AMERICAN COLLEGE
OF TRIAL LAWYERS

THE ARBITRATION HANDBOOK

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Arbitration Committee

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AMERICAN COLLEGE OF TRIAL LAWYERS

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Approved by the Board of Regents October 2026

Introduction

The American College of Trial Lawyers created its Arbitration Committee in 2023. The committee members are all trial lawyers, but they also have significant experience in arbitration. This "Arbitration Handbook" is their first major work; it was written by Fellows of the College for trial lawyers.

As the College recognized, many commercial disputes are now being decided by arbitrators in conference rooms, not judges and juries in courtrooms. Many of the largest domestic commercial disputes, and essentially all commercial disputes arising from cross-border transactions, are being arbitrated, not tried.

Arbitration and litigation are similar in many ways, but they are not identical, and the differences can require changes in advocacy. Civil trial lawyers used to depositions, direct testimony, evidence rules, and "making the record" might be surprised that arbitration usually has less discovery, no or limited direct, fewer rules, and essentially no appeal.

This "Arbitration Handbook," we hope, reduces the surprises and offers suggestions as to how trial lawyers can adapt to and thrive in this different dispute resolution process.

Fourteen Fellows of the College contributed chapters, each addressing the law, lore, or practice of arbitration—lessons that those Fellows learned, many times the hard way, through experience. They wrote under the supervision of Editor-in-Chief David M. Brodsky, the first chair of the College's Arbitration Committee. He was ably assisted by Associate Editors Tom Cunningham and Dennis Suplee.

Arbitration law and practice in the United States and Canada have been advancing and changing rapidly. Neither the College nor its Arbitration Committee can claim that this "Arbitration Handbook" contains the only advice possible or, as time progresses, the most current advice. We do hope, though, that trial lawyers undertaking an arbitration find this "Arbitration Handbook" a useful primer.

Paul Klaas, FACTL
Chair, Arbitration Committee
March 2026

Chapter 1: United States Arbitration Law

Paul Klaas, Esq., FACTL

1. Overview

This section of the American College of Trial Lawyers' Arbitration Handbook flies at 10,000 feet. There are hundreds of court opinions concerning US arbitration law, and essentially every word of the Federal Arbitration Act ("the FAA")". has been the subject of litigation and interpretation. Our intent is not to provide legal advice; it is, rather, to provide an overview, without pretending to be detailed or comprehensive.

2. Brief history of arbitration in the U.S.

For much of US history, the courts were neither favorably inclined toward arbitration nor particularly impressed by arbitrators. Typical of the courts' view was that expressed by the United States District Court for the District of Massachusetts in *Tobey v. County of Bristol,* 23 F.Cas. 1313 (1845):

> *[Arbitrators] are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium.*

Whatever the historic dim view of arbitration and arbitrators, the US courts were either forced or naturally came to be more supportive of arbitration. Now, the US is known globally as an "arbitration friendly" jurisdiction.

3. The "FAA"

The Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("the FAA")[1] is the legal foundation for U.S. domestic arbitration.

3.1. Chapter 1 of the FAA: Chapter 1 of the FAA affirms the validity of arbitration agreements (§2); requires that courts stay lawsuits when the parties have agreed to arbitrate (§3); empowers arbitrators to issue subpoenas (§7); directs the courts to confirm arbitration awards, unless "vacated, modified, or corrected" (§9); specifies the limited grounds upon which arbitration awards may be vacated by the courts (§10); and requires the courts to enter judgments based on those arbitration

1 *See* Appendix 1.

awards, enforceable as if the arbitration awards were court judgements entered at the end of a lawsuit (§13).

3.2. Chapters 2 and 3 of the FAA: The FAA also provides, in its Chapter 2, that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention of 1958"), and, in its Chapter 3, that the Inter-American Convention on International Commercial Arbitration ("the Panama Convention") shall be enforced.[2]

3.3. Chapter 4 of the FAA: The FAA, originally enacted in 1925, was most recently amended in 2022 with the addition of Chapter 4, providing that, at the election of a person alleging sexual harassment or sexual assault, an arbitration agreement shall not be valid or enforceable.

4. State arbitration statutes

All US states have state arbitration statutes. Many are based on the Uniform Law Commission's Uniform Arbitration Act or the Revised Uniform Arbitration Act; several are based on the UNCITRAL Model Arbitration Law.

To the extent the state statutes are inconsistent with the FAA in cases involving interstate commerce, they are pre-empted. Generally, in significant arbitration cases, the FAA—not a state statute—matters most, but, of course, it is important to be aware of all possibly applicable arbitration laws.

5. *"Lex arbitri"*

This section of the ACTL Arbitration Handbook also only addresses US arbitration law (the *"lex arbitri"*). This section does not address the substantive law applicable to the dispute (the "*lex contractus"* or *"lex causa"*), other than to identify, in paragraph 12, below, some pitfalls to be avoided when selecting the applicable substantive law.

6. Validity of arbitration agreements

FAA §2 provides that arbitration agreements must be "written" to fall within the statute.

2 *See* Chapter 16, International Commercial Arbitration.

FAA §2 provides that an arbitration agreement in "any maritime transaction or a contract evidencing a transaction involving commerce" can apply to disputes that have not yet arisen or that have already arisen.

FAA §2 provides that, if there is a valid arbitration agreement between parties to an arbitrable dispute, their agreement shall be deemed by the courts "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in Chapter 4" (specifying procedures to be followed in the event of a dispute as to whether there actually is an arbitration agreement).

Application of that last "savings" clause of FAA §2 has been the subject of much litigation. Generally speaking, it requires that courts treat arbitration agreements as they treat all agreements—no more requirements, no fewer.

7. Stay of litigation

If there is a valid arbitration agreement governing an arbitrable dispute, FAA §3 requires the courts "to stay the trial of the action until such arbitration has been had…"

So, if a party to a valid arbitration agreement governing an arbitrable dispute sues the other party in court, "on application of one of the parties," the court is required to stay the litigation until the arbitration is concluded.

FAA §3 is mandatory. The courts "shall" stay litigation when the parties have agreed to arbitrate an arbitrable dispute.

8. Subpoena power

FAA §7 empowers arbitrators to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case."

At the time this ACTL Arbitration Handbook was written (2024-26), the practical application of FAA §7 was in some disarray amongst the federal circuits and courts. For example, some courts allow pre-hearing *subpoenas duces tecum,* and others do not. In those courts that do not allow pre-hearing *subpoenas duces tecum,*

arbitrators sometimes convene a brief "hearing," receive the evidence, then adjourn for weeks or months, to whenever the full merits hearing is scheduled. Practitioners who seek pre-hearing "discovery" need to check the current state of the law in the controlling jurisdiction. For a more in-depth discussion, see Chapter 11, Securing Evidence from Non-Parties to Arbitrations.

9. Confirmation of arbitration awards

If a party that loses an arbitration does not comply with the Award, FAA §9 permits the party that won to apply to court "for an order confirming the award."

"[T]hereupon, the court **must** grant such an order **unless** the award is vacated, modified, or corrected as prescribed in sections 10 and 11…" of the FAA.

10. Grounds upon which arbitration awards may be vacated

The courts may vacate an arbitration award, if and only if one of the grounds specified in FAA §10 is found.

FAA §10 grounds include corruption, fraud, undue means, evident partiality or corruption of arbitrators, "misconduct" by arbitrators in refusing to postpone a hearing upon sufficient cause or in refusing to hear material evidence, other prejudicial "misbehavior" of arbitrators, arbitrators exceeding their powers or "so imperfectly execut[ing] them that a mutual, final, and definite award upon the subject matter submitted was not made."

FAA §10 does not permit courts to vacate arbitration awards because, in the court's view, the arbitration award is wrong on the facts or the law. In some circuits, arbitrators' "manifest disregard of the law" is thought to be grounds for a court to vacate an award, but, in other circuits even "manifest disregard of the law" is not enough. The Second, Fourth, Sixth, Eighth, Nine, and Tenth Circuit Courts of Appeals have recognized "manifest disregard of the law" as a proper ground upon which to vacate or refuse to enforce an arbitration award. *See, e.g., Smarter Tools Inc. v. Chongqing SENCI Imp. & Exp. Trade Co.,* 57 F.4th 372 (2d Cir. 2023); *Warfield v. Icon Advisers, Inc.,* 26 F.4th 666 (4th Cir. 2022); *In re Romanzi,* 31 F.4th 367 (6th Cir. 2022); *Zeidman v. Lindell Management LLC,* No. 24-1608 (8th Cir. 2025); *HayDay Farms, Inc., v. FedEx Holdings, Inc.,* 55 F.4th 1232 (9th Cir. 2022); *Goldgroup Res., Inc. V. DynaResource de Mexico, S.A. De C.V.,* 994 F.3d 1181 (10th Cir. 2021). The Fifth, Seventh, and Eleventh Circuits have not recognized "manifest disregard of the law"

as a proper ground upon which to vacate or refuse to enforce an arbitration award. *See, e.g., United States Trinity Energy Servs., LLC v. Southeast Directional Drilling, LLC/,* 135 F.4th 303 (5th Cir. 2025); *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals,* 660 F.3d 281 (7th Cir. 2011); *Payne v. Savannah Coll. FP Art & Design, Inc.,* 81 F.4th 1187 (11th Cir. 2023). As of the date this chapter was written (December 2025), the First, Third, and DC Circuits have not yet directly held on this issue.

The extraordinary deference given to arbitration awards, and the very limited grounds upon which the courts can reject arbitration awards, was perhaps best summarized in *Oxford Health Plans v. Sutter,* 133 S.Ct. 2064 (2013):

> *[C]onvincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under [the Federal Arbitration Act]. The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." The arbitrator's construction holds, however good, bad, or ugly.*

11. Arbitration award, enforceable as court judgment

FAA §13 provides that, upon confirmation of an arbitration award, the court enters a judgment upon the award with "the same force and effect…[as] a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

Pursuant to FAA §13, then, the judicial power of the United States is essentially lent to the otherwise private arbitration process to permit enforcement of the resulting award.

12. Some substantive law pitfalls that can arise in arbitration

The parties to an arbitration agreement can select the substantive law that will apply to an arbitrable dispute. The parties to a contract that contains an arbitration agreement can select the substantive law that will apply to an arbitrable dispute. Unless the language used by the parties is ambiguous, the parties' choice must be honored by the arbitrators. Although this section of the ACTL Arbitration Handbook

does not address substantive law otherwise, these three pitfalls (among others!) can arise in connection with arbitrations and merit mention:

- **Statutes of limitations:** It is not necessarily so that the statute of limitations that would be applied in litigation would be applied in arbitration. In some states, the same limitations period would be applied, *Raymond James Financial Services, Inc. v. Phillips,* 126 So.3d 186 (Fla. 2013); in some states, the same limitations period would not be applied because an arbitration is not deemed an "action" or a "suit" within the state's statutory language, *Har-Mar Inc. v. Thorsen & Thorsen, Inc.,* 300 Minn. 149, 218 N.W.2d 751, 755 (1974); and, in some states, application of a statute of limitations can become a matter for arbitrator discretion (*see, e.g.,* N.Y. C.P.L.R § 7502(b)). Many practitioners include a provision in their arbitration agreements requiring that the same statute of limitations that would apply in court should be applied in arbitration.
- **Choice of law:** Some jurisdictions have choice of law doctrines that direct application of the law of the place a contract was formed, or where a breach of contract or tort occurred. There is thought to be some risk that, for example, if the parties chose the law of State X (unrelated to the transaction) rather than State Y (where the contract was formed, performed, and breached), State X might apply State X's conflict of law doctrine and apply State Y's law. Many practitioners include in their arbitration agreements phrases such as "apply State X law, exclusive of its conflict of laws provisions."
- **CISG:** The United States is a signatory to the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), so the CISG is constitutionally the supreme law of the land. The CISG has broad scope, resembles in many regards the US Uniform Commercial Code, but has some provisions that make US lawyers and parties uncomfortable. Whether, by virtue of being a US treaty, the CISG pre-empts or becomes part of the law of a US state is debatable, but many practitioners think that is not a debate worth having. The CISG itself allows contracting parties to opt out of its application, and, in the arbitration agreement, many US lawyers and parties exercise that option.

Chapter 2: Arbitration and Litigation: Key Differences

David M. Brodsky, Esq., FACTL

1. Overview

Civil litigation and arbitration are both recognized methods of resolving disputes, but skilled advocates in the former should not assume that their skills will be equally effective in the latter. This is principally the case because arbitrators are often selected by the parties because of their knowledge of the subject matter of the underlying dispute, whether it be construction, private equity, copyright, or some other specialized area of the law, or because of their prior exposure to a state's body of law in a particular area, such as Delaware's construction of insurance contracts. Further, arbitrators, by and large, are less formal in their administration of an arbitration than state or federal jurists, with an emphasis on speed and efficiency, so effective arbitration advocates should sharply focus their oral and written presentations or examinations of witnesses.

2. The arbitration clause

Unlike the vast majority of civil litigations, arbitrations are creations of contract between the disputing parties, so the first document to be included in every arbitration advocate's trial notebook is the arbitration agreement. Often the agreement is embedded in a business contract between the parties and, thus, entered into before the arbitration dispute has arisen; occasionally, an arbitration agreement is entered into after the dispute has already arisen. In all cases, the arbitration agreement must be carefully reviewed by the advocates because it will contain the rules for the appointment of the arbitrator or arbitrators, possible agreements as to the shifting of costs and expenses, including attorneys' fees, and the location of the hearing. It may also contain agreements on scope of discovery, length of the hearing, mandatory pre-arbitration mediation, and the neutrality or non-neutrality of party-appointed arbitrators.

3. Selection of arbitrators

As distinct from civil litigation, parties choose the arbitrators who will decide the dispute and may agree to have either neutral or non-neutral arbitrators. The distinction between the two is that neutral arbitrators are forbidden to discuss *ex parte* the merits

of the arbitration dispute, whereas nonneutrals may discuss *ex parte* the merits but are generally forbidden to discuss the deliberations of the arbitral tribunal.

3.1. The initial communication: Unless prohibited by the arbitration agreement or otherwise, prospective neutral arbitrators may engage in *ex parte* communications with the selecting party, usually counsel. The communications should be limited to a basic discussion of the nature of the dispute, the arbitrator's ability, willingness, and availability to serve, as well as the identities of the parties, counsel, and witnesses, including experts, if known. The communications should not include discussions of the merits.

> *See AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon III(B)(1)("Code").*[3]

3.2. Appointment and disclosures: In yet another way that civil litigation is different from arbitration, prospective arbitrators are required to make substantial disclosures about their prior associations and to investigate the possibility of prior relationships with counsel, witnesses, and other arbitrators.

> *See Turner, The What, Why and How of Arbitrator Disclosures,* http://adr.org/index.php/blog/the-what-why-and-how-of-arbitrator-disclosures (as of March 12, 2025).

3.3. Presumption of neutrality: Unless designated as non-neutral, party-appointed arbitrators are presumed to be neutral, see Canon IX(A), meaning that after the arbitrator has executed the oath of office, they will be unbiased, impartial, and independent. According to the College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration ("Best Practices"), "an independent arbitrator is one who has no close financial, personal, or professional relationship with a party and will not profit from the outcome of the arbitration either directly or indirectly," at 9.

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3 "An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:
(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case."

3.4. Investigation and disclosures: Once prospective arbitrators have been supplied with information about parties and counsel, they must investigate the existence of, and disclose, any "material financial or personal interest in the outcome of the arbitration and any past or existing relationship with any of the parties, lawyers, witnesses, or other arbitrators that might reasonably affect the arbitrator's impartiality in the eyes of the parties." Code, Canon II(A). An arbitrator who fails to so investigate or disclose any such facts or relationships threatens the viability of an award which could be vacated by a reviewing court.

See Schmitz v. Zilveti, 20 F.3d 1043, 1048 (9th Cir. 1994).

3.5. Blanket disclosures:[4] It is an acknowledged fact that arbitrators belong to associations, attend meetings and conventions, and socialize with other arbitrators and lawyers; to forestall any challenge to an arbitrator's independence or impartiality based upon such memberships or informal meetings, arbitrators often include in their disclosures a blanket form of disclosure regarding such instances.

4. Compensation

Arbitrators depend upon the parties for their compensation. Once selected but before accepting their appointments, arbitrators are required by Canon VII(B)(1) to set forth to the parties their rates of compensation for the arbitration. Some institutions like the American Arbitration Association ("AAA") require members to publish their terms of compensation, including billing rate, cancellation policy, and travel terms, so that parties know in advance such terms before selecting the arbitrator.

4 "I also note for the information of the Parties that I interact frequently with members of the legal profession, including through active involvement in arbitral institutions, bar associations and other professional organizations. I regularly attend and speak at professional seminars, conferences, and training events relating to arbitration. I write about arbitration matters for publication, both individually and as part of committees in which I am involved. I am also a member of various online professional communities, networks, and list serves, such as LinkedIn. It is possible that I may have had contact with case participants or their firms or affiliated organizations through such professional activities, or that I may have occasional contact with them through such activities going forward. My practice is not to make inquiries in regard to these types of activities as it is not feasible to keep track of all such connections or to conduct a complete and accurate conflicts search of persons and entities with whom I have, or have had, such contact. Furthermore, standing alone, such connections are not, in my judgment, those 'which might reasonably affect impartiality or lack of independence in the eyes of any of the parties.' Accordingly, I make no disclosures with regard to any connections of the nature described above."

4.1. Estimates and deposits: After being selected and being introduced to the outlines of the case by means of the first pre-hearing scheduling conference, *see infra,* arbitrators will generally set forth their expected compensation for the entire arbitration or for stages thereof, so that the parties may know what each's share is of the arbitrator compensation. The AAA and other institutions will bill the parties for their shares and hold the deposits against which the arbitrators will bill their periodic invoices. In some cases, additional deposits may be required if the original estimates were inadequate.

5. The selection of a chair

When a tribunal is to be composed of three arbitrators, two of whom are party-selected, the general method of selection is for each side to submit names to their respective party-designated arbitrator who will then discuss the merits of each candidate, with the expectation that they will agree on a third arbitrator to be chair. This process is often iterative, with names being exchanged and each party-designated arbitrator consensually consulting with their designating party, until a third arbitrator is named. It sometimes occurs that the arbitrators cannot agree on a third arbitrator and they may resort to what amounts to a coin flip to choose a chair.[5]

6. The pre-hearing scheduling conference and order

Another distinctive difference between civil litigation and commercial arbitration is the Pre-Hearing Scheduling Conference, which is held within a very short period of time after the Tribunal is established. Although in federal civil litigation and in most state litigation courts will also hold scheduling conferences, the purposes of the two are significantly different in practice. In the federal civil litigation format, generally the Rule 16 scheduling conference is focused on setting deadlines for discovery, motions, and other pretrial activities to ensure the case progresses efficiently, and may set provisional dates for a trial.

By contrast, an arbitration pre-hearing conference sets the parameters for the entire proceeding through the final hearing, clarifies the issues to be tried, often sets aside a specific time when the parties should discuss possible settlement, whether or not by using a mediator, lays down firm dates for every substantive

5 The "virtual coin flip" technique works as follows: one candidate is designated as "even" and the other as "odd"; the Arbitrators then consult the closing average of the next following DJIA closing on the NYSE and look to the digit immediately to the left of the decimal point. If the number is "even", then the chair-designate is the one designated "even" and likewise, if the number is "odd," the chair-designate is the one designated as "odd."

event during the pre-hearing process, including possible motions for summary disposition, and, based on input from the parties and other peoples' respective calendars, establishes the specific dates of the final hearing. An advocate who is well prepared for the conference will have thoroughly discussed the issues with the client representative and made decisions regarding possible discovery, the viability of a summary disposition motion, what experts will be called, whether witnesses will orally testify on both direct and cross or whether written witness statements will be used in lieu of a complete oral direct.

6.1. Motions for summary disposition: The rules of arbitral institutions such as the AAA, JAMS, FedArb, and others give arbitrators the ability to hear and decide dispositive motions. In ad hoc arbitrations, the parties can provide the arbitrators such authority in the arbitration agreement. As alluded to above, in order to weed out motions that are evidently lacking in merit, are not cost effective, or will not expedite the final hearing, arbitrators often include in the Scheduling Order a procedure for screening of prospective motions. Such screening is usually a short letter sent to the panel by the proposing party, followed by a short opposition letter. From such letters, panels are generally able to discern which motions are appropriate candidates for summary disposition and which not.

> *See AAA Commercial Rule R-33:* "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

7. The final hearing

7.1. Evidence: The rules of the major arbitration associations provide, without equivocation, that federal and local rules of evidence do not control in arbitration, giving arbitrators substantial latitude regarding evidentiary issues.

> *See, e.g.,* Commercial Arbitration Rules & Mediation Procedures r. 35(a) (Am. Arbitration Ass'n 2024) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.").

That said, the practices of arbitrators vary widely. A study conducted in 2018 by the American College of Trial Lawyers found that "the majority of arbitrators tend to let in nearly all evidence that is pertinent to the controversy, going so far as to admit evidence that is only tangentially pertinent 'for what it's worth,' while excluding only evidence that is unnecessarily cumulative, or privileged" and recommended that, "Arbitrators should address evidentiary issues by permitting the parties the latitude, within reason, of offering the evidence they desire to support their cases; preserving the award from attack; mitigating unnecessary legal expenses or inconvenience of witnesses; and avoiding unnecessary exposure to clearly immaterial or unfairly prejudicial evidence."[6]

Civil litigators who find themselves in an arbitration should strive to become aware of the different views of the arbitrators before whom they will appear regarding evidence rules and comport themselves accordingly. As mentioned above, the ideal time to raise this issue is in the Pre-Hearing Scheduling Conference.

7.2. Experts: In general, arbitrators will follow the disclosure practices set forth in the Federal Rules, but, increasingly, arbitrators are using variants of the so-called "hot-tubbing" of experts where opposing experts are simultaneously subject to questioning by the tribunal members.

Another form of "hot-tubbing" occurs when the Scheduling Order provides for the opposing experts to prepare a joint report of their specific agreements and disagreements.

7.3. Examination of witnesses: In an arbitration where witness statements, in lieu of traditional extensive direct oral examination, are required, the examining attorney, on direct, should seek the arbitrator's permission to have the witness summarize their background and the basic facts before turning them over for cross-examination. And in direct contrast to a typical cross-examination in a civil trial, a cross-examination in an arbitration should be tightly focused on the factual issues in the hearing and not devolve into a line-by-line attack on credibility based on slight discrepancies in prior testimony, such as a deposition or transcript from another hearing. Arbitrators are not jurors and are generally more attuned to making credibility judgments.

6 American College of Trial Lawyers, *Best Practices Regarding Evidence In Arbitrations*, 2018, 3, 6.

8. The award

The final product of the arbitration process is the final award, generally issued by the arbitrators within thirty days of the close of the hearing. Often, the close of the hearing is deemed to be the date that closing oral arguments are heard, although arbitrators may vary that if final briefs are submitted rather than oral arguments.

8.1. Vacatur: Arbitrators must constantly be aware of the grounds for an award to be vacated by an appellate panel. Such grounds are set forth in state and federal law (e.g., Section 10 of the Federal Arbitration Act), but the grounds are beyond the scope of this chapter.

> *See Walgreens Co. v. PWNHealth, LLC,* 2025 WL 445349 (USDC, D. DE 2025) ("[A] party moving to vacate an arbitration award pursuant to [Federal Arbitration Act] Section 10 ... bears the burden of proof." *PG Publ'g, Inc. v. Newspaper Guild of Pittsburgh,* 19 F.4th 308, 314 (3d Cir. 2021). "It's a steep climb to vacate an arbitration award." *France v. Bernstein,* 43 F.4th 367, 377 (3d Cir. 2022). "[T]he standard of review of an arbitrator's decision is extremely deferential." Id. Under the Federal Arbitration Act, an arbitration award may only be vacated under the "exceedingly narrow circumstances listed in 9 U.S.C. § 10(a)." Id. (cleaned up) (quoting *Freeman v. Pittsburgh Glass Works, LLC,* 709 F.3d 240, 251 (3d Cir. 2013))...")

9. Confidentiality

It is generally said that, unlike civil litigation, arbitrations are private and confidential so that parties can air sensitive information without fear of its being disclosed. This secrecy can be achieved but its nature may vary depending upon which arbitral institution is administering the dispute and whether the parties have entered into a confidentiality order.

9.1. Confidentiality agreement: To achieve true confidentiality, the parties should enter a confidentiality agreement that prevents the parties and their attorneys from publicizing the arbitral proceedings and information learned during the arbitration.

9.2. Check institutional arbitration rules and state law: If the arbitration is governed by the rules of some arbitral institution, such as the AAA, JAMS, CPR, ICC, the institution itself and the arbitrators, as well as, in some cases, the parties, must treat the proceedings as confidential.

See, e.g., AAA/ABA Code, Canon VI(B); C.P.L.R. Rule 18; ICC, Article 22(3); ICDR, Article 40; (2021).

9.3. Exceptions to confidentiality

(i) **Court proceedings:** Notwithstanding the existence of a confidentiality agreement and protections in institutional rules, pursuing a confirmation or vacatur of a final award may cause the award to become public because civil litigation files are generally open to public scrutiny, absent a sealing order. Court rules on this subject vary and should be checked.

(ii) **Third-party litigation:** If a third party brings an action to seek discovery of an arbitral proceeding and can show it has a legal right to view the underlying documents, disclosure would, generally, be allowed, notwithstanding a confidentiality agreement or confidentiality protections of the arbitral institution.

10. Conclusion: five things counsel should avoid[7]

10.1. Don't confuse arbitrators for judges

(i) Address Panel Members as Madame, Ms., or Mr. Arbitrator Smith or Chairperson Jones, but not "Your Honor."

10.2. Don't confuse hearings with trials[8]

(i) Objections to testimony or exhibits should be sparingly made; remember objections "for the record" don't belong in arbitrations, as there is a limited right of appeal (except as contracted for between the parties) in arbitrations.

(ii) Excessively long direct and cross-examinations are frowned upon; make your point and move on.

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7 *See also* Davidson, "Top Ten Mistakes Litigators Make in US Commercial Arbitration," Practical Law Arbitration (2019).

8 "Arbitrators, in contrast, are bemused by litigators who approach arbitration as a shadow judicial forum with the expectation that arbitrators are to be impressed by frequent and expert citations to court rules such as the Federal Rules of Evidence ('FRE'). The fact that formal rules of evidence do not apply in arbitration (unless the parties expressly mandate it, which is rare) little deters the transplanted trial lawyer." Alfred G. Feliu, Evidence in Arbitration: A Guide for Litigators, in AAA Handbook on Commercial Arbitration 267 (2nd ed. 2010).

10.3. Don’t go for excess

(i) Pare your exhibits to the bone; mark (or, better yet, pre-mark) only what is actually going to be shown to a witness on direct or cross-examination.

(ii) Cut your witness list so there aren’t multiple witnesses testifying to the same issues.

(iii) Avoid string cites to cases and other authorities; and don’t fail to hyperlink to cases or authorities, or provide PDFs of all citations.

10.4. Avoid bringing unnecessary disputes to the arbitrator

(i) Strive to resolve all scheduling disputes and discovery disputes by trying to work it out with opposing counsel first.

(ii) Don’t make “dispositive” motions unless you have very strong grounds upon which you are relying. Unlike summary judgment motions in civil courts, which are often used to educate the judge, generally arbitrators find such motions a waste of time and unnecessary drain on resources.

10.5. Avoid at all costs Rambo tactics and uncivil relations with opposing counsel

Chapter 3: Multi-Party Arbitration

Tom Cunningham, Esq., FACTL

1. Overview

This chapter addresses issues that arise when litigants seek to arbitrate claims involving multiple parties, including: (1) arbitrations with persons who are not signatories to the arbitration agreement; (2) consolidation of separate arbitration proceedings; and (3) class-action arbitration. Because arbitration is always a creature of contract, the prevailing law focuses on whether the particular arbitration structure is authorized or supported by the arbitration agreement either expressly or by implication. These questions are ordinarily resolved according to state law.

2. Joinder and nonsignatories

2.1. Summary: There are several theories by which a person who is not a party to the original arbitration agreement may nevertheless be bound to participate in the arbitration, and whose rights and obligations may be finally determined in the arbitration. The most significant of these are: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; and (5) estoppel. Ordinarily the utility of any of these theories is determined according to the state law applicable to the dispute.

(i) General

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

Arbitration is a matter of contract so a party cannot be required to submit to arbitration of any dispute that he has not agreed to arbitrate.

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009).

Traditional principles of state law allow a contract to be enforced by or against nonparties through assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel. A litigant who was not a party to the relevant arbitration agreement may seek a stay of litigation concerning an issue referable to arbitration if the relevant state contract law allows him to enforce the agreement.

GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, Inc., 590 U.S. 432, 140 S.Ct. 1637, 207 L.Ed.2d 1 (2020).

The Federal Arbitration Act permits courts to apply state law in enforcing arbitration agreements. The Act places arbitration agreements on the same footing as other contracts and does not replace state law principles regarding the scope of written agreements, including the question of who is bound by them. This includes enforcement of contracts involving nonsignatories.

Merrill Lynch Inv. Managers v. Optibase, Ltd., 337 F.3d 125 (2d Cir. 2003).

Absent an express agreement to arbitrate, courts recognize only limited theories upon which to enforce an agreement against a non-signatory. These theories include: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel. An important factor is whether the party seeking to arbitrate is the signatory (in which case compelling the nonsignatory to arbitrate is more difficult) or the nonsignatory (in which case the courts are more amenable to requiring the signatory party to arbitrate). Here, the party seeking arbitration was the signatory and failed to show that arbitration is appropriate under any of the listed theories.

(ii) Incorporation by reference

Al Rushaid v. National Oilwell Varco, 757 F.3d 416 (5th Cir. 2014).

A price quotation for sale of oil and gas drilling equipment provided, "Terms and conditions are based on the general conditions stated in the enclosed [document]," which in turn contained an arbitration clause. The court held the reference to those terms and conditions was sufficient to bind the purchaser to arbitrate the dispute regarding the contract formed around the supplier's price quotation.

McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co., 2015 WL 144190 (S.D.N.Y. 2015).

A party may be bound under an incorporation-by-reference theory only when it signs an agreement that incorporates an earlier agreement containing an arbitration provision. Conversely, a party is not bound to arbitrate based upon an agreement that does not contain an arbitration

provision, which is later incorporated into an agreement between other parties that does contain an arbitration provision.

Clarendon Nat. Ins. Co. v. Lan, 152 F.Supp.2d 506 (S.D.N.Y 2001).

A nonsignatory to an agreement containing an arbitration provision can be compelled to arbitrate when the nonsignatory is a party to a separate contract with the signatory to the arbitration agreement that incorporates the existing arbitration clause. Nevertheless, courts have drawn a distinction between arbitration clauses that are restricted to the parties identified in the agreement (in which case the nonsignatory cannot be compelled to arbitrate) and broadly worded arbitration provisions that can be read not to exclude third parties (in which case the nonsignatory can be compelled to arbitrate).

(iii) Assumption

Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960).

A written arbitration provision in a qualifying transaction is the basis of an enforceable arbitration agreement. It does not follow, however, that the obligation to arbitrate attaches only to one who has signed the arbitration agreement. Ordinary contract principles determine who is bound by an arbitration clause, the same as any other written agreement. Where a nonsignatory is assigned rights under a contract containing an arbitration clause, the assignee ordinarily assumes the obligation to arbitrate pursuant to that clause.

Ribadeneira v. New Balance Athletics, Inc., 65 F.4th 1 (1st Cir. 2023).

A nonsignatory may be bound by an arbitration agreement if its conduct indicates that it is assuming the obligation to arbitrate. Further, if a nonsignatory is assigned rights under a contract containing an arbitration clause, the assignee assumes the obligation to arbitrate pursuant to that clause. Under Massachusetts law, a nonsignatory successor-in-interest may be bound to an arbitration agreement to which the predecessor is a party if the succeeding entity is essentially the same business despite a formalistic change of name or corporate form, i.e., if the succeeding entity is merely a continuation of its predecessor. In this case, involving a distribution agreement between New Balance and a Peruvian distributor,

the successor was specifically created and implemented to take over performance of the underlying distribution contract. For this reason, the court held that the successor was obligated to arbitrate under the arbitration clause in the distribution agreement.

GMAC Commercial Credit LLC v. Springs Industries, Inc., 171 F.Supp.2d 209 (S.D.N.Y. 2001).

Consistent with the Uniform Commercial Code principle that the rights of a contract assignee are subject to all the terms of the contract and any claim or defense that might arise from it, an assignee asserting a claim on an assigned contract is bound by that contract's arbitration clause. Otherwise, an arbitration clause would have no value since a party could escape it by assigning a claim subject to arbitration to a third party.

Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc., 293 F.3d 1023 (7th Cir. 2002).

Where a nonsignatory to a licensing agreement containing an arbitration clause merged with, and then dissolved, a signatory licensee, the merging entity was held to have voluntarily assumed the obligations of the licensing agreement, including the obligation to arbitrate disputes, as the successor to the signatory licensee. The court reasoned that the nonsignatory licensee should not be permitted to escape the obligation to arbitrate by effectively legislating the signatory out of existence.

Ryan, Beck & Co., LLC v. Fakih, 268 F.Supp.2d 210 (E.D.N.Y. 2003).

Determination of the issue of successor liability is fact specific. In the Second Circuit, the factors include (1) continuity of ownership; (2) cessation of ordinary business by the predecessor; (3) assumption by the successor of liabilities ordinarily necessary for continuation of the predecessor's business; and (4) continuity of management, personnel, physical location, assets, and general business operation.

(iv) Agency

ABM Industry Groups, LLC v. International Union of Operating Engineers, Local 30, 30A, 30B, AFL-CIO, 968 F.3d 158 (2d Cir. 2020).

Traditional principles of agency law may bind a nonsignatory to an arbitration agreement. Former employees, nonsignatories to the relevant

collective bargaining agreement, were represented by their local union in arbitration against the former employer of claims for unpaid accrued vacation credits. By authorizing the union to represent them, the former employer manifested an intent to be bound by the arbitration award.

Tamsco Properties, LLC v. Langemeier, 597 Fed.App'x. 428 (9th Cir. 2015).

Applying California law, the court held that when a nonsignatory and one of the parties to an arbitration agreement have an agency relationship, the arbitration agreement can be enforced against the nonsignatory. In this case, the nonsignatories admitted that the signatory persons who engaged in the activities giving rise to the agreement did so on behalf of the nonsignatories. Consequently, the nonsignatories were subject to the arbitration agreement.

McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co., 2015 WL 144190 (S.D.N.Y. 2015).

Generally, an agent who signs an agreement on behalf of a disclosed principal will not be bound individually to arbitrate claims against the agent as an individual except where the terms indicate that the agent is within the scope of the agreement, such as signing the agreement both in an individual capacity and as an agent for the disclosed principal. However, when charged with misconduct relating to behavior in their representative capacities, agents may avail themselves of the arbitration provision in the underlying contract to compel arbitration of claims against them.

(v) Alter ego

Gateway Structures, Inc. v. Carpenters 46 Northern California Counties Conference Bd. of United Broth. Of Carpenters and Joiners of America, AFL-CIO, 779 F.2d 485 (9th Cir. 1985).

Nonsignatory employer was bound to an arbitration award based on a collective bargaining agreement where the signatory employer and nonsignatory employer were operated as a unit, and where the collective bargaining agreement provided that each individual employer, corporate or other legal entity, or its successor, shall be liable under, subject to, and bound by the agreement.

Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995).

Arbitration arises out of a contract. A party cannot be required to arbitrate a dispute to which it has not agreed to submit. A corporate parent did not exert sufficient control over its subsidiary to justify piercing the corporate veil. Consequently, the parent entity was held not bound to arbitrate a dispute based upon an arbitration agreement between the subsidiary and the subsidiary's supplier.

Zurich American Ins. Co. v. Watts Industries, Inc., 417 F.3d 682 (7th Cir. 2005).

Where insurance policies and accompanying deductible agreements were separate agreements and the deductible agreement contained an arbitration clause signed by the insured's parent, the insured corporation could not be compelled to arbitrate a dispute arising out of the deductible agreements because the corporate relationship between the insured and its parent was insufficient to support an alter ego theory and the insured did not seek any direct benefit under the deductible agreements.

Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC, 310 Fed.App'x. 858 (6th Cir. 2009).

Nonsignatories may be bound to an arbitration agreement under ordinary contract and agency principles. Here, the two defendant companies were so closely interconnected as to support the conclusion that one was the alter ego of the other, such that the nonsignatory defendant was bound to arbitrate the dispute.

McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co., 2015 WL 144190 (S.D.N.Y. 2015).

A nonsignatory may be bound to arbitrate where it exercised complete control over a signatory and where the domination gives rise to the claim made the subject of the arbitration.

(vi) Estoppel

Reeves v. Enterprise Products Partners, LP, 17 F.4th 1008 (10th Cir. 2021).

The scope of an arbitration agreement, including the question of who it binds, is a question of state contract law. Under the law of Oklahoma

and several other states, the doctrine of equitable estoppel applies in the arbitration context to determine whether nonsignatories are bound by the arbitration agreement. Equitable estoppel applies when the signatory raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349 (2d Cir. 1999).

A party is estopped to deny its obligation to arbitrate when it receives a direct benefit from a contract containing an arbitration clause.

International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000).

The doctrine of equitable estoppel recognizes that a party may be estopped to deny that the absence of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. In this case, the purchaser of industrial equipment asserted a contract claim against the manufacturer, subsequently adding claims based on a separate contract between manufacturer and distributor containing an arbitration clause. Because of his reliance on those contracts as the basis for his claim for relief, the purchaser was required to arbitrate his claims notwithstanding that he was not a signatory to the second manufacturer/distributor contract.

World Omni Fin. Corp. v. Ace Capital Re Inc., 64 Fed.App'x. 809 (2d Cir. 2003).

A nonsignatory asserting a claim as a third-party beneficiary of a contract containing an arbitration clause is said to be estopped to deny a duty to arbitrate that claim.

Bridas S.A.P.I.C. v. Government of Turkmenistan, 345 F.3d 347 (5th Cir. 2003).

Direct benefits estoppel applies when a nonsignatory knowingly exploits the agreement containing the arbitration clause. Government of Turkmenistan's wholly owned oil company was party to a joint venture agreement to conduct hydrocarbon operations, which contained an arbitration provision.

However, Turkmenistan was not a signatory to the agreement and never asserted a claim based on the agreement. Thus, Turkmenistan could not be compelled to arbitrate a dispute related to the agreement.

Graves v. BP America, Inc., 568 F.3d 221 (5th Cir. 2009).

While it is true that damages in a wrongful death action based on a work-related injury are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss, the cause of action is entirely derivative of the decedent's rights under the employment contract between the decedent and its signatory employer, which contained an arbitration clause. The beneficiaries were therefore required to arbitrate the wrongful death claim.

Life Technologies Corp. v. AB Sciex Pte. Ltd., 803 F.Supp.2d 270 (S.D.N.Y. 2011).

A nonsignatory may be deemed to have directly benefitted from an agreement containing an arbitration provision if the purported benefit was specifically contemplated by the parties to the agreement.

Robinson Brog Leinwand Greene Genovese & Gluck P.C. v. John M. O'Quinn & Assocs., 523 Fed.Appx. 761 (2d Cir. 2013).

A nonsignatory is bound to arbitrate a claim for benefits derived from a contract, either singly or as part of a group of contracts functioning together.

McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co., 2015 WL 144190 (S.D.N.Y. 2015).

A third party beneficiary of an agreement may be bound by an arbitration clause if it was an intended beneficiary of the agreement and knowingly accepted the benefits of the agreement.

3. Consolidation

3.1. Summary: Since arbitration requires agreement of the parties, it has been held that a court cannot consolidate or transfer arbitration proceedings unless the parties agree to it. In appropriate circumstances, however, a court may construe arbitration provisions as expressing or implying consent to consolidation.

Weyerhauser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984).

The jurisdiction of federal courts over arbitration is predicated on private agreement of the parties. Federal courts cannot order consolidation unless the parties agree not only to arbitrate but to consolidate as well.

Maxum Foundations, Inc. v. Salus Corp., 817 F.2d 1086, 1087 (4th Cir. 1987).

The arbitration clause, common to both the general contract and the subcontract provided: "No arbitration shall include by consolidation, joinder or in any other manner, parties other than the Owner, the Contractor and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration." The court held that related contracts between project owner and general contractor, and between general contractor and subcontractor, sufficiently revealed their intention to consolidate arbitration proceedings to promote efficiency and prevent inconsistent arbitrations.

New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988), *cert. denied,* 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989).

The Federal Arbitration Act does not preclude a court from ordering consolidation of arbitrations pursuant to state law specifically providing for consolidation where agreement between the parties is silent on issue.

Baesler v. Continental Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990).

"The Supreme Court has explicitly rejected the assertion that the overriding goal of the [Federal Arbitration] Act is to promote the expeditious resolution of claims. [Citations]. Instead, the Court has recognized that the passage of the Act 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.' [Citation]. In accordance with this purpose, we read the Federal Arbitration Act as requiring federal courts to enforce arbitration agreements as they are written. Accordingly, we hold that absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings."

American Centennial Ins. Co. v. National Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991).

"...we align ourselves with the view taken by the Fifth, Eighth, Ninth, and Eleventh Circuits, and hold that a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation."

Connecticut General Life Ins. Co. v. Sun Life Assur. Co. of Canada, 210 F.3d 771 (7th Cir. 2000).

Arbitration is an alternative to a judicial proceeding so the rules attendant to judicial proceedings do not apply. A court must enforce the arbitration agreement as written and is not authorized to interfere with arbitral procedures absent explicit statutory authority or the agreement of the parties. Nevertheless, a court must construe the parties' agreement in light of the extant circumstances. This case involved a reinsurance contract in the workers' compensation market involving multiple insurers and multiple insureds. The contract required arbitration of any dispute arising out of the interpretation, performance, or breach of the agreement, entitled each party to choose one arbitrator, and did not mention consolidation. The identical dispute among the multiple parties led to multiple demands to arbitrate. Considering that the disputes between the multiple parties were identical and that multiple arbitrations over the same issue were a formula for disaster, the court concluded that the arbitrations should be consolidated.

Rolls-Royce Indus. Power, Inc. v. Zurn EPC Services, Inc., 2001 WL 1397881 (N.D. Ill., Nov. 7, 2001).

Purchase order to supply a boiler system and subcontract to design and fabricate the boiler system were different contracts, although they contained identical arbitration provisions. Neither contract expressly authorized consolidation of the arbitrations arising from each contract. Only one party was common to the contracts and the remaining parties had not agreed to arbitrate disputes with each other. One arbitration was seated in Atlanta by agreement, the other seated in California. The court declined to consolidate the arbitration proceedings, even though they pertained to the same construction project and arguably involved the same or similar facts.

Philadelphia Reinsurance Corp. v. Employers Ins. of Wausau, 61 Fed.App'x. 816 (3d Cir. 2003).

Even though the parties did not agree to consolidate arbitration in any of the original ten arbitration clauses in the disputed contracts, their subsequent informal agreement to litigate the actions simultaneously served as a modification. The informal agreement was therefore regarded as an explicit agreement to consolidate and was enforceable by the district court.

Note: American Arbitration Association Commercial Arbitration Rule R-8 provides a procedure by which consolidation may be effectuated even if all parties do not agree. The AAA checklist of matters to be addressed at the preliminary hearing includes whether to consider consolidation of claims or counterclaims with another arbitration. American Arbitration Association Commercial Arbitration Rules, Preliminary Hearing Procedures, Checklist P-2(vi)(c).

4. Class arbitrations

4.1. Summary: The Supreme Court has drawn a clear distinction between class action arbitrations and individual biparty arbitrations. Class action arbitrations are viewed as inconsistent with the traditional objectives of arbitration, including efficiency, economy, informality, and procedural adaptability. The threshold requirements for class certification and other complex procedural issues inherent in class actions are better resolved by courts and accompanying appellate review.

Class action arbitration also raises important jurisdictional and due process concerns as to whether all parties have agreed to have their rights finally determined in an arbitration. Class action arbitration is seen as changing the nature of arbitration to such a degree that it cannot be presumed that the parties consented to it by simply agreeing to submit their disputes to an arbitrator. Class action arbitrations are disfavored and not permitted in the absence of clear and unmistakable authorizing language in the arbitration agreement.

Because class-action arbitration is seen as a significant departure from the practices inherent in bilateral arbitration, the question whether to permit it in each case is generally regarded as a "gateway" issue closely related to the foundational question of arbitrability, i.e., whether the parties actually agreed to arbitrate. For this reason, most but not all cases hold that the decision is one for the court,

and not a procedural matter reserved to the arbitrator, unless the arbitration agreement specifically provides otherwise.

The authorities are split on whether reference in the arbitration agreement to agency rules, such as the American Arbitration Association, that speak of or permit class-action arbitration constitutes a clear and unmistakable indication of the intent of the parties to engage in a class-action arbitration.

> *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010).
>
> Maritime charter agreements contained arbitration provision that did not mention class arbitration. By agreement, multiple antitrust claims asserted by the charter parties were submitted to arbitration and a panel of arbitrators ruled that the arbitration could proceed as a class action. The court reversed, holding that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the parties concurred that they had reached no agreement on that issue. The arbitration panel's justification that the arbitration provisions did not expressly preclude class arbitration, coupled with its own policy considerations related to the efficiency of class arbitration, conflicted with the Federal Arbitration Act's foundational principle that arbitration is a matter of consent.
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> *Lamps Plus, Inc. v. Varela,* 587 U.S. l76, 139 S.Ct. 1407, 203 L.Ed.2d 636 (2019).
>
> To follow *Stolt-Nielsen,* which held that the FAA bars an order requiring class arbitration when the arbitration agreement is silent, the court here held that the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather ambiguous about the availability of such arbitration. The court grounded its opinion upon the notion that class arbitration is fundamentally different from traditional individual arbitration and does not carry the same objectives of speed, economy and efficiency that are inherent in individual arbitration. Class proceedings involve numerous complicated issues that are better addressed in court with accompanying appellate review. Additionally, class arbitration carries due process risks to the rights of absent members of the plaintiff class with only limited judicial review.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the Federal Arbitration Act.

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018).

The Federal Arbitration Act requires courts rigorously to enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted. Employer/Employee agreements providing for individualized arbitration proceedings to resolve employment disputes are enforceable to preclude class or collective actions by employee groups.

Catamaran Corporation v. Towncrest Pharmacy, 946 F.3d 1020 (8th Cir. 2020).

There are fundamental differences between individual and class arbitrations. In a class arbitration, the benefits of time and cost efficiency normally characteristic of biparty arbitration are lessened, the presumption of confidentiality and privacy is less effective, the commercial stakes are usually much higher with limited judicial review, and due process concerns arise because it adjudicates the rights of absent parties. In view of these factors, the courts presume that agreements to arbitrate disputes do not include class arbitration unless it is affirmatively stated. A general arbitration clause providing that "[a]ny controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the applicable rules of the [AAA]" is ineffective to reflect an agreement to class arbitration.

Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019).

Although the applicable state law presumes that a court would decide whether an arbitration agreement permits class procedures is a threshold question of arbitrability, where the arbitration agreement clearly and unmistakably delegates that question to the arbitrator, the agreement prevails. Incorporation of the American Arbitration Association

Supplementary Rules for Class Arbitration evinces an agreement to have the arbitrator decide the question of class arbitrability.

Marbaker v. Statoil USA Onshore Properties, Inc., 801 Fed.App'x. 56 (3d Cir. 2020).

Oil and gas lease did not mention class arbitration. Courts will not compel arbitration without the parties' affirmative consent. The court construed the arbitration clause at issue as bilateral. The court rejected the plaintiff's argument that the agreement to conduct the arbitration according to the AAA Commercial Rules includes the AAA Supplementary Rules for Class Arbitrations, indicating mutual consent to a class arbitration. Conceding that the "Supplementary Rules sometimes allow class arbitration," the Court characterized them as buried in "'a daisy-chain of cross-references—going from the Leases themselves to the rules of the American Arbitration Association to the Commercial Rules and, at last, to the Supplementary Rules.'" The court declined to infer consent to class arbitration based solely upon a general reference to the AAA Commercial Rules.

Shivkov v. Artex Risk Solutions, Inc., 974 F.3d 1051 (9th Cir. 2020).

Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to class arbitration. Consent to class arbitration requires clear and unmistakable language indicating that class arbitration was part of the arbitration agreement. The present arbitration agreement provided for mediation, arbitration before an arbitrator selected by the parties, and if the parties cannot agree on an arbitrator, arbitration before the AAA. This mere reference to the AAA without specific reference to class arbitration held insufficient to authorize the arbitration as a class action.

American Institute for Foreign Study, Inc. v. Fernandez-Jimenez, 6 F.4th 120 (1st Cir. 2021).

Interpretation of an arbitration agreement carries the presumption that the parties have not agreed to class arbitration without an affirmative contractual indication. Neither silence nor ambiguity is sufficient to indicate such an agreement. Spanish au pair's contract with placement agency contained an agreement to arbitrate disputes under the AAA Commercial Arbitration rules, and a waiver of the right to bring claims,

either individually or as a member of a class, in any forum other than arbitration before the AAA. As the agreement did not mention class arbitration, the district court was correct in granting a preliminary injunction prohibiting the au pair's class arbitration. The au pair's argument that reference to the AAA Commercial Rules incorporates class arbitration was waived for failing to raise it in her opening brief.

Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 142 S.Ct. 1906, 213 L.Ed.2d 179 (2022).

California Labor Code's Private Attorneys General Act of 2004 (PAGA) empowers individual aggrieved employees to bring an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that otherwise could have been recovered only by the State in an enforcement action. Noting that the individual employee's claim is brought in a representative capacity as an agent of the state and in effect is a one-on-one dispute between the State (as the real party in interest) and the employer, the dispute resembles the traditional aspects normally perceived as susceptible to arbitration by agreement of the parties.

4.2. Who decides class arbitration?

Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. 63, 139 S.Ct. 524, 202. L.Ed.2d 480 (2019).

The parties may agree to have an arbitrator decide not only the merits of a particular dispute but also initial or gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003).

The arbitration provisions in lending agreements provided, "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract … shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Two state court lawsuits initiated by separate borrowers were referred to arbitration and proceeded to awards as class arbitrations, one class

certified by the trial court and the other based upon class certification by the arbitrator. The lender maintained that the lending agreements should be construed to forbid class arbitration. Noting that the arbitration clauses were silent as to class-wide arbitration, the South Carolina Supreme Court nevertheless interpreted the contracts to permit it. According to the United States Supreme Court, however, this court interpretation contravened the Federal Arbitration Act. Whether an arbitration provision in a contract permits class arbitration, a question of state law contract construction, is not a gateway issue inquiring whether the contracting parties agreed to arbitrate; rather it inquires as to the kind of arbitration proceeding they agreed to. This is a question for the arbitrator and not the courts. Because it appeared in this case that the arbitrator selected by the parties had not clearly ruled on the issue, the Supreme Court decided to remand the case for that to be done.

Catamaran Corporation v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017).

Courts presume that substantive questions of arbitrability, which include whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy such as class arbitration, are for judicial determination unless the parties clearly and unmistakably provide otherwise.

Shivkov v. Artex Risk Solutions, Inc., 974 F.3d 1051 (9th Cir. 2020).

The availability of class arbitration is a gateway issue presumptively for the court to decide unless the parties have delegated that function to the arbitrator by clear and unmistakable language in the arbitration agreement.

20/20 Communications, Incorporated v. Crawford, 930 F3d.715, 718 (5th Cir. 2020).

"We agree with our sister circuits and hold today that class arbitrability is a gateway issue for courts, not arbitrators, to decide, absent clear and unmistakable language to the contrary. Like our sister circuits, we regard the decision to arbitrate a dispute as a class, rather than on an individual basis, as a threshold question of arbitrability, because class arbitrations differ from individual arbitrations in fundamental ways."

DISH Network L.LC. v. Ray, 900 F.3d 1240 (10th Cir. 2018).

The employment agreement at issue contained an arbitration clause providing, "A single arbitrator … shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes." Rule 6(a) of the rules provided, "The Arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The court held that the incorporation of the AAA Rules in this fashion was clear and unmistakable evidence that the parties intended to delegate matters of arbitrability to the arbitrator, including whether the agreement authorizes class arbitration.

Chapter 4: Ad Hoc Arbitration

Gordon W. Netzorg, Esq., FACTL

1. Overview

Ad hoc arbitrations are arbitrations in which the parties participate without the use of an agency like the American Arbitration Association (AAA) or JAMS, for example, to administer the arbitrations.[9] In administratively supervised arbitrations, the supervisory entity generally has a comprehensive set of rules and procedures, as well as staff who are assigned to each arbitration. The rules provide procedural guidelines for the conduct of the arbitration. In an ad hoc arbitration, typically opposing party representatives agree to use a single arbitrator, or to each choose an arbitrator, allowing the two selected arbitrators to choose the arbitration chair. Frequently, parties who at some time in the past agreed to a supervised arbitration will decide to forego use of a particular agency and will opt for ad hoc arbitration. In order to make the resulting award confirmable, the parties must submit the dispute to the arbitrator(s) for resolution.

> *See Section 2 of the Federal Arbitration Act ("FAA"):*
>
> **Validity, irrevocability, and enforcement of agreements to arbitrate.** A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The primary motivation for using the ad hoc vehicle is to avoid incurring what the parties consider to be the hefty administrative fees charged by supervisory organizations. Other benefits of ad hoc arbitrations may include giving the parties more latitude to customize the arbitration to suit the particular needs of the parties and their dispute.

9 There are many other supervisory agencies as well, including the International Center for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA).

2. Rules

Although ad hoc arbitrations do not necessarily have a particular set of rules which the arbitrators must follow, frequently the parties will designate a set of rules of an administrative organization to be used in the arbitration, with the proviso that such associated administrative agency not participate. Alternatively, the parties may agree to use the UNCITRAL Rules, which are a comprehensive set of arbitration procedural rules promulgated by the United Nations Commission On International Trade Law.

See https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

Other dispute resolution organizations may actually provide administrative services without any predetermined set of rules.

See, e.g., the Judicial Arbiter Group, Inc. in Denver, Colorado.

Counsel who seek to participate in ad hoc arbitrations should give careful consideration to the rules which will apply to the proceedings since there are significant differences among the various sets of rules.

3. Disadvantages

There are some disadvantages to ad hoc arbitrations which should be carefully considered. In an ad hoc arbitration, the parties will likely have to deal directly with the arbitrators' offices and in many cases directly with the arbitrators on payment of arbitrator fees. Since the arbitrators will be deciding the dispute, this interactive process can be awkward because neither party will want to risk upsetting the arbitrators by questioning their fees. In supervised administration cases, the agency sponsoring the arbitration works with the parties on questions relating to payment of arbitrator and administrative fees.

Most arbitrators prefer to have an intermediary handle fee estimates by the arbitrators, and payment of the estimates by the parties, rather than interacting directly with parties or their representatives. In an ad hoc arbitration, if one party or another fails to pay its share of arbitrator fees, there is generally no third party who can intervene to address unpaid fee issues. Parties should consider whether direct financial interactions with the arbitrators might have an impact on the arbitrators as well as the arbitration itself. For parties who want an intermediary to deal with

fees and fee collections, the AAA, CPR, and other administrative organizations offer services for arbitrator fee collection or other such tasks to parties who do not wish to utilize its administrative services.

> *See, e.g.,* AAA's Case Financial Administrative Services, https://go.adr.org/case-financial-administration.html?utm_source=website&utm_medium=click&utm_campaign=case_financial_administration; and CPR's Rules for Non-Administered Arbitrations ("A non-administered or self-administered process is designed to proceed without the involvement of a separate administering entity. Instead, the neutral(s) and parties, themselves, administer the proceedings. The selected neutral manages all aspects of the proceedings not controlled by the parties under their agreement, including keeping the necessary files, arranging the location of the proceedings, and agreeing upon a neutral fee and collection process. The proceedings may follow institutional rules and procedures, such as those outlined in CPR's Rules for Non-Administered Arbitration and the CPR Mediation Procedure or may adhere to a procedure defined by and agreed to by the parties.")

Parties should explore use of these or other services to avoid having to deal directly with arbitrators regarding their charges.

One of the roles of arbitration administrators is to determine whether an arbitrator may be removed from a tribunal because that arbitrator is biased or has engaged in some misconduct. The AAA, for example, has a panel of administrators who consider issues of arbitral bias, and who are empowered to actually remove an arbitrator from service under certain circumstances, such as an arbitrator's failure to disclose a relationship with an opposing party. In an ad hoc arbitration, it may be difficult to remove an arbitrator for similar misconduct without expensive and time-consuming court intervention, and likely not until after an arbitration award has been rendered during the confirmation process.

> Section 10(a)(2) of the FAA provides as follows:
>
> … (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration— …

> (2) where there was evident partiality or corruption in the arbitrators, or either of them …

Again, most administrative organizations offer services to allow challenges to an arbitrator's qualification to serve in non-administered arbitrations.

> *See* the AAA Arbitrator Challenge Review Process, https://go.adr.org/nonadministered/; and the CPR Challenge of Arbitrator Post Selection, http://drs.cpradr.org/services/a-la-carte-services.

4. Conclusion

Ad hoc arbitrations may be particularly attractive in smaller matters where the parties do not want to incur the additional burden of administrative expenses. However, in contentious and significant disputes, supervised arbitrations provide a level of certainty concerning application of rules and processes which may not be present in the ad hoc setting. Although costs of administration may be significant, they pale in comparison to the added costs of court proceedings should matters not go as anticipated.

Chapter 5: Expedited and Emergency Arbitration

Geoffrey H. Bracken, Esq., FACTL

1. Overview

This chapter addresses the nature of and ability to secure expedited and emergency relief in domestic arbitrations, including temporary restraining orders ("TROs") and preliminary injunctions. Expedited relief is usually obtained from the arbitration panel that will hear the complete arbitration, while emergency relief is generally obtained from a single arbitrator appointed solely to hear the application for interim relief before the full panel is appointed.

2. Background

Historically, parties to a written arbitration agreement routinely requested court intervention to provide injunctive relief pending conclusion of their arbitration, and the common law has long accepted this exception to the general rule in favor of addressing and enforcing the exclusive nature of arbitration clauses. The cases interpreting the Federal Arbitration Act and the 2000 Revised Uniform Arbitration Act, which updated the Uniform Arbitration Act of the mid- 1950s, uniformly recognize the district court's equitable power to issue preliminary injunctive relief in disputes that are ultimately to be resolved by an arbitration panel.

With the exception of courts in the Eighth Circuit, a federal court has the discretion to grant a preliminary injunction to preserve the status quo pending arbitration of the parties' dispute, if the enjoined conduct would render that process a "hollow formality." *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.,* 230 F.3d 569, 581 (2d Cir. 2000) (quoting *Niagara Hooker Emps. Union v. Occidental Chem. Corp.,* 935 F.2d 1370, 1377 (2d Cir. 1991)); *see Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 910 F.2d 1049, 1052 (2d Cir. 1990) (and cases cited therein), *but see Merrill Lynch Pierce, Fenner & Smith, Inc. v. Hovey,* 726 F.2d 1286, 1292 (8th Cir. 1984).

3. Expedited relief

Not surprisingly, the application of the court's injunctive relief to the affected parties would typically last only so long as the arbitration panel had made its own interim award providing injunctive relief or the final award was issued. So, roughly

a decade ago, several of the major arbitral fora, such as JAMS,[10] the AAA,[11] and CPR[12] amended their rules to include and address emergency measures, including appointment of an arbitrator to consider a claim of injunctive relief.

> *See* Rule 24(e) (Awards), (JAMS) Comprehensive Arbitration Rules & Procedures (eff. June 1, 2021):
>
> (e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
>
> *See also* R-38(a) (Interim Measures), AAA Commercial Rules (Amended and Effective 9/1/22):
>
> (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
>
> *See also* Rule 13 (Interim Measures of Protection), CPR Administered Rules (eff. July 1, 2013):
>
> 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.

To ensure that a court of competent jurisdiction can consider injunctive, equitable, or other emergency relief, the parties' written agreement should state this expressly. Even then, there is law to the effect that by choosing arbitration providers (e.g., JAMS, AAA , CPR, and the like), the courts are not permitted to interfere with the parties' choice of forum and any determination rests exclusively with the arbitrator(s).

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10 Judicial Arbitration & Mediation Services.

11 The American Arbitration Association.

12 The International Institute for Conflict Prevention & Resolution.

See TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC, 667 S.W. 3d 694, 712 (Tex. 2023) (Language in the parties' contract that prescribes an arbitration services' rules providing that the arbitrator "shall have the power" to determine "the arbitrability of any claim" incorporates those rules).

As a routine matter, a large number of arbitration clauses apply to "all disputes," but actual language varies across the board. An arbitration agreement may contain language precluding some types of relief by the arbitrator, or alternatively, a very broad grant of authority to permit arbitrators to issue broad interim and equitable relief. Further, under the AAA Commercial Rule 38, JAMS Rule 24 (e), and CPR Rule 13.2, a litigant's choice to seek relief from a court will not be interpreted as a waiver of a right to arbitrate. One of the drawbacks, however, with having the arbitrators hear the request for injunctive relief is the inability to seek *ex parte* relief.

4. Emergency relief

In response to a perceived need to provide parties with the ability to obtain emergency, short-term relief where immediate action is needed to protect assets, preserve evidence, or prevent irreparable harm, these same arbitral fora have enacted emergency relief procedures to occur **prior to** the parties' actual appointment of a sole arbitrator or arbitral panel, a selection process that can sometimes delay the commencement of an arbitration. "Emergency relief most commonly is petitioned for upon the filing of the arbitration demand and may be compared to motions for injunctive relief or a temporary restraining order in court."[13]

Although there are some differences in the rules of the various arbitration fora, the principal characteristics of these rules for emergency relief are (1) a written application, with notice to all parties, of the emergency relief being sought and the justification for such relief; (2) the rapid (generally, one day) appointment of an Emergency or Special Arbitrator; (3) the establishment within a very compressed time table of a schedule for resolution of the motion; and (4) if the applying party can establish its entitlement to such relief, the entry of an interim award.

See JAMS Rule 2 (Party Self-Determination and Emergency Relief Procedures); AAA Rule 38 (Emergency Measures of Protection); and CPR Administered Rule 14 (Interim Measures of Protection by a Special Arbitrator).

13 Romeo, "ADR: What's Your Emergency?," http://adr.org/blog/ADR-Whats-Your-Emergency.

5. Confirmation of an interim or emergency award

Since interim relief is now routinely granted by arbitration panels, it might behoove a party to get any interim award confirmed by a district court. Confirmation will allow the prevailing party to avail itself of the power of the federal judiciary to enforce compliance. Courts have appeared to differ as to whether an "interim" award is a "final" award, sufficient under Section 9 of the FAA to give the court jurisdiction.

> *Compare Ace/Cleardefense, Inc. v. Clear Defense, Inc.,* 47 F. App'x 582, 582–83 (D.C. Cir. 2002), 538 U.S. 925 (2003) (denying certiorari) ("We also conclude that the district court did not err in confirming the award despite its interim nature. Section 9 speaks of an arbitration 'award,' not a 'final award'") *with Major League Baseball Players Association v. Arroyo,* 2024 WL 3539575, at *3 (S.D.N.Y., 2024) ("By its terms, the FAA gives courts the power to confirm only a final 'award' of an arbitral panel.").

However, on closer examination, the courts appear to agree that when the relief being sought is in the nature of a temporary restraining order or preliminary injunction, confirmation of the injunction is necessary to make final relief meaningful.

> *See Yasuda Fire & Marine Ins. Co. v. Cont'l Cas. Co.,* 37 F.3d 345, 348 (7th Cir. 1994) (stating that interim relief aimed at preserving assets necessary to make final relief meaningful constitutes an "award" under the FAA); *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.,* 935 F.2d 1019, 1023 (9th Cir. 1991) (holding that "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful ... are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA").
>
> *Ace/Cleardefense, Inc. v. Clear Defense, Inc., supra.*

The ability to have an emergency award confirmed will be dependent on whether the court will be able to find that the arbitration award, however labeled, was intended by the arbitrator to be a "complete determination of all claims submitted ..." *Michaels v. Mariform Shipping, S.A.,* 624 F.2d 411, 413-14 (2d Cir. 1980) (citation and footnote omitted). Where there are claims for damages and the emergency relief sought only an injunction, for example, then the award will likely not be considered "final."

Finally, it is in the parties' best interest to make it clear in their arbitration agreement that an emergency award is intended to be "a final determination on the issue submitted." *Corporate Printing Co., Inc. v. New York Typographical Union No. 6,* 1994 WL 376093, at *4 (S.D.N.Y. 1994) (Sotomayor, D.J.)

Chapter 6: Selecting the Arbitrator

David M. Brodsky, Esq., FACTL

One of the principal aspects of an arbitration that distinguishes it from litigation is the general ability of the parties to select the arbitrator or arbitrators (hereinafter, "arbitrator") who will hear and decide the matter. How the parties exercise this ability is the subject of this chapter. The chapter does not deal with the situation where the parties choose to allow the arbitral institution to choose the arbitrator subject to checking disclosures by the arbitrator.

1. First steps

When parties to an arbitration agreement start the process of selecting an arbitrator, their first step should be to check the agreement itself. The agreement constitutes the contract by which the parties have agreed on the procedures to govern the resolution of their dispute and governs the dispute. A breach of that agreement could constitute grounds for vacating any award.[14] The agreement should contain important details about the selection of the arbitrator, including whether it will be done by the parties or by a tribunal such as the AAA, JAMS, CPR, FedArb, or other arbitral institution. If not to be done by a tribunal, the agreement most likely will inform the parties how many arbitrators must be selected, usually one or three,[15] whether the parties may each select one and then the two arbitrators choose a chair or umpire, and whether the party-selected arbitrators are independent or not, a topic discussed below. Finally, the agreement might also provide whether there are special qualifications to be met by the arbitrators, such as expertise in certain subject areas, like technology, private equity, or health care.

14 *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos,* 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."); *Szuts v. Dean Witter Reynolds, Inc.,* 931 F.2d 830, 832 (11th Cir. 1991) ("Because the arbitrators violated the provisions of the arbitration agreement requiring arbitration before at least three arbitrators, they exceeded their authority under the arbitration agreement.").

15 In the absence of any guidance in the arbitration agreement on how many arbitrators must be chosen, the arbitral institutions provide varying approaches. The AAA and JAMS provide that there shall be one arbitrator selected, unless, in the instance of JAMS, "all Parties agree otherwise," JAMS Comprehensive Arbitration Rules & Procedures R. 7(a) (effective July 1, 2014) (JAMS Rules); and, in the instance of the AAA, the AAA in its discretion agrees to three, AAA Commercial Arbitration Rules R-16(a) (effective October 1, 2013). By contrast, R. 5.1(a) of the International Institute for Conflict Prevention & Resolution (CPR) (effective July 1, 2013), provides that "[u]nless the parties have agreed otherwise in writing, the Tribunal shall consist of three arbitrators…" *See* Harrie Samaras, "Selecting the Arbitrators" in *Arbitrating Commercial Disputes in the U.S.* (hereinafter, "Arbitrating"),§7.2, (PLI Press, 2018).

2. Essential traits

If the parties are choosing the arbitrator, there are usually certain traits that are being looked for. Chief among them are an understanding of the hearing process, the temperament to be patient and nonjudgmental during the pre-hearing and hearing procedures, and management skills, such as "the ability to organize and conduct a cost- and time-efficient process and deal decisively with procedural issues…"[16]

Counsel to the parties may contact proposed party arbitrators to determine whether they are available for appointment or may have special qualifications as set forth in the arbitration agreement. Such *ex parte* communications are authorized by the Code of Ethics:

> Parties are free to discuss with the candidate his or her experience, suitability to serve, availability, possible disclosures, fee requirements and general knowledge of the subject matter of the dispute or the industry or the technology or the area of law involved … They may not discuss the substance of the issues in dispute or the candidate's views about any disputed issue of fact or law. [17]

Further, once selected, the party arbitrator may consult, *ex parte,* with party counsel regarding the election of the chair and the names and qualifications of possible chairs.[18]

2.1. Understanding the hearing process: "The primary objective of arbitration is to arrive at a just and enforceable result, based on a private procedure that is fair, expeditious, economical and less burdensome and adversarial than litigation," CPR Non-Administered Arbitration Rules (effective March 1, 2018). To accomplish these objectives, an understanding of the essential differences between litigation and arbitration is essential.[19]

First, do the proposed arbitrators demonstrate the skills and experience to "organize and conduct a cost- and time-efficient process and deal decisively with procedural issues." NYSBA, An Arbitration Primer for Litigators, 7. In other words, are they "able and willing to actively manage the process?"

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16 NYSBA, Dispute Resolution Section, Domestic Arbitration Committee, An Arbitration Primer for Litigators, 7.

17 Richard Chernick, "Selecting Party Arbitrators," Association of Business Trial Lawyers Report, Vol. XXXIV, No. 4 (Summer 2014); see Code of Ethics, Canon III.

18 Chernick, id.

19 See Chapter 2, Brodsky, Differences Between Litigation and Arbitration.

Second, do the proposed arbitrators show a realization that discovery is limited and not, as in civil litigation, almost open-ended? Do they offer examples of the ways in which they have dealt with discovery disputes and other procedural issues in a timely and effective manner?

Third, do the proposed arbitrators demonstrate an understanding regarding the flexibility of the arbitral forum concerning evidentiary questions of admissibility, relevance, and materiality, and that, unless otherwise expressly agreed to by the parties, a court's formal rules of evidence do not apply?[20]

> *See* American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures R. 34 (effective October 1, 2013); International Institute for Conflict Prevention and Resolution (CPR) R. 12.2 (effective July 1, 2013).

2.2. Ability to serve: Another factor to be considered is the prospective arbitrator's ability to serve, including availability and fitness.[21] Although arbitrators have an independent obligation to determine whether they are competent and can be available to serve in the particular case, the parties should make an independent effort to understand whether a prospective arbitrator has had the health and stamina in the past to undertake a lengthy hearing, or even a contentious discovery process. In addition, the parties' counsel, through their own professional circles, have the ability in most cases to understand whether a prospective arbitrator has the available time to devote to the pending matter.[22]

2.3. Independence and impartiality: Unless specifically agreed to by the parties in the arbitration agreement or otherwise, it is presumed that the arbitrators selected in a matter will be independent and impartial, regardless of whether they are party-appointed or selected by the arbitral forum.[23] "The terms 'independence' and 'impartiality' are often used interchangeably, but ought to be distinguished. Independence, the notion most frequently employed in national laws and arbitration rules suggests the absence of any connection, financial or otherwise,

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20 *See generally,* John Gardiner, Barry H. Garfinkle, & Gunjan Sharma, *The Evidentiary Hearing,* Arbitrating §12:6.1.

21 The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes ("Code of Ethics"), Canon I(B)(3).

22 At least one arbitral institution, CPR, makes it explicit that "[b]y accepting appointment, each arbitrator shall be deemed … to have represented that he or she has the time available to devote to the expeditious process contemplated by these Administered Rules," CPR Administered Rule, R. 7.2.

23 Code of Ethics, Canon IX, provides that "In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator."

with a party to the proceedings."[24] By contrast, "[i]mpartiality of an arbitrator refers generally to the state of mind, subjective and abstract concept which is difficult to measure and can be deduced from his/her external conduct. It entails an 'absence of external control' as well as any 'bias and predisposition towards a party.'"[25]

Each arbitral institution has its own rule regarding the requirement of an arbitrator's impartiality or independence.[26] The Code of Ethics advises arbitrators as to their disclosure obligations regarding impartiality and provides, in relevant part, that:

> A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
>
> (i) any known direct or indirect financial or personal interest in the outcome of the arbitration;
>
> (ii) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners,

24 Malintoppi, L., *Part III Procedural Issues, Chapter 20 - Independence, Impartiality, and Duty of Disclosure of Arbitrators*, in Muchlinski, P. T., Ortino, F. and Schreuer, Ch. (eds.), The Oxford Handbook of International Investment Law, 2008, 807.

25 Vitali, "Arbitrator's Impartiality and Independence," https://jusmundi.com/en/document/publication/en-arbitrators-impartiality-and-independence (internal citations omitted).

26 See AAA Rule 17(a)("Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration."); CPR R.7.1 ("Each arbitrator shall be independent and impartial."), R. 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."); JAMS Comprehensive Arbitration Rules R. 7(c) ("Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral."), R.15(h)("The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives.").

or professional or business associates that can be ascertained by reasonable efforts;

(iii) the nature and extent of any prior knowledge they may have of the dispute; and

(iv) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

Because of the legal profession's profusion of bar associations, committees, continuing legal education courses, law journals, as well as client education seminars, arbitrators are likely to have had some passing relationships with one or more lawyers in a firm now proposing to select such arbitrators as members of a tribunal before whom they will appear as counsel to one of the parties. Such a relationship may not, from the subjective view of the arbitrator, constitute a basis that would reasonably affect impartiality but the Canon does not speak of the arbitrator's subjective view but, rather, the view of any of the parties. Accordingly, disclosure of any such relationships is required, as set forth above.

Parties may agree in the arbitration agreement that the party-selected arbitrator will be "non-impartial" or non-neutral. Non-neutral arbitrators may consult *ex parte* with the appointing party prior to the commencement of the hearing on issues such as "how to effectively frame the issues, legal theories, presentation of witnesses and other evidence and appropriate expert testimony." Once the hearing begins, however, a non-neutral arbitrator's *ex parte* communications should be limited to whatever the parties and the arbitrators agree at the first scheduling conference and order.[27] It is a violation of Canon X of the Code of Ethics for non-neutral arbitrators to discuss with any party or counsel any deliberations or discussions among the arbitrators:

Canon X [non-neutral] arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

27 Chernick, *id.*

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

2.4. Other factors to consider: Other factors include "experience, expertise and background, including familiarity with the subject matter in dispute[28] and governing law; and temperament and evenhandedness." NYSBA, *id.* Finally, "the benefits of diversity should also be taken into consideration." *Id.*

Regarding diversity, it was not until relatively recently that he desirability of a diverse arbitration panel became a factor in selecting an arbitrator. But, "[i]nsofar as arbitrators 'serve a role that is often a substitute for (and sometimes annexed to) the judicial process,' it stands to reason that arbitrators presiding over a private arbitration should represent the individuals, institutions, and communities that come before them."[29]

2.5. Disclosures: Following the selection by the parties of their designated arbitrators, often referred to as "wing arbitrators" or "wings," the parties will then have the ability to scrutinize the disclosures that each of the wings is obliged to make. Based on the parties' own research and the arbitrator's disclosures, the parties and their counsel will have the opportunity to scrutinize the disclosures and make a determination as to whether the arbitrators have demonstrated, *inter alia,* the requisite degree of impartiality, independence, and freedom of any prior financial, professional, family, or social relationships that might create an appearance of bias.[30] The duty to disclose any such factors remains with the arbitrator through the duration of the proceeding.[31]

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28 For example, in an arbitration with which the author has personal familiarity, prospective arbitrators were asked to submit their responses to the following questions before selection commenced:

> Please describe your experience, if any, as an arbitrator, mediator or practitioner with:
>
> 1. hedge funds, private equity funds, other investment funds or special purpose acquisition companies (SPACs);
> 2. hedge fund or investment industry compensation or accounting issues, including contractual "burn-down" or "earn out" payments;
> 3. non-compete or non-solicitation provisions; and
> 4. partnership or LLC accounting issues.

29 Samaras, *id.,* §7:3.8, citing David H. Burt and Laura A. Kaster, *Why Bringing DIVERSITY to ADR Is a Necessity*, ACC Docket 41 (Oct. 2013).

30 Code, Canon II(A); see generally The CCA Guide to Best Practices in Commercial Arbitration, *Appointment, Disclosures, and Disqualifications of Neutral Arbitrators,* 19 *et seq.* (4th Edition 2017).

31 Code, Canon II(B).

Chapter 7: Arbitration Pleadings

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1. Overview

Domestic commercial arbitration is designed to be an alternative to court litigation. Its objective is to achieve a final, binding resolution of a dispute in a fair, reasonably expeditious, and mostly cost-effective manner. It is designed to be faster and less expensive than court litigation. The procedural rules governing arbitration serve that objective: they are different from, and most often less burdensome than, those governing civil litigation; they are meant to streamline the proceedings and provide only the most limited, and wide, guardrails. Those rules are established either by the forum administering the arbitration (such as the American Arbitration Association (AAA), JAMS, the CPR Institute, or the Financial Industry Regulatory Association (FINRA)) or by the parties themselves in a negotiated bespoke fashion.

> *See, e.g.,* AAA Commercial Arbitration Rules; CPR (International Institute for Conflict Prevention & Resolution) Administered Arbitration Rules; JAMS Comprehensive Arbitration Rules and Procedures; FINRA Codes of Arbitration Procedure for Customer and Industry Disputes.

An arbitration generally begins in the manner called for in the parties' contract. That can range from, in the case of a process administered by the AAA, the initiating party, called the claimant, making a simple demand stating little beyond the parties' names, the nature of the claim, and a specified amount of damages, to the claimant filing a detailed document fully stating the known facts and the applicable legal theories. *See* AAA Commercial Arbitration Rules, R-4. And the continuum is populated by practices falling between these two.

The opposing party, usually called the respondent, may respond to the opening pleading in equally varied ways, ranging from silence (which constitutes a general denial, except at FINRA, which requires the respondent to submit an answering statement setting forth its defenses or face default, *see* §12303(a)(2)) to a full-throated defense setting forth its view of the facts and applicable legal defenses as well as any counterclaim.

See, e.g., AAA R-5; JAMS Comprehensive Arbitration Rules and Procedures, Rule 9; CPR Administered Rules, Rules 3.6 through 3.9; FINRA Code of Arbitration Procedure §§12302-12304.

A party's strategy will dictate its methods. If the respondent chooses not to submit a statement of response, it nevertheless will be obligated, perhaps at the first conference with the arbitrator or panel, to apprise the claimant of the defenses it expects to interpose.

The claimant typically must provide a copy of the demand and any supporting documents, such as a statement of claim, to the respondent. Mail or email will suffice; there is no need for a formal process server. When claimant files whatever the administrative forum requires (typically, the demand, any supporting documents and a fee), the forum provides notice of the demand to the parties (and, if known, their counsel). The respondent in turn will file any written response, such as a statement of response, together with any counterclaim and related fee.

Although mere notice pleading is available, and may advance certain strategies, the pleadings, whether they be statements of claim, of response, or of counterclaim, usually are the first documents provided to the arbitrator or panel, and they may be the only things the arbitrator or panel sees until the hearing on the merits. Many practitioners welcome the opportunity to take advantage of the power of primacy: they use the statement of claim or statement of response to tell the story of their client's claim or defenses; in so doing, they hope to guide and even to persuade. Instead of the compulsory program under the rules of civil procedure, the parties skate freely.

A statement of claim, response or counterclaim may take virtually any form. No specific format is required. It may consist of short paragraphs addressing separate known facts. It may consist of long, narrative paragraphs including facts known and facts stated on information and belief. It may look like a complaint. It may look like a short story. It may include charts, graphs, excerpts of documents, or pictures. The paragraphs may be numbered or not. In short, the sky may be the only limit. The talisman should be whether the format, style, and content frame the issues, are persuasive, and enhance the proponent's credibility with the arbitrator or the panel.

Because these pleadings are not constrained by the formalities—or the requirements—of the rules governing civil litigation, practitioners may be creative

without, in most instances, risking the challenges available to a defendant in civil litigation (motions to strike, motions for a more definite statement, motions to dismiss). Indeed, although the rules of most administered fora envision at least a possibility of motion practice challenging the pleadings, such motions are disfavored and, in many instances, simply unavailable. Whether they are allowed will most often be at the discretion of the arbitrator or panel, who are often trained to discourage them as inconsistent, because of the time and expense they take, with the nature of arbitration.

> *See, e.g.,* AAA R-33; JAMS Rule 18; FINRA Codes §§12308, 13308.

In any event, as a practical matter, motions to dismiss are rarely granted. Unless it is clear beyond peradventure that the claimant simply does not have a claim (such as, for example, because the limitations period has expired) or that the issues for the merits hearing can almost certainly be substantially narrowed, they accordingly should rarely be brought.

The likely unavailability of a motion to challenge the pleadings does not mean that a claimant, or a respondent, may have free rein to add additional facts, claims, or defenses later in the proceedings. In most fora, the parties may have the ability to seek to amend their pleadings, but once the arbitrator or panel has been appointed, doing so will be at their discretion.

> *See, e.g.,* AAA R-6(b); CPR Administered Rules, Rule 3.10; JAMS Rule 10; FINRA Code §12309(b).

In some cases, however, the parties will be expected to have stated all material facts, theories of liability and defenses in their respective pleadings and may, at the discretion of the arbitrator or panel, be precluded from introducing new facts or theories of liability and defense at the merits hearing.

> *See, e.g.,* FINRA Code §§12308, 13308.

Chapter 8: The Initial Pre-Hearing Conference and Schedule

David R. Haigh, K.C., FACTL

1. In the beginning …

Whether under prescribed rules or on an ad hoc basis, arbitrations are usually commenced by a claimant sending notification to respondent parties of a Request for Arbitration or Notice of Arbitration or similar instrument. Upon commencement of the arbitration, the next step is the establishment of the tribunal whether that is by appointment of a sole arbitrator or a panel of three.[32]

Once the tribunal is established, the first procedural step for the arbitrators is, almost invariably, to conduct a case management conference with the parties.[33] This conference is sometimes called the Preliminary Hearing or First Procedural Conference or Organizational Conference.

The objective of the preliminary hearing is to allow the arbitrators and the parties to collaborate on the manner in which the arbitration will be conducted. For example, in the case of Large Complex Disputes, the American Arbitration Association (AAA) Commercial Arbitration Rules provide, in part:

> L-3 Management of Proceedings
>
> (a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a large Complex Commercial Dispute.
>
> (b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with Procedures P-1 and P-2 of these rules.

Other institutional rules have similar provisions. For example, the 2018 CPR Non-Administered Arbitration Rules direct:

32 In some instances, an emergency arbitrator may be appointed before the full tribunal has been set up. This section proceeds on the usual basis that upon the tribunal being established, the next step is to hold a preliminary hearing with the parties.

33 In relatively small matters, an arbitrator may dispense with a preliminary hearing and proceed to communicate directly with the parties on organizational questions.

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 the conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct …

Before contacting the parties to initiate a pre-hearing conference, the presiding arbitrator will usually begin informally to communicate with the other arbitrators to ensure their availability and to determine their initial thoughts on the conduct of this first procedural conference. Whether or not the arbitrators know one another or have previously worked together, they will often begin their work together with general comments on such things as who are the counsel in the case and what the arbitration seems generally to be about.

2. How, when and where …

It has become common practice for the preliminary hearing to be conducted on-line rather than in person. This practice can be adapted to local circumstances where it may be convenient to meet in person, but the economies of on-line sessions usually compel this type of forum to be utilized.

The presiding arbitrator is commonly expected to take the lead in organizing the preliminary hearing. This will usually consist of writing the parties to invite them to participate in the preliminary hearing and to request that, after conferring with one another, they should provide the tribunal with some agreed upon dates for doing so.

It is also quite common practice for the presiding arbitrator to circulate ahead of the preliminary hearing a draft procedural order number one in order that the parties can begin to provide their input into the conduct of the proceedings.

The first procedural order will eventually become the road map, in effect, for the conduct of the whole of the case. Thus, the draft version tendered at the outset by the tribunal is frequently pretty generic with lots of blanks to be filled in by the parties. In some instances, headings only are included with the substance left to be discussed with the parties.

The draft procedural order will normally include a brief description of the agreement out of which the dispute arises, identity of the parties, the names and addresses of legal representatives, the arbitration clause, the place of arbitration if it has been agreed or needs to be fixed, the applicable law if already agreed upon or may need to be identified, the rules under which the case shall be conducted and the manner of communicating between the arbitrators and the legal representatives as well as a prohibition of any *ex parte* communications, and possibly some language concerning confidentiality and cyber security. More recently, the draft first procedural order may also include some draft direction on the possible use of AI by either the arbitrators or the parties and duties for its non-use or, alternatively, disclosure in the event of its use.

Sometimes the arbitrators will refrain from transmitting a draft procedural order number one, setting out instead an agenda of items that they expect the parties to address during the preliminary hearing. Those items often reflect the headings to be found later in the first procedural order issued by the tribunal.

One of the most significant features of such orders is the attachment of a procedural timetable. Thus, the presiding arbitrator may submit ahead of the preliminary hearing not only a rough first draft of procedural order number one, but also a procedural timetable with no dates entered but merely identifying the major procedural steps, such as delivery of a statement of claim or answer or replies and markers for setting dates for the making of and replying to document requests, their production or tribunal rulings on disputed requests and so forth. While the desire is to focus the parties' minds as early as possible on the timing of such events, the tribunal will also tend to be cautious about presuming how the parties wish to proceed until after actually hearing from them at the preliminary hearing itself.

Whether or not the tribunal sends out a draft procedural timetable, it will usually notify the parties that the arbitrators will expect to hear from them during the preliminary hearing on the general nature of their case, the amount of time they anticipate will be needed to conduct the hearing and potentially the hearing dates proposed. It is not unusual to ask legal counsel to bring their calendars with them to the preliminary hearing in order that the potential timing of the hearing can be explored and potentially set.

Some arbitrators follow the practice of requiring a senior party representative from each side of the dispute to attend the first procedural conference. While this is not

a universal practice, it is recognized as one that may encourage parties from the outset to appreciate the need for responsible behavior in the conduct of their case and the potential cost implications should abuses occur.

In the case of non-administered arbitrations, the issue of retaining the arbitrators and providing for their remuneration, including advance deposits to ensure timely payment of their accounts, should be identified ahead of the preliminary hearing. This is usually a subject that is treated with some delicacy, but experienced practitioners know that it must be dealt with clearly from the inception of the case.

3. The first procedural conference itself

Apart from the early written communications, the pre-hearing conference is usually the first practical opportunity for the arbitrators to set the tone for how the case is going to be conducted. Given that arbitration is a consensual process, it is clear from the outset that both the parties and the tribunal derive their authority from that consent. Thus, collaboration between the tribunal and legal counsel is a notable hallmark of arbitration. However, that feature need not detract from the authority of the arbitrators to act firmly or for anything other than respectful behavior. While avoiding the use of first names, a type of cordial formality should be maintained. Above all, the guiding principle in arbitration that should prevail is that the parties shall be treated equally and given a reasonable opportunity to present their case.

As suggested above in relation to the preliminary communications from the presiding arbitrator to the parties, each party will be expected to provide a short narrative or overview of its case. This statement will usually include the first telling of the party's story, including setting out the amount of damages being sought by the claimant and the position of the respondent. As the arbitrators are acting not only as case managers but also as the eventual judge and jury for the case, counsel may find that a fair minded and reasonable manner in these statements is most persuasive.

These oral statements should also indicate to the tribunal what events may need to be provided for in the procedural timetable. Thus, if a party wishes to seek bifurcation of the merits of the case from the setting of damages, that issue should be raised at the preliminary hearing. If, to take another example, a party objects to jurisdiction, it may seek to raise that prospect at the preliminary hearing with a view to having that issue heard earlier in the proceedings than simply leaving it as one issue to be decided after a full hearing. Other threshold or potentially dispositive

issues may be identified and a request made to build in a procedure in the timetable for them to be heard.

The practical organization of the hearing is sometimes discussed at this stage. Thus, there may be directions for real time transcript reporting, such as Live Note, a discussion of the expected times for sitting, the need for separate break out rooms for the tribunal and the occasional accommodation of a witness or a tribunal member for timing on particular days during the hearing, the need for taking testimony from a remote location or possibly an eventual site visit, and translation of testimony into the language of the arbitration.

The two matters that frequently take up the most attention at preliminary hearings entail pre-hearing document discovery and the timing for the delivery of pleadings and the hearing dates. For the seasoned trial lawyer it may seem concerning that arbitration scheduling orders almost never include provision for oral depositions. For larger and more complex commercial disputes, it has become common practice for the evidence-in-chief of witnesses to be set out in a witness statement, usually prepared with assistance from counsel and accompanied by exhibits that are relevant and material to the evidence of that witness. The witness is then expected to be cross-examined at the hearing on these statements.

Document discovery in larger and more complex arbitrations is usually conducted in a specified time frame with delivery of all requests for production being followed by an opportunity to object and then timely rulings by the tribunal on outstanding objections. It is usual to include specific dates for such steps in order to keep the arbitration moving steadily towards the final hearing date. Guidelines may also be discussed and even set for rulings on document requests such as a requirement that they be of “a narrow and specific category” or “relevant to the case and material to its outcome.” IBA Rules on the Taking of Evidence in International Arbitration, Article 3 (3)(a)(ii), (b).

One of the most significant features of arbitrations is that the hearing date is usually set at the beginning of the proceedings after the timing has been discussed between the arbitrators and the parties’ legal teams at the preliminary hearing. Thus, from this early stage of the case, the ultimate hearing date is known and is considered to be fixed, if not immovable, except for extremely good cause shown. There can be exceptions to this approach, but most tribunals will vigorously guard the sanctity of the hearing date once set. This practice thus compels the parties and

arbitrators to follow the deadlines and dates set out in the procedural timetable. There will be only minimal opportunity to interject additional surprise motions or to delay the hearing. The parties are expected, in other words, to cut their sail to fit their cloth. All things necessary for a full and fair hearing must be accomplished within the procedural timetable scope. Amendments to that timetable are usually allowed only in fully justifiable circumstances.

In large and complex disputes, it is often the case that some issues will be addressed by expert witnesses. Managing the evidence of expert witnesses should not be left to chance. Timing should be fixed in the procedural timetable for delivery of their initial and rebuttal statements. In large construction disputes, for example, it may be appropriate to ask the parties and their experts to confer and advise the tribunal on the scope of discovery of information that may be required in order to ensure that the experts will be able to offer their opinions based on a common set of facts or at least equal access to such facts. Where domestic arbitration has been influenced by international arbitration practice, the experts may also be asked, following exchanges of their opinions, to meet and provide a joint report to the tribunal and the parties, indicating where they agree or disagree and a brief note on why they may disagree.

4. The outcome of the first procedural conference

By the conclusion of the preliminary hearing or shortly thereafter, the terms for procedural order number one and the procedural timetable should be established. With that, the arbitrators and the parties should have a clear understanding of when the final hearing will occur and what will be the deadlines for the steps leading up to that hearing. The timing for the exchange of pleadings, making of and responding to document requests, the tribunal's rulings on objections to production and the exchange of expert reports should be settled. Dispositive motions or other interim applications, if any, should be identified and included in the timetable.

As a result, the potential for surprise motions is minimized and the proceedings should progress as contemplated in the procedural timetable. Both the arbitrators and the parties should be confident that their commitments to the prescribed timing of events will be followed. To the extent that this procedure is upheld, the parties will be provided with a fair and efficient resolution of their dispute.

Chapter 9: Dispositive Motions in Arbitration

Robert J. Jossen, Esq., FACTL

An essential objective of arbitration as a means of alternative dispute resolution is to provide the parties with a fair, efficient and reasonably expeditious resolution of their dispute. For most litigants and for most arbitrators this is accomplished by a merits evidentiary hearing following some limited discovery.

In pursuing arbitration, the parties do not (and should not) expect that the full panoply of adversarial tools common in court disputes will be available to them.

Chief among the tools of limited use in arbitration, but of frequent use in court litigation, are dispositive motions.

For purposes of this outline, "dispositive motions" are motions that would dispose of all or part of a case without an evidentiary hearing, dismiss a claim or defense on the basis of law or other documents, or motions which may challenge the authority of the arbitral tribunal to hear the case. As to this last point, most courts are inclined to permit arbitrators to decide their own jurisdiction unless there is no agreement to arbitrate, nor any statutory basis to mandate arbitration. *See generally, Brennan v. Opus Bank,* 796 F.3d 1125 (9th Cir. 2015).

Despite a long history of dispositive motions being discouraged, their use (or attempted use) in arbitrations has increased significantly over the last several years. This trend has developed even though dispositive motions frequently can increase the cost of arbitration and in fact lead to delays in the resolution of the dispute. *See generally* John Wilkinson, "Dispositive Motions," §10:2.1[A], *Arbitrating Commercial Disputes in the United States* (PLI Press, 2018).

First, when presented with a request for a dispositive motion, the arbitrator should look to the rules of the forum under which the arbitration is being conducted. Most arbitral forums include a rule regarding the making of dispositive motions. For example:

(a) Rule 34 of the Commercial Arbitration Rules of the American Arbitration Association provides as follows:

"R-34. Dispositive Motions The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

(b) Rule 18 of the JAMS rules provides as follows:

"The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case."

(c) Similarly, in international arbitral forums, there is an expanding body of rules which permit dispositive motions in such matters. Again, an arbitrator should look to the rules of the forum in which sitting to consider how to proceed.

Second, the arbitrator should look carefully at the underlying arbitration agreement between the parties. In some agreements, the parties explicitly provide authority for the arbitrator to consider dispositive motions and establish a right of the parties to make such motions. Depending on the wording of the provision, this may remove the arbitrator's discretion to decide whether to permit a dispositive motion.

The arbitrator should raise the issue whether there will be dispositive motion practice at an early time in the proceeding. Establishing a cutoff date for any such motions is a good idea. The point here is not to encourage dispositive motions but to make sure that the progress of the proceeding is not interrupted by a delayed request to make such a motion and to confirm the parties' expectations.

As a general matter, most arbitration rules have in common the point that it is in the sound discretion of the arbitrator whether to permit the making of dispositive motions. Regardless of the specific forum rules, it is important for the arbitrator to consider the following factors in deciding whether to permit the filing of a dispositive motion:

(a) What is the likelihood that such a motion will eliminate the need for a hearing or, at the least, shorten or simplify the hearing?

(b) Will the parties require discovery before a dispositive motion can be heard?

(c) How extensive will be the briefing necessary for the presentation of a dispositive motion?

(d) How will the dispositive motion impact the time schedule for the arbitration?

(e) Are there factual issues necessary to consider/decide as a part of any dispositive motion?

(f) Are the parties in agreement that a dispositive motion is appropriate? If not, what is the basis of the objection of the party which opposes a dispositive motion?

If the arbitral tribunal consists of more than one arbitrator, it is incumbent on the chair to consult with the other members of the panel to determine their views about whether a dispositive motion should be entertained. A disagreement among members of the tribunal may be a reason in itself to exercise the discretion to deny the making of such a motion.

Without encouraging the making of such motions, caselaw in the United States is supportive of an arbitrator's determination to hear a dispositive motion and to grant relief through such a motion. However, the Courts will focus on whether the parties have been provided with a fundamentally fair proceeding. *See generally, Dispositive Motions in Arbitration: Authority, Rules and Practical Tips*, by Janice Sperlow, April 11, 2023, 2026 Dispute Resolution Services LLC.

A well-known arbitrator and expert in the field has written the following helpful observation:

> "There are many fact patterns in which a summary adjudication of all or part of the claims and defenses asserted in an arbitration may be appropriate. To illustrate, summary adjudications by arbitrators were granted and confirmed by the courts on the following grounds: res judicata and collateral estoppel, plain meaning of the contract, statute of limitations, standing and preemption, waiver and estoppel,

> employment at will, failure to comply with a contractual claims or notice procedure, evidence insufficient to permit a rational inference by a trier of fact, and failure to state a claim because no duty was owing."
>
> *Reflections on the Use of Dispositive Motions in Arbitration,* by Edna Sussman and Solomon Ebere, NYSBA New York Dispute Resolution Lawyer, Spring 2011, Vol. 4, No. 1 (Footnotes omitted).

An arbitrator who decides to permit a dispositive motion should allow for oral argument by the parties. A principal focus of the oral argument should be whether there are factual matters in dispute, whether the motion will eliminate or simplify the merits hearing in the case and, if not, why both parties should not be permitted to proceed with their cases on the merits.

A decision on a dispositive motion should be presented in a written reasoned decision in which the arbitrator discusses in full why it is appropriate and fair to grant/deny the motion. A reasoned decision is in the parties' interest since, if denied, it will guide the parties in planning for final hearings, and if granted and disposing of the case, it will simplify any issues as part of any motions to confirm or overturn the award.

If the tribunal decides not to permit a dispositive motion, the reasons should be clearly documented in a procedural order. There obviously is considerable discretion with the tribunal whether to permit the filing of a dispositive motion. The panel should clearly state the reasons why its discretion has been exercised one way or the other.

It is possible that the dispositive motion requested by a party might be reframed to seek less relief than originally claimed but which might shorten or simplify the proceedings. The tribunal should be proactive in such circumstances to modify the dispositive motion which it may be prepared to entertain.

In the last analysis, most participants in the arbitration process expect that it will unfold with a merits hearing after discovery on a reasonably expeditious basis. This expectation alone often will justify an arbitrator's decision not to permit the making of a dispositive motion.

Chapter 10: Discovery in Arbitration

Charles (“Chuck”) H. Dick, Esq., FACTL

1. Overview

This chapter deals with one of the most significant differences between arbitration and civil litigation: the prospect of resolving a dispute without the monotony and crushing expense of limitless pretrial discovery. Arbitration facilitates due process without endless arguments about overbreadth, irrelevance, and ambiguity. If the parties and their counsel choose, the difference between case preparation in arbitration and civil litigation can be profound.

2. History

To understand the penchant for restricted discovery in arbitration, it is helpful to provide some historical context. The beginning of the 20th Century was marked by cries for all manner of social and economic reform. In state courts around the country, new rules of civil procedure were issued, and by the time America began to recover from the Great Depression, federal courts joined the rules reform movement. Civil practice and procedure adopted a kit of tools intended to equip counsel for efficient case preparation. Litigants, large and small, were afforded an equal opportunity to explore an adversary’s evidence. Trial by ambush was to be replaced with discovery as a matter of right.

However, over the years, the opportunity for extensive discovery effectively gave the opportunity and incentive to deploy all or nearly all the many instruments of discovery adding considerable time and expense to litigation. That, in turn, began to make for a compelling argument for arbitration. In recent decades, arbitration (particularly for commercial disputes) has become an accepted, even preferred, method for resolving disputes.

3. What discovery is allowed in arbitration: Role of arbitrators

Being a matter of contract, discovery in arbitration is governed by what the parties have agreed to do. Even if an arbitration agreement does not specify what discovery will be allowed, it is common for agreements to incorporate the rules of an institutional provider, and those rules generally provide for some baseline exchange of information. Parties also are able to engage in whatever discovery they

choose, so long as counsel agree, provided the discovery will not conflict with the principal mandate of arbitration to streamline dispute resolution.

In an adversary system, amity is the exception, so arbitrators can be expected to play an active role in managing the "discovery" phase of the case. Arbitration's adamant expectation that the parties will make a voluntary disclosure of information needed to prepare for an evidentiary hearing is embodied in the rules of arbitration providers.

- American Arbitration Association ("AAA") Commercial Rules R-23(b)(i) and (iii) provide that "the arbitrator may, on application of a party or on the arbitrator's own initiative: … require the parties to exchange documents in their possession or custody on which they intend to rely …" and "require the parties, in response to reasonable document requests, to make available to the other party documents in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, and reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues …"
- JAMS Comprehensive Rule 17(a) contains the more demanding expectation that the "Parties will cooperate in good faith in the voluntary and informal **exchange of all non-privileged documents or other information … relevant to the dispute or claim …"**
- Rule 11 of the CPR Non-administered Arbitration Rules is more relaxed, stating, "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."
- FedArb Rule 10.7, entitled "Discovery and Special Master" is very spare: "The Tribunal shall closely supervise discovery, and if necessary, may appoint a Discovery Master for that purpose, on terms acceptable to the parties and FedArb." The balance of the rule deals with the appointment and supervision of Discovery Masters.
- The International Bar Association Rules on the Taking of Evidence in international commercial arbitration make no provision for conventional discovery, which is the norm for international arbitration. Article 3 of those Rules simply obliges a party to provide the Arbitral Tribunal and opposing parties "all documents available to [the producing party] on which it relies …"

In general, evidentiary privileges will be respected in arbitral proceedings. Provider rules accommodate privileges when requiring voluntary disclosure. Attorney-client communications and work product will be protected, and the use of privilege logs is commonplace.

Regarding inadvertent waiver of attorney-client privileged documents, existing arbitration rules and procedures do not contain a claw-back analog to Rule 502, Fed.R.Civ.P. Arbitration counsel should not be misled by the relative informality of alternative dispute procedures into believing that all will be well even if one lets vigilance lapse in producing privileged documents in an arbitration. Even an explicit provision in a binding protective order or separate stipulation endorsed by the arbitrator may not forestall a costly dispute to defend a claw back of inadvertently produced privileged documents against third parties or against the adversary in a separate proceeding.

4. Domestic arbitration

4.1. General: Discovery in arbitration will differ from case to case as attempts are made to tailor discovery to the peculiarities of the case. However, unlike civil litigation, in which pretrial preparation often follows a predictable template of interrogatories, document production, multiple depositions, requests for admissions, and summary judgment motions, arbitration is likely to follow a more restrictive and streamlined process of pre-hearing preparation. Provider rules often discourage the use of written discovery devices, and the arbitrator can be expected to constrain discovery, minimizing (if not eliminating) written discovery.

4.2. Proportionality and equity: When state or federal discovery procedures specifically are incorporated in the language of an arbitration agreement, an arbitrator should permit wider use of conventional discovery. Yet, as has been the trend in civil litigation, proportionality has become a standard, and an arbitrator will likely limit discovery so that it remains proportional to the complexity of the case and the amount of damages at issue. In the end, as indicated in AAA Commercial Rule R-23(a) (“The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party’s opportunity to fairly present its claims and defenses”), an arbitrator also must provide a fair arbitral process, and equity may require

restricting discovery when there is an imbalance in the financial abilities of the parties to engage in expansive discovery.

4.3. Depositions: Current practice in domestic arbitration allows reasonable deposition discovery:

- Rule 23 of the AAA broadly authorizes the Arbitrator to manage the "exchange of information" between the parties, and some number of depositions can be expected, especially when the parties are in agreement.
- JAMS Comprehensive Rule 17(b) explicitly lets each party take one deposition, and more depositions are within the discretion of the arbitrator. A deposition of a "person most knowledgeable" on behalf of a corporate party is normative.

Even in international arbitration, there has been some relaxation of norms in recent time, and when parties agree, some deposition discovery may occur. Even so, depositions generally remain anathema in international arbitration circles, and efforts to incorporate civil litigation discovery will encounter obstacles that generally are insurmountable.

4.4. Expert testimony: Expert or opinion testimony regularly is presented in arbitration proceedings, and it is common for the arbitrator to fix a schedule for designation of experts. Some counsel in arbitration prefer to exchange formal expert reports, akin to Federal Rule 26 requirements. Whether such reports will be required is a topic counsel should expect will be discussed when a preliminary hearing is convened to schedule pre-hearing events. If reports are produced, counsel may forego depositions, but a deposition of each opinion witness is a common occurrence.

4.5. Contention interrogatories/requests for admission: Contention interrogatories and requests for admission are designed to limit the issues that will be presented at trial, but they may have little utility in arbitration. Due process involves notice of an opponent's factual and legal positions, and pre-hearing preparation is intended to avoid surprise. Even so, a party is likely to enjoy some latitude in presenting testimony at an evidentiary hearing because one of the few reasons for *vacatur* of an arbitration award is a refusal to afford a full and fair opportunity for presentation of evidence. With that in mind, arguments about what a party

said in response to written discovery are usually less important in arbitration. This requires a balancing of interests, but extensive, time-consuming discovery will be discouraged, and counsel should expect an arbitrator to "push back" against broad form discovery, especially when the perceived benefit is outweighed by the cost, even if the parties agree.

4.6. Discovery disputes: Discovery disputes in arbitration occur, but the arbitral process allows for a speedy disposition, often without the need for motions to compel and attendant briefing. Faced with a dispute, counsel can arrange a conference call with the arbitrator and discuss the matter, perhaps resolving the disagreement on the spot. And even if briefing may be needed, the issues can be argued on an expedited timetable. If there is a three-member Tribunal, often the parties will agree that the Chair can resolve such pre-hearing controversies, thus helping with a more efficient process and avoiding the necessity for delay in administration of the case.

4.7. Third-party discovery: Third-party discovery is permissible in arbitration, but it is a topic that warrants careful attention. See Chapter 11, Securing Evidence from Non-Parties to Arbitrations. While the arbitral process remains a matter of contract between the parties, there may be a need to obtain documents or testimony from people who are not parties to the arbitration agreement. If a third party will cooperate, and perhaps only wants a subpoena for record purposes, documents and testimony may be easy to obtain. A cooperative third party cannot be guaranteed, and at a minimum, counsel will need to allow ample time for issuance and enforcement of subpoenas.

Under both state law and the Federal Arbitration Act ("FAA"), arbitrators may issue subpoenas to non-parties, but strict obedience to the statutory requirements will be imperative if a subpoena needs to be enforced. The FAA applies to cases involving interstate commerce. State laws compelling attendance may vary, and the law of the place where the arbitration is being conducted must be examined to determine any idiosyncratic local requirements. Even when arguably allowed under state law, the best practice is for subpoenas to be issued by the arbitrator.

4.8. Section 7, Federal Arbitration Act: Section 7 of the FAA permits an arbitrator to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case …" While there is a

split of authority among federal circuits, most courts have interpreted this language to preclude issuance of a conventional document discovery or deposition subpoena (*compare Life Receivables Tr. v. Syndicate 102 at Lloyd's of London,* 549 F.3d 210, 215–16 (2d Cir. 2008) (statute only allows subpoenas that compel physical attendance at a "hearing") *with Security Life Insurance Co. of America,* 228 F.3d 865 (8th Cir. 2000) (allowing pre-hearing *subpoena duces tecum*)). The FAA, however, does not confer subject matter jurisdiction in domestic arbitration, and enforcement of a subpoena in a district court requires an independent basis for federal jurisdiction. *Stolt-Nielsen SA v. Celanese AG,* 430 F.3d 567, 572 (2d Cir. 2005).

In those federal circuits that narrowly restrict enforcement of subpoenas for document production or testimony at an evidentiary hearing, commentators have argued that the "work around" is to have the arbitrator actually convene a hearing, receive the documents or testimony, and then recess to await a later date for a plenary hearing *(see Stolt-Nielsen, id. at 578).* It is less clear whether that hearing must be in person, convened wherever the subpoena can be enforced. Given the widespread acceptance of "virtual" hearings now, there is a case to be made for convening a hearing via video conference and receiving evidence remotely. Whether that will be enough to enforce a subpoena under Section 7 remains in doubt (*see Managed Care Advisory Grp. v. CIGNA Healthcare,* 939 F.3d 1145, 1160 (11th Cir. 2019); *Broumand v. Joseph,* 522 F. Supp. 3d 8 (S.D.N.Y. 2021); Chapter 11, Securing Evidence from Non-Parties to Arbitrations.)

5. Subpoena in a foreign proceeding

Authority exists for enforcement of a discovery subpoena to compel production of documents or provide testimony for ultimate use in international arbitration. A third-party subpoena can be directed to a person in the United States for discovery of evidence in connection with an arbitration in a foreign country. While a subpoena in a foreign proceeding can be enforced under federal law (28 U.S.C. § 1782), there are technical requirements. For example, in *ZF Automotive US, Inc. v. Luxshare Ltd.,* 142 S. Ct. 2078 (2022), the Court held that issuance of a subpoena by a "tribunal" means a governmental authority, as distinguished from a panel of arbitrators.

6. Conclusion

Recalling that arbitration is intended to provide an efficient, cost-effective path to a final resolution, it is understandable why conventional discovery would be discouraged by arbitrators. The parties' agreements ultimately will be decisive,

but counsel should expect the need to prepare for an evidentiary hearing without access to the full range of discovery tools. The focus should be on a voluntary exchange of information, supplemented by such additional discovery as may have been reasonably required for a fair exploration of an opponent's case. Tailoring discovery in that way can avoid the burden of an unproductive, civil discovery frolic.

Chapter 11: Securing Evidence from Non-Parties to Arbitrations

Steve W. Gaskins, Esq., FACTL

1. Overview

Persons not party to an arbitration agreement frequently have possession of documents or knowledge central to an understanding of the facts of the dispute that has led to the arbitration. The central problem of securing evidence from them is that they did not agree to participate in the arbitration and frequently aren't keen to do so, and so they resist appearing to testify or produce documents.

Since 1925, however, when the Federal Arbitration Act was enacted, arbitrators have had the power to summon any person to attend before them. But the legal framework governing arbitral subpoenas is complicated—shaped by divergent judicial interpretations of the FAA across U.S. jurisdictions. This paper examines the mechanisms, enforcement challenges, and practicalities of using subpoenas in arbitration to secure testimony or documents or both from unwilling non-party witnesses.

2. Legal authority for arbitral subpoenas

The Federal Arbitration Act since its inception has given arbitrators the power to issue subpoenas. Most states also have their own arbitration laws and provide for arbitral subpoenas. And the arbitration rules of most arbitration organizations, like those of the AAA and JAMS, allow arbitrators to issue subpoenas as provided by law.

Under Section 7 of the Federal Arbitration Act, arbitrators may "summon any person to attend before them" to testify and to produce documents. The summons must be in writing, signed by the arbitrator, and served in the same manner as subpoenas to appear and testify in court. For those who decline to obey the summons, petitions to compel attendance are lodged in the federal "district court for the district in which such arbitrators, or a majority of them, are sitting…"

State arbitration laws also generally provide for the issuance of arbitral subpoenas. The Revised Uniform Arbitration Act—and the arbitration acts of most states that have not adopted the Uniform Law Commission's suggested language—empowers

arbitrators to subpoena witnesses and documents. Most permit depositions in the discretion of the arbitrator when a witness cannot be compelled to an arbitration hearing and, again in the arbitrator's discretion, for discovery. Because state arbitration laws only apply when interstate commerce or some other federal law is not involved, the majority of the action over the enforcement of arbitral subpoenas happens in the federal courts. And in many federal courts, the scope of an arbitrator's subpoena power is limited.

3. Judicial interpretation and Circuit splits

Disagreement among the Federal Circuits concerning the enforcement of arbitral subpoenas of non-parties centers on this phrase in Section 7: arbitrators "may summon in writing any person to attend before them."

Two important issues have arisen in the fights over the meaning of this phrase: (1) Do these words allow pre-hearing discovery outside the presence of the arbitrators? and (2) Do the words requiring arbitrators to subpoena persons to "attend before them" allow the use of video?

On the first question, i.e., can arbitrators require third parties to produce documents or testimony in discovery, here's how the Circuit split breaks down:

Circuit position	Key features	Circuits adopting position
Majority view	Subpoenas limited to hearings; no pre-hearing document or deposition discovery	Second, Third, Ninth, and Eleventh Circuits
Minority view	pre-hearing discovery from non-parties permitted	Sixth And Eighth Circuits
Special need exception	pre-hearing discovery allowed only if "information is otherwise unavailable"	Fourth Circuit

4. The majority view: No pre-hearing discovery from non-parties

The majority view has most recently been advanced by the Eleventh Circuit in *Managed Care Advisory Grp., LLC v. Cigna Healthcare, Inc.* That case examines two issues raised by the language of Section 7 regarding subpoenas arbitrators issue to non-party witnesses: (1) What constitutes proper service under the Act? and (2) under what circumstances may a court enforce arbitral summonses?

As to what constitutes proper service, the Eleventh Circuit noted that Section 7 states that the summons "shall be served in the same manner as subpoenas to appear and testify before the court." The Court then wrote, "Without specifically citing the rule by name, this provision references Rule 45 of the Federal Rules of Civil Procedure." And then it concluded that—as of 2013 when Rule 45 was amended—this language in the FAA authorized nationwide service. The Court distinguished a 2006 Second Circuit case which had held to the contrary. The Second Circuit case was decided before Rule 45 was amended to allow nationwide service. The Eleventh Circuit panel also had no trouble finding that due process was not offended by nationwide service and noted that only in unusual cases will a witness's having to cross state lines rise to a constitutional concern.

As to whether a court may enforce an arbitral subpoena seeking pre-hearing discovery, the 11th Circuit held that the "attend before them" language of Section 7 of the FAA does not allow for pre-hearing discovery of testimony or documents, but rather requires that the evidence be taken at a hearing with the arbitrator or arbitrators present. In coming to this conclusion, the Eleventh Circuit sided with the Second, Third, and Ninth Circuits.

The policy rationale supporting the majority view is that parties to an arbitration agreement give up certain procedural rights in order to secure a more efficient and cost-effective resolution of their dispute. One of the surrendered rights is the right to pre-hearing discovery because limitations on discovery promote the policy underpinnings of arbitration which are speed, efficiency, and reduction of litigation expenses.

While the Fourth Circuit embraces the majority view that subpoenas of non-party witnesses cannot be used for pre-hearing discovery, the case setting forth that principle has a wrinkle. The explicit holding of the case was this: "The [FAA] does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship."

The Fourth Circuit's decision declined to compel non-party National Science Foundation personnel to appear for discovery depositions and document production in an arbitration of a contract dispute over the construction of a radio telescope. The Court relied on the strict construction of the "attend-before-them" language of Section 7 and corroborated that view with the observation that speed and efficiency of arbitrations would be compromised by depositions outside the context of a hearing. But the Court added, addressing an argument made by the proponent of the depositions *duces tecum,* that if a party could demonstrate special circumstances, then pre-hearing discovery could be compelled. The Court further noted that "at a minimum" the special circumstances would have to include the fact that the information the arbitrator sought from the non-party was "otherwise unavailable."

The only policy explanation for the Fourth Circuit's special circumstances exception to the no-discovery-from-non-parties rule seems to be that it is, well, sensible.

5. The minority view: Pre-hearing discovery allowed

Cases in the Sixth and Eighth Circuit Courts have allowed pre-hearing discovery of documents demanded in an arbitral subpoena *duces tecum* to non-parties. Although both cases allowed pre-hearing production of documents, neither case actually enforced a testimonial subpoena; but they have been generally described as standing for the proposition that the power of arbitrators to compel any person to appear before them implicitly includes the power to compel pre-hearing discovery.

In the battle of policy rationales, the Eighth Circuit noted the following: "Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing." Again, this seems sensible. Why require a hearing to produce the documents, adjourn to allow the parties and arbitrators to read and digest them, and then reconvene as seems to be the majority view? But if the arbitrators really need the documents, that is what they would do. And, if the witnesses were in California and the arbitrators were in New York, that process would be neither speedy, efficient, nor economical.

Unless, of course, the arbitrators could convene a video conference, or it is feasible to retain local counsel.

6. The issue of video hearings

So what happens if you have an arbitration in New York and a couple of non-party witnesses with documents you need, one in California and one in Virginia? Although Rule 45 allows nationwide service of process, Rule 45(c) restricts the place of compliance to the state in which the witness resides or works or within 100 miles of that.

In the jurisdictions where pre-hearing discovery of non-parties is allowed, there should be no problem—you just subpoena them and their documents to appear for a deposition in the state they are in, maybe by phone or Zoom, and use that.

In the jurisdictions where pre-hearing discovery is not allowed, one speedy and economical solution would be for the arbitrators to schedule a hearing and allow the remote witnesses to appear by electronic means—telephone, Zoom, Microsoft Teams, whatever—get the testimony and documents at the hearing, and then adjourn the hearing to be completed at another date and time. It would be a bit of a hassle, but that solution would accommodate the witnesses' due process rights and the arbitration's need for the witnesses' information and evidence. Problem solved.... But wait.

Let us now return to *Managed Care,* the Eleventh Circuit's case which announced that there would be no enforcement of non-party pre-hearing discovery subpoenas in arbitrations in their jurisdiction. That Court, after ruling that it would not allow pre-hearing discovery, turned to the arbitral subpoena *duces tecum* before it. The arbitral subpoena, as it turns out, had not sought discovery but rather had required the non-party witnesses to appear by video conference at a hearing of the arbitrators to be held in Miami. Although the non-parties were summoned "to attend before" the arbitrators for testimony and document production by video, it did not require their appearance in person—a fatal flaw in the arbitral subpoena as the Eleventh Circuit saw it. The Court ruled that Section 7 of the FAA did not allow the arbitrators to dodge the "attend-before-them" requirement by convening a video hearing. And since the documents subpoenaed for the video hearing would, as a practical matter, have to be provided in advance of the hearing, the arbitral subpoena amounted to pre-hearing document discovery and would be disallowed on that ground as well.

So it appears that in the Eleventh Circuit the only way to make non-parties supply evidence in an arbitration is to convene an in-person hearing, probably within the

state or 100 miles of the witnesses' residence or workplace, and to subpoena them to appear in-person there.

A case out of the Southern District of New York, *Broumand v. Joseph,* 522 F. Supp. 3d 8 (S.D.N.Y. 2021), followed the Eleventh Circuit's lead and declined to enforce an arbitral subpoena of non-parties to a hearing by video on two grounds (1) that the arbitral subpoena to witnesses in Virginia and California for a hearing by video with arbitrators in New York City violated Rule 45(c)'s geographical limitations on the place for compliance because use of video did not change the place of the hearing and witnesses could not be summoned to a hearing more than 100 miles from their residence or work—even if they never had to get off their couches—and (2) following the Eleventh Circuit's lead, that video appearance was inconsistent with the requirement in Section 7 of the FAA that the subpoenaed witness "attend before" the arbitrators since the witnesses would not be physically present at the hearing.

The *Broumand* Court also offered a policy rationale that had not been suggested by other courts that had strictly and technically interpreted the words "attend before them" as a ground to deny pre-hearing discovery and the use of video for remote witnesses. The Court said,

> The principle, as discussed, is to force an arbitrator to think twice before issuing an arbitral subpoena. Allowing arbitrators to subpoena nonparties for discovery without requiring the arbitrators to convene and preside over a physical hearing would largely undermine that calculation.
>
> *Broumand* at 25.

The thought here seems to be that by making it hard to subpoena non-parties, arbitrators will not, by and large, go to the trouble to convene a physical hearing in another place just to secure testimony or documents or both from a non-party; and, further, that one thing that keeps arbitration speedy and cost-efficient is restricting an arbitrator's easy access to information in the hands of non-parties.

Although *Broumand* is not the only court to decide that remote attendance by video does not comply with the requirement that witnesses attend before arbitrators, other courts have taken a more pragmatic view. For example, a magistrate judge in Minnesota, which is in the 8th Circuit, citing the decision in *In re: Sec. Life Ins. Co. of Am. and Duncanson & Holt, Inc,* 228 F.3d 865 (8th Cir. 2000), enforced an arbitral

subpoena for a video deposition. Notably, on the question of whether Rule 45(c)'s geographical limitation prevented a video proceeding, the Court in *Broumand* decided that the location of the hearing to which the witness had been subpoenaed was the deciding factor, but the 8th Circuit noted that Rule 45(c) was concerned with the location of **compliance** and found that Rule 45(c) was satisfied because the witness "can comply with the deposition [subpoena] from his home or anywhere else he chooses that is within 100 miles of his residence."

7. Conclusion

Arbitration is designed to be streamlined compared to a lawsuit. Big discovery is not favored. The rules of evidence are relaxed. And reliable evidence can be found through available, but not conventionally admissible, sources—e.g., through reliable hearsay. Arbitrators are used to working in this environment of limited discovery and relaxed evidentiary rules. So, often non-parties need not be bothered to provide evidence where other sources will be good enough. Rules and policies designed to keep the process streamlined are much to be desired. And the insistence of four Circuits on non-party witnesses being subject only to a subpoena for a 100% in-person hearing would seem to further that aim.

But there are times when an arbitrator really does need information from third parties—frequently documents—in order to have enough facts to make an informed and fair award. What the parties testify to or produce is, as in a trial, biased, self-interested, often incomplete, sometimes even dishonest; so information from non-parties is frequently essential to a clear understanding of the merits of a dispute.

Hence, arbitrators should have access to all the tools available to secure the evidence necessary to an informed and fair award. The arbitral subpoena is an important one of those tools. Arbitrators, not the parties, must issue any subpoena; and arbitrators are well aware that their process should not allow fishing expeditions or unnecessary fact-finding. It is in the interest of arbitration writ large to keep things simple and as fast as possible. Yet a blanket refusal to allow the arbitrator to secure evidence from a non-party other than through a hearing conducted within 100 miles of the non-party's work or residence can make the process slow, cumbersome, and expensive or, where critical evidence is foregone because of the hassle, just unfair.

The use of pre-hearing depositions *duces tecum* seems entirely sensible and economical for arbitrations. So far, the Fourth Circuit does allow pre-hearing discovery but only on a showing that the information sought is otherwise unavailable. In that, it is alone.

Section 7 gives arbitrators the power to summon "any person to attend before them." It seems to the author a stretch to conclude, as the Sixth and Eighth Circuits have held, that such language "implicitly" includes the power to summon any person to a pre-hearing deposition, or even, as the Fourth Circuit has held, that pre-hearing discovery is available on a special showing of need. Absent legislation allowing pre-hearing discovery of non-parties, a revised view of the meaning of section 7, or a Supreme Court decision resolving the Circuit split, the prevailing view in the Second, Third, Ninth, and Eleventh Circuits regarding securing evidence from unwilling non-parties will likely require arbitrators to convene a hearing to do so. And in the Eleventh Circuit, that hearing will not include anyone making a remote appearance.

However, in the other Circuits there is no definitive holding on whether the phrase "attend before them" can include hearings in which the witness or the arbitrators appear by virtual mechanisms. And neither Rule 45(c)'s geographical limit on the place of witnesses' compliance with a subpoena nor the literalist construction of the words "appear before them" in an age in which there are myriad ways for a person to appear on a screen before the arbitrators, necessarily, have to be obstacles that other circuit and district courts cannot overcome.

In sum, then, arbitrators do have the power to secure testimony and documents from non-party witnesses through the use of arbitral subpoenas. There are self-imposed limits because arbitrators generally aim to keep arbitrations streamlined. And in some jurisdictions there are judicially imposed restraints on the use of electronic appearances and pre-hearing discovery. But there are many federal jurisdictions that have not decided. So if advocates want to move the law in a more sensible direction, there is room to maneuver.

Chapter 12: The Arbitration Hearing

The Hon. Christine Byrd, Judge (Ret.), FACTL

1. Overview

How to present an arbitration case at the time of hearing depends, of course, on the case. Nevertheless, there are some basic principles that remain constant in all cases and bear discussion here. This chapter is an attempt to provide arbitration advocates with the insight that will allow them to see effective methods of presenting their own cases in a traditional setting as well as in a digital or "virtual" format.

2. Traditional arbitration formats

Throughout earlier chapters, the differences between civil litigation and arbitration have been discussed, with cautionary messages that one should not litigate an arbitration. While the differences are important to consider, it bears noting that the function of an arbitration is identical to the function of a civil trial, namely, presenting evidence to a decision-maker. The methods for presenting the evidence can and should be adjusted to suit the venue and the decision-maker, but the essential function remains the same.

The major difference between an arbitration and a civil trial is, obviously, the decision-maker. In a civil trial, the decision-maker is typically a jury of 6–12 lay people, and in a bench trial it will be a single judicial officer. In contrast, in an arbitration, the decision-maker may be an individual arbitrator or a panel of 3 arbitrators.

It goes without saying that an arbitration is not like a jury trial, but it is important to recognize that it is not like a bench trial either.

The first major difference is that the judge in a bench trial is usually assigned to your case, not selected by the parties, whereas arbitrators are always selected by or on behalf of the parties.

The second major difference is that the judge in a bench trial may be very experienced in the trial process but usually knows nothing about your client, your industry, or anything else about the context of the dispute. In this respect, a judge in a bench trial is similar to the members of a jury, who are lay people and bring no expertise to their decision-making. In contrast, the decision-makers in an

arbitration may have been selected precisely because of their prior experience and knowledge about your client, your industry, the applicable law, or the context giving rise to the dispute. In the case of arbitrators who are not lawyers, most certainly they have been selected because of that expertise. Viewed from this perspective, arbitrators are the opposite of a judge in a bench trial.

The third major difference between a bench trial and an arbitration is that, in a bench trial, the judge must follow the rules of evidence. In contrast, in an arbitration, the arbitrator typically does not have to follow the rules of evidence and certainly will admit evidence that would never be admitted in a court trial.

> *See* "Best Practices Regarding Evidence in Arbitrations," American College of Trial Lawyers Alternative Dispute Resolution Committee, n. 1 ("Arbitrators should '[m]ake clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained.'" COLL. OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 75 (Thomas J. Stipanowich et al. eds., 2010)).
>
> *See also Rosensweig v. Morgan Stanley & Co., Inc.,* 494 F.3d 1328, 1333 (11th Cir. 2007) (citation and quotation omitted) (stating that arbitrators "enjoy wide latitude in conducting an arbitration hearing" and "are not constrained by formal rules of procedure or evidence."); *Sunshine Mining Co. v. United Steelworkers of Am.,* 823 F.2d 1289, 1295 (9th Cir. 1987) (citation omitted) ("Arbitrators may admit and rely on evidence inadmissible under the Federal Rules of Evidence.").

The rules of both the American Arbitration Association and JAMS provide clearly that federal and local rules of evidence do not control in arbitration. *See, e.g.,* Am. Arbitration Assoc. Commercial Arbitration Rules & Mediation Procedures, Rule 35(a) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary."); JAMS Comprehensive Arbitration Rules & Procedures, eff. June 1, 2021, Rule 22(d) ("Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or

she finds relevant and material to the dispute, giving the evidence such weight as is appropriate.") The bottom line is that, unless an arbitration clause requires otherwise, arbitrators may admit anything and everything and they may choose to do just that rather than risk vacatur for the exclusion of evidence.

That does not mean that it is effective advocacy to present evidence that would not be allowed in a court trial. The rules of evidence represent centuries of jurisprudence on the reliability of, and weight to be given to, certain types of evidence. Arbitrators may exhibit great patience, or may exhibit great impatience, at the presentation of hearsay evidence, for example, that would be inadmissible in a court trial but that is admissible in an arbitration, or the presentation of evidence that has only marginal relevance in the arbitration. Neither reaction, patience or impatience, should be taken as a signal of the ultimate outcome because arbitrators may admit evidence that may appear to have only marginal value, and the parties must realize that the weight to be given to the evidence by the arbitrators is something they will determine later. Especially if the arbitrator anticipates ruling against that party, admitting all the evidence that party is offering may be the wiser course, notwithstanding the risk that "receiving otherwise inadmissible or questionable evidence may tilt the outcome in favor of the offering party, despite the evidence being untrustworthy or unfairly prejudicial."[34]

The lack of controlling rules of evidence is an obvious difference between a bench trial and an arbitration, but what is the significance from an advocacy point of view? It means that it is important to ensure that you are presenting evidence that will be given great weight when presented and will be remembered by the arbitrator later on during the deliberation stage. Regarding credibility, retired judges and experienced arbitrators, having heard so many witnesses during their time hearing cases, typically feel very comfortable in their abilities to determine credibility and/or the weight to be given to evidence. It is easy for testimony to be admitted during the hearing but to be ignored or overlooked after the hearing has concluded. If your evidence is organized and memorable, then it will assist the arbitrator to focus

34 *See, e.g.,* Edna Sussman, What Lurks in the Unconscious: Influences on Arbitrator Decision Making, 32 ALTERNATIVES TO HIGH COST LITIG. 149, 153 (2014) ("Yet studies with judges have confirmed that inadmissible evidence, once heard, has a profound impact on judicial decisions;" concluding the same is true for arbitrators); Andrew Wistrich et al., Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. 1251, 1279–81 (2005) (finding that well more than half of a control group of judges who saw a document damaging to plaintiffs and claimed to be privileged ruled against the plaintiffs, while, in the other half that did not see the document, more than half ruled in favor of plaintiff).

on the key issues, rather than on distractions. Evidence of this quality, regardless of whether it is strictly in conformity with rules of evidence, can prove effective in guiding the decision in the case in your direction.

This is particularly true when it comes to cases with voluminous documentary evidence. Lawyers frequently have a witness testify about a few pages in a voluminous document, such as a year's worth of bank records, or emails, or Slack communications, or the like, and then seek to admit the entire document even if it is hundreds of pages. Pointing out the key page in a 100-page document is effective advocacy, whereas leaving it for the arbitrators to find that page on their own is questionable advocacy. If there is no material information in those other 100 or more pages, by admitting them you are, at best, wasting the arbitrators' time and, at worst, you are allowing distractions to cloud your case.[35]

The fourth and final major difference between a bench trial and an arbitration is that an arbitration does not take place in a courtroom. This may seem too obvious to be worth stating, but the impact of the physical surroundings cannot be overstated, as will be seen again in the next section when "virtual" arbitrations are discussed.

Most traditional arbitrations take place in conference rooms. Some of the rooms are small enough that the arbitrator may sit almost knee-to-knee with a lawyer, whereas other rooms have long tables arrayed as if on three sides of a rectangle. People are seated at the tables for one party or the other, or, in a large room, in a row of seats behind the tables for the parties. There is no audience section and no public gallery area. There is usually no separate entrance for the arbitrators; they enter and leave through the same doors used by the parties, their lawyers, and their witnesses and they are usually wearing the same professional attire, i.e., no robes (or wigs in the United Kingdom, Ireland, and many Commonwealth countries) that, in a courtroom, serve to set judges apart from parties and their advocates. Arbitrators and attorneys can see each other drinking coffee, walking the hallways, chatting amongst themselves, and can see their human interactions, such as an attorney berating a paralegal who drops a notebook or an attorney helping a

35 *See* Davidson, "Top Fifteen Mistakes Litigators Make in US Commercial Arbitration" 4, Westlaw (2025) ("Judges are free but arbitrators cost money. In a substantial commercial arbitration, the total of the hourly rates of a three-arbitrator panel may approach or exceed $2,000 per hour. Excessively long briefs with too many citations, cumulative testimony, and a record stuffed with duplicative or only tangentially relevant exhibits all contribute to unnecessarily increasing the fees of the arbitrators. And although they are being paid for it, arbitrators hate having to wade through mountains of chaff in search of a kernel of wheat."

paralegal with notebooks. Exhibit binders and notes are left on tables and witnesses usually sit in other conference rooms or even lobbies. Overall, the atmosphere resembles a conference of fellow legal professionals more than a battle of adversaries. This does not mean that advocacy is less vigorous; it simply means that courtroom advocacy is out of place. In a conference room arbitration, advocacy that emphasizes substance over style and conveys professional cooperation and civility will be the most effective strategy.

3. Virtual arbitration formats

During the physical isolation of the COVID pandemic, in areas of the country, arbitrations stopped taking place in conference rooms. Instead, arbitrations quickly pivoted to use video technologies, such as Zoom or Microsoft Teams, that allowed lawyers, parties, witnesses, and arbitrators to be remote and separate from each other and yet to be together at the same time in the virtual world. When the pandemic restrictions eased, people did not abandon the video technology and return to in-person arbitrations. Instead, lawyers and arbitrators had come to recognize the utility of the virtual technology and continued to use it for some of their cases, for most pre-hearing or scheduling conferences, for argument of motions, or for hearings with some participants appearing physically and others virtually, now known as a "hybrid" format.[36]

Today, 5 years after the pandemic began, the use of virtual technology compared to traditional in-person hearings varies widely depending on geography and age group. Roughly 50% of the arbitration hearings in Los Angeles use virtual technology in whole or in part for the evidentiary hearings and almost all non-evidentiary matters are handled virtually. The important point is that a wholesale return to the traditional in-person arbitration format has not occurred and is unlikely to occur. The use of remote computer technology, whether in whole or in part, is here to stay.

The use of remote computer technology affects the arbitration hearing in significant ways. While the full significance of the changes will probably not be clear for a few more years, nevertheless, it is already clear that at least the following aspects of arbitration hearings are quite different in a virtual as compared to an in-person hearing and should be taken into consideration.

36 For a more comprehensive analysis of online arbitration, which is necessarily beyond the scope of this chapter, see Schmitz, Ordering Online Arbitration in the Age of Covid … and Beyond, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916406#.

3.1. Arbitrator selection: The first area of impact is in the selection of arbitrators. When the need for travel is eliminated, as it is in a virtual hearing, lawyers have almost limitless possibilities of arbitrator candidates. In a matter involving federal law, the parties could select one arbitrator from Los Angeles, another from New York, and a third from Chicago. The author served as arbitrator in a matter where one set of attorneys was in San Francisco, another set was in Texas, a third set was in Atlanta, and the author was in Los Angeles.

Nor is selecting arbitrators who are "tech savvy" a requirement as long as the provider organization can provide the arbitrator with support in managing the video calls, breakout rooms, and the like. Alternatively, the parties can agree on tech support for the arbitrator.

While one is tempted to believe that younger arbitrators would be more "tech savvy" than older ones, that appears to be inaccurate. Older arbitrators seem to have become quite skilled of necessity, whether from prior virtual arbitrations or mediations, or from increased personal use. Regardless of the reason, the level of comfort with technology does not seem to correlate with either youth or with age.

3.2. Advocacy style: The technology of virtual arbitrations has completely upended arbitration advocacy style because, quite simply, the body language of in-person advocacy does not translate to a computer screen filled with numerous small squares showing only faces.

Physically moving around while questioning a witness, placing an exhibit in front of a witness with great delicacy or with a flourish, showing surprise at an answer—none of this can be done effectively on Zoom. Even the traditional techniques of spreading out enormous exhibit binders and papers on a table, or in contrast, having nothing on a table but a notepad, are physical language techniques that cannot be replicated in the small snapshots on a computer screen.

On the positive side, traditional intimidating tactics are ineffective in a virtual environment. Asserting verbal dominance by interrupting or speaking out of turn—all techniques occasionally seen in a traditional arbitration—are almost impossible to accomplish in a virtual setting. In the event that the behavior requires it, the offending person can be placed on "mute" and required to use a digital "raise hand" signal in order to be heard at all.

Advocacy through focused and well-paced questioning and concise and cogent arguments remains effective and, with the elimination of the courtroom drama, takes on heightened importance.

3.3. Witness and exhibit presentation: Remote testimony technology adds an additional dimension in the preparation of witnesses. Preparing a witness for testimony now includes more than just familiarity with the question-answer format and the exhibits likely to be used. For a virtual hearing, witness preparation now includes arrangements for adequate lighting, adequate audio, and an adequate real or virtual background. The same is true for all lawyers being shown on camera. Having a witness with a camera placed so poorly that his or her face is shadowed or seriously distorted or, worse, showing only one eye peering into the camera, is a sign that the lawyers have been careless and also clueless. Having a witness with such severe backlighting that his or her face cannot be seen is a missed opportunity, as is a witness whose audio is so poor that the testimony is "glitchy" or overlaid with static. For witnesses using older laptops, this is a common failing.

When preparing witnesses, their equipment should be tested in their expected location, knowing that a witness bent over a laptop or a cell phone in a dim hotel room can undermine the persuasiveness of their testimony just as effectively as a devastating cross-examination.

Likewise, preparing a witness should include testing the display of exhibits on their screen to determine their ability to view the exhibit adequately for a detailed direct examination, and to view it adequately to withstand cross-examination.

Preparation for an examination of a remote witness with exhibits includes preparation of the lawyers, who should be knowledgeable on the display of digital exhibits or have a technical assistant to handle the exhibits. The lawyers should be encouraged to set aside adequate time to practice with the witness until both are comfortable with the format and the process. When the use of digital exhibits is not feasible, the alternative is to deliver hard copies of the exhibits to the witness in advance and to practice the questioning using that paper copy.

Whether digital or in hard copy, narrowing a voluminous exhibit to selected pages, a technique mentioned above in the discussion of the traditional arbitration format, makes it easier to use the exhibit with the witness, to display the relevant portion of the exhibit on the screen or to call their attention to the

relevant portion of a paper exhibit, to use “call out” boxes or highlighting, and to emphasize the substantive points. Doing all this may require some practice by the lawyers as well as by the witness.

Although the digital technology seems cumbersome sometimes and seems very efficient other times, it seems likely to continue in use for the foreseeable future because arbitrators and lawyers recognize the convenience and cost savings of the virtual format, whether for the entirety of an arbitration or just for some witnesses. Learning to use it effectively will become a priority for the legal community.

3.4. Transcripts, privacy, and other unresolved issues: One of the unique aspects of arbitration is that the proceedings are private, not public. In the traditional conference room format where the parties have engaged a court reporter to transcribe the proceedings, limiting the people who may receive the transcript and limiting the use and copying of the transcript is usually sufficient to maintain its private nature. Often, parties stipulate to a protective order to this effect.

In the virtual arbitration format, however, the proceedings may use recording technology instead of or in addition to a remote court reporter and some services offer an AI alternative to a traditional court reporter. All these techniques pose their own questions about privacy and confidentiality. The key issue is whether the recording and/or transcript are going through an “open” database at any stage before returning to the parties and arbitrators. For example, if the arbitration involves the secret location of a hidden treasure and the transcript process uses a database, say for proofreading, to which ChatGPT has access, then the information in the transcript about the secret location is available for the next person who uses ChatGPT for a search involving hidden treasures.

Lawyers and arbitrators are not well-equipped to ensure the privacy of the transcript process from beginning to end and yet this is a critical analysis in any case involving sensitive information. This issue is not necessarily unique to the virtual hearing. How a court reporter handles the transcript of an in-person hearing is equally important to the handling of the transcript of a virtual hearing. It is, however, the coincidence of the rise of the virtual hearing format and the rise of AI that has brought these questions to the attention of arbitration participants. How the issue will be resolved remains to be seen.

The increased acceptance of technology for arbitration hearings has led to some other new and interesting issues. For example, what is the reach of a hearing summons when the arbitrators are holding the hearing remotely and hundreds of miles apart?[37]

Another question is what constitutes unavailability of a witness who may be unable to travel but need only have access to a home computer in order to testify.

And finally, a fundamental issue, not yet resolved by the Supreme Court, is whether under Section 7 of the Federal Arbitration Act, an arbitration panel may issue a summons to a third party to appear in a video deposition and to produce documents.[38] The current proposal to amend Rule 45 of the Federal Rules of Civil Procedure, regarding the "place of attendance" provision in subpoenas when remote testimony is sought, could have an impact on future analysis under Section 7.

These and other questions will keep the topic of virtual hearings an interesting one for some time to come.

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37 *See, e.g., Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1157 (11th Cir. 2019) ("Because Section 7 of the FAA contains a general reference to Rule 45 by requiring subpoenas to be 'served in the same manner as subpoenas to appear and testify before the court,' it incorporates subsequent changes to Rule 45, including the 2013 amendment permitting nationwide service. … Accordingly, we conclude that nationwide service of arbitral summonses is appropriate."); *see also* Schmitz and Brodsky, Bringing Section 7 into the Next Century, 14 Am. U. Bus. L. Rev. 659 (2025).

38 *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404, 407 (3d Cir. 2004), where then-Judge Alito found that the plain language of Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time"; see also, *Managed Care, supra* at 1159 ("the plain language of the statute is unambiguous in requiring witnesses to appear before an arbitrator and bring any documents with them, thus prohibiting pre-hearing discovery from non-parties. The FAA confers the power to compel a non-party to attend an arbitration hearing and bring documents, but it is silent regarding the power to compel documents from non-parties without summoning the non-party to testify. See 9 U.S.C. § 7. … Accordingly, we conclude that 9 U.S.C. § 7 does not permit pre-hearing depositions and discovery from non-parties."); *Broumand v. Joseph,* 522 F.Supp.3d 8, 23 (S.D.N.Y. 2021) ("…[A]rbitral subpoenas are unenforceable under Rule 45(c) because they would require respondents [employed or residing more than 100 miles from the site of the issuance of the summons] to "attend" [via a video link] an evidentiary hearing beyond 100 miles of where they are employed or regularly transact business in person. … [T]he arbitral subpoenas, as modified to require video testimony, are [additionally] unenforceable because they seek to compel respondents to produce documents without also requiring respondents to testify in person at an evidentiary hearing.").

Chapter 13: The Arbitration Award

Tom Cunningham, Esq., FACTL

1. Overview

The final arbitration award is the centerpiece of the arbitration. It is the culminating event that resolves the dispute. Every other activity in the arbitration is performed to bring about a viable and enforceable final award. While arbitration usually involves decisions on various preliminary or procedural matters, which are also sometimes called awards, the final award is the definitive binding document that the parties have chosen to end their dispute. A final award resembles in some respects the opinion of an appellate court. However, it is the product of the agreement of the parties to resolve a dispute out of court. Consequently, a final arbitration award is usually more expansive than an appellate opinion and it must embody the form and substance that conform to the arbitration agreement.

2. Types of arbitration awards

Arbitration awards may take a variety of forms. The form of award is often specified in the arbitration agreement. Some agreements contain detailed instructions defining the form and scope of the award. Additionally, the form of award is ordinarily covered in the initial pre-hearing scheduling conference and embodied in the first procedural order. The award forms most commonly used are: (1) the standard award; (2) the reasoned award; and (3) findings of fact and conclusions of law.

- **Standard award:** A standard award is one that simply states the outcome without reasoning or explanation how the arbitrator viewed the evidence and arguments or applied the law. A standard award normally contains a concise written breakdown of monetary amounts awarded and a per-claim disposition of all non-monetary claims or counterclaims. It is the quickest and most economical form of award. The standard award's abbreviated form provides fewer opportunities for challenge or attempts to set it aside. The standard award is common in routine cases. Rule R-48(b) of the AAA Commercial Arbitration Rules and Mediation Procedures (September 1, 2022) provides, "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." Conversely, Rule 15.2 of both the CPR Administered Arbitration

Rules (March 1, 2019) and the CPR Non-Administered Arbitration Rules (March 1, 2018) provides, "All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise." In consumer cases, Rule R-43(b) of the AAA Consumer Arbitration Rules (September 1, 2014) provides, "The award shall provide the concise written reasons for the decision unless the parties all agree otherwise."

- **Reasoned award:** A reasoned award shows the arbitrator's work. It explains in detail the issues addressed, the evidence evaluated and the thought process by which the arbitrator reached the conclusions expressed in the award. A reasoned award captures the story of the case from the time it is filed until the date of disposition. It discusses the underlying facts, each of the issues in dispute, the procedural history, rulings on significant pre-hearing matters, the evidence presented, the arguments advanced, legal analysis, and ultimately the arbitrator's decision on each issue. Although it is common for reasoned awards to contain a disclaimer denying all relief not specifically granted, a good award carefully addresses each claim or defense raised by the parties. For this reason, it is important for the parties to clearly and independently articulate in their statements of claim and defense each particular issue to be addressed.
- **Findings of fact and conclusions of law:** Findings of fact and conclusions of law are well known in legal parlance. As the name implies, this form of award contains a statement of relevant facts the arbitrator has found to be true together with conclusions regarding the law applicable to those facts. Typically, preparation of findings of fact and conclusions of law takes a lot of time and consequently can be quite expensive. Additionally, abstract statements of fact and legal conclusions are often less effective in communicating the underlying logic than a reasoned award. Findings of fact and conclusions of law are generally less desirable than the other forms of award.

The arbitrators must follow the parties' agreement as to the form of the award. Failure to do so may result in a successful challenge and vacatur. Under the Federal Arbitration Act, an arbitral award may be vacated "… where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. §10(a)(4). It has been held that arbitrators exceed their powers by failing to provide an award

in the form requested. *W. Employers Ins. v. Jefferies & Co.,* 958 F.2d 258, 260 (9th Cir.1992) (vacating an award that failed to provide findings of fact and conclusions of law specified in the arbitration agreement). In another case, the court remanded the dispute to the arbitrator for clarification prior to confirming a revised award. *Maignan v. Precision Autoworks,* 2020 WL 1061049 (D. N.J. March 4, 2020). The Federal Arbitration Act favors confirmation of arbitration awards and rarely interferes with the arbitrator's decisions. However, arbitration agreements must be enforced according to their terms, and where that includes direction as to the form of the award, it must be followed. *Cat Charter, LLC v. Schurtenberger,* 646 F.3d 836, 843 (11th Cir. 2011).

Rulings of the arbitrators on preliminary matters are also referred to as awards. Such awards are issued much like pre-trial orders in litigation and include:

- **Emergency awards:** When arbitrators are empowered to step into a fluid dispute requiring immediate action to prevent imminent prejudice or injury, the decision is embodied in an emergency award. Such awards ordinarily have only temporary effect like a temporary restraining order or temporary injunction. Emergency awards are regarded as binding, but they are not self-executing.
- **Consent awards:** As its name implies, a consent award may be issued at the request of the parties to effectuate the terms of a settlement. Having agreed to submit the dispute to arbitration, the consent award is the means to engraft the binding effect of a final award to the terms of the settlement. In addition to concluding the arbitration the final consent award facilitates enforcement of the settlement.
- **Interim awards:** Interim awards are used to dispose of issues or components that comprise part of a claim or defense. For example, where liability and damages have been bifurcated, the interim award would be issued to resolve the liability issues while deferring consideration of damages. Interim awards are customarily embodied or incorporated into a partial or final award to effect complete disposition of the claim or defense of which they are a part.
- **Partial final awards:** Similar to partial summary judgments, partial final awards dispose of claims, defenses and primary substantive issues leaving others for additional proceedings. A partial final award is used, for example, when the only remaining issues pertain to attorneys' fees and costs.

Regarded as binding in themselves, partial final awards are usually made a part of or incorporated into the final award.

- **Final awards:** The final award concludes the disposition of every matter in dispute. It ends the arbitration. The agreement to arbitrate necessarily includes the agreement to abide by the final award. Accordingly, although the final award is not self-executing and may require court assistance in confirmation and enforcement, the final award may be given *res judicata* and issue preclusive effect, at least between the parties and privies. Also, because the power of the arbitrators derives from the arbitration agreement, the arbitrators have no jurisdiction or power thereafter to reconsider or change the award except to correct clerical errors or otherwise clarify its meaning.

3. Scope of awards

The most common domestically referenced rules and guidelines for the procedural conduct of arbitration are those of the American Arbitration Association, the International Center for Dispute Resolution and the CPR International Institute for Conflict Prevention and Resolution, Inc. Each of these rule sets contain statements of the scope and limitations of an arbitral award. The AAA Commercial Arbitration Rules, for example, provide:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, equitable relief and specific performance of a contract.

AAA Commercial Arbitration Rules and Mediation Procedures (September 1, 2022) R-49(a). In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. The arbitrator may assess and apportion the fees and expenses related to the award as the arbitrator deems appropriate. *Id.,* R-49(b).

The CPR Institute has published rules for proceedings that it administers and those that are administered by the parties themselves. Both of these rule sets define the permissible scope of an award as follows:

> 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 the award is 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.

CPR Administered Arbitration Rules (March 1, 2019); CPR Non-Administered Arbitration Rules (March 1, 2018).

CPR has also published rules for expedited proceedings. CPR Fast Track Administered Arbitration Rules (July 1, 2020). In keeping with its stated purpose, Fast Track Rule 7.1. simply says, "All awards shall be succinct and shall ordinarily be shorter in length than in a non-expedited proceeding."

There are various other agencies worldwide that publish procedural rules for arbitration. These are just examples. Arbitration agreements normally prescribe the governing rules which then are treated as part of the agreement and binding upon the parties.

4. *Functus officio*

An important concept in the law of arbitration is the doctrine called *functus officio*. Simply stated, the doctrine holds that once arbitrators have rendered a final decision on the matters submitted to them, their authority is exhausted and they have no power or jurisdiction to proceed further. *Verizon Pennsylvania, LLC v. Communications Workers of America,* AFL-CIO, Local 13000, 13 F.4th 300, 303 (3d Cir. 2021); *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.,* 909 F.3d 544, 548 (2d Cir. 2018). *Functus officio* underscores the finality of arbitral awards and assures that once a final award is rendered the power of the arbitrator to decide the issue in question is exhausted and may not be revisited. *La Vale Plaza, Inc. v. R.S. Noonan, Inc.,* 378 F.2d 569, 572 (3d Cir. 1967). *See also Trade & Transport, Inc. v. National Petroleum Charterers, Inc.,* 931 F.2d 191, 195 (2d Cir. 1991).

While the doctrine of *functus officio* underscores the finality of arbitral awards, there are certain exceptions where arbitrators may retain limited authority to revisit their decisions:

- An arbitrator can correct a mistake which is apparent on the face of the award;
- Where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and
- Where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.

  Verizon Pennsylvania, LLC, 13 F.4th at 307; *Colonial Penn Ins. Co. v. Omaha Indem. Co.,* 943 F.2d 327, 333 (3d Cir. 1991).

The arbitrator's power to make minor adjustments to an award is embodied in most of the rules governing arbitration. For example, Rule 15.5 of CPR's Non-Administered Arbitration Rules (March 1, 2018) provides:

> Within 20 days after receipt of the award, either party, with notice to the other party, may request the Tribunal to clarify the award; to correct any clerical, typographical or computation 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 20 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, and the provisions of this Rule 15 shall apply to them.

5. Confirmation, enforcement and vacatur

Arbitration awards are not-self executing and the arbitrators have no independent power to enforce their awards. Except by agreement, implementation and enforcement of an award requires confirmation by a court of competent jurisdiction. Upon submission of a proper application or motion, the court will confirm and enter a judgment upon the award, which is enforceable as any other judgment of that court. The confirmation proceedings are normally expedited in keeping with the policy favoring the finality of arbitration awards.

Courts are reluctant to confirm an award that is interlocutory in nature. *See Michaels v. Mariform Shipping, S.A.,* 624 F.2d 411, 414 (2d Cir. 1980). However, interim awards that completely dispose of separate claims are said to be final even if other independent issues remain pending. *Offshore Expl. & Prod., LLC v. Morgan Stanley Private Bank, N.A.,* 626 F.App'x 303, 307 (2d Cir. 2015).

United States policy favors arbitration as a complete method of dispute resolution and not merely a prelude to judicial process review. *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *Hall Street Assocs., LLC v. Mattel, Inc.,* 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). Accordingly, it is universally held that a court can vacate an arbitral award only in exceptional circumstances. *Oxford Health Plans LLC v. Sutter,* 569 U.S. 564, 568, 133 S.Ct. 2064, 186 L.Ed.2d 113 (2013). Judicial review of arbitration decisions is among the narrowest known to the law. *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.,* 508 F.3d 995, 1001 (11th Cir. 2007). The presumption against vacatur applies with even greater force when a federal court reviews an award rendered during an international arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631, 105 S.Ct. 3346, 3355, 87 L.Ed.2d 444 (1985).

The law and policy upon the basis of which arbitration awards can be vacated or set aside is the subject of another chapter. Generally speaking, however, the Federal Arbitration Act provides the limited grounds upon which an arbitration award may be vacated:

- Where the award was procured by corruption, fraud, or undue means;
- Where there was evident partiality or corruption in the arbitrators, or either of them;
- Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or
- Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §10.

The Supreme Court has held that these statutory grounds are the exclusive means by which an arbitration award may be challenged, underscoring that arbitration awards are intended to be binding subject only to very limited exceptions. *Mitsubishi Motors Corp.* 105 S.Ct. at 3354 (parties who agree to arbitrate their disputes must accept the resulting award as final and binding); *Oxford Health Plans LLC v. Sutter,* 133 S.Ct. at 2068 (the purpose of arbitration is to provide a final and conclusive resolution to disputes, where parties have limited recourse to challenge the outcomes).

For international commercial awards, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a treaty incorporated into the Federal Arbitration Act at 9 U.S.C §201, sets forth the following grounds for vacatur:

- The parties were under some incapacity or the arbitration agreement was invalid under the law of the country where it was made;
- The party against whom the award is invoked was not given proper notice of the proceedings or otherwise unable to present its case;
- The award deals with a dispute that is beyond the scope of the parties' agreement to arbitrate;
- The composition of the tribunal or arbitral procedure was not in accordance with the parties' agreement or the law of the country where the arbitration took place;
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority;
- The subject matter of the dispute is not capable of settlement by arbitration under the law of the country where the arbitration took place; or
- The recognition or enforcement of the award would be contrary to the public policy of the country where the arbitration took place.

  9 U.S.C. §207; *Admart AG v. Stephen and Mary Birch Foundation,* 457 F.3d 302, 307 (3d Cir. 2006).

6. Res judicata

A valid and final arbitration award generally has the same res judicata effect and is subject to the same exceptions and qualifications as a court judgment. Restatement (Second) of Judgments §84 (1982); *Lenox MacLaren Surgical*

Corporation v. Medtronic, Inc., 847 F.3d 1221, 1239 (10th Cir. 2017). Application of these rules may be complicated due to the nature of arbitration as being based upon and limited by the arbitration agreement. For example, it is held that an arbitral award does not bar litigation of claims that are not subject to the arbitration agreement or against persons not parties to the arbitration. *W. J. O'Neil Company v. Shepley, Bulfinch, Richardson & Abbott, Inc.,* 765 F.3d 625, 630-631 (6th Cir. 2014). In other words, res judicata bars a successive action only if the matter in the second case was or could have been resolved in the first. *Id.,* at 634. If the terms of the arbitration agreement limit the binding effect of the award in subsequent proceedings, the arbitration agreement controls. Also, the scheme of remedies in the first proceeding may not dispose of all claims related to the same transaction, in which case res judicata will not bar the second claim. Restatement (Second) of Judgments §84(2), (4).

Whether or not the award has been judicially confirmed may be important. The Full Faith and Credit Act, 28 U.S.C. 1738, requires federal courts to afford judicial proceedings the same preclusive effect those proceedings would receive in courts of the same state. It has been held, however, that an unconfirmed arbitration award is not entitled to preclusive effect. *McDonald v. City of W. Branch, Mich.,* 466 U.S. 284, 288, 104 S.Ct. 1799, 1801-2, 80 L.Ed.2d 302 (1984). This decision has not always been followed depending upon the nature of the arbitration, whether it is sufficiently adjudicatory, whether the proceedings afford the disputants fundamental rights, etc. *See, e.g., Hanson v. Musk,* 122 F.4th 1162, 1169 (9th Cir. 2024).

Parties seeking to apply claim preclusion to international awards must prove: (1) the claim or claims in question must have been adjudicated on the merits in the prior award; (2) the prior award must have been entitled to recognition and enforcement under the Federal Arbitration Act; (3) the claims in question involve the same claims and the same parties; and (4) barring relitigation of the claims is consistent with the arbitration agreement and the reasonable expectations of the parties. Restatement (Third) U.S. Law of Int'l Comm. Arb. §4.35.

7. Practice commentary

The goal of the arbitrator is to produce a final award that addresses every claim and defense in a manner that is sustainable and enforceable. The goal of the advocate is to obtain a final award that advances the client's interests. The award must be written in clear and unambiguous language, well organized, logical, comprehensive

and in accord with the format and scope prescribed in the arbitration agreement. It must demonstrate careful consideration of the evidence, law and arguments, and that the matter has been resolved fairly.

The final award necessarily reflects the manner in which the case is presented. The better organized and more logical presentation leads to a sustainable award. A helpful device is to draft a desired award at the beginning of the case and to use that draft to guide and focus the development and presentation of the evidence. This practice assists the arbitrator's understanding of the case and production of an award that yields a favorable outcome. At last, the arbitrator is charged with the task of writing the award. The sophisticated advocate gives the arbitrator the information necessary to complete that task

Chapter 14: Judicial Scrutiny of Arbitral Awards[39]

Jeffrey S. Leon, FACTL

1. Overview

For many years courts in both Canada and the United States were inconsistent when considering whether to intervene, set aside or vacate arbitral awards. More recently, concurrent with the development of arbitration processes and standards that have established arbitration as a recognized and, in many instances, preferred mode of dispute resolution (particularly in a commercial context), the trend has been to give arbitration and arbitrators their due by placing strict limits on the circumstances where courts will intervene in the arbitral process.

While Canadian and American law now have many similarities, there are some differences. This is also true when it comes to considering approaches from province to province in Canada and from state to state in the United States. This paper provides a general review of the law, primarily in Canada (and in particular in Ontario), and a review of general principles under the Federal Arbitration Act in the United States; where an arbitration is being conducted under specific province or state rules, these rules should be consulted and considered.

2. Canada: Overview

The law governing the arbitration of commercial disputes in Canada is generally understood to place strict limits on judicial intervention in arbitral processes and outcomes. Justice Côté of the Supreme Court of Canada recognized in *Peace River Hydro Partners v. Petrowest Corp* (2022 SCC 41) that the concepts of "[p]arty autonomy and freedom of contract go hand in hand with the principle of limited court intervention in arbitral proceedings." Under that principle, arbitration agreements are presumptively enforceable and, as a result, "[g]enerally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule."

General limits on court intervention in arbitral proceedings apply to appeals from and reviews of arbitral awards. Whether an arbitral award is appealable depends

39 This chapter is based in part on Leon, Beauline and Cooper, "Tall Ships Cast Long Shadows: Judicial Scrutiny of Arbitral Awards in 2024 and Beyond," in Annual Review of Civil Litigation (Wilson, ed.) (Toronto: Thompson Reuters Canada, 2024.)

on the governing legislation, the terms of the relevant arbitration agreement, and the nature of the question at issue.[40] For example, Ontario's Arbitration Act, 1991 contains two provisions that govern appeals and reviews of arbitral awards:

1. Section 45 provides that an appeal from an arbitral award is only permitted on a question of law. Leave is required if the arbitration agreement does not contain a specific provision. Leave may be granted if a court is satisfied that an appeal is justified given the importance to the parties of the matters at stake in the arbitration **and** the question of law to be determined will significantly affect the rights of the parties. Leave is not required to appeal a question of law if the arbitration agreement so provides. Parties can agree to permit appeals on questions of fact or mixed fact and law, or to prohibit any appeal whatsoever. The court can require the tribunal to explain any matter. The court may confirm, vary or set aside an award or remit it to the tribunal.
2. Section 46 provides the courts with jurisdiction to review and set aside arbitral awards. A court may set aside an award on the following bases:
   (i) A party entered into the arbitration agreement while under a legal incapacity.
   (ii) The arbitration agreement is invalid or has ceased to exist
   (iii) The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
   (iv) The composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the Act.
   (v) The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
   (vi) The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or the appointment of an arbitrator.

40 For a comprehensive review, see: J. Kenneth McEwen and Ludmila Herbst, Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations (Toronto: Thomson Reuters Canada 2004) (Loose-leaf updated).

(vii) The procedures followed in the arbitration did not comply with the Act.

(viii) An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.

(ix) The award was obtained by fraud.

(x) The award is a family arbitration award that is not enforceable under the Family Law Act. 1991, c. 17, s. 46 (1); 2006, c. 1, s. (7).

The statutory provisions reflect the delicate balance between honoring the autonomy of the parties who chose to arbitrate and the need for judicial scrutiny when appropriate. Judicial over-reach in arbitral processes and outcomes conflicts with the primary goals of arbitration—efficiency, cost-savings, choice of decision maker and confidentiality. The often streamlined and less formal nature of arbitration attracts parties seeking swift resolutions outside the court system. It is therefore important to understand and define when parties who elected arbitration can be formed into the court system.[41]

Parties have the right to agree to resolve disputes by arbitration rather than court proceedings. As Justice Myers of the Ontario Superior Court of Justice has put it, a corollary of the choice to arbitrate is that "the parties have very limited access to the courts when things do not go as they hope." Arbitration is not "a test run in which evidence and positions can be tried on for size and then discarded in subsequent court proceedings." When a party to arbitration seeks judicial intervention in an arbitral process or outcome, resort to the court does not afford a "do-over". The arbitration "is the main event," *Lobanova v. Grynyshyn,* (2019 ONSC 3064).

As noted, these principled constraints on judicial intervention have not always been evenly applied. In its 2022 decision in *Tall Ships Development Inc. v Brockville (City)* ("Tall Ships") (2022 ONCA 861), the Court of Appeal for Ontario considered the bounds within which judges may exercise review powers related to arbitral awards in domestic arbitration. *Tall Ships* marries the law governing appeals and set-aside applications with the Supreme Court of Canada's guidance on the foundational principles of arbitration law. It also endorses and clarifies the approach of general judicial restraint when courts scrutinize arbitral processes and outcomes. By denying leave to appeal in January 2024, the Supreme Court of Canada confirmed that the Court of Appeal's decision is the final word, at least in Ontario.

41 Joel Richler, "The City of Ottawa v. The Coliseum Inc., A Case Comment" (2016) 25-2 Can. Arbitration & Mediation J 8

Tall Ships represents a meaningful step towards clarifying the limits on judicial intervention in domestic commercial arbitral proceedings. By approving a cautious approach to section 45 appeals and clarifying that section 46 cannot be used to "bootstrap" substantive appeals by framing them as breaches of procedural fairness, *Tall Ships* has and will continue to improve consistency and predictability on appeals and set-aside applications in Ontario and in other Canadian provinces.

3. The development of the Law of Canada

It is noteworthy that as early as 2003 the Supreme Court of Canada described arbitration as a "private justice system" that operates "parallel to the state's judicial system," *Desputeaux v. Éditions Chouette* (1987) inc., 2003 SCC 17. Reflecting this systemic separateness, the courts' inherent jurisdiction to review arbitral awards has been substantially circumscribed by enacting legislation across Canada aimed at bolstering commercial arbitration's position as an alternate route to the traditional court system.

In response to legislative limits on judicial scrutiny of arbitral awards, courts have moved closer to embodying a principle of general non-interference. In 2019, in *Telus Communications Inc. v Wellman* (2019 SCC 19), the Supreme Court of Canada noted the shift in the case law since the passing of arbitration legislation, as more recent case law has "consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly particularly in the commercial setting." Encouraging and enforcing fidelity to agreements to arbitrate "goes hand in hand" with limited judicial scrutiny of arbitral awards.

In terms of appeals, the Ontario Court of Appeal has stated that, broadly speaking, "the starting point in exercising the court's role under the Arbitration Act, 1991 is the recognition that appeals from private arbitration decisions are neither required nor routine." *Alberta Utilities Corporation v. Solar Power Network Inc.* (2019 ONCA 254). The Supreme Court of Canada's subsequent decision in *Sattva Capital Corp v. Creston Moly Corp.* (2014 SCC 53) provided guidance on appellate review of arbitral awards on questions of law. The Supreme Court found that, when arbitral awards are appealable on questions of law, the appeal may only occur if the arbitrator is said to have erred on an "extricable" question of law, meaning a question that, essentially, can be analyzed independent of the application of the law to the facts. This direction arose from an appeal concerning the contractual

interpretation process, in which context the Supreme Court instructed that judges should exercise appellate powers with particular caution. The Supreme Court later echoed this sentiment in *Teal Cedar Products Ltd v. British Columbia,* (2017 SCC 32) highlighting that "[a] narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings."

In *Sattva,* the Supreme Court observed that a "central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute." That limit "reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation." Sattva therefore clarifies that appeals of arbitral awards are, unless the parties bargain otherwise, limited to cases in which an error of law is extricable from the mixed-fact-and-law nature of contractual interpretation. Those instances may include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor." The Supreme Court emphasized that judges should take extra care in identifying those errors given that litigants may attempt to "frame any alleged errors as questions of law."

In terms of the power to set aside an arbitral award, before its ruling in *Tall Ships,* the Ontario Court of Appeal considered the jurisdiction to set aside an award under section 46 of the Arbitration Act, 1991 and, ultimately, concluded that the application judge in each case had exceeded the scope of that jurisdiction.

The Court of Appeal in *Mensula Bancorp Inc. v. Solar Power Network Inc.* (2022 ONCA 769) reaffirmed its observations about the limited grounds for setting aside an award under section 46. It also provided a reminder that this provision cannot be used as an alternate appeal route:

> As explained in *Alectra Utilities Corporation v. Solar Power Network Inc.,* s. 46(1)3 of the Arbitration Act, 1991 provides a narrow basis upon which a court may interfere with an arbitration award. It does not create a right of appeal, nor contemplate a review of the correctness or reasonableness of the arbitrator's decision. It requires that the court not interfere with the arbitrator's award as long as the issue decided was properly before the arbitrator.

These cases clarified the narrow discretion of judges to set aside an arbitration award under section 46 of the Ontario Act. Aside from comments made in obiter, however, these decisions did not deal with appeals under section 45.

4. Recent clarification on the law regarding appeals

In the *Tall Ships* case, the Ontario Court of Appeals held that the judge below had erred by characterizing questions of mixed fact and law as extricable questions of law and had "effectively bootstrapped the substantive arguments" by considering them as breaches of procedural fairness.

The Court of Appeal then drew on the Supreme Court's guidance in commenting on the role of appellate courts in reviewing the proposed grounds of appeal from a commercial arbitration award. The Supreme Court had cautioned in *Sattva:*

> Courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the AA, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized.

The Court of Appeal's decision on these points demonstrates careful attention to the policy rationales underpinning restraint on judicial scrutiny of arbitral awards. The Court found that "characterizing the obligation to keep the [City] informed as an 'implied term,' such that it attracts a right to appeal in these circumstances, would entirely undermine the intent of these parties to submit this dispute [...] to arbitration, and would particularly frustrate their specific provision that only errors of law could be appealed."

The Court of Appeal further found no basis for a procedural unfairness argument. The Arbitrator had interpreted the agreement based on his findings of fact. Those findings happened to largely favour the City:

> The conclusion that the procedural rights of *Tall Ships* were violated because the "implied terms" were neither pleaded nor argued is bootstrapped by the erroneous finding that these were "implied terms" that the arbitrator had erred in interpreting to be part of the contract.

And further, it is again worth repeating that this (an interest claim) was a question of mixed fact and law, not subject to appeal under s. 45. It also bears repeating that s. 46 of the Arbitration Act cannot be used as a broad appeal route to bootstrap substantive arguments attacking an arbitrator's finding which the parties had agreed would be immune from appeal.

Central to the Court of Appeal's decision in *Tall Ships* was its careful attention to the Supreme Court's direction to limit appeals of arbitral awards to only extricable errors of law, and its emphasis on the narrow basis for setting aside arbitral awards under section 46, in line with its earlier decisions in *Alectra and Mensula, supra.* The Court of Appeal applied the Supreme Court's direction to exercise appellate powers under arbitration statutes with caution when extricating questions of law from the interpretation process. "Failing to exercise such caution," the Court of Appeal stated, "will result in the very inefficiencies, delays and added expense that choosing an arbitral process seeks to avoid." Building on this principle, the Court of Appeal stated that exercising care in identifying issues of law is "of particular importance when, as here, the impugned terms form a relatively small part of a large and complex arbitration decision."

5. American law[42]

As noted, while the law in the United States is similar to Canada, there are some important differences. The vacating of awards made under the Federal Arbitration Act are limited to the grounds for modification and vacatur enumerated in 9 U.S.C. §§10 and 11, and certain court decisions, which are:

1. Arbitrator bias: The arbitrators were biased or corrupt, 9 U.S.C. 10(a)(a),(b);
2. Arbitrator misconduct: The arbitrators engaged in misconduct, such as refusing to postpone a hearing or refusing to hear evidence, 9 U.S.C. 10(a)(c);
3. Arbitrator overreach: The arbitrators exceeded their powers or did not execute their powers properly, 9 U.S.C. 10(a)(d); and
4. Manifest disregard for the law: The arbitrators intentionally ignored or refused to apply a governing legal principle.

As indicated, federal and some state courts added a very limited ground that an award may be vacated if it exhibits a "manifest disregard of law." *Duferco Intl. Steel*

42 With thanks to Robert Jossen, Esq., FACTL, of the New York Bar.

Trading v. T. Klaveness Shipping A/S, 333 F3d 383, 388 (2d Cir. 2003); *Goldman v. Architectural Iron Co.,* 306 F3d 1214, 1216 (2d Cir 2002), citing *DiRussa v Dean Witter Reynolds Inc.,* 121 F.3d 818, 821 (2d Cir 1997). As also indicated, manifest disregard of law is a "severely limited" doctrine, *Matter of Arbitration No. AAA13-161-0511-85 Under Grain Arbitration Rules,* 867 F.2d 130, 133 (2d Cir 1989). It is a doctrine of last resort limited to the rare occurrences of apparent "egregious impropriety" on the part of the arbitrators, "where none of the provisions of the FAA apply," *Duferco,* 333 F.3d at 389.

> As The New York State Court of Appeals interpreted the law,
>
> The Second Circuit has also indicated that the doctrine requires "more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the law." *Duferco*, 333 F.3d at 389. We agree with that premise. To modify or vacate an award on the ground of manifest disregard of the law, a court must find "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (*Wallace v. Buttar,* 378 F.3d 182, 189 (2d Cir 2004), quoting *Banco de Seguros del Estado v. Mutual Mar. Off., Inc.,* 344 F3d 255, 263 (2d Cir. 2003)).
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> *Wien & Malkin LLP v. Helmsley-Spear, Inc.,* 6 N.Y.3d 471, 489 (2006).

6. Conclusion

With the strengthening of confidence in the arbitration process, in part as a result of the development of arbitral institutions, an increased number of highly skilled arbitrators with significant commercial expertise and more sophisticated understanding of the benefits of arbitration by counsel and corporate clients, the trend for the courts to recognize and respect arbitral awards should continue. Parties should be allowed to agree to arbitration and its benefits. That includes finality. With the backlogs and other issues facing many of our court systems, this makes even more sense.

Chapter 15: Arbitration in Canada

The Hon. Neil Wittmann, K.C., FACTL

1. Overview

The fundamentals of commercial arbitration in Canada are the same, or similar to, those in the United States. Arbitration is consensual and party autonomy is paramount. The courts, in their modern approach, support the arbitration of commercial and private law disputes and court intervention is limited.[43] The source of an arbitration and of an arbitrator's jurisdiction is an arbitration agreement, combined with applicable legislation.[44] The applicable legislation includes powers of enforcement by the courts, the arbitration process, an ability to determine the jurisdiction of an arbitrator and to review an award under limited circumstances, subject to the agreement of the parties.[45]

2. Governing legislation

There are two main processes found under the general rubric of "international" or "domestic." If international, *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention)* applies and requires a State where a legal action is commenced to refer the parties to arbitration if there is a valid arbitration agreement and generally requires that State to enforce a foreign arbitral award as a judgment of that State's courts.

Most Canadian provinces have legislation to implement the *New York Convention.* The Federal Government in Canada implemented the *New York Convention* by passing the *United Nations Foreign Arbitral Awards Convention Act.* Also applicable in the international setting is the Model Law on international commercial arbitration. The Model Law is a creature of the United Nations Commission on International Trade Law (UNCITRAL), since 1985. Both the Federal Government in Canada and the provinces have adopted the Model Law for all international commercial arbitrations.

Most provinces have legislation pertaining to international arbitration and domestic arbitration ("the domestic acts"), with some exceptions.

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43 *Clayton v Canada (Attorney General),* 2024 ONCA 581.

44 *Desputeaux v Editions Chouette* (1987) Inc. [2003] SCR 178.

45 *Domestic Arbitration Acts;* Model Law, Article 34.

3. Federal legislation

After the *New York Convention* was adopted in Canada, all provinces passed their own foreign award enforcement legislation or otherwise incorporated the *New York Convention* into their statutes governing international commercial arbitration. The Federal *Commercial Arbitration Act* concerns both domestic and international commercial arbitrations that come within the jurisdiction of the federal government, usually where one of the parties is a federal department, or a Crown corporation, or the dispute pertains to other matters, such as the Free Trade Agreements between Canada, the United States and Mexico.

Most of the provinces have enacted an *International Commercial Arbitration Act,* as well as an *Arbitration Act,* the former governing international arbitrations, and the latter domestic arbitrations. Usually excluded by legislation under an *Arbitration Act* is labour arbitration. Most international commercial arbitration statutes incorporate the *New York Convention* and the Model Law as schedules. In Quebec, both international and domestic arbitrations are contained in the *Code of Civil Procedure* and the *Civil Code of Quebec.*

Whether an arbitration is "international" and "commercial" may be the subject of dispute. The Model Law has a definition of "international," but no definition of "commercial." The British Columbia *Commercial Arbitration Act* has specifically included a definition of "commercial." In other provinces, where no statutory definition exists, there have been Court interpretations of what is, or is not, "commercial."[46]

4. Arbitration agreement

Fundamental to any arbitration is the concept of jurisdiction. An arbitrator has neither more nor less jurisdiction than is conferred or implied by an arbitration agreement. An arbitration agreement may incorporate legislative provisions such as the Model Law in an appropriate case, and the provisions of a domestic statute. In addition, with the exception of Quebec, the parties may contract out of applicable legislation by their agreement or otherwise modify what would be applicable legislative provisions.

Many arbitration agreements contain a provision that the arbitration agreement, when contained as part of a contract between the parties governing their relations,

46 Patel v Kanbay International Inc., 2008 ONCA 867; Uber v Heller, 2020 SCC 16.

is stand alone and separable from the parties' contract, even where that contract may be declared inoperative.

A separate, independent and autonomous arbitration agreement is contemplated in provincial legislation, the Model Law as well as the Quebec Civil Code.

The domestic statutes and the Model Law provide that the arbitral tribunal may rule on its own jurisdiction. Also, most domestic acts provide that if an arbitral tribunal rules on an objection to the jurisdiction of an arbitral tribunal on a preliminary basis, a party may within thirty (30) days after receiving notice of the tribunal's ruling, make an application to the court to decide the matter.

Several other issues surround an arbitration agreement such as what is the proper law of arbitration, where is the arbitration to occur, and what procedure is to be followed at the arbitration. Most of these issues are dealt within the relevant international or domestic legislation in the event the parties do not otherwise agree.[47]

Some arbitration agreements are made after a dispute has already proceeded to litigation in court; this resort to arbitration has occurred because of the inability of the courts in many jurisdictions in Canada to accommodate the timely resolution of commercial disputes. In other instances, an arbitration agreement is made by disputing parties to avoid conventional litigation.

An important consideration in drafting an arbitration agreement concerns whether to insert an institution to administer the arbitration and to adopt that institution's procedural rules, or to proceed to an ad hoc arbitration. There is a cost to institutional arbitration and consideration should be given to the value added. Factors to be considered include the fee structure of the prospective institution, the procedural rules of the institution and the level of service provided by the institution. Consultation with others familiar with a particular institution is helpful.[48]

Some examples of institutions in use in Canadian arbitrations include the ADR Institute of Canada, ICDR Canada, the Vancouver International Arbitration Centre, the International Chamber of Commerce, and the Canadian Commercial Arbitration Centre. Each institution has a set of applicable rules. In ad hoc arbitrations, it is not

47 E.g. Model Law, Articles 19, 20; *Alberta Arbitration Act,* ss 20-22.

48 Arbitration Law of Canada (4th Edition) by J. Brian Casey at p 113.

uncommon for the parties to incorporate by reference some, but not all, of the provisions of the institutional rules and add to or modify them by agreement.

5. Procedure

Written statements or pleadings should be required under any procedural rules adopted by the parties.

The Quebec *Code of Civil Procedure,* Article 6.33 indicates arbitrators may require the parties to produce a statement of claim with supporting documents. Under the domestic acts, and the Quebec *Code of Civil Procedure,* oral statements may be permitted, but this practice is not advisable.

In an international setting under the Model Law, the requirement for delivery of a statement of claim and defense, is stated in detail, under article 23(1).

It is helpful and is usual to include what has become known as a Memorial to be submitted initially, followed by Counter Memorials and Reply Memorials. These documents require a reference to all the documents a party relies upon, all of the evidence and law to be presented and argued, including witness statements.

Whether an arbitration proceeds by way of initial statements or pleadings that are akin to conventional litigation or in the form of a Memorial, witness statements will usually be required setting out all of the witness's evidence and its source. The witness statements are usually divided into lay witness statements and expert witness statements.

A lay witness statement is usually accompanied by a statement, at the beginning, that it is made based on the witness's personal knowledge or information and belief, and, at the end, that it is made under oath or affirmation to be true. Where it is stated to be based upon information and belief, the source of the information is identified.

It is common to have opposite parties indicate to each other whether a witness is required to be produced for cross-examination at the arbitration hearing. This is usually done by giving a notice within a reasonable time prior to the commencement of the hearing. At the hearing, with respect to lay witnesses, the witness statements serve as the direct evidence of that witness and the witness is usually turned over for cross-examination with a very brief introduction by way of direct evidence or simply indicating whether there are any corrections to the statement of the witness.

With respect to expert witnesses, there is an expectation that the expert witness's statement, commonly known as an expert report, will be the subject of direct examination of the expert, followed by cross-examination. Many arbitration agreements include a provision requiring a challenge to the expert's qualifications to be made prior to the arbitration hearing. This process is preferable to awaiting the hearing to determine the validity of the qualifications. At the very least, providing notice that the expert witness's qualifications are going to be challenged is preferable.

The ADRIC Rules and the ICDR Canada Rules and the IBA Rules follow the process that each party must produce the documents upon which it intends to rely. Thereafter, document production under any of the institutional rules usually proceeds through a Redfern process which involves a schedule, setting out in columnar form, the document or category of documents requested by a party, the relevance and materiality according to the requesting party, objections to the document request, reply to the objections to the document request, and the tribunal's decision. After that exchange, each party may request additional documents from the opposite party and the reason for the request. The receiving party may object and state the reasons why it objects and thereafter the tribunal must rule on the requirement to produce. The usual test is whether the document sought is relevant and material to the outcome of the dispute. Disclosure of documents is of course subject to general rules of privilege and, under some rules, proportionality.

In Canada, an area of some controversy is whether pre-hearing oral examination for discovery may occur. In some arbitrations, the parties agree to have pre-hearing oral examination of a corporate representative or a witness. Although some of the rules contemplate either the parties' agreement or the tribunal's determination, it is not unusual to have a clause indicating that oral examination may occur only with leave of the tribunal. When granted, it is important to set time limits to conduct the examination and what use can be made of the pre-hearing evidence. In the common law provinces, it may be used under court rules to impeach the witness's testimony at the hearing or may be "read-in" and adopted as the evidence of the examining party. These court rules are often adopted by the parties or ruled appropriate by the tribunal.

A schedule or timetable is an essential tool to keep an arbitration, international or domestic, on time and on schedule. Such a schedule should include when initial statements including claims and defenses and counterclaims must be delivered,

when memorials or witness statements must be delivered, when reliance documents must be produced and when requests for additional documents must be made, when an objection to production must be made and when the tribunal must rule. A schedule for witness statements and expert witness statements is necessary, as well as some dates for pre-hearing conferences and, of course, the hearing time.

In many arbitrations, the hearing time is agreed upon or ruled upon by the tribunal in terms of a time allocation to each party. Where there are two parties, it is not uncommon to allocate the time equally and to exclude from that time any participation in the hearing by the tribunal, in terms of the tribunal's questioning of witnesses or discussion with the parties.

6. Statutory provisions: Conduct of arbitration

Remembering that an arbitration agreement can effectively displace the procedure stated in the domestic and international acts, some default provisions are noteworthy. In the domestic acts there is provision that a tribunal shall treat the parties "equally and fairly" and that each party shall be given an opportunity to present a case and respond to other party's cases.

Also, the arbitration tribunal may determine its own procedure and, where the tribunal consists of more than one member, may delegate procedural questions to the chair.

The domestic acts require an award to be made in writing with reasons, unless there has been a settlement.[49]

Similar provisions are contained in the Model Law applicable to international arbitrations in Articles 18 (Equality and Opportunity of Each Party to Present Their Cases); and Article 31 (The Award to be Made in Writing with Reasons).

7. Court intervention

Early court intervention includes jurisdictional challenges but also applications for a stay of litigation which has been commenced where an arbitration agreement governs the dispute. Granting a stay is dependent on the relevant applicable legislation. Domestic and international arbitration legislation provides for stays of

49 *Arbitration Act* (Alberta), §38(1). The author refers to sections of the Alberta Arbitration Act, but the reader should note that domestic acts in the other Canadian provinces contain similar, if not identical, provisions.

proceedings. The Supreme Court of Canada has stated that a party to an arbitration agreement who commences a proceeding in Court with respect to the dispute referred to in the arbitration agreement requires the Court on the motion of another party to stay the proceeding in favour of arbitration.

The domestic acts provide that a party may appeal an award on a question of law, or a question of fact, or a question of mixed law and fact, if provided in an arbitration agreement. If the grounds of appeal are not provided, permission of the court is required to appeal and then on a question of law only.[50]

In addition, the domestic acts provide for the "setting aside" of an award on specific grounds, including an absence of jurisdiction over the matter in dispute, legal incapacity of a party, manifestly unfair and unequal treatment of a party, and a corrupt or fraudulent act by the arbitrator.[51]

Similar provisions with respect to post-award access to a court are contained in Article 34 of the Model Law, which refers to setting aside an award under grounds similar to those found in the domestic acts.

8. Costs

In Canada, both conventional civil commercial litigation and arbitration allow awarding the costs of the proceeding. The domestic acts typically contain provisions allowing the tribunal to make a costs award.[52] These provisions contain an ability of a tribunal to award solicitor and client costs, or party-and-party costs, or any other basis in the discretion of the tribunal.[53] Often, the dominant factor in the exercise of discretion is the degree of success on the merits by the party claiming costs. The costs consist of the parties' legal expenses, the fees and expenses of the tribunal, and any other expenses relating to the arbitration.[54] Also, the tribunal is to consider whether a party made an offer in writing to another party to settle, which offer may not have been accepted. If the arbitral tribunal's award is less favourable to that party than the offer, that is a matter to be take into account when considering costs.

There appear to be no specific costs provisions in the Model Act, but of course the parties may agree on a costs regime and customarily include a reference to costs

50 *Arbitration Act,* §§ 44(1), (2), (2.1).
51 *Arbitration Act*, § 45(1).
52 *Arbitration Act*, § 53(1).
53 *Arbitration Act,* § 53(2).
54 Arbitration Act, § 53(3).

in an arbitration agreement or by reference to the adoption of the applicable rules containing costs provisions.

9. Enforcement of awards

The domestic acts contain provisions requiring a court to give a judgment enforcing the award, provided that award is made in the court's home jurisdiction or elsewhere in Canada, subject to some exceptions relating to the finality of the award.[55]

In the context of international arbitration, the Model Law in Articles 35 and 36 sets forth the requirement to enforce an award regardless of the country in which it was made subject to some grounds for refusing recognition or enforcement, most of which are similar to the grounds for setting aside an award.

10. Conclusion

Commercial arbitration in Canada is resorted to in a wide array of contractual settings governing relations between businesses and individuals. It is flourishing, not only because of its perceived efficiency and fairness, but also because of its timeliness compared to conventional commercial litigation in the courts.

55 *Arbitration Act,* § 49(1); § 49(4).

Chapter 16: International Commercial Arbitration

Paul Klaas, Esq., FACTL

1. Overview

By treaty, a commercial arbitration award issued in the United States is enforceable in 172 other countries, and an arbitration award issued in any of those 172 countries is enforceable in the United States. There is no similar treaty offering reciprocal recognition and enforcement of court judgments.

The global enforceability of commercial arbitration awards secured by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as "the New York Convention of 1958") is an enormous advantage enjoyed by arbitration over litigation in disputes arising between nationals of different countries.

That advantage has not gone unnoticed by the many businesses now engaged in the global economy. Indeed, although no precise data exist, the most common estimate is that 90% of all modern international commercial contracts contain arbitration agreements.

2. Industries involved in international commercial arbitration

International commercial arbitration is consensual. That is, the parties must choose arbitration; it cannot be thrust upon them. Arbitration is overwhelmingly chosen to resolve the disputes that arise from global commerce in essentially all industries.

Industries that are particularly active in international commercial arbitration include aviation and aerospace; energy; pharmaceuticals; banking; financial services; insurance; consumer products; mining; oil and gas; agriculture; construction and engineering; culture, media, and sports; health care; shipping; telecommunications; commodities; and professional services.

3. Characteristics of international commercial arbitration

International arbitration offers businesses in these industries all of the well-known arbitration advantages of efficiency, speed, cost-effectiveness, confidentiality, finality, enforceability, expertise, neutrality, and flexibility. In an international context, neutrality and flexibility are particularly important.

3.1 Neutrality: By opting for international commercial arbitration, no party has to concede "home court" advantage to another, for there is no need to resort to any nation's domestic courts for decisions on the merits of transnational disputes. Instead, disputes are resolved by impartial arbitrators, independent of any government.

International commercial arbitrators of many nationalities are available, and typically all serve as neutrals. Parties are regularly involved in selecting arbitrators, but even the party-nominated arbitrators are sworn to impartiality. (The party-advocate arbitrator, sometimes permitted in US labor arbitration, is essentially unknown in international commercial arbitration.)

Whether a party-nominated arbitrator can, in fact, maintain impartiality is the subject of ongoing debate, but impartiality is certainly the rule, the expectation, and (in the experience of most active participants in international commercial arbitration) the reality.

3.2 Flexibility: Arbitration's flexibility is doubly important in international matters—doubly important, because the dispute resolution processes that parties from different countries are used to and expect can be so inconsistent, even contradictory.

1. **Pre-hearing "discovery:"** US lawyers, for example, are used to and expect broad discovery, with expansive pre-hearing document production, depositions, interrogatories, and requests for admission. That is almost never permitted in international commercial arbitration. In fact, Article 24 (10) of the 2021 International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR") (the international division of the American Arbitration Association) explicitly provides that "[d]epositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information under these Rules."

   Even document requests, under ICDR and most other international arbitral rules, are limited to "specific documents or classes of documents" accompanied by an explanation as to their relevance and materiality.

2. **Hearing:** A typical international arbitration hearing—to the extent there is such a thing—tends to have more written presentations of evidence and argument, where a US lawyer might be used to and expecting oral presentations.

Written statements from fact witnesses and extensive written reports from expert witnesses are commonplace in international commercial arbitration.

Factual witness statements are usually exchanged between the parties and provided to the arbitrators before the hearing. Those written statements may not just presage direct examination; they may replace it. Many times, the live testimony of witnesses appearing in international commercial arbitration hearings is limited to cross- examination.

Written reports are almost always required from expert witnesses. Their reports too are exchanged between the parties and submitted to the arbitrators before the hearing. Many times, the arbitrators will direct opposing experts to consult with each other before the hearing and submit to the arbitrators a list of issues on which they agree and a list of issues on which they disagree. As to those issues on which they disagree, the experts can be either cross-examined separately or questioned together. "Witness conferencing" (examining witnesses testifying about the same issue at the same time—colloquially referred to as "hot tubbing"—is more commonly used with expert witnesses, but it can be used with factual witnesses as well.

International arbitrators themselves question witnesses directly, and they may even lead the questioning when witness conferencing is used. Most international arbitrators will allow counsel to conduct their examinations first, with only occasional interjections, but some international arbitrators take over earlier and at will.

At the end of a hearing, oral final argument from counsel may be permitted, but oral arguments are sometimes replaced by post-hearing written submissions.

3. **Award:** International commercial arbitration awards are "reasoned" awards. There is nothing like AAA Commercial Arbitration Rule 48(b) ("The arbitrator need not render a reasoned award unless the parties request such an award prior to appointment of the arbitrator or the arbitrator determines that a reasoned award is appropriate.") in international commercial arbitration rules or practice.
4. **"Costs:"** "Costs" (a term that, in international parlance, includes attorneys' fees) "follow the event" in most national legal systems—that is, generally

the "loser pays" not only its own attorneys' fees but also the winner's attorneys' fees. The "American rule" (each side bears its own attorneys' fees) is applied in very few national legal systems outside of the United States. In most international commercial arbitrations, the "loser pays."

4. Special challenges of international commercial arbitration

International commercial transactions can be especially challenging. Different languages may be spoken; different legal and business cultures may have to be understood; even different ethics may have to be accommodated. Those challenges also arise in arbitrating disputes that arise from international commercial transactions.

4.1. Different languages: The parties and the witnesses frequently speak different languages, and, of course, write their documents in different languages. Even if the parties specify which language is to be used in the arbitration (as they should), translation of the oral and written evidence to that language can be cumbersome and expensive.

English has become the dominant language of global commerce, and English is the most common language in which international commercial arbitrations are conducted, but international commercial arbitrations can be conducted in any language.

4.2. Different legal philosophies: The parties may well come from different legal cultures. Accommodating the expectations of a party from a common law country and the contrary expectations of a party from a civil law country is a routine challenge in international commercial arbitration.

Most common law countries, including the United States, were once part of the British Empire. Most civil law countries were once part of the Roman Empire, or part of the empires of countries that themselves were once part of the Roman Empire (*e.g.,* France, Germany, Spain, Portugal, the Netherlands). There are far fewer common law countries than civil law countries, and, for whatever reason, most countries that have modernized their legal systems within the past century or so (*e.g.,* China, Japan) have adopted a civil law model.

To oversimplify, the common law is fundamentally inductive (general principles of law arise from decisions in specific cases) while the civil law is fundamentally

deductive (specific cases are decided by applying general principles of law). Common law dispute resolution is adversarial—the truth, it is thought, emerges from the clash of opposing positions presented by counsel before neutral, mostly passive, decision-makers. Civil law dispute resolution is inquisitorial—the truth, it is thought, can be determined by active neutrals who both investigate and decide. Common law countries, particularly the United States, usually permit pre-hearing disclosure or "discovery"—forced production of relevant documents, even "depositions" (pre-hearing interrogations of the opposing party's witnesses), while civil law countries usually permit little or nothing of the kind. A typical common law hearing features witness testimony, cross-examination, and oral argument; civil law dispute resolution relies more on contemporaneous documents and written presentations.

These fundamental differences between the common law and civil law cultures surface in practical questions that arise throughout international commercial arbitrations: How detailed should the pleadings be? How much "discovery"/ disclosure should be required or allowed, if any? Should the arbitrators be active investigators and interrogators? Will there be an oral hearing? If so, will the arbitrators allow witnesses to testify and be cross-examined, and will the arbitrators allow the lawyers to argue?

4.3. Different contractual construction: Most international commercial arbitrations arise from contracts. Americans, particularly American lawyers, are sometimes surprised by how differently contractual obligations are viewed around the world.

One of the tenets of American business and law is that a contract is enforced as written—if the words are unambiguous, evidence of the actual intent of the parties is not just unimportant… it's inadmissible.

That tenet is not universally shared. In Norway, for example, even an unambiguous provision in an agreement may be set aside or amended by the court (or the arbitrator, if Norwegian law controls) whenever it would be unreasonable or contrary to generally accepted business practice to invoke that provision. And, in some Latin American and Asian countries, the calumny and, to a lesser extent, the reality are that a written contract is just another phase of an ongoing negotiation.

The substantive law applicable to an arbitration is—or, at least, should be—specified by the contract. If New York law is specified, it will be—or, at least,

should be—applied, and unambiguous contracts should be enforced as written. It is difficult, though, to dislodge the fundamental cultural differences that arbitrators can bring with them. Sometimes, it is necessary to emphasize a legal or business tenet that might otherwise be thought a given.

4.4. Different legal ethics: The advocates in international commercial arbitrations are normally lawyers from the party's country. The opposing parties' legal teams, therefore, may be bound by very different ethical rules.

It is safe to assume that lawyers appearing in international commercial arbitrations are not allowed to suborn perjury or try to change a witness's testimony. But, the extent to which those lawyers may prepare their witnesses varies widely.

In the US, for example, it is routine for lawyers to prepare witnesses by meeting with them before they testify; going over the documents that the witness wrote or read; discussing the witness's recollection of the key events; organizing the witness's direct examination; predicting the witness's cross examination; and role-playing both the direct and the cross.

In many countries, what US lawyers do would be considered unethical. In some countries, a lawyer is not allowed to speak with testifying witnesses at all before they testify. Even in England—the home of the common law—barristers are not allowed to role-play the case with witnesses.

But, what US lawyers do usually strengthens the witnesses, and helps them withstand even withering cross-examination. In an international commercial arbitration between a US party and (for example) an Italian party, is it fair to permit the US lawyers to prepare their witnesses meticulously, while the Italian lawyers prepare their witnesses not at all, in compliance with their respective ethical rules and usual practices? That question – and many others that arise from the mingling of different cultures in international commercial arbitration – are frequently raised by skilled counsel and answered by experienced tribunals very early in the arbitral proceedings. The best practice is to "level the playing field" throughout, not just react to tilts.

5. Meeting the special challenges of international commercial arbitration

Many of the special challenges of international commercial arbitration can be met by the arbitration agreement itself; by the procedural rules selected for the arbitral process; and by "soft law" (guidelines, recommendations, and "best practices"

published in aid of international commercial arbitration by various non-governmental organizations). Indeed, many businesses have found it useful to incorporate selected procedural rules and "soft law" into the arbitration agreement itself, transforming them into contractual commitments. Even when combined, though, the arbitration agreement, the procedural rules, and "soft law" still leave a broad swath of issues to resolve through party agreements or arbitrator discretion.

One article of faith among international arbitrators is party autonomy. Arbitrators have broad discretion, but they will usually defer to party agreements. So, for example, if the arbitration agreement itself specifies that depositions shall be permitted, even civil- law arbitrators who detest depositions will permit them.

5.1. Arbitration agreement: The arbitration clause of a cross-border transaction typically does not rivet the dealmakers; instead, many times the arbitration clause from some former deal will be dredged up from somebody's laptop, adapted only as necessary, and then inserted into the current deal amongst the boilerplate, forlorn and quickly forgotten. That inattention can be a costly error, or, at least, a missed opportunity.

International arbitration agreements should specify the core features of the dispute resolution model the parties desire, including the scope of matters to be arbitrated; the language in which the arbitration will be conducted; the substantive law that will control; the "seat" (the legal place of the arbitration); the administering institution, if any; and the arbitral rules. International arbitration clauses can also specify the number of arbitrators, the timeline, and whatever arbitral process the parties choose.

Many experienced and wise practitioners recommend short, simple arbitration agreements, leaving much to the discretion of the eventually-appointed arbitrators. Other equally experienced and wise practitioners recommend that the parties specify particulars of the arbitration process they desire, or it will be left to the discretion of persons as yet unknown who may choose a process that one or both parties find unsatisfactory. All experienced and wise practitioners agree, though, that great care should be taken in drafting the arbitration agreement, for all have encountered clauses that are so flawed that the parties' agreement to arbitrate fails. The risk of creating a so-called "toxic" or "pathological" clause rises with the number of matters specified in the arbitration agreement, but many think the reward of maintaining some party control justifies the risk of being specific.

5.2. Institutions and institutional rules: A dizzying array of institutions, headquartered all over the world, administer international commercial arbitrations. Most of them are known by their acronyms, e.g., ACICA, CANACO, CIETAC, CPR, DIS, HKIAC, ICC, ICDR, JCAA, KLRCA, LCIA,

MARC, NAI, SCA, SCC, SIAC, WIPO. Essentially all of these institutions offer sets of procedural rules that parties can incorporate into their arbitration agreements, and most of them will administer arbitrations under other compatible rules, including the more generic international arbitration rules published by the United Nations Commission on International Trade Law ("UNCITRAL") and the International Institute for Conflict Prevention and Resolution ("CPR") .

There are important variations among the institutional rule sets, but, in general, they all set forth how the arbitration is to be commenced; what pleadings will be required; how the tribunal will be appointed; how the proceedings will be conducted; whether and what information will be exchanged before the hearing; whether interim measures can be imposed (under some rules, by specially-appointed "emergency arbitrators"); how the hearing should be run; the form of the award; and how costs will be assessed.

The institutions themselves do not decide the cases, nor do they interfere substantively in the decision. The institutions provide administrative support, usually for a reasonable fee. But, it is entirely possible to conduct an international commercial arbitration without any institution being involved. For such non-institutional ("ad hoc") arbitrations, it is advisable to specify in the arbitration agreement which arbitral rules are to be used, and the UNCITRAL or CPR rules are usually good choices.

The institutional rules and the UNCITRAL rules, however, are sparse—compared to the Federal Rules of Civil Procedure, they are skeletal. Many parties find it useful to incorporate some "soft law" in their arbitration clauses, or even to adopt some "soft law" after a dispute has arisen, to supplement the procedural rules.

5.3. "Soft law:" A number of other entities—not governments, and not international arbitration administering organizations—have published sets of rules, guidelines, or "best practices" that can be incorporated into arbitration agreements or adopted for international commercial arbitration proceedings. These publications, known as "soft law" (a term that is not always used admiringly), can be used to fill many of the gaps in the institutional rules with more detailed prescriptions.

The Chartered Institute of Arbitrators ("CIArb"), for example, issues practice guidelines that are intended "give guidance to arbitrators on the conduct of arbitration from cradle to grave—from the first interview of a prospective arbitration to the drafting of the final award… [T]hey do not favor any particular jurisdiction and they attempt to give guidance from a truly international perspective. They are not 'rules.' They are intended to help arbitrators in difficult situations, to work out what they could and should be thinking of, and guide them as to how they should get to making a decision on the issue in front of them…" Betancourt JC *et al., "International Arbitration Guidelines: Safe Ports for Arbitral Storms"* (2016) 82(2) *Arbitration* 169 at 172.

Perhaps the most successful and widely-used "soft law" is the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration, adopted in 1999 and most recently revised in 2020. The IBA Rules, according to their Preamble, are "designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration." When applied, the IBA Rules provide some structure for document production, fact witnesses, expert witnesses, on-site inspections, evidentiary hearings, and the admissibility and assessment of evidence. The structure tends to "split the difference" between common law and civil law practices.

The IBA has also published "soft law" that addresses recurring ethical issues that arise in international commercial arbitration, for both arbitrators and advocates.

The IBA's Guidelines on Conflicts of Interest in International Arbitration are addressed principally to arbitrators. They describe generally what relationships, experience, or knowledge create conflicts of interest, and they provide examples of situations that are conflicts of interest ("Red List"), situations that may be conflicts and should be disclosed to the parties before accepting appointment ("Orange List"), and situations that are not conflicts and need not be disclosed ("Green List").

The IBA's Guidelines on Party Representation in International Arbitration are addressed principally to advocates. They describe proper communications with arbitrators, submissions to the arbitrators, duties arising from information exchanges and disclosure, proper handling of witnesses, and remedies for misconduct. These Guidelines too were intended to "split the difference" between common law and civil law practices, though many civil lawyers think that they tilt more toward common law practices and are, in any event, unnecessary.

Many welcome the proliferation of international arbitration "soft law" as a means of educating less-experienced practitioners, particularly in parts of the world without a long or strong tradition of arbitration; to help combat "guerrilla tactics"; and to level the playing field among wildly-different legal and business cultures. Others believe that "soft law" has become a "pandemic" of "legislitis" that makes the field resemble a "teenager's bedroom." See Dasser F., "A Critical Analysis of the IBA Guidelines on Party Representation," in *Association Suisse de l'Arbitrage Special Series No. 37* (2015).

5.4. Skilled counsel and experienced arbitrators: The proliferation of "soft law," whether welcome or unwelcome, is a symptom of one striking characteristic of international commercial arbitration—it is not rule-bound.

Even combining an elaborate arbitration agreement, the most detailed institutional rules, and a passel of "soft law" does not bring international arbitration close to the level of pre-ordained processes typically prescribed by the detailed rules of national courts.

Much is left to the parties' counsel to work out, or to the arbitrators' discretion. As a result, every international commercial arbitration is bespoke, with the parties designing significant parts of their dispute resolution process collaboratively or with the arbitrators designing those processes for them.

International commercial arbitration's flexibility is attractive, but it can also be dangerous in the wrong hands. Inept counsel or arbitrators can turn the international commercial arbitration process into a "teenager's bedroom." However, skilled counsel and competent arbitrators—particularly those who have experience managing the culture clash inherent in international arbitration—can resolve cross-border disputes efficiently and speedily, fairly and finally.

6. Conclusion

International commercial arbitration is chosen by most businesses in virtually all industries for resolution of cross-border disputes. A neutral forum and flexible process leading to an award enforceable essentially everywhere are advantages that litigation does not offer. However, international arbitration—like international business itself—presents unique challenges, for the parties may speak different languages, come from different business and legal cultures, and even have different ethics. Those challenges are being met by arbitration agreements, arbitral institutions and institutional rules, "soft law," skilled counsel, and experienced arbitrators.

Appendix 1: Authors and Editors

Geoff Bracken (Chapter 5, Expedited and Emergency Arbitration) is a licensed attorney in Texas and Colorado, and a commercial litigation partner in Foley & Lardner LLP's Houston office, with over forty years of experience in the energy sector. He is a Member of the American Board of Trial Advocates (ABOTA), a Fellow of the American College of Trial Lawyers (ACTL), and head of Foley's Energy Litigation Practice Group. He has broad experience in commercial arbitration matters, including NAESB disputes and Joint Operating Agreement claims. He is a graduate of Dartmouth College and the University of Houston Law School.

David M. Brodsky (Editor-in-Chief and Chapters 2, Arbitration and Litigation: Key Differences, and 6, Selecting the Arbitrator) is an independent provider of arbitration and mediation services. He has been a member of the Commercial Panel of the American Arbitration Association; a Distinguished Neutral on the Panels of Hedge Funds, Banking and Financial Services, General Counsel, and NY Region of the International Institute for Conflict Prevention and Resolution (CPR); a member of CPR's Council; a member of the National Academy of Distinguished Neutrals and of the New York Academy of Mediators and Arbitrators; and a Fellow of the American College of e-Neutrals. Prior to 2012 when he began his arbitration and mediation practice, Mr. Brodsky had been a member of three law firms—Guggenheimer & Untermeyer (1973-1980); Schulte Roth & Zabel (1980-1999), where he chaired the Litigation Department; and Latham & Watkins (2002-2011), where he co-chaired the Global Securities Litigation and Professional Liability Practice Group. Between 1999 and 2002, he served as General Counsel-Americas, Credit Suisse First Boston. He is a Fellow of the College of Commercial Arbitrators and of the American College of Trial Lawyers, where he served as the Chair of the ADR Committee and the first Chair of the Arbitration Committee. He is a Life Member of the American Law Institute, was Chair of the American Constitution Society of Law and Policy and the New York Lawyers for the Public Interest, and Chair, Nominations Committee, Equal Justice Works. He served as a law clerk to the Honorable Dudley Bonsal, U.S. District Judge for the Southern District of New York. He was an Assistant United States Attorney for the Southern District of New York and an Associate Independent Counsel in the Matter of Michael Deaver. He is a graduate of Brown University and Harvard Law School.

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Tom Cunningham (Associate Editor and Chapters 3, Multi-Party Arbitration and 13, The Arbitration Award) has been an active trial lawyer and arbitrator for over 50 years. A graduate of the University of Texas Law School, Mr. Cunningham joined Fulbright & Jaworski, L.L.P. (now Norton Rose Fulbright) in 1974 where he became a senior litigation partner. In 1998, he founded a boutique litigation firm to focus exclusively on the trial and arbitration of complex business cases. Mr. Cunningham is a Fellow of the American College of Trial Lawyers, a Fellow-Elect of the College of Commercial Arbitrators, a member of the American Board of Trial Advocates, and a member of the American Law Institute. He is a fellow of the Chartered Institute of Arbitrators, on the Panel of Distinguished Neutrals of the CPR International Institute for Conflict Prevention and Resolution, and the Panel of Commercial Arbitrators of the American Arbitration Association. He is certified in mediation and dispute resolution by CEDR, London. He frequently serves as a sole arbitrator or member of a panel of arbitrators in commercial disputes, both domestically and internationally.

Charles Dick (Chapter 10, Discovery in Arbitration) is a mediator and commercial arbitrator with JAMS in Southern California. He retired from partnership in Baker McKenzie after more than four decades as a trial lawyer in business disputes, and his tenure included leadership roles with its Disputes Resolution practice group. He was admitted to American College of Trial Lawyers Fellowship in 1991, and he served as a Regent of the College and President of the College's Foundation. Chuck is a Fellow of the Chartered Institute of Arbitrators and a member of California Arbitration—an association promoting international commercial

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Steve Gaskins (Chapter 11, Securing Evidence from Non-Parties to Arbitrations) has practiced for nearly forty years in courts all over the country. Starting as a Assistant District Attorney in New York City, he went west to Minnesota in 1982 and practiced at Faegre & Benson, then founded his own that specialized in litigation and that through the years has boasted several College Fellows. He managed a significant civil trial practice representing individuals and major corporations in high stakes matters. Steve is a Fellow of the American College of Trial Lawyers and chaired the College's Minnesota State Committee.

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Honourable Neil Wittmann, K.C., (Chapter 15, Arbitration in Canada) was appointed to the Court of Appeal of Alberta in 1999, Associate Chief Justice of the Court of Queen's Bench of Alberta in 2005 and Chief Justice in 2009. He holds a Bachelor of Commerce, University of Manitoba; Bachelor of Laws, University of Alberta; Doctor of Laws, (Hon.), University of Lethbridge. Judge Wittmann is a Fellow of the Canadian College of Construction Lawyers, a Fellow of the American College of Trial Lawyers and a member of the Canadian Academy of Distinguished Neutrals. He was the Founding Chair of the Canadian Lawyers' Insurance Association, a former chair of the Standards Advisory Board of the Canadian Institute of Chartered Accountants, a past President of the Canadian Bar Insurance Association and a former Uniform Law

Commissioner for Alberta. He served as a Bencher of the Law Society of Alberta and as President. He also served as the Chair of the Alberta Law Reform Institute. Since 2018, Judge Wittmann has been engaged as an arbitrator and mediator in many large corporate, commercial, construction, energy, finance and other disputes. He is a graduate of the University of Manitoba and the University of Alberta Law School.

Appendix 2: The Federal Arbitration Act

The Federal Arbitration Act, Title 9, US Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLs669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15.

Chapter 1. General provisions

Section 101. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transaction", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 102. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 103. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 104. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default

in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 105. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Section 106. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 107. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which

such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Section 108. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Section 109. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 110. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award

upon the application of any party to the arbitration

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of Title 5.

Section 111. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 112. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 113. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action. The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Section 114. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Section 115. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

Section 116. Appeals

(a) An appeal may be taken from

(1) an order

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

Chapter 2. Convention on the recognition and enforcement of foreign arbitral awards

Section 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Section 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of Title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Section 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Section 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Section 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Section 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Chapter 3. Inter-American Convention on international commercial arbitration

Section 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

Section 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

Section 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

Section 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

Section 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

Section 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of Title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

Section 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

Chapter 4. Arbitration of disputes involving sexual assault and sexual harassment

Section 401. Definitions

In this chapter:

(1) **Predispute arbitration agreement.** The term "predispute arbitration agreement" means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

(2) **Predispute joint-action waiver.** The term "predispute jointaction waiver" means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

(3) **Sexual assault dispute.** The term "sexual assault dispute" means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law,

including when the victim lacks capacity to consent.

(4) **Sexual harassment dispute.** The term "sexual harassment dispute" means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

Section 402. No validity or enforceability

(a) **In general.** Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

(b) **Determination of applicability.** An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.