

## **HOW ARBITRATION WORKS: DISCOVERY, MOTIONS, HEARINGS**

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Arbitration has been a federally sanctioned and encouraged method of dispute resolution since at least 1925, when Congress passed the Federal Arbitration Act (FAA), now codified as Title 9 of the United States Code. As an option to litigation, arbitration remains one of the most accepted and widely applied forms of alternate dispute resolution (or “ADR”). Disputes over intellectual property rights give rise to special considerations for those contemplating arbitration.

As for many other substantive legal areas, an arbitration agreement involving intellectual property rights typically initiates the arbitration proceeding. Arbitration agreements fall broadly into two categories: pre-dispute agreements, generally incorporated into contracts concerning commercial transactions in the hope and expectation that disputes will not arise; and agreements to arbitrate a concrete dispute that has already arisen. The parties enter into pre-dispute agreements before either party has a full understanding of what may be gained or lost in a particular dispute by giving up the right to sue (or be sued) in court. Consent is the touchstone of arbitration and, once the dispute has arisen, often one party or the other will see a benefit to remaining within the traditional legal system and will withhold its consent. Thus, pre-dispute agreements are the more common of the two types.

In the area of intellectual property disputes, infringement claims usually arise between parties who are strangers, contractually speaking, to one another. Although it is certainly true that a former franchisee may be sued for trademark infringement once the franchise is revoked, or that a licensee under a patent may sue a licensor seeking to invalidate the patent that is the subject of the license, such cases are more the exception than the rule. More often, competitors sue one another for infringement without the existence of pre-dispute contractual arbitration

agreements. In addition, most corporations overwhelmingly favor arbitration for disputes involving relatively small stakes, but few prefer arbitration when the risks exceed the six or seven figures common in intellectual property disputes. Perhaps for these reasons, it may be the case that, in the area of intellectual property disputes, arbitration is less prevalent than in other areas of commercial law.

Still, the possibility of arbitrating a patent, trademark, copyright, or trade secret dispute is a real one. These particular areas of the law raise unique concerns, both procedural and substantive. Such concerns begin with drafting an arbitration clause as part of an agreement involving intellectual property or perhaps a separate agreement to arbitrate an intellectual property dispute. They continue with questions about whether an agreement to arbitrate will be upheld--especially in the international arena--and, if upheld, whether the result of the proceeding--especially a decision invalidating a patent, trademark, or copyright--will be confirmed and can be enforced. Much has been written addressing these and other concerns raised by the general topic of arbitration in the intellectual property area.

This article focuses more narrowly on the procedural “nuts and bolts” of an arbitration proceeding: discovery, preparing and filing motions, and the conduct of hearings. Aspects of these procedures specific to intellectual property arbitration are highlighted. An introduction section identifies the various types of arbitration and outlines the federal and state arbitration statutes. In the next section, titled “Sources of Help,” the article mentions various rules and the agencies, organizations, and associations available to guide parties who wish to conduct an arbitration proceeding. The next three sections of the article address discovery, motions, and hearings, respectively. Finally, the article concludes, among other things, that the parties have

the opportunity in most instances to shape the procedures of the arbitration process to their own particular needs.

## **I. *Introduction***

Binding arbitration is one of the most accepted and widely applied forms of ADR tools. It has been used to resolve a variety of disputes in different cultures and industries. The several types of arbitration have facilitated its wide application. Administered or “institutional” arbitration is conducted by an independent agency, which typically charges a fee to oversee the proceedings. Some of these agencies are identified below. In contrast, in an ad hoc or non-administered arbitration, the parties appoint one or more arbitrators (hereinafter, “arbitrator” is meant to cover one or multiple arbitrators) who supervise the proceedings without institutional guidance. The arbitration rules of an established organization (see below) may be adopted, or the parties may draft their own rules entirely or partially.<sup>1</sup> Ad hoc arbitration is typically chosen when the parties are sophisticated in arbitration, particularly when the arbitration is part of a repetitive pattern, or for small cases.

As an alternative to one of the forms of binding arbitration outlined above, the parties may chose an informal, non-binding (advisory) arbitration when attempting to resolve their dispute. Typically, non-binding arbitration works in the same way as does binding arbitration with a few exceptions. The primary distinction, of course, is that the award in non-binding arbitration seeks to encourage voluntary settlement rather than to bind the parties. Consequently, the practice rules under which the non-binding proceeding is conducted can be relaxed even more than for binding arbitration: rules of evidence can be less stringent, discovery can be

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<sup>1</sup> Because the rules of some agencies state that an agreement to arbitrate under their rules authorizes that agency to administer the arbitration, the parties must consider, in their arbitration contract, the ramifications of choosing both a set of applicable rules and who will oversee the proceedings. *See, e.g.*, Commercial Arbitration Rule 2 of the American Arbitration Association (“When parties agree to arbitrate under these rules . . . they thereby authorize the AAA to administer the arbitration.”).

truncated, and the case can be presented by counsel with client input but without presenting witnesses. The suggested resolution or award may be presented orally (rather than in writing) by the arbitrator. To induce settlement, the arbitrator also should orally give reasons explaining the strengths and weaknesses of each party's case.<sup>2</sup>

Congress and the courts have embraced non-binding arbitration with statutes and local rules that offer or mandate "court-administered" or "court-annexed" arbitration.<sup>3</sup> Several district courts require parties in certain disputes to submit to arbitration before they are allowed to argue their case in court.<sup>4</sup> The arbitration award can be challenged, by requesting a trial de novo, within a certain period of time (typically thirty days).<sup>5</sup> Absent a timely challenge, however, the arbitrator's award is confirmed as a court judgment. Many of the local rules concerning court-administered arbitration provide little guidance for the procedural conduct of the proceeding. Therefore, the parties may face the decision between submitting to mandatory, non-binding arbitration under the local rules of a district court or voluntarily agreeing to arbitrate under guidelines (i.e., administered or ad hoc arbitration) selected by the parties themselves.

If federal provisions such as the FAA are inapplicable,<sup>6</sup> state laws may fill the void. State laws are usually patterned after the FAA or the Uniform Arbitration Act (UAA). The UAA was created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved by the House of Delegates of the American Bar Association (ABA) in 1955-56; it was

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<sup>2</sup> T. Arnold, *Patent Alternative Dispute Resolution Handbook* ch. 8 (1991).

<sup>3</sup> Under the "Alternative Dispute Resolution Act of 1998, H.R. 3528, signed into law in 1999, all federal courts must adopt local rules directed to court-annexed mediation and arbitration. In addition, some federal and state statutes create procedural rules that apply to arbitration within the scope of the particular statute. The "lemon law" statutes enacted by many states, directed to automobiles, are typical.

<sup>4</sup> See, e.g., N.D. Calif. R. 500-2, Mandatory Arbitration (requiring mandatory arbitration for all civil cases, in which the United States is not a party, which seek relief less than a certain dollar amount and are founded on diversity of citizenship).

<sup>5</sup> See *Parker v. Babcock*, 37 Cal. App. 4<sup>th</sup> 1682, 44 Cal. Rptr. 2d 602 (1995) (the opportunity for a de novo trial is what principally distinguishes court-annexed arbitration pursuant to the Judicial Arbitration Act from private arbitration conducted pursuant to party agreement).

<sup>6</sup> The FAA encompasses primarily interstate commerce. Intrastate disputes are governed by applicable state arbitration statutes.

revised in 2000.<sup>7</sup> The UAA covers many substantive and procedural aspects of arbitration that are not specifically addressed by the FAA, including depositions. A list of the arbitration statutes for the fifty states and the District of Columbia follows this article.

As a general proposition, the FAA, the UAA, state arbitration statutes, and the rules of the various arbitral institutions are intentionally designed to provide for a dispute resolution method different from a court or jury trial governed by formal procedural and evidentiary rules. Many who oppose arbitration do so, however, because they perceive that arbitration means no discovery, no rules of evidence, no cross-examination of witnesses, no record of the proceedings, and no written opinion. Such perceptions are inaccurate. The parties can have discovery, rules of evidence, cross-examination, a record, and a written opinion—among other procedures—if they expressly require such procedures in their arbitration contract. Of course, if the parties go too far and contract for most or all of the procedures normally inherent in litigation, they will also likely experience the expenses and delays of litigation.<sup>8</sup>

## **II. *Sources of Help***

Regardless of the type of arbitration, it is important that the parties and the arbitrator have some guidelines under which to conduct the arbitration. A recommended approach is to adopt an agency's rules with such modifications as desired and as recited in the agreement to arbitrate. When adopting rules, however, the parties should be as specific as possible. For example, the American Arbitration Association (AAA) ([www.adr.org](http://www.adr.org)), an international non-profit entity founded in 1926 and dedicated to ADR with regional offices in most states, has several sets of

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<sup>7</sup> The text of the revised UAA can be found at [www.law.upenn.edu/bll/ulc/ulc\\_frame](http://www.law.upenn.edu/bll/ulc/ulc_frame). See generally, T. Heinsz, "The Revised Uniform Arbitration Act: An Overview," 56 Disp. Resol. J. 28 (2001).

<sup>8</sup> Judge Learned Hand cautioned: "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge about it with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery."

rules, among them the AAA International Arbitration Rules, the AAA Commercial Arbitration Rules, and the AAA Patent Arbitration Rules. Which rules apply if the parties' contract specifies only "the AAA rules"?<sup>9</sup> Moreover, too often parties adopt reference rules they have never read or considered. One way to reduce this risk would be to attach a copy of the reference rules as an exhibit or appendix to the arbitration contract.

Perhaps the most widely used rules in the United States, for ad hoc arbitration, are those promulgated by the CPR Institute for Dispute Resolution (CPR) ([www.cpradr.org](http://www.cpradr.org)) (formerly the Center for Public Resources, Inc., founded in 1977), an independent non-profit organization created by an alliance of major U.S. corporations and leading law firms. For administered arbitration, the rules of the AAA are favored by many. JAMS/Endispute ([www.jamsadr.com](http://www.jamsadr.com)) is one example of a for-profit entity operating in most areas of the United States and having published procedural arbitration rules. There are many other private or independent entities that have their own set of procedural rules, such as the National Arbitration Forum ([www.arb-forum.com](http://www.arb-forum.com)).

Other rules may be useful in a particular situation. The arbitration of international commercial disputes is not new, for example, and will only increase in our expanding global economy.<sup>10</sup> It is beyond the scope of this article to address the specific considerations in arbitrating an international dispute. The AAA and CPR have international rules specifically drafted for such disputes. The primary entities specializing in international ADR are the World Intellectual Property Organization (WIPO) ([www.arbiter.wipo.int](http://www.arbiter.wipo.int)) in Geneva, the International Chamber of Commerce (ICC) ([www.iccwbo.org](http://www.iccwbo.org)) in Paris, the United Nations Commission on

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*American Almond Prod. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944), *quoted in* Tupman, "Discovery and Evidence in U.S. Arbitration," 44 Arb. J. 28 (Mar. 1989).

<sup>9</sup> When used in this article, the term "AAA Rules" refers to the AAA Commercial Arbitration Rules rather than to any of the other rules offered by the AAA.

International Trade Law (UNCITRAL) ([www.uncitral.org](http://www.uncitral.org)), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) ([www.chamber.se/arbitration/english](http://www.chamber.se/arbitration/english)), the London Court of International Arbitration (LCIA) ([www.lcia-arbitration.com](http://www.lcia-arbitration.com)), the Japan Commercial Arbitration Association (JCAA) ([www.jca.or.jp](http://www.jca.or.jp)), the Commercial Arbitration and Mediation Center for the Americas (CAMCA), the Hong Kong International Arbitration Centre, the Netherlands Arbitration Institute, and the International Centre for Settlement of Investment Disputes (ICSID).<sup>11</sup>

In addition to private and public forums for arbitration, the procedure has spawned many professional organizations and associations. A partial list includes the Society of Professionals in Dispute Resolution (SPIDR) (organized in 1973); the National Institute of Dispute Resolution (NIDR) (organized in 1983); and specific sections of the American Intellectual Property Law Association (AIPLA), the American Association of Law Schools (AALS), and the ABA. Publications on the topic abound, including those of some of the listed organizations (e.g., newsletters of CPR and NIDR) and several specialized law reviews. In addition, most law schools offer courses that cover arbitration. In summary, there is no shortage of information available regarding arbitration; the challenge is sifting through the large amount of information to find useful guidance on a particular question.

### **III. *Discovery***

Perhaps the most important distinction between arbitration and litigation lies in discovery. In a court case, discovery is a way of life and often takes on an expensive and time-consuming life of its own. In arbitration, discovery, as a general rule, is not available unless the parties have provided for discovery in the arbitration contract or later voluntarily agree to

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<sup>10</sup> International arbitration is subject to 9 U.S.C. § 201 et seq. (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and 9 U.S.C. § 301 et seq. (Inter-American Convention on International Commercial Arbitration).

conduct discovery. This limitation is consistent with the policy underpinnings of arbitration: speed, efficiency, and reduced expense.<sup>12</sup> In fact, one of the touted advantages of arbitration is the avoidance of the substantial burdens of discovery under the Federal Rules of Civil Procedure. The degree of formality and the nature and extent of discovery in arbitration can vary with the relationships involved, the nature of the dispute, and the choice of governing rules. The established rules of arbitration differ in their treatment of discovery.

#### **A. Summary of Selected Rules**

1. **FAA.** The FAA does not refer to discovery by written interrogatories, requests for admissions, depositions, or document requests. The courts have rejected the view that, because the FAA is silent, the Federal Rules of Evidence and of Civil Procedure apply. In one case,<sup>13</sup> for example, the respondent sought to depose the petitioner's employees before the arbitration hearing contending that, because the FAA did not provide for a pre-hearing discovery procedure, Fed. R. Civ. P. 81(a)(3) should make the federal discovery rules applicable to the arbitration proceedings. Rule 81(a)(3) provides that, in "proceedings under [the FAA], these rules apply only to the extent that matters of procedure are not provided for in [the FAA]." The court rejected the contention, holding that the term "proceedings under" refers to judicial proceedings collateral to the arbitration proceedings rather than to the arbitration proceedings themselves.

The court further held that, when discovery is sought during the arbitration proceeding on the merits, judicial rules for discovery do not apply:

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<sup>11</sup> For a copy of many of these sets of rules, send an electronic communication to the author at [krcasey@ratnerprestia.com](mailto:krcasey@ratnerprestia.com).

<sup>12</sup> See, e.g., *Burton v. Bush*, 614 F.2d 389, 390 (4<sup>th</sup> Cir. 1980); *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 845 F.2d 950 (11<sup>th</sup> Cir. 1988).

<sup>13</sup> *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957).



By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. “A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial.” 1 Wigmore, Evidence § 4(e) (3d ed. 1940). . . . [A] party having chosen to arbitrate cannot then vacillate and successfully urge a preference for a unique combination of litigation and arbitration. The proposition that “[arbitration] is merely a form of trial . . .” which stated thus broadly might indicate the propriety of pre-hearing discovery in arbitration, was rejected by the Supreme Court in *Bernhardt v. Polygraphic Co.*, 1956, 350 U.S. 198.

The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one and its superfluity and utter incompatibility in the other.<sup>14</sup>

Although pre-hearing discovery is not generally available to the parties,<sup>15</sup> Section 7 of the FAA does give the arbitrator the power to summon witnesses to testify and to order production

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<sup>14</sup> *Id.* at 361-62; *accord, e.g., Burton*, 614 F.2d 389; *Penn Tanker Co. v. C.H.Z. Rolimpex Warszawa*, 199 F. Supp. 716 (S.D.N.Y. 1961).

<sup>15</sup> With respect to arbitrator orders of pre-hearing depositions of non-parties, for example, the courts are inconsistent. Some courts hold that the FAA does not permit such an order because the arbitration contract binds only the parties. *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995). Other courts would not so limit the arbitrator’s authority. *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988) (plaintiff’s motion for an order enjoining defendant from obtaining subpoenas and requesting documents prior to an arbitration hearing was denied).

by the witnesses of “any book, record, document, or paper which may be deemed material as evidence in the case” at the arbitration hearing. The arbitrator’s subpoena power may be limited to witnesses and documents within the federal judicial district (or 100 miles) unless the arbitration contract expressly includes the Federal Rules of Civil Procedure, which permit the issuance and enforcement of subpoenas in other districts.<sup>16</sup> This subpoena power has been held to provide a legal basis for pre-hearing discovery in arbitrations governed by the FAA.<sup>17</sup> The arbitrator has rather broad authority to permit and control discovery or, as one court put it, almost “anything goes” before the arbitrator.<sup>18</sup>

2. **UAA.** Like the FAA, the UAA also does not provide for discovery. UAA § 7 does contain a provision comparable to the FAA, however, which permits a party to obtain evidence at the hearing. The arbitrators may also permit depositions to be taken, under UAA § 7(b), for use as evidence when a witness “cannot be subpoenaed or is unable to attend the hearing.”

3. **AAA.** Consistent with the FAA and the UAA, the AAA Commercial Arbitration Rules do not give a party a right to discovery.<sup>19</sup> Thus, if the parties stipulate that the AAA Rules govern their arbitration, they waive their right to engage in discovery.<sup>20</sup> Nevertheless, several AAA rules, taken together, give the arbitrator authority to allow and

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<sup>16</sup> *Commercial Solvents Corp.*, 20 F.R.D. at 362-63; *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878, 883 (N.D. Ill. 1995), *appeal dismissed*, 101 F.3d 110 (7<sup>th</sup> Cir. 1996); S. Koda, “Subpoena Issues in Arbitration,” in Currents: The Newsletter of Dispute Resolution Law and Practice (ABA, Spring 1997).

<sup>17</sup> *See, e.g., Stanton*, 685 F. Supp. at 1242-43 (“under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary . . . . Plaintiffs’ contention that § 7 of the Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded.”). In fact, most courts will enforce an arbitrator’s order requiring production of documents and witness lists before the actual hearing. *See, e.g., Integrity Ins. Co.*, 885 F. Supp. 69; *Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994).

<sup>18</sup> *Commercial Solvents*, 20 F.R.D. at 363 (arbitrators “may be relied on to draw such inferences from the failure of the petitioner to produce [the witnesses] as they in their unreviewable judgment think the circumstances justify. Mere suggestion as to the testimony these witnesses would give if available at the hearing would in an arbitration hearing probably cast the onus on the petitioner to negate the unsupported assertion that if called their testimony would be unfavorable to its position. Fortunately or otherwise . . . almost ‘anything goes’ before arbitrators.”).

<sup>19</sup> *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979).

<sup>20</sup> *Harleysville Mut. Cas. Co. v. Adair*, 421 Pa. 141, 218 A.2d 791 (1966).

control discovery. This authority is helpful if the arbitrator will assume management initiative and control.

The arbitrator may suggest or order prehearing discovery if it is deemed appropriate. AAA Rule 10, for example, provides: “At the request of any party or upon the AAA’s own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as . . . potential exchange of information . . .” AAA Rule 23, titled “Exchange of Information,” allows the parties to request discovery and, consistent with the expedited nature of arbitration, permits the arbitrator to (a) exercise discretion to direct “the production of documents and other information,” and (b) “resolve any disputes concerning the exchange of information.”

Therefore, a party who desires pre-hearing discovery should request it either by motion to the arbitrator or at a pre-hearing conference. It seems unlikely that the adverse party will refuse the arbitrator’s suggestion that there be discovery.<sup>21</sup> AAA Rule 33 requires, at the arbitration hearing, that the parties “shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. . . . An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.” Thus, the arbitrator may deem necessary either depositions or responses to interrogatories and requests for admission.

**4. CPR.** The CPR rules for non-administered arbitration explicitly give the arbitrator power to define and control discovery. For instance, CPR Rule 11 allows the arbitration tribunal “to require and facilitate such discovery as it shall determine appropriate . . . . [T]he tribunal may issue orders to protect the confidentiality of proprietary information, trade

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<sup>21</sup> Although some courts may grant pre-hearing discovery, other courts refuse to order discovery ostensibly in aid of an arbitration. *See, e.g., Cavanaugh v. McDonnell & Co.*, 357 Mass. 452, 258 N.E.2d 561 (1970).

secrets and other sensitive information disclosed in discovery.” This rule clearly allows discovery to the extent the arbitrator thinks “appropriate.”

5. **UNCITRAL.** Like the CPR, the UNCITRAL arbitration rules give the arbitrator power to define and control discovery. Article 24, Section 3, of the UNCITRAL rules provides that “at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.”

6. **ICC.** Under European practice in general, the decisionmaker has wide discretion to adopt either the common law (adversarial) approach, the civil law (inquisitorial) approach, or a mixture of both. The ICC rules of arbitration seem to reflect such practice. Specifically, under Article 20, Section 1, the arbitrator shall “establish the facts of the case by all appropriate means.” This provision seems to indicate that the arbitrator can require each party to produce evidence, perhaps even (under the inquisitorial approach) to the arbitrator but not to the other party. Such authority may be very helpful in the hands of a proactive arbitrator. As one commentator suggests, it can be especially useful in patent arbitrations for which an experienced patent trial lawyer acts as arbitrator. The arbitrator can early-on deliver to each party interrogatories designed to elicit interference-type information,<sup>22</sup> requests for document identification or production, and other discovery.<sup>23</sup>

7. **WIPO.** The WIPO rules, like the ICC rules, parallel European practice. Article 38 grants the arbitrator the general power to “conduct the arbitration in such manner as it considers appropriate.” Articles 48, 49, and 50 expressly state, respectively, that the arbitrator can require each party to produce documents or other evidence; observe tests or other processes

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<sup>22</sup> See the “Preliminary Statement” of 37 C.F.R. § 1.622.

<sup>23</sup> T. Arnold, *supra* n.2, at 7-48.

of verification; or “inspect or require the inspection of any site, property, machinery, facility, production line, model, film, material, product or process as it deems appropriate.”

**8. State Statutes.** Many of the state arbitration statutes (see attached list) are modeled after the UAA. Some of the state statutes provide for discovery in varying degrees. In Massachusetts, for example, requests for the production of documents and entries onto land for inspection are permitted.<sup>24</sup> The parties are similarly entitled to discovery under the New Jersey statute.<sup>25</sup> The California arbitration statute expressly gives the parties the right to take, and the arbitrator the power to compel, discovery.<sup>26</sup> The Kansas arbitration act states, “[o]n application of a party the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators.”<sup>27</sup> Other states, such as New York, significantly restrict discovery in arbitration proceedings.<sup>28</sup>

## **B. Court Intervention**

Courts are most reluctant to compel pre-hearing discovery. Federal and state courts have permitted discovery, however, in at least two special circumstances. First, pre-hearing discovery may be compelled when a party contests the arbitrability of a dispute.<sup>29</sup> The second situation arises when the party seeking discovery has made a showing of “extraordinary

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<sup>24</sup> Mass. Ann. Laws, ch. 251, section 7, subsection (e).

<sup>25</sup> Under the New Jersey Alternative Procedure for Dispute Resolution Act, each party is “entitled to discovery by way of oral deposition, including videotape deposition, inspection and copying of all relevant documents within the care, custody or control of a party or witness and interrogatories when authorized by leave of the umpire.” New Jersey Stat. § 2A:23A-1, App. Doc. 4. With certain exceptions, “the rules of the Supreme Court governing discovery shall be applicable.” In order for this provision to apply, however, the parties must refer to the Act in their agreement.

<sup>26</sup> The California arbitration statute provides that “parties to arbitration shall have the right to take depositions and obtain discovery regarding the subject matter of the arbitration.” Cal. Civ. Proc. Code § 1283.05(a) (Deering 1981). Section 1283.05(b) gives the arbitrator broad powers to compel discovery: “[T]he arbitrator . . . shall have power to enforce discovery” coextensive to that of a court in civil actions. Except in the case of arbitrations involving negligent injury or wrongful death, however, discovery is not permitted unless the parties have expressly stipulated that Section 1283.05 applies to the arbitration proceeding.

<sup>27</sup> Kansas Stat. Ann. § 5-407.

<sup>28</sup> In New York, Section 3102(s) of the arbitration statute provides that, “before an action is commenced, disclosure to aid arbitration may be obtained, but only by court order.” N.Y. Civ. Prac. L. & R. 3102(c) (McKinney Supp. 1990). The courts will not compel discovery, however, absent a showing of “extraordinary circumstances.” *Motor Vehicle Acc. Indem. Corp. v. McCabe*, 19 A.D.2d 349, 243 N.Y.S.2d 495 (1963).

<sup>29</sup> Tupman, *supra* n.7, at 30.

circumstance” or particular need, mandating the use of discovery.<sup>30</sup> Thus, the key to obtaining court-compelled discovery, on those rare occasions when it is permitted, appears to be showing that the information sought is otherwise unavailable and cannot be developed before the arbitrators, and that undue delay inconsistent with the nature of arbitration will not result if discovery is permitted.<sup>31</sup> Even if a party clearly establishes such circumstances, courts will narrowly restrict discovery.

### C. Suggestions

A discovery clause in an arbitration contract will likely be enforceable in court, but should also be specific. Parties who wish to conduct discovery are advised to be explicit, with reference to discovery type and timing. One practical suggestion is to include a contract clause that permits all of the discovery vehicles found in the Federal Rules of Civil Procedure. To preclude abuse, however, the application of these vehicles should be under the detailed management and control of the arbitrator who is admonished to expedite and limit discovery as much as is deemed reasonable.<sup>32</sup>

Parkinson’s law works in arbitration as well as in litigation: the job expands to fill the time available. Therefore, the arbitration contract should include provisions that both allow the arbitrator to rule on discovery controversies (which by themselves may suggest only a passive role) and require the arbitrator to take an active initiative to ensure that discovery runs smoothly. The latter contractual instruction to act might prompt the arbitrator, for example, to hold an initial meeting to devise a discovery plan, draft a first round of written discovery or edit the parties’ requests, and enforce set cut-off dates. The arbitrator might attend key depositions,

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<sup>30</sup> See, e.g., *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 125 F.R.D. 398 (S.D.N.Y. 1989).

<sup>31</sup> *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973).

<sup>32</sup> T. Arnold, *supra* n.2, at 7-11. Note that the ICC has, effective April 1, 1997, significantly revised its arbitration rules. Article 16 gives the arbitrator extensive powers to manage the proceedings for the stated purpose of expediting the resolution of disputes.

while there making instant rulings, disciplining unprepared or obstructionist counsel as needed, and learning more about the case. One caution: the arbitrator who attends depositions might be exposed to certain evidence that otherwise would not be offered later, during the hearing.

Many lawyers and parties refuse, or are at least hesitant, to yield their control over and need for thorough discovery. One response is the German system, which allows no discovery at all and a one-day patent infringement trial. Empowered arbitrators may be an acceptable balance between the Federal Rules of Civil Procedure and the German practice.

#### **IV. *Motions***

Unlike rules applicable in litigation, the federal and state arbitration statutes and the AAA rules do not address the subject of motions during the arbitration hearing. In the absence of rules governing motions in arbitration, parties are free to make such motions at their discretion, and are not bound by timeliness or foundation requirements as is the case in court adjudications. The decision about whether to grant motions is a matter within the arbitrator's discretion.

##### **A. *Examples of Substantive Motions***

**1. *Preliminary Injunctions.*** The courts split over whether they can grant preliminary relief (a preliminary injunction or a temporary restraining order (TRO)) when there is a dispute and a contract to arbitrate.<sup>33</sup> This split in authority counsels that parties should explicitly recite whether the relief of a TRO or a preliminary injunction is available from a court. Of course, the arbitrator has the power to grant interim awards and the power to grant injunctive relief enforceable by the courts.<sup>34</sup> Nevertheless, it is always wise to recite such power in the arbitration contract.

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<sup>33</sup> Compare *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806, 811-12 (3d Cir. 1989) (relief may be granted), with *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*, 726 F.2d 1286, 1291 (8<sup>th</sup> Cir. 1984) (relief may not be granted).

<sup>34</sup> See, e.g., AAA Rules 36, 45; WIPO Arbitration Rules Art. 62(a).

**2. Third Party Involvement.** With a few exceptions, the arbitration proceeding is limited to the two parties to the arbitration contract. Although an arbitration proceeding may benefit from the inclusion of more than just the contractual parties, the law essentially provides that a party cannot be forced to arbitrate unless it has expressly agreed to do so.<sup>35</sup> Thus, in contrast with litigation under Rules 14, 19, 20, and 24 of the Federal Rules of Civil Procedure, in arbitration interested third parties cannot generally intervene or be impleaded by the parties in an existing arbitration absent agreement among the respective parties.

Of course, the risk attendant such a restrictive approach to third-party involvement is that piecemeal proceedings may result before separate tribunals who may issue conflicting decisions. The U.S. Supreme Court has decided that it was Congress's intent to accept that risk as a matter of policy:

The pre-eminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute.<sup>36</sup>

The general inability of a third party to intervene in an arbitration or for the parties to implead a third party should be considered when drafting the arbitration contract.<sup>37</sup> In many patent cases,

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<sup>35</sup> See 9 U.S.C. § 4 (courts may compel arbitration only "in accordance with the terms of the agreement").

<sup>36</sup> *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). See also *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 148 (5<sup>th</sup> Cir. 1987) (courts must enforce arbitration agreement as written even if result is multiple actions).

<sup>37</sup> The arbitration provisions used in the construction industry are often drafted specifically to limit the parties that can or must participate in the arbitration proceeding. The American Institute of Architects, in paragraph 9.1 of its standard agreement between owners and contractors, provides that: "No arbitration, arising out of or relating to this Agreement, shall include, by consolidation, joinder or in any other manner, any additional person not a party to this Agreement except by written consent containing a specific reference to this Agreement and signed by the Architect, the Owner, and any other person sought to be joined. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein." Consequently, when a dispute raises the issue



for example, the accused infringer may have an indemnity agreement with its manufacturer or supplier. If so, the parties may specifically recite in their arbitration contract that the indemnitor has the right to intervene. Consider also the situation where one or both of the parties has applicable insurance; the insurance company's participation in the arbitration may be desired.

**3. Consolidation of Multiple Pending Actions.** A question related to third-party involvement is whether two or more arbitrations involving common issues of law and questions of facts may be consolidated by the courts absent agreement by the parties. The courts disagree on the answer to that question. The Second Circuit has held that precedent supports judicial consolidation of arbitrations under the federal statute.<sup>38</sup> The First Circuit has agreed, at least when the arbitration agreement is silent and state law permits such consolidation.<sup>39</sup> In the majority of circuits, however, the courts have refused to order consolidation arising from separate agreements to arbitrate absent an express agreement between the parties--even when the proceedings involve the same questions of fact and issues of law.<sup>40</sup> Therefore, when multiple

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of the architect's duty as well as the owner's and contractor's duties, most courts will not compel the architect to be a party to the arbitration between the contractor and owner. See, e.g., *In re Mercury Constr. Corp.*, 656 F.2d 933, 945 (4<sup>th</sup> Cir. 1981), *aff'd sub nom.*, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Martin K. Eby Constr. Co. v. City of Arvada, Colo.*, 522 F. Supp. 449 (D. Colo. 1981). See generally J. Tansey, "The Principal Differences between Arbitration and Litigation," in Commercial Arbitration for the 1990s at 45 (ABA Section of Litigation 1991).

<sup>38</sup> See *Compania Espanola de Petroleos, S.A. v. Nereus Ship.*, 527 F.2d 966 (2d Cir. 1975) (there is ample support in the case law for the propriety of court-ordered consolidation), *cert. denied*, 426 U.S. 936 (1976). Support may also be found in Fed. R. Civ. P. 42(a) and 81(a)(3). *But see Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993) (overruling previous judgments holding otherwise, the appellate court reversed the judgment of the district court because consolidation of arbitration proceedings arising from separate agreements between appellee ministry of defense and appellant helicopter manufacturer and between appellee and respondent engine manufacturer, absent the parties' agreement to allow such consolidation, could not be enforced).

<sup>39</sup> See *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1<sup>st</sup> Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). In explaining its rationale, the First Circuit stated, "[t]he issue before us is whether state law may supplement that Act on matters collateral to the agreement to arbitrate." *Id.* at 5 n.2. The court resolved this issue in the affirmative by finding that (1) when the arbitration provision is silent on the issue of consolidation and (2) when state law permits consolidation, the federal court has the authority to determine whether the two arbitrations meet the requirements for consolidation. The court rejected the argument that Section 4 of the FAA prevents a court from ordering consolidation without the parties' consent.

<sup>40</sup> In *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11<sup>th</sup> Cir. 1989) (per curiam), the court stated: "We agree with the reasoning of *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9<sup>th</sup> Cir. 1984), in which the court held that under the Federal Arbitration Act, . . . the power of federal courts is 'narrowly circumscribed.' *Id.* at 637. . . . As the Ninth Circuit observed, this interpretation of section 4 'comports with the statute's underlying premise that arbitration is a creature of contract . . . . Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in.;" accord *Champ v. Siegel Trading*

arbitrations are foreseeable (e.g., licensing situations), the parties are advised to specify in the arbitration contract that further arbitrations involving at least one common party and common issues of law and questions of facts may or may not be consolidated into a single arbitration proceeding.<sup>41</sup>

4. **Adjournments.** The decision to grant a motion to adjourn the arbitration proceeding is generally within the discretion of the arbitrator.<sup>42</sup> A court will vacate a decision to adjourn only when that discretion is abused.<sup>43</sup>

5. **Default.** The failure of a party to appear for the arbitration hearing may result in sanctions. Such sanctions may include a default judgment. Under AAA Rule 3, the arbitration hearing may proceed in the absence of any party who, after due notice, fails to either attend or obtain a postponement.<sup>44</sup> The party who fails to appear then may be precluded from rejecting the arbitration award,<sup>45</sup> and may lose the right to appear at a jury trial.<sup>46</sup>

## B. Briefs

Both pre- and post-hearing briefs often help inform the arbitrator of the issues involved in the dispute and the parties' relative positions. Despite the obvious benefits of briefs, neither relevant statutory provisions nor existing rules explicitly entitle the parties to submit briefs. For

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Co., 55 F.3d 269 (7<sup>th</sup> Cir. 1995); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6<sup>th</sup> Cir. 1991); *Del. E. Webb Constr. Co. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5<sup>th</sup> Cir. 1987); *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8<sup>th</sup> Cir. 1990).

<sup>41</sup> See generally T. Stipanowich, "Arbitration and the Multiparty Dispute: The Search for Workable Solutions," 72 Iowa L. Rev. 473, 481-82 (1987).

<sup>42</sup> See, e.g., *Harwyn Luggage, Inc. v. Henry Rosenfeld, Inc.*, 90 A.D.2d 747, 747-48, 456 N.Y.S.2d 3, 3-4 (1982), in which the arbitrator had granted several adjournments over a five-month period. The court held that the arbitrator had not abused his discretion in denying the adjournment sought by the respondents, who were attempting to substitute counsel for the fourth time and who claimed that the second law firm it retained was holding files necessary for the preparation of its defense in the arbitration. The respondents had failed to specify the missing documents they considered essential and the steps they took to obtain documents.

<sup>43</sup> See, e.g., *Local 251, Int'l Bhd. of Teamsters v. Narragansett Improvement Co.*, 503 F.2d 309 (1<sup>st</sup> Cir. 1974).

<sup>44</sup> Accord WIPO Arbitration Rules Art. 56.

<sup>45</sup> *Morales v. Mongolis*, 293 Ill. App. 3d 660, 228 Ill. Dec. 219, 688 N.E.2d 1196 (1997).

<sup>46</sup> *Bachmann v. Kent*, 293 Ill. App. 3d 1078, 228 Ill. Dec. 299, 689 N.E.2d 171 (1997).

example, neither the FAA nor the UAA provides for post-hearing briefs or for the procedures governing their submission. AAA Rule 37 provides in pertinent part that:

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearings closed. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs.

Rather than a typical component of the arbitration procedure, the submission of briefs is within the arbitrator's discretion.<sup>47</sup> That discretion is limited: if an arbitrator's refusal to receive a brief deprives a party of a fair hearing, such refusal may prompt a reviewing court to vacate the arbitrator's award.<sup>48</sup>

At least two important distinctions should be noted between arbitration briefs and litigation briefs. First, many arbitration cases are conducted by non-lawyer arbitrators who may work without ready access to legal precedent. Even lawyer arbitrators may be disinclined to take the time (and incur for the parties the expense) to independently review legal authority. The AAA states that, if some legal issues "require further clarification," the arbitrator should "ask counsel for each side to explain the law," rather than conduct independent research.<sup>49</sup> Therefore, an arbitration brief should include a discussion of relevant cases sufficiently complete in both

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<sup>47</sup> Factors determining whether briefs are appropriate include whether the case (1) is factually complex, (2) is legally complex, (3) involves high stakes, and (4) is subject to judicial review. Donovan Leisure Newton & Irvine ADR Practice Book at 52 (J. Wilkinson, ed., 1990 & 1999 Supp.) (hereafter "J. Wilkinson").

<sup>48</sup> In *Allstate Ins. Co. v. Fioravanti*, 451 Pa. 108, 299 A.2d 585 (1973), the arbitrators refused to receive a brief on the controlling legal issue. The reviewing court stated that, when such refusal would lead to the "complete omission of critical factual evidence," vacating the award might be justified. 451 Pa. at 113, 299 A.2d at 588. Because Allstate had the opportunity to, and did, argue the issue during the arbitration hearing, however, the court held that there had been no denial of a full and fair hearing that would justify setting aside the arbitration award. In support of its decision, the court noted that the AAA Rules contained no explicit provision on the right to file briefs; rather, briefing was a matter of the arbitrator's discretion. *Id.* at n.3.

<sup>49</sup> AAA, *A Guide for Commercial Arbitrators* 7 (1988) (hereinafter "AAA Guide").

factual background and holding to permit comprehension of the significance of each case without having to read them. A copy of an essential opinion should be attached to the brief. As is true for litigation briefs, string citations should be avoided in arbitration briefs.

Second, arbitration briefs should avoid giving undue weight to the legal issues and legal reasoning of the case. Typical litigation briefs may be of little help in advancing the party's objective in the context of a more flexible arbitration proceeding. Arbitrators are more likely than courts to focus on commercial realities and the economics of the parties, especially because their decision (and reasoning, if written) will not carry the weight of precedent.<sup>50</sup>

## V. *Hearings*

The parties are generally free to negotiate the procedural rules that will govern their arbitration hearing.<sup>51</sup> In some states, however, the parties may not provide for court involvement not authorized by state statutes or rules.<sup>52</sup>

**A. Preliminary Administrative Hearing.** A preliminary hearing to schedule and identify ground rules (e.g., witnesses, discovery, timing, etc.) can and should be held.<sup>53</sup> Such a preliminary hearing facilitates subsequent proceedings. Suggested topics for discussion include: essential and irrelevant issues to clarify the substantive issues to be resolved; stipulated facts; discovery; qualification and appointment of arbitrators; identification of all essential parties, their related parties, and any possible conflicts of interest; and rulings on preliminary evidentiary questions. Topics of secondary importance may include issues of arbitrability, the necessity of

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<sup>50</sup> T. Arnold, *supra* n. 2, at 7-70.

<sup>51</sup> See, e.g., *Shearson Lehman Bros., Inc. v. Brady*, 783 F. Supp. 1490 (D. Mass. 1991); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7<sup>th</sup> Cir. 1994) ("short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

<sup>52</sup> See, e.g., *Brucker v. McKinlay Transp., Inc.*, 454 Mich. 8, 18, 557 N.W.2d 536, 540 (1997) ("M.C.R. 3.602 . . . does not allow the parties to use the courts as a resource that will issue advisory opinions to guide the arbitrator through the more difficult portions of the task.").

<sup>53</sup> See AAA Commercial Arbitration Rules 10, 22; WIPO Arbitration Rules Art. 47. In its "Optional Procedures for Large, Complex Commercial Disputes," the AAA requires both an administrative conference under Rule L-2, "unless it determines same to be unnecessary," and a preliminary hearing under Rule L-4.

written briefs and briefing schedules, a list of witnesses with outlines of testimony, estimated length of the proceeding and suitable deadlines, determination of hearing dates and location, logistics such as room size, and the form of the award.<sup>54</sup> The preliminary hearing can be conducted by telephone if desired.<sup>55</sup> Telephone conferences are easier to conduct as a practical matter if there is only one arbitrator. With multiple arbitrators, however, a telephone conference may not be as manageable given the likely need for private consultation by the arbitrators. Regardless of the manner in which they are conducted, preliminary hearings are almost always worthwhile and cost-effective proceedings.

**B. Settlement Conference.** None of the FAA, the UAA, or the various state arbitration statutes provide for settlement conferences. The AAA encourages the settlement of disputes and its Commercial Arbitration Rules suggest that the parties might wish to conduct a mediation conference to facilitate settlement at any stage of the arbitration proceeding. Nevertheless, the AAA admonishes the arbitrator not to be involved either in a mediation conference or in settlement discussions.

You should not participate in settlement discussions. If the parties wish to discuss settlement, you should be excused from the room. If you are a party to settlement discussions or attempt to mediate unsuccessfully, a party might later challenge the impartiality of the arbitrator on that basis. In appropriate situations, the AAA may appoint a mediator to conduct mediation under Commercial Mediation Rules.<sup>56</sup>

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<sup>54</sup> J. Wilkinson, *supra* n.46, at 50.

<sup>55</sup> See AAA Commercial Arbitration Rules 10, 22.

<sup>56</sup> AAA Guide at 23.

Thus, the AAA leaves to the parties the decision of whether a mediation conference is or settlement discussions are appropriate and, generally, requires them to conduct the negotiations without relying on or benefiting from the arbitrator's involvement.

**C. Exhibit and Witness Lists.** Neither the FAA nor state arbitration statutes expressly provide for the identification of exhibits or witnesses prior to the hearing. In contrast, AAA Rule 23(a) provides:

At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called.

In larger and more complex cases, the AAA suggests that the arbitrator should also consider requiring the parties to exchange reports from experts, outlines of witness testimony, biographies of expert witnesses, and the advance filing and identification of exhibits.<sup>57</sup> WIPO similarly gives its arbitrator the authority to “require either party to give notice of the identity of witnesses it wishes to call, as well as the subject-matter of their testimony and its relevance to the issues.”<sup>58</sup>

**D. Jurisdiction and Venue**

The AAA grants the arbitrator the power to rule on the preliminary question of jurisdiction, and requires a party to object to the jurisdiction of the arbitrator or to the arbitrability of a claim no later than the filing of the answering statement to the claim that gives rise to the objection.<sup>59</sup> The parties to an arbitration contract are advised to include a clause reciting that each party submits to the personal jurisdiction of the courts in the state where the arbitration will be held. This clause anticipates the possibility that court action might be

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<sup>57</sup> AAA Guide at 9, 12.

<sup>58</sup> WIPO Arbitration Rules Art. 54(a).

necessary to enforce the contract to arbitrate or the arbitration award. If that possibility occurs, and one or more of the parties lack sufficient minimum contacts with the forum state, the court may lack power to act. An explicit submission to the personal jurisdiction of the forum state may avoid that problem and has been held valid.<sup>60</sup>

Similarly, the parties to an arbitration contract are advised to include a clause identifying a particular location for the arbitration. Such clauses are usually enforced.<sup>61</sup> In addition, a party seeking to change that location will have a much more difficult time than in seeking to change a litigation forum.<sup>62</sup> Unlike litigation forum-selection clauses, which are upheld unless unreasonable, an agreement to arbitrate in a particular forum will be upheld unless the party seeking to avoid arbitration can “prove that the arbitration clause itself was a product of fraud, coercion, or ‘such grounds as exist at law or in equity for the revocation of any contract.’”<sup>63</sup> Consequently, at least under the FAA, the doctrine of forum non conveniens does not apply.<sup>64</sup>

#### **E. Choice of Law**

The parties to an arbitration contract are also advised to include a clause specifying the law applicable to the dispute. The clause should specify both the governing arbitration or procedural law (e.g., the FAA or the law of some state) and, separately, the choice of substantive law that the parties want the arbitrator to apply. Even though a dispute involves interstate commerce, the FAA does not apply if the parties have agreed that the arbitration will

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<sup>59</sup> See AAA Rule 8.

<sup>60</sup> See, e.g., *Wilmot H. Simpson Co. v. Green Textile Assoc., Inc.*, 554 F. Supp. 1229, 1232 (N.D. Ill. 1983).

<sup>61</sup> See, e.g., *In re Arbitration Between Standard Tallow Corp. & Kil-Management A/S*, 901 F. Supp. 147, 150 (S.D.N.Y. 1995); *Snyder v. Smith*, 736 F.2d 409, 419 (7<sup>th</sup> Cir.), cert. denied, 469 U.S. 1037 (1984); *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.*, 198 F. Supp. 284 (S.D.N.Y. 1961); *Gantt v. Felipe Y. Carlos Hurtado & Cia*, 297 N.Y. 433, 79 N.E.2d 815, cert. denied, 335 U.S. 843 (1948).

<sup>62</sup> See, e.g., *Redshaw Credit Corp. v. Ins. Professionals, Inc.*, 709 F. Supp. 1032 (D. Kan. 1989).

<sup>63</sup> *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5<sup>th</sup> Cir. 1976) (quoting FAA § 2). In fact, an arbitration forum-selection clause must be enforced even if the result is unreasonable. *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 332 (5<sup>th</sup> Cir.), cert. denied, 484 U.S. 943 (1987).

<sup>64</sup> See, e.g., *Spring Hope Rockwool, Inc. v. Industrial Clean Air, Inc.*, 504 F. Supp. 1385 (E.D.N.C. 1981).

be governed by state law.<sup>65</sup> On the other hand, state law cannot preclude an arbitration authorized by the FAA if interstate or foreign commerce is involved.<sup>66</sup> The arbitration of patent disputes is governed almost exclusively by 35 U.S.C. § 294 (the “Patent Arbitration Act”) and the FAA.<sup>67</sup>

## **F. Evidence**

**1. Overview.** One of the advantages or disadvantages (depending on perspective) of arbitration is that conformity to legal rules of evidence is unnecessary. Absent formal rules of evidence, arbitrators are more likely to hear relatively inexpensive evidence of the type relied upon in every-day business, but at the risk of also hearing unreliable and irresponsible submissions. The degree of concern raised by this risk depends upon the arbitrator. The formal rules of evidence are essentially rules of exclusion, designed to protect a lay jury from hearing or considering prejudicial or unreliable information. Hopefully, the arbitrator will be relatively sophisticated and can hear everything necessary to understand the case yet disregard evidence that is unhelpful, irrelevant, or unreliable. Arbitrators are free to conduct their hearings in any manner as long as they satisfy minimal standards of fairness.<sup>68</sup> Specifically, for example, the arbitrator should not exclude any material or relevant evidence.

The established rules of arbitration vary significantly in their treatment of evidentiary rules. When interpreting arbitration statutes and rules, however, the courts have uniformly held that the evidentiary rules applicable to judicial proceedings do not apply in

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<sup>65</sup> *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989) (permitting parties to arbitrate by state rules and, in what appeared to be a FAA case, affirming application of state arbitration law pursuant to the choice of law clause in the arbitration contract); Becker, “Choice of Law and the Federal Arbitration Act; The Shock of Volt,” 45 *Arb. J.* at 32 (June 1990).

<sup>66</sup> *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9<sup>th</sup> Cir. 1992) (state laws pertaining to adhesion contracts may not be invoked to bar the arbitration of disputes under FAA).

<sup>67</sup> The FAA is made applicable to patent arbitration by 35 U.S.C. § 294(b).

<sup>68</sup> See, e.g., *Sunshine Mining Co. v. United Steelworkers of Am.*, 823 F.2d 1289 (9<sup>th</sup> Cir. 1987) (arbitration hearings should provide adequate notice for the parties, be decided on the evidence, and result in an impartial decision by the arbitrator); *Rini v. United Van Lines, Inc.*, 903 F. Supp. 234 (D. Mass. 1995) (district court held that arbitration program for Carmack Amendment claims, with no opportunity to present witnesses, was unfair because it would place the shipper at a disadvantage).



arbitration. The parties agree, in effect, to waive the rules of evidence when they agree to arbitrate.<sup>69</sup> Unless the terms of the arbitration agreement expressly provide otherwise, the arbitrator is not required to follow the judicial rules of evidence.<sup>70</sup>

The arbitrator is the sole judge of the relevancy and materiality of evidence. Typically, evidence that courts would exclude is received and considered by the arbitrator.<sup>71</sup> In one case, a party sought to vacate an arbitration award on the ground that the decision was the result of “misconduct” for lack of reasonable evidence to support the award. The Second Circuit upheld the lower court’s order denying the motion to vacate, stating:

The arbitration was conducted in accordance with the rules of the American Arbitration Association, as agreed, and we can perceive no misconduct; the arbitrators appear to have accepted hearsay evidence . . . as they were entitled to do. If parties wish to rely on such technical objections they should not include arbitration clauses in their contracts.<sup>72</sup>

Thus, arbitrators may consider hearsay and otherwise incompetent testimony. An arbitrator is not required, however, to hear cumulative evidence.

## **2. Summary of Selected Rules.**

**a. FAA.** Many of the arbitration statutes are silent with respect to evidentiary matters. Typically, they caution only that the arbitrator should not exclude any material or relevant evidence. Under Section 10(c) of the FAA, for example, a court may vacate

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<sup>69</sup> See, e.g., *Korein v. Rabin*, 29 A.D.2d 351, 287 N.Y.S.2d 975 (1968).

<sup>70</sup> See, e.g., *Bell Aerospace Co. Div. of Textron v. Local 516, Int’l Union*, 500 F.2d 921 (2d Cir. 1974); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310 (7<sup>th</sup> Cir. 1981).

<sup>71</sup> *Barker v. Government Employee Ins. Co.*, 339 F. Supp. 1064 (D.D.C. 1972).

<sup>72</sup> *Petroleum Separating Co. v. Interamerican Refining Corp.*, 296 F.2d 124, 124 (2d Cir. 1961).

an arbitration award if the arbitrator refused “to hear evidence pertinent and material to the controversy.”

**b. UAA.** Similarly, under UAA § 5(b), the “parties are entitled . . . to present evidence material to the controversy” unless otherwise provided by their agreement. Section 12 of the UAA further provides that, upon the motion of a party, “the court shall vacate an award where . . . [the arbitrator] refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party.”

**c. AAA.** The AAA rules do provide specific guidelines on the matter of evidence.<sup>73</sup> Specifically, AAA Rule 33 provides that:

(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.

(b) The Arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

Thus, all evidence, regardless of its character, is normally admissible. The “guiding principle” to be applied, per the AAA, is that “everything that could further understanding of the case should

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<sup>73</sup> *Harvey Alum. Inc. v. Local 10, United Steelworkers of Am.*, 263 F. Supp. 488 (C.D. Cal. 1967).

be heard.”<sup>74</sup> As further guidance, the AAA has given the following advice to commercial arbitrators:

After a hearing gets under way and the flow of testimony begins, you might be asked to rule on the admissibility of evidence.

Courtroom rules of evidence do not apply in arbitration, but you might still have to decide whether to permit a witness to continue after a party objects. One guiding principle must be kept in mind: *everything that could further understanding of the case should be heard.*

Because arbitration awards can be subject to attack when arbitrators refuse to hear material testimony, arbitrators may accept doubtful material but give it little weight. You need not accept everything offered. When in doubt, you should ask the parties to present arguments. When one party has stated reasons for its objection and the other has answered, the arbitrator can decide whether the testimony is relevant or material. Even when evidence of doubtful relevance is accepted, the arbitrator can judge how much weight any piece of evidence is worth.<sup>75</sup>

**d. CPR.** CPR Rule 12.2 states that the arbitrator is not required to follow judicial laws of evidence “provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity.” As one commentator explains, this rule may strike a worthwhile compromise between giving the arbitrator a broad range of evidence while

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<sup>74</sup> AAA Guide 20.

<sup>75</sup> AAA Guide 20 (emphasis in original).

giving the parties an important element of protection. He asks, “Who would knowingly agree to arbitrate, if to do so waived all privilege and work product immunity from discovery?”<sup>76</sup>

**e. WIPO.** Consistent with the rules of other administering bodies, WIPO gives its arbitrators wide latitude on the subject of evidence. Specifically, Article 48(a) of the WIPO Arbitration Rules states that the arbitrator “shall determine the admissibility, relevance, materiality and weight of evidence.”

**f. UNCITRAL.** Article 25, Section 6, of the UNCITRAL rules states, “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.” Under Article 26, Section 1, “the arbitral tribunal may take any interim measures it deems necessary in respect to the subject-matter of the dispute.” The arbitrator has broad discretion under these provisions and, for example, may protect certain evidence by issuing a protective order.

**g. ICC.** The ICC rules provide no specific evidentiary guidelines. The ICC arbitrator determines what practices to apply.

**h. SCC.** The SCC rule on evidence is similar to the AAA rule. Under SCC Article 26, the parties are required to state “the evidence on which they intend to rely, specifying what they intend to prove with each item of evidence, and shall present documentary evidence on which they rely.” The arbitral tribunal may refuse to accept the evidence if it “considers such evidence to be irrelevant, non-essential or if proof can be established by other means which it considers more convenient or less expensive.”

**3. Suspect Evidence.** It may be desirable to allow the parties to present all relevant evidence during the hearing. Doing so, however, raises several concerns. The problem of hearsay and other suspect evidence can be solved in one or both of two ways. First, the party

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<sup>76</sup> T. Arnold, *supra* n.2, at 7-57.

opposing admission of the evidence may assert an objection. Second, the arbitrator may be given (or assume) the power to accord minimal weight to suspect evidence. This power should be specifically granted in the arbitration contract. Each solution relies on the arbitrator to be both flexible and reasonable under the circumstances.

### **G. Subpoenas**

Most federal and state laws permit arbitrators to issue subpoenas ad testificandum for the attendance of witnesses, including nonparty witnesses, and subpoenas duces tecum for the production of books, records, documents, and evidence at the hearing.<sup>77</sup> Arbitrators issue subpoenas as a matter of course. In some states, such as New York, the law extends this privilege to counsel for the parties, obviating the need to proceed through the arbitrator.<sup>78</sup>

If a party objects to the propriety of a subpoena, the arbitrator may request written comments (occasionally, a brief is required) or hold an oral hearing. The arbitrator can then decide whether to quash the subpoena. Elaborating on the use of subpoenas, the AAA advises its commercial arbitrators:

Occasionally, one party will wish to put into record a document held by the other party. The decision as to whether the document should be produced is made by you. Again, the parties should be asked to comment. If you are convinced that the document is essential, the party should be directed to produce it. This usually results in compliance because few parties in arbitration wish to risk the adverse conclusions that might be drawn from refusal. When,

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<sup>77</sup> Section 7 of the FAA provides: "The arbitrators . . . 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." *Accord* UAA § 7(a). AAA Rule 33(d) provides: "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently."

as rarely happens, there is no compliance, you may issue a subpoena or draw a negative interference.

AAA Guide 20.

When parties seek to compel compliance with a subpoena, courts treat the action as being independent from the arbitration proceeding without regard to the law applicable to the arbitration proceedings. Thus, the laws relating to the jurisdiction of the courts govern issues involving compelled compliance.<sup>79</sup> Section 7 of the FAA also provides for the enforcement of an arbitrator's subpoena power in a manner coextensive with that of a civil action in the federal courts:

[I]f 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.<sup>80</sup>

Unfortunately, however, the courts are somewhat inconsistent in their enforcement.<sup>81</sup>

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<sup>78</sup> N.Y. Civ. Prac. L. & R. §§ 2302(a), 7505.

<sup>79</sup> *Western Emp. Ins. Co. v. Merit Ins. Co.*, 492 F. Supp. 53 (N.D. Ill. 1979). When a federal court possesses the requisite statutory authority and jurisdiction over the parties concurrent with the jurisdiction of a state court, the federal court may order compliance with a state subpoena issued pursuant to state law. *Local Lodge 1746, Int'l Assn. of Mach. v. Pratt & Whitney Div. U.A.C.*, 329 F. Supp. 283 (D. Conn. 1971).

<sup>80</sup> *Accord* UAA § 7(a).

<sup>81</sup> *Compare Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (district court relied on FAA § 7 to uphold the power of the arbitrators to compel document production from third parties, before arbitration hearing); *Minerals & Chem. Philipp Corp. v. Panamerican Commodities, S.A.*, 15 A.D.2d 432, 224 N.Y.S.2d 763 (1962) (arbitrator had issued a subpoena duces tecum directing a third party to produce certain books and records, the reviewing court refused to grant a motion to quash on the ground that the party that had secured issuance of the subpoena had made a sufficient showing of the relevancy of the documents sought, which documents were otherwise unavailable), *appeal dismissed conditionally*, 11 N.Y.2d 1109, 184

## H. Affidavits

Evidence in arbitration hearings is often presented in affidavits containing witness statements, rather than live testimony, as a supplement to the documentary evidence.

Submissions of affidavits may be met, of course, with motions to strike. The arbitrator will be disposed not to strike an affidavit. The admission of an affidavit into evidence does not mean, however, that the arbitrator will give the affidavit full, or even any, weight.<sup>82</sup> Typically, arbitrators will be guided by the following criteria: (1) statements in affidavits are less reliable than statements subject to cross-examination,<sup>83</sup> (2) affidavits made without a basis in personal knowledge carry little weight,<sup>84</sup> (3) only opinion testimony that would be admissible in court should be given weight in an affidavit,<sup>85</sup> (4) speculative statements in an affidavit warrant no weight,<sup>86</sup> and (5) arbitrators may disregard conclusions of law and findings of ultimate fact in an affidavit.<sup>87</sup> Expanding on the use of affidavits, the AAA notes that:

Business people generally prefer arbitration because of its convenience. When witnesses are in a distant city and when it would be costly to bring them to the hearing, parties may ask the arbitrator to accept testimony in the form of affidavits. The arbitrator may agree if convinced there is good reason for the

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N.E.2d 319, *cert. denied*, 372 U.S. 910 (1962); *with Integrity Ins. Co.*, 885 F. Supp. 69 (court held that arbitrator lacks authority to compel nonparty witnesses to appear for depositions before arbitration hearing because such witnesses, who were not parties to the arbitration agreement, never agreed to participate); *Oceanic Transport Corp. v. Alcoa S.S. Co.*, 129 F. Supp. 160 (S.D.N.Y. 1954) (court vacated the subpoena because the documents sought were not sufficiently material to be “a proper case” for the issuance of a subpoena).

<sup>82</sup> AAA Rule 34(a) provides that “[t]he arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objections made to its admission.” *Accord* WIPO Arbitration Rules Art. 54(d).

<sup>83</sup> *See, e.g., United States v. Dibble*, 429 F.2d 598, 602 (9<sup>th</sup> Cir. 1970); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 577 (2d Cir. 1969).

<sup>84</sup> *See, e.g., Kern v. Tri-State Ins. Co.*, 386 F.2d 754, 756 (8<sup>th</sup> Cir. 1967); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440, 458 (E.D. Pa. 1966).

<sup>85</sup> *See, e.g., Paton v. La Prade*, 524 F.2d 862, 871 (3d Cir. 1975).

<sup>86</sup> *See, e.g., United States v. Johns-Manville Corp.*, 245 F. Supp. 74, 80-81 (E.D. Pa. 1965).

<sup>87</sup> *See, e.g., id.*

request. If there is an objection, the arbitrator should hear arguments from both sides before making a decision. In evaluating affidavits, the arbitrator should take into account the fact that witnesses were not subject to cross-examination, as they would have been had they appeared in person.

AAA Guide 7.

## **I. Experts**

### **1. Overview.**

The flexibility of the arbitration proceeding allows for, but does not require, the use of expert testimony. As in traditional litigation, experts may be appointed by the tribunal or employed by the parties. Some established rules of arbitration allow the arbitrator to appoint experts; others do not specifically provide for independently appointed experts.<sup>88</sup> At least one experienced arbitrator and advocate recommends that “it is better for the parties to employ their own experts, and for the arbitrators to cross-examine them until the arbitrator understands, than to presume that a neutral expert is correct.”<sup>89</sup>

### **2. Summary of Selected Rules.**

- a. FAA.** The FAA rules are silent with respect to expert testimony.
- b. UAA.** Like the FAA rules, the UAA rules do not address expert testimony.
- c. AAA.** The AAA rules allow the arbitrator to independently subpoena witnesses but do not explicitly provide for independently appointed experts.

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<sup>88</sup> For a summary of some of the relevant rules, see T. Arnold, *supra* n.2, at 7-64 to 65.

<sup>89</sup> T. Arnold, , *supra* n.2, at 7-65.



**d. CPR.** CPR Rule 12.3 allows the tribunal to “appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.”

**e. UNCITRAL.** Perhaps the most comprehensive rules regarding experts are found in Article 27 of the UNCITRAL rules. Under Section 1 of that article, “The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal.” Section 2 requires “[t]he parties shall give the experts any relevant information or produce for his inspection any relevant documents or goods that he may require of them.” Section 3 states, “[u]pon receipt of the expert’s report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report.” Finally, Section 4 of Article 27, requires, after delivery of the report, “the parties shall have the opportunity . . . to interrogate the expert.”

**f. WIPO.** The WIPO rules closely parallel the detailed UNCITRAL rules.<sup>90</sup>

**g. ICC.** The ICC rules provide that “the arbitrator may decide to hear . . . any other person, in the presence of the parties . . . provided they have been duly summoned.” Moreover, under ICC Article 20, Section 4, the arbitrator may appoint one or more experts and may receive their reports, hear from them in person, or both.

**h. SCC.** Article 27 of the SCC Rules states, “[u]nless otherwise agreed by the parties, the Arbitral Tribunal may appoint one or more experts to report to it on a specific issue.”

## **J. Conduct of the Hearing**

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<sup>90</sup> See Article 55, titled “Experts Appointed By The Tribunal.” Articles 48 and 53 also refer to the inclusion of expert witnesses among the people to whom evidence might be made available and to provide testimony at the hearing, respectively.

Differences between arbitration and litigation also exist once the arbitration hearing begins. An arbitration hearing is not a court or jury trial, and need not be conducted like one. Therefore, procedures in arbitration hearings need not comply with procedural requirements governing trials.<sup>91</sup> Generally, however, the standard format by which the parties present their case to the arbitrator is much like they would in court. The arbitrator gives introductory remarks. The claimant, then the respondent, respectively delivers an opening statement. The claimant next presents its case, typically through witness testimony (the respondent may cross-examine and the arbitrator may also ask questions) and the introduction of exhibits. The respondent similarly presents its case. Finally, the claimant, then the respondent, respectively delivers closing summations. Rarely, but possibly, the arbitrator conducts an on-site inspection or an independent investigation.

Although the format outlined above is typical, none of the FAA, the UAA, or the state statutes define the hearing process to any significant extent. Specifically, the FAA does not attempt to regulate the procedures before the arbitrators or prescribe rules or regulations for hearings before arbitrators.<sup>92</sup> AAA Rule 32(a) does provide generally, however, for the order of proceedings:

The claimant shall present evidence to support its claims.

The respondent shall then present evidence to support its defense.

Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with

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<sup>91</sup> See, e.g., *Alonso v. Kaiser Alum. & Chem. Corp.*, 345 F. Supp. 1356 (S.D. W. Va. 1971).

<sup>92</sup> See *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960).

equality and that each party has the right to be heard and is given a fair opportunity to present its case.

Of course, and preferably, the parties may predefine or otherwise stipulate to the applicable procedures.<sup>93</sup> If the parties do stipulate to a set of rules, the rules will govern their hearing.<sup>94</sup> Thus, what actually happens during the arbitration hearing depends primarily on how the parties and the arbitrator want the hearing to proceed, and not what the law or rules provide. Unlike a trial, for example, an arbitration may proceed on an issue-by-issue basis. Accordingly, a party should not plan its strategy for an arbitration hearing based on the assumption that it will be comparable to a court trial, for it may be significantly different.

**1. Language.** The inclusion of a choice-of-language provision in the arbitration contract is recommended. Time and expense can be saved if the parties can agree on a single language in which the arbitration proceeding shall be conducted. Absent agreement between the parties, the AAA, in Article 14 of its International Arbitration Rules, provides that the language should be inferred from the language of the arbitration contract: “If the parties have not agreed otherwise, the language(s) of the arbitration shall be that of the documents containing the arbitration agreement, subject to the power of the tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration.” One commentator notes that the AAA previously determined which language would be used to conduct the arbitration based on four considerations: (1) the nationality of the parties, (2) the nationality of counsel, (3)

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<sup>93</sup> See *Scherck v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

<sup>94</sup> See *Reed & Martin, Inc. v. Westinghouse Elec. Corp.*, 439 F.2d 1268, 1273-74 (2d Cir. 1971) (the arbitration contract stated that the AAA rules would govern and, although the contract also provided that the court would decide the location of the hearing, the court held that it was not improper for the arbitrators to have selected the location for the hearing pursuant to then AAA Rule 20 (now AAA Rule 11)).

the nationality of potential witnesses, and (4) the location of the hearing.<sup>95</sup> AAA Rule 29 also provides for interpreters.

**2. Representation by Counsel.** There is no requirement that the parties be represented by counsel. Although the FAA is silent on this subject, Section 6 of the UAA and AAA Rule 26 provide that parties to an arbitration may be represented by counsel. Although representation by counsel is optional, if an arbitrator refuses to permit a party to be represented by counsel, the refusal may constitute arbitral misconduct, vitiating the award.

**3. Stenographic Record.** In arbitration hearings, absent stipulation by the parties to the contrary, a record of the hearing is not required.<sup>96</sup> AAA Rule 28 provides, however, that “[a]ny party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record.” Article 53(d) of the WIPO Arbitration Rules gives the arbitrator authority to decide on the advisability or necessity of a transcript: “The Tribunal shall determine whether and, if so, what form a record shall be made of any hearing.”

**4. Confidentiality.** One commonly cited advantage of arbitration is the relative privacy of arbitration proceedings as compared to public trials. Most institutional arbitration rules contain provisions safeguarding the confidentiality of the proceedings. Generally, they impose on the arbitrators and administrators the obligation not to disclose confidential information provided by the parties and witnesses, and to keep confidential all matters relating to the arbitration and award, unless otherwise agreed by the parties or required

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<sup>95</sup> T. Arnold, *supra* n.2, at 7-34 to 7-35.

<sup>96</sup> *Brotherhood of R.R. Trainmen v. Chicago, M., St. P. & Pac. R.R.*, 237 F. Supp. 404 (D.D.C. 1964).

by applicable law. The FAA and the UAA are silent on this matter, but AAA Rule 25 provides that:

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.<sup>97</sup>

By far the most extensive provisions covering confidentiality are provided by WIPO. Article 53(c) of the WIPO Arbitration Rules states, “Unless the parties agree otherwise, all hearings shall be in private.” Article 52 is a detailed provision addressing “Disclosure of Trade Secrets and Other Confidential Information.” An entire section (VII) is directed to “Confidentiality,” and includes Article 73 directed to “Confidentiality of the Existence of the Arbitration,” Article 74 directed to “Confidentiality of Disclosures Made During the Arbitration,” Article 75 directed to “Confidentiality of the Award,” and Article 76 directed to “Maintenance of Confidentiality by the Center and Arbitrator.”

The courts have also held that arbitration is a private proceeding, generally closed to the public.<sup>98</sup> Other than the WIPO rules, however, the confidentiality safeguards apply only to the arbitrator and staff; they do not necessarily extend to the parties themselves. Therefore,

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<sup>97</sup> See also AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI (“Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”).

<sup>98</sup> See, e.g., *Hoteles Condado Beach, La Concha & Conv. Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34 (1<sup>st</sup> Cir. 1985).

whatever other confidentiality provisions the arbitration contract may contain, further language may be desired if the parties also want to guard against unwelcome disclosures by a party of matters relating to the arbitration or award.

**5. Sequestering Witnesses.** Most institutional rules do not address the subject of sequestering witnesses. Distinguish AAA Rule 25, quoted above,<sup>99</sup> and the WIPO rules,<sup>100</sup> which give the arbitrator specific authority to sequester. The arbitrator's decision to exclude certain people from attendance at hearings is a matter of discretion, subject only to the overall requirement that the arbitrator not deprive a party of a fair hearing.<sup>101</sup>

**6. Cross-Examination.** Live cross-examination by the parties of those witnesses who attend the hearing is typical in arbitration. In many arbitrations, the arbitrator also may separately cross-examine both the attorneys and the witnesses.<sup>102</sup> Although the FAA does not explicitly provide for cross-examination, the UAA and state arbitration statutes modeled after the UAA do.<sup>103</sup> In some cases, however, the arbitrator might refuse to permit cross-examination of a particular witness under the umbrella of the arbitrator's overriding discretion to conduct the hearing. In one case, for example, the arbitrator refused to permit cross-examination of experts retained by the arbitrator.<sup>104</sup> These experts had provided the arbitrator with technical information and analysis to aid the arbitrator in determining the issue in dispute--the net value of developed area reserves. The court held that it was not improper for the arbitrator to have refused to permit cross-examination because the parties in their submission agreement had never contemplated the

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<sup>99</sup> "The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witnesses."

<sup>100</sup> Article 52(c) gives the arbitrator authority to "decide under which conditions and to whom the confidential information may in part or in whole be disclosed."

<sup>101</sup> See *Johns Constr. Co. v. Unified Sch. Dist. No. 210*, 233 Kan. 527, 664 P.2d 821 (1983); see also AAA Rule 25 (giving the arbitrator "discretionary" power).

<sup>102</sup> See Article 54(c) of the WIPO Arbitration Rules ("Any witness who gives oral evidence may be questioned, under the control of the Tribunal, by each of the parties. The Tribunal may put questions at any stage of the examination of the witnesses.").

<sup>103</sup> See UAA § 5(b).

<sup>104</sup> *Continental Materials Corp. v. Gaddis Mining Co.*, 306 F.2d 952 (10<sup>th</sup> Cir. 1961).

formalities of a court trial.<sup>105</sup> Strict adherence to any specific procedural rules is not required except to the extent dictated by the arbitration contract.

**K. Reopening Hearing.** The decision of whether to reopen a hearing before rendering the award is within the arbitrator's discretion.<sup>106</sup> Thus, upon suitable notice and if not prejudicial, an arbitrator may reopen a hearing as an act within the exercise of discretion.<sup>107</sup> In fact, if an arbitrator fails to issue a notice of reopening, resulting in the *ex parte* receipt of evidence bearing on the award, the court may have a valid basis to find prejudicial misconduct justifying it in vacating the award.<sup>108</sup>

**L. Award Form**

The parties at their option can specify in the arbitration contract or later by agreement that the award be a simple conclusion (e.g., "judgment for ACME Co. in the amount of \$1") or that the award include reasons. A reasoned award is essentially an opinion stating the findings of fact and conclusions of law supporting the judgment. Reasoned awards are common in Europe and under ICC practice; they are less common in the United States.<sup>109</sup> The arguments for and against "reasons" have filled books.<sup>110</sup> Reasons cause delay, increase costs, and may provide the losing party with ammunition to attack the award in court--all undermining the goal of a timely, cost-effective, final, non-appealable decision. On the other hand, an extensive analysis may improve the quality of the judgment in some cases.

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<sup>105</sup> *Id.* at 955-56.

<sup>106</sup> For example, an arbitrator's refusal to reopen a hearing will not result in a court's vacating the award for refusal to hear evidence when the complaining party had the opportunity during the hearing to present the evidence, but failed to do so. *Hutchins Constr. Co. v. Bell*, 396 F. Supp. 1262 (D.V.I. 1975).

<sup>107</sup> *Local Lodge 1746, Int'l Ass'n of Mach. v. Pratt & Whitney Div.*, 329 F. Supp. 283 (D. Conn. 1971).

<sup>108</sup> *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649 (5<sup>th</sup> Cir. 1979).

<sup>109</sup> Generally, arbitrators are under no obligation to set out the reasons for their award (i.e., findings of fact or conclusions of law on which their award is based). *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410 (5<sup>th</sup> Cir. 1990). More specifically, absent proof that the arbitrator acted improperly or that the award was not supported by the evidence, the arbitrator is not required to disclose the precise mathematical basis upon which the damages portion of an award was calculated. *See, e.g., Hialeah Park, Inc. v. Ocala Breeders' Sales Co.*, 528 So.2d 1227 (Fla. App. 1988).

**1. Summary of Selected Rules.**

**a. FAA.** The FAA is silent with respect to the form of the arbitration award.

**b. UAA.** Section 8 of the UAA rules merely requires that the arbitrator's award "shall be in writing." The UAA rules neither require reasons for the award nor do they sanction dissenting opinions. Therefore, if the parties do not contract otherwise, the arbitrator has discretion to render either a one-sentence, conclusory, written award or a full written opinion.

**c. AAA.** AAA Rule 44(a) requires that the arbitrator's award "shall be in writing." AAA Rule 44(b) expresses a preference for or a presumption in favor of "naked" or non-reasoned awards, stating: "The arbitrator need not render a reasoned award unless the parties request such an award in writing . . . or unless the arbitrator determines that a reasoned award is appropriate." The award must be made, per AAA Rule 43, within 30 days after the hearing closes. Finally, AAA Rule 42 implicitly sanctions dissenting opinions. Titled "Majority Decisions," Rule 42 states that a majority of the arbitrators (when the panel consists of more than one arbitrator, of course) must make all decisions unless the law requires or the parties agree otherwise.

**d. CPR.** CPR Rule 14.2 recites that "[a]ll awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise." In addition, assuming a panel of multiple arbitrators rather than a single arbitrator, CPR Rule 14.3 allows one of the arbitrators who desires not to join in the award to file a dissenting opinion.

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<sup>110</sup> See, e.g., C. Coleman & G. Gershenfield, "Write Ya' Heart Out! The Act of Communicating Arbitral Judgments," Manual of Commercial Arbitrators (Jan. 1999).



e. **UNCITRAL.** Article 32 of the UNCITRAL rules states that “[t]he award shall be made in writing” and that “[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.” Thus, the default (i.e., absent override by the parties’ agreement) provided by the UNCITRAL rules requires written reasons for the award.

f. **ICC.** The ICC rules also require the arbitrator to give reasons for the award. Moreover, Article 27 requires that, before signing the award, the arbitrator must submit it in draft form to the ICC International Court of Arbitration. Under that article, the court may “lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance . . . [but] [n]o award shall be rendered . . . until it has been approved by the Court as to its form.” This procedure can provide a helpful check on the quality of the arbitration but, of course, costs money and takes time.

g. **WIPO.** WIPO reverses any presumption against a written order, while preserving flexibility. Article 62 of the WIPO Arbitration Rules requires the award to be written and to “state the reasons on which it is based, unless the parties have agreed that no reasons should be stated and the law applicable to the arbitration does not require the statement of such reasons.” Articles 61 and 62(d) explicitly allow for dissenting opinions when multiple arbitrators are involved. Article 63 requires the arbitrator to deliver the award within three months after the proceedings are closed. If unable to meet that deadline, the arbitrator must give both WIPO and the parties “a written explanation for the delay.”

h. **JCAA.** JCAA Rule 49 requires the award to include both the “text of the award” and “reason for the award.” Rule 49 also provides, however, that the parties may

agree to have an award without reasons. Therefore, the form of the award should be decided in the arbitration agreement or at least before the hearing. Rule 48 mandates that the award must be entered within five weeks from the conclusion of the hearing. Thus, upon completion of the hearing, the parties can anticipate a timely end to the dispute.<sup>111</sup>

i. **SCC.** Article 32 of the SCC Rules requires that the award “contain an order or declaration, as well as the reasons for it.” In addition, an arbitrator may attach a dissenting opinion to the award.

j. **State Statutes.** Most state statutes do not specify requirements for the form of the award. Typically, factual findings are not essential nor is legal reasoning required.<sup>112</sup> Because a few states do require that an arbitrator make findings of fact and conclusions of law supporting an award, however, familiarity with the applicable provisions is recommended.<sup>113</sup>

2. **Patent Awards.** A special caution is warranted for arbitration awards relating to U.S. patents. First, the judgment of a district court must be entered on the arbitration award before it will have the effect of a judicial decision. Second, the Commissioner of Patents and Trademarks must receive notice of the award before it can be enforced.<sup>114</sup>

3. **Award Types.** A variety of different methods are applied to determine the arbitration award. The most typical method (standard arbitration) permits the arbitrator to evaluate the facts of the case and the relevant law and to render a decision based on what seems

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<sup>111</sup> Absent sanctions, however, late awards are fairly common regardless of what arbitration rules govern. *See* T. Arnold, *supra* n.2, at 7-61.

<sup>112</sup> J. Wilkinson, *supra* n.46, at 53.

<sup>113</sup> *But see First Preservation Capital, Inc. v. Smith Barney*, 939 F. Supp. 1559, 1563 (S.D. Fla. 1996) (failure to provide reasons for award not adequate basis for vacating an award even when state statute requires such reasons).

<sup>114</sup> *See* 9 U.S.C. § 9.

just and equitable.<sup>115</sup> In a second method, “high-low” arbitration, the parties agree on the upper and lower dollar limits of the arbitrator’s authority. The arbitrator may or may not know the limits. The actual award is adjusted to the nearest dollar limit agreed upon. Third, “last best offer” or “final offer” arbitration proceeds with the parties submitting their final settlement offers. In one variation, the arbitrator does not know those offers and the figure of the parties closest to the arbitrator’s actual award is adopted. The second variation is sometimes called “baseball arbitration” because it is used by Major League Baseball: the arbitrator is informed of the parties offers and decides which of the two offers to adopt.

**4. Scope of Awards.** The basic principle is that the arbitrator must fashion an award that is within the scope and procedural provisions of the arbitration contract.<sup>116</sup> Absent an express contract provision to the contrary, however, an arbitrator generally has the discretion to award any relief permitted by law or at equity and may fashion novel forms of relief that may not ordinarily be available through the courts.<sup>117</sup> In some jurisdictions, the arbitrators have the authority to award punitive damages.<sup>118</sup> At least in the context of a “broad” contractual arbitration clause, and absent a contrary agreement by the parties, an arbitrator can award interest on the award.<sup>119</sup> An award may include attorney’s fees where authorized.<sup>120</sup> Absent statutory

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<sup>115</sup> See, e.g., AAA Rule 45 (“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”).

<sup>116</sup> *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *American Federation of Tech. Eng’rs v. Western Elec. Co.*, 508 F.2d 106 (7<sup>th</sup> Cir. 1974).

<sup>117</sup> See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). For relief beyond that available in court, see *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4<sup>th</sup> 362 (1994) (arbitrator award of license instead of damages, which was beyond powers of courts, was consistent with the arbitration contract and upheld). See generally M. Hoellering, “Remedies in Arbitration,” *Arbitration and the Law* (1984).

<sup>118</sup> See, e.g., *Mastrobuono*, 514 U.S. 52 (punitive damages award enforceable even though arbitration agreement did not expressly refer to claims for punitive damages); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11<sup>th</sup> Cir. 1988); *Raytheon Co. v. Automated Business Sys.*, 882 F.2d 6 (1<sup>st</sup> Cir. 1989); *Barbier v. Shearson Lehman Hutton, Inc.*, 752 F. Supp. 151 (S.D.N.Y. 1990); see generally T. Stipanowich, “Punitive Damages and the Consumerization of Arbitration,” 92 Nw. L. Rev. 1 (1997); R. Ryder, “Punitive Award Survey,” 8 Sec. Arb. Commentator at 4 (Nov. 1996).

<sup>119</sup> See, e.g., WIPO Arbitration Rules Art. 60(b). To determine whether state or federal law is applied to calculate interest, see *Northrop Corp. v. Triad Int’l Marketing, S.A.*, 842 F.2d 1154 (9<sup>th</sup> Cir. 1988); *Laminoirs-Trefleries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980).

<sup>120</sup> See, e.g., *Schultz v. Subaru of Am., Inc.*, 407 Mass. 1004, 553 N.E.2d 893 (1990); *Leaf v. State Farm Mut. Automobile Ins. Co.*, 544 So.2d 1049 (Fla. App. 1989); WIPO Arbitration Rules Art. 72.

authorization or contractual agreement between the parties, however, the prevailing American rule is that each party pays its own attorney's fees.<sup>121</sup>

**5. Appealing, Vacating, or Modifying Awards.** The arbitrator must render an award within the time limitation (if any) set by the parties. An award not timely rendered may be void.<sup>122</sup> Once an award is granted, the prevailing party should seek confirmation of an award within a reasonable time after the arbitrator grants the award; otherwise, the court may decline confirmation.<sup>123</sup> In some jurisdictions, a binding arbitration award is not appealable on the merits of the dispute;<sup>124</sup> other jurisdictions expressly provide for appeals.<sup>125</sup> The courts are undecided about whether the parties may provide by agreement for an appeal or review in court. One view is that the parties may not confer jurisdiction on the courts.<sup>126</sup> The other view is that, if jurisdiction would otherwise be available, the parties may expressly provide in their agreement for such review.<sup>127</sup>

The general rule in common law arbitration is that, once an award is rendered, the arbitrator is "functus officio" and has no power to proceed further. Under this doctrine, once the arbitrator has finalized an award and delivered it to the parties, the arbitrator can no longer act on the matter.<sup>128</sup> Nevertheless, grounds do exist for judicially vacating a binding award, as governed by statute and institutional rules, although such grounds usually are limited to fraud, mistake, or

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<sup>121</sup> See, e.g., *Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 18 USPQ2d 1332 (Fed. Cir. 1991); *Menke v. Monchecourt*, 17 F.3d 1007 (7<sup>th</sup> Cir. 1994).

<sup>122</sup> See, e.g., *Government of India v. Cargill*, 867 F.2d 130 (2d Cir. 1989).

<sup>123</sup> See, e.g., *Sverdrup Corp. v. WHC Contractors, Inc.*, 787 F. Supp. 542 (D.S.C. 1992) (court held that 9 U.S.C. § 9 barred confirmation when the prevailing party failed to move for confirmation within one year after grant); UAA § 11.

<sup>124</sup> See, e.g., WIPO Arbitration Rules Art. 64(a).

<sup>125</sup> See, e.g., FAA § 16; UAA § 19 (permitting appeals).

<sup>126</sup> See, e.g., *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7<sup>th</sup> Cir. 1991); *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8<sup>th</sup> Cir. 1998).

<sup>127</sup> See, e.g., *Lapine Tech. Corp. v. Kycocera Corp.*, 130 F.3d 884 (9<sup>th</sup> Cir. 1997); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4<sup>th</sup> Cir. 1997), cert. denied, 118 S. Ct. 1039 (1998).

<sup>128</sup> See, e.g., *Mercury Oil Ref. Co. v. Oil Workers*, 187 F.2d 980, 983 (10<sup>th</sup> Cir. 1951); 1 *Domke on Commercial Arbitration*, §§ 22:01, 32:01 (G. Wilner, ed., 1996).

gross misconduct.<sup>129</sup> Other limited grounds that might be used as a basis for challenging an award include partiality on the part of the arbitrator,<sup>130</sup> or that the award was contrary to well-defined public policy.<sup>131</sup> In short, a court's authority to vacate an award is extremely narrow and will be applied and upheld only in a few exceptional circumstances.<sup>132</sup>

The general rule is that, once an arbitrator enters an award, that award may not be modified by a court--or even the original arbitrator--absent agreement by the parties.<sup>133</sup> The twin bases for this rule are the desire for finality and exhaustion of the arbitrator's authority upon entering the award. In specific circumstances, however, an award rendered following an arbitration proceeding might be modified.<sup>134</sup> Modifications and corrections as to matters of form (e.g., clerical, computational, and typographical errors) not affecting the merits of the controversy are almost uniformly permitted. The primary substantive exceptions to the general rule exist when the award is either so ambiguous or incomplete that it cannot be implemented or when a subsequent, unanticipated event prevents implementation according to the terms of the award.<sup>135</sup>

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<sup>129</sup> See, e.g., *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998); *Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588 (8<sup>th</sup> Cir. 1998); *Syncor Int'l Corp.*, 120 F.3d 262, *cert. denied*, 118 S. Ct. 1039 (1998); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017 (5<sup>th</sup> Cir. 1990); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986); *Carte Blanche (Singapore) PTE, Ltd. v. Carte Blanche Int'l, Ltd.*, 683 F. Supp. 945 (S.D.N.Y. 1988); *In re Complaint of Southwind Shipping Co., S.A.*, 709 F. Supp. 79 (S.D.N.Y. 1989); Tex. Civ. Prac. & Rem. Code § 171.014; 9 U.S.C. § 10(a); UAA §§ 9, 12. See generally S. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 Ga. L. Rev. 731, 752 (1996).

<sup>130</sup> See, e.g., *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F. Supp. 2d 1118 (D. Hawaii 2000). Generally, the party alleging partiality bears a heavy burden of proof. See, e.g., *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (D.C. Cir. 1996); *AAOT Foreign Economic Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980 (2d Cir. 1998) (corruption defense waived because, although corruption was known, it was raised only after the arbitration award was entered); *Park v. First Union Brokerage Servs., Inc.*, 926 F. Supp. 1085 (M.D. Fla. 1996) (even accepting challenger's allegation, under 9 U.S.C. § 10(a)(2), that party went out of its way to replace a stricken female panelist with another female, challenger failed to show evident partiality in the individual arbitrators who sat on the case; thus, challenge failed).

<sup>131</sup> *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

<sup>132</sup> See, e.g., *Labor Relations Div. of Constr. Indus. of Mass. v. Int'l Bhd. of Teamsters*, 29 F.3d 742 (1<sup>st</sup> Cir. 1994).

<sup>133</sup> AAA Rule 48 ("The arbitrator is not empowered to redetermine the merits of any claim already decided."); R. Porter, "Remanding An Award For Clarification," in *ADR Currents* at 1, 8-10 (AAA, Dec. 1999).

<sup>134</sup> See, e.g., 9 U.S.C. § 11; UAA §§ 9, 13; AAA Rule 48; WIPO Arbitration Rules Art. 66.

<sup>135</sup> *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327 (3d Cir. 1991).

**M. Costs of the Arbitration.** The parties must address, either in their arbitration contract or by separate contract with the arbitrator, the amount and when they will pay the arbitrator (unless pro bono).<sup>136</sup> They must also arrange to pay any administrative fees due the institution, if any, hired to facilitate their arbitration.<sup>137</sup> Otherwise, the arbitrator may be empowered to assess such payments as part of the award.<sup>138</sup> With respect to other costs of the arbitration, including witness and attorney's fees, a summary of selected rules is provided below. Most of the established rules of arbitration allow the arbitrator to determine certain costs of the proceeding.

1. **FAA.** The FAA is silent with respect to the costs of the arbitration.

2. **UAA.** Section 10 of the UAA rules states, rather generally, "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." Thus, the UAA gives the arbitrator wide discretion to award costs. Of particular note is the exclusion of counsel fees; apparently, the UAA adopts the American rule under which each party pays its own attorney's fees (absent a contractual provision to the contrary).

3. **AAA.** AAA Rule 45(c) specifically allows the arbitrator to apportion the arbitration costs: "In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-51 [Administrative Fees], R-52 [Expenses], and R-53 [Neutral Arbitrator's Compensation]. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." Rule 52 specifically states, however, that the "expenses of witnesses for either side shall be paid

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<sup>136</sup> See, e.g., AAA Rules 45(c), 53; WIPO Arbitration Rules Art. 69.

<sup>137</sup> See, e.g., AAA Rules 45(c), 51; WIPO Arbitration Rules Art. 67, 68.

by the party producing such witnesses.” The AAA rules do not specifically address the attorney’s fees of the prevailing party as a component of the cost of the arbitration.

4. **CPR.** CPR Rule 16.2 allows the arbitrator to consider several types of expenses in determining the cost of the arbitration. For example, the arbitrator shall consider: (a) the fees and expenses of the arbitrators, (b) the cost of expert advice, (c) the travel and other expenses of witnesses, (d) the costs for legal representation and experts incurred by the successful party as deemed appropriate, (e) the charges and expenses of CPR, and (f) the costs of a transcript and of meeting and hearing facilities. Typically, the arbitrator apportions the cost of the arbitration between or among the parties as deemed reasonable under the circumstances of the case. In addition, under Rule 16.4, the arbitrator may ask each party to deposit an appropriate amount as an advance against the costs. The arbitrator holds the parties jointly and severally liable for the required payment under Rule 16.5.

5. **UNCITRAL.** Articles 38 to 41 of the UNCITRAL rules specify a broad range of costs which the arbitrator may consider. For instance, the arbitrator is specifically required to fix the costs of: (a) the fees of the arbitrator, (b) the travel and other expenses incurred by the arbitrator, (c) the costs of expert advice required by the arbitrator, (d) the travel and other expenses of the witnesses, (e) the reasonable costs for legal representation of the successful party, and (f) the fees and expenses of the appointing authority. Article 40 provides that “the costs of arbitration shall in principle be borne by the unsuccessful party . . . , [but] the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.” The arbitrator may also apportion the costs of legal representation under Section 2 of Article 40.

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<sup>138</sup> See, e.g., AAA Rule 45(c); UAA § 10.

6. **ICC.** Article 31 of the ICC rules allows the arbitrator to “fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.” Section 1 of Article 31 defines these costs to include the expenses of the arbitrator, the fees and expenses of any experts, and the normal legal cost incurred by the parties. In this respect, the ICC rules are comparable to the CPR rules. The ICC has also given the arbitrator power to fix higher or lower fees as determined by the circumstances of the case. ICC Article 31, Section 2.

7. **WIPO.** Title VI of the WIPO Arbitration Rules addresses fees and costs in detail. Articles 67 and 68 covers WIPO’s administrative fees. Article 69 covers fees of the arbitrators. Article 70 requires the parties to deposit with WIPO an amount determined by WIPO as an advance for the costs of arbitration. Article 71 rather generally authorizes the arbitrator to fix the costs of arbitration in the award. Finally, Article 72 empowers the arbitrator, “subject to any contrary agreement by the parties and in the light of all the circumstances and the outcome of the arbitration,” to “order a party to pay the whole or part of reasonable expenses incurred by the other party in presenting its case, including those incurred for legal representatives and witnesses.”

8. **JCAA.** The JCAA rules are similar in scope to the AAA rules. Rule 38 provides that a party requesting a witness, inspection, or investigation shall pay for the resulting expense. Rule 38 also provides that the parties shall share any such expense if requested by the arbitrator.

9. **SCC.** Under Article 39 of the SCC rules, the arbitrator decides the compensation due the institute and the arbitrator. In addition, “the parties are jointly and severally liable for all payments of all costs.” The arbitrator may order the losing party,



however, to compensate the other party for legal representation and other expenses for presenting its case.

## **VI. Conclusion**

Arbitration has become a primary mechanism favored by parties (and, more recently, courts) to resolve disputes in many areas of the law.<sup>139</sup> The growth in the use of arbitration, its application to resolve disputes of greater complexity, and the development of law in the area have prompted involvement by many sources offering helpful rules, people, and facilities. At its base, however, arbitration is a consensual, contractual process in which the autonomy of the parties who enter into arbitration agreements should be given primary consideration (as long as their agreements conform to traditional notions of fundamental fairness). Thus, the parties have the opportunity in most instances to shape the arbitration process to their own particular needs. Helpful sources stand ready to provide a default mechanism if the parties do not have a specific agreement on a particular arbitration issue. The underlying reason that many parties choose arbitration is the speed, lower cost, and greater efficiency possible with the process relative to traditional litigation. Ideally, the procedures followed during the arbitration process will advance these ends.

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<sup>139</sup> For a summary of the most recent U.S. Supreme Court rulings, each characterized as favoring arbitration, see M. Berger, "Arbitration's Grand Slam Victory in the Supreme Court's 2000-2001 Term," LXXII Pa. Bar J. 175 (Oct. 2001).

Arbitration Statutes of the Fifty States & DC

<u>State</u>	<u>Source</u>	<u>Provision (Section)</u>	<u>Note</u>
Alabama	Code	§ 6	Applies Only to Existing Disputes
Alaska	Statutes	§§ 09.43.010 <i>et seq.</i>	Incorporates the UAA
Arizona	Revised Statutes	§§ 12-1501 <i>et seq.</i>	Incorporates the UAA
Arkansas	Statutes Ann.	§§ 35-511 <i>et seq.</i>	Incorporates the UAA
California	Code Civil Procedure	§§ 1280 <i>et seq.</i>	
Colorado	Revised Statutes	§§ 13-22-201 <i>et seq.</i>	Incorporates the UAA
Connecticut	General Statutes Annotated	§§ 52-408 <i>et seq.</i>	
Delaware	Code Annotated	Title 10, §§ 5701 <i>et seq.</i>	Incorporates the UAA
District of Columbia	Code	Title 16, §§ 16-4301 <i>et seq.</i>	Incorporates the UAA
Florida	Statutes Annotated	§§ 682.01 <i>et seq.</i>	
Georgia	Code	§§ 9-9-80 <i>et seq.</i>	Applies Only to Construction Disputes
Hawaii	Revised Statutes	§§ 658-1 <i>et seq.</i>	Incorporates the UAA
Idaho	Code	§§ 7-901 <i>et seq.</i>	Incorporates the UAA
Illinois	Revised Statutes	Chapter 10, §§ 101 <i>et seq.</i>	Incorporates the UAA
Indiana	Code Annotated	§§ 34-4-2-1 <i>et seq.</i>	Incorporates the UAA
Iowa	Code	§§ 679A.1 <i>et seq.</i>	Incorporates the UAA
Kansas	Statutes	§§ 5-401 <i>et seq.</i>	Incorporates the UAA
Kentucky	Revised Statutes	§§ 417.045 <i>et seq.</i>	Incorporates the UAA

<u>State</u>	<u>Source</u>	<u>Provision (Section)</u>	<u>Note</u>
Louisiana	Revised Statutes	§§9:4201 <i>et seq.</i>	Incorporates the UAA
Maine	Revised Statutes Annotated	Title 14, §§ 5927 <i>et seq.</i>	Incorporates the UAA
Maryland	Courts & Judicial Procedure Code Annotated	§ 3-201 <i>et seq.</i>	Incorporates the UAA
Massachusetts	Annotated Laws	Chapter 251, §§ 1 <i>et seq.</i>	Incorporates the UAA
Michigan	Comp. Laws	§§600.5001 <i>et seq.</i>	
Minnesota	Statutes Annotated	§§ 572.08 <i>et seq.</i>	Incorporates the UAA
Mississippi	Code Annotated	§§ 11-51-1 <i>et seq.</i>	Incorporates the UAA; Applies Only to Construction Disputes
Missouri	Annotated Statutes	§§ 435.350 <i>et seq.</i>	Incorporates the UAA
Montana	Rev. Code Annotated	§§ 27-5-111 <i>et seq.</i>	Incorporates the UAA
Nebraska	Revised Statutes	§§ 25-2601 <i>et seq.</i>	Incorporates the UAA
Nevada	Revised Statutes	§§ 38.015 <i>et seq.</i>	Incorporates the UAA
New Hampshire	Revised Statutes Annotated	§§ 542:1 <i>et seq.</i>	Incorporates the UAA
New Jersey	Statutes	§§ 2A:23-1 <i>et seq.</i> & 2A:24 <i>et seq.</i>	
New Mexico	Statutes Annotated	§§44-7-1 <i>et seq.</i>	Incorporates the UAA
New York	Civil Practice Law	§§ 7501 <i>et seq.</i>	
North Carolina	General Statutes	§§ 1-567.1 <i>et seq.</i>	Incorporates the UAA
North Dakota	Cent. Code	§§ 32-29.2-01 <i>et seq.</i>	Incorporates the UAA

<u>State</u>	<u>Source</u>	<u>Provision (Section)</u>	<u>Note</u>
Ohio	Revised Code Annotated	§§ 2711.01 <i>et seq.</i>	
Oklahoma	Statutes Annotated	Title 15, §§ 801 <i>et seq.</i>	Incorporates the UAA
Oregon	Revised Statutes	33.210 <i>et seq.</i>	
Pennsylvania	Statutes Annotated	Title 42, §§ 7301 <i>et seq.</i>	Incorporates the UAA
Rhode Island	General Laws	§§ 10-3-1 <i>et seq.</i>	
South Carolina	Code	§§ 15-48-10 <i>et seq.</i>	Incorporates the UAA
South Dakota	Codified Laws Annotated	§§ 21-25A-1 <i>et seq.</i>	Incorporates the UAA
Tennessee	Code Annotated	§§ 29-5-302 <i>et seq.</i>	Incorporates the UAA
Texas	Revised Civil Statutes Annotated	Title 10, Articles 224 <i>et seq.</i>	Incorporates the UAA
Utah	Code Annotated	§§ 78-31a-1 <i>et seq.</i>	
Vermont	Statutes Annotated	Title 12, §§ 5651 <i>et seq.</i>	Incorporates the UAA
Virginia	Code Annotated	§§ 8.01-577 <i>et seq.</i>	Incorporates the UAA
Washington	Revised Code Annotated	§§ 7.04.010 <i>et seq.</i>	
West Virginia	Code	§ 55	Applies Only to Existing Disputes
Wisconsin	Statutes Annotated	§§ 788.01 <i>et seq.</i>	
Wyoming	Statutes	§§ 1-36-101 <i>et seq.</i>	Incorporates the UAA