

LEGAL PRACTICE

Merits-based Review of an Arbitration Award: An ‘Appealing’ Option?

by Theodore K. Cheng

An arbitration proceeding is intended to arrive at a final and binding resolution of a dispute in a fair, expeditious, efficient, and cost-effective manner. Consistent with that intention, it is generally not possible to obtain a comprehensive merits-based review of an arbitration award, as one might expect in an appeal of a federal or state court judgment. Rather, subsequent review of an arbitration award is severely limited in scope, with one notable exception: where the parties elect to apply appellate arbitration rules to the underlying award. This article will discuss the availability of these optional rules and some considerations for practitioners and disputants in considering whether to adopt them.

The Lack of Merits-based Review Over Arbitration Awards

Under the Federal Arbitration Act (FAA),¹ which generally governs disputes involving interstate commerce and broadly preempts state arbitration laws,² an aggrieved party may only petition a court to vacate the award on discrete, enumerated grounds:

- where the award was the product of corruption, fraud or undue means;
- where the arbitrators exhibited evident partiality or corruption;
- where the arbitrators committed “misconduct,” such as refusing to postpone the hearing or hear relevant evidence; or
- where the arbitrators exceeded their powers.³

Moreover, in *Hall Street Associates, L.L.C. v Mattel, Inc.*, the U.S. Supreme Court held that these grounds are exclusive and may not be supplemented by an agreement of the parties.⁴

Because review of arbitration awards by courts is narrowly circumscribed, the arbitration process generally suffers from

the criticism that parties have limited recourse in the face of an adverse award. Parties often exhibit reluctance in even contemplating arbitration as a dispute resolution mechanism, espousing that one of arbitration’s shortcomings is that the arbitrators simply get the law wrong, leading to incorrect results with no availability of appellate review. Risk-adverse parties view such a system as potentially problematic, decrying the absence of meaningful checks and balances in the arbitration process, namely, that the arbitrators are relatively unconstrained by statutes, case law, or rules of evidence, and their subjective notions of fairness can lead to one-sided awards.

Thus, notwithstanding the finality that arbitration can provide (saving parties both time and cost), many will not accept the risk accompanying the extraordinarily wide latitude given to arbitrators to render decisions because it is virtually impossible to know the outcome in advance and how much it will cost. This risk may be particularly poignant in so-called ‘bet-the-company’ cases (or high-stakes litigation) where the fate of an entire business may be at stake and the risk of an irrational award has dire consequences.

Arbitration Providers Offer Merits-based Review of Awards

In response to these concerns, and to encourage more parties to use arbitration as a dispute resolution mechanism, over the years many arbitration providers have offered parties the option to agree upon an appellate review process as part of their agreement to resolve their dispute in an arbitral forum. Such an optional appellate review process would generally provide for a different set of arbitrators (usually a panel of three, but sometimes a single arbitrator) to review an award on the merits, with the ability to correct erroneous decisions.

For example, in 1999, the International Institute for Conflict Resolution & Prevention (CPR) first promulgated its Arbitration Appeal Procedure, to which it has made editorial revisions over time.⁵ In 2003, JAMS issued its Optional Arbitration

Appeal Procedure.⁶ Most recently, in 2013, the American Arbitration Association (AAA) set forth its own Optional Appellate Arbitration Rules.⁷ These rules prescribe how, when, and on what grounds the parties may appeal an arbitration award. Under all three sets of rules, the providers require a record of the original, underlying arbitration proceeding, prohibit the appellate tribunal from remanding to the original arbitrator(s), and include proposed language for parties wishing to agree to an appeal process. However, there are marked distinctions between the rules, especially on the grounds for appeal.

Under the CPR appellate rules, an appeal of an award rendered in any binding arbitration conducted in the United States (regardless of whether it was administered by CPR or conducted under CPR's arbitration rules) may be filed where: 1) the arbitrators "were required to reach a decision in compliance with the applicable law and rendered a written decision setting forth the factual and legal bases of the award"; and 2) there is a record that includes all hearings and evidence from the underlying proceeding.⁸ Unless the parties agree on a different time period, the appeal must be commenced within 30 days of the date on which the original award was received by the parties. CPR will then arrange for the appointment of an appeal tribunal (comprising three members, unless the parties agree to only one), with input from the parties, from a roster composed of former federal judges or such others as CPR deems appropriate. The rules also address the specifics of briefing and oral argument, and even permit the tribunal to request that the parties supplement the record as it may deem appropriate, in order to fulfill its function.

The tribunal may issue an appellate award that modifies or sets aside the original award, but only if the original award: 1) "contains material and preju-

dicial errors of law of such a nature that it does not rest upon any appropriate legal basis"; 2) "is based upon factual findings clearly unsupported by the record"; or 3) is subject to one or more of the grounds for *vacatur* under the FAA.⁹

The tribunal's decision (which may simply be a reinstatement of the original award) must be set forth in writing and include a concise explanation for the decision, unless all parties agree otherwise. Notably, the rules also provide for the appellant to reimburse the appellee's attorneys' fees and costs if the original award is affirmed, as well as permit the tribunal to apportion fees and costs if the award is modified or reversed. They further maintain the confidentiality of the appellate proceedings. Regarding timing, the rules only call for the parties and the tribunal to use their best efforts to avoid delay and assure the appeal will be concluded within six months of its commencement. Although the parties may not pursue judicial review while the appellate arbitration is pending, they reserve the right to petition a court to judicially review the appellate award under the FAA once the appeal process has concluded. However, and in keeping with the cost-shifting paradigm of the rules, if judicial review does not result in the *vacatur* or substantial modification of either the original award or the appellate award, the party seeking that review must reimburse the opposing party for its attorneys' fees and costs incurred in connection with the additional review.

A similar procedure is afforded under the JAMS appellate rules, including the appointment of a three-member appeal panel and the specifics of preparing the record on appeal, briefing, and oral argument. Notably, however, these rules only apply to awards that have been rendered under the JAMS arbitration rules. The appeal must be served on JAMS and the opposing party within 14 calendar days after the original award

has become final, although the original award would not be considered final during the pendency of the appellate process for purposes of further judicial review.

Regarding the standard of review, the rules account for differences in geography and jurisdiction: "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."¹⁰ Moreover, "[t]he Appeal Panel will respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules," which generally affords wide discretion to the arbitrators on evidentiary issues.¹¹ The panel is authorized to affirm, reverse, or modify the original award, and it may re-open the record in order to review evidence that had been improperly excluded by the original arbitrators or evidence that may now be necessary in view of the panel's interpretation of law. Absent good cause, the panel must render its decision in a concise written explanation within 21 calendar days of the date of either the oral argument, the receipt of new evidence, or the receipt of the record and all briefs, whichever is applicable or later. At that point, the award will be deemed final for purposes of further judicial review.

Like the CPR appellate rules, the AAA appellate rules may, by stipulation or contract, apply to awards regardless of whether it was administered by AAA (or its international division, the International Centre for Dispute Resolution). The appeal must be commenced within 30 days of the date on which the original award is submitted to the parties, and only on the grounds that the original award is based upon "(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."¹² AAA will then arrange for the appointment of an appellate tribunal of three arbitrators (unless the parties opt for a single arbitrator) from

its appellate panel (or, for an international dispute, from its international appellate panel). The AAA appellate rules also address the specifics of preparing the record on appeal, briefing, and oral argument. Within 30 days of service of the last brief, the day following the conclusion of oral argument, or other good cause for modification, the tribunal must issue its decision, which must be in writing and include a concise summary of the decision and an explanation for it. Like the CPR appellate rules, the appellant may be assessed the appellees' attorneys' fees and costs if the tribunal does not determine that the appellant is the prevailing party. Likewise, the rules also maintain the confidentiality of the appellate proceedings. Before the conclusion of the appeal process, the original award is not considered final for purposes of any subsequent judicial proceedings, but once the appeal process has been completed, the tribunal's decision becomes the final award for those purposes.

Thus, in varying ways, with emphases on setting forth certain incentives and disincentives, the three main domestic arbitration providers offer disputants the option to have a merits-based review in advance of, or in place of, subsequent judicial review under the FAA. Of course, as is the case with all of the above rules, the parties may contractually alter the provisions to suit their particular needs, circumstances, and approaches. For example, they may elect to entirely waive the right to seek statutory *vacatur*, require the appellate panel to issue a reasoned award, only trigger an appellate process if the original award exceeds a certain floor monetary amount, or even bar the appellate procedure from applying to awards that had been rendered unanimously by the original arbitration panel. The parties can also choose to incorporate these rules into their original pre-dispute arbitration clause, or agree to an appellate arbi-

tration process in a separate post-dispute agreement. However, it seems unlikely the parties would agree to do so after the original award has been issued, unless either both sides are dissatisfied with the award or the prevailing party has doubts about whether the award can be confirmed, or, conversely, whether the award is vulnerable to *vacatur*.

Considerations Before Agreeing to Adopt an Appellate Arbitration Process

The parties and their counsel should consider various issues and their practical ramifications before pursuing an appellate arbitration process so that, if such a process is adopted, it will best serve their needs, as well as more likely be accepted by the other disputant(s) and their counsel. For example, the selection of the applicable appellate arbitration rules can have significant consequences. The grounds on which an appeal may be filed differ markedly and should be appropriate for the nature of the dispute. At least in the case of the CPR and AAA rules, cost-shifting to the prevailing party can also occur, affecting not only the likelihood of whether an appeal will be filed, but also how the underlying arbitration itself is conducted. At bottom, an appellate arbitration process will likely incur some additional cost and delay, as an entirely separate process will be invoked, with its own attendant fees and cost structures, and with the finality of the arbitration award postponed until the appellate tribunal renders its award.

However, for those parties who seek an additional level of review short of the limited remedies available in the courts, an appellate process is worth considering. Indeed, focusing attention on possibly incorporating an appellate arbitration process can permit the parties to contemplate the propriety of using a single arbitrator for disputes that might have ordinarily counseled the use of a

three-member panel (such as in a bet-the-company case) precisely because of the availability of an additional merits-based review and concomitant remedies that would not be available in court. A single decision maker in the underlying arbitration, perhaps even coupled with a single appellate arbitrator, could also potentially reduce both the time and cost to finality, somewhat counterbalancing the additional cost and delay of adopting an appellate process in the first instance.

In the end, the balance is one of trading off the usual expeditiousness of a straightforward arbitration process against possibly increasing the parties' comfort in reaching the correct result. Adopting an appellate arbitration process may not be appropriate in every case, but it should certainly be one consideration in the overall dispute resolution strategy. Any discussion among the parties of a possible appellate process would undoubtedly lead to additional negotiations over the scope of the pre-dispute arbitration clause, or at least serious discussions before entering into a separate post-dispute agreement that adopts such a procedure. Those discussions alone would be worthwhile, as they could potentially increase confidence in the arbitration process as a whole. ☺

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ENDNOTES

1. 9 U.S.C. § 1 *et seq.*
2. For a review of the New Jersey Arbitration

Act (NJAA), N.J.S.A. 2A:23B-1 *et seq.*, which was enacted in 2003, and its interplay with the FAA, see Laura A. Kaster, The Revised Uniform Arbitration Act at 15, *Dispute Resolution Magazine* (Winter 2016) at 38, available at http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/winter2016/9_Kaster_Winter_2016.authcheckdam.pdf.

3. 9 U.S.C. § 10(a). Even a modification of an arbitration award is limited to very narrow grounds. See 9 U.S.C. § 11.
4. See 552 U.S. 576, 581-84 (2008). For a discussion on whether parties could increase the level of judicial review or, alternatively, limit the scope of judicial review or even waive or eliminate it altogether (questions left open by *Hall Street*), see Theodore K. Cheng, Developments on Judicial Review Under the FAA After *Hall Street*, *ABA Alternative Dispute Resolution*, Vol. 19, No. 2 (July 30, 2015), available at <http://apps.americanbar.org/litigation/committees/adr/articles/summer2015-0715-developments-judicial-review-under-faa-hall-st.html>. See also Paul Bennett Marrow, A Practical Approach for Expanding the Review of Commercial Arbitration Awards: Using an Appellate Arbitrator, *AAA Handbook on Commercial Arbitration*, Chapter 28 (3d ed. Juris Net, L.L.C. 2016) (arguing that, providing for an arbitral appeals process would help overcome the risks in having an arbitrator's award become final without a merits-based review), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754455.
5. CPR Arbitration Appeal Procedure and Commentary (as revised 2015) (CPR App. Rules), available at <https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf>.
6. JAMS Optional Arbitration Appeal Procedure (effective 2003) (JAMS App. Rules), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.
7. American Arbitration Association Optional Appellate Arbitration Rules (effective Nov. 1, 2013) (AAA App. Rules), available at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9e172798-c60f-4de0-9ebc-438e54e78af8%7D_AAA_ICDR_Optional_Appellate_Arbitration_Rules.pdf.
8. CPR App. Rule 1.3.
9. CPR App. Rule 8.2.
10. JAMS App. Rule (D).
11. *Id.*
12. AAA App. Rule A-3(a)(i); *id.*, A-10.



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A publication of the Dispute Resolution Section
of the New York State Bar Association

Message from the Chair

Thanks to our active and passionate membership, 2015-16 has been a terrific year for the Dispute Resolution Section. We had the highest attendance ever at our Annual Meeting on January 29, 2016 (Rona Shamoon and Lela Love, Co-Chairs) and Fall Meeting on October 30, 2015 (Abigail Pessen and Theo Cheng, Co-Chairs). At the Fall Meeting, we were honored to have Honorable Judith Kaye speak on one of the panels, shortly before she passed away in January 2016.



David C. Singer

The Section presented its annual three day intensive training programs on arbitration in June (led by Charlie Moxley) and mediation in March (taught by Simeon Baum and Steve Hochman), which were both excellent and well attended. For the first time, a second intensive mediation training is scheduled for September 2016. Our Annual Diversity Program was held on April 12, 2016, with excellent panels that addressed the important challenge of increasing diversity within the dispute resolution bar, both as advocates and neutrals.

In order to expand its reach throughout New York State, the Section presented a program in Albany, entitled "Saving ADR—Maximizing Efficiency and Economy in Arbitration" (Paul Jureller, Chair); and Suffolk/Nassau Counties, entitled "Making the Most of Commercial and Real Estate ADR: Representing Your Clients in Arbitration and Mediation" (David Abeshouse and Erica Garay,

Co-Chairs). Two presentations, entitled "Valuable Tools in Avoiding and Resolving Employment Related Disputes" and "Resolving Disputes through Arbitration and Mediation," respectively, were made to the New York State Council of Industry (Manufacturers Association of the Hudson Valley) in Newburgh and New Paltz (Carolyn Hansen and David Singer). All programs were highly successful and appreciated by those who attended.

The Section also created, developed and hosted its first law school arbitration competition, which took place in November 2015 and attracted 14 law school teams from throughout New York State and New Jersey that participated in the two-day arbitration competition (organized and run by John Wilkinson, Ross Kartez, Liz Champnoi, Richard Mattiaccio, Rona Shamoon). The program was a tremendous success. The program will continue on an annual basis. The next competition will take place on November 18-19, 2016 and will be named the second annual "Judith S. Kaye Arbitration Competition."

The Section, determined to honor the memory of Judith Kaye in other ways, created a special edition of the *New York Dispute Resolution Lawyer* in her honor, which

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The Case for Bringing Diversity to the Selection of ADR Neutrals¹

By Theodore K. Cheng

Addressing the dearth of women and people of color who are selected to act as neutrals in the alternative dispute resolution (ADR) field has long been a challenge.² Historically, not only have the various rosters and lists maintained by private ADR providers (and courts, for that matter) failed to reflect the pool of available and qualified women and minority neutrals, but the selection process has also repeatedly afforded opportunities to only a small percentage of this growing pool. Corporate America's emphasis on diversity and inclusion over the past several decades demonstrates the growing understanding of the value added by promoting a diverse workforce and demanding that its suppliers also be similarly committed. However, while great strides have been achieved in many disparate areas, little to no improvement has been seen in the selection of ADR neutrals.

"[R]equests for proposals for legal work often mandate a certain level of diversity amongst the legal professionals who are anticipated to work on the matter."

It All Began With Workplace and Supplier Diversity

The awareness of the benefits of adopting principles of diversity and inclusion began with a close look at workplace diversity issues. In 1987, U.S. Secretary of Labor William Brock commissioned a study by the Hudson Institute (an independent non-profit organization) of various economic and demographic trends. This study was later turned into a book called *Workforce 2000: Work and Workers for the 21st Century*, which helped develop the business case for diversifying the workforce.³ Specifically, the trends identified by the study suggested that companies needed to make workforce diversification an economic imperative if they wanted to remain competitive and continue to be able to attract workers in a dynamic demographic environment. Thus, companies began measuring diversity, and the costs for failing to pay it heed, in terms of metrics such as retention, turnover, productivity, stock value, revenue/market share, succession planning, and public image. Looking outward, companies sought to expand their customer base to market more to diverse customers. Concomitantly, looking inward, they promulgated policies to diversify their suppliers, principally setting forth criteria and requirements applicable to their procurement processes that looked to the diversity of a

supplier's workforce as part of that supplier's eligibility for continued receipt of the company's business.

Because outside law firms are suppliers of legal services to in-house corporate legal departments, as a natural extension of the supplier diversity initiatives, some companies also began imposing similar criteria and requirements to the legal profession. In 1998, Charles Morgan, BellSouth Corporation's Executive Vice President and General Counsel, authored a document entitled, "Diversity in the Workplace: Statement of Principles."⁴ This document, which was signed by the Chief Legal Officers of approximately 500 major corporations, proclaimed the dedication to diversity in the workplace by corporate legal departments. However, concerned with a lack of progress in this area, in 2004, Roderick A. Palmore, General Counsel of General Mills Corporation, issued "A Call to Action: Diversity in the Legal Profession," which reaffirmed corporate legal departments' commitment to diversity in the legal profession, espousing the mantra that clients deserve legal representation that reflects the diversity of their employees, customers, and communities.⁵ In some sense, this was a natural extension of the companies' obligation to be an equal opportunity employer.

These efforts have resulted in marked changes to the way in which certain corporate legal departments work with outside law firms. Notable, recognizable examples of companies who have embraced these diversity ideals include Sara Lee, Coca-Cola, The Gap, AIG, Microsoft, Shell Oil, DuPont, Eli Lilly, Wal-Mart, Pitney Bowes, and International Paper, just to name a few. For example, requests for proposals for legal work often mandate a certain level of diversity amongst the legal professionals who are anticipated to work on the matter. Corporate legal departments may also more generally require disclosure by law firms of the demographic statistics relating to the legal professionals at the firm. Some companies also now more closely track their legal spending on women and minority-owned firms. As a result, many corporate legal departments have pared down their use of law firms who do not meet their criteria and have generally put pressure on law firms to similarly embrace diversity and inclusion. In doing so, corporate legal departments have clearly stated that they want to be represented by law firms that value diversity as much as they do. Law firms have also moved in parallel. In conjunction with a shift in demographics showing an increase in women and minorities in the legal profession, they have generally sought to diversify their attorney ranks, primarily through recruiting, and then through institutional changes, such as the creation of

affinity groups and sponsoring of mentoring programs to address retention issues.

Curiously, however, unlike the manner in which corporate legal departments select diverse outside counsel, corporations persist in pursuing an outdated approach to the selection of diverse neutrals. Companies largely continue to outsource both the drafting of dispute resolution clauses and the actual neutral selection to outside counsel, abdicating these fundamental strategic decisions to others. Far too much reliance is placed on established networks, word-of-mouth, and the recommendations of the same “usual suspects,” leading to a reluctance to try out someone new and an attendant loss of opportunity to broaden the company’s roster of preferred neutrals. Relatedly, there is a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process, which can exist just as easily in the decision to select the neutrals who will oversee the resolution of the dispute.⁶ The end result—at least in the case with private ADR providers—is the existence of a double-screen problem: a neutral must generally first be appointed to a roster or list, and then either outside counsel or in-house counsel must select the neutral from that list.

Neutrals, after all, are suppliers of services to in-house corporate legal departments as well. Yet, they are not viewed in the same way as outside counsel, let alone the entity who sells the company its reams of copier paper. It is simply not in the consciousness of Corporate America in the same way as other suppliers and vendors. Perhaps some companies have not fully analyzed the tradeoffs—advantages or benefits gained vs. losses or disadvantages incurred—from pursuing diversity and inclusion as one component of a strategy for selecting neutrals. Maybe some companies do not construe law firms and similar professional services providers to be a part of their procurement process, thus exempting them from any applicable supplier diversity requirements. As a result, the diversity and inclusion mandate that appears to have permeated a large swath of corporate legal departments has not trickled down to the selection and hiring of mediators, arbitrators, and other types of ADR neutrals. At the same time, there has been a tremendous increase in the number of ADR practitioners, and, in particular, a large increase in the younger, unseasoned cohort of that population. This likely stems from law schools increasingly offering both substantive courses and experiential clinics devoted to ADR, thereby exposing students to the profession and encouraging them to consider a career as a prospective neutral. Thus, the lack of diversity we see in the ADR profession is not necessarily rooted in an issue of lack of supply. For example, the American Bar Association’s Dispute Resolution Section has put together lists of women and minority ADR neutrals that are publicly available on its website.⁷ There appear to be plenty of women and minority neutrals willing and able to serve. They just need to be given the opportunity to actually do so.

Why Is Diversity in ADR Important?

By any measure, the state of diversity in ADR is dismal.⁸ Yet, there are sound rationales for why diversity is and should be an important (although perhaps not the sole or overriding) factor in selecting an appropriate neutral to resolve a dispute.

“That same dedication and resolve should be applied to improve the paucity of women and people of color who are selected to act as neutrals in the ADR field.”

First, because ADR processes are essentially the privatization of a public function—namely, a proceeding brought in a judicial forum to resolve a dispute—the need for diversity is paramount.⁹ As is the case for the judiciary, an ADR profession dominated by individuals of one background, perspective, philosophy, or persuasion is neither healthy nor ideal.¹⁰ Rather, the professionals who sit as neutrals should reflect the diverse communities of attorneys and disputants whom they serve. A diverse pool of neutrals also instills confidence in those constituents and ensures a measure of fairness, public access, and public justice.

Second, particularly in situations where more than one decision-maker has been engaged (*e.g.*, a panel of arbitrators), the process of decision-making itself is generally improved, resulting in normatively better and more correct outcomes, when there exist different points of view.¹¹ Aside from the value of affording cognitive diversity to the panel, having a diverse panel typically adds new perspectives, while destroying the tendency to have the panel engage in unnecessary groupthink, so long as the decision-makers are able to exercise independence of opinion.

For these reasons alone, corporate legal departments should think more strategically when selecting neutrals to serve as arbitrators and mediators on their disputes. There is already a deep-rooted commitment stemming from Corporate America’s workplace and supplier diversity initiatives, and the “Call to Action” has resulted in noticeable changes in the legal marketplace (although there is admittedly more that needs to be done). That same dedication and resolve should be applied to improve the paucity of women and people of color who are selected to act as neutrals in the ADR field.

Endnotes

1. An earlier version of this article was originally published in *ABA Just Resolutions e-News* (November 2015), available at <http://nysbar.com/blogs/ResolutionRoundtable/The%20Case%20for%20Bringing%20Diversity%20to%20the%20Selection%20of%20ADR%20Neutrals%20%28T%20%20Cheng%29.pdf>.

2. See, e.g., David A. Hoffman and Lamont E. Stallworth, "Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity," *AAA Dispute Resolution Journal*, Vol. 63, No. 1 (Feb./Apr. 2008), at 36, available at http://lamontstallworth.org/Articles/PDFS/Leveling_the_Playing_Field.pdf.
3. See William B. Johnston and Arnold E. Packer, "Workforce 2000: Work and Workers for the 21st Century" (Hudson Institute 1987), available at <http://files.eric.ed.gov/fulltext/ED290887.pdf>.
4. See "Diversity in the Workplace: Statement of Principles," available at <http://heionline.org/HOL/LandingPage?handle=hein.journals/busilntom9&div=78&id=&page=>.
5. See "A Call to Action: Diversity in the Legal Profession," available at <http://www.acc.com/v1/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>.
6. See, e.g., Edna Sussman, "Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them," 24 *Amer. Rev. Int'l Arb.* 487 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372307; Linda R. Tropp and Rachel D. Godsil, "Overcoming Implicit Bias and Racial Anxiety," *Psychology Today* website (Jan. 23, 2015), available at <https://www.umass.edu/peacepsychology/sites/default/files/Overcoming%20Implicit%20Bias%20and%20Racial%20Anxiety%20|%20Psychology%20Today.pdf>; Rachel D. Godsil, "Answering the Diversity Mandate: Overcoming Implicit Bias and Racial Anxiety," *New Jersey Lawyer Magazine* (Feb. 2014) at 44.
7. See Women in Dispute Resolution (WIDR) Member Directory of ADR Practitioners (ABA Mar. 2015), available at http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/widr_member_directory.authcheckdam.pdf; Minorities in Dispute Resolution (MIDR) Member Directory (ABA May 2015), available at http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/MIDR-Directory.authcheckdam.pdf.
8. See, e.g., Beth Trent, Deborah Masucci, and Timothy Lewis, "The Dismal State of Diversity: Mapping a Chart for Change," *ABA Dispute Resolution Magazine*, Vol. 21, No. 1 (Fall 2014) at 21, available at http://www.americanbar.org/publications/dispute_resolution_magazine/2014/fall/the-dismal-state-of-diversity-mapping-a-chart-for-change.html; Gina Viola Brown and Andrea Kupfer Schneider, "Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey," 47 *Akron L. Rev.* 975 (2014), available at <http://idealexchange.uakron.edu/cgi/viewcontent.cgi?article=1274&context=akronlawreview>; Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr., and Christopher M. Kwok, "Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field," 35 *Fordham Urban L. J.* 119 (2008), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2278&context=ulj>; Hon. Ariel E. Belen, "We Need More Diversity in Mediation," *Law360* (Mar. 15, 2013) ("Anecdotally, the evidence is very strong that among the thousands of mediators and arbitrators selected to resolve disputes every year, it is rare that a minority ADR practitioner is chosen."), available at <http://www.jamsadr.com/files/Uploads/Documents/Articles/Belen-Diversity-2013-03-15.pdf>.
9. See Laura A. Kaster, "Why and How Corporations Must Act Now to Improve ADR Diversity," *Corporate Disputes* (Jan.-Mar. 2015) at 36, 37, available at <http://www.corporatedisputesmagazine.com/why-and-how-corporations-must-act-now-to-improve-adr-diversity/>; David H. Burt and Laura A. Kaster, "Why Bringing Diversity to ADR is a Necessity," *ACC Docket* (Oct. 2013), at 41, available at <http://www.cpradr.org/Portals/0/Why%20Bringing%20Diversity%20D%20Burt.pdf>.
10. See Vincent T. Chang, Theodore K. Cheng, and James P. Chou, "Reflecting the Communities it Serves: Increasing the Diversity of the Federal Bench," *AABANY Advocate* (Winter 2011) at 3, available at <http://c.ymcdn.com/sites/www.aabany.org/resource/resmgr/imported/Advocate%20Winter%202011.pdf>.
11. See generally Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton Univ. Press 2007); James Surowiecki, *The Wisdom of Crowds* (Anchor Books 2004).

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Message from the Co-Editors-in-Chief

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The Working Group II effort will move forward. If it can create or maintain momentum, a convention is the possible outcome and such a convention would change the trajectory of mediation in the world. It would be the basis for a groundswell and a growth spurt for international mediation. Let's keep watching.

This year will also see the commencement of the Global Pound Conference, which will take place in many cities around the world in an attempt to map the future of ADR and better determine what ADR users want and

need. The article this month by Deborah Masucci, who is involved with this project that is being spearheaded by the International Mediation Institute, describes this project for our readers.

We also have all the regular components of our journal reflecting on cases, developments, challenges and trends in ADR and we invite your suggestions and comments as we work to continually improve our efforts.

Laura A. Kaster, Edna Sussman and Sherman Kahn



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Increasing Diversity Among Arbitrators

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

By **Sasha A. Carbone** and **Jeffrey T. Zaino**

Introduction

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

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

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

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

A Look at the Numbers, a Greater Need for Diversity

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

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

At the American Arbitration Association (AAA), creating and maintaining the diversity of our neutrals roster is part of our mission. While the AAA has made great strides, it recognizes that more work is needed. At the AAA, our overall Roster of Neutrals is approximately 23% diverse for gender and race. For the AAA's major

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

1. Mentoring

Mentoring should start when a professional is considering the ADR practice, and it should never end. Successful mentoring relationships can provide invaluable aid to building and managing an ADR practice. Mentorship is a tradition in many areas of alternative dispute resolution

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

divisions, the diversity varies depending upon the caseload: labor (27%), employment (42%), commercial (17%), construction (10%), and insurance (20%).

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

Getting on a Panel Is Just the Beginning

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

— for example, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides that one of the obligations an experienced arbitrator has to the profession is to cooperate in training new arbitrators.

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

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

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

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

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

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

2. Pro Bono or Reduced Fee Work

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

Court-Sponsored ADR Programs

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

Bar Associations

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

Private ADR Providers

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

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

mediating disputes and to meet others embarking on similar careers.

3. Exposure – Networking Through Professional Organizations and Publishing Opportunities

Bar Associations

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

Industry-Specific Organizations

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

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

Join Committees, Subcommittees

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

Run for Office Within the Organization

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

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

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

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

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

Publishing Articles

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

Ongoing Evaluation and Review

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

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

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

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

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

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

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

Publish Written Opinions; Allow Easy Access by ADR Users

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

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

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

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

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

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

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

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

Review of Ranking to Provide Guidance to Arbitrators

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

Permanent Panels for New Arbitrators

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

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

By sponsoring professional and social networking events, ADR providers and users can provide greater exposure, which benefits new arbitrators. In May 2010 and June 2011, the New York City Bar Association and AAA co-

sponsored successful panel programs with 12 new arbitrators. More than 150 ADR users attended each program.

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

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

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

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

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

Conclusion

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

Arbitration Tips and Traps for Corporate Counsel

Richard L. Mattiaccio, Corporate Counsel

October 16, 2014 | [0 Comments](#)

Arbitration is a field of study worthy of Hermann Rorschach. Parties who bring to it a preference for the formality and forensic opportunities of litigation see arbitration as the Wild West. Others, who prefer to resolve all business disputes quickly and informally, see it as just another form of litigation. Businesspeople who want to submit disputes to a business-oriented, neutral third party bound by rules that ensure basic fairness, but do not want all the bells and whistles of litigation, see arbitration as a happy medium.

In practice, the parties to a large extent create their own arbitration reality, starting from the time they choose the applicable rules and otherwise construct their arbitration clause, to the time the arbitrators close the hearing.

The following, admittedly partial list of “tips” and “traps” is offered to suggest practical ways to make arbitration work better for companies that rely on it as a more efficient and business-like way to resolve disputes than litigation in court.

The Arbitration Clause

Businesspeople in the throes of negotiating an agreement rarely want to spend time, energy or negotiating capital on the arbitration clause. Inside counsel can count on second-guessing, however, if a dispute goes to arbitration and it takes too long, costs too much and is decided by arbitrators who seem like aliens to the businesspeople.

The company that has a well-considered, consistent approach to arbitration clauses has a better chance of shaping the clause in any given contract, and is more likely to be satisfied with the arbitration process.

Tip: *Develop a standard arbitration clause and fallback positions in advance of negotiations.*

Trap: *Assuming all provider rules and arbitrator panels are the same.* Arbitration rules and panels can vary greatly, even within the same provider organization.

Tip: *Select the place of arbitration based on its law regulating the arbitration process and the quality of its arbitrator community.* Your corporate home might seem best, but its courts could interfere excessively in arbitration, or it might lack a deep bench of arbitrators suited to your dispute or industry.

Trap: *Selecting the place of arbitration for local advantage or proximity to your litigators.* A “home court” advantage is unlikely in arbitration. Good litigators are more easily found than good arbitrators.

Tip: *Think about the ideal number of arbitrators and consider the new appeal-within-arbitration options.* The trend is toward sole arbitrators in all but the highest-stakes cases. Leading providers now allow parties to opt-

in to a well-defined, expedited appeal process within the arbitration itself. The appeal process addresses concerns that some companies may have about the risk of a “runaway” sole arbitrator.

Trap: *Assuming the need for three arbitrators in all cases.* It is more difficult to schedule hearings with three arbitrators, resulting in an increased time lapse from filing to award. A full hearing with one arbitrator followed by an appeal within arbitration may involve much less time and expense than a three-arbitrator panel without any appeal.

Arbitrator Selection

As in jury selection, cases can be won or lost during arbitrator selection. Unlike jury selection, arbitrator selection happens at the beginning of a case. A party and its counsel should invest substantial time and effort in the selection process, and should understand the case as deeply as possible before selecting arbitrators.

Tip: *Front-load the planning of your case.* Having a strategy lets you select arbitrators who are more likely to be open and receptive to your arguments.

Trap: *Filing quickly and developing the case over time.* This approach results not only in less-effective arbitrator selection, but less-effective advocacy in those crucial early conferences.

Tip: *Select counsel familiar with the arbitrator pool and selection process.* An arbitrator’s prior awards rarely are available to the public, and this hampers the evaluation of potential arbitrators. If counsel does not know or have access to those who know arbitrator candidates well, consider engaging specialized counsel to assist in arbitrator selection.

Trap: *Relying entirely on official arbitrator resumes.* Arbitrator bios tend to be designed to trigger keyword search hits; they rarely convey a sense of the individual.

Discovery

Discovery is the most debated and misunderstood phase of arbitration. Some parties complain that too much discovery is allowed, making arbitration time-consuming and expensive and too similar to litigation. Others complain that too little discovery is allowed, making it difficult to develop claims or defenses.

Arbitration providers train arbitrators to limit discovery so that the process keeps its promise of offering a faster and cheaper alternative to litigation. Parties may influence these ground rules to some degree by adding specific language about discovery to their arbitration clause or by presenting agreed discovery plans, but arbitrators retain discretion to limit discovery to what is proportional. Counsel needs to be ready to present a limited-stakes case with little document exchange beyond what each side plans to rely on at the hearing, and to proceed to hearing with limited or no discovery depositions, especially in international cases.

Tip: *Locate and preserve all relevant company documents early, and develop the facts from those documents and company witnesses.* In a high-stakes case, a party also should consider authorizing an ethically conducted investigation to supplement internally available information.

Trap: *Planning to build your case out of the other side’s files.* Many factors work against this approach in arbitration.

Tip: *Identify and disclose your witnesses early in the case.* Arbitrators need this information to conduct effective conflicts checks.

Trap: *Holding back names to achieve surprise at the hearing.* The party who holds back witness names risks disruptive midstream replacement of an arbitrator, continued service of an arbitrator who might not have been selected or preclusion of a key witness.

Motions, Papers and Objections

Arbitration traditionally is a more hearing-driven and less paper-driven process than litigation. Thanks to a generational shift and to recent changes in provider rules, arbitrators are becoming more comfortable with dispositive motions and other complex written submissions. There remains, however, a strong emphasis in arbitration on looking carefully at whether a proposed motion would result in net savings of time and expense to the parties. Similarly, evidentiary objections work differently in arbitration than in litigation. Attorneys need to understand and use these differences to be effective advocates in arbitration.

Tip: *Be skeptical if your counsel wants to engage in extensive motions practice.* Arbitrators really need to be convinced not just that a motion likely has merit but that, if granted, the motion will save hearing time and net expense to the parties.

Trap: *Asking arbitrators to decide motions with little practical effect on case complexity.* Arbitrators might conclude that your side is playing for time or intentionally running up expenses, or that counsel just does not understand arbitration.

Tip: *Encourage counsel to keep memos of law short and focused on essentials.* Be sure counsel briefs clearly and succinctly all the law on which your side principally relies. Arbitrators are expected to work without associate or law clerk support in most cases and cannot be faulted for not finding the law themselves. Very few commercial arbitrators like to read learned treatises, however, so a memo of law needs to get quickly to the point.

Trap: *Repeating points for emphasis in papers.* Arbitrators generally read everything submitted and do not appreciate repetitive papers, especially repetitive rhetoric.

Tip: *Encourage counsel to make evidentiary objections briefly and only if focused on the most significant matters.* Arbitrators rarely sustain evidentiary objections. However, if an objection shows an important document to be unreliable, it can be effective even if overruled.

Trap: *Using objections to disrupt rhythm and flow.* Arbitrators recognize this tactic and can overcompensate when they help the witness get back on track.

Demeanor and Etiquette

Litigation sometimes resembles the combat of gladiators, but arbitration is more like chess and requires different approaches and skills.

Tip: *Encourage counsel to offer reasonable solutions to disputes with opposing counsel.* Arbitrators respect the problem-solver more than the die-hard.

Trap: *Expecting arbitrators to figure it out.* Opposing counsel may offer a solution, and your side may not like it.

Tip: *Insist that your counsel be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel, staff and witnesses.* Arbitrators tend to pay more attention to the adults in the room.

Trap: *Encouraging counsel to be aggressive.* If you lose, you'll quickly forget how good it felt to hear your trial lawyer roar.

Tip: *Make sure that your lead counsel thanks the arbitrators for their service, attention and patience.* Most arbitrators are human. They tend to like it when others appreciate them.

Trap: *Appearing ungracious with opposing counsel.* Graciousness is particularly impressive when opposing counsel has done little to deserve it.

Richard L. Mattiaccio, a New York-based partner in Squire Patton Boggs (U.S.), has 30 years of experience as counsel in commercial arbitration and in cross-border and IP-related litigation. He has served as an arbitrator for 25 years; is a Fellow of the College of Commercial Arbitrators; co-chairs the International Dispute Resolution Committee of the New York State Bar Association Dispute Resolution Section; is a founding member and former co-chair of the New York City Bar In-House/Outside Litigation Counsel Group; and is a member of the executive committee of the New York International Arbitration Center Inc.

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CPR'S FULL RANGE OF ARBITRATION OPTIONS

The International Institute for Conflict Prevention and Resolution ("CPR") has long championed its Rules for Non-Administered Arbitration (Rev. 2007) as a means of providing for a fair, expeditious, and economical arbitration process. Hallmark features of non-administered or *ad hoc* rules include management of the process by the Tribunal and counsel, without the need for the involvement of a separate administering entity. To aid participants in a non-administered process when necessary, CPR offers customized services, such as arbitrator selection and a challenge procedure. For a full menu of such services, please refer to CPR's website, www.cpradr.org.

CPR maintains its commitment to non-administered processes. However, mindful of the benefits that an arbitral institution can provide in appropriate cases, CPR has promulgated a set of administered arbitration rules to increase parties' range of options. The CPR Rules for Administered Arbitration (July 1, 2013) provide parties with the same well-designed procedures and high quality arbitrators as CPR's non-administered option, while also allowing the parties to avail themselves of CPR's quality staff and resources when an administered process is desired.

Mediation and Other ADR Procedures. The following Rules are intended to govern administered arbitration proceedings. However, parties also may wish to incorporate pre-arbitral negotiation or mediation phases in their contract provisions. Parties desiring to use such procedures should consult the *CPR Mediation Procedure* and CPR's *Dispute Resolution Clauses* (available on CPR's website at www.cpradr.org).

To obtain a copy of any of our rules and procedures, or to find out more about our Dispute Resolution Services and fees, visit our website at www.cpradr.org or call CPR's office at +1.212.949.6490.

CPR MODEL CLAUSES FOR ADMINISTERED ARBITRATION

Standard Contractual Provisions

The CPR Rules for Administered Arbitration (the "Administered Rules" or "Rules") are intended in particular for use in complex commercial arbitrations where parties desire an administered process. They are designed to assure the expeditious and economical conduct of proceedings. The Administered Rules may be adopted by parties wishing to do so by using one of the following standard provisions:

A. Pre-Dispute Clause for Administered Arbitration

“Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Administered Rules” or “Rules”) by (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state).”

B. Existing Dispute Submission Agreement for Administered Arbitration

“We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Administered Rules” or “Rules”) the following dispute:

[Describe briefly]

We further agree that the above dispute shall be submitted to (a sole arbitrator) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be appointed by CPR) (three arbitrators, of whom each party shall designate one, with the third arbitrator to be designated by the two party-appointed arbitrators) (three arbitrators, of whom each party shall designate one in accordance with the screened appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be designated by either party). [We further agree that we shall faithfully observe this agreement and the Administered Rules and that we shall abide by and perform any award rendered by the arbitrator(s).] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be (city, state).”

A. GENERAL AND INTRODUCTORY ADMINISTERED RULES

Rule 1: Scope of Application

- 1.1 Where the parties to a contract have provided for arbitration under the International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Administered Rules” or “Rules”), they shall be deemed to have made these Administered Rules a part of their arbitration agreement, except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Administered Rules. Unless the parties otherwise agree, these Administered Rules, and any amendment thereof adopted by CPR, shall apply in the form in effect at the time the arbitration is commenced. If the parties have provided for CPR arbitration without specifying either the Non-Administered or Administered Rules, the CPR Administered Rules shall apply to any arbitration agreement dated July 1, 2013 or later.
- 1.2 These Administered Rules shall govern the arbitration except that where any of these Administered Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail.

Rule 2: Notices

- 2.1 Notices or other communications required under these Administered Rules shall be in writing and delivered to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given by registered mail, courier, telex, facsimile transmission, email or any other means of telecommunication that provides a record thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed *prima facie* proof of receipt of any notice or communication given under these Rules.
- 2.2 Time periods specified by these Administered Rules or established by the Arbitral Tribunal (the “Tribunal”) shall start to run on the day following the day when a notice or communication is received, unless these Rules or the Tribunal shall specifically provide otherwise. If the last day of such period is an official holiday or a non-business day at the place where the notice or communication is received, the

period is extended until the first business day which follows. Official holidays and non-business days occurring during the running of the period of time are included in calculating the period.

Rule 3: Commencement of Arbitration

- 3.1** The party commencing arbitration (the "Claimant") shall deliver to the other party (the "Respondent") a notice of arbitration with an electronic copy to CPR at the same time in accordance with Rule 3.3.
- 3.2** The notice of arbitration shall include in the text or in attachments thereto:
- a.** The full names, addresses, telephone numbers and email addresses for the parties and their counsel;
 - b.** A demand that the dispute be referred to arbitration pursuant to these Rules;
 - c.** The text of the arbitration clause or the separate arbitration agreement that is involved;
 - d.** A statement of the general nature of the Claimant's claim;
 - e.** The relief or remedy sought; and
 - f.** The name, address, telephone number and email address of the arbitrator designated for appointment by the Claimant, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.
- 3.3** Delivery of the notice of arbitration to CPR required under this Rule 3.1 shall be as specified on the CPR website. Simultaneous with delivery of the notice of arbitration to CPR, the Claimant shall make payment to CPR of the appropriate Filing Fee as provided in the Schedule of Administered Arbitration Costs on the CPR website. In the event the Claimant fails to comply with this requirement, CPR may fix a time limit within which the Claimant must make payment, failing which the file shall be closed without prejudice to the Claimant's right to submit the same claim(s) at a later date in another notice of arbitration if permissible.
- 3.4** The date on which CPR is in receipt of both the notice of arbitration and Filing Fee shall, for all purposes, be deemed to be the date of the commencement of the arbitration ("Commencement Date"). CPR will determine the Commencement Date and so notify the parties.

- 3.5** CPR shall notify the Respondent of its time to deliver a notice of defense, which shall be 20 days after the Commencement Date.
- 3.6** The Respondent shall deliver to the Claimant a notice of defense by the date provided by CPR under Rule 3.5 with an electronic copy to CPR at the same time. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the notice of arbitration shall be deemed denied. Failure to deliver a notice of defense shall not excuse the Respondent from notifying the Claimant and CPR in writing, by the date provided by CPR under Rule 3.5, of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.
- 3.7** The notice of defense shall include:
- a.** The full names, addresses, telephone numbers and email addresses for the parties and their counsel;
 - b.** Any comment on the notice of arbitration that the Respondent may deem appropriate;
 - c.** A statement of the general nature of the Respondent's defense; and
 - d.** The name, address, telephone number and email address of the arbitrator designated for appointment by the Respondent, unless the parties have agreed that neither shall designate an arbitrator or that the party-designated arbitrators shall be appointed as provided in Rule 5.4.
- 3.8** The Respondent may include in its notice of defense any counterclaim within the scope of the arbitration clause. If it does so, the counterclaim in the notice of defense shall include items (a), (b), (c), (d) and (e) of Rule 3.2.
- 3.9** If a counterclaim is asserted in accordance with Rule 3.8, CPR shall notify the Claimant of its time to deliver a response, which shall be 20 days after CPR's receipt of the notice of defense and counterclaim. Such response shall have the same elements as provided in Rule 3.7(b) and (c) for the notice of defense. Failure to deliver a reply to a counterclaim shall not delay the arbitration; in the event of such failure, all counterclaims set forth in the notice of defense shall be deemed denied.

3.10 Claims or counterclaims within the scope of the arbitration clause may be freely added, amended or withdrawn prior to the appointment of the Tribunal and thereafter with the consent of the Tribunal. Notices of defense or replies to added or amended claims or counterclaims shall be delivered by the date CPR provides, which shall be within 20 days after CPR's receipt of the addition or amendment or such other date as specified by CPR, or, if the Tribunal has been appointed, by the date specified by the Tribunal.

3.11 If a dispute is submitted to arbitration pursuant to a submission agreement, this Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement.

Rule 4: Representation

- 4.1** The parties may be represented or assisted by persons of their choice.
- 4.2** Each party shall communicate the name, address, telephone number and email address, and function of such persons in writing to the other party, to the Tribunal and to CPR.

B. RULES WITH RESPECT TO THE TRIBUNAL

Rule 5: Selection of Arbitrator(s) by the Parties

- 5.1**
- a.** Unless the parties have agreed otherwise in writing, the Tribunal shall consist of three arbitrators, one designated for appointment by each of the parties as provided in Rules 3.2 and 3.7 respectively, and a third who shall chair the Tribunal, selected as provided in Rule 5.2.
 - b.** Unless otherwise agreed, any arbitrator not designated for appointment by a party shall be a member of the CPR Panels of Distinguished Neutrals ("CPR Panels"). Upon request, CPR will provide a list of candidates from the CPR Panels in accordance with the Rules.
 - c.** Where a party has designated an arbitrator for appointment, CPR will query such candidate for their availability and request that the candidate disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of any candidate on grounds of

lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment on the objection. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as a party-appointed arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection made under this Rule 5.1(c) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

- 5.2 a.** Unless the parties agree that the third arbitrator who shall chair the Tribunal be selected jointly by the party-appointed arbitrators, CPR shall select the third arbitrator as provided in Rule 6.
- b.** If the party-appointed arbitrators shall designate for appointment the third arbitrator who shall chair the Tribunal, such designation cannot occur until after appointment by CPR of both of the party-designated arbitrators. The party-appointed arbitrators shall inform CPR of the candidate designated by them to be the third arbitrator, whereupon CPR will query such candidate for availability and request such candidate to disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Upon receipt, CPR shall circulate any disclosures made to the parties, and, within 10 days after receipt of that candidate's disclosures, a party may object to the appointment of such candidate on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as the third arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.2 (b) by referring

it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

In the event that the party-appointed arbitrators are unable to agree on a third arbitrator within 20 days of CPR's appointment of the second arbitrator, the third arbitrator shall be selected by CPR as provided in Rule 6.2.

- 5.3** If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be designated for appointment by either party, the parties shall attempt jointly to designate such arbitrator(s) within 20 days after the notice of defense provided for in Rule 3.6 is due. CPR will query such jointly designated candidate(s) in accordance with the procedure provided for in Rule 5.1(c). The parties may extend their selection process until one or both of them have concluded that a deadlock has been reached, but in no event for more than 30 days after the notice of defense provided for in Rule 3.6 is due. In the event the parties are unable to designate the arbitrator(s) within the extended selection period, the arbitrator(s) shall be selected as provided in Rule 6.2.
- 5.4** If the parties have agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them, as provided for in this Rule 5.4, CPR shall conduct a "screened" selection of party-designated arbitrators as follows:
- a.** CPR will provide each party with a copy of a list of candidates from the CPR Panels together with confirmation of their availability to serve as arbitrators and disclosure of any circumstances that might give rise to justifiable doubt regarding their independence or impartiality, as provided in Rule 7. Within 10 days after the receipt of the CPR list, each party shall designate from the list three candidates, in order of preference, for its party-designated arbitrator, and so notify CPR and the other party in writing.
 - b.** Within the same 10-day period after receipt of the CPR list, a party may also object to the appointment of any candidate on the list on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment. If there is no

objection to the first candidate designated by a party, or if the objection is overruled by CPR, CPR shall appoint the candidate as the arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8. At its discretion, CPR may decide an objection under this Rule 5.4 (b) by referring it to a Challenge Review Committee pursuant to the CPR Challenge Protocol (excluding its fee requirement).

- c. If the independence or impartiality of the first candidate designated by a party is successfully challenged, CPR will appoint the subsequent candidate designated by that party, in order of the party's indicated preference, provided CPR does not sustain any objection made to the appointment of that candidate.
- d. Neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or appointed arbitrator as to which party selected either of the party-designated arbitrators. No party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate or appointed arbitrator pursuant to this Rule 5.4.
- e. The chair of the Tribunal will be appointed by CPR in accordance with the procedure set forth in Rule 6.2, which shall proceed concurrently with the procedure for appointing the party-designated arbitrators provided in subsections (a)-(d) above.

5.5 Where the arbitration agreement entitles each party to designate an arbitrator but there is more than one Claimant or Respondent to the dispute, and either the multiple Claimants or the multiple Respondents do not jointly designate an arbitrator, CPR shall appoint all of the arbitrators as provided in Rule 6.2.

Rule 6: Selection of Arbitrator(s) by CPR

6.1 Whenever (i) a party has failed to designate its arbitrator to be appointed by CPR; (ii) the parties, acting jointly, have failed to designate the arbitrator(s) for appointment by CPR; (iii) the parties have agreed that the party-designated arbitrators who have been appointed by CPR shall designate the third arbitrator and such arbitrators have failed to designate the third arbitrator; (iv) the parties have provided that one or more arbitrator(s) shall be

appointed by CPR; or (v) the multi-party nature of the dispute calls for CPR to appoint all members of a three-member Tribunal pursuant to Rule 5.5, the arbitrator(s) required to complete the Tribunal shall be selected as provided in this Rule 6.

- 6.2** Except where a party has failed to designate the arbitrator to be appointed by it, CPR shall proceed as follows:
- a.** CPR shall jointly convene the parties by telephone to discuss the selection of the arbitrator(s).
 - b.** Thereafter, CPR shall provide to the parties a list of candidates, from the CPR Panels, of not less than five candidates if one arbitrator is to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications, availability and disclosures in writing of any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality as provided in Rule 7. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall appoint as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.
- 6.3** Where a party has failed to designate the arbitrator to be appointed by it, CPR shall appoint a person whom it deems qualified to serve as such arbitrator.

Rule 7: Qualifications, Challenges and Replacement of Arbitrator(s)

- 7.1** Each arbitrator shall be independent and impartial.

- 7.2 By accepting appointment, each arbitrator shall be deemed to be bound by these Administered Rules and any modification thereof agreed to by the parties, and to have represented that he or she has the time available to devote to the expeditious process contemplated by these Administered Rules.
- 7.3 Each arbitrator shall disclose in writing to CPR and the parties prior to appointment in accordance with the Rules, and also promptly upon there arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.
- 7.4 No party or anyone acting on its behalf shall have any *ex parte* communications concerning any matter relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise an arbitrator candidate being considered for designation as its appointed arbitrator of the general nature of the case and discuss the candidate's qualifications, availability, and independence and impartiality with respect to the parties, and a party also may confer with its designated arbitrator after the arbitrator's appointment by CPR regarding the selection of the chair of the Tribunal. As provided in Rule 5.4(d), no party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator candidate designated or appointed pursuant to Rule 5.4.
- 7.5 Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, provided that a party may challenge an arbitrator whom it has designated only for reasons of which it becomes aware after the designation has been made.
- 7.6 A party may challenge an appointed arbitrator only by a notice in writing to CPR, with a copy to the Tribunal and the other party, in accordance with the CPR Challenge Protocol (excluding its fee requirement) given no later than 15 days after the challenging party (i) receives notification of the appointment of that arbitrator, or (ii) becomes aware of the circumstances specified in Rule 7.5, whichever shall last occur. The notice shall state the reasons for the challenge with specificity. The notice shall not be sent to the Tribunal when the challenged arbitrator is a party-designated arbitrator selected as provided in Rule 5.4; in that event, CPR may provide

each member of the Tribunal with an opportunity to comment on the substance of the challenge without disclosing the identity of the challenging party.

- 7.7** When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. Neither of these actions implies acceptance of the validity of the challenge.
- 7.8** If neither agreed disqualification nor voluntary withdrawal occurs, the challenge shall be decided by CPR in accordance with the CPR Challenge Protocol (excluding its fee requirement) after providing the non-challenging party and each member of the Tribunal with an opportunity to comment on the challenge in accordance with these Rules.
- 7.9** In the event of death, resignation or successful challenge of an arbitrator not designated by a party, a substitute arbitrator shall be appointed pursuant to the procedure by which the arbitrator being replaced was selected. In the event of the death, resignation or successful challenge of an arbitrator designated by a party, that party may designate a substitute arbitrator; provided, however, that should that party fail to notify CPR and the other party of the substitute designation within 20 days from the date on which it becomes aware that the opening arose, that party's right of designation shall lapse, and CPR shall appoint a substitute arbitrator forthwith in accordance with these Rules.
- 7.10** In the event that an arbitrator fails to act or is *de jure* or *de facto* prevented from duly performing the functions of an arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement. If the parties do not agree on whether the arbitrator has failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination forthwith.
- 7.11** If the sole arbitrator or the chair of the Tribunal is replaced, the successor shall decide the extent to which any hearings held previously shall be repeated. If any other arbitrator is replaced, the Tribunal in its discretion may require that some or all prior hearings be repeated.
- 7.12** If an arbitrator on a three-person Tribunal fails to participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision,

ruling or award, notwithstanding the failure of the third arbitrator to participate, unless the parties agree otherwise. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of a third arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement.

Rule 8: Challenges to the Jurisdiction of the Tribunal

- 8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
- 8.2 The Tribunal shall have the power to determine the existence, scope or validity of the contract of which an arbitration clause forms a part. For the purpose of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.
- 8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made no later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended, a challenge to jurisdiction over such claim or counterclaim must be made not later than the response to such claim or counterclaim as provided under these Rules.

C. RULES WITH RESPECT TO THE CONDUCT OF THE ARBITRAL PROCEEDINGS

Rule 9: General Provisions

- 9.1 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chair shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal, and shall keep CPR informed of such arrangements throughout the proceedings.
- 9.2 The proceedings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each

phase of the proceeding, including without limitation, the time allotted to each party for presentation of its case and for rebuttal. In setting time limits, the Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible.

- 9.3** The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. Such conference shall be held promptly after the constitution of the Tribunal, unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Following the initial pre-hearing conference, a schedule for the conduct of the arbitration should be issued as soon thereafter as appropriate. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following:
- a.** Procedural matters (such as setting specific time limits for, and manner of, any required discovery; the desirability of bifurcation or other separation of the issues in the arbitration; the desirability and practicability of consolidating the arbitration with any other proceeding; the scheduling of conferences and hearings; the scheduling of pre-hearing memoranda; the need for and type of record of conferences and hearings, including the need for transcripts; the amount of time allotted to each party for presentation of its case and for rebuttal; the mode, manner and order for presenting proof; the need for expert witnesses and how expert testimony should be presented; and the necessity for any on-site inspection by the Tribunal);
 - b.** The early identification and narrowing of the issues in the arbitration;
 - c.** The possibility of stipulations of fact and admissions by the parties solely for purposes of the arbitration, as well as simplification of document authentication;
 - d.** The possibility of appointment of a neutral expert by the Tribunal; and
 - e.** The possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator.

After the initial conference, further pre-hearing or other conferences may be held as the Tribunal deems appropriate.

- 9.4** In order to define the issues to be heard and determined, the Tribunal may, *inter alia*, make pre-hearing orders and instruct the parties to file more detailed statements of claim and of defense and pre-hearing memoranda.
- 9.5** Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix the place of arbitration based upon the contentions of the parties and the circumstances of the arbitration. The award shall be deemed made at such place. The Tribunal may schedule meetings and hold hearings wherever it deems appropriate.
- 9.6** Except as otherwise provided in these Administered Rules, only electronic copies of filings, communications and other documents shall be sent to CPR; hard copies of filings or other documents sent to the Tribunal and/or the other party should not be sent to CPR in the ordinary course.

Rule 10: Applicable Law(s) and Remedies

- 10.1** The Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.
- 10.2** Subject to Rule 10.1, in arbitrations involving the application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.
- 10.3** The Tribunal may grant any remedy or relief, including but not limited to specific performance of a contract, which is within the scope of the agreement of the parties and permissible under the law(s) or rules of law applicable to the dispute.
- 10.4** The Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law.

Rule 11: Discovery

The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The

Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

Rule 12: Evidence and Hearings

12.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements:

- a.** A statement of facts;
- b.** A statement of each claim being asserted;
- c.** A statement of the applicable law and authorities upon which the party relies;
- d.** A statement of the relief requested, including the basis for any damages claimed; and
- e.** A statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony.

12.2 If either party so requests or the Tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply any rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply any lawyer-client privilege and work product immunity it deems applicable. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

12.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.

12.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

Rule 13: Interim Measures of Protection

- 13.1** At the request of a party, the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.
- 13.2** A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

Rule 14: Interim Measures of Protection by a Special Arbitrator

- 14.1** Unless otherwise agreed by the parties, this Rule 14 shall be deemed part of any arbitration clause or agreement that provides for arbitration under these Administered Rules.
- 14.2** Prior to the constitution of the Tribunal, any party may request that interim measures be granted under this Administered Rule against any other party by a special arbitrator appointed for that purpose.
- 14.3** Interim measures under this Administered Rule are requested by written application to CPR, entitled "Request for Interim Measures of Protection by a Special Arbitrator," describing in reasonable detail the relief sought, the party against whom the relief is sought, the grounds for the relief, and, if practicable, the evidence and law supporting the request. The request shall be delivered in accordance with Administered Rule 2.1, and shall certify that all other parties affected have been notified of the request or explain the steps taken to notify such parties.
- 14.4** The request for interim measures by a special arbitrator shall be accompanied by an initial deposit payable to CPR as provided in the Schedule of Administered Arbitration Costs on the CPR website. CPR shall promptly determine whether any further deposit is due to cover the fee of CPR and the remuneration of the special arbitrator, which amount shall be paid within the time period determined by CPR.
- 14.5** If the parties agree upon a special arbitrator within one business day of the request, that arbitrator shall be appointed by CPR subject to Rule 14.6. If there is no such timely agreement, CPR shall appoint a special arbitrator from a list of arbitrators maintained by CPR for that purpose. To the extent practicable, CPR shall appoint the special arbitrator within one business day of CPR's receipt of the application for interim measures under this Administered Rule. The

special arbitrator's fee shall be determined by CPR in consultation with the special arbitrator. The special arbitrator's fee and reasonable out-of-pocket expenses shall be paid from the deposit made with CPR.

- 14.6** Prior to appointment, a special arbitrator candidate shall disclose to CPR any circumstances that might give rise to justifiable doubt regarding his or her independence or impartiality within the meaning of Administered Rule 7. Any challenge to the appointment of a special arbitrator must be made within one business day of the challenging party's receipt of CPR's notification of the appointment of the arbitrator and the circumstances disclosed. A special arbitrator may be challenged on any ground for challenging arbitrators generally under Administered Rule 7. To the extent practicable, CPR shall rule on the challenge within one business day after CPR's receipt of the challenge. CPR's ruling on the challenge shall be final.
- 14.7** In the event of death, resignation or successful challenge of a special arbitrator, CPR shall appoint a replacement forthwith in accordance with the procedures set forth in Administered Rules 14.5 and 14.6.
- 14.8** The special arbitrator shall determine the procedure to be followed, which shall include, whenever possible, reasonable notice to, and an opportunity for hearing (either in person, by teleconference or other appropriate means) for all affected parties. The special arbitrator shall conduct the proceedings as expeditiously as possible, and shall have the powers vested in the Tribunal under Administered Rule 8, including the power to rule on his or her own jurisdiction and the applicability of this Administered Rule 14.
- 14.9** The special arbitrator may grant such interim measures as he or she deems necessary, including but not limited to measures for the preservation of assets, the conservation of goods or the sale of perishable goods.
- 14.10** The ruling on the request for interim measures shall be made by award or order, and the special arbitrator may state in such award or order whether or not the special arbitrator views the award or order as final for purposes of any judicial proceedings in connection therewith. The award or order may be made conditional upon the provision of security or any act or cessation of any act specified in the award or order. The award or order may provide for the payment of a specified amount in case of noncompliance with its terms.

- 14.11** The award or order shall specify the relief awarded or denied, shall determine the cost of the proceedings, which includes CPR's administrative fees and expenses, the special arbitrator's fee and expenses as determined by CPR, and apportion such costs among the parties as the special arbitrator deems appropriate. The special arbitrator may also apportion the parties' reasonable attorneys' fees and expenses in the award or order or in a supplementary award or order. Unless the parties agree otherwise, the award or order shall state the reasoning on which the award or order rests as the special arbitrator deems appropriate.
- 14.12** Prior to the execution of any special arbitrator's award, the special arbitrator shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, suggest any corrections to the special arbitrator and the special arbitrator shall as soon as possible thereafter deliver executed copies of the award to CPR, which shall promptly deliver the award to the parties, provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.
- 14.13** A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate, including the agreement to this Administered Rule 14, or as a waiver of that agreement.
- 14.14** The special arbitrator's award or order shall remain in effect until modified or vacated by the special arbitrator or the Tribunal. The special arbitrator may modify or vacate the award or order for good cause. If the Tribunal is constituted before the special arbitrator has rendered an award or order, the special arbitrator shall retain jurisdiction to render such award or order unless and until the Tribunal directs otherwise. Once the Tribunal has been constituted, the Tribunal may modify or vacate the award or order rendered by the special arbitrator.
- 14.15** The special arbitrator shall not serve as a member of the Tribunal unless the parties agree otherwise.

Rule 15: The Award

- 15.1** The Tribunal may make final, interim, interlocutory and partial awards. With respect to any interim,

interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

- 15.2** All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. The award shall be deemed to be made at the seat of arbitration and shall contain the date on which the award was made. When there are three arbitrators, the award shall be made and signed by at least a majority of the arbitrators.
- 15.3** A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award.
- 15.4** Prior to execution of any award, the Tribunal shall send a copy of the award in draft form to CPR for a limited review for format, clerical, typographical or computational errors, or any errors of a similar nature in the award. CPR shall promptly review such award, and suggest any corrections to the Tribunal.
- 15.5** Thereafter as soon as possible, but in no event more than 3 days, the Tribunal shall deliver executed copies of the award and of any dissenting opinion to CPR, which shall promptly deliver the award and any dissenting opinion to the parties provided no fees, expenses and other charges incurred in accordance with the Schedule of Administered Arbitration Costs are outstanding.
- 15.6** Within 15 days after receipt of the award, either party, with notice to the other party and CPR, may request the Tribunal to clarify the award; to correct any clerical, typographical or computational errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any clarification, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests a clarification, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All clarifications, corrections, and additional awards shall be in writing, shall be submitted directly to CPR by the Tribunal for delivery by CPR to the parties, and the provisions of this Administered Rule 15 shall apply to them.

- 15.7** The award shall be final and binding on the parties, and the parties will undertake to carry out the award without delay. If an interpretation, correction or additional award is requested by a party, or a correction or additional award is made by the Tribunal on its own initiative as provided in Administered Rule 15.6, the award shall be final and binding on the parties when such clarification, correction or additional award is issued by CPR or upon the expiration of the time periods provided in Administered Rule 15.6 for such clarification, correction or additional award to be made, whichever is earlier.
- 15.8 a.** The dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference required by Administered Rule 9.3. The final award should in most circumstances be submitted by the Tribunal to CPR within 30 days after the close of the hearing and thereafter CPR should render the award to the parties promptly. The Tribunal and CPR shall use their best efforts to comply with this schedule.
- b.** CPR must approve any scheduling orders or extensions that would result in a final award being rendered more than 12 months after the initial pre-hearing conference required by Administered Rule 9.3. When such approval is required, CPR in its discretion may convene a call with the parties and arbitrators to discuss factors relevant to such request.

Rule 16. Failure to Comply with Administered Rules

Whenever a party fails to comply with these Administered Rules, or any order of the Tribunal pursuant to these Administered Rules, in a manner deemed material by the Tribunal, the Tribunal, if appropriate, shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

D. RULES WITH RESPECT TO COSTS AND FEES

Rule 17. Arbitrator Fees, Expenses and Deposits

- 17.1** Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator and shall be reimbursed for any reasonable travel and other expenses. The compensation for each arbitrator should be fully disclosed to all Tribunal members and parties. If there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by CPR and confirmed in writing to the parties. The parties shall be jointly and severally liable for such fees and expenses.
- 17.2** The Tribunal shall determine the necessary advances on the arbitrator(s) fees and expenses and advise CPR which, unless otherwise agreed by the parties, shall invoice the parties in equal shares. The amount of any advances to cover arbitrator fees and expenses may be subject to readjustment at any time during the arbitration. Such funds shall be held and disbursed in a manner CPR deems appropriate. An accounting will be rendered to the parties and any unexpended balance returned at the conclusion of the arbitration as may be appropriate.
- 17.3** If the requested advances are not paid in full within 10 days after receipt of the request, CPR shall so inform the parties and the proceeding may be suspended or terminated unless the other party pays the non-paying party's share subject to any award on costs.

Rule 18. CPR Administrative Fees and Expenses

- 18.1** In addition to the CPR Filing Fee, CPR shall charge a Case Administrative Fee ("Administrative Fee") as set forth in the Schedule of Administered Arbitration Costs on the CPR website. CPR reserves the right to adjust the Administrative Fee based on developments in the proceeding.
- 18.2** Unless otherwise agreed by the parties, CPR shall invoice the parties in equal shares for the Administrative Fees. Payment shall be due on receipt unless other arrangements are authorized by CPR. The parties shall be jointly and severally liable to CPR for the Administrative Fee. In the event a party fails to pay as provided in the invoice, the proceeding shall be suspended or terminated unless the other party pays the non-paying party's share subject to any award on costs.

Rule 19. Fixing and Apportionment of Costs

- 19.1** The Tribunal shall fix the costs of arbitration in its award. The costs of arbitration include:
- a. The fees and expenses of members of the Tribunal;
 - b. The costs of expert advice and other assistance engaged by the Tribunal;
 - c. The travel and other expenses of witnesses to such extent as the Tribunal may deem appropriate;
 - d. The costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate;
 - e. The CPR Administrative Fee with respect to the arbitration;
 - f. The costs of a transcript; and
 - g. The costs of meeting and hearing facilities.
- 19.2** Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

E. MISCELLANEOUS ADMINISTERED RULES

Rule 20: Confidentiality

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

Rule 21: Settlement and Mediation

- 21.1** Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.
- 21.2** With the consent of the parties, the Tribunal at any stage of the proceeding may request CPR to arrange for mediation of the claims asserted in the

arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure.

21.3 The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.

21.4 If the parties settle the dispute before an award is made, the Tribunal shall terminate the arbitration and so inform CPR. If requested by all parties and accepted by the Tribunal, the Tribunal may record the settlement in the form of an award made by consent of the parties. The Tribunal is not obliged to give reasons for such an award. CPR shall issue the award.

Rule 22: Actions Against CPR or Arbitrator(s)

Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Administered Rules.

Rule 23: Waiver

A party knowing of a failure to comply with any provision of these Administered Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto.

Rule 24: Interpretation and Application of Administered Rules

The Tribunal shall interpret and apply these Administered Rules insofar as they relate to the Tribunal's powers and duties. When there is more than one member on the Tribunal and a difference arises among them concerning the meaning or application of these Administered Rules, that difference shall be decided by a majority vote. All other Rules shall be interpreted and applied by CPR.



Notes:



Fact Sheet

Enhanced Neutral Selection Process

for Large Complex Cases

- Q. Why should I select my arbitrator from the AAA's Roster of Neutrals?**
- A.** As the nation's leading provider of alternative dispute resolution services, the American Arbitration Association's National Roster of Neutrals consists of the most highly trained, accomplished and respected experts from the legal and business communities. Our neutrals are required to have achieved academic and professional honors, which mark them as leaders in their fields. Qualifications include a minimum of 15 years of senior level business experience or legal practice, honors and awards indicating leadership in their field, and training and experience in arbitration or other forms of dispute resolution.
- Q. What makes arbitrators from the AAA's Roster of Neutrals different from other ADR providers?**
- A.** The AAA has a standardized Arbitrator Development Program that is designed to ensure that every individual admitted to the AAA's Roster of Neutrals receives fundamental, advanced and continuing education and training in AAA rules, case management procedures, the arbitrator's role and authority, and legal and statutory developments affecting arbitration. Experience has shown that AAA's trained neutrals significantly impact the efficiency of the ADR process and the satisfaction of the parties.
- Q. What is the Enhanced Neutral Selection Process?**
- A.** The Enhanced Neutral Selection Process is designed to give parties in AAA arbitrations who use the Procedures for Large, Complex disputes greater flexibility and control in selecting the most appropriate arbitrator for their case. Under this process, parties agree to use one or more screening and/or selection methods to assist them in choosing an arbitrator.
- Q. What screening methods are available under the Enhanced Neutral Selection Process?**
- A.** In addition to the standard procedure outlined in the rules, the AAA offers parties the following options:
- **Representative sample review**
The AAA will provide the parties with an early, initial sample of arbitrator resumes based on the qualifications requested by the parties. The parties will confer with the case manager, either telephonically or in person to provide feedback as to which resumes are more favorable, and why. This feedback will be used in developing the final list of arbitrators from which the parties will select. This process is also helpful to the parties in determining whether or not they wish to use any of the other methods listed below.
 - **Oral or written interviews of the arbitrator candidates**
The AAA will work with parties to develop an interview protocol in order for the parties to have an opportunity to present questions to potential arbitrator candidates, either through a telephone conference, or in writing. Examples of interview question topics might include: industry expertise, relative experience in similar disputes, the arbitrator's procedural handling practices, and any other questions that the parties would find helpful to the selection process.

The purpose of this Q&A is to provide a brief guide to the Enhanced Neutral Selection Process. Please make sure to review the applicable rules and guides for more information.

- **Pre-screening for arbitrator disclosures and availability**
The AAA will pre-screen a select number of arbitrators who possess the qualifications requested by the parties. The arbitrators may be pre-qualified for conflicts of interest, availability, or both.
- **Expanded resumes**
The AAA will obtain additional information about an arbitrator's experience in the field of the dispute, as requested by the parties. This may also include a request for references.
- **Block listing**
For cases involving three-arbitrator panels, the AAA can provide separate lists of arbitrators to the parties, each one containing arbitrators with a specified background or level of expertise, i.e., one list of retired judges, one list of attorneys and one list of business and industry experts.

Q. What are the benefits to using the Enhanced Neutral Selection Process?

A. The Enhanced Neutral Selection Process is designed to give parties the tools they need to find the arbitrator who is best qualified to resolve their dispute. The process instills greater party confidence in the selected arbitrator, and can often save time and expense in the long run.

Q. Can parties combine these options and use more than one of the methods listed above on a particular case?

A. Yes. Parties can customize any or all of the above methods, in order to meet their needs during the arbitrator appointment process.

Q. Does the AAA charge an additional fee for Enhanced Neutral Selection Process?

A. No. We understand that selecting the right arbitrator is critical to the parties' satisfaction with the arbitration process, which is why this service is offered at no additional charge.

Q. How do the parties go about requesting the Enhanced Neutral Selection Process?

A. The AAA case manager will discuss the Enhanced Neutral Selection process during the initial administrative conference, and help facilitate an agreement to use one, or a combination of the methods described in this Fact Sheet. The case manager will confirm all arrangements made in writing.

Q. If the parties do not agree to use the Enhanced Neutral Selection Process, can one party request it?

A. In some cases, we may be able to work with the parties to help bridge the gap and develop a process that is agreeable to everyone. However, if after full discussion with the parties, an agreement is still not reached, the case manager will administer the case in accordance with the standard arbitrator selection process outlined in the rules.

Q. What if the parties would like to use an enhanced selection process that is not described in this Fact Sheet?

A. We encourage the parties to work together to agree on as many procedural items as possible. As long as the process is fair and reasonable, and does not violate any applicable law or AAA rules, we are happy to facilitate an enhanced selection process that is developed and agreed upon by the parties.

The purpose of this Q&A is to provide a brief guide to the Enhanced Neutral Selection Process. Please make sure to review the applicable rules and guides for more information.



American Arbitration Association® Administrative Review Council

Overview and Guidelines

A. Overview

The Administrative Review Council (ARC or Council) will act as the administrative decision making authority for the AAA® to resolve certain administrative issues arising on large, complex domestic cases. Administrative issues that should be submitted to the Council, as further outlined in Section D below, include objections to arbitrators, locale determinations and whether the filing requirements contained in the AAA's Rules have been met. At the discretion of the chairperson or vice chairperson, the Council may review these issues arising in other AAA administered cases.

The ARC has been developed to ensure that case issues are reviewed and resolved at a high level by individuals within the AAA with significant arbitration experience. The primary responsibility of this Council is to ensure that decisions are made after careful consideration of the issues presented and the parties' contentions, while upholding the integrity of the arbitration process and retaining the parties' confidence in the fairness of the process.

B. Structure

The ARC will include at least five voting members, including a chairperson and a vice chairperson, constituted from among internal, divisional and corporate executives, or external members such as retired AAA executives, AAA board members or other individuals with arbitration expertise. The ARC may also include additional non-voting members as determined by the chairperson. A member of the legal department will also serve as a non-voting liaison to the ARC. At least one voting or non-voting member must be part of the AAA's Senior Leadership team.

C. Meeting Schedule

The Council will establish weekly meetings to hear and decide issues raised for review. Meetings may take place via conference call or any other means. At the discretion of the chairperson or vice chairperson, additional Council meetings may also be scheduled based on workload and particular case needs.

D. Scope of Authority

The Council will act as the administrative decision making authority for the AAA's large, complex domestic caseloads to resolve arbitrator objections, locale determinations, and whether the filing requirements contained in the AAA's Rules have been met. The AAA Vice President or Director in charge of the AAA's office where the case is being administered has the discretion whether or not to request that the ARC decide if the filing requirements contained in the AAA Rules have been met. The Council may also review arbitrator objections, filing requirement issues, and locale determinations arising in other AAA administered cases subject to approval by the chairperson or vice chairperson to accept these submissions.



For the purposes of this Council, filing requirements disputes are those disputes that could impact the AAA's determination whether or not to administer a matter, including signatory issues or other questions regarding whether a party has met the AAA's filing requirements. The AAA is not authorized to make arbitrability determinations, however the ARC will review disputes about whether a matter has been properly filed with the AAA. The ARC may determine that the AAA will proceed to administer an arbitration, with the direction that the parties may present their jurisdictional or arbitrability dispute to the arbitrator once appointed.

E. Issue Submission

1. Issues may be submitted to the ARC by various AAA staff with the title Assistant Vice President-Director or above.
2. Upon the discretion of the chairperson or Council, submissions involving issues outside the Council's scope of authority or incomplete submissions may be rejected and returned to the submitting executive.
3. Upon the discretion of the chairperson or Council, the chairperson/Council may request that the submitting executive gather further information from the parties or arbitrator prior to a Council decision being made.

F. Decision-Making

The Council chairperson or their designee to lead a call will circulate a list of the cases to be reviewed and decided prior to each meeting of the ARC.

1. All participating Council members must have reviewed the necessary information prior to the call.
2. Any Council member wishing to be heard on a case issue will be given the opportunity to present their views and supporting rationale.
3. Any Council member who submitted the issue for review will not vote on the issue but may attend the Council meeting.
4. Decisions will be made by a panel of at least three Council members designated by the chairperson or vice chairperson.
5. Decisions will be made in accordance with the ARC Review Standards.
6. Decisions will be by a majority vote of the designated panel of Council members assigned to a case, and the results will be promptly announced to the appropriate case management staff.
7. All decisions of the Council will be confirmed in writing and include the following:
 - a. Case number
 - b. Issue presented
 - c. Date of the conference call
 - d. Decision



G. Escalation

Certain issues may be escalated for additional review to the entire Council, or to a Senior Management Committee.

1. Escalation to the entire Council. For any non-unanimous ARC decision, any Council member may request that the entire Council hear and decide the pending issue. For matters referred to the entire Council, at least five voting members of the Council must be present to vote and consider a matter.
2. Escalation to Senior Management Committee. The Senior Vice President representative to the Council or the legal department liaison may raise a pending issue to the AAA's General Counsel who will convene a committee of the AAA senior management for further consideration. Any decision made by the senior management must be by a majority.

Myth: *Arbitration Is Becoming As Expensive And Time-Consuming As Litigation*

B2B arbitration thrives today, used by thousands of businesses in every sector. Companies count on the American Arbitration Association® (AAA®) to handle commercial disputes, including large and complex cases, through a private, customized process decided by expert neutrals who understand the intricacies unique to the parties' industry sector.

However, there are many people who say arbitration is becoming as expensive and time consuming as litigation. We looked at 4,400 cases administered by the AAA concluded in 2009 through 2011, across five important U.S. business sectors. There were billions of dollars in claims, one third of which were even over \$500,000 and involved complex disputes.

FACT: PARTIES SETTLE PRIOR TO HEARINGS AT A RATE OF 3 TO 1

Disputes in industries where parties typically continue to work together, like Healthcare, settled at a rate of 80%.

The AAA, cognizant of its high settlement rates, works hard to move each case fairly and efficiently, leading to earlier and less-expensive settlements for the parties. In fact, median forum* costs on the settled cases were just \$3,250.

SETTLEMENTS

PERCENT OF CASES SETTLED

ALL FIVE INDUSTRIES	71%
ENERGY	68%
HEALTHCARE	80%
FINANCIAL SERVICES	68%
TECHNOLOGY	72%
TELECOM	65%

FACT: SOME LARGE COMPLEX CASES (LCC) WERE AWARDED IN 5 MONTHS OR LESS

B2B Arbitration users depend on the AAA for speedy resolution of disputes. A critical component of AAA arbitration is helping the parties customize the process. While some add litigation-like procedures that lead to a time-consuming process, most adhere to arbitration's original intent of a fair, fast and efficient resolution of their disputes.

BIG BUT QUICK

FASTEST TO AWARD

ENERGY	4.3 Months
HEALTHCARE	4.5 Months
FINANCIAL SERVICES	4.8 Months
TECHNOLOGY	3.5 Months
TELECOM	4.4 Months

FACT: BILLION-DOLLAR AND BET-THE-COMPANY CASES TRUST ARBITRATION AND THE AAA

With high stakes cases, transaction costs increase rapidly. In business, time is money. While every LCC case exceeded \$500,000 in claims, several included \$1 to \$5 Billion. These parties know that AAA is experienced at administering high-profile, high-stakes cases.

* Forum costs = AAA Fees + Arbitrator Fees

BIG \$ FIGHTS

****AVERAGE LCC CLAIM**

LARGEST CLAIM

ALL FIVE INDUSTRIES	\$2.0M	\$4.97B
ENERGY	\$4.3M	\$623M
HEALTHCARE	\$1.3M	\$129M
FINANCIAL SERVICES	\$2.2M	\$4.97B
TECHNOLOGY	\$1.8M	\$140M
TELECOM	\$1.6M	\$650M