandemic, must we have hearings live if at least one party wants it? How do we fairly decide the issue if one party wants a remote hearing to save on costs and time, and the other opposes it?
- Survey is too long.
- None
- Virtual proceedings are here to stay and, over time, participants will develop new tools to increase their effectiveness. Eliminating, or reducing, the constraints of travel and concomitant expense will become even more compelling factors as time goes on.
- Adequate preparation of counsel parties and witnesses is a sine qua non to a successful proceeding.
- The use of a qualified third-party host is essential so arbitrators can concentrate on the counsel, witnesses and evidence being presented.
- The cost savings in multi-party arbitrations justifies their being held virtually. Counsel, party representatives, arbitrators do not have to incur travel, lodging and related expenses which are significant. Additionally, the "safe" practices are more-or-less a joke. They are a complete crapshoot as to whether they will be effective or not.
- They are here to stay, especially for short and simple arbitrations. They are much more cost effective and convenient. They are not a substitute for in-person hearings in large, complex disputes. They will be used for addressing procedural matters. There is absolutely no need to meet in-person for such procedural matters. Much more cost effective and convenient.
- Technical training and rehearsal in advance is a must
- The way documents are provided to the panel and witnesses is a critical element

Doc. No. 17

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PUBLIC NOTICE

REGARDING NEW LOCAL RULE 16.6
SCHEDULING AND PROCEDURES FOR PATENT CASES

After public notice dated August 14, 2008 and time for public comment having expired regarding proposed new Local Rule 16.1.P (now amended to be Local Rule 16.6), the Judges of the United States District Court for the District of Massachusetts have adopted new Local Rule 16.6 in the form attached hereto effective immediately. This rule was proposed by a Task Force of the Boston Patent Law Association to provide special scheduling and procedures for cases involving claims of patent infringement. The provisions of the rule have been developed, according to its proponents, to "help provide certainty and order to patent litigation and are intended to be neutral as between patentee and accused infringer." The Judges have found great merit in the proposal and accordingly this rule was adopted on November 4, 2008.

Sarah Allison Thornton

November 24, 2008 Clerk of Court

LOCAL RULE 16.6
SCHEDULING AND PROCEDURES IN PATENT INFRINGEMENT CASES

(A) Additional Items for Consideration by the Court and the Parties

In addition to the parties' obligations under Fed. R. Civ. P. 26 (f) and LR 16.1, the parties in cases raising issues of patent infringement shall consider and address in their joint statement under L.R. 16.1 the following issues:

(1) The timing for disclosing initial infringement and invalidity positions;

(2) The process for identifying disputed claim terms, exchanging proposed claim constructions, and claim construction briefing;

(3) The timing of and procedure for the claim construction hearing, including:

- (a) whether the Court will decide claim construction through live testimony at a hearing or based on the papers and attorney argument; and
- (b) the timing of claim construction relative to summary judgment, expert discovery, and the close of fact discovery.

(4) The need for tutorials on the relevant technology, including:

- (a) the form and scope of any such tutorials; and
- (b) the timing for such tutorials.

(5) The identification of dispositive issues that may lead to an early resolution of the litigation.

(6) Whether the court should authorize the filing under seal of any documents that contain confidential information.

(7) Procedures for, and limits (if any) to be placed on, the preservation and discovery of electronically stored information, including:

(a) whether preservation and discovery of electronically stored information should be limited to that located on the parties' active computer systems or extended to backup systems;

(b) the identification of key persons, if any, who should have their electronically stored information produced;

(c) whether production of electronically stored information should be limited to discrete time periods;

(d) whether costs of producing electronically stored information should be shifted, particularly costs of preserving and producing information stored on backup systems.

(B) Scheduling Order

The Scheduling Conference in cases raising issues of patent infringement should result in a special tailored Scheduling Order. A template for such a Scheduling Order is set forth as a default in the Appendix.

APPENDIX

SAMPLE SPECIAL SCHEDULING ORDER FOR PATENT INFRINGEMENT CASES

This appendix sets forth a sample scheduling order for claim construction and related procedures in patent cases *[with suggested timing in brackets]*. These procedures should be viewed as supplementing, not replacing, the LR 16.1 schedule. The Court and parties may incorporate such suggested procedures into the LR 16.1 scheduling order.

(A) Preliminary Disclosures

(1) Preliminary Infringement Disclosure

No later than _____ [30] days after the Rule 16 Case Management Conference, the patentee shall serve and file preliminary disclosure of the claims infringed. The patentee shall specify which claims are allegedly infringed and identify the accused product(s) or method(s) that allegedly infringe those claims. The patentee shall also specify whether the alleged infringement is literal or falls under the doctrine of equivalents. If the patentee has not already done so, the patentee shall produce all documents supporting its contentions and/or identify any such supporting documents produced by the accused infringer. Such disclosures may be amended and supplemented up to ____ [30] days before the date of the Markman

Hearing. After that time, such disclosures may be amended or supplemented only pursuant to ¶ D(1) or by leave of court, for good cause shown.

The patentee may use a table such as that represented below.

CLAIM LIMITATION	**ACCUSED COMPONENT**	**BASIS OF INFRINGEMENT CONTENTION**

(2) Preliminary Invalidity and Non-Infringement Disclosures

No later than _____ [60] days after service of the patentee's preliminary infringement contentions, the accused infringer shall serve and file Preliminary Invalidity and Non-Infringement Contentions. The accused infringer shall identify prior art that anticipates or renders obvious the identified patent claims in question and, for each such prior art reference, shall specify whether it anticipates or is relevant to the obviousness inquiry. If applicable, the accused infringer shall also specify any other grounds for invalidity, such as indefiniteness, best mode, enablement, or written description. If the accused infringer has not already done so, the accused

infringer shall produce documents relevant to the invalidity defenses and/or identify any such supporting documents produced by the patentee. Further, if the accused infringer has not already done so, the accused infringer shall produce documents sufficient to show operation of the accused product(s) or method(s) that the patentee identified in its preliminary infringement disclosures. Such disclosures may be amended and supplemented up to _____ [30] days before the date of the Markman Hearing. After that time, such disclosures may be amended or supplemented only pursuant to ¶ D(1) or by leave of court, for good cause shown, except that, if the patentee amends or supplements its preliminary infringement disclosures, the accused infringer may likewise amend or supplement its disclosures within ___ [30] days of service of the amended or supplemented infringement disclosures.

The accused infringer may use the charts shown below.

CLAIM LIMITATION	**PRIOR ART OR OTHER EVIDENCE**	**BASIS OF INVALIDITY CONTENTION**

CLAIM LIMITATION	ACCUSED COMPONENT	BASIS OF NON-INFRINGEMENT CONTENTION

(3) Disclosures in Declaratory Judgment Actions

In declaratory judgment actions initially filed by potential infringers(*i.e.*, as opposed to being stated by way of answer, counterclaim, or other response to a first-filed complaint for patent infringement), the disclosure requirements of subsections (A)(1) and (2) above apply as if the action had been initiated by the patent holder, except that (a) the preliminary infringement disclosure of the declaratory judgment defendant/patent holder shall be due not less than 90 days after the Rule 16 Case Management Conference and (b), if the declaratory judgment defendant/patent holder does not state a claim for infringement, then only the declaratory judgment plaintiff/potential infringer’s disclosure requirements shall apply.

(B) Claim Construction Proceedings

(1) No later than _____ [120] days after completion of the preliminary disclosures, the parties shall simultaneously exchange a list of claim terms to be construed and proposed constructions.

(2) No later than _____ [20] days after exchanging the list of claims, the parties shall simultaneously exchange and file preliminary claim construction briefs. Each brief shall contain a list of terms construed, the party's proposed construction of each term, and evidence and argument supporting each construction. Absent leave of court, preliminary claim construction briefs shall be limited to _____ [25] pages, double spaced, of at least 12-point Times New Roman font or equivalent, including footnotes.

(3) No later than _____ [10] days following exchange and filing of the preliminary claim construction briefs, parties shall simultaneously exchange reply briefs. Absent leave of court, reply briefs shall be limited to _____[15] pages, double spaced, of at least 12-point Times New Roman font or equivalent, including footnotes.

(4) No later than _____ [15] days following exchange and filing of the reply briefs, the parties shall finalize the list of disputed terms for the court to construe. The parties shall prepare and file a joint claim construction and prehearing statement (hereafter the "joint statement") that identifies both agreed and disputed terms.

(a) The joint statement shall note the anticipated length of time necessary for the claim construction hearing and whether any party proposes to call witnesses, including a statement

that such extrinsic evidence does not conflict with intrinsic evidence.

(b) The joint statement shall also indicate whether the parties will present tutorials on the relevant technology, the form of such tutorials, and the timing for such tutorials in relation to the claim construction hearing. If the parties plan to provide tutorials in the form of briefs, declarations, computer animations, slide presentations, or other media, the parties shall exchange such materials _____ [5] days before the claim construction hearing. In the alternative, the parties may present tutorials through presentations by the attorneys or experts at the claim construction hearing.

(c) The joint statement shall include a proposed order in which parties will present their arguments at the claim construction hearing, which may be term-by-term or party-by-party, depending on the issues in the case.

(d) The joint statement shall limit the number of claim terms to be construed and shall prioritize the disputed terms in order of importance. The Court suggests that, ordinarily, no more than ten (10) terms per patent be identified as requiring

construction.

(e) The joint statement shall include a joint claim construction chart, noting each party's proposed construction of each term, and supporting evidence. The parties may use the form shown below.

TERM	PATENTEE'S CONSTRUCTION	ACCUSED INFRINGER'S CONSTRUCTION	COURT'S CONSTRUCTION

(C) The Claim Construction Hearing (a.k.a. "*Markman* Hearing")

The Court shall schedule a hearing date promptly after the filing of the joint claim construction statement.

(D) After the Hearing

(1) If necessary, the parties may amend their preliminary infringement/non-infringement and invalidity disclosures, noting whether any infringement or invalidity contentions are withdrawn, within [30] days after the Court's ruling on the claim construction.

(2) If the fact discovery period has expired before a ruling on claim construction, and upon motion or stipulation of

the parties, the Court may grant additional time for discovery. Such additional discovery shall be limited to issues of infringement, invalidity, or unenforceability dependent on the claim construction.

(E) Expert Discovery

(1) Ordinarily, expert discovery, including expert reports and depositions, shall be scheduled to occur after the close of fact discovery.

(2) If expert discovery has been substantially conducted before a claim construction ruling, then the Court may grant additional time for supplemental expert discovery. Such additional discovery shall be limited to issues of infringement, invalidity, or unenforceability dependent on the claim construction.