DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

FINDING THE RIGHT FIT:
A COMPARISON OF LITIGATION IN DELAWARE'S SPECIALIZED COMMERCIAL COURTS AND ARBITRATION

LIVE DSBA SEMINAR

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION IN PARTNERSHIP WITH THE INTERNATIONAL CHAMBER OF COMMERCE INTERNATIONAL COURT OF ARBITRATION AND USCIB/ICC USA

WEDNESDAY, JUNE 21, 2023 | 4:00 P.M. – 5:00 P.M.

1.0 Hour of CLE credit for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

Parties have a choice when it comes to litigating complex commercial disputes. In this program, a panel of current and former judges and arbitrators from Delaware and beyond will discuss the advantages and disadvantages of arbitration vs. litigation and the various venues that might be consider for resolving disputes.

Moderator

Travis S. Hunter, Esquire
Richards, Layton & Finger, P.A.

Speakers

The Honorable Meghan A. Adams
Superior Court of the State of Delaware

Joseph R. Slights III, Esquire
Wilson Sonsini Goodrich & Rosati

Conna Weiner, Esquire, FCIArb

Marek Krasula, Esquire
International Chamber of Commerce
International Court of Arbitration

Visit https://www.dsba.org/event/finding-the-right-fit-a-comparison-of-litigation-in-delawares-specialized-commercial-courts-and-arbitration/ for all the DSBA CLE seminar policies.

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Finding the Right Fit: A Comparison of Litigation in Delaware's Specialized Courts and Arbitration

Delaware State Bar Association: June 21, 2023 @ 4:00 PM - 5:00 PM

Networking Event to Follow

Sponsored by the DSBA & the ICC

ICC International Court of Arbitration® 100 years

Caveats!

- **Personal Views Only**

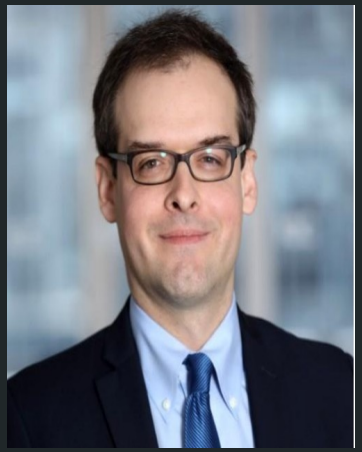
The Panel

Travis S. Hunter

Joseph R. Slights III

Honorable Meghan A. Adams

Conna A. Weiner



Marek Krasula

Business Courts – Who Needs Them?

Court of Chancery

CCLD

Boston

Texas

Georgia

(Apparently Everyone)

Delaware Superior Court CCLD – A Popular Venue

How Do I Get There?

The Complex Commercial Litigation Division (CCLD) for Superior Court, New Castle County started in May 2010.

Any case that includes a claim asserted by any party (direct or declaratory judgment) with an amount in controversy of $1 Million or more (designated in the pleadings for either jury or non-jury trials), or involves an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement, or is so designated by the President Judge, qualifies for assignment to the CCLD.

Excluded cases include any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or household purposes or where the agreement relates to an individual or collective contract of employment.

Delaware Superior Court CCLD – Case Management

The following principles shall govern the administration of cases assigned to the CCLD:

a. The case will remain assigned to the same Panel Judge for all purposes through final disposition. If the assigned Judge rotates off the Panel, the case will remain with that Judge through final disposition.

b. The Panel shall establish uniform procedures and Case Management Forms for the handling of qualifying cases. The assigned Panel Judge will hold an early Rule 16 scheduling conference after all responsive pleadings have been filed. At such conference the parties shall meet and confer with the Panel Judge concerning the progression of the case through trial and preparation of a case management order. View Revised 2015 Sample Case Management Order. Unless otherwise ordered by the Judge after conferring with the parties at the Rule 16 scheduling conference, the case management order shall:

   i. establish a procedure for handling discovery disputes and dispositive motions which may include the handling of such disputes by the Panel Judge or a particular Commissioner or appointed Special Master;
   ii. require early mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a);
   iii. establish procedures for electronic discovery and other matters relevant to the case (e.g. appropriate protective orders and alternative dispute resolution procedures). View sample e-Discovery Plan (Exhibit B); and
   iv. address other matters set forth in Rule 16 and any other matters appropriate in the circumstances of the case.

c. Firm pretrial and prompt trial dates will be established which will not be continued due to scheduling conflicts with other civil cases. Trials will be scheduled during the Panel Judge's scheduled civil rotation on the soonest practicable date given the pretrial complexities of the case and will be given priority as among the Panel Judge's other trial assignments. Prior to trial, the Court will:

   i. establish procedures for the conduct of the trial as a bench trial, should the parties agree to a bench trial, including procedures to streamline the presentation of evidence, to efficiently present legal issues in pre- and/or post-trial briefs, and to ensure prompt and effective post-trial decision(s) on the merits; and
   ii. establish appropriate special procedures for the selection of the jury and the conduct of the trial before a jury should the parties elect a jury trial.

Delaware Superior Court CCLD – Popular Business Disputes

In re: Designation of Actions Filed Pursuant to 8 *Del. C.* § 111

Arbitration – Confidential Resolution of Business Disputes

Chancery Arbitration??

A More Traditional Approach

- ICC
- JAMS
- AAA
- DRAA

Benefits of Arbitration?

- - Confidentiality
- - Subject Matter Expertise
- + Procedural Benefits
- + Substantive Benefits
- - Customization for Speed and Efficiency
- - Global Enforcement
- - Easier Cross-Border Resolution

“ICC” – What’s That?

- Global Reach
- Case Management Process
- Terms of Reference
- Award Scrutiny

Arbitration – Actual Truth or Urban Legend?

- Split the Baby?
- Rogue Arbitrator?
- Can't Appeal?
- No Off Ramp (MTD, SJ)?
- Expensive?
- Limited Third-Party Participation? (discovery, etc.)
- Other?

Drafting Appropriate Venue Provisions

Standard ICC Arbitration Clause

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

Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator.

CCLD

"Each of the Parties hereby consents to the Superior Court of the State of Delaware, Complex Commercial Litigation Division, as the sole and exclusive forum for the resolution of any dispute relating to or arising out of this Agreement, except that, if the Superior Court lacks jurisdiction, the Parties consent to the exclusive jurisdiction of any other appropriate Court within the State of Delaware, to resolve any dispute relating to or arising out of this Agreement."

FORM AGREEMENT I
("Bare Minimum")

DRAA

NOTE: As set forth in the text, the arbitration clause that follows contains the bare minimum provisions necessary to invoke the DRAA. This form should be used sparingly, if at all, since it effectively consigns the parties to all of the default provisions of the Act. See Chapter 9, regarding the consequences of using this form.

The parties hereby agree to arbitrate any and all disputes arising under or related to this agreement, including disputes related to the interpretation of this agreement, under the Delaware Rapid Arbitration Act. This provision shall be governed by Delaware law, without reference to the law chosen for any other provision(s) of this agreement.

JAMS Standard Arbitration Clause for Domestic Commercial Contracts

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

Arbitration vs. Litigation Considerations

A Hypothetical Dispute

Small Biotech licensed certain underlying patents and know-how from University. It used the University technology to help develop a cancer drug, CancerCure, that is in Phase II clinical trials. In connection with that development, however, Small Biotech used other patents and research, as well as government funding, and filed its own patents on the technology it developed. The University license permits Small Biotech to sublicense the University's technology but requires that Small Biotech remit to University 2% of any "sublicensing income" obtained by Small Biotech from any downstream licensee of Small Biotech.

Small Biotech has now exclusively licensed all of the IP and know-how associated with CancerCure to Large Pharma Company so that Large Pharma Company can take the product forward through Phase III trials, submit the New Drug Application to secure FDA approval and commercialize the product with a large sales and marketing campaign. Large Pharma Company has a number of other cancer drugs in development and on the market. Large Pharma Company paid upfronts to Small Biotech and will owe Small Biotech milestone payments based upon the achievement of regulatory and commercial milestones, along with royalties upon sales once the product is launched. Large Pharma Company is required to try to meet these milestones using commercially reasonable efforts. The agreement also has a non-compete provision.

University, having belatedly learned about the deal with Large Pharma Company, is accusing Small Biotech of breaching obligations to share revenue it obtained from Large Pharma Company A pursuant to the sublicensing income provisions. Resolution of this dispute will likely require determining the magnitude of the contribution of University's technology to the bundle of rights exclusively licensed to Large Pharma Company.

Small Biotech is accusing Large Pharma company of not pursuing its obligations using commercially reasonable efforts, and in fact prioritizing pursuit of its other cancer products over CancerCure. Large Pharma Company has said it is making reasonable efforts and in any event has cited technical reasons and murky data in on-going trials for its failure to advance as quickly as Small Biotech would like. Resolution of these issues will likely require, among other things, an assessment of Large Pharma Company's reasons for its actions and the credibility of its claims that technical reasons justified the pace of its efforts.

Q&A

ICC Dispute Resolution Services

ICC Dispute Resolution Bulletin

2022 | ISSUE 2 | EXTRACT

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International Court of Arbitration

Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process

15 November 2021, online

During the 2021 New York Arbitration Week (NYAW), members of the ICC International Court of Arbitration ('Court') provided ten practical tips on how to improve the quality and enforceability of arbitral awards. These tips were based on frequent issues that arise during the scrutiny of draft awards. The discussion demonstrated the value of the scrutiny process to parties and identified common pitfalls encountered by arbitrators when drafting awards.

The panelists included Maria Chedid (Partner, Arnold & Porter, San Francisco; Alternate Member, ICC Court); Ndanga Kamau (Founder, Ndanga Kamau Law, Kenya/Netherlands; Vice President, ICC Court); Ina C. Popova (Partner, Debevoise & Plimpton, New York; Member, ICC Court); and Todd Wetmore (Partner, Three Crowns, Paris; Vice President, ICC Court). The text below is a synopsis of the full event which can be viewed online.

What is scrutiny?

Scrutiny of draft awards, a distinctive feature of ICC arbitration, is designed to enhance the quality and enforceability of awards. Pursuant to Article 34 of the ICC Rules of Arbitration ('ICC Rules'),[1] no award shall be rendered by an arbitral tribunal until the award is approved by the Court. Scrutiny is a mandatory gateway through which an award must pass before it is notified to the parties. During the scrutiny process, the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, the Court also may draw the arbitral tribunal's attention to points of substance.

The scrutiny process involves multiple layers of review and may take up to three to four weeks.[2] As a first step, the Secretariat of the Court reviews the draft award and prepares suggested comments, setting out observations on various drafting and substantive points.

The Court then reviews the award with the assistance of the Secretariat's comments and identifies the points to be brought to the attention of the arbitral tribunal. The Court also decides whether to approve the award as drafted, approve the award subject to its comments being subsequently addressed by the arbitral tribunal, or not approve the award and invite the arbitral tribunal to provide a further revised draft.[3]

When the Court scrutinizes draft awards, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration (see Article 7 of Appendix II to the ICC Rules). The consideration of mandatory law aligns with the general rule that both the Court and the arbitral tribunal shall make every effort to ensure that the award is enforceable at law (Article 42 of the ICC Rules).

Below are ten practical tips for arbitrators to improve the quality and enforceability of their awards. These tips can also assist counsel in international arbitration craft their submissions.[4]

1. Consult the ICC Award Checklist

The ICC Award Checklist ('Checklist') is an invaluable resource that the Secretariat provides to arbitral tribunals at the beginning of the arbitral process.[5] Though not exhaustive, the Checklist highlights key elements of a draft award that are frequently missing. The Checklist provides guidance for newer arbitrators and helpful reminders for more experienced arbitrators.

1 **https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/**

2 See paras. 168-171 of the **ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration**, which address the timing of scrutiny.

3 'In 2020, the Court approved 564 awards (142 partial awards, 383 final awards and 39 awards by consent). The vast majority of draft awards were approved subject to certain points raised for the consideration of arbitral tribunals. Only four draft awards were approved without any comments. A further 47 draft awards (7% of the total awards scrutinized in 2020) were not approved when first scrutinized by the Court and were returned to the arbitral tribunal for further consideration', see **ICC Dispute Resolution 2020 Statistics.**

4 The provided tips do not bind the Court and do not represent or reflect an official position of the Court.

5 The ICC Award Checklist and other ICC practice notes are available at **https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/**.

The Checklist includes reminders, for example, to:

- identify all parties and representatives in the arbitration;
- provide details about the relevant arbitration agreement(s);
- summarize the history of the proceedings;
- fully reason jurisdictional decisions and the tribunal's disposal of the parties' claims; and
- fix the final costs of the arbitration.

2. Support findings on jurisdiction and the merits by reference to specific contract provisions, provisions of law or case law; provide specific reasons for conclusions pertaining to the persuasiveness of evidence and on credibility

Because jurisdictional decisions are especially prone to challenge before domestic courts, it is crucial to have such decisions well-reasoned and substantiated. When a jurisdictional objection is raised, it is essential to make clear which parties are bound by the arbitration agreement(s), on what basis, and what law is applicable when analyzing this issue. In practical terms, as the ICC Award Checklist states, the award should quote the entire arbitration agreement(s), including any amendments, and address the issue of the (non) signatories to the relevant contractual documents.

When addressing jurisdictional objections, it is also important to identify the non-jurisdictional issues, such as those pertaining to admissibility. For instance, an issue may arise regarding whether a party has complied with mandatory pre-arbitration steps. As such, properly labeling these issues as they are addressed in the award is essential.

When addressing the merits of the case, and analyzing the parties' claims, arbitral tribunals should include specific references and citations to case law and evidence relied upon, just as parties are expected to do in their briefs. They should also cite to the parties' specific submissions and exhibits when referring to the parties' arguments, and avoid making conclusions based only on general references to 'parties' submissions' or 'evidence in the record'.

Furthermore, arbitral tribunals should identify the legal elements and evidentiary standard to be met for each claim or cause of action under the relevant applicable law. They should also explain why, for instance, a party has not met its burden of proof.

Similarly, general views to the effect that the arbitral tribunal found an expert or fact witness to be 'credible' should be accompanied by some explanation as to why the arbitral tribunal found the testimony persuasive. In the context of expert witness testimony, the arbitral tribunal should consider stating why it found the expert's conclusions to be well-founded or correct and specify the elements taken into account (e.g. calculation method applied, elements of comparison, the base amount(s) used, and the relevant period(s) of time).

When the arbitral tribunal has assessed expert/fact witness evidence based on general statements that it found the clarifications of a witness 'unconvincing' without further elaboration, the Court has requested that the arbitral tribunal include a summary of the testimony, the criteria applied in its evaluation and references to the relevant parts of the transcript.

3. Tread carefully with non-participating parties

When a case involves a non-participating party (i.e. a party fails to participate in the proceedings either from the outset or at a later stage, or the party comes in and out of the proceedings intermittently), the scrutiny process will focus in particular on the procedural history of the matter, decisions on jurisdiction, and the arbitral tribunal's reasoning on the merits.

To demonstrate that due process was consistently respected and that the non-participating party was given a fair opportunity to be heard, the Court expects to see a detailed procedural history in the award of all pertinent steps. The Court is therefore focused on whether the award contains references to the way notices were sent or attempted, when the attempts were made and notices received, how records of the notices were kept, and whether the non-participating party was informed of the consequences of its non-participation. Such detailed documentation can show that all means have been taken to inform the non-participating party of each step of the procedure.

In cases involving a non-participating party, arbitral tribunals also need to decide on their own jurisdiction per Article 6(3) of the ICC Rules. The award therefore should address the existence of a binding arbitration agreement and contain reasoning for this decision, and a determination on this point should be included in the dispositive section of the award.

Additionally, arbitral tribunals are expected to reflect in the award that they have even-handedly considered the evidence and neither automatically accepted the participant's arguments nor advocated for the non-participating party's case. In summary, the award should show how the arbitrators independently tested all claims and reached their conclusions.

4. Carefully approach *jura novit arbiter/curia*

When grappling with the possible application of *jura novit arbiter/curia,* arbitral tribunals are invited to proceed cautiously so they do not exceed their mandate, defy the parties' legitimate expectations, or override mandatory provisions of the *lex arbitri*, including any due process rules.

Arbitral tribunals should carefully consider the applicable legal framework, how it applies, and when and how the parties' comments should be solicited on legal arguments that the parties may have not raised. Inviting party comments can help prevent surprises down the line, show that the relevant law is properly applied, and support the enforceability of the award.

For example, during the scrutiny process, if the Court notices an authority cited that is not associated with a submission from the parties, it will usually enquire whether that authority or legal argument was raised by the parties, and if so, where it is in the record and how the opposing party responded. This omission can bring to light an issue of form (e.g. a missing exhibit) or point to a substantive concern (e.g. whether the tribunal raised a legal issue on which the parties did not have an adequate opportunity to comment).

In one instance, an arbitral tribunal applied the *jura novit curia* principle to raise a statute of limitations issue where neither party had raised or referred to the application of that principle in its submissions. The Court invited the arbitral tribunal to consider whether the parties would not be surprised by such decision as neither party had been given the opportunity to comment on that point. The Court also invited the arbitral tribunal to consider to what extent the *jura novit curia* principle under that governing law applied to issues concerning the statute of limitations. Following the scrutiny process, the arbitral tribunal confirmed that this principle of *jura novit curia* was applicable under the relevant law and included references to the principle in support of its conclusions in the award.

5. Treacherous waters of dissenting opinions — moderate your tone and address the points raised by the other side

While most awards are unanimous, in some instances, an arbitrator is unable to agree with the other members of the arbitral tribunal and will dissent from the majority decision. Dissents may be limited to only some issues and may be expressed with or without the filing of a separate dissenting opinion.[6]

If a dissenting opinion is filed, the arbitral tribunal should ensure that it meets the mandatory requirements of the applicable law/local law, which may have specific conditions or prohibitions on dissents. In addition, a dissent may be filed when a breakdown in relations between the members of the arbitral tribunal has occurred. In such case, arbitrators in the majority and the dissenter are invited to moderate their language and tone when referring to each other. Finally, the majority should consider whether it has adequately addressed, where appropriate, the points raised by the dissenting arbitrator.

6. Fraud/illegality allegations — don't avoid red flags

Tackling allegations of fraud can be tricky and the scrutiny process can help ensure that the award appropriately addresses such issues. Arbitral tribunals should not jump to conclusions that implicate fraud, but should pay appropriate attention to any red flags that give rise to legitimate questions of fraud that may require additional inquiry.

The Court may invite the arbitral tribunal to ensure that matters which could be red flags are properly addressed given that an award may be set aside for contravening public policy, failing to decide all issues, or if the arbitral tribunal goes too far, deciding something that the parties have not argued. Arbitral tribunals should be vigilant to deal with these sorts of issues, if they arise, in an appropriate level of detail in the award.

In one case, an arbitral tribunal initially concluded that, while one could see red flags, it did not have either the duty or the power to consider *sua sponte* whether the contract at issue had an illegal object or was tainted by illegality. During the scrutiny process, the Court drew the arbitral tribunal's attention to points of substance and whether additional steps had to be taken. The Court invited the arbitrators to consider diving deeper into the red flag issue, expanding on the standard of proof for these types of allegations under the applicable law, addressing best practices for red flags under the governing framework, and explaining how they applied the law and standards to the record before them. After several rounds of exchanges, the draft award was approved and notified to the parties.

6 'In 2020, of the 289 partial and final awards rendered by three-member tribunals, 46 awards (16%) were rendered by majority. All majority awards were accompanied by a dissenting opinion, incorporated in the award itself in 18 cases or made by way of a separate document in 28 cases', see **ICC Dispute Resolution 2020 Statistics.**

7. Beware of awards by consent and check whether they align with the applicable mandatory requirements

Although consent awards may appear to be straightforward, they require a degree of caution. When drafting consent awards, arbitrators must balance the need to respect the parties' agreement with ensuring that they are not unwittingly part of something nefarious. Appropriate precautions are required to ensure that awards by consent are not vehicles for money-laundering, corruption, fraud, or do not run against public policy by virtue of the agreements or settlement terms that they incorporate. If the Court has any doubts in this respect, it will invite the arbitral tribunal to make the appropriate inquiries.

The applicable law may also have an impact on the scope of agreements/settlement terms that can be ratified in awards by consent. In one instance, where the settlement agreement was drafted in very broad terms, the Court invited the arbitral tribunal to check whether the parties' settlement agreement needed to be in line with the scope of the parties' claims in dispute in the arbitration. The arbitral tribunal considered that, under the applicable law, settlement agreements could be drafted in broad terms, the parties' settlement agreement was in line with what was before the arbitral tribunal and did not contravene any mandatory requirements.

8. Write an enforceable dispositive section and don't rule *infra petita* or *ultra petita*

The dispositive section of an award should provide rulings on all requests for relief and reflect decisions made in the body of the award. It should avoid replicating the reasons or analysis from the body of the award, avoid declarations/orders that were not requested, and not include procedural directions. The dispositive section should instead respond directly to the relief sought by the parties (i.e. the orders/declarations the parties seek).

The crucial test at the scrutiny stage is whether the dispositive section addresses all of the claims – and nothing but the claims – that the parties have raised. The draft award contains a serious defect if an arbitral tribunal fails to address a claim/relief the parties have raised (*infra petita*) or if the arbitral tribunal grants relief that has not been claimed (thereby ruling *ultra petita*).

To ensure that all claims have been addressed in the draft award, arbitral tribunals should carefully track the relief sought by the parties from the inception of the case (and incorporated in the Terms of Reference) until the parties' final submissions and also pay attention to what may have been subsequently withdrawn.

9. Costs — be rigorous

Costs decisions are not always addressed thoroughly in draft awards. These decisions typically follow two basic approaches in ICC awards: either the loser pays the successful party's costs (often referred to as 'costs follow the event') or each party pays its own costs regardless of the outcome.[7] Frequently, the outcome of a case is not decisively in favor of one side or the other: there is mixed success, which can raise important questions as to how that scenario should be reflected in the allocation of costs.

The parties' conduct during the proceedings and considerations of reasonableness may also impact the allocation. The requirement that the costs be reasonable serves as an important check protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders.

While the allocation of costs is within the arbitral tribunal's discretion under Article 38 of the ICC Rules, the allocation may be subject to specific terms agreed upon by the parties in the arbitration agreement. The process for arriving at a decision on costs may also subsequently be agreed upon by the parties during the pendency of the arbitration. In one case, the parties had agreed that the arbitral tribunal should first render an award on the merits and then decide the costs. Because the tribunal also allocated costs in its draft award when deciding the merits of the matter, the Court alerted the arbitral tribunal during the scrutiny process that it needed to follow the sequence that had been agreed by the parties.

In short, when scrutinizing an award, the Court will consider whether the arbitral tribunal has clearly set out the parties' positions on costs in their draft awards, specified the total amounts claimed (by all sides), provided an assessment of the reasonableness of the parties' legal and other costs (e.g. time spent, number of lawyers, number of submissions and complexity of the matter), and included a decision on who should pay these costs, in what specific proportion, and why.

7 For more information and a study of ICC awards, see ICC Arbitration and ADR Commission Report on **Decisions on Costs in International Arbitration** (2015).

10. Interest — seek clarifications from the parties when appropriate

Parties often neglect to address in sufficient detail issues pertaining to interest, and instead make a general conclusory request for interest or rely upon a general statement at the end of their submissions requesting from the arbitral tribunal any relief that the arbitral tribunal may deem appropriate. Arbitral tribunals in draft awards also frequently give insufficient attention to requests for interest, especially in cases in which the parties have not provided fulsome submissions on the issue.

Issues regarding interest which may need further attention include: (i) whether the party seeks interest on all amounts awarded, including arbitration costs, or only on certain amounts; (ii) the start and end dates for the calculation of interest; (iii) the applicable rate; (iv) whether interest should be simple or compound; and (v) whether post-award interest should run on accumulated pre-award interest in addition to the principal claims, at the same rate, or at a different rate.

To avoid the need to seek supplemental submissions on interest at a late stage of the proceedings, arbitral tribunals should ensure that the parties have fully ventilated the issues in their submissions. When drafting the award, the arbitral tribunal can then fully state the reasons for its decision to grant or deny the request for interest, with reference to the parties' submissions, and if interest is awarded, its justifications for the type of interest awarded.

This synopsis was prepared by Marek Krasula, Director, ICC Arbitration and ADR, North America; Abbey Pellino Hawthorne, Deputy Director, ICC Arbitration and ADR, North America; and Stephanie Torkomyan, Publications Manager, ICC Dispute Resolution Services. They wish to thank Shivani Garg and Joao Gabriel Campos for their assistance.

RICHARDS, LAYTON & FINGER

The Practitioner's Guide to the **Delaware Rapid Arbitration Act**

SECOND EDITION

By Gregory V. Varallo, Blake Rohrbacher and John D. Hendershot

STATE OF DELAWARE
DEPARTMENT OF STATE

Delaware has long been recognized as the preeminent authority on corporate law. The State's General Corporation Law, as well as its advanced modern statutes for alternative entities, provides companies with the stability and flexibility they need to manage their affairs. For more than a century, Delaware legal professionals have worked together to craft and fine-tune this sophisticated collection of business statutes to address the evolving needs of the business community.

The Delaware Rapid Arbitration Act reflects this commitment to serve the State's corporate citizens in a thoughtful and collaborative manner. Responding to the call for alternatives to the existing arbitration regimes, the Act provides an innovative arbitration process that builds on the best practices of leading international arbitration chambers to offer a brand new option for efficient and binding resolution of business disputes.

This handbook provides the first in-depth discussion of the nuances and the practical application of the Act, and serves as a guide for businesses and counsel to understand the opportunities the new Act provides.

It is our hope that this legislation will provide an effective mechanism for the speedy, efficient, and fair resolution of business disputes, regardless of the nature of the problem and the location of the parties.

Jeffrey W. Bullock
Secretary of State
Delaware

Revised, December 2015
Published, April 2015

TABLE OF CONTENTS

Introduction*

In April 2015, Delaware Governor Jack Markell signed into law one of the most highly specialized arbitration statutes ever passed: the Delaware Rapid Arbitration Act (hereafter the "Act" or the "DRAA"). The Act, a response to the request by Delaware's corporate citizenry for a modern and useful arbitration statute, is the work of an interdisciplinary team of arbitration practitioners from Delaware, New York, Washington and abroad, led by Delaware's Chief Justice Leo E. Strine, Jr., Delaware's Chancellor Andre G. Bouchard and Delaware's Secretary of State Jeffrey Bullock.

Developed through extensive consultation with leading U.S. and foreign arbitration specialists, the Act is intended to capture the best practices of the leading international arbitration chambers while also addressing key complaints about arbitration voiced by Delaware's corporate citizenry. The Act was built upon Delaware's earlier (now enjoined) experiment with prompt, confidential court-annexed arbitration, preserving the best features of that experiment and adding to its strengths in several ways. While respecting the parties' contractual decisions throughout, the Act also innovates to make commencing an arbitration a speedy and inexpensive process, accelerates the arbitration itself to ensure a swift resolution, does away with confirmation proceedings altogether, and provides for either contractual appeals or challenges directly to the Delaware Supreme Court.

The Act is not designed to preempt more "traditional" arbitration proceedings. Indeed, the drafters of the Act understood what the practitioner needs to understand most clearly: arbitration under the Act is a speedy, specialized proceeding for prompt and confidential business dispute resolution. It is not suitable to parties who are not willing to move to speedy resolution of a dispute. Nor is it suitable to parties seeking to retain "optionality" in arbitral proceedings,

such as the right to challenge the scope of the arbitrator's authority, slow the proceedings with interim challenges to the arbitrator's rulings, or grind the proceedings to a halt with motions and other disputes.

Instead, those who opt to proceed under the Act do so with a clear understanding that their arbitrator, whether selected by the parties or appointed by Delaware's Court of Chancery, will have broad powers to rule on the scope of the arbitration itself as well as on his or her own authority. The arbitrator will have the authority to grant a full panoply of injunctive and other remedies and, unless the parties contract for a broader appeal, will be subject to only the most limited standard of review in any challenge. In short, those who determine to proceed under this Act do so with the understanding that they are asking for prompt and efficient resolution of their disputes, and that they will get such resolution with only minimal review of the arbitrator's decisions. Delaware's "rapid" arbitration statute is meant to be just that.

In response to comments from general counsel of large companies based around the world, the Act returns arbitration to its long-lost roots: speedy, efficient and binding resolution of disputes, stripping away the various mechanics of delay that have built up over the last 50 years of practice. Make no mistake: the DRAA is not for the faint of heart or for those who would seek to use disproportional leverage to their favor in the event of a dispute. Instead, the Act is designed to address resolution of disputes where the parties most need no-nonsense and swift resolution (for example, in the case of ongoing business relationships that can't abide drawn-out litigation).

The purpose of this handbook is to assemble in one place what the practitioner needs to know to proceed under the Act, including the dispute resolution forms necessary to invoke the DRAA, practical guidance based on the authors' direct experience with the prior Delaware arbitral regime, and insight into the drafting of the Act and the Delaware Rapid Arbitration Rules that accompany it.

* The authors wish to thank their colleague Sarah Galetta, Esq., for her invaluable assistance in the creation of this second edition of the handbook.

CHAPTER 1

Background to the DRAA

In many ways the Act is the second generation of modern thinking in Delaware regarding efficient arbitration-based dispute resolution. Of course, for years Delaware has had its own version of the Uniform Arbitration Act,[1] but it was not until 2009, under the leadership of former Chancellor William B. Chandler, III, of the Delaware Court of Chancery, that the state moved beyond the Uniform Act's approach to such proceedings and began to innovate with court-annexed arbitration. Understanding this initial experiment is important to understanding the Act, as the Act was built on the success of that first set of alternative dispute resolution experiments.

Delaware's Experiment with Judicial Arbitration

In 2009, Delaware's General Assembly passed the state's first modern experiment with arbitration, 10 *Del. C.* § 349, titled *Arbitration Proceedings for Business Disputes*. The statute was simple: it provided that any Delaware-formed business entity could, by agreement, consent to arbitrate matters confidentially before a sitting member of the Delaware Court of Chancery, a court widely recognized as the leading business law court in the United States. The idea animating the statute was even simpler: to offer Delaware's business citizens the very best of the Delaware judicial system in confidential arbitral proceedings for the speedy and efficient resolution of business disputes between sophisticated business entities. No longer would parties who chose arbitration be faced with arbitrators' noted tendency to "split the baby."

1 10 *Del. C.* § 5701, *et seq*.

Instead, the arbitrator was a sitting judge, schooled in making decisions and moving on. As passed, the legislation also provided that any proceeding to "vacate, stay or enforce" an order of the Court in an arbitration proceeding would be filed directly with the Delaware Supreme Court, which Court was expressly required by statute to "exercise its authority in conformity with the Federal Arbitration Act."[2]

Soon after the statute was enacted, the Court of Chancery adopted rules for proceedings under the statute. Most important among these rules was Rule 97(e), providing for the arbitration hearing to "generally" occur within 90 days of the parties' filing of their petition to arbitrate. Thus, through its rules implementing the new legislation, the Court dealt with the second most prevalent critique of arbitration: it simply takes too long to get to resolution when the decision makers are paid by the hour.

Notwithstanding that any new experiment in dispute resolution often takes years to play out—parties first learn about and then include clauses triggering the new forum's arbitration in their commercial agreements, only to reach arbitration years later when a serious dispute threatens to disrupt their business relationship—Delaware's experiment was met with widespread interest and prompt adoption. Thus, in the first year that the Chancery Court Rules were in place, no fewer than six different arbitrations were filed on the confidential "arbitration only" docket of the Court, and all were finally resolved by either the assigned judicial arbitrator or the parties themselves.

As the parties pushed forward with their arbitrations under the new regime, a number of practical lessons were learned. For example, while the Chancery Court Rules provided for final resolution of all arbitrations within 90 days of the initial conference, for most of the newly filed arbitrations that time period was simply too truncated. Thus, in two of the more complex of the first wave of arbitrations, the parties, by stipulation, extended the time for final resolution to 120 days. The first of these resulted in a ruling from the arbitrator within the extended time frame, and the second settled two days into the final hearing. In another matter, however, the parties had agreed to submit their disputes without discovery or live witnesses, and were able to resolve their limited legal issues well within the 90 days provided under the rules.

Likewise, as the Court became attuned to the needs of parties to arbitration proceedings, the Court's Rules Committee was tasked with amending the rules to ensure that parties to arbitrations had a workable and efficient set of rules to

2 10 *Del. C.* § 349(c).

govern their proceedings. For example, as initially adopted, the rules promulgated by the Court for arbitrations merely piggybacked on certain (but not all) of the Chancery Court Rules, leaving much discretion to the arbitrator. But experience showed rather quickly that the failure to include Rule 15 (pertaining to amendments) and Rule 45 (relating to third-party subpoenas), among others, gave rise to some practical issues.[3]

Likewise, the first parties to go to final award in an arbitration were uncertain of precisely how to go about confirmation of that final award, absent some public proceeding in the Court, while still maintaining the confidential nature of the proceedings. The direction from the Court was interesting: the Vice Chancellor who had acted as arbitrator to decide the matter would simply "change hats" and exercise his judicial authority as Vice Chancellor to confirm his own award and direct its entry on the record of the Court as an enforceable judgment.

But before experience with the regime was able to lead to a more tailored set of rules or to the first appellate proceedings under the new regime, the federal government intervened to put an end to the state's developing experiment in arbitration.

The Federal Government Halts Delaware's Experiment

Delaware Coalition for Open Government, Inc. v. Strine,[4] which challenged the state's arbitration program under the First Amendment to the U.S. Constitution, was filed and served on the defendants (the five members of the Court of Chancery) on the very day that the Court held its first hearing under the new regime. The suit began in the U.S. District Court for the District of Delaware, where all the members of the Court recused themselves. The District Court, with a judge from the Eastern District of Pennsylvania presiding by designation, granted judgment on the pleadings, striking the statute in its entirety (notwithstanding that such relief had not been asked for by anyone) on grounds that the proceedings were effectively trials, and trials (at least criminal trials) had historically been open to the public.[5]

On appeal to the U.S. Court of Appeals for the Third Circuit, a three-judge panel wrote three separate opinions. Notwithstanding the lower court's decision to grant broader relief than requested or to strike down a state statute in its entirety,

3 *See, e.g.*, Varallo, Rollo & Zeberkiewicz, *Chancery Arbitrations After Year One: Annotated New Form*, ABA Section of Litigation, Commercial & Business (Aug. 16, 2012).

4 894 F. Supp. 2d 493 (D. Del. 2012).

5 *Id*.

and even though federal jurists around the country routinely engage in non-public ADR of pending civil disputes, usually through mediation, the first of the three opinions determined that the District Court's ruling should be upheld on the basis that the so-called "reason and experience" test suggested that civil trials had historically been open to the public and that arbitrations, while sometimes confidential, had also been held publicly from time to time. The lead opinion also took issue with the fact that the proceedings were conducted by sitting judges in a courthouse.

The concurring opinion found no fault with sitting judges acting as arbitrators, but concurred in the judgment invalidating the statute on the basis that the public had a right of access to such proceedings, based on a less than clear historical record. The sole dissenter, Judge Jane Roth, forcefully defended the state's experiment and took issue with the historical record as related by the other members of the panel in their "experience and logic" analysis.[6]

The state's writ of certiorari to the United States Supreme Court, although supported by various amici, was not able to attract sufficient support on the Supreme Court, effectively ending the state's innovative experiment with confidential, judicially annexed arbitration.[7] Interestingly, the Third Circuit's judgment, which now stands as the law of (at least) that circuit on the subject of public access to judicial proceedings conducted in courthouses, seems not to have shut down the federal courts' constructive use of private ADR before magistrate judges and others to resolve so many of the matters initially filed in those courts.

Lessons Learned from Round One

Delaware learned several lessons from its initial experiment with court-annexed confidential arbitration. First, as made clear by the lack of action by the U.S. Supreme Court, using sitting judges for confidential arbitrations is simply not possible. But since one of arbitration's key benefits is confidentiality, it seemed to make no sense to continue the program utilizing judges to conduct public arbitration proceedings. Indeed, given the flexible approach to proceedings in the Court of Chancery, few doubt that consenting parties to a publicly filed civil action in that Court could simply consent to truncate their matter and apply for early scheduling, effectively replicating the efficiency benefits of arbitration in a civil case. For example, there is no clear reason why parties to a Chancery Court action

6 733 F.3d 510 (2013).
7 *Strine v. Delaware Coalition For Open Government, Inc*., 134 S. Ct. 1551 (2014).

could not simply stipulate that neither party would take more than five depositions without court order on good cause shown, both would waive their rights to file substantive motions, and both would join in approaching the Court to set a final trial in 120 days.

Moreover, notwithstanding the enormous benefits of having arbitrations decided by sitting judges, the obvious downside to using currently serving judges is that the parties to the proceeding are required to come to the judges to arbitrate, rather than enjoy the benefits of an arbitration in the parties' locale.

Finally, the developing practice of attempting to eliminate unnecessary road blocks by having the arbitrator merely "change hats" and enter judgment as a member of the Court of Chancery, while useful, had not yet been sufficiently worked out to ensure the elimination of the ancillary proceedings that have become customary in arbitrations. Thus, nothing in the Court's rules or the statute itself dealt with the possibility of proceedings to enjoin the arbitration; similarly, nothing determined the scope of the arbitrator's authority under the body of common law developed around the distinction between "procedural" and "substantive" arbitrability. Likewise, as noted above, the regime had not existed for sufficient time to test the appellate experience in the Delaware Supreme Court.

Thus, by the time of the federal dismantling of Delaware's experiment, the state had learned that confidentiality was a *sine qua non* to a successful arbitration regime, that the place of an arbitration could matter, and that more work was needed to ensure that the typical collateral challenges to an arbitration proceeding were eliminated. At the same time, experience showed that a 90-day resolution track was perceived as useful to those using arbitration, even if more complicated matters typically required a bit more than three months to resolve.

CHAPTER 2

Delaware Innovates to Create the Rapid Arbitration Act

Soon thereafter, the state returned to innovating to meet the needs of its constituents. In his first State of the Judiciary address in June 2014, new Chief Justice Strine made clear that a revised arbitration regime was a top priority of the judiciary, and that he anticipated legislation being introduced in the General Assembly's 2015 session.

Problems Identified in Traditional Arbitration

Delaware's efforts to build the next generation of a world-leading arbitration regime were undertaken with a series of consultations around the world to identify the needs of Delaware's constituencies interested in ADR and how those needs could best be met. Representatives of the state met with companies and practitioners in the U.S. and abroad to evaluate the need for an improved arbitration scheme. Experts in international arbitration practicing in London, Singapore and the U.S. were consulted. Leading in-house counsel in various industries and academics with an interest in arbitration and ADR were consulted, as were corporate practitioners from across the country.

As a result of months of such consultations, the working group developing the statute identified a number of problems that seemed to pervade more traditional arbitration. While ADR advocates have always promised prompt and efficient resolution of disputes, the feedback from arbitration practitioners suggested that arbitration practice differs significantly from expectations.

Curiously, one of the biggest complaints heard throughout the consultation process related to speed. Arbitrations, once thought of as a highly efficient short cut to final resolution of complex business disputes, have become every bit as slow and laborious as some court actions. This appears to have resulted from two identifiable trends: each party's desire to preserve its own optionality and, in some cases, the arbitrator's perceived desire to maximize his or her personal return.

The first trend manifests itself at the outset of many arbitrations. In circumstances where an agreement to arbitrate does not name an arbitrator or clearly define a type of arbitrator on which the parties can reasonably (and promptly) agree, the parties often seek judicial aid to appoint the arbitrator. In one matter in which the authors were involved, for example, the arbitration agreement provided for an "appraiser" to value a series of complex and valuable businesses in a joint venture dissolution. When the parties were unable to agree on who that appraiser should be, months of civil litigation followed in which the issue was whether an appraiser was an investment banker or a recognized member of one or more of the professional appraisal associations. In another matter, after the accounting firm chosen by the parties' contract as their arbitrator declined the appointment, the parties spent almost a full year negotiating the retention of a suitable replacement firm.

Even where an arbitrator is identified in the parties' agreement or is easily agreed on, the law in many jurisdictions allows parties who have committed to arbitration to access the courts, either before or during the arbitration. Thus, a body of complex common law has grown around issues identified as "substantive" and "procedural" arbitrability, with one category of questions to be determined by a court and the other by the arbitrator. In almost all cases where such a dispute arises, however, parties who have already agreed to arbitrate quickly find themselves subject to often extensive judicial proceedings to determine whether an arbitration should go forward, who should decide the parameters of that arbitration, and what those parameters will be.

Likewise, the need to "confirm" an arbitral award presents yet another opportunity to slow the ultimate resolution of the matter and involves a new decision maker in the mix. Where the confirming court does not closely hew to the Federal Arbitration Act scope of review, confirmation proceedings may become mini-adjudications of already arbitrated issues.

Thus, the first identified series of trends—parties' desire to preserve optionality—manifests itself at numerous points along what should otherwise

be a truncated timeline and tends to cause that timeline to become elongated, with concomitant expense associated with the drawing out of the dispute. Certainly, if the parties to a contract anticipate resolution of their dispute in three months, taking a year to identify the arbitrator is not likely to lead to the bargained-for resolution.

The second identified trend is the universal human desire to maximize one's own interests. Based on feedback from the state's consultations, it appeared that the subtle influence of self-interest—both on the part of practitioners and of arbitrators—may also tend to extend arbitrations. Unlike public judges who get paid no more in longer disputes, private arbitrators often face the opposite situation. While the blame for what has become widely recognized as an unduly elongated process cannot rest wholly on the professionals who administer that process, arbitrators cannot escape some degree of responsibility for the gradual mutation of the arbitration process.

In addition to these trends towards delay, inefficiency and cost, Delaware's consultation process also suggested as a concern the lack of a sufficiently independent pool of decision makers. In addition, in many cases the parties wished to appoint specialized arbitrators for their matters who, while highly knowledgeable about an industry, might lack training in law. For example, many transactional disputes involving "true ups" or post-closing adjustments selected accounting or other financial arbitrators. But, to the extent that such parties were not also law-trained, when called on to apply the law selected by the parties, such specialized arbitrators often found themselves outside their own expertise and largely without any reliable way to navigate the often difficult legal issues presented by the parties.

Thus, the state's constituencies identified several basic challenges, the solutions to which were perceived as making any arbitral regime more useful and thus likely to be used. Those were: (1) a return to truly speedy resolution of disputes in arbitration without undue costs or distractions, (2) access to an independent appellate body expert in the law and willing to limit challenges to the narrow scope of the Federal Arbitration Act, and (3) the ability to utilize non-law-trained experts as arbitrators without losing the ability of such arbitrators to assess and apply the law where appropriate and necessary.

Solutions Implemented in the DRAA

The working group that drafted the DRAA was informed by this feedback and focused on finding working solutions to each of the challenges presented.

Offering solutions to each identified challenge, the DRAA implements a number of new approaches in arbitration that make the statute unique among national and international arbitration regimes.

First, the Act provides for a truncated "summary" proceeding before the Delaware Court of Chancery to select an arbitrator where such selection was not made in the agreement to arbitrate.[8] By statute, this proceeding must be concluded no more than 30 days after its initiating filing is served, and the jurisdiction of the Court is highly limited.

Second, the Act eliminates the "optionality" problem by divesting the courts of jurisdiction to hear and decide any issue concerning arbitrability or the scope of issues to be arbitrated. Instead, the Act vests the arbitrator, and only the arbitrator, with the power and authority to decide such issues. Thus, the body of law relating to whether an issue presented at the outset is "substantive" or "procedural" does not apply to arbitrations under the Act, and neither party can seek to disrupt the commencement of a DRAA arbitration by running into court.

Third, the Act vests the arbitrator with power to enjoin any conduct of a party to the arbitration and divests the courts of power in this regard after an arbitrator is appointed,[9] thus avoiding the need for parallel proceedings to compel or enjoin arbitration. The answer selected by the Act is simple: if a decision is needed, bring the matter to the arbitrator and the arbitrator will decide it quickly and finally.

Finally, the Act provides that, absent an agreement otherwise, all matters must be finally determined within 120 days of the arbitrator's acceptance of appointment (which deadline may be extended to 180 days, but no longer, by unanimous consent of the parties). Furthermore, the Act imposes a financial penalty on an arbitrator who does not decide the matter within the allotted time frame: the forfeiture of the arbitrator's fees. The Act solves the second identified issue relating to the availability of appeal by making challenges to the arbitrator's final award available directly to the Delaware Supreme Court in accordance with the limited standards set forth in the Federal Arbitration Act, eliminating any intermediate level of review. The Act also provides that the parties may waive any right to challenge or appeal the arbitrator's final award by agreement or, where the parties wish to maintain confidentiality or allow more searching review, they may proceed with an arbitral appeal.

8 *See* Chapter 5.

9 The Court of Chancery retains power to issue injunctions in aid of arbitration only until the arbitrator is appointed and accepts appointment.

The Act also allows the parties to an arbitration agreement to select an arbitrator not trained in law to resolve their dispute. Thus, financial specialists, accountants or industry experts may be selected and appointed as arbitrators. In such circumstances, the arbitrator may retain a lawyer to decide any legal issue arising during the course of the proceeding. While the expert arbitrator will render the final award in the arbitration, to the extent that the arbitration requires the resolution of legal issues, the retained lawyer (subject to the arbitrator's determination) may exercise the full power of the arbitrator to render decisions on such issues of law. Arbitrators who use this option may wish to rule directly (based on their counsel's advice) to avoid any possible foreign enforcement issues arising from such rulings.

In short, the Act directly addresses and resolves each of the major issues identified by the statute's constituencies as problems or issues arising in more traditional arbitration proceedings. The drafters of the Act recognize that some of these solutions may lead to fewer rather than more DRAA arbitrations. Nevertheless, Delaware opted for a regime that is responsive to concerns expressed by arbitration constituencies in an effort to revitalize arbitration as an efficient, speedy and meaningfully different dispute resolution choice.

CHAPTER 3

An Overview of the DRAA

The Overriding Principle of Freedom of Contract

Delaware's jurists have often described the state as "contractarian" in the sense that Delaware takes seriously both the importance of allowing parties the freedom to contract as they see fit and the obligation to enforce those contracts as written when disputes arise.[10] Delaware's statutes often expressly include a statement of policy intended to give "maximum effect to the principle of freedom of contract."[11] The Act continues that strong policy preference for private ordering and freedom of contract, expressly stating that the "policy" of the Act is "to give maximum effect to the principle of freedom of contract and to the enforceability of agreements."[12]

In particular, the Act leaves to the parties decisions such as who should be the arbitrator, whether the matter should be decided by one arbitrator or a panel of arbitrators, the rules that will govern the arbitration, whether the parties will be allowed to gather and present evidence before the arbitration hearing, whether that evidence-gathering process will extend to third parties, the scope of the arbitrator's power to make final awards, the place and timing of the proceedings, and the nature of the challenge or appeal (if any) from the arbitrator's final award. By allowing the parties a high degree of freedom to contract, the Act is intended to provide a flexible platform for highly customized proceedings; of course, the Act also contains a series of default provisions where the parties choose not to

10 *See, e.g., GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011).
11 *E.g.*, 6 *Del. C.* § 18-1101(b).
12 10 *Del. C.* § 5811.

customize. As is the case in many other areas of Delaware law, however, the Act purposefully elevates private ordering above the imposition of "one size fits all" statutory mandates and is best understood as a broadly enabling statute.

The Overriding Importance of Speedy, Efficient and Private Dispute Resolution

If one theme pervades the Act, it is the intent to create an arbitral regime with the potential to put an end to protracted arbitration proceedings. Described in Chapter 2, Delaware's consultation process revealed a perception that arbitration had become bogged down in procedural gamesmanship and had become just as slow-moving and expensive as litigation.

The Act also offers the important benefit of privacy in the resolution of disputes. Parties to disputes often prefer not to have the fact of their disputes become public. For example, venture capital firms whose purpose is to invest in promising start-up companies tend to prefer not to become publicly identified with litigation against their investees, given the competition among such firms for new investments. Of course, there are many other examples, but all point in the same direction: disputing parties need a speedy, efficient and private form of dispute resolution.

Qualifying Disputes

The Act is to be used primarily to resolve business disputes. Thus, by its terms, the Act is not applicable to any dispute with a "consumer," as that term is defined in the Delaware statutes.[13] Similarly, the Act may not be used to resolve disputes involving homeowners' associations, a prohibition to ensure that the Act may not be used unfairly in such circumstances.[14] Unlike Delaware's prior arbitration statute, however, the DRAA does not contain any monetary thresholds. Thus, parties may use the Act to seek non-monetary relief or a declaration as to how a particular contract provision is to be interpreted.

To invoke the Act, the parties must have a written agreement signed by the parties to the arbitration. The agreement to arbitrate must be governed by Delaware law (regardless of the law governing the broader contract), and the agreement must expressly refer to the Act by name.[15] Likewise, one of the parties to

13 10 *Del. C.* § 5803(a)(3).
14 *Id.*
15 10 *Del. C.* § 5803(a)(5).

the arbitration must either have its principal offices in Delaware or be a Delaware-organized entity—either a corporation, limited liability company, partnership or other Delaware-chartered business entity.[16] Importantly, the Delaware-chartered entity need not actually do business in the state. Nor does the statute preclude the formation of a special purpose Delaware entity for purposes of utilizing the statute. Put differently, nothing in the Act would preclude the ability of a non-Delaware entity from forming a Delaware subsidiary to enter into a contract for the express purpose of availing the parties to that contract of the benefits of the Act.

Likewise, although the requirement that the parties to the arbitration sign the agreement to arbitrate would preclude the use of the Act to resolve intra-corporate governance disputes with non-signing stockholders, the parties to a stockholders' agreement or an LLC operating agreement in a private-company context could well agree to resolve governance disputes under the Act, provided only that all parties must sign the agreement containing the DRAA arbitration provisions.

Doing Away with the Initial Round of Disputes: Procedural and Substantive Arbitrability Reserved for the Arbitrator

As noted in Chapter 2, the Act includes a number of approaches designed to build speed and efficiency back into arbitration. One way the Act accomplishes this goal is to eliminate that typical initial round of litigation before arbitration, where one party seeks relief in court to determine which issues are properly subject to arbitration and which are not. The Act makes clear that the arbitrator, and not the court, has sole jurisdiction to determine such questions. By statute, therefore, any dispute with respect to the scope of what is to be arbitrated is vested solely with the arbitrator, thus effectively eliminating initial court skirmishes over the scope of the arbitration.

Empowering the Arbitrator: Extremely Limited Extra-Arbitral Injunctions

Another common round of litigation often occurs at the outset of an arbitration when one party attempts to enjoin the other from proceeding with an arbitration, typically on the theory that the dispute is not covered by the contract's arbitration clause. Such proceedings often slow the pace of dispute resolution and involve the parties in public litigation when they have bargained for private arbitration, working against the strong policy in favor of rapid and efficient

16 10 *Del. C.* § 5803(a)(2).

final resolution of controversies. The Act addresses the issue by divesting courts of the power to enjoin an arbitration altogether.

While the Act authorizes the Court of Chancery to issue an injunction "in aid of arbitration," the Court may only do so for the period before the arbitrator accepts appointment. Moreover, this limited grant of jurisdiction can only be used in a way that does not "divest the arbitrator of jurisdiction or authority."[17] Thus, by limiting the jurisdiction of the Court and empowering the arbitrator, the Act is designated to avoid the delays associated with the pre-arbitration skirmishes that have become commonplace.

Doing Away with the Confirmation Process: Deemed Confirmation

In addition to eliminating pre-arbitration litigation, the Act also accelerates the final resolution of disputes by removing another layer of delay between award and finality. It does so by eliminating the confirmation process.

In many jurisdictions, an arbitrator's final award must be converted to a final judgment of the court to commence enforcement or collection proceedings. This is typically accomplished through the filing of a civil action to confirm the arbitral award as a judgment of the court. Although the grounds on which a party may challenge confirmation are limited by the Federal Arbitration Act, this proceeding can still take additional time and effort and, by definition, will always delay the finality of arbitration proceedings.

The Act does away with this layer of review (which in many cases is simply another time-consuming obstacle to a prompt final resolution) by providing that the arbitrator's final award is "deemed to have been confirmed" on the fifth business day following the period in which the parties may file a challenge to the Delaware Supreme Court or invoke the jurisdiction of a private appellate arbitration panel.[18] Thus, if the agreement to arbitrate waives appellate challenge or review, the arbitrator's final award is deemed confirmed by the mere passage of time and without the need for confirmation proceedings in the trial court. In many cases, this could truncate the path to final resolution of arbitrated disputes by as much as several months.

17 10 *Del. C.* § 5804(b)(5).
18 10 *Del. C.* § 5810(a).

Access to the Delaware Supreme Court for Limited Challenges; Arbitral "Appeals"

The Act expedites final resolution and deals with the subject of interim challenges to the arbitrator's rulings and orders simply: it prohibits them. Thus, any party to a DRAA arbitration is deemed by the Act to waive the right to challenge an interim ruling or order of an arbitrator.[19]

Similarly, the Act permits parties who have sufficient confidence in the arbitration process to waive the right to challenge the arbitrator's final award.[20] In such cases, the arbitrator's final award, which is "deemed confirmed" by the Act, will be the final step in the arbitration.

Where the parties wish to preserve the right to challenge the arbitrator's award, however, they may take such a challenge directly to the Delaware Supreme Court, without the need to first engage in a challenge before the trial court. The intent of this direct challenge process is clear: the Act seeks to accelerate the process to prompt and speedy final resolution. Under the DRAA, a challenge before the Delaware Supreme Court must be filed within 15 days of the issuance of the arbitrator's final award.[21]

Notably, the Delaware Supreme Court's jurisdiction is limited; it may only "vacate, modify, or correct the final award in conformity with the Federal Arbitration Act."[22] While the DRAA permits the parties to opt for private appellate arbitration in their contract, under no circumstances can the parties validly contract to expand the scope of a challenge before the Delaware Supreme Court, since that Court's jurisdiction is expressly limited by the Act.

The Act also provides parties with a third alternative: a private "appeal" to one or more appellate arbitrators. Such "appeals" are solely creatures of contract, so the parties may choose as broad or as narrow a scope of review as they wish.

19 10 *Del. C.* § 5803(c)(3).
20 10 *Del. C.* § 5809(d)(1).
21 10 *Del. C.* § 5809(b).
22 10 *Del. C.* § 5809(c).

CHAPTER 4

Commencement of Arbitration under the DRAA

Particularly given the many concessions that the DRAA requires, in an effort to maintain speed and efficiency, the statute contains provisions that seek to ensure that the parties who invoke the Act actually intend to do so. Thus, to qualify under the DRAA, an arbitration agreement must satisfy a number of specific requirements.

The Parties Must Specifically Agree to Arbitrate Pursuant to the DRAA

Arbitrations under the DRAA move quickly and require the parties to waive a number of procedural protections. Accordingly, the DRAA mandates that the parties make a specific and unequivocal choice to arbitrate under the DRAA.

The DRAA requires that the parties enter into—and sign—a written agreement to submit to arbitration under the DRAA.[23] It also requires that this arbitration agreement include "an express reference to the 'Delaware Rapid Arbitration Act.'"[24] In other words, the agreement must specifically state the name of the Act; an implicit reference, such as "the parties agree to a rapid arbitration under Delaware law," does not suffice.

These three requirements (a written agreement, signed by the parties to the arbitration, with an express reference to the DRAA) are designed to ensure that no person may be drawn into an arbitration under the DRAA without that person's

23 10 *Del. C.* § 5803(a).
24 10 *Del. C.* § 5803(a)(5).

knowledge and consent. For example, stockholders of a corporation may not be forced to submit to arbitration of corporate disputes under the DRAA by a provision in the corporation's charter or bylaws, unless those documents are actually signed by the stockholders—which should only happen in a private-company context. The requirement of a signed written agreement with express reference to the DRAA allows for clear evidence of a party's agreement to be bound by the DRAA. This is significant, because the DRAA imposes a strict regime on the parties.

To ensure the rapidity of arbitrations under the Act, the DRAA exacts from parties a number of concessions: parties to arbitration agreements under the DRAA are deemed to have consented to (1) the arbitration procedures set forth in the DRAA; (2) the exclusive jurisdiction of the arbitrator to determine issues of substantive and procedural arbitrability; (3) the exclusive personal and subject matter jurisdiction of an arbitration, regardless of the location of the arbitration; (4) the exclusive personal and subject matter jurisdiction of the Delaware courts for the limited purposes set forth in the DRAA; and (5) except as set forth in the arbitration agreement, the arbitrator's authority to determine the scope of the arbitrator's remedial authority and to grant any appropriate relief.[25] The first and fifth concessions assist in the smooth functioning of the arbitration. The second is important in that it prevents a typical delaying tactic in which the party defending against an arbitration files suit in a court to enjoin an arbitration on the ground that some issue in the arbitration is not arbitrable. This second concession ensures that only the arbitrator—and not any court—has jurisdiction to determine such issues and therefore prevents parties from seeking such injunctions once an arbitrator has accepted appointment. The third and fourth concessions ensure that no party to an arbitration agreement under the DRAA may contest jurisdictional issues in the arbitration or in the Delaware courts (if a proper proceeding is brought in the Delaware courts). The fourth concession also ensures that parties to an arbitration agreement may not contravene the provisions of the DRAA or seek delay by bringing suit in a court outside of Delaware. Only the Delaware courts, which are likely to interpret the DRAA as originally intended, have jurisdiction—and then only limited jurisdiction—to address the few judicially cognizable issues under the DRAA.

The DRAA also provides that parties to an arbitration agreement have waived a number of rights.[26] Among those waived rights are (1) the right to seek

25 10 *Del. C.* § 5803(b).
26 10 *Del. C.* § 5803(c).

injunctions of any arbitrations under the DRAA; (2) the right to remove to a federal court any court proceeding under the DRAA; (3) the right to appeal an arbitrator's interim awards; (4) the right to appeal an arbitrator's final award, except under the limited grounds available in the DRAA; and (5) the right to challenge the propriety of an arbitration, except under the limited grounds available in the DRAA. As noted above, the first waiver ensures that no party to an arbitration agreement under the DRAA can defeat the rapid nature of the arbitration by seeking to enjoin it. The second waiver also prevents delay of the expedited proceedings in the Delaware courts (and reinforces the consent to exclusive jurisdiction in the Delaware courts) by ensuring that parties may not seek to remove those proceedings to the federal courts. The third, fourth and fifth waivers reinforce the DRAA's procedures for challenging the final arbitration award by limiting the parties' ability to appeal or challenge an arbitration except as specifically set forth in the DRAA.

Although the DRAA generally allows the parties to an arbitration to amend their arbitration agreement, it does impose one important limitation. While an arbitration is pending, the parties may only amend their arbitration agreement to alter the procedures of the arbitration with the arbitrator's approval.[27] This provision contemplates that the parties to an arbitration might agree to modifications of their chosen arbitration procedure that they did not anticipate before the arbitration began. But to prevent the parties to an arbitration from springing an unanticipated procedural change on the arbitrator, these modifications must be approved by the arbitrator. Nonetheless, the DRAA will not allow the parties (even together with the arbitrator) to circumvent the statute's strict arbitration time limit by amending their arbitration agreement. That is, during the pendency of the arbitration, an arbitration agreement "may not be amended so as to alter the time set forth in § 5808(b)."[28]

The Parties Must Choose Delaware Law to Govern the Arbitration Agreement

The DRAA specifically provides that an arbitration agreement is valid and enforceable when that agreement "provides that it shall be governed by or construed under the laws of [the State of Delaware], without regard to principles

27 10 *Del. C.* § 5803(a).
28 *Id.*

of conflict of laws."[29] This provision ensures that the Delaware courts will be construing Delaware law in any expedited proceedings under the DRAA.

Nevertheless, the DRAA grants significant flexibility to the parties. It specifically provides that, although Delaware law must apply to the arbitration agreement, the DRAA does not require that "the laws of [the State of Delaware] govern the parties' other rights, remedies, liabilities, powers and duties."[30] In other words, parties may enter into a comprehensive joint-venture agreement that chooses New York law to govern a particular aspect of their relationship (for example, licensing provisions) that is enforceable in the New York courts, but chooses Delaware law to govern the joint venture's management provisions, which are enforceable only in an arbitration under the DRAA. So long as the arbitration agreement itself is governed by Delaware law, it satisfies the DRAA, regardless of which jurisdiction's law governs the other portions of the agreement.

An Arbitrable Dispute Must Involve a Business Dispute and at Least One Delaware Entity

Given the stringent requirements and significant waivers imposed on arbitration parties under the DRAA, the statute is designed to protect those who do not intend—or do not wish—to arbitrate under the statute's provisions. As noted above, the DRAA requires that the parties to an arbitration have signed a written agreement to arbitrate including an express reference to the DRAA. The DRAA also provides another protection against contracts of adhesion: under the DRAA, no party to an arbitration agreement may be "a consumer, as that term is defined in § 2731 of Title 6."[31] The referenced statute defines a consumer as "an individual who purchases or leases merchandise primarily for personal, family or household purposes."[32] Therefore, business entities are generally prohibited from using the DRAA to impose arbitration on individuals who do business with them. As noted above, the signature requirement eliminates the possibility that stockholders of public companies will be forced to arbitrate intra-corporate disputes under the Act. Likewise, the Act prohibits its use in arbitrations with homeowners' associations, a prohibition designed to protect against the potential for perceived abuses in that area.[33]

29 10 *Del. C.* § 5803(a)(4).
30 *Id.*
31 10 *Del. C.* § 5803(a)(3).
32 6 *Del. C.* § 2731(1). As defined in that provision, merchandise includes "any objects, wares, goods, commodities, intangibles, real estate or services, other than insurance." *Id.* § 2731(3).
33 10 *Del. C.* § 5803(a)(3). Specifically, the Act provides that no party to an arbitration agreement under

The DRAA is also designed, in part, to provide an additional service to Delaware business entities. Accordingly, one of the parties to any arbitration agreement under the DRAA must be "a business entity, as that term is defined in § 346 of [Title 10], formed or organized under the law of [the State of Delaware] or having its principal place of business in [the State of Delaware]."[34] The term "business entity" is defined broadly to include "a corporation, statutory trust, business trust or association, a real estate investment trust, a common-law trust, or any other unincorporated business, including a partnership (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)) or a limited liability company."[35] Regardless of its form, the business entity must either be organized under Delaware law or, if organized under the law of a state other than Delaware, have its principal place of business located in Delaware.

The Arbitrator Must Be Chosen, Either in the Agreement, by the Parties or by Delaware's Court of Chancery

Before any arbitration may commence, an arbitrator must accept appointment as such.[36] But before that, some person must be chosen as the arbitrator. Here, as elsewhere, the DRAA permits significant flexibility to the parties.

First, the parties may name a person in the arbitration agreement as an arbitrator.[37] In other words, a specific individual (for example, "Judge Jones") or a specific entity (for example, "ABC Accounting Co.") may be named in the agreement. While this approach may provide some level of certainty in the identity of the arbitrator, it might also cause problems if the arbitrator so selected is unable or unwilling to fill the role. Not only should the potential arbitrator's consent be sought before naming an arbitrator in an agreement, but the parties should also consider addressing such future problems (for example, "Judge Jones or, if Judge Jones is unable or unwilling to serve, Attorney Smith").

Second, the parties may provide a method in the agreement under which an arbitrator may be selected.[38] This method could simply provide a procedure

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the DRAA may be an "organization," defined to include "a civic association, neighborhood alliance, homeowners maintenance corporation, homeowners maintenance association, common interest community (as defined in § 81-103 of Title 25), or other similar entity charged with or assuming the duties of maintaining the public areas, open space, or common facilities within a residential development or community." 10 *Del. C.* § 5801(5).

34 10 *Del. C.* § 5803(a)(2).
35 10 *Del. C.* § 346(b).
36 10 *Del. C.* § 5808(b).
37 10 *Del. C.* § 5801(3).
38 *Id.*

for choosing arbitrators (for example, "each party will choose an arbitrator, and those two arbitrators will choose a third"). A different method could list qualifications that constrain the parties' choices in the event of a dispute (for example, "the arbitrator must be a Delaware lawyer who has practiced in the area of real estate law for at least five years"). While providing a method to select an arbitrator may allow for more flexibility in the event of a future arbitration, the method itself could also cause additional disputes.

Third, the parties may simply appoint an arbitrator, even if their agreement does not specify the identity of the arbitrator or provide a method under which an arbitrator may be chosen.[39] This consensual appointment by the parties may occur at any time before the arbitrator accepts appointment, and it need not be contemplated by the arbitration agreement itself.

Fourth, if the parties did not or cannot agree on an arbitrator (or if the agreed-on arbitrator cannot or will not serve), the Court of Chancery of the State of Delaware is specifically empowered to appoint an arbitrator.[40] This procedure is addressed in detail in Chapter 5.

39 *Id*.
40 10 *Del*. *C*. § 5805.

CHAPTER 5

The Proceeding to Appoint an Arbitrator

If the parties to a DRAA arbitration are unable to agree on an arbitrator, or if the agreed-on arbitrator refuses to serve, the Act provides a mechanism by which an arbitrator is appointed. In keeping with the DRAA's emphasis on speed, this mechanism—which involves a proceeding in the Delaware Court of Chancery—is designed to operate in an expedited fashion.

The Prerequisites for an Appointment Proceeding

Under the DRAA, the Court of Chancery of the State of Delaware has exclusive jurisdiction to appoint an arbitrator (or arbitrators) in five situations: "(1) the consent of all parties to an agreement; (2) the failure or inability of an arbitrator named in or selected under an agreement to serve as an arbitrator; (3) the failure of an agreement to name an arbitrator or to provide a method for selecting an arbitrator; (4) the inability of the parties to an agreement to appoint an arbitrator; or (5) the failure of a procedure set forth in an agreement for selecting an arbitrator."[41] Each of those five situations is discussed in more detail below.

First, the parties to an arbitration agreement can, for any reason they see fit, seek the assistance of the Court of Chancery in appointing an arbitrator. That is, even when the arbitration agreement names a specific arbitrator, if the parties

41 10 *Del. C.* § 5805(a).

all decide that they would prefer to seek a different arbitrator, they may seek the Court's assistance under this provision.

Second, if the parties have chosen an arbitrator—either by naming that arbitrator in the arbitration agreement or by selecting the arbitrator through a method specified in the agreement—but the arbitrator refuses or is unable to serve, the parties may seek appointment by the Court. This mechanism could apply if, for example, a specified firm dissolves or a specified person becomes ill. It could also apply if a conflict, such as a post-agreement representation by the arbitrator of one of the parties, arises after the agreement, or if an arbitrator decides that he or she is unable to complete the arbitration in the statutory time frame (for example, if the arbitrator has pre-existing obligations that would make a determination within 120 days impracticable).

Third, if the parties did not set forth in their arbitration agreement any provision regarding the identity of the arbitrator, the DRAA provides a mechanism by which the Court of Chancery can appoint an arbitrator. That is, if the parties neither identified a specific arbitrator nor provided any mechanism by which an arbitrator could be selected, they may apply to the Court to appoint one.

Fourth, if any party is unable or refuses to assist in the process of appointing an arbitrator, any other party may apply to the Court of Chancery for assistance. This provision ensures that no party may be deprived of its right to a rapid arbitration by an opposing party's delay or recalcitrance.

Fifth, if the procedure set forth in an arbitration agreement fails for some reason, any party may petition the Court of Chancery. That is, if it later is determined that the provision in an arbitration agreement is unworkable or ambiguous, or if the selection criteria are too narrow (or too broad), the parties are not without recourse.

The Appointment Proceeding

As provided in the DRAA, an appointment proceeding in the Court of Chancery begins with a petition in a new case or an application in an existing case.[42] The petition (or application) need not be complex, but it should (1) include reference to the parties' arbitration agreement, (2) attach the agreement as an exhibit, and (3) set forth the specific reason(s) in Section 5805(a) that jurisdiction exists. Under the Chancery Court Rules, each petition must be verified.[43]

42 10 *Del. C.* § 5805(a).
43 Ct. Ch. R. 3(aa).

Service of the petition in a new case must comply with the Chancery Court Rules applicable to any new proceeding, but an application in an existing case may simply be served as would any other papers in that case.[44] The responding party has five business days in which to respond to the petition or application by filing an answer.[45] Nevertheless, no answer is required under the Chancery Court Rules, and no dispositive motions are allowed.[46] Given the intended simplicity of an appointment proceeding, the Court will not expect the responding party to respond formally unless some allegation in the petition or application must be challenged.[47] Further, the responding party may not raise counterclaims or cross-claims in response—this limited proceeding is restricted to the appointment of an arbitrator.[48]

Within seven business days after the petition (or application) is served—or within three business days after an answer is served, whichever is later—the parties must file with the Court "a joint list of persons that are qualified and willing to serve as an arbitrator" under the DRAA.[49] The timing of this joint list may be altered by the Court of Chancery.[50]

Under the DRAA, each party to the proceeding may propose no more than three persons.[51] To avoid any potential bias or advantage to either side's proposed arbitrator, the list filed with the Court may not indicate which party proposed which person (although either party may file the letter).[52] The joint list must be accompanied by background information regarding the proposed persons that would be helpful to the Court in making its decision.[53]

As a practical matter, if the parties find, when compiling their list of potential arbitrators, that they have each chosen the same arbitrator, the parties may discontinue the proceeding and simply appoint their mutual choice.[54] Otherwise, the parties will be responsible for ensuring that their proposed arbitrators are

44 Ct. Ch. R. 96(b).
45 Ct. Ch. R. 96(c).
46 Ct. Ch. R. 96(c), (e).
47 For example, if a person not party to an arbitration agreement is named in the suit or the allegations in the petition are simply false, an answer might be appropriate so that the Court can address the situation.
48 Ct. Ch. R. 96(c).
49 Ct. Ch. R. 96(d).
50 *Id*.
51 10 *Del*. *C*. § 5805(a).
52 Ct. Ch. R. 96(d).
53 *Id*.
54 *See* 10 *Del*. *C*. § 5801(3) (providing that an arbitrator may be "appointed by the parties to an agreement").

willing and able to serve in that role, and they should take into account both the limitations imposed by the DRAA and any provisions of the arbitration agreement bearing on the selection of an arbitrator.

Under the DRAA, the Court of Chancery may only appoint "a. A person named in or selected under an agreement; b. A person expert in any non-legal discipline described in an agreement; or c. A member in good standing of the Bar of the Supreme Court of [Delaware] for at least 10 years."[55] Thus, the Court of Chancery's options are somewhat constrained, further promoting a speedy determination. The first category includes those persons specifically referenced in an agreement, and will typically apply if the parties simply cannot agree as between two people or firms named in the agreement. The Act's reference to persons "selected under an agreement" also allows the Court to appoint an arbitrator pursuant to specific selection criteria set forth in an arbitration agreement. For example, if the agreement provides that the arbitrator shall be an "independent accounting firm of at least 10 accountants, located in New York City," the Court may choose from among proposed accounting firms matching those criteria. The second category is similar; it allows the parties to provide in their agreement and propose to the Court, for example, a "financial" or "accounting" expert as an arbitrator. If the arbitration agreement is silent, or if the parties do not propose persons in the categories set forth in an agreement, the Court of Chancery may simply appoint a senior Delaware lawyer. This third, catch-all provision ensures that the Court has the power to appoint a known quantity when none of the parties' other proposed candidates seems ideal.[56]

Once the list has been submitted, the choice of arbitrator is made by the Court of Chancery. As a general matter, unless the Court otherwise orders, the parties will not be entitled to take discovery in an appointment proceeding.[57] The Court of Chancery must appoint the arbitrator within 30 days after the petition (or application) is served.[58] The arbitrator so appointed is endowed with the same power and authority as if that person had been specifically named in an arbitration agreement.[59] If the arbitration agreement does not specify otherwise, the Court of Chancery will appoint only a single arbitrator.[60]

55 10 *Del. C.* § 5805(b)(2).
56 For this reason, a party might choose to propose at least one senior Delaware lawyer as a possible arbitrator, no matter the criteria set forth in the arbitration agreement.
57 Ct. Ch. R 96(e).
58 10 *Del. C.* § 5805(b)(1).
59 10 *Del. C.* § 5805(b).
60 *Id.*

In making its appointment decision, the Court of Chancery may "take into account: a. The terms of an [arbitration] agreement; b. The persons proposed by the parties; and c. Reports made under § 5806(d) of [the DRAA]."[61] As noted above, the Court may choose to appoint an arbitrator in accordance with the terms of the arbitration agreement or may simply appoint a senior Delaware lawyer—even if not named by the parties as a proposed arbitrator. In making its determination, the Court of Chancery may consider any reports made to the Register in Chancery under Section 5806(d) concerning an arbitrator's failure to issue a final award within the time specified by statute. Essentially, the Court of Chancery's discretion is unbounded in this proceeding, and the Court's decision is not appealable to the Delaware Supreme Court.[62] If the parties wish to retain control over the appointment of their arbitrator, they would be well advised to address the issue fully in their arbitration agreement.

61 10 *Del. C.* § 5805(b)(1).
62 10 *Del. C.* § 5804(a)(1).

Sample Form: Petition to Appoint an Arbitrator

The specifics of any petition to appoint an arbitrator will depend on the exact circumstance in which the petition arises, but the following is a sample petition.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

[PETITIONER], Petitioner	)	
v.	)	C.A. No. _ _ _ _ _ - _ _ _
[RESPONDENT], Respondent.	)	

VERIFIED PETITION FOR APPOINTMENT OF ARBITRATOR

Petitioner, upon knowledge as to its own conduct and upon information and belief as to all other matters, by and through its undersigned attorneys, alleges its Verified Petition for Appointment of Arbitrator as follows:

1. Petitioner and Respondent are parties to an agreement dated January 1, 2016 (the "Agreement"), which includes a written agreement to arbitrate. A true and correct copy of the Agreement is attached hereto as Exhibit A.

2. A dispute has arisen between Petitioner and Respondent under the terms of the Agreement, which provides that the dispute must be resolved under the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "DRAA").

3. Section 10.1 of the Agreement provides that any DRAA arbitration would proceed before John Smith, Esq., but Mr. Smith has informed Petitioner and Respondent that he is unable to serve as an Arbitrator for any DRAA arbitration.

COUNT I

Appointment of Arbitrator Under 10 *Del. C.* § 5805

4. Petitioner repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.

5. Petitioner and Respondent have a dispute that must be arbitrated under the DRAA.

6. The Arbitrator named in the Agreement is unable to serve as an Arbitrator.

7. Therefore, Petitioner seeks the appointment of an Arbitrator under 10 *Del. C.* § 5805(a)(2).

WHEREFORE, Petitioner respectfully requests that this Court enter an order:

A. Appointing an Arbitrator; and

B. Granting such other and further relief as the Court deems just and proper.

[SIGNATURE BLOCK]

Sample Form: Letter Providing List of Proposed Arbitrators

As noted above, the joint list containing the proposed arbitrators may be filed by any party, but it may not indicate which party proposed which person.

[Court of Chancery]

Re: *Petitioner v. Respondent*, C.A. No. 9999-CC

Dear Chancellor:

I write on behalf of the parties to the above-captioned action pursuant to Chancery Court Rule 96(d) to provide a joint list of persons that are qualified and willing to serve as an Arbitrator in the parties' impending arbitration under the Delaware Rapid Arbitration Act. The proposed persons are set forth below in alphabetical order. Exhibit 1, enclosed herewith, contains further information regarding each such person.

AAA Accounting Firm, Inc.
BBB & Co. Accountants
Jane Doe, Esq.
John Smith, Esq.

If Your Honor should have any questions, counsel are available at the Court's convenience.

Respectfully submitted,

CHAPTER 6

The Arbitration

Although the DRAA preserves a great deal of contractual freedom for the parties to agree in advance to different rules and requirements, both the default provisions created by the statute and the limitations on the parties' ability to contract around the statute are designed to promote the speedy and private resolution of arbitral proceedings.[63] The statute sharply restricts the parties' ability to use the court system to delay or interfere with arbitral proceedings,[64] provides an expedited process for securing appointment of an arbitrator if the parties cannot agree,[65] and requires the arbitrator to decide the matter finally within 120 days of accepting appointment under threat of a substantial financial penalty.[66]

The Powers of the Arbitrator

Perhaps the most significant grant of power to the arbitrator in the DRAA is the power to determine all issues of arbitrability. A party that agrees to arbitration under the DRAA is deemed by statute to have consented to submit all issues of substantive and procedural arbitrability exclusively to the arbitrator.[67] This provision eliminates litigants' ability to seek a determination from a court as to the scope of the arbitration. It also precludes litigants from challenging the

63 *See* 10 *Del. C.* § 5802.
64 *See* 10 *Del. C.* § 5803(c)(1)-(3); *see also* 10 *Del. C.* § 5804(b)(5) ("[N]o court has jurisdiction to enjoin an arbitration under this chapter.").
65 *See* 10 *Del. C.* § 5805.
66 *See* 10 *Del. C.* § 5806(b).
67 *See* 10 *Del. C.* § 5803(b)(2).

arbitrator's rulings on arbitrability in an arbitral appeal or an appeal to the Delaware Supreme Court. This provision of the DRAA is mandatory and not subject to alteration by agreement of the parties.

The parties may modify or eliminate by agreement the arbitrator's powers to determine the scope of his or her remedial authority and to grant any legal or equitable remedy the arbitrator deems appropriate.[68] Unless the parties do so in their agreement, however, the arbitrator is empowered to "make such rulings, including rulings of law, and [to] issue such orders or impose such sanctions as the arbitrator deems proper to resolve an arbitration in a timely, efficient and orderly manner."[69]

The statute authorizes the arbitrator to oversee the progress of the arbitration case and to control the presentation of evidence at the arbitration hearing. The arbitrator has the power to administer oaths and to compel the appearance of witnesses and the production of documents and other forms of evidence, unless the arbitration agreement otherwise provides.[70] But the arbitrator lacks the power to issue subpoenas or to award commissions to permit depositions to be taken, unless the arbitration agreement confers those powers. If subpoena power is granted, and the respondent to a subpoena refuses to comply, the arbitrator may seek enforcement of that subpoena by the Court of Chancery.[71]

The arbitrator's interim rulings—including arbitrability determinations, determinations of the scope of the arbitrator's remedial authority, and interim equitable relief and sanctions—cannot be appealed or challenged.[72] The final award may be challenged or appealed only through the statute's appeal process, discussed in Chapter 8.

Non-Lawyer Arbitrators and the Arbitrator's Ability to Appoint Counsel

The DRAA does not impose mandatory qualifications on the arbitrator. The arbitrator need not be a lawyer and need not have experience or expertise in any particular field, unless the parties otherwise agree.

The DRAA therefore gives the parties significant flexibility to choose an arbitrator (or a panel of arbitrators) with the specialized knowledge necessary to

68 *See* 10 *Del. C.* § 5803(b)(5).
69 *See* 10 *Del. C.* § 5807(c).
70 *See* 10 *Del. C.* § 5807(b).
71 *See* 10 *Del. C.* § 5804(b)(3); Ct. Ch. R. 97(b).
72 *See* 10 *Del. C.* § 5803(c)(3).

resolve complex or technical disputes fairly. For example, parties to a merger agreement may wish to submit disputes over an earn-out provision for arbitration by an accountant. Parties to intellectual property licensing arrangements may wish to require that the arbitrator have expertise in the relevant field of intellectual property.

The process for selecting an arbitrator—whether by agreement of the parties or by application to the Delaware Court of Chancery—is described in Chapter 5. The Court of Chancery has the authority to appoint a non-lawyer as arbitrator only if the person is named in or selected under the parties' agreement or if the person is "expert in any non-legal discipline described" in the parties' agreement.[73] If the parties' agreement fails to impose qualifications of this nature for the arbitrator, the Court will appoint a senior member of the Bar of the Supreme Court of the State of Delaware as arbitrator.[74]

The arbitrator has the authority to retain appropriate counsel in consultation with the parties.[75] Although the arbitrator must consult with the parties in choosing appropriate counsel, both the decision to retain counsel and the choice of counsel rest ultimately with the arbitrator and cannot be blocked by the parties.

Counsel retained by the arbitrator may make rulings on issues of law if the arbitrator so requests, and (if the arbitrator so determines) those rulings shall be the arbitrator's rulings.[76] In making such a ruling, the arbitrator may wish to consider whether to rule directly, based on counsel's advice, to avoid unexpected extra-territorial enforcement issues.

The Ability to Preserve—or Abandon—U.S. Style Discovery

The burdens and costs of discovery in the U.S. civil litigation system are well known. Under Federal Rule of Civil Procedure 26 and parallel provisions in most states' civil litigation rules, discovery may be had into any non-privileged matter that is relevant to any party's claim or defense. Discovery of documents, including electronically stored information, frequently involves significant burdens of time and money. Although U.S. courts are empowered to limit the use of discovery to prevent disproportionate burden, the scope and cost of discovery are often major drivers of parties' litigation strategy and settlement decisions.

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73 *See* 10 *Del. C.* § 5805(b)(2)(a)-(b).
74 *See* 10 *Del. C.* § 5805(b)(2)(c).
75 *See* 10 *Del. C.* § 5806(c).
76 *See id.*

The DRAA is silent as to the scope of permissible pre-hearing discovery, leaving that issue entirely to the parties and (if the parties cannot agree) the arbitrator. The DRAA empowers the arbitrator to oversee the discovery process and to make any interim orders or rulings he or she deems necessary to determine what evidence and what witnesses will be presented at the hearing.[77] Practically, unless the parties agree before the arbitration begins to a deadline substantially longer than the 120-day default period, the scope of discovery in an arbitration under the DRAA will likely be more circumscribed than what might be expected if the same dispute was litigated in a U.S. civil court on a non-expedited basis. Moreover, unless the parties agree to allow third-party discovery, the arbitrator will not have the authority to issue subpoenas or award commissions.[78]

The Ability to Tailor the Proceedings by Agreement

Consistent with the DRAA's express policy of allowing maximum effect to the principle of freedom of contract,[79] the Act leaves the parties free to adopt procedures appropriate to their particular disputes. Provided that they do so before the arbitrator accepts his or her appointment, the parties may agree to any time limit for the arbitration, whether longer or shorter than the 120-day period provided by statute. They may impose parameters on the scope of pre-hearing discovery or forgo discovery altogether. The parties may agree to forgo cross-examination of witnesses or to limit the scope of the evidence that may be presented at the hearing. They may limit the legal issues on which the arbitrator may rule.[80]

The parties, by agreement before the arbitrator's appointment, may limit the forms of final relief the arbitrator may award.[81] They may, for example, agree to a "high/low" or "baseball" format for the arbitration. They may limit the arbitrator to making a monetary award or preclude the arbitrator from doing so. But the DRAA does not permit the parties to limit the forms of interim relief that the arbitrator may award, ensuring that the arbitration proceeds in a timely and efficient manner.[82]

The parties may agree to vary the DRAA's default pattern of a single prompt appeal to the Delaware Supreme Court limited solely to the grounds for vacation,

77 10 *Del. C.* § 5807(a).
78 10 *Del. C.* § 5807(b).
79 *See* 10 *Del. C.* § 5811.
80 *See* 10 *Del. C.* § 5808(a).
81 *See id.*
82 *See* 10 *Del. C.* § 5807(a), (c).

modification or correction set forth in the Federal Arbitration Act.[83] The parties may instead agree to waive appellate review or to permit appellate review by an arbitral tribunal.[84] The DRAA does not forbid the parties from expanding or constricting the scope of review by an arbitral appellate tribunal.[85] But the parties are not free to vary the Delaware Supreme Court's jurisdiction, which is fixed in the statute.

The parties also may agree to fee-shifting arrangements. The DRAA's default rule permits the arbitrator to impose the arbitrator's fees and expenses (including the fees of any counsel retained by the arbitrator) in any manner in the final award, subject to the non-waivable fee reductions in case of a late award.[86] The DRAA does not affect the default American Rule requiring each party to bear the fees and expenses of its own counsel. But the statute does not prohibit the parties from agreeing that the losing party will bear the arbitrator's fees and expenses, the victorious party's counsel fees or both.

Basic Procedural Requirements of the Arbitration

The arbitrator is expected to adhere to baseline standards of due process in conducting the arbitration, absent an agreement to the contrary by the parties. The arbitrator is empowered to select a time and place for a hearing or adjourned hearing, which may take place anywhere in the world.[87] Parties to an arbitration have a right to be heard, to present relevant evidence, and to cross-examine witnesses appearing at a hearing.[88] But if a party has been duly notified of the hearing and fails to appear or to participate, the arbitrator has the power to resolve the arbitration on the basis of the evidence presented at the hearing.[89]

These rights, however, are subject to the arbitrator's authority to determine what evidence and which witnesses will be presented at the hearing and to limit the hearing presentations so as to enable resolution within the time limit,[90] as well as to the arbitrator's powers to make rulings of law, issue orders and impose sanctions as the arbitrator may deem proper to resolve the arbitration in a timely, efficient and orderly manner.[91] The arbitrator's use of these powers is not

83 *See* 10 *Del. C.* § 5809(c).
84 *See* 10 *Del. C.* § 5809(d).
85 *See* 10 *Del. C.* § 5809(d)(2).
86 *See* 10 *Del. C.* § 5806(b)-(c).
87 *See* 10 *Del. C.* § 5807(a).
88 *See id.*
89 *See id.*
90 *See id.*
91 *See* 10 *Del. C.* § 5807(c).

reviewable in court on an interim basis.[92] Thus, the arbitrator's exercise of authority to shape the procedure is subject to review only after a final award is made and then, under the default scheme of the DRAA, only on grounds that would suffice to order vacation, modification or correction of an arbitral award under the Federal Arbitration Act.

Statutory Time Limits to Complete the Arbitration

The DRAA requires the arbitrator to render a final award within 120 days of acceptance of appointment, unless the parties otherwise agree to a different time period before the arbitrator accepts appointment.[93] With the arbitrator's concurrence, the parties may extend that deadline by unanimous consent for up to 60 days, but no longer.[94] Nevertheless, the statute does not limit the parties' ability to agree to a longer period before the arbitration begins.

If the arbitrator does not render a final award within the required time, the statute imposes a reduction in the arbitrator's fees.[95] If the final award is delivered late, but less than 30 days late, the arbitrator's fees are reduced by 25 percent. If the final award is delivered between 30 and 60 days late, the arbitrator's fees are reduced by 75 percent. If the final award is more than 60 days late, the arbitrator loses 100 percent of the fee. In addition, an arbitrator who makes a late final award is required by statute to self-report this late award to the Court of Chancery.[96] As noted in Chapter 5, this report may be considered in any future proceeding to appoint an arbitrator.

The statutory reduction in fees—the "hammer" that seeks to force the arbitrator to decide the matter in a timely fashion—is not waiveable by the parties. Although the parties may agree before the arbitration begins to alter the time when a final award will become untimely,[97] once that time is established by the arbitrator's acceptance of appointment, the parties are limited to a maximum aggregate extension of 60 days by unanimous written consent.

The only exception to the statutory reduction in fees is that the arbitrator may petition the Court of Chancery for a summary determination that "exceptional circumstances exist such that the reductions ... should be modified or

92 *See* 10 *Del. C.* § 5803(c)(3).
93 10 *Del. C.* § 5808(b).
94 10 *Del. C.* § 5808(c).
95 *See* 10 *Del. C.* § 5806(b).
96 10 *Del. C.* § 5806(d).
97 *See* 10 *Del. C.* § 5806(b).

eliminated."[98] The statute expressly places on the arbitrator the burden of showing by "clear and convincing evidence" that these exceptional circumstances exist.[99] The "clear and convincing evidence" standard has been described in other contexts as "evidence that produces an abiding conviction that the truth of the contentions is 'highly probable.'"[100] The twin requirements of showing "exceptional circumstances" and doing so by "clear and convincing evidence" are designed to ensure that the Court's intervention is sought and received only in rare and truly exceptional circumstances.

98 *See id*.
99 *Id*.
100 *In re Bailey*, 821 A.2d 851, 863 (Del. 2003).

CHAPTER 7

The Final Award

Unless the parties resolve their dispute before the arbitration is complete, the end result of a DRAA arbitration will be a final award by the arbitrator. Part of Delaware's commitment to a prompt arbitral procedure is automatic confirmation of the final award and a simple procedure to obtain a judgment on the final award.

The Final Award

Under the DRAA, the term "final award" refers only to the award designated as final by the arbitrator.[101] The arbitrator may enter interim orders or other rulings during the pendency of the arbitration,[102] but those do not qualify as the final award under the DRAA.

The final award "must be in writing and signed by an arbitrator."[103] Although the DRAA does not specifically provide that a final award must set forth the arbitrator's reasoning for the decision, the parties may provide in their arbitration agreement for a reasoned final award. A final award must also include a form of judgment for entry under Section 5810 of the DRAA.[104] This requirement ensures that all parties are on notice of the judgment that may be entered (similarly, the Act requires that the arbitrator provide a copy of the final

101 10 *Del. C.* § 5801(4).
102 10 *Del. C.* § 5807(c).
103 10 *Del. C.* § 5808(a).
104 *Id.*

award to every party in the arbitration).[105] As addressed in Chapter 6, the final award must be issued by the statutory deadline.[106]

Unless the parties have provided otherwise in their arbitration agreement, the final award may provide for legal or equitable relief, such as damages and/or injunctions.[107] The final award may also include rulings on issues of law, if the arbitrator considers such rulings relevant and necessary, although the parties may provide in their agreement that the arbitrator may not make such legal rulings.[108]

Confirmation of a Final Award

As discussed in Chapter 8, the parties may provide for appellate review by an arbitrator or panel of arbitrators or for a challenge under the standards of the Federal Arbitration Act to the Delaware Supreme Court.[109] Assuming that no appellate review is sought, the DRAA provides for deemed confirmation of the final award on the fifth business day after the time period for a challenge expires.[110] Unlike other arbitration regimes, the DRAA expressly disallows a proceeding to confirm an arbitrator's final award. Instead, that final award is deemed confirmed automatically by the simple passage of time. Any challenge to a final award must be taken within 15 days of the issuance of a final award,[111] so the final award will be deemed to be automatically confirmed five business days after that date. If the parties' arbitration agreement provides for no appellate review, the final award is deemed to have been confirmed by the Court of Chancery five business days after the final award is issued.[112]

This streamlined procedure ensures that the parties need not take any additional steps to confirm the final award, but the efficiency of the procedure also renders impractical post-issuance corrections or modifications of a final award. If the parties wish to preserve the opportunity to seek modification or reargument of a final award before it is automatically confirmed, they might agree to a procedure in which the arbitrator issues a draft final award, gives the parties notice and a brief time in which to challenge specific factual or legal findings, and then issues a final award after considering the parties' challenges.

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105 *Id*.
106 *See also* 10 *Del*. *C*. § 5808(b)-(c).
107 10 *Del*. *C*. § 5808(a).
108 *Id*.
109 10 *Del*. *C*. § 5809.
110 10 *Del*. *C*. § 5810(a).
111 10 *Del*. *C*. § 5809(b).
112 10 *Del*. *C*. § 5810(a).

Entry of Judgment on a Final Award

Because confirmation of the arbitrator's final award is automatic, the prevailing party should need to approach the Delaware courts only once to obtain a final judgment on the final award. The identity of the relevant court will depend on the nature of the final award.

If the final award is solely for money damages, entry of judgment will be accomplished in the Delaware Superior Court.[113] The procedure is set forth in the DRAA: the prevailing party may make application to the Superior Court, and the Prothonotary will enter a judgment on the Superior Court's judgment docket in conformity with the final award (and with the form of judgment included with the final award).[114] Once the final judgment is entered, it has the same force and effect as if it had been entered by the Superior Court; it also "is a lien on all the real estate of the debtor in the county, in the same manner and as fully as judgments rendered in the Superior Court are liens, and may be executed and enforced in the same way as judgments of the Superior Court."[115]

For all other final awards, the judgment may be entered in the Court of Chancery.[116] Either party—although it would likely be the prevailing party—may commence the Chancery proceeding to enter judgment.[117] The commencing party must file a verified petition in the Court of Chancery pursuant to Chancery Court Rule 3, and the petition must be accompanied by a copy of the final award from the arbitration.[118] No defendant need be named in the petition, but service of the petition must be made on the other parties to the arbitration under the method of service prevailing in the arbitration.[119] The proceeding is designed to be swift; no answer may be filed, and no discovery may be taken.[120] Once the Court of Chancery is satisfied that the requirements of Section 5810 of the DRAA have been met, "final judgment shall be entered forthwith."[121] Once the final judgment is entered, it "has the same effect as if rendered in an action by the Court of Chancery."[122]

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113 10 *Del. C.* § 5810(c).
114 *Id.*
115 *Id.*
116 10 *Del. C.* § 5810(b).
117 Ct. Ch. R. 97(d)(2).
118 *Id.*
119 *Id.*
120 Ct. Ch. R. 97(d)(3)-(4); 10 *Del. C.* § 5810(b).
121 Ct. Ch. R. 97(d)(5).
122 10 *Del. C.* § 5810(b).

Sample Form: Petition for Entry of Judgment in the Court of Chancery

The petition for entry of judgment in the Court of Chancery should be a simple document, since the proceeding for entry of judgment is designed to be prompt.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ARBITRATION OF [PETITIONER]	)))	C.A. No. _ _ _ _ _ - _ _ _

VERIFIED PETITION FOR ENTRY OF JUDGMENT

Petitioner, upon knowledge as to its own conduct and upon information and belief as to all other matters, by and through its undersigned attorneys, alleges its Verified Petition for Entry of Judgment as follows:

1. Petitioner is the prevailing party in an arbitration under the Delaware Rapid Arbitration Act. A true and correct copy of the final award in that arbitration (the "Final Award") is attached hereto as Exhibit A. The Final Award includes a monetary award as well as equitable relief in the form of a permanent injunction.

2. The Final Award was entered on January 5, 2016, and no challenge was taken of the Final Award. Pursuant to 10 *Del. C.* § 5810(a), the Final Award is deemed to have been confirmed on January 27, 2016.

COUNT I

Entry of Judgment Under 10 *Del. C.* § 5810

3. Petitioner repeats and realleges the allegations set forth in the preceding paragraphs as if fully set forth herein.

4. Therefore, Petitioner seeks the entry of judgment under 10 *Del. C.* § 5810(b).

WHEREFORE, Petitioner respectfully requests that this Court:

A. Enter final judgment according to the Final Award attached hereto as Exhibit A; and

B. Grant such other and further relief as the Court deems just and proper.

[SIGNATURE BLOCK]

Sample Form: Affidavit for Entry of Judgment in Superior Court

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR [COUNTY]

PETITIONER, Plaintiff/Judgment Creditor, v. RESPONDENT, Defendant/Judgment Debtor.	))))))))	C.A. No. _ _ _ _ _ _ _ -_ _ _

AFFIDAVIT OF [ATTORNEY], ESQUIRE

STATE OF DELAWARE [COUNTY]	)))	SS.

BE IT REMEMBERED that, on this 3rd day of February, 2016, personally appeared before me, a Notary Public for the State and County aforesaid, [Attorney], attorney for Petitioner, who being by me duly sworn did depose and say as follows:

1. This judgment action stems from a judgment deemed confirmed by the Court of Chancery of the State of Delaware pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5810(a).

2. Defendant in the arbitration was Respondent. Respondent is now a judgment debtor.

3. Plaintiff in the arbitration was Petitioner. Petitioner is now a judgment creditor.

4. The arbitrator issued a final award against judgment debtor on January 5, 2016, and it was deemed confirmed by the Court of Chancery on January 27, 2016.

5. Attached as Exhibit A is a true and correct copy of the confirmed final judgment.

6. Each of the foregoing facts is true to the best of my knowledge, information, and belief.

[NOTARY] [SIGNATURE BLOCK]

CHAPTER 8

Appellate Review of the Final Award

The DRAA provides the parties with three options for review of the arbitrator's final award. The parties may agree in advance that there will be no appeal from the final award or that arbitral appellate review will be available.[123] If the parties do not elect one of these two options, the default third option applies, and the final award may be challenged on limited grounds before the Delaware Supreme Court.[124] Parties to an agreement to arbitrate under the DRAA are deemed to have waived their right to appeal or challenge the arbitrator's final award, except pursuant to one of these three options permitted by the Act.[125]

The statute expressly divests the Delaware Supreme Court of jurisdiction to hear appeals on orders ancillary to a DRAA arbitration that may be entered by the Delaware Court of Chancery. Specifically, the Supreme Court lacks jurisdiction to hear an appeal from an order of the Court of Chancery appointing an arbitrator, granting or denying an arbitrator's application for fees notwithstanding a failure to deliver a timely final award, granting or denying an application for an injunction in aid of arbitration, or granting or denying an order enforcing a subpoena.[126]

123 *See* 10 *Del. C.* § 5809(d).
124 *See* 10 *Del. C.* § 5809(a).
125 *See* 10 *Del. C.* § 5803(c)(4).
126 *See* 10 *Del. C.* § 5804(a); *cf.* 9 U.S.C. § 16 (describing scope of appeal from orders relating to arbitrations conducted under the Federal Arbitration Act).

The Default Option: Public Challenge Before the Delaware Supreme Court

If the parties do not elect to waive all appeals or to allow an arbitral appeal, then the parties have the right to challenge the final award in a proceeding before the Delaware Supreme Court.[127] Under the Act, the grounds for a challenge are limited to the grounds for obtaining vacation, modification or correction of an arbitral award under the Federal Arbitration Act (the "FAA").[128] The statute does not authorize the parties to agree to plenary appellate review by the Delaware Supreme Court; if the parties desire plenary review, or any scope of review broader than the limited challenge procedure, they must agree to arbitral appellate review.

The FAA permits a court to vacate an arbitral award: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators, or any of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[129]

The FAA permits modification or correction of the award: (a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; and (c) where the award is imperfect in matter of form not affecting the merits of the controversy.[130] The FAA permits a court to "modify and correct the award, so as to effect the intent thereof and promote justice between the parties."[131] The Delaware Supreme Court has characterized the standard as one of the narrowest standards of review in American jurisprudence and has looked to federal cases under the FAA to interpret the Delaware Uniform Arbitration Act, which contains a similar standard for obtaining vacation, modification or correction of an arbitral award.[132]

127 *See* 10 *Del. C.* § 5809.
128 9 U.S.C. §§ 1, *et seq*.
129 9 U.S.C. § 10(a).
130 9 U.S.C. § 11.
131 *Id*.
132 *See*, *e.g.*, *SPX Corp. v. Garda*, 94 A.3d 745, 750 (Del. 2014).

A challenge under the DRAA has a speed advantage over the appeal process from an arbitral award under the FAA or parallel provisions in the laws of many states, including Delaware. Under the FAA, the Delaware Uniform Arbitration Act and many similar state laws, an application to vacate, modify or correct an arbitral award is directed to a trial court, the decisions of which may be reviewed on appeal. The FAA directs such applications to the federal district court in the district where the arbitral award was rendered,[133] and authorizes appeals to the circuit court from the district court's orders, including orders vacating, modifying or correcting the arbitral award.[134] Similarly, Delaware's Uniform Arbitration Act[135] directs applications to modify, correct or vacate an arbitral award to the state's trial courts and authorizes appeals from certain of those orders to the Delaware Supreme Court.[136] In contrast, a challenge to an arbitral award under the DRAA lies directly in the Delaware Supreme Court.[137] The reduction of post-arbitration litigation to a single proceeding in a single court should reduce the delay and cost associated with judicial proceedings ancillary to an arbitration. A challenge to a final award issued in a DRAA arbitration must be filed within 15 days of issuance of the final award.[138]

Parties considering whether to allow an arbitral award under the DRAA to be challenged in the Delaware Supreme Court should bear in mind that a challenge before the Delaware Supreme Court is presumptively a public proceeding. Article I, Section 9 of the Delaware Constitution provides that the courts "shall be open."[139] Oral arguments of cases before the Delaware Supreme Court are usually open to the public. The Court usually makes audiovisual recordings of such arguments and makes those recordings available to the public over the Internet. Documents filed on the docket are also usually available to the public through a subscription service and through a public access terminal maintained by the Court.[140]

Although the Supreme Court and other Delaware state courts possess and exercise discretionary authority to restrict public access to judicial proceedings and records in some instances,[141] parties considering how to frame an agreement

133 *See* 9 U.S.C. §§ 10-11.
134 *See* 9 U.S.C. § 16.
135 10 *Del. C.* §§ 5701, *et seq.*
136 *See* 10 *Del. C.* §§ 5702, 5714, 5715, 5719.
137 10 *Del. C.* § 5804(a).
138 10 *Del. C.* § 5809(b).
139 Del. Const. art I, § 9.
140 *See* Del. Supr. Ct. R. 10.2(7).
141 *See* Del. Supr. Ct. R. 10.2(5), (9).

to arbitrate under the DRAA should be prepared for the possibility that some or all of the record of the challenge proceeding in the Delaware Supreme Court will be made available to the public.

Private Arbitral Appeals

The parties may instead choose to provide for appeal through a second arbitral process; indeed, they should do so if they desire to preserve the option of appellate review on any grounds more wide ranging than those permitted by the FAA and the DRAA. Litigants should also consider agreeing to an arbitral appeal if they desire certainty that the record compiled in the arbitration will not become public, because the record filed as part of a challenge to the Delaware Supreme Court may become public, in whole or in part. The DRAA does not address or restrict the scope of an arbitral appeal, thereby leaving the parties free to provide for plenary review, minimal review for procedural fairness, or review by any other standard the parties may choose.

Parties considering allowing an arbitral appeal should consider a number of substantive and procedural factors in setting up their agreements. An arbitral appeal is subject to many of the same rules as an initial-level arbitration under the DRAA, raising many of the same issues for parties framing an agreement. Nevertheless, the DRAA does not provide specific guidelines for arbitral appeal, requiring the parties to take a more active role in shaping the process in their agreement.

The parties should consider carefully their choice of an appellate arbitrator or arbitral panel. As at the initial arbitration stage, the parties may choose to specify an individual, group or organization to serve as appellate arbitrator, or may provide for a method of selecting an appellate arbitrator or panel. They may specify a neutral panel or a panel composed of neutrals and non-neutrals. They may specify an arbitrator or panel with expertise in designated subjects.

The DRAA empowers the Court of Chancery to appoint an appellate arbitrator or appellate arbitral panel, on application by a party, if the parties' agreement provides for arbitral appellate review.[142] As at the initial stage, the Court's involvement is not necessary if the parties agree on the selection of the appellate arbitrator and the appellate arbitrator agrees to serve. The procedures for securing appointment of an appellate arbitrator or panel from the Court are the

142 10 *Del. C.* § 5809(d)(2); *see also* Chapter 5.

same as those for securing appointment of a trial-level arbitrator or panel.[143] As at the initial arbitration stage, the Court will appoint a single arbitrator unless the parties' agreement provides otherwise.[144]

The parties should consider the structure and scope of the record on appeal and make appropriate provision for transcription of the proceedings and preservation of the briefs, exhibits and other papers before the trial-level arbitrator. The parties should think about whether, and at whose request, additional rounds of briefing or oral argument will be permitted.

The parties should also provide explicitly for any restrictions on the scope of review. Should the appellate tribunal be empowered to review the initial arbitrator's decisions as to scope of remedial authority?[145] Should the appellate tribunal be limited to vacating, modifying or correcting the award, as the Delaware Supreme Court would be on a challenge, or should the appellate tribunal engage in a broader review? Should the appellate tribunal be limited to considering only certain subject matters or awarding only certain types of relief? To the extent the parties desire anything other than FAA review, the appeal provisions in the arbitration agreement should so provide.

The parties should also consider the time frame surrounding an appellate arbitration. Although the statute aims to secure the prompt and efficient resolution of the matter and enforces promptness by reducing or eliminating the arbitrator's fees in case of a tardy final award, the DRAA does not include provisions relating to the timeliness for appeal, which are left to the parties' contract.

If the parties provide for arbitral appeal, then the appellate arbitrator or panel has authority to order confirmation of a final award and to trigger the deemed-confirmation provisions of the statute.

Preparing the Record for a Challenge in the Delaware Supreme Court or for Arbitral Appeal

An arbitral tribunal is not a court of record. For that reason, litigants and their counsel should think in advance about the need to prepare a record for a potential challenge to the Delaware Supreme Court or for an appeal to an arbitral tribunal. The DRAA does not of itself oblige the arbitrator to explain the basis for the final award (*i.e.,* to make a reasoned award). The statute does not require preparation

143 *See* 10 *Del. C.* § 5809(d)(2).
144 *See* 10 *Del. C.* § 5805(b).
145 *See* 10 *Del. C.* § 5803(b)(5)(a) (arbitration agreement may vary default rule that initial-level arbitrator determines scope of remedial authority subject to challenge).

of a stenographic or other record of the arbitration hearing, nor retention of the papers, exhibits and other materials submitted to the arbitrator. Indeed, the DRAA does not preclude the parties from agreeing—for reasons of confidentiality, cost or otherwise—that the proceedings will not be recorded, that the arbitrator need not issue a reasoned award, and that the papers submitted to the arbitrator cannot be used as part of the record on an appeal or challenge. If the parties elect not to prepare a record or preserve the sources from which a record can be compiled for challenge or appeal, then a challenge or appeal may become more difficult to sustain as a practical matter.

If the parties elect to conduct the arbitration under the Delaware Rapid Arbitration Rules (the "Rules"),[146] the arbitrator will consult with the parties at a preliminary hearing regarding whether a stenographic or other official record of the proceedings will be maintained.[147] An arbitrator under the Rules will maintain a record of all pleadings and other papers submitted,[148] and may (unless the parties agree otherwise or the agreement to arbitrate otherwise provides) direct preparation of a stenographic or other record of the arbitration hearing.[149] The cost of preparing the record, if any, may be allocated in advance by the agreement to arbitrate or it may be awarded as part of the final award by the arbitrator.[150]

The DRAA provides that "the record on the challenge is as filed by the parties to the challenge in accordance with the Rules of the Supreme Court."[151] At present, the Supreme Court has not promulgated special rules regarding compilation of the record for purposes of a challenge. This leaves the parties free to agree to the scope of the record on a challenge. However, parties should be aware that the Rules of the Delaware Supreme Court permit parties to a civil appeal to stipulate to omit portions of the trial court from the record on appeal, provided that either the Supreme Court or the trial court may override the stipulation and order any or all of the omitted materials to be transmitted to the Supreme Court.[152] In the absence of special rules governing the record on a

146 On June 17, 2015, the Delaware Supreme Court, in accordance with Section 5804(a) of the Delaware Rapid Arbitration Act, adopted the Delaware Rapid Arbitration Rules to govern the procedure for arbitrations under the DRAA. The Rules became effective on June 22, 2015. A copy of the Rules can be located in Appendix I or at http://www.rlf.com/DRAA/OfficialRules.

147 *See* Rule 4.

148 *See* Rule 13.

149 *See* Rule 22.

150 *See* Rule 25.

151 10 *Del. C.* § 5809(b).

152 *See* Del. Supr. Ct. R. 9(c).

challenge to the final award in a DRAA arbitration, parties should be aware of the possibility that the Supreme Court may apply this rule and Section 5809(a) of the Act to direct preparation and submission of portions of the record that the parties may have agreed to omit.

Waiver of Appeals

The DRAA authorizes the parties to include in their agreement to arbitrate a provision that there will be "[n]o appellate review of a final award."[153] A mutual election to forgo appellate review of the final award may speed final resolution of the dispute, reduce cost and eliminate optionality that the parties' counsel might otherwise choose to preserve.

By choosing to waive all appeals, the parties agree to forgo potential proceedings to vacate, modify or correct the final award. If there is to be no appellate review, then the arbitrator's final award is deemed confirmed, and may be reduced to a judgment in the Delaware state courts, on the fifth business day following its issuance.[154]

153 10 *Del. C.* § 5809(d)(1).
154 10 *Del. C.* § 5810(a); *see* Chapter 7.

CHAPTER 9

Drafting the Agreement to Arbitrate

It is often the case that drafters of a complex commercial agreement quickly agree that they want to provide for alternative dispute resolution. But because planning for breakdowns in a commercial relationship often takes a back seat while the parties work on more immediately important promises, ADR provisions in contracts often receive far less thought and careful attention than they should. While it is true that the ADR provision is only utilized when a problem arises in the parties' relationship, it is usually the case that the drafters wish that they had given more careful attention to the ADR clause of the contract when that problem actually does arise.

This chapter provides an overview of the choices that are available to drafters of an ADR provision under the Act, to help non-litigating corporate counsel understand which decisions need to be made under the Act and which can be comfortably left to the statutory defaults. We discuss in detail a series of sample provisions that are included in this handbook and also available on our website[155] in ready-to-use format.

To invoke DRAA arbitration, the Act requires that the parties (1) must have a written agreement to submit a controversy to arbitration, (2) signed by each party to the arbitration, (3) where at least one of the parties is a Delaware business entity,

155 www.rlf.com/DRAA/Clauses.

and (4) none are consumers or homeowners' associations.[156] The agreement to arbitrate itself must be governed by Delaware law, and it must expressly state that the parties intend to proceed under the "Delaware Rapid Arbitration Act."[157] The minimum statutory requirements are addressed further in Chapter 4.

A sample clause setting forth the *minimum* provisions necessary to invoke the DRAA is found at the end of this chapter as Form Agreement I.

The Consequences of Using a Bare Minimum DRAA Clause

There are four principal consequences to using a bare minimum DRAA clause. First, since the parties will not have selected a specific arbitrator or type of arbitrator, either party will have authority to petition the Court of Chancery to appoint an arbitrator after the dispute arises.[158] By statute, that Court will be limited to appointing a senior Delaware lawyer as arbitrator.[159] To the extent that the parties want a specific individual or expert to be their arbitrator, failing to name or describe that individual in the agreement to arbitrate (or in an amendment agreed to by all parties) leads to the statutory default.

Second, using a bare minimum clause will preclude the arbitrator, once appointed, from authorizing third-party discovery, unless all parties agree to amend the agreement to arbitrate to authorize the issuance of process to third parties and the arbitrator approves of the amendment.[160]

Third, using a bare minimum clause will allow either party to challenge the final award of the arbitrator before the Delaware Supreme Court, but only subject to the limited review otherwise provided under the Federal Arbitration Act. This default provision carries with it the possibility that at least *the fact* of the parties' otherwise confidential arbitration will become public when a challenge is filed in the Delaware Supreme Court. Moreover, unless that Court grants confidential treatment to specific confidential business information as part of the appellate process, the likelihood exists that information beyond the mere fact of the parties' dispute may also become public during the course of the challenge before the Delaware Supreme Court. Of course, the Act provides several alternatives to a public challenge, but the failure to contract for one of these alternatives results in all parties to the arbitration having a default right to a public challenge in the Supreme Court.

156 10 *Del. C.* § 5803(a).
157 10 *Del. C.* § 5803(a)(5).
158 *See* Chapter 5.
159 10 *Del. C.* § 5805(b)(2)(c).
160 10 *Del. C.* § 5807(b); *see also* 10 *Del. C.* § 5803(a).

Fourth, a bare minimum clause does not provide for any specific rules to govern the arbitration. The Delaware Rapid Arbitration Rules (discussed in Chapter 10) will govern the arbitration in the absence of a contrary choice in the parties' agreement.

Customizing the Agreement: Annotated Checklist of Options in the Agreement to Arbitrate

The Act gives drafters of a commercial agreement a great degree of flexibility to tailor the nature and scope of any arbitration that is held to resolve a dispute under their agreement. The extent of that flexibility is detailed in the checklist below, identifying matters that the Act specifically allows the parties to customize in their contract. Where appropriate, the checklist is annotated to explain or expand upon the nature of the options available.

The Checklist

Contract point: The name ("John Smith") or description ("Big Four Accounting Firm") of the arbitrator or type of arbitrator desired.[161]

Annotation: As noted above, the failure to identify an arbitrator by name or other description will lead to the default appointment of a senior Delaware attorney as arbitrator, unless the parties are able to agree on an arbitrator before the Court of Chancery appoints one. Where the parties are unable to agree on the name of a specific individual whom they intend to act as arbitrator, at least a general description of the nature of the arbitrator whom they wish to have appointed should be included. That description could be as broad as "a certified public accountant currently in practice with more than 10 years of experience" or "a petroleum reserves engineer."

Contract point: Whether the parties desire to proceed before one or more than one arbitrator.[162]

Annotation: Where the agreement to arbitrate is silent, the Act provides that the Court of Chancery will appoint a single arbitrator. Thus, if the parties wish to proceed before a panel of three arbitrators, they will need to specify that in their agreement.

161 10 *Del. C.* § 5801(3).
162 *Id.*

Contract point: If multiple arbitrators are indicated, whether they are required to act unanimously (default rule is action by a majority).[163]

Contract point: Whether the parties wish to conduct their arbitration pursuant to the Delaware Rapid Arbitration Rules or a different set of rules.[164]

Annotation: No one set of rules is required for all arbitration proceedings, in the sense that there is one set of court rules that apply in all civil actions filed in a particular court. The Delaware Supreme Court, in consultation with the Court of Chancery, adopted the Delaware Rapid Arbitration Rules, a set of default rules for use in DRAA arbitrations where the parties did not expressly select other rules. A copy of the Rules can be located in Appendix I or at http://www.rlf.com/DRAA/OfficialRules. These Rules will apply to all DRAA arbitrations unless the parties choose to proceed under a different set of rules of their choice.[165]

Contract point: Whether the arbitrator's fees and expenses may be split other than as set forth in the final award.[166]

Annotation: The Act provides that, absent agreement of the parties, the fees and expenses of the arbitrator are to be taxed as provided in the final award. To the extent that parties wish to vary this default rule, they must do so in the agreement to arbitrate.

Contract point: The time and place for the arbitration hearing itself.[167]

Annotation: While the seat of the arbitration is Delaware, the arbitration itself may be conducted at any place in the world agreed to in advance by the parties. Barring such agreement, the time and place of the arbitration hearing is determined by the arbitrator.

Contract point: Whether the parties to the arbitration are entitled to be heard, present evidence and cross-examine at the final hearing.[168]

Annotation: The default rule under the Act is that, absent agreement to the contrary by the parties, each will be entitled to be heard, present evidence and cross-examine at the final hearing. While this will undoubtedly be the choice of

163 10 *Del. C.* § 5801(3)(b).
164 10 *Del. C.* § 5804(a).
165 *See id.*
166 10 *Del. C.* § 5806(b).
167 10 *Del. C.* § 5807(a).
168 *Id.*

the vast majority of drafters, there could be disputes for which the parties simply want a technician's answer, without the formality of a full hearing with evidence and examination of witnesses. If the parties choose the DRAA to settle accounting or similar disputes, for example, it may be appropriate to appoint a non-legal expert as arbitrator and to provide expressly that the parties are to present their positions on the issue to the arbitrator without witnesses or evidence, or perhaps only with limited expert evidence. Of course, in many types of contracts it will not be possible to predict in advance what type of dispute may arise, but where the nature of the arbitration is expected to be limited or technical, or where the answer sought is binary, it may be worthwhile to consider drafting to eliminate discovery and/or live witnesses at the final hearing.

Contract point: Whether the arbitrator will be authorized to administer oaths and compel the production of witnesses and documents.[169]

Annotation: The Act authorizes the arbitrator to administer oaths and compel discovery from the parties to the arbitration, unless the parties otherwise agree. Absent a desire to ban party discovery, it would generally not be appropriate to alter this default rule.

Contract point: Whether the arbitrator can issue subpoenas and/or commissions to non-parties.[170]

Annotation: The drafters should carefully consider whether to empower the arbitrator to require third parties to give discovery in the arbitration. The issuance of subpoenas or commissions to third parties, by definition, will alert persons outside the arbitration to the fact of the proceedings and thus put at risk the confidentiality of the dispute. Without such power, however, it might be the case that third-party accountants, investment banks or other advisors will not be subject to compulsory process during the arbitration. Depending on the issues presented in the arbitration, that result may be a significant detriment to the parties' ability to present their case to the arbitrator.

Contract point: Whether the arbitrator's power to make any award he or she sees fit, including a legal or equitable award, is to be curtailed in any way.[171]

169 10 *Del. C.* § 5807(b).
170 *Id.*
171 10 *Del. C.* § 5808(a).

Annotation: The Act provides a great deal of power to arbitrators: the power to define the scope of the arbitration and the power to issue awards of any sort, both legal and equitable. If the parties reasonably anticipate that the disputes likely to arise under their agreement should be cabined, providing for limitations on the arbitrator's power may be appropriate.

Contract point: Whether the arbitrator's power to rule on any issue of law is to be circumscribed or limited in any way.[172]

Annotation: In the event that the drafters intend to utilize the Act to deal with limited technical disputes, it may be appropriate to make clear that the power of the arbitrator is limited to ruling on certain specified disputes or classes of disputes. Where the parties intend to arbitrate only some of the potential disputes that could arise under a commercial agreement but allow other disputes to be litigated, they should clearly spell out that intention on the face of their agreement.

Contract point: Whether the arbitrator's final award will be issued in the default time set in the statute (120 days) or some shorter or longer time.[173]

Annotation: The Act provides that all arbitrators must issue their final award within 120 days of acceptance of appointment, unless the parties unanimously agree with the arbitrator to extend that timeline for 60 additional days. The Act specifically prohibits further extensions, however, *unless the parties provide for a longer period of time in their agreement*. Importantly, the Act is structured to *prohibit* an amendment of the agreement to arbitrate to extend the time for the delivery of the final award once the arbitration begins. Thus, to the extent that the parties believe that their dispute is likely to take more than 120-180 days to finally resolve, they should affirmatively expand the time for the arbitration in their agreement.

Contract point: Whether the parties prefer to waive their right to challenge the arbitrator's final award before the Delaware Supreme Court, or instead whether they prefer to proceed to an appeal before one or more appellate arbitrators and, if so, what the scope of review of such appellate arbitration should be.[174]

Annotation: As noted above, absent any provision in the agreement, the statutory default rule is that any party may challenge the final award of the arbitrator on

172 *Id*.
173 10 *Del*. *C*. § 5808(b).
174 10 *Del*. *C*. § 5809(d).

the limited bases provided for challenge under the Federal Arbitration Act. If the parties wish to prohibit such a challenge, effectively making the arbitrator's final award the final word in the dispute, they must do so in the arbitration agreement itself. Likewise, if the parties wish to provide for a private appeal or challenge of the arbitrator's final award, either under an FAA-style challenge or pursuant to a broader scope of review such as that utilized in ordinary appeals from civil actions in court, they need to so provide in their agreement to arbitrate.

Form Arbitration Agreements

Form Agreement I provides the "bare minimum" arbitration clause necessary to invoke the Act. As noted above, there are important reasons why the parties would want to use a more detailed form.

Form Agreement II is a "master form," which addresses the potentially important decisions that can be made under the Act and which provides annotations and notes in the text. This master form is a useful instrument to begin crafting an appropriately detailed dispute resolution provision under the Act.

A ready-made "discovery lite" form can be found as Form Agreement III. This form contemplates no discovery by the parties (and no third-party discovery) and the default appeal to the Delaware Supreme Court. As with any form, this should be customized by the parties to reflect their agreements on the scope of the arbitration.

Form Agreement IV is a ready-made "party discovery" form that contemplates discovery of the parties to the arbitration, but not third parties. In addition, this form contemplates the default appeal to the Delaware Supreme Court. As above, this form should be customized to reflect the parties' agreements.

Form Agreement V is a ready-made "full bore" form that contemplates the broadest possible discovery, including third-party discovery and an appeal to a panel of appellate arbitrators, with a scope of review that is as broad as an ordinary appeal from a civil action. Note that this form alters the deadline for the arbitrator to issue his or her final award. Where disputes are likely to be fact intensive, those using this form may wish to expand the timeline for the arbitrator's final award. As above, this form should be carefully customized to reflect the parties' actual agreements.

Finally, a word about these forms. The master form is intended to provide drafters with a broad platform on which to add their customized provisions. As should be evident, given the number of customization options provided under

the Act, one could imagine many permutations of ready-made forms that deal with every potential combination of choices. The five forms set forth above represent only five basic types of possible arbitration clauses.

These forms have been circulated widely to leading national and international practitioners. The forms included in the handbook may be modified over time, and the most current version of each of these forms is available for downloading, without charge, at www.rlf.com/DRAA/Forms.

FORM AGREEMENT I
("Bare Minimum")

NOTE: As set forth in the text, the arbitration clause that follows contains the bare minimum provisions necessary to invoke the DRAA. This form should be used sparingly, if at all, since it effectively consigns the parties to all of the default provisions of the Act. See Chapter 9, regarding the consequences of using this form.

The parties hereby agree to arbitrate any and all disputes arising under or related to this agreement, including disputes related to the interpretation of this agreement, under the Delaware Rapid Arbitration Act. This provision shall be governed by Delaware law, without reference to the law chosen for any other provision(s) of this agreement.

FORM AGREEMENT II
("Master")

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a "Dispute") shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "DRAA"). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the "Arbitration") in accordance with this Section [_], and each party represents and warrants that it is not a "consumer" as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.[175] To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.[176]

(d) The Arbitration shall be presided over by one arbitrator (the "Arbitrator") who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person's appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a

175 The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

176 The parties may elect to hold the arbitration in a different location. Note, however, that the "seat" of the arbitration is, by statute, in Delaware.

mutually agreeable replacement arbitrator (the "Replacement Arbitrator"). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.[177]

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.[178]

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.[179]

(g) The arbitral award (the "Award") shall (i) be rendered within [120] days after the Arbitrator's acceptance of his or her appointment;[180] (ii) be delivered in writing; (iii) state the reasons for the Award;[181] (iv) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived;[182]

177 The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

178 The DRAA empowers the parties to include one, both or neither of the provisions set forth in subsection (e). If the parties wish to proceed without discovery, neither of the sentences in subsection (e) would be included. If they wish to proceed with only party discovery, then only the first sentence would be used. The second sentence would be used only where the parties wished to be able to take discovery from third parties. The Act would also permit the taking of only documentary discovery (as opposed to deposition or other testimony) or, alternatively, only oral testimony (as opposed to documents). The Act contemplates that the scope of discovery is customizable in this agreement, so in all events, this issue should be addressed. The statutory default, which would come into play if this provision was not included in some form, would be for the Arbitrator to be empowered to summon party witnesses and evidence, but not third-party evidence or witnesses.

179 The DRAA provides that the agreement may modify or eliminate the foregoing processes. Elimination may be appropriate in circumstances where the parties agree to present a pure issue of law for resolution, or in circumstances where a narrow, technical issue is the subject of the arbitration.

180 The parties may specify a longer period for the arbitration. If they do not do so, the 120-day period of the DRAA is the default, and such period may be extended by no more than an additional 60 days, and then only upon consent of all parties to the arbitration.

181 A reasoned award is not required by the Act, but may be required by the parties' contract.

182 The DRAA allows the parties to waive the right to appeal. This provision should only be included if the parties intend to waive appellate rights. Subsection (l) below is included in the event that the parties wish to preserve the right to appeal the Arbitrator's award, in which case clause (iv) of subsection (g) should not be included.

and (v) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.[183]

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,[184] and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, any third-party discovery proceedings, including any discovery obtained pursuant thereto, and any decision of the Arbitrator or Award) [NOTE: the parties would eliminate reference to "third party discovery proceedings" in the event that such proceedings were not contracted for in Section e, above], shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery.[185] In all events, the parties [and any third parties] participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.[186]

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183 Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

184 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

185 Clause (v) would be excluded in the event that third-party discovery was not provided for in subsection (e) above.

186 The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the "Respondent") is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata,* collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

(l) Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.[187] *[NOTE: The following is an alternative appellate provision in the event that the parties do not to wish to proceed with an appeal before the Delaware Supreme Court and desire a limited scope of appeal in accordance with the FAA.]* Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].[188] The appellate panel may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act.[189] *[NOTE: The following is an alternative appellate provision for use in the event that the parties do not to wish to proceed with an appeal before the Delaware Supreme Court and desire that the scope of their appeal be as broad as possible.]* Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators].[190] The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.

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event that the parties wish to vary this provision, they should do so here. Such variations could include a "loser pays" provision or an "arbitrator chooses" provision, which is not prohibited by the DRAA.

187 The DRAA permits the parties to waive appellate review, to proceed with a limited review in the Delaware Supreme Court, or to proceed with a private appellate arbitral review. This provision contemplates a review in the Delaware Supreme Court. In the event it is used, the parties should eliminate clause (iv) of subsection (g).

188 In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one or more senior Delaware lawyers.

189 This provision contemplates a scope of challenge to the Arbitrator's final judgment limited to the grounds for review of an arbitral award under the Federal Arbitration Act. Parties who wish a broader scope of review may wish to consider the succeeding alternate provision set forth above.

190 In the event that the parties wish to have a particular type of arbitrator appointed, they should so specify here. If not, the Court will appoint one or more senior Delaware lawyers.

FORM AGREEMENT III
("Discovery Lite")

NOTE: The following is a draft provision to be used as a starting point for triggering arbitration under the DRAA. The clause omits discovery and limits appeal to a public appeal before the Delaware Supreme Court. This type of provision would likely be useful in resolving disputes where a technical issue, such as an earn-out, is to be resolved by an expert arbitrator. The Act would allow drafters to modify this form to, inter alia, expand discovery rights or change (or eliminate) appellate options.

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a "Dispute") shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "DRAA"). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the "Arbitration") in accordance with this Section [_], and each party represents and warrants that it is not a "consumer" as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.[191] To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.[192]

191 The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

192 The parties may elect to hold the arbitration in a different location. Note, however, that the "seat" of the arbitration is, by statute, in Delaware.

(d) The Arbitration shall be presided over by one arbitrator (the "Arbitrator") who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person's appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the "Replacement Arbitrator"). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.

(e) No discovery shall be taken in support of the Arbitration, although each side shall exchange such documents and other information as may be required by this Agreement. In addition, each side shall exchange such additional information as may be directed by the Arbitrator, either on his own motion or on application of any party for good cause shown.

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party. In no event, however, shall witnesses other than employees or experts retained or employed by the parties, or former employees of the parties, be called to testify at the arbitration.

(g) The arbitral award (the "Award") shall (i) be rendered within 120 days after the Arbitrator's acceptance of his or her appointment; (ii) be delivered in writing; (iii) be the sole and exclusive final and binding remedy with respect to the Dispute between and among the parties without the possibility of challenge or appeal, which are hereby waived; and (iv) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.[193]

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,[194] and all matters relating thereto

193 Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

194 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; and (iv) other employees or agents of the parties with a need to know such information. In all events, the parties participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.[195]

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the "Respondent") is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata,* collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

195 The DRAA permits the parties to direct how costs of the Arbitration are to be borne. Thus, in the event that the parties wish to vary this provision, they should do so here. Such variations could include a "loser pays" provision or an "arbitrator chooses" provision, which is not prohibited by the DRAA.

FORM AGREEMENT IV
("Party Discovery")

Form of DRAA Arbitration Provision (Modest discovery)

NOTE: This form of provision contemplates that the parties will preserve their right to appeal to the Delaware Supreme Court and take limited discovery of each other, but not third parties. This clause might best be used where the parties are in an ongoing relationship, need prompt resolution of their dispute, but prefer to keep entirely private the fact of the dispute, even from third-party advisors, etc.

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a "Dispute") shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "DRAA"). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the "Arbitration") in accordance with this Section [_], and each party represents and warrants that it is not a "consumer" as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.[196] To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.[197]

196 The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

197 The parties may elect to hold the arbitration in a different location. Note, however, that the "seat" of the arbitration is, by statute, in Delaware.

(d) The Arbitration shall be presided over by one arbitrator (the "Arbitrator") who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person's appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the "Replacement Arbitrator"). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents.

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.

(g) The arbitral award (the "Award") shall (i) be rendered within 120 days after the Arbitrator's acceptance of his or her appointment; (ii) be delivered in writing; (iii) state the reasons for the Award; and (iv) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.[198]

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,[199] and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, including any discovery obtained pursuant thereto, and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and

198 Under the DRAA, the parties have the right to limit the power of the Arbitrator to award relief. Any such limitation should be specified here, in lieu of the last sentence of this provision.

199 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; and (iv) other employees or agents of the parties with a need to know such information. In all events, the parties participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the "Respondent") is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata,* collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

(l) Any challenge to the final award of the Arbitrator shall be brought before the Supreme Court of the State of Delaware within the time frame provided in the DRAA, and pursuant to the Rules of such Court.

FORM AGREEMENT V
("Full Bore")

NOTE: This clause has been customized to provide for the maximum permitted discovery, including third-party discovery, and a plenary (and private) appeal. It is best used in matters where the parties expect to need to develop a full record and prefer the need for a "litigation style" appeal.

Section [_]. Arbitration.

(a) The parties hereto agree that any dispute or controversy arising out of, relating to, or in connection with this Agreement or the transactions contemplated hereby (a "Dispute") shall be arbitrated pursuant to the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "DRAA"). The parties agree to take all steps necessary or advisable to submit any Dispute that cannot be resolved by the parties for arbitration under the DRAA (the "Arbitration") in accordance with this Section [_], and each party represents and warrants that it is not a "consumer" as such term is defined in 6 *Del. C.* § 2731. By executing this Agreement, (i) each party hereby waives, and acknowledges and agrees that it shall be deemed to have waived, any objection to the application of the procedures set forth in the DRAA, (ii) consents to the procedures set forth in the DRAA, and (iii) acknowledges and agrees that it has chosen freely to waive the matters set forth in subsections (b) and (c) of Section 5803 of the DRAA. In connection therewith, each party understands and agrees that it shall raise no objection to the submission of the Dispute to Arbitration in accordance with this Section [_] and that it waives any right to lay claim to jurisdiction in any venue and any and all rights to have the Dispute decided by a jury.

(b) The Arbitration shall be conducted in accordance with the Delaware Rapid Arbitration Rules, as such Rules may be amended or changed from time to time; provided that the parties may agree to depart from the Rules by (i) adopting new or different rules to govern the Arbitration or (ii) modifying or rejecting the application of certain of the Rules.[200] To be effective, any departure from the Rules shall require the consent of the Arbitrator and shall be in writing and signed by an authorized representative of each such party.

(c) The Arbitration shall take place in Wilmington, Delaware, or such other location as the parties and the Arbitrator may agree.[201]

200 The parties may elect to use different rules. If different rules are desired, they should be set forth or incorporated by reference into this subsection (b).

201 The parties may elect to hold the arbitration in a different location. Note, however, that the "seat" of the arbitration is, by statute, in Delaware.

(d) The Arbitration shall be presided over by one arbitrator (the "Arbitrator") who shall be [insert name of person]. In the event that [named person] fails to accept appointment as Arbitrator for any reason within five (5) days of being notified of such person's appointment or otherwise becomes unwilling or unable to serve as arbitrator, the parties shall promptly meet and confer to identify a mutually agreeable replacement arbitrator (the "Replacement Arbitrator"). The Replacement Arbitrator shall be [describe qualifications of the Replacement Arbitrator]. In the event that the parties are unable to agree upon the identity of the Replacement Arbitrator within forty-five (45) days of the commencement of the Arbitration, or the Replacement Arbitrator is unable or unwilling to serve, then either party may file a petition with the Court of Chancery pursuant to Section 5805 of the DRAA.[202]

(e) Each of the parties shall, subject to such limitations as the Arbitrator may prescribe, be entitled to collect documents and testimony from each other party, and the Arbitrator shall have the power to administer oaths and compel the production of witnesses and documents. The Arbitrator shall have the power to issue subpoenas and commissions for the taking of documents and testimony from third parties.

(f) The Arbitrator shall conduct the hearing, administer oaths, and make such rulings as are appropriate to the conduct of the proceedings. The Arbitrator shall allow each of the parties an opportunity to present evidence and witnesses and to cross examine witnesses presented by the opposing party.

(g) The arbitral award (the "Award") shall (i) be rendered within 9 months[203] after the Arbitrator's acceptance of his or her appointment; (ii) be delivered in writing; (iii) state the reasons for the Award; and (iv) be accompanied by a form of judgment. The Award shall be deemed an award of the United States, the relationship between the parties shall be deemed commercial in nature, and any Dispute arbitrated pursuant to this Section [_] shall be deemed commercial. The Arbitrator shall have the authority to grant any equitable or legal remedies, including, without limitation, entering preliminary or permanent injunctive relief; provided, however, that the Arbitrator shall not have the authority to award (and the parties waive the right to seek an award of) punitive or exemplary damages.

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202 The parties may wish to proceed before a panel of arbitrators. In such event, this provision should be changed to reflect the desired number of arbitrators and to state their names or provide the descriptive qualifications.

203 The Act provides for disposition within 120 days, subject to no more than one agreed-to 60-day extension, unless otherwise provided in the agreement to arbitrate. We have chosen to so provide in light of the scope of the proceedings contemplated in this clause. Should the parties wish a more truncated time frame, then this phrase should be modified.

(h) The parties hereto agree that, subject to any non-waivable disclosure obligations under federal law, the Arbitration,[204] and all matters relating thereto or arising thereunder, including, without limitation, the existence of the Dispute, the Arbitration and all of its elements (including any pleadings, briefs or other documents submitted or exchanged, any testimony or other oral submissions, any third-party discovery proceedings, including any discovery obtained pursuant thereto, and any decision of the Arbitrator or Award), shall be kept strictly confidential, and each party hereby agrees that such information shall not be disclosed beyond: (i) the Arbitrator and necessary support personnel; (ii) the participants in the Arbitration; (iii) those assisting the parties in the preparation or presentation of the Arbitration; (iv) other employees or agents of the parties with a need to know such information; and (v) any third parties that are subpoenaed or otherwise provide discovery in the Arbitration proceedings, only to the extent necessary to obtain such discovery. In all events, the parties and any third parties participating in the Arbitration proceedings shall treat information pertaining to the Arbitration with the same care that they treat their most valuable proprietary secrets. In the event that federal law imposes upon either party an obligation to disclose the fact of the Arbitration or the nature of the claims or counterclaims asserted, such party(-ies) shall disclose no more than the minimum information required by law after first consulting with and attempting in good faith to reach agreement with the opposing party(-ies) regarding the scope and content of any such required disclosure.

(i) Each party hereto shall bear its own legal fees and costs in connection with the Arbitration; provided, however, that each such party shall pay one-half of any filing fees, fees and expenses of the Arbitrator or other similar costs incurred by the parties in connection with the prosecution of the Arbitration.

(j) Notwithstanding any provisions of this Agreement, or any statute protecting the confidentiality of the Arbitration and proceedings taken in connection therewith, in the event that either party in the Arbitration (the "Respondent") is required to defend himself, herself or itself in response to later proceedings instituted by the other in any court, relating to matters decided in the Arbitration, such party shall be relieved of any obligation to hold confidential the Arbitration and its proceedings in order to submit, confidentially if and to the extent possible, sufficient information to such court to allow it to determine whether the doctrines of *res judicata,* collateral estoppel, bar by judgment, or other, similar doctrines apply to such subsequent proceedings.

(k) Notwithstanding anything to the contrary set forth in this Section [_], if any amendment to the Act is enacted after the date of this Agreement, and such amendment would render any provision of this Section [_] unenforceable

204 This phrase would be included only in the event that one or both parties were subject to federal disclosure obligations which could encompass the Arbitration.

thereunder, such provision shall be excluded and the remaining provisions of this Section [_] shall be enforced to the fullest extent permitted by law.

(l) Any challenge to the final award of the Arbitrator shall be made before a panel of three (3) appellate arbitrators, who shall be [insert names or description of appellate arbitrators]. The scope of the appeal shall not be limited to the scope of a challenge under the Federal Arbitration Act, but instead shall be the same as any appeal from a judgment in a civil action filed in court.

CHAPTER 10

The Delaware Rapid Arbitration Rules

The DRAA authorizes the Delaware Supreme Court, in consultation with the Court of Chancery, to publish rules for DRAA arbitrations.[205] On June 17, 2015, the Delaware Supreme Court, in consultation with the Court of Chancery, adopted the Delaware Rapid Arbitration Rules.[206] The Rules, which became effective on June 22, 2015, set forth the procedure for arbitrations under the DRAA and will govern the arbitration in the absence of a contrary choice in the parties' agreement. The parties remain free to choose or create an alternative set of procedural rules, provided that the rules chosen are not inconsistent with the requirements of the DRAA.

An Overview of the Procedure Envisioned by the Rules

The Delaware Rapid Arbitration Rules (the "Rules") contemplate a process similar in many respects to an expedited court proceeding. Unless the arbitration agreement provides otherwise, a party to a DRAA arbitration "is entitled to be heard, to present evidence relevant to the arbitration, and to cross-examine witnesses appearing at a hearing," subject to the arbitrator's authority to control the order of proof and to proceed to resolve an arbitration in the absence of a duly notified party.[207]

205 *See* 10 *Del. C.* § 5804(a).
206 These rules are available in Appendix I or at http://www.rlf.com/DRAA/OfficialRules.
207 10 *Del. C.* § 5807(a); *see also* Rule 8.

Promptly after accepting appointment, the arbitrator will hold a preliminary conference.[208] The parties are expected to collaborate in preparing a scheduling order for entry by the arbitrator. The scheduling order sets the date, time and location for the final arbitration hearing and various interim deadlines.[209] The Rules provide for the parties to exchange pleadings setting forth each party's claims and the factual basis underlying them.[210] The parties then engage in an exchange of information and have an opportunity to seek additional information from third parties.[211] The exchange of information may take the form of document production, depositions or other forms familiar in the world of litigation.

The Rules do not permit dispositive motion practice unless the arbitrator approves a scheduling order allowing it.[212] Instead, the parties proceed directly to a final arbitration hearing, at which the parties have the opportunity to present evidence and cross-examine witnesses.[213] The arbitrator may allow or require pre-hearing or post-hearing briefing.[214] The arbitrator then makes a final award in writing.[215]

Application of the Rules (Rules 1, 2, 3)

The DRAA contemplates that, by order, the Delaware Supreme Court may adopt rules that will apply in all DRAA arbitrations, unless the parties agree to different rules.[216] The Rules specify that the parties may agree to adopt additional or different rules with the arbitrator's consent, provided that the amendments or additions may not be inconsistent with the DRAA.[217]

Rule 2 provides that, unless the parties agree otherwise, the rules governing an arbitration will be those in effect at the time of the arbitrator's appointment. The arbitrator has the exclusive authority to resolve finally any question as to the rules governing the proceeding, or their interpretation or application, including any question arising out of an amendment of the Rules,[218]

208 *See* Rule 16.
209 *See* Rule 4.
210 *See* Rules 12, 14.
211 *See* Rules 17, 18.
212 *See* Rule 16.
213 *See* Rule 22.
214 *See* Rules 21, 23.
215 *See* Rule 24.
216 10 *Del. C.* § 5804(a); Rule 1.
217 *See* Rule 3.
218 *See* Rule 2.

or arising out of an agreement by the parties to alter or add to the Rules for purposes of a particular arbitration.[219]

Confidentiality (Rule 5)

DRAA arbitrations are designed to be private and confidential proceedings. Rule 5 extends confidentiality protection to memoranda and work product in the arbitrator's case files, and to communications made in or in connection with the arbitration that relate to the controversy being arbitrated. The latter protection extends both to statements made at conferences or hearings with the arbitrator and to communications with other parties in the arbitrator's absence. The arbitrator possesses authority under Rule 5 to issue orders to protect the confidentiality both of the proceedings and of the documents and other matters used in the arbitration.

Materials subject to the confidentiality obligations of Rule 5 are protected from disclosure in other judicial or administrative proceedings. But the rule does not protect from disclosure materials that were not prepared specifically for use in the arbitration and that are otherwise subject to disclosure. This exception is designed to bar the parties from invoking the arbitration's confidentiality protection to shield unrelated materials improperly from disclosure in other proceedings.

The parties may waive the confidentiality protections by unanimous written consent. They may also, with the arbitrator's consent, agree to confidentiality rules or protections that are tailored to the circumstances of the individual arbitration matter.

Rule 5 provides that materials submitted to the arbitrator, served on the parties, used at an arbitration hearing or conference, or referred to or relied upon in an arbitral award do not become part of the public record. But in the event of a challenge to the Delaware Supreme Court, the record submitted on the challenge may become part of the public record. Parties drafting an arbitration agreement that provides for a challenge to the Delaware Supreme Court should be careful to balance the need for an adequate record to support review for limited purposes with their confidentiality needs. Similarly, parties drafting an agreement that provides for arbitral appellate review should ensure that the appellate tribunal has access to a record adequate for its purpose.

219 *See* Rule 6.

The Arbitrator (Rules 6, 7, 10)

Like the DRAA itself, the Rules seek to eliminate the delay and expense of court proceedings over issues of arbitrability by committing all questions of substantive or procedural arbitrability exclusively and finally to the arbitrator.[220] The exclusive submission to the arbitrator of questions of arbitrability is statutory[221] and cannot be eliminated by agreement of the parties. The statute permits the parties to impose limits on the arbitrator's discretion to determine the scope of remedial authority, on the scope of review over the arbitrator's exercise of that discretion, and on the scope of the remedial authority itself.[222]

The Rules refer to the arbitrator any question of the interpretation or application of the rules governing the arbitration.[223] The Rules also authorize the arbitrator to determine the scope of remedial authority and to grant any interim or final relief the arbitrator deems appropriate. The Rules oblige the arbitrator to issue the final award in writing and to sign it, but do not impose a similar obligation as to interim awards or orders.[224]

Because the DRAA contemplates that the parties may select an arbitrator who is not a lawyer or who lacks expertise in a legal discipline that is relevant to the matter in dispute (or that the Court of Chancery may select such an arbitrator if the arbitration agreement so provides), both the DRAA and the Rules permit the arbitrator to retain counsel.[225] The arbitrator may ask the retained counsel to make rulings of law and to determine that counsel's rulings of law will have the same effect as a ruling of law by the arbitrator.[226] The arbitrator also may retain counsel without asking that counsel to make legal rulings on the arbitrator's behalf; for example, the arbitrator may seek advice on a specialized issue or may retain litigation counsel to secure dismissal of an improperly brought effort to enjoin the arbitration. The fees and costs incurred by retained counsel are chargeable as part of the arbitrator's expenses in the final award.[227]

Rule 6 gives the arbitrator the power to administer oaths, to compel the attendance of witnesses and the production of documents and other evidence (except as limited by the arbitration agreement), and to make legal and factual

220 *See id*.
221 *See* 10 *Del*. *C*. § 5803(b)(2).
222 *See* 10 *Del*. *C*. § 5803(b)(5).
223 *See* Rule 6.
224 *See* Rule 24.
225 *See* 10 *Del*. *C*. § 5806(c); Rule 25.
226 *See* 10 *Del*. *C*. § 5806(c).
227 *See id*.

rulings and issue such orders and sanctions as the arbitrator may deem proper to resolve the arbitration in a timely, efficient and orderly manner. Notably, however, the arbitrator cannot issue subpoenas or award commissions to permit depositions to be taken of witnesses who cannot be subpoenaed, unless the arbitration agreement so provides.[228] Parties who wish to empower the arbitrator to oversee a discovery process that involves third-party discovery should consider granting the arbitrator such authority, and likely should also consider carefully whether the default 120-day deadline for delivery of the final award makes sense for such a dispute.

Rule 7 immunizes the arbitrator from being compelled to testify in other proceedings on matters relating to service as an arbitrator. Unless the parties agree under Rule 5 to waive confidentiality, or agree with the arbitrator's consent to a more limited scope of confidentiality, the arbitrator ordinarily will be unable to provide testimony about the arbitration in other proceedings.

Rule 7 also precludes civil suit against the arbitrator for acts or omissions in connection with the arbitration, subject to exceptions for acts or omissions "in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another." This immunity, which is provided by statute[229] and cannot be waived by the parties' agreement, is similar to that afforded arbitrators in other arbitral regimes.[230]

Finally, Rule 10 discourages *ex parte* communications with the arbitrator concerning the arbitration. The rule recognizes that exigent circumstances may make *ex parte* communication necessary, but requires the party to the communication to make prompt disclosure of the communication to all other parties to the arbitration.

The Parties' Rights to Representation and to Attend Hearings (Rule 8)

As in civil litigation, parties to a DRAA arbitration have a right to be represented by counsel. Parties are required under Rule 8 to give prompt notice of any

228 *See* Rule 6.

229 *See* 10 *Del. C.* § 5806(a).

230 Section 5806(a) of the Act provides an arbitrator with immunity from suit. The Act does not, however, expressly shield the arbitrator from discovery. The parties' use of the Rules will provide a testimonial privilege to the arbitrator, and the parties will be barred from attempting to take testimony from the arbitrator. Further, the parties may wish to consider allowing such testimony to be taken if the arbitrator issues a late award and petitions the Court of Chancery to reverse the statutory reduction of the arbitrator's fees.

change of counsel and are not entitled to delay the arbitration as a result of a change of counsel.

Rule 8 also obliges each party to send at least one representative with authority to resolve the matter to the final arbitration hearing, but a party's failure to comply with this obligation will not delay the arbitration or divest the arbitrator of authority to proceed.

Service of Papers (Rule 13)

Rule 13 contemplates that the arbitrator's scheduling order will specify the manner in which arbitration papers may be served on the arbitrator and the parties or their counsel. The pleadings, any request for pre-hearing exchange of information, any orders of the arbitrator, and any written communication delivered to the arbitrator must be served on all parties to the arbitration. This requirement expands slightly on the normal rule in American litigation, that requests for discovery should be served on the parties but not filed with the tribunal, because the arbitrator will ordinarily be expected to take a more active role in supervising the discovery process than a judge in a non-expedited case might. The arbitrator is required to maintain a record of all pleadings and other papers delivered, but that case file is subject to the confidentiality restrictions of Rule 5.

Appointment and Replacement of the Arbitrator (Rules 9, 11)

The DRAA empowers the Court of Chancery to appoint one or more arbitrators.[231] But if the parties are able to agree on an arbitrator or panel of arbitrators (as the arbitration agreement may provide) and the chosen arbitrator or panel is willing to serve, the Court's involvement is not necessary. As discussed in Chapter 5, the parties may, but are not required to, seek by petition (if no litigation is pending) or application (if a case between the parties is already pending before the Court) an order appointing the arbitrator.

The arbitration is commenced, and the deadlines for resolving the matter begin to run, when the arbitrator gives written notice of acceptance of appointment.[232] If the arbitrator is appointed by order of the Court of Chancery, then the arbitrator is required to file a written notice of acceptance of appointment with the Court and serve it on the parties. If the parties choose an arbitrator without the Court's involvement, then the arbitrator need not file

231 *See* 10 *Del. C.* § 5805(a).
232 *See* 10 *Del. C.* § 5808(b); Rule 9.

anything with the Court, but must serve the written notice of acceptance on the parties. If more than one arbitrator is appointed, then the time periods begin to run upon service of the last arbitrator's written notice of acceptance of service.[233]

The Rules also contain a provision for replacement of an arbitrator if the arbitrator is unable to continue.[234]

Pleadings (Rules 12, 14, 15)

The Rules contemplate that the issues for the arbitration will be framed by pleadings, including a complaint, an answer (which may assert affirmative defenses and/or counterclaims) and a reply to any counterclaims.[235] The pleadings are required to give the other parties reasonable notice of the nature of the pleading party's position and the factual basis for the position. The arbitrator has discretion to decline to consider a claim as to which reasonable notice has not been given in the pleadings.[236] The authority granted to the arbitrator implicitly includes the authority to require a party to supplement its pleadings so as to give reasonable notice or to impose sanctions (potentially including judgment for the opposing party) for a failure to give reasonable notice. However, the Rules do not permit the parties to engage in motion practice testing the sufficiency of the pleadings without permission from the arbitrator.[237]

The complaint is due two business days after the arbitrator accepts appointment, and it should include copies of any litigation pleadings if the matter in dispute is already the subject of litigation. The answer is due five business days after service of the complaint, and any reply is due three business days after service of the answer; the arbitrator may alter these periods.[238]

In view of the compact timeline for a DRAA arbitration, the Rules limit the parties' ability to amend their pleadings. Any amendment to the pleadings requires the arbitrator's consent.[239] The parties cannot stipulate to allow an amendment without the arbitrator's consent, nor does a party have a right under the Rules (as it might in the civil litigation system) to amend before a responsive pleading is served. The Rules contemplate that, where a monetary award is sought and the parties do not agree otherwise, the arbitrator will

233 *See* Rule 9.
234 *See* Rule 11.
235 *See* Rule 12.
236 *See* Rule 14.
237 *See* Rule 16.
238 *See* Rule 12.
239 *See* Rule 15.

include a date in the scheduling order by which a party may amend its pleading solely by increasing or decreasing the amount of the monetary award sought.[240] The arbitrator may include a cut-off date by which a party may amend its pleading in other respects, but this is left to the arbitrator's discretion.

In keeping with the statutory goal of ensuring prompt and efficient adjudication, the Rules do not permit an amendment to the pleadings or a party's failure to serve a timely answer or reply to operate to delay the arbitration.[241] The arbitrator has discretion to deal with scheduling issues arising from granting a party's request for leave to amend its pleadings, but neither the arbitrator nor the parties can use an amendment as an occasion to extend the statutory deadlines for delivery of the final award.

Order of Proceedings (Rule 16)

A DRAA arbitration normally will proceed through stages similar to those of an expedited trial in the civil court system, subject to the parties' agreement or the arbitrator's decision to alter the procedure. Under Rule 16, the arbitrator will convene a preliminary conference as soon as practicable after serving the notice of acceptance of appointment. The preliminary conference is a telephone conference among the arbitrator and the parties, designed to obtain conflict statements from the parties, discuss scheduling matters, and consider whether mediation or some other alternative dispute resolution procedure may be appropriate.[242] The preliminary conference ordinarily should take place within 10 calendar days of the arbitrator's acceptance of appointment.[243]

As soon as possible after the preliminary conference, the arbitrator should enter a scheduling order.[244] Similar to a scheduling order in the civil litigation system, the scheduling order should describe the discovery in which the parties are authorized to engage, the cut-offs for completing fact and expert discovery (if any) and for amending the pleadings, and the deadlines for any written submissions to the arbitrator. The scheduling order should also set a date, time and location for the arbitration hearing, which is the final hearing on the merits. Under Rule 4, the arbitration hearing generally should be scheduled no more than 90 days after the arbitrator serves the notice of acceptance of appointment, unless the parties

240 *See id*.
241 *See* Rules 12, 15.
242 *See* Rule 4.
243 *See* Rule 16.
244 *See* Rule 4.

and the arbitrator agree otherwise. The arbitrator has discretion to amend the scheduling order, including discretion to reschedule the arbitration hearing, but cannot by doing so alter the statutory deadlines for delivery of the final award in the statute.

The arbitrator may also convene one or more telephonic preliminary hearings on reasonable notice. The Rules do not limit the subjects that the arbitrator and the parties may consider at a preliminary hearing.[245] The Rules suggest a variety of potential topics, such as framing of the issues through the pleadings and stipulations of fact, the scope and methods of discovery, identification of witnesses for the arbitration hearing, the use of deposition testimony or affidavits in lieu of live witness testimony, and administrative matters relating to the efficient conduct of the arbitration hearing.

Because the arbitration hearing ordinarily will be held within 90 days of the arbitrator's appointment, the Rules do not allow the parties to engage in dispositive motion practice, such as motions to dismiss or motions for summary judgment, without the arbitrator's permission.[246]

The Pre-Hearing Exchange of Information (Rules 17, 18)

The parties will engage in "an exchange of information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the consent of the Arbitrator, to forgo pre-hearing exchange of information."[247] Materials exchanged are subject to express confidentiality restrictions. The parties' obligation to make information available for exchange, to the extent agreed by the parties or ordered by the arbitrator, extends to information in the possession of their employees, agents and retained professionals.[248] Parties also are expected to make their employees, agents and retained professionals available for deposition without the need for compulsory process, to the extent the scope of information exchanged includes depositions.[249]

The parties and their counsel are expected to attempt in good faith to agree on the scope of the pre-hearing exchange of information, a vital necessity given that a DRAA arbitration conducted under the Rules will ordinarily go from appointment of the arbitrator to final hearing on the merits within three months. Unless the

245 *See id*.
246 *See* Rule 16.
247 *See* Rule 17.
248 *See* Rule 18.
249 *See id*.

parties agree in advance to a substantial extension of the deadline for the final award, full American-style discovery will likely not be practicable.

The DRAA permits third-party discovery, subject to limitations agreed to by the parties or ordered by the arbitrator, but parties framing an agreement to arbitrate should consider carefully the practicalities of potential third-party discovery. On the default schedule calling for a final hearing on the merits within three months and a final award within four, obtaining meaningful third-party discovery, especially from non-cooperative third parties, is likely to be difficult. The DRAA empowers the arbitrator to issue subpoenas or commissions to permit depositions to be taken only if the parties' arbitration agreement so provides.[250]

Rule 17 directs the arbitrator to resolve disputes over the scope of discovery under a "necessary and appropriate" standard, "taking into account the importance of the information to the arbitration, the burden of producing the information and such other factors as the Arbitrator deems relevant." The rule expressly provides that the scope of information exchanged "should ordinarily be substantially less broad than the scope of information that might be subject to discovery in civil litigation."

The arbitrator possesses broad powers to enforce the parties' discovery obligations, including the power to make legal or factual rulings and to impose sanctions for violations of discovery orders.[251] These powers include the power to compel (as against the parties) the attendance of witnesses and the production of evidence, unless otherwise agreed.[252] It may be expected that material breaches of discovery orders may lead to substantial prejudice to an opposing party preparing for a final hearing within three months, and that the arbitrator's remedial discretion will be exercised accordingly.

Dismissal and Settlement (Rules 20, 26)

The Rules permit a claimant to withdraw its claims unilaterally before the arbitrator serves written notice of acceptance of appointment.[253] Once the arbitrator has accepted appointment, however, a party cannot withdraw from the arbitration without the written agreement of all parties. A party may unilaterally withdraw a claim or counterclaim without prejudice upon written notice to the arbitrator and all parties, but the other parties may apply

250 10 *Del. C.* § 5807(b); *see also* Rule 18.
251 *See* Rule 17.
252 *See* Rule 18; 10 *Del. C.* § 5807(b).
253 *See* Rule 20.

to the arbitrator within seven calendar days for an order determining that the dismissal of the claim or counterclaim will be with prejudice. The arbitrator will determine such a request finally and exclusively, after allowing the parties an opportunity to be heard on the request.[254]

The Rules expressly contemplate that the arbitrator may consider with the parties whether mediation or other efforts to settle may be productive.[255] The arbitrator also is required to apply the law of privilege as to communications or statements made in connections with efforts to reach a settlement.[256]

If the parties succeed in reaching a settlement, they may, but are not required to, ask the arbitrator to set forth the terms of the settlement in a consent award.[257] Unless the arbitrator determines, after allowing the parties to be heard on the issue, that the proposed settlement is "unlawful or undermine[s] the integrity of the arbitration," the arbitrator is required to issue the consent award requested by the parties.[258] A consent award is required to contain an allocation of fees and costs, as a final award would.

The Arbitration Hearing (Rules 19, 21, 22, 23)

Unless the parties agree to a different procedure, the arbitration hearing is conducted comparably to a trial in the civil courts, with each party having the opportunity to present relevant evidence and to cross-examine witnesses appearing at the hearing, subject to the arbitrator's control over the order of proof.[259] The parties are entitled to notice of the date, time and place of the arbitration hearing and to appear and be represented by counsel.[260] The arbitrator may require witnesses to testify under oath.[261] But the arbitrator is not obliged to apply the formal rules of evidence strictly, other than those relating to privileges and immunities and to the inadmissibility of settlement communications.

The Rules contemplate that the arbitration hearing ordinarily will be limited to a single day. However, the parties' agreement to arbitrate may specify a longer or shorter period, and the arbitrator may, in consultation with the parties, decide on a different period.[262]

254 *See id*.
255 *See* Rule 4.
256 *See* Rule 22.
257 Rule 26.
258 *Id*.
259 *See* 10 *Del*. *C*. § 5807(a); Rule 22.
260 *See* Rules 8, 22.
261 *See* Rule 22.
262 *See id*.

The arbitration agreement may specify the location of the arbitration hearing, and the location need not be in the State of Delaware or in the United States of America.[263] If the arbitration agreement does not specify a location, the arbitrator may select the location. Rule 22 contemplates the possibility of an arbitration hearing conducted by telephone or other electronic means, if the arbitration agreement so provides or the parties so agree. Regardless of where the arbitration hearing is held, the seat of the arbitration is the State of Delaware.[264]

An arbitrator under the Rules has the authority to direct preparation of a stenographic or other record of the arbitration hearing, unless the parties' agreement to arbitrate otherwise provides or the parties otherwise agree.[265] If a record is prepared, it is to be made available for the use of the arbitrator and the parties.[266] Unless the arbitration agreement otherwise provides, the final award should provide for the allocation of the cost of preparing the record.[267]

Before the arbitration hearing, the parties are required to identify the fact and expert witnesses they intend to call at the hearing and to describe each witness's expected testimony and the expected duration of the testimony. The parties are also required to disclose the exhibits they expect to use at the arbitration hearing, pre-marking them for ease of reference if possible.[268] The scheduling order should include deadlines for witness and exhibit disclosures.

The arbitrator may permit or require the parties to submit pre-hearing briefs.[269] If pre-hearing briefing is to take place, the scheduling order should give deadlines and provide for the format and maximum length of the briefs. The scheduling order also should state how many pre-hearing briefs each party will submit and whether the briefs will be submitted sequentially or in parallel.

Similar to the provisions for pre-hearing briefing, the arbitrator may allow or require the submission of post-hearing briefing.[270] The scheduling order should specify the number, sequence, due dates, format and permissible length of post-hearing briefs.

263 *See* 10 *Del. C.* § 5807(a).
264 10 *Del. C.* §§ 5803(b)(3), 5807(a); Rule 22.
265 *See* Rule 22.
266 *See id.*
267 *See* Rule 25.
268 *See* Rule 19.
269 *See* Rule 21.
270 *See* Rule 23.

The Final Award, Fees and Costs (Rules 24, 25)

The Rules require the arbitrator to issue a final award in writing and to sign the final award, but they do not expressly require the award to be a reasoned award.[271] The parties are free to agree in their arbitration agreement that the arbitrator should make a reasoned award, and they should consider doing so if they wish to preserve the optionality of a challenge to the Delaware Supreme Court or an arbitral appeal.

The Rules permit the arbitrator to award any form of legal or equitable relief the arbitrator deems appropriate, and to include rulings on any issue of law the arbitrator deems relevant, unless the arbitration agreement provides otherwise.[272] The arbitrator may retain appropriate counsel (in consultation with the parties) and may direct that counsel to make rulings on issues of law.[273]

The final award should contain an allocation of payment of the fees and costs of the arbitration, including the arbitrator's fees and costs, the fees and costs of any counsel retained by the arbitrator, and the cost of preparing a record (if any).[274] The Rules do not require the arbitrator to allocate the counsel fees of the parties. That is, the Rules contemplate that each party will bear its own counsel fees, but the arbitrator retains discretion to shift counsel fees on appropriate grounds (which might include a fee-shifting provision in the arbitration agreement or the substantive law governing the dispute, or any of the recognized exceptions to the American Rule requiring each party to bear its own counsel fees).[275]

The Rules do not provide an opportunity for the arbitrator to correct a final award once issued, as some arbitral regimes do. Instead, the Rules and the DRAA contemplate that any correction will be made through the challenge process or through an arbitral appeal. Especially in cases where the parties have agreed to waive appeal, the parties and the arbitrator should consider building time into the scheduling order for the arbitrator to issue a draft award and for the parties to apply to the arbitrator for corrections before that award becomes final.

271 *See* Rule 24.
272 *See id*.
273 *See* Rule 25; 10 *Del. C*. § 5806(c).
274 *See* Rule 25.
275 *See id*.

APPENDIX I: DELAWARE RAPID ARBITRATION RULES

Rule 1: Applicability of the Rules

These Rules shall govern the procedure in arbitrations under the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801, *et seq.* (the "Act"), always subject to the provisions of the Act and subject to any agreement in conformity with Rule 3 modifying these Rules or adopting additional rules for an Arbitration. The promulgation of these Rules shall not impair the ability of entities to use arbitral procedures of their own choosing other than the Act.

Rule 2: Amendments to the Rules

These Rules are promulgated by order of the Supreme Court of the State of Delaware and may be amended by order of that Court at any time. Unless otherwise agreed between the parties, the Rules in effect at the time the Arbitrator accepts appointment as provided in Rule 9 shall govern in any Arbitration. Any question as to the Rules applicable to an Arbitration arising out of any amendment to these Rules shall be resolved by the Arbitrator.

Rule 3: Alteration of Rules by Agreement of the Parties and Consent of the Arbitrator

The parties to an Arbitration may agree, with the consent of the Arbitrator, to modify any of these Rules or to adopt additional rules governing the Arbitration, provided that no modification of or addition to these Rules may be inconsistent with any provision of the Act, including without limitation the location of the seat of the Arbitration in 10 *Del. C.* § 5807(a), the time periods set forth in 10 *Del. C.* §§ 5806(d), 5808(b), 5808(c) or 5809(b), and the reduction of the Arbitrator's compensation in the event of an untimely award set forth in 10 *Del. C.* § 5806(b). By way of example and without limiting the scope of permissible amendments to these Rules, the parties may agree, with the consent of the Arbitrator, to proceed on a more accelerated schedule than these Rules contemplate and may agree to dispense with or limit any process for gathering evidence before the Arbitration Hearing. Any such modification of or addition to these Rules shall be in writing and may appear in the Arbitration Agreement.

Rule 4: Definitions

As used in these Rules:

"Arbitration Agreement" means an agreement described in 10 *Del. C.* § 5803(a).

"Arbitration" means the voluntary submission of a dispute between or among parties to an Arbitrator for final and binding determination, and includes all

contacts and communications by and among the Arbitrator, any party and any other person participating in such proceeding.

"Arbitrator" means a person, persons or organization appointed under 10 *Del. C.* § 5805 or chosen by the parties to an Arbitration in conformity with the Arbitration Agreement, and who serves a written notice of acceptance of appointment as provided in Rule 9. If an Arbitration proceeds before more than one Arbitrator, references in these Rules to the Arbitrator shall be deemed to be references to the Arbitrators, and (unless otherwise provided in the Arbitration Agreement) references in these Rules to an act of the Arbitrator shall be references to an act of a majority of the Arbitrators.

"Preliminary Conference" means a telephonic conference with the parties and/or their attorneys or other representatives: (i) to obtain additional information about the nature of the dispute, the anticipated length of the Arbitration Hearing and other scheduling issues, (ii) to obtain conflicts statements from the parties, and (iii) to consider with the parties whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

"Preliminary Hearing" means a telephonic conference with the parties and/or their attorneys or other representatives to consider, without limitation: (i) prompt exchange of pleadings and such other statements of each party's claims, damages, defenses, issues asserted, legal authorities relied upon, and positions with respect to issues asserted by other parties, as the Arbitrator may direct, (ii) stipulations of fact, (iii) the scope of exchange of information before the Arbitration Hearing, (iv) exchanging and pre-marking of exhibits for the Arbitration Hearing, (v) the identification and availability of witnesses, including experts, and such matters with respect to witnesses, including their qualifications and expected testimony as may be appropriate, (vi) whether, and to what extent, any sworn statements and/or depositions may be introduced, (vii) the length of the Arbitration Hearing, (viii) whether a stenographic or other official record of the proceedings shall be maintained, (ix) the possibility of mediation or other non-adjudicative methods of dispute resolution, and (x) any procedure for the issuance of subpoenas.

"Scheduling Order" means the order of the Arbitrator (and any amendment thereto) setting forth the pre-hearing activities and the hearing procedures that will govern the Arbitration. The Scheduling Order shall also set forth the date, time and location for the Arbitration Hearing, which ordinarily should be no more than 90 days after the Arbitrator serves the written notice of acceptance of appointment as Arbitrator. The Arbitrator should enter a Scheduling Order as promptly as possible following the Preliminary Conference. The Arbitrator may amend the Scheduling Order, including postponing or rescheduling the Arbitration Hearing, but no amendment to the Scheduling Order shall operate to alter the time periods set forth in 10 *Del. C.* § 5808(b) and (c).

"Arbitration Hearing" means the proceeding in which the claimant presents evidence to support its claims and the respondent presents evidence to support its defenses, and witnesses for each party submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure (so long as the parties are treated equitably and each party has a fair opportunity to be heard and to present its case).

Rule 5: Confidentiality of Arbitrations

Arbitrations under the Act are confidential proceedings. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the Arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at a Preliminary Conference, Preliminary Hearing or Arbitration Hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the Arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence that are otherwise subject to disclosure and were not prepared specifically for use in the Arbitration.

No document or other matter submitted to the Arbitrator, served upon the parties to an Arbitration, used in any hearing or conference with the Arbitrator, or referred to or relied upon in an arbitral award shall become part of a public record as a result of such submission, service, use, reference or reliance. However, in the event of the taking of a challenge to a final award to the Supreme Court of Delaware under 10 *Del. C.* § 5809, a document or other matter submitted to the Supreme Court of Delaware shall become part of the public record only to the extent required by the Rules of that Court or by order of that Court.

The Arbitrator shall have power to issue orders to protect the confidentiality of the proceedings and of any documents or other matter used in the Arbitration.

Rule 6: The Arbitrator's Authority

Upon acceptance of appointment as prescribed in Rule 9, the Arbitrator shall have power and authority: (1) to resolve, finally and exclusively, any dispute of substantive or procedural arbitrability; (2) to resolve, finally and exclusively, any dispute as to the interpretation and application of these Rules (including any modifications of or additions to the Rules made in compliance with Rule 3); (3) to determine in the first instance the scope of the Arbitrator's remedial authority, subject to review solely under 10 *Del. C.* § 5809 (except as otherwise limited by the Arbitration Agreement); (4) to grant interim and/or final relief, including to award any legal or equitable remedy appropriate in the sole judgment of the Arbitrator; (5) to administer oaths as authorized by 10 *Del. C.* § 5807; (6) to compel

the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence (unless otherwise provided in the Arbitration Agreement); (7) to make such rulings, including such rulings of law, and to issue such orders or impose such sanctions as the Arbitrator deems proper to resolve an Arbitration in a timely, efficient and orderly manner.

In addition, if, but only if, the Arbitration Agreement so provides, the Arbitrator shall have power and authority to issue subpoenas and to award commissions to permit a deposition to be taken, in the manner and on the terms designated by the Arbitrator, of a witness who cannot be subpoenaed.

Rule 7: Immunity of the Arbitrator

An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. An Arbitrator shall be immune from civil liability for or resulting from any act or omission done or made in connection with the Arbitration, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

Rule 8: Representation; Parties' Right to Attend Arbitration Hearing

The parties are entitled to be represented at the Preliminary Conference, the Preliminary Hearing and the Arbitration Hearing by counsel of their choice. Counsel appearing in the Arbitration proceeding on behalf of a party shall promptly provide the Arbitrator and counsel for all other parties with their names, postal and email addresses, and telephone and fax numbers. A party electing to change counsel shall notify the Arbitrator and all other parties forthwith; a change of counsel by a party shall not operate to delay the Arbitration.

At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the Arbitration Hearing, but a failure by any party to comply with this obligation shall not operate to delay the Arbitration nor to divest the Arbitrator of any authority, including without limitation the authority to proceed with the Arbitration Hearing in the absence of a party that has received notice of the date, time and location of the Arbitration Hearing, as provided in Rule 22.

Rule 9: Commencement of Arbitration

The parties to an Arbitration may choose an Arbitrator in conformity with the Arbitration Agreement, and if the Arbitrator so chosen by the parties agrees to serve as Arbitrator, then the Arbitration under the Act is commenced upon service by the Arbitrator upon all parties of a written notice of acceptance of appointment as Arbitrator. If a petition or application for appointment of an Arbitrator is filed with the Court of Chancery (whether on a consensual basis

or otherwise), then an Arbitration under the Act is commenced upon entry of an order by the Court of Chancery under 10 *Del. C.* § 5805(b) appointing an Arbitrator, and the Arbitrator shall file with the Court of Chancery and serve upon the parties a written notice of acceptance of appointment as Arbitrator. The notice of acceptance shall set forth the Arbitrator's postal and electronic mail addresses and telephone and fax numbers, and shall specify the form in which written submissions to the Arbitrator shall be made.

Except as permitted by the Act, the time period specified in 10 *Del. C.* § 5808(b) shall commence upon service of the written notice of acceptance of appointment as Arbitrator (or, if more than one person is appointed as Arbitrator, upon service of the written notice of acceptance of appointment by the last such person to effect service).

Rule 10: Communications with the Arbitrator

After the Arbitrator serves the written notice of acceptance of appointment as Arbitrator, the parties should avoid *ex parte* communications with the Arbitrator concerning the Arbitration. Any *ex parte* communication with the Arbitrator made necessary by exigent circumstance shall be reported promptly to all other parties.

Rule 11: Replacement of the Arbitrator

The appointment of a new Arbitrator shall be as provided in the Arbitration Agreement; otherwise, the Court of Chancery may appoint a new Arbitrator in the event the Arbitrator becomes unable to continue as Arbitrator for any reason.

Rule 12: Pleadings

Not later than two business days after service of the written notice of acceptance of appointment by the Arbitrator, the claimant shall serve upon all other parties a complaint giving notice of its claims and the remedies sought. If the dispute giving rise to the Arbitration is already the subject of litigation, then the complaint shall include copies of the pleadings in such litigation.

Within five business days after service of the complaint, or such other time as the Arbitrator may allow, each party against whom relief is sought shall, and any other party may, serve an answer setting forth its response to the claims and remedies sought in the complaint and any affirmative defenses (including jurisdictional challenges) or counterclaims it may wish to assert in the Arbitration. If the answer asserts counterclaims, a party against whom a counterclaim is asserted may serve a reply within three business days after service of the answer, or within such other time as the Arbitrator may allow.

The failure of a party to answer a complaint or reply to counterclaims shall not operate to delay the Arbitration.

Rule 13: Service of Arbitration Papers

The complaint shall be delivered to the Arbitrator in the manner specified in the written notice of acceptance of appointment as Arbitrator. The complaint shall also be served upon the parties to the Arbitration in a manner calculated to provide them with actual notice and to provide the claimant with written proof of delivery of the complaint, or in such manner as the Arbitrator may direct.

The answer, any reply, any request for pre-hearing exchange of information, any order of the Arbitrator and any written communication delivered to the Arbitrator shall be served upon the Arbitrator and upon all parties to the Arbitration. The Scheduling Order shall specify the manner in which service shall be made upon the parties or their representatives. If the Scheduling Order does not specify a manner of service, then service upon a party shall be effected by electronic mail to the party's counsel, or if the party is not represented by counsel, to the party or the party's designated representative.

A record of all pleadings and other papers delivered to the Arbitrator shall be maintained by the Arbitrator, but shall remain confidential except as otherwise provided by Rule 5.

Rule 14: Contents of Pleadings

Each party's pleadings shall afford all other parties reasonable notice of the pleading party's claims, affirmative defenses and counterclaims, including the factual basis for such claims, defenses and counterclaims. The Arbitrator may decline to consider a claim, affirmative defense or counterclaim of which the other parties have not been given reasonable notice.

Rule 15: Amendments to Pleadings

Except as provided in this Rule, a party may amend its pleadings only with the Arbitrator's consent. Unless otherwise agreed by the parties, in cases in which any party seeks a monetary award, the Scheduling Order shall include a cut-off date by which a party may increase or decrease the amount of monetary award sought. The Arbitrator may include in the Scheduling Order a cut-off date by which a party may amend its pleading in other respects. An amendment to the pleadings shall not operate to delay the Arbitration Hearing or alter the time periods set forth in 10 *Del. C.* § 5808(b) and (c).

Rule 16: Order of Proceedings

As soon as practicable after the Arbitrator serves the written notice of acceptance of appointment, the Arbitrator shall set a date and time for the Preliminary Conference and shall notify all parties of that date and time. The Preliminary Conference ordinarily should take place within 10 calendar days of the service of the written notice of acceptance of appointment by the Arbitrator.

The Arbitrator may also schedule one or more Preliminary Hearings, in consultation with the parties and upon reasonable notice to the parties.

The parties shall not engage in dispositive motion practice unless the Scheduling Order so provides.

Rule 17: Exchange of Information Before the Arbitration Hearing

There shall be an exchange of information necessary and appropriate for the parties to prepare for the Arbitration Hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the consent of the Arbitrator, to forgo prehearing exchange of information.

The parties shall, in the first instance, attempt in good faith to agree on pre-hearing exchange of information, which may include depositions, and shall present any agreement to the Arbitrator for approval at the Preliminary Conference or as soon thereafter as possible. The Arbitrator may require additional exchange of information between and among the parties, or additional submission of information to the Arbitrator. If the parties are unable to agree on any matter relating to the exchange of information, they shall present the dispute to the Arbitrator promptly, and the Arbitrator shall direct such exchange of information as the Arbitrator deems necessary and appropriate, taking into account the importance of the information to the Arbitration, the burden of producing the information, and such other factors as the Arbitrator deems relevant. The scope of information subject to exchange should ordinarily be substantially less broad than the scope of information that might be subject to discovery in civil litigation.

Unless otherwise agreed by the parties, information exchanged between the parties shall be used exclusively for purposes of the Arbitration, shall be maintained on a confidential basis by the other parties, and shall be returned or destroyed upon conclusion of the Arbitration, except in the event of a challenge to a final award under 10 *Del. C.* § 5809 or an appeal under such arbitral appeal procedures as the Arbitration Agreement may prescribe.

The Arbitrator may make such rulings, including rulings of law, and issue such orders or impose such sanctions for violations of discovery orders as the Arbitrator deems proper to resolve the Arbitration in a timely, efficient and orderly manner.

Rule 18: Obtaining Information from Third Parties

The parties generally are expected to cause non-privileged information in the possession, custody or control of their employees, agents and retained professionals to be produced, to the extent such information is subject to exchange under Rule 17. The parties are also expected to produce their employees, agents and retained professionals for deposition, to the extent the

Arbitrator determines that the prehearing exchange of information should include depositions of such persons.

Unless otherwise provided in the Arbitration Agreement, the Arbitrator may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts and all other documents and evidence. If, but only if, the Arbitration Agreement so provides, the Arbitrator may issue subpoenas or commissions to permit depositions to be taken, and in such case the Arbitrator may specify the manner in which and the terms on which such depositions shall be taken. In addition, the parties may seek information from third parties by means of subpoena or otherwise, and the Arbitrator may issue such orders in aid of such requests for information as the Arbitrator may deem appropriate for the timely, efficient and orderly resolution of the Arbitration.

Rule 19: Pre-Hearing Disclosures

Before the Arbitration Hearing, at the time specified in the Scheduling Order, each party shall disclose to the Arbitrator and to all other parties the following information: (1) the identity of all fact and expert witnesses the party intends to call at the Arbitration Hearing; (2) a brief description of the expected testimony of each such witness and an estimate of the duration of the witness's testimony upon direct examination; and (3) a list of all exhibits expected to be used at the Arbitration Hearing. Exhibits should be pre-marked to the extent possible.

Rule 20: Dismissals

The claimant may withdraw its claims before the Arbitrator has served the written notice of acceptance of appointment. After the Arbitrator has served the written notice of acceptance of appointment, no party may withdraw from the Arbitration without the written agreement of all parties to the Arbitration. A party may unilaterally withdraw a claim or counterclaim without prejudice upon written notice to the Arbitrator and to all parties, provided that another party may, within seven calendar days of service of such notice, request that the Arbitrator order the withdrawal to be with prejudice. After affording the parties the opportunity to be heard on such a request, the Arbitrator shall determine the request finally and exclusively.

Rule 21: Pre-Hearing Submissions

The Arbitrator may allow or require the parties to submit brief summaries of the factual and legal basis for their claims, defenses and counterclaims. The Scheduling Order shall specify the number, sequence, due dates, format and maximum length of any such submissions.

Rule 22: The Arbitration Hearing

The Arbitration Hearing will be limited to one day unless the Arbitration Agreement specifies a different period or the Arbitrator determines that a different period is appropriate in consultation with the parties. The Arbitration Hearing ordinarily shall be conducted in person at a location specified in the Arbitration Agreement or (if the Arbitration Agreement does not specify a location) selected by the Arbitrator. The location of the Arbitration Hearing may be at any place, within or without the State of Delaware and within or without the United States of America. The Arbitration Hearing may be conducted by telephone or by other means of remote electronic communication, in whole or in part, if the Arbitration Agreement so specifies or if the Arbitrator, in consultation with the parties, so determines. Regardless of whether the Arbitration Hearing is conducted within or without the State of Delaware, by telephone or by other means of remote electronic communication, the seat of the Arbitration is the State of Delaware.

The Arbitrator shall give notice of the date, time and location of the Arbitration Hearing to all parties, and may proceed with the Arbitration Hearing and resolve the Arbitration on the evidence produced at the Arbitration Hearing in the absence of one or more parties if such parties have received notice.

The Arbitrator shall control the order of proof and shall allow all parties an opportunity to be heard, to present evidence relevant to the arbitration, and to cross-examine witnesses appearing at the Arbitration Hearing. Unless the Arbitration Agreement otherwise provides, the Arbitrator shall not be obliged to apply the rules of evidence strictly, except that the Arbitrator shall apply applicable law relating to privileges and immunities and to communications or statements made in connection with efforts to settle the dispute.

Witnesses may be required to testify under oath or affirmation in the Arbitrator's discretion. The Arbitrator may consider statements made outside the Arbitration Hearing (whether sworn or unsworn, and whether presented by deposition, affidavit or other means), but shall afford such statements appropriate weight based on the circumstances of such statements.

Unless the Arbitration Agreement otherwise provides or the parties otherwise agree, the Arbitrator may direct that a stenographic or other record of the Arbitration Hearing be prepared and made available for the use of the Arbitrator and the parties.

Rule 23: Post-Hearing Submissions

The Arbitrator may allow or require the parties to submit brief summaries of the evidence presented at the Arbitration Hearing and the application of legal principles to the facts established thereby. The Scheduling Order shall specify the number, sequence, due dates, format and maximum length of any such submissions.

Rule 24: The Final Award

A final award shall be in writing, shall be signed by the Arbitrator, shall be served on each party to the Arbitration, and shall include or be accompanied by a form of judgment for entry under 10 *Del. C.* § 5810. Unless otherwise provided in the Arbitration Agreement, the final award may take any form, whether legal or equitable in nature, deemed appropriate by the Arbitrator. Unless otherwise provided in the Arbitration Agreement, the final award may include rulings by the Arbitrator (or by the Arbitrator's counsel retained under 10 *Del. C.* § 5806(c) and Rule 25, if applicable) on any issue of law that the Arbitrator considers relevant to the Arbitration.

The Arbitrator shall issue the final award within the time fixed by the Arbitration Agreement, or, if not so fixed, within the time specified by 10 *Del. C.* § 5808.

Rule 25: Fees and Costs

An Arbitrator may in consultation with the parties retain appropriate counsel to provide advice to the Arbitrator, to make rulings on issues of law, to the extent requested by the Arbitrator, or both. The fees and costs incurred by the Arbitrator's counsel shall be included as part of the Arbitrator's expenses.

The final award shall provide for the allocation of payment of fees and costs, subject to the reductions for an untimely award provided by 10 *Del. C.* § 5808(b). Unless otherwise provided in the Arbitration Agreement, those fees and costs shall include the Arbitrator's fees and expenses, the costs of preparing a record of the Arbitration Hearing (if any), the fees and costs incurred by counsel retained by the Arbitrator under 10 *Del. C.* § 5806(c), and any other expenses incurred in the conduct of the Arbitration, but not including the counsel fees of the parties to the Arbitration.

Rule 26: Consent Award Upon Settlement

If the parties reach agreement on a settlement of the issues in dispute and ask the Arbitrator to set forth the terms of the settlement in a consent award, the Arbitrator may make such an award, and shall do so unless the Arbitrator concludes, after consultation with the parties, that the terms of the proposed settlement are unlawful or undermine the integrity of the Arbitration. A consent award shall include an allocation of the fees and costs specified in Rule 25.

Rule 27: Enforcement of the Final Award

Proceedings to enforce, confirm, modify or vacate a final award will be controlled by the Delaware Rapid Arbitration Act.

APPENDIX II: DELAWARE RAPID ARBITRATION ACT

Title 10 — Courts and Judicial Procedures
Part IV
Special Proceedings
Chapter 58
DELAWARE RAPID ARBITRATION ACT

§ 5801 Definitions.

For purposes of this chapter only, unless the context requires otherwise:

(1) "Agreement" means an agreement described in § 5803(a) of this title.

(2) "Arbitration" means an arbitration provided for under this chapter.

(3) "Arbitrator" means a person named in an agreement, selected under an agreement, or appointed by the parties to an agreement or the Court of Chancery, to preside over an arbitration and issue a final award. If an arbitration proceeds before more than 1 arbitrator,

a. References in this chapter to an arbitrator shall be deemed to be references to the arbitrators; and

b. Unless otherwise provided in an agreement, references in this chapter to an act of an arbitrator shall be deemed to be references to an act of a majority of the arbitrators.

(4) "Final award" means an award designated as final and issued in an arbitration by an arbitrator.

(5) "Organization" means a civic association, neighborhood alliance, homeowners maintenance corporation, homeowners maintenance association, common interest community (as defined in § 81-103 of Title 25), or other similar entity charged with or assuming the duties of maintaining the public areas, open space, or common facilities within a residential development or community.

§ 5802 Purpose of the chapter.

The purpose of the Delaware Rapid Arbitration Act is to give Delaware business entities a method by which they may resolve business disputes in a prompt, cost-effective, and efficient manner, through voluntary arbitration conducted by expert arbitrators, and to ensure rapid resolution of those business disputes. This chapter is intended to provide an additional option by which sophisticated entities may resolve their business disputes. Therefore,

nothing in this chapter is intended to impair the ability of entities to use other arbitral procedures of their own choosing, including procedures that afford lengthier proceedings and allow for more extensive discovery.

§ 5803 Effect of arbitration agreement.

(a) A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the controversy, so long as:

(1) The agreement is signed by the parties to an arbitration;

(2) At least 1 party to the agreement is a business entity, as that term is defined in § 346 of this title, formed or organized under the laws of this State or having its principal place of business in this State;

(3) No party to the agreement is a consumer, as that term is defined in § 2731 of Title 6, or an organization, as that term is defined in this chapter;

(4) The agreement provides that it shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, regardless of whether the laws of this State govern the parties' other rights, remedies, liabilities, powers and duties; and

(5) The agreement includes an express reference to the "Delaware Rapid Arbitration Act."

During the pendency of an arbitration, an agreement may be amended to alter the procedures of the arbitration only with the approval of an arbitrator, but the agreement may not be amended so as to alter the time set forth in 5808(b) of this title.

(b) A party to an agreement is deemed to have waived objection and consented to:

(1) The arbitration procedures set forth in this chapter;

(2) The submission exclusively to an arbitrator of issues of substantive and procedural arbitrability;

(3) The exclusive personal and subject matter jurisdiction of an arbitration, the seat of which is this State, regardless of the place of a hearing;

(4) The exclusive personal and subject matter jurisdiction of the courts of the State for the limited purposes set forth in § 5804 of this title; and

(5) Except as otherwise limited by the agreement, an arbitrator's power and authority to:

a. Determine in the first instance the scope of the arbitrator's remedial authority, subject to review solely under § 5809 of this title; and

b. Grant relief, including to award any legal or equitable remedy appropriate in the sole judgment of the arbitrator.

(c) A party to an agreement is deemed to have waived the right to:

(1) Seek to enjoin an arbitration;

(2) Remove any action under this chapter to a federal court;

(3) Appeal or challenge an interim ruling or order of an arbitrator;

(4) Appeal or challenge a final award, except under § 5809 of this title; and

(5) Challenge whether an arbitration has been properly held, except under § 5809 of this title.

§ 5804 Jurisdiction.

(a) *Jurisdiction of the Supreme Court.* — Except as otherwise provided in an agreement, the making of the agreement confers jurisdiction on the Supreme Court of the State to hear only a challenge to a final award under § 5809 of this title. The Supreme Court does not have jurisdiction to hear appeals of:

(1) The appointment of an arbitrator under § 5805 of this title;

(2) The determination of an arbitrator's fees under § 5806(b) of this title;

(3) The issuance or denial of an injunction in aid of arbitration under paragraph (b)(5) of this title; and

(4) The grant or denial of an order enforcing a subpoena issued under § 5807(b) of this title.

A party to any agreement shall be deemed to have waived the right to such appeals. The Supreme Court, in consultation with the Court of Chancery, may publish rules for arbitration proceedings under this chapter and, unless an agreement provides for different rules, may specify that those rules govern arbitration proceedings under this chapter.

(b) *Jurisdiction of the Court of Chancery.* — The making of an agreement confers jurisdiction on the Court of Chancery of the State only to:

(1) Appoint an arbitrator under § 5805 of this title;

(2) Enter judgment under § 5810(b) of this title;

(3) Upon the request of an arbitrator, enforce a subpoena issued under § 5807(b) of this title;

(4) Determine an arbitrator's fees under § 5806(b) of this title; and

(5) Issue, only before an arbitrator accepts appointment as such, an injunction in aid of an arbitration, provided that the injunction may not divest the arbitrator of jurisdiction or authority. Notwithstanding the

foregoing, no court has jurisdiction to enjoin an arbitration under this chapter. The Court of Chancery may promulgate rules to govern proceedings under this chapter.

(c) *Jurisdiction of the Superior Court.* — The making of an agreement confers jurisdiction on the Superior Court of the State only to enter judgment under § 5810(c) of this title.

§ 5805 Appointment of arbitrator by the Court of Chancery.

(a) The Court of Chancery of the State, on petition or on application of a party in an existing case, has exclusive jurisdiction to appoint 1 or more arbitrators upon:

(1) The consent of all parties to an agreement;

(2) The failure or inability of an arbitrator named in or selected under an agreement to serve as an arbitrator;

(3) The failure of an agreement to name an arbitrator or to provide a method for selecting an arbitrator;

(4) The inability of the parties to an agreement to appoint an arbitrator; or

(5) The failure of a procedure set forth in an agreement for selecting an arbitrator.

Following the petition or application, each party shall propose to the Court of Chancery no more than 3 persons that are qualified and willing to serve as an arbitrator.

(b)(1) The Court of Chancery shall, within 30 days of the service of the petition or application, appoint an arbitrator and, in so doing, may take into account:

a. The terms of an agreement;

b. The persons proposed by the parties; and

c. Reports made under § 5806(d) of this title.

(2) An arbitrator appointed by the Court of Chancery may only be:

a. A person named in or selected under an agreement;

b. A person expert in any nonlegal discipline described in an agreement; or

c. A member in good standing of the Bar of the Supreme Court of the State for at least 10 years.

An arbitrator so appointed has all the powers of an arbitrator specifically named in an agreement. Unless otherwise provided in an agreement, the Court of Chancery shall appoint a single arbitrator.

§ 5806 Arbitrator; fees and expenses of arbitration.

(a) A person accepting an appointment as an arbitrator is deemed to have:

(1) Consented to the terms of this chapter; and

(2) Accepted the consequences set forth in subsection (b) of this section for failing to comply with the provisions of § 5808(b) of this title.

An arbitrator is immune from civil liability for or resulting from any act or omission done or made in connection with an arbitration, unless the arbitrator's act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a wilful, wanton disregard of the rights, safety, or property of another.

(b) Unless otherwise provided in an agreement, an arbitrator's fees and expenses, together with other expenses incurred in the conduct of an arbitration, but not including counsel fees of parties to the arbitration, shall be borne as provided in a final award. Notwithstanding the foregoing, an arbitrator that fails to issue a final award in compliance with § 5808(b) of this title is not entitled to full payment of the arbitrator's fees. The arbitrator's fees must be reduced by 25% if the final award is less than 30 days late; the arbitrator's fees must be reduced by 75% if the final award is between 30 and 60 days late; and the arbitrator's fees must be reduced by 100% if the final award is more than 60 days late. Notwithstanding the foregoing sentence, upon petition by an arbitrator, the Court of Chancery may summarily determine, on clear and convincing evidence, that exceptional circumstances exist such that the reductions in the foregoing sentence should be modified or eliminated.

(c) An arbitrator may retain appropriate counsel, in consultation with the parties. The arbitrator's counsel may make rulings on issues of law, to the extent requested to do so by the arbitrator, which shall have the same effect as a ruling by the arbitrator, if the arbitrator so determines. The fees and expenses incurred by the arbitrator's counsel must be included in the arbitrator's expenses described in subsection (b) of this section.

(d) An arbitrator that fails to issue a final award in compliance with § 5808(b) of this title shall, within 90 days of the failure, report that failure to the Register in Chancery, indicating:

(1) The date on which the arbitrator accepted appointment as an arbitrator; and

(2) The date on which the final award was issued.

§ 5807 Hearing; witnesses; prehearing evidence gathering; rulings before final award.

(a) Unless otherwise provided in an agreement, an arbitrator shall appoint a time and place for a hearing or an adjourned hearing, either of which may be held within or without the State and within or without the United States.

Notwithstanding the foregoing sentence, the seat of an arbitration is the State of Delaware. Unless otherwise provided in an agreement, a party to an arbitration is entitled to be heard, to present evidence relevant to the arbitration, and to cross-examine witnesses appearing at a hearing. Notwithstanding the foregoing, an arbitrator may make such interim rulings and issue such interim orders as the arbitrator deems necessary to determine what evidence and which witnesses may be presented at the hearing, including to limit the presentation of evidence and witnesses as necessary to satisfy § 5808(b) of this title. An arbitrator may resolve an arbitration on the evidence produced at a hearing notwithstanding the failure of a party duly notified to appear or participate at the hearing.

(b) Unless otherwise provided in an agreement, an arbitrator has the power to administer oaths and may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence. Only if provided in an agreement, an arbitrator has the power to issue subpoenas, and all provisions of law compelling a person under subpoena to testify are applicable. Only if provided in an agreement, an arbitrator may award commissions to permit a deposition to be taken, in the manner and on the terms designated by the arbitrator, of a witness who cannot be subpoenaed.

(c) An arbitrator may make such rulings, including rulings of law, and issue such orders or impose such sanctions as the arbitrator deems proper to resolve an arbitration in a timely, efficient, and orderly manner.

§ 5808 Awards.

(a) A final award must be in writing and signed by an arbitrator, must be provided to each party to an arbitration, and must include a form of judgment for entry under § 5810 of this title. Unless otherwise provided in an agreement, an arbitrator may make any award, whether legal or equitable in nature, deemed appropriate by the arbitrator. Unless otherwise provided in an agreement, an arbitrator may make in a final award rulings on any issue of law that the arbitrator considers relevant to an arbitration.

(b) Subject to subsection (c) of this section, an arbitrator shall issue a final award within the time fixed by an agreement or, if not so fixed, within 120 days of the arbitrator's acceptance of the arbitrator's appointment.

(c) Parties to an arbitration may extend the time for the final award by unanimous consent in writing either before or after the expiration of that time, but the extension may not exceed, whether singly or in the aggregate, 60 days after the expiration of the period set by subsection (b) of this section.

§ 5809 Challenges; court powers to vacate, modify, or correct a final award.

(a) A challenge to a final award may be taken to the Supreme Court of the State in the manner as appeals are taken from orders or judgments in a civil action.

(b) A challenge to a final award must be taken within 15 days of the issuance of the final award. The record on the challenge is as filed by the parties to the challenge in accordance with the Rules of the Supreme Court.

(c) In a challenge to a final award, the Supreme Court of the State may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act [9 U.S.C. § 1 et seq.]. The Supreme Court shall have the authority to order confirmation of a final award, which confirmation shall be deemed to be confirmation under § 5810(a) of this title.

(d) Notwithstanding any other provision of this section, an agreement may provide for:

(1) No appellate review of a final award; or

(2) Appellate review of a final award by 1 or more arbitrators, in which case appellate review shall proceed as provided in the agreement. An appellate arbitrator may be appointed by the Court of Chancery of the State under § 5805 of this title. An appellate arbitrator shall have authority to order confirmation of a final award, which confirmation shall be deemed to be confirmation under § 5810(a) of this title.

§ 5810 Confirmation of a final award; judgment on final award.

(a) Unless a challenge is taken under § 5809 of this title or unless an agreement provides for appellate review by 1 or more arbitrators, a final award, without further action by the Court of Chancery of the State, is deemed to have been confirmed by the Court of Chancery on the fifth business day following the period for challenge under § 5809(b) of this title. If an agreement provides for no appellate review of a final award, the final award is deemed to have been so confirmed on the fifth business day following its issuance.

(b) Except if a final award is solely for money damages, upon application to the Court of Chancery of the State by a party to an arbitration in which a final award has been confirmed under subsection (a) of this section, the Court of Chancery shall promptly enter a final judgment in conformity with that final award. A final judgment, so entered, has the same effect as if rendered in an action by the Court of Chancery.

(c) If a final award is solely for money damages, upon application to the Superior Court of the State by a party to an arbitration in which a final award has been confirmed under subsection (a) of this section, the prothonotary of the Superior

Court shall promptly enter a judgment on the judgment docket in conformity with that final award. The prothonotary of the Superior Court shall enter in the judgment docket the names of the parties, the amount of the final award, the time from which interest, if any, runs, and the amount of the costs, with the true date of the filing and entry. A final judgment, so entered, has the same force and effect as if rendered in an action at law, and, from that date, becomes and is a lien on all the real estate of the debtor in the county, in the same manner and as fully as judgments rendered in the Superior Court are liens, and may be executed and enforced in the same way as judgments of the Superior Court.

§ 5811 Application of chapter.

It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of agreements.

§ 5812 Short title.

This chapter may be cited as the "Delaware Rapid Arbitration Act."

About the Authors

Gregory Varallo, John Hendershot and Blake Rohrbacher are directors of Richards, Layton & Finger in Wilmington, Delaware.

Mr. Varallo focuses his practice on complex corporate and business litigation, arbitration, corporate governance and corporate transactions. He is a certified mediator with the Delaware Superior Court and has acted as arbitrator and mediator in numerous matters, as well as counsel for parties in arbitration and mediation. He was lead counsel in several of the arbitrations under the prior court-annexed arbitration program. Mr. Varallo serves on the Delaware Supreme Court Rules Committee and is co-chair of the ABA Delaware Business Law Forum. He has been recognized in numerous legal ranking directories.

Mr. Rohrbacher's practice includes litigation as well as advisory and transactional matters relating to Delaware corporations and alternative entities. A graduate of Yale Law School, Mr. Rohrbacher has authored a number of publications regarding Delaware corporate law and litigation practice, and he has been recognized in *Benchmark Litigation*, *Super Lawyers* and *Chambers USA*. Mr. Rohrbacher serves on the Delaware Court of Chancery Rules Committee.

Mr. Hendershot focuses his practice on corporate litigation in Delaware's courts. He has litigated matters involving fiduciary duties of directors, statutory appraisal rights, advancement and indemnification rights, statutory rights to inspect books and records, and commercial and contract law. Mr. Hendershot has been recognized in *Benchmark Litigation*, *The Best Lawyers in America* and *The Legal 500*.

About Richards, Layton & Finger

Richards, Layton & Finger, Delaware's largest law firm, has been committed from its founding to helping sophisticated clients navigate complex issues and the intricacies of Delaware law. Our lawyers have long played crucial roles in drafting and amending Delaware's influential business statutes, and we have worked on many of the groundbreaking cases defining Delaware corporate law. Our commitment to excellence and innovation spans decades and remains central to our reputation for delivering extraordinary service to our clients.

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JAMES T. VAUGHN, JR.
PRESIDENT JUDGE

KENT COUNTY COURTHOUSE
38 The Green
Dover, Delaware 19901

ADMINISTRATIVE DIRECTIVE OF THE PRESIDENT JUDGE OF THE SUPERIOR COURT OF THE STATE OF DELAWARE

NO. 2010-3

COMPLEX COMMERCIAL LITIGATION DIVISION

Effective May 1, 2010.

IT IS DIRECTED THAT:

1. A new division is created in New Castle County known as the Complex Commercial Litigation Division ("CCLD").

2. Any case commenced hereafter which (1) includes a claim asserted by any party (direct or declaratory judgment) with an amount in controversy of One Million Dollars or more (designated in the pleadings for either jury or non-jury trials), or (2) involves an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement, or (3) is so designated by the President Judge, qualifies for assignment to the CCLD (hereinafter "qualifying case(s)"); except the following, which are excluded: any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family, or

household purposes or where the agreement relates to an individual or collective contract of employment; .

3. Identification of a qualifying case shall be made by any party by stating the letters CCLD for the Civil Case Code and Complex Commercial Litigation for the Civil Case Type on the Case Information Statement (CIS).

4. Unless specially assigned by the President Judge, a case identified as a qualifying case shall be assigned, on a rotating basis, to a Judge on the panel of the CCLD (hereinafter the "Panel"). The Panel shall be appointed by the President Judge from among the Judges of the Superior Court, and each judge on the Panel shall serve a term of three (3) years unless earlier replaced by the President Judge. If a case is assigned initially to a Judge of the Court under another case category and is subsequently identified as a qualifying case by a CIS filed by a responding party, it shall be reassigned to a Judge of the Panel.

5. A party opposing identification of a case as a qualifying case shall do so by motion filed before the Rule 16 scheduling conference referred to below, or at such other time as the assigned Panel Judge may direct. The filing of such a motion shall not affect the time for filing any pleading, motion, or required response under the Court's rules. If the assigned Panel Judge determines that the case is not a qualifying case, the Judge shall notify the Prothonotary who will reassign the case within the appropriate Civil Case Type Category as determined by the Prothonotary.

6. The following principles shall govern the administration of cases assigned to the CCLD:

a. The case will remain assigned to the same Panel Judge for all purposes through final disposition. If the assigned Judge rotates off the Panel, the case will remain with that Judge through final disposition.

b. The Panel shall establish uniform procedures and Case Management forms for the handling of qualifying cases. The assigned Panel Judge will hold an early Rule 16 scheduling conference after all responsive pleadings have been filed. At such conference the parties shall meet and confer with the Panel Judge concerning the progression of the case through trial and preparation of a case management order. A sample case management order is attached as Exhibit A. Unless otherwise ordered by the Judge after conferring with the parties at the Rule 16 scheduling conference, the case management order shall:

(i) establish a procedure for handling discovery disputes and dispositive motions which may include the handling of such disputes by the Panel Judge or a particular Commissioner or appointed Special Master;

(ii) require early mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a);

(iii) establish procedures for electronic discovery and other matters relevant to the case (e.g. appropriate protective orders and alternative

dispute resolution procedures). A sample E-Discovery Plan is attached as Exhibit B; and

(iv) address other matters set forth in Rule 16 and any other matters appropriate in the circumstances of the case.

c. Firm pretrial and prompt trial dates will be established which will not be continued due to scheduling conflicts with other civil cases. Trials will be scheduled during the Panel Judge's scheduled civil rotation on the soonest practicable date given the pretrial complexities of the case and will be given priority as among the Panel Judge's other trial assignments. Prior to trial, the Court will:

(i) establish procedures for the conduct of the trial as a bench trial, should the parties agree to a bench trial, including procedures to streamline the presentation of evidence, to efficiently present legal issues in pre- and/or post-trial briefs, and to ensure prompt and effective post-trial decision(s) on the merits; and

(ii) establish appropriate special procedures for the selection of the jury and the conduct of the trial before a jury should the parties elect a jury trial.

7. Judges assigned to the Panel are expected to collaborate to promote uniformity in case management.

8. Judges assigned to the Panel may establish standing orders and protocols.

9. A CCLD section will be created on the Court's Web site which will include,

inter alia, sample case management orders, standing orders or protocols, recent opinions, sample jury instructions and other pertinent information.

Dated: April 26, 2010

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Court Administrator
Margaret Derrickson
Law Libraries
File

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Plaintiff,	)	
	)	C.A. No.
v.	)	
	)	
Defendants.	)	

CASE MANAGEMENT ORDER

After consideration of the proposals of the parties, as well as the interests of justice, the Court hereby enters this Case Management Order.

I. GENERAL

A. Application

This Case Management Order shall apply to the presently pending action entitled: _____.

B. Service of Case Management Order on New Parties

Upon the addition of any party to the Action, the party adding the new party to the Action shall serve a copy of this Case Management Order at the same time that it serves a copy of the pleading joining such new party.

C. Applicable Court Rules

Unless otherwise provided by the Initial Case Management Order, the Superior Court Civil Rules shall apply.

D. Discovery Master

Upon application of any party, the Court may issue an Order of Reference to a Special Master or Commissioner, who shall thereafter handle all matters referred to in that Order of Reference.

II. LEXIS/NEXIS E-FILING PROCEDURES

The filing and service of documents shall be in accordance with Rule 79.1 of the Superior Court Civil Rules and the Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2007-6, E-File Administrative Procedures, dated December 13, 2007, published by the Prothonotary, except that documents initiating discovery requests (interrogatories, requests for production of documents, and requests for admission) and responses to such discovery requests (excluding the actual production of documents) shall be served electronically through LEXIS/NEXIS.

III. DISCOVERY SCHEDULE

A. Document Production

1. Requests for production of documents shall be served on or before _____ with all documents to be produced on or before _____.

2. Privilege logs shall be produced in accordance with the Superior Court Civil Rules and Rule 502 of the Delaware Uniform Rules of Evidence so as to be completed on or before _____.

3. Inadvertent Production of Documents. In the event a party discovers that it has inadvertently produced a document that it considers privileged or confidential, or receives a document that it believes was inadvertently produced on the ground that it is privileged or confidential, the parties shall undertake to resolve the inadvertent disclosure issue through the Protective Order entered in this case or, in the absence of such an Order, in the Protocol for the Inadvertent Production of Documents

attached as Exhibit A.1 hereto. The Court will determine any issues not resolved by the parties.

B. Fact Depositions

1. Each party will be limited to taking _____ fact depositions, unless the Court for good cause extends that limit. Each deposition shall be limited to seven hours unless extended by agreement or Court order.

2. Depositions shall proceed as follows: (a) depositions of document records custodians may be noticed for deposition on and after _____ so as to be completed by _____ and (b) all other non-expert depositions may be noticed for deposition on or after _____ so as to be completed by: _____.

C. Fact Discovery Cut-off

The parties shall conduct fact discovery so that it is completed on or before _____.

D. Expert Discovery

Expert Discovery shall commence on _____ and shall be completed no later than _____. Exhibit A.2 hereto shall govern expert discovery.

IV. DISPOSITIVE MOTIONS

Dispositive motions may be filed on or before _____.

V. PRETRIAL STIPULATION AND ORDER; TRIAL

A. Trial Date and Jury Selection

The trial of this Action shall begin on _____ at ____ a.m., and continue for_____, if necessary. Jury selection will be conducted on _____ at _____a.m.

B. Jury Questionnaire

To expedite the selection of jurors who will be able to serve for as long as __ weeks, the parties will exchange proposed jury questionnaires on or before _____. The parties shall confer immediately upon the exchange of the questionnaires and submit a joint agreed upon questionnaire or a joint questionnaire that reflects areas of disagreement to the Court no later than _____.

C. Pre-Trial Stipulation and Order, Jury Instructions, Special Interrogatories, and Pre-Trial Conference

1. On or before _____, the parties collectively shall:

a. exchange drafts of a Pre-Trial Stipulation and Order that shall address the items set forth in Superior Court Civil Rule 16(c) to the extent not previously resolved; and

b. exchange proposed jury instructions and special interrogatories.

2. Immediately following the exchange of the proposed Pre-Trial Stipulation and Order, the parties shall meet and confer in an attempt to reach an agreement on a final Pre-Trial Stipulation and Order, jury instructions and any special interrogatories. On or before _____, the parties shall submit to the Court a proposed Pre-Trial Stipulation and Order. In the event the parties cannot reach agreement on all the terms of the Pre-Trial Stipulation and Order, jury instructions and special interrogatories, a single proposed order shall be filed and any areas of disagreement shall be appropriately noted in the one proposed order submitted and plaintiff shall submit a set of jury instructions and special interrogatories that contain any party's proposal.

3. The Pre-Trial Conference with the Court shall take place on _____

at _____ __.m.

D. Motions In Limine

All motions in limine shall be filed no later than _____ and all responses to those motions shall be filed no later than _____.

VI. MOTIONS

A. All motions shall be heard at the Court's convenience.

B. All motions shall be accompanied with an opening brief supporting the motion. Subject to the requirements of this Order, any defendant may file a separate joinder or brief adopting or supporting a motion or opposition of another defendant provided it is served within three (3) business days after service of the motion or opposition and does not exceed three (3) pages, exclusive of appendices.

C. Subject to the requirements of this Order, any party may file an answering brief to a motion. Unless an alternative schedule has been agreed to by the parties or ordered by the Court, such answering brief shall be filed and served the later of _____ (_) days after any service of the motion, or _____ (_) days after any defendant files a separate joinder or brief adopting or supporting a motion or opposition of another defendant.

D. Reply briefs may be filed ten (10) days after responses are received, but no later than three (3) days before any hearing on the motion.

E. All briefs shall conform to the requirements of Superior Court Civil Rule 107, except that in the case of discovery motions, whether handled by the Court or the Special Discovery Master in the first instance, the timing of such discovery motion practice and the length of the briefs on discovery motions shall comport with the requirements in the Order of Reference to Special Discovery Master, dated

_____. The Court may set page limitations that differ from Superior Court Civil Rule 107.

This Case Management Order may be amended by the Court or supplemented by additional Case Management Orders as deemed appropriate by the Court. Nothing herein shall prevent any party from seeking relief from any provision for good cause shown.

IT IS SO ORDERED this ___ day of _____, 200__.

_____
Judge

EXHIBIT A.1

PROTOCOL FOR THE
INADVERTENT PRODUCTION OF DOCUMENTS

In the absence of a Protective Order governing inadvertent production of documents, in the event a party discovers that it has inadvertently produced a document that it considers privileged or confidential, or received a document that it believes was inadvertently produced on the ground that it is privileged or confidential, the parties will undertake to resolve the issue by complying with the following protocol:

1. If a party produces privileged or confidential information or documents ("Privileged Material") that the recipient believes were produced inadvertently, the recipient immediately shall either return such Privileged Material to the producing party or notify the producing party of the apparent inadvertent production.

2. If a producing party discovers that it inadvertently produced information or documents that it considers Privileged Material, in whole or in part, it may retrieve such Privileged Material or parts thereof as follows:

a. During the period within one hundred twenty (120) days after the date of the inadvertent production, the producing party may give written notice to all parties that the producing party claims said document, in whole or in part, to be privileged material and must state the nature of the privilege.

b. Upon receipt of such notice, all parties who have received copies of the produced documents shall promptly return them to the producing party or destroy them and shall certify that all copies of the documents in their possession, and in the possession of anyone who receives copies from them, have either been

returned or destroyed. Moreover, all parties who have received copies of the produced documents shall not make any use of the contents of the allegedly Privileged Material, unless and until a party challenges the privileged claim and the court determines the claim of the producing party is not well founded. In the event that only parts of documents are claimed to be Privileged Material, the producing party shall furnish redacted copies of such documents, removing only the part(s) thereof claimed to be Privileged Material, to all parties within ten (10) days of their return to the producing party or their destruction by the receiving party.

c. After timely service of such notice, no motion to compel the production of the inadvertently produced document may rely on an allegation that any protection as to the document was waived by its inadvertent production. Nothing in this paragraph shall preclude any recipient of such notice from promptly moving for an order compelling production of such document on the ground that the claim of privilege is not well founded.

d. During the period more than one hundred twenty (120) days after the inadvertent production, but in no event later than thirty (30) days prior to trial, the producing party may request the return of said document which it claims, in whole or in part, to be Privileged Material, pursuant to and in accordance with the following procedure:

i. The producing party must give written notice to all parties that the producing party claims said document, in whole or in part, to be Privileged Material and must state the nature of the privilege;

ii. Within ten (10) days of giving written notice pursuant to paragraph (i) above, the parties shall meet and confer to discuss the assertion of privilege. If the parties cannot reach agreement within ten (10)

days of the giving of such written notice, the producing party shall file a Motion for Protective Order in accordance with the Superior Court Civil Rules that seeks the return or destruction of the inadvertently produced privileged document(s).

e. Inadvertent production of privileged material, the return of which is requested in accordance with this section, shall not be considered a waiver of any claim of privilege.

EXHIBIT A.2

PROTOCOL FOR EXPERT DISCOVERY

Expert discovery in this Action shall be conducted pursuant to the following protocol:

A. Identification of Expert Witnesses

1. On or before _____ the parties shall identify expert witnesses and submit Superior Court Civil Rule 26(b) statements. On or before _____, any party may designate additional expert witness(es) whose function shall be solely to rebut an opinion taken by a designated expert witness. At the same time a party designates a rebuttal expert witness, the party designating the rebuttal expert witness shall produce corresponding Rule 26(b) statements for that witness.

2. Depositions of expert witnesses shall take place during the period of _____ through _____.

B. Depositions of Expert Witnesses

1. As soon as practicable, the party taking a deposition will advise the other side of its good faith estimate of the amount of time it is anticipated that the testifying expert's deposition will take.

2. Each party will pay its testifying experts' fees and expenses incurred in connection with the deposition of such experts. All costs incurred in the production of documents discussed herein shall also be borne by the party producing the documents.

3. The parties will make a good faith effort to schedule testifying expert depositions at locations convenient for counsel and the experts. In the absence of any agreement, each deposition will take place in Wilmington, Delaware. If the deposition is taken in Wilmington, Delaware, the deposition will be held at a location

to be selected by counsel for the party taking the deposition.

4. Testifying expert witnesses will appear for depositions without the necessity of subpoenas.

C. <u>Document Identification And Production Of Documents Relied Upon By Experts</u>

1. On or before fourteen (14) calendar days before the expert's deposition begins, the party proffering the testifying expert shall provide the other side with a list of the documents reviewed by each testifying expert in his capacity as a testifying expert in this case. The list will include the Bates numbers (if any) or a deposition exhibit number (if any), the date, and a brief description of each document, such as the names of the author and addressee and the title or line reference.

2. On or before fourteen (14) calendar days before each expert deposition begins, the party proffering a testifying expert will produce to the party taking the testifying expert's deposition the following documents relied upon by a testifying expert in his capacity as a testifying expert in this case:

a. Documents relied upon by a testifying expert in his capacity as a testifying expert in this case that were obtained by one side from third parties and not produced to the other side in this action;

b. Documents relied upon by a testifying expert in his capacity as a testifying expert in this case that were produced in this action for which there is no common Bates numbering or a deposition exhibit number;

c. Documents prepared by a non-testifying expert that were relied upon by a testifying expert in his capacity as a testifying expert in this case;

d. All publications of any type relied upon by a testifying expert in his capacity as a testifying expert in this case, including by way of example

only, documents considered to be "learned treatises" under D.U.R.E. 803(13). This subparagraph is not intended to include publications that merely form part of the basis of a testifying expert's education, training and experience in a particular field, but rather, only those on which a testifying expert is relying or about which he will testify at trial. Further, if a publication otherwise required to be produced pursuant to this subparagraph is shown by the party proffering a testifying expert to be readily accessible in its entirety from other sources, then only the relevant portions thereof must be produced;

e. Notwithstanding any of the provisions set forth herein, no communications between counsel for a party and the party's expert shall be produced; and

f. No party shall be required to produce any work product between the expert witness and the proffering party's counsel.

3. No later than ten (10) days after a party's designation of a testifying expert, each party proffering a testifying expert will produce to the party taking the expert's deposition: (a) the testifying expert's curriculum vitae and (b) a list that will include, at a minimum, the cases, administrative matters or other proceedings in which the expert has given trial or other testimony in public within the last four (4) years, without prejudice to any party's right to request such information for a period not to exceed ten (10) years. If the request for information exceeding four (4) years is opposed, the party seeking such additional information may apply to the Court for relief. The list also will include the name of the matter, the name of the court or other public body, the names of the parties and their attorneys, whether the expert or the party for which he is testifying has a copy of the testimony, and a brief description of the nature of the proceeding.

4. The cost of producing documents, as required herein, for a party's testifying expert, shall be borne by the party designating the testifying expert.

APPENDIX B

E-DISCOVERY PLAN GUIDELINES

(a) *Meet and Confer Requirement*. Unless the parties otherwise agree or the Court otherwise orders, not later than 21 days before the first scheduling conference with the Court, all parties that have appeared in the proceeding shall hold a meet and confer session concerning discovery of electronically stored information ("ESI") that is reasonably likely to be sought in the proceeding, and if so the parties shall discuss:

(1) any issues relating to preservation of ESI;

(2) the form in which each type of ESI will be produced and any problems relating thereto;

(3) the scope of production, including the custodians, time period, file types and search protocol to be used to identify which ESI will be produced;

(4) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation materials, including whether such claims may be asserted after production;

(5) the method for asserting or preserving confidentiality and proprietary status of ESI relating to a party or a person not a party to the proceeding;

(6) whether allocation among the parties of the expense of preservation and production is appropriate; and,

(7) any other issue relating to the discovery of ESI.

(b) *e-Discovery Plan and Report to the Court*. The parties shall:

(1) develop a proposed plan relating to discovery of ESI; and

(2) not later than 14 days after the meet and confer session under subsection (a), submit to the Court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

(c) *Form of Court Order*. Following the submission of the discovery plan and any disputes over the plan, the Court will enter an order governing discovery of ESI that will address:

(1) preservation of ESI;

(2) the form in which each type of ESI is to be produced;

(3) the scope of production, including the custodians, time period, file types and search protocol to be used to identify which ESI is to be produced;

(4) the permissible scope of discovery of ESI;

(5) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation material after production;

(6) the method for asserting or preserving confidentiality and the proprietary status of ESI relating to a party or a person not a party to the proceeding;

(7) allocation of the expense of production; and

(8) any other issue relating to the discovery of ESI.

(d) Limitations On Discovery.

In developing a discovery plan and in entering any discovery order, the plan or order shall provide that a party may object to discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for such undue burden or expense. On a motion to compel discovery or for a protective order relating to the discovery of ESI, the objecting party bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

The Court may order discovery of ESI that is from a source that is not reasonably accessible because of undue burden or expense if the need for proposed discovery outweighs the likely burden or expense, taking into account the amount in

controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

If the Court does order discovery of ESI under this subsection, it may set conditions for discovery of the information, including allocation of the expense of discovery.

The Court shall limit the frequency or extent of discovery of ESI, whether or not that ESI is from a source that is reasonably accessible, if the Court determines that:

(1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(2) the discovery sought is unreasonably cumulative or duplicative;

(3) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(e) Safe Harbors.

The order governing e-discovery shall also provide that:

(1) A party that is subject to an order entered by the court to deal with e-discovery and who acts in compliance with the terms of that order may thereafter apply its regular document destruction procedures to any ESI that has not been ordered to be produced and shall not be subject to any sanction for the destruction of ESI that is not subject to its obligation to produce under such court order. The order entered by the Court may be modified upon application for good cause and shall thereafter be applicable to the preservation of ESI.

(2) The production of ESI shall not constitute a waiver of

attorney-client privilege or work-product protection if the disclosure was inadvertent and the party making the claim of privilege or protection shall promptly take reasonable steps to recover the ESI.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

*********************,** **Plaintiff,** **v.** *********************,** **Defendant.**	**C.A. No. ************ ANY CCLD**

CASE MANAGEMENT ORDER

After consideration of the proposals of the parties, as well as the interests of justice, the Court hereby enters this Case Management Order.

I. GENERAL

A. APPLICATION

This Case Management Order shall apply only to this presently pending action.

B. SERVICE OF CASE MANAGEMENT ORDER ON NEW PARTIES

Upon the addition of any party to the Action, the party adding the new party to the Action shall serve a copy of this Case Management Order at the same time that it serves a copy of the pleading joining such new party.

C. APPLICABLE COURT RULES

Unless otherwise provided by this Case Management Order or any amendment thereto, the Superior Court Civil Rules, CCLD Standing Orders, and the undersigned's web-published judicial preferences shall apply.

D. ADDITION OF PARTIES; AMENDMENTS OR SUPPLEMENTS OF PLEADINGS

Motions seeking to join other parties and motions to amend or supplement the pleadings must be filed and served on or before _____. In the event a new party is added or an amendment or supplement to the Complaint is made, the parties shall meet and confer in good faith to discuss any appropriate extensions to the deadlines for written discovery, the production of documents, the exchange of privilege logs, the deadline for factual discovery, and any other deadlines, as they relate to the newly added party, amendment or supplement.

II. LEXIS/NEXIS E-FILING PROCEDURES

The filing and service of documents shall be in accordance with Rule 79.1 of the Superior Court Civil Rules and the Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2003-8, E-File Administrative Procedures, dated August 12, 2003, published by the Prothonotary, except that documents initiating discovery requests (interrogatories, requests for production of documents, and requests for admission) and responses to such discovery requests (excluding the actual production of documents) shall be served electronically through LEXIS/NEXIS.

III. DISCOVERY SCHEDULE

A. DOCUMENT PRODUCTION

1. **Requests for Production** of documents shall be served on or before _____, with all documents to be produced on or before _____.

2. **Third-Party Subpoenas.** The parties are permitted to serve third-party subpoenas until _____. Any party that receives documents in response to its issuance of a subpoena shall produce such documents to all other parties within three (3) business days of the party's receipt of such documents, except where such documents require privilege review.

3. **Privilege Logs** shall be produced in accordance with the Superior Court Civil Rules and Rule 502 of the Delaware Uniform Rules of Evidence so as to be completed on or before September 30, 2021.

4. **Inadvertent Production of Documents.** In the event a party discovers that it has inadvertently produced a document that it considers privileged or confidential, or receives a document that it believes was inadvertently produced on the ground that it is privileged or confidential, the parties shall undertake to resolve the inadvertent disclosure issue through the Stipulation and Order Governing the Production and Exchange of Confidential Information entered in this case. The Court will determine any issues not resolved by the parties.

B. FACT DEPOSITIONS

1. Each party will be limited to taking no more than _____ fact depositions, unless extended by agreement or Court order. Each deposition shall be limited to seven (7) hours unless extended by agreement or Court order. Depositions of a corporate designee(s) pursuant to Superior Court Civil Rule 30(b)(6) shall be permitted, and every seven (7) hours of corporate designee testimony shall count as one (1) deposition.

2. Depositions shall proceed as follows: (a) depositions of document records custodians may be noticed for deposition on and after _____, so as to be completed by _____, and (b) all other non-expert depositions may be noticed for deposition on or after _____, so as to be completed by _____.

C. FACT DISCOVERY CUT-OFF

The parties shall conduct fact discovery so that it is completed on or before _____.

D. EXPERT DISCOVERY

Expert Discovery shall commence on _____, and shall be completed no later than _____. Exhibit A.2 hereto shall govern expert discovery.

E. DISCOVERY MASTER

Upon application of any party or upon the Court's *sua sponte* determination for need, the Court may issue an Order of Reference to a Special Master or Commissioner, who shall thereafter handle all matters referred to in that Order of Reference.

IV. MEDIATION

Mediation is mandatory in this case and is to be conducted no later than _____. The parties should notify the Court in writing of the date of the scheduled mediation. The parties may be excused from this deadline only by order of the Court. **All** parties necessary for decision making/case resolution must attend and participate in the mediation in good faith, unless expressly excused by the mediator. Representatives of all affected insurers with authority up to policy limits must also be present. Neither the fact nor the result of the mediation shall be admissible at trial. The mediation proceedings shall not be transcribed unless specifically authorized by the Court for good cause shown.

V. DISPOSITIVE MOTIONS DUE

Dispositive motions may be filed on or before _____. Any response to a dispositive motion is due no later than thirty (30) days after the filing of the dispositive motion and briefing and further proceedings on dispositive motions are to proceed in accord with Section VII-A of this Order.

VI. PRETRIAL STIPULATION AND ORDER; TRIAL

A. TRIAL DATE

The trial of this Action shall begin on _____, at _____ a.m., and continue for _____ days, if necessary.

B. PRE-TRIAL STIPULATION AND ORDER, SPECIAL INTERROGATORIES, AND PRE-TRIAL CONFERENCE

1. On or before _____, the parties collectively shall exchange drafts of a Pre-Trial Stipulation and Order that shall address the items set forth in Superior Court Civil Rule 16(c) to the extent not previously resolved.

2. Immediately following the exchange of the proposed Pre-Trial Stipulation and Order, the parties shall meet and confer in an attempt to reach an agreement on a final Pre-Trial Stipulation and Order. On or before _____, the parties shall submit to the Court a proposed Pre-Trial Stipulation and Order. In the event the parties cannot reach agreement on all the terms of the Pre-Trial Stipulation and Order a single proposed order shall be filed and any areas of disagreement shall be appropriately noted in the one proposed order submitted.

3. The Pre-Trial Conference with the Court shall take place on _____, at _____ a.m. Delaware counsel and trial counsel must appear unless expressly excused by the Court.

VII. MOTIONS PRACTICE

A. DISPOSITIVE MOTIONS

1. **Time of Hearing.** All dispositive motions shall be heard at the Court's convenience. Counsel must obtain possible dates and times for hearing of such motions from Judge Wallace's Administrative Specialist before filing of such motion. The parties shall agree upon a proposed date and time and the motion noticed accordingly.

2. **Opening Brief on a Dispositive Motion.** Each dispositive motion shall be accompanied by an opening brief supporting the motion. Subject to the requirements of this Order, any defendant may file a separate joinder or brief adopting or supporting a motion or opposition of another defendant provided it is served within three (3) business days after service of the motion or opposition and does not exceed 750 words that comply with the typeface requirement of Superior Court Civil Rule 107(b), exclusive of appendices.

3. **Answering Brief on a Dispositive Motion.** Subject to the requirements of this Order, any party may file an answering brief to a dispositive motion. Unless an alternative schedule has been agreed to by the parties or ordered by the Court, such answering brief shall be filed and served the later of thirty (30) days after any service of the motion, or thirty (30) days after any defendant files a separate joinder or brief adopting or supporting a motion or opposition of another defendant.

4. **Reply Brief on a Dispositive Motion.** A reply brief on a dispositive motion may be filed fourteen (14) days after responses are received, but no later than seven (7) days before any hearing on the motion.

5. **Formatting of Dispositive Motion Briefs.** All briefs on dispositive motions shall conform to the requirements of Superior Court Civil Rule 107.

B. DISCOVERY AND OTHER MOTIONS.

As for a discovery motion or any motion other than a dispositive motion or motion in limine, such motion shall be a "speaking motion" limited to 2,500 words that comply with the typeface requirement of Rule 107(b) and shall be noticed for presentation on one of the Court's routine motions calendars (Mondays at 9:00 a.m.) unless the Court orders a different hearing date. Absent leave of the Court, all discovery and other motions shall be filed no less than fifteen (15) calendar days prior to the noticed hearing date; responses shall be filed no later than seven (7)

calendar days after the filing of the motion and in no case later than the Wednesday prior to the motion's hearing—such responses shall also be limited to 2,500 words; and no reply submission shall be filed. If the case is referred to a special discovery master, then a modified protocol for discovery motion practice may be entered.

C. MOTIONS IN LIMINE

All motions in limine shall be filed no later than _____ and all responses to those motions shall be filed no later than _____. Each motion in limine shall be a "speaking motion" limited to 2,500 words that comply with the typeface requirement of Rule 107(b) and shall be noticed for presentation at the Pre-Trial Conference. The response to a motion in limine is also limited to 2,500 words.

D. LETTERS

A letter to the Court shall not exceed 1,000 words. Parties should use letters only to provide updates to the Court or to address logistical, scheduling, and other ministerial issues. Letters shall not be used to request substantive relief.

THIS CASE MANAGEMENT ORDER may be amended by the Court or supplemented by additional Case Management Orders as deemed appropriate by the Court. Nothing herein shall prevent any party from seeking relief from any provision for good cause shown.

IT IS SO ORDERED this ___ day of _____, 202*.

_____
**********, Judge

COMMISSION ON ARBITRATION AND ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives

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EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives

The purpose of this guide is to provide in-house counsel and other party representatives, such as managers and government officials, with a practical toolkit for making decisions on how to conduct an arbitration in a time- and cost-effective manner, having regard to the complexity and value of the dispute. The guide can also assist outside counsel in working with party representatives to that effect.

Reflecting the ICC's continuing efforts to provide arbitration users with means to ensure that arbitral proceedings are conducted effectively, the guide focuses on time and cost issues in the management of arbitration. While strategic considerations are of great importance in any arbitration and will have a significant impact on its management, they tend to be case-specific and are beyond the scope of this guide.

While the guide was conceived with the ICC Rules of Arbitration in mind, most of its contents, as well as the dynamic generated by it, can be used in any arbitration. The guide can be useful for both large and small cases.

INTRODUCTION

Arbitration is a dispute resolution mechanism that provides diverse users worldwide with a neutral forum, a uniform system of enforcement and the procedural flexibility that allows parties to tailor-make a procedure to suit their needs in each case. With a joint commitment to efficient management by parties, outside counsel and arbitral tribunals, it can achieve a time- and cost-effective resolution of a dispute. Without that commitment, the opposite can be true: the very flexibility of arbitration can lead to increased time and cost.

As arbitration has become more complex and the scrutiny of dispute resolution mechanisms has intensified, users have expressed the concern that arbitration is often too long and too expensive. One user has queried why a bridge can be built in one or two years but an arbitration to determine responsibility for delays and defects can take as long as three to four years. In light of the concerns of users, the ICC decided to address time- and cost-efficiency in arbitration head-on.

As a first step, in 2007, the ICC Commission on Arbitration (as it was then known) published its report on controlling time and costs in arbitration. Prior research covering a wide range of ICC cases had showed that on average:

- 82% of the costs of an arbitration were party costs, including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration;
- 16% of the costs covered arbitrators' fees and expenses; and
- 2% of the costs covered ICC administrative expenses.

It followed that, to minimize costs, special emphasis needed to be placed on reducing the costs connected with the parties' presentation of their cases. The report developed a series of suggested concrete measures for each phase of the arbitration that can be used to reduce time and cost.

Then, in 2009, the Commission began its revision of the ICC Rules of Arbitration. The revised Rules came into force on 1 January 2012.* One of the guiding principles for the revision was to improve the time- and cost-efficiency of arbitration. Among the provisions directed to that end is the requirement of an early case management conference during which the parties and the tribunal can establish an appropriate, time- and cost-effective procedure for the arbitration. The suggestions in the 2007 report, many of which are now included as an appendix to the Rules, may be used for that purpose.

The present guide is a continuation of that effort and is designed to help party representatives implement the new provisions and make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings.

As noted above, arbitration rules permit flexibility and do not specify precisely how an arbitration is to be conducted. For example, there is nothing in the ICC Rules of Arbitration about the number of rounds of briefs, document production, the examination of witnesses, oral argument, post-hearing memoranda or bifurcation. The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses. This was found to increase time and cost in many arbitrations. Under the new case management provisions in Articles 22–24 of the Rules, which are specifically designed to address that problem, the process of tailor-making the procedure has now become a formal requirement.

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* Those Rules have since been further revised to include, among other things, an expedited procedure for lower-value cases. Effective as of 1 March 2017, the newly revised Rules can be downloaded from the ICC website (www.iccwbo.org). In this guide, references to the Rules have been updated, where necessary.

Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference. What is more challenging is determining the appropriate level of process and resources to match the value and complexity of the case. It is faster and cheaper to have one round of briefs rather than three, or to hold a three-day rather than a three-week hearing, but an extended opportunity to be heard will necessarily be given up. It is less expensive and less burdensome to present a witness by videoconference, but perhaps also less persuasive. The goal of each party is to present its case in a manner that is most likely to persuade the arbitral tribunal to find in its favour. The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute. For each phase of the arbitration, cost/risk/benefit decisions have to be made.

Appropriate time and cost decisions can be made when party representatives have a collaborative relationship with outside counsel and actively participate in the making of those decisions. Each party best knows its own internal processes, the value of the underlying transaction and what is ultimately at stake. It is the party's case, the party's risk and the party's money, so the party itself is in the best position to decide what level of risk to accept and what strategic decisions to make. Outside counsel can assist in reaching such decisions on the basis of an informed evaluation of the pros and cons of the available alternatives. In addition, arbitral tribunals play an important role by bringing their experience to bear in devising cost-effective procedures and encouraging all of the parties to assist in conducting the arbitration in an expeditious and cost-effective manner, as contemplated by Article 22(1) of the Rules.

CASE MANAGEMENT CONSIDERATIONS

As a general matter, party representatives should consider the following when managing an arbitration:

Early case assessment. Much time and cost can be saved by not litigating matters with low chances of success, or that are not worth the cost/time/distraction to its personnel. This should be analysed before an arbitration has begun; however, case assessment should also continue during the arbitration.

Maintaining realistic schedules. Setting up of a realistic schedule for the entire arbitration as early as possible and sticking to that schedule, unless there are serious reasons for not doing so, are essential to controlled and predictable proceedings. Parties will be able more accurately to foresee the date of the award and make appropriate financial plans. The arbitral tribunal also has an important role in establishing and maintaining a realistic schedule.

Establishing a tailor-made and cost-effective procedure. Using this guide, party representatives along with outside counsel can determine optimum procedures from the party's perspective. The question then is how to implement those procedures. First, one party may consult with the other party with a view to reaching agreement on the applicable procedures. Any such agreement must be applied pursuant to Article 19 of the Rules. If the parties cannot agree on one or more of the procedures, each can present its position to the arbitral tribunal prior to or during the case management conference. The arbitral tribunal will decide after hearing the parties.

Awareness of settlement procedures. Settlement procedures such as mediation, neutral evaluation and direct settlement discussions can occur at any time before or during an arbitration. As an arbitration progresses, views on the case and parties' needs may change, affecting the desirability and nature of a potential settlement. New facts may come to light, a partial award may be rendered, management changes may occur, and new perspectives in relations between the parties may emerge. The parties should continually reassess their case and determine whether, at any given point in time, there is an opportunity for a meaningful settlement.

STRUCTURE OF THE GUIDE

This guide is composed of three main parts, each of which is designed to assist in making effective time and cost decisions for an arbitration: first, a discussion of settlement considerations; second, a discussion of the case management conference; and third, a series of eleven topic sheets.

Each topic sheet deals independently with a specific step in the arbitration process where cost/risk/benefit decisions need to be made. The topic sheets are not intended to cover every aspect of an arbitration; rather, they are designed to provide a methodology for decision-making. They may also serve as a tool to assist in making appropriate decisions on each topic. The following topics are covered:

- Request for arbitration
- Answer and counterclaims
- Multiparty arbitration
- Early determination of issues
- Rounds of written submissions
- Document production
- Need for fact witnesses
- Fact witness statements
- Expert witnesses
- Hearing on the merits
- Post-hearing briefs

Each topic sheet is designed to serve as an executive summary and follows a standard format consisting of a series of separate sections. The first section presents the topic and identifies the issue(s); the second section sets out the options available to the parties for that topic; the third section discusses the pros and cons of the different options; the fourth section analyses the different choices from a cost/risk/benefit perspective; and the fifth section lists useful questions that will help to focus on the key decisions that need to be made. The list of questions could, for example, serve as a basis for discussion between party representatives and outside counsel regarding the choices that need to be made for that particular phase of the arbitration. Where useful, a final section contains other general points to consider.

The topic sheets are not prescriptive and do not provide any definitive answers but rather contain suggestions that can be used to stimulate discussion and decision-making. It is the hope of the Commission that these topic sheets will help in taking the appropriate cost/risk/benefit decisions that need to be made in order to conduct an expeditious and cost-effective arbitration, having regard to the complexity and value of the dispute.

SETTLEMENT CONSIDERATIONS

A negotiated settlement of the dispute can save a great deal of time and cost, and parties would be well advised to maintain focus on the availability of settlement opportunities before and throughout an arbitration. The case management techniques listed in Appendix IV (h) to the ICC Rules of Arbitration indicate that the arbitral tribunal may inform the parties that they are free to settle all or part of the dispute at any time and, where agreed with the parties, may take steps to facilitate a settlement, subject to enforceability considerations under applicable law.

WHETHER OR NOT TO SETTLE

This is a complex question that will depend on each individual case. It is necessary to weigh the chances of success in an arbitration against a series of factors including the costs, burden and distraction caused by the proceedings and the time required to obtain the result. The choice may be affected by matters of principle or the need to eliminate financial or other uncertainties. Additional considerations include:

Preservation of relationships. Parties to an arbitration may have an ongoing relationship which they wish to preserve. Settlement may support that relationship better than litigating the dispute.

Difficulties of enforcement. If a claimant anticipates difficulties in enforcing an arbitral award against a particular respondent, it should factor that difficulty into its assessment of the strength of its case. When enforcement is uncertain, a settlement for a lower amount may be appropriate.

Reasons not to settle. Various factors may militate against settlement. For example, a claimant may wish to obtain a precedent or guidance from a tribunal for use in future cases or may consider that a given settlement offer does not match the chances of success in an arbitration. A respondent may prefer not to settle in order to discourage other potential claimants from seeking a settlement or because it is concerned that a settlement may be interpreted as an admission of liability.

Importance of confidentiality. A settlement may be preferable to an arbitration that is not confidential. ICC arbitration proceedings will not be confidential unless the parties have so agreed, the tribunal has so ordered or applicable law so requires.

METHODS OF SETTLEMENT

If the parties have decided to explore settlement, various methods are available to them. They may seek a settlement on their own, with the assistance of counsel or with the assistance of a mediator pursuant to the ICC Mediation Rules. Recourse to the Mediation Rules may be based on an agreement between the parties or a unilateral request by one party subsequently accepted by the other. While providing for mediation, the ICC Mediation Rules also allow the parties to choose any other settlement method that may be better suited to their dispute. Settlement methods that can be used under the ICC Mediation Rules include:

Mediation. The neutral acts as a facilitator to help the parties arrive at a negotiated settlement of their dispute. The neutral is not requested to provide any opinion on the merits of the dispute.

Neutral evaluation. The neutral provides a non-binding opinion or evaluation on any of a wide variety of matters including issues of fact or law, technical questions or the interpretation of a contract.

Mini-trial. A panel consisting of the neutral and an authorized executive of each party hears presentations by the parties, after which either the panel or the neutral can mediate the dispute or express an opinion on the merits.

A combination of methods, such as mediation with a neutral evaluation on a particular issue.

The report of an expert, selected pursuant to the ICC Rules for the Administration of Expert Proceedings to make findings on a disputed matter, may help to facilitate settlement. However, unlike a neutral evaluation and unless the parties agree otherwise, the expert's report will be admissible in judicial or arbitral proceedings if no settlement is reached.

CASE MANAGEMENT TECHNIQUES

The parties and their counsel should keep in mind that even where settlement is not feasible before or at the outset of an arbitration, the arbitration can be managed in such a way as to facilitate settlement throughout the proceedings. Appendix IV to the ICC Rules of Arbitration highlights several case management techniques that can be used to that end:

Bifurcation. In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration.

Early consideration of controlling issues. In some cases there are issues of law, fact or a mixture of fact and law, which necessarily affect the determination of the claims in the arbitration, yet can be resolved independently at relatively little expense. Examples include the determination of the applicable law, statute of limitations, the interpretation of a particular contractual provision, the determination of a key fact or technical issue or the measure of damages. The parties may find it easier to arrive at a settlement after such issues have been resolved by the tribunal.

Engagement of the arbitral tribunal. Where the parties agree and the applicable law permits, the arbitral tribunal can actively facilitate settlement either by encouraging the parties to pursue one of the settlement methods described above, or through discussions with the parties.

CREATIVITY AND OPEN-MINDEDNESS

Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.

CASE MANAGEMENT CONFERENCE

The case management conference provides the mechanism for determining the manner in which the arbitration will be conducted. If it is not possible to determine the entire procedure at the first case management conference, the remaining issues may be decided at a subsequent conference. The decisions made at the case management conference can be modified during the course of the arbitration by agreement of all of the parties or, failing such agreement, by a decision of the arbitral tribunal.

Article 24(1) of the ICC Rules of Arbitration requires the arbitral tribunal to convene an early case management conference to consult the parties on the conduct of the arbitration. Thereafter, pursuant to Article 22(2) of the Rules, the arbitral tribunal may adopt procedural measures for the conduct of the arbitration, provided that they are not contrary to any agreement of the parties. Article 22(1) requires the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Issues to be decided include: the number of rounds of briefs; the extent of document production, if any; the early determination of issues; fact and expert witnesses; and the conduct of the hearing, if any. The topic sheets contained in this guide are designed to assist the parties, along with their counsel and the arbitral tribunal, in making appropriate choices for the conduct of the arbitration.

In practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals. If it does not do so, the parties can seek to agree between themselves upon the conduct of the proceedings. If they arrive at an agreement, it must be followed, subject to any proposals of the arbitral tribunal that are accepted by all of the parties. If the parties do not reach an agreement, the arbitral tribunal, after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand.

While Article 22(1) of the Rules refers to expeditious and cost-effective proceedings, it also makes clear that speed and low cost are not ends in themselves. The complexity and value of the dispute must be taken into account. A cost-effective and expeditious arbitration will be one in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake. In each case, it is necessary to make a cost/benefit analysis in order to see whether a particular procedural measure is cost-justified.

The objectives of the parties will play a crucial role in making such choices. Some examples of how parties' goals may translate into case management strategy are set forth below:

- When an important matter of principle is at stake, it may be worth the time and expense needed for a thorough examination of the facts and a full articulation of all legal arguments. A party with this objective may be willing to incur the expense of more extensive document production, multiple rounds of written submissions, a larger number of fact and expert witnesses, and the like.
- When neither an important principle nor great sums are at stake, parties may wish the arbitration to be as inexpensive and rapid as possible. Here, in contrast, parties may seek to limit document production, limit the number of witnesses, shorten hearings or minimize submissions.
- When parties wish to settle the case, for example in order to maintain their relationship or mitigate the risk of loss, they may use the case management conference to seek bifurcation of the proceedings or an early determination of controlling issues, the resolution of which might facilitate settlement. The parties may also agree to undertake settlement procedures either before or during the remaining phases of the arbitration.

TOPIC SHEETS

1. Request for Arbitration
2. Answer and Counterclaims
3. Multiparty Arbitration
4. Early Determination of Issues
5. Rounds of Written Submissions
6. Document Production
7. Need for Fact Witnesses
8. Fact Witness Statements
9. Expert Witnesses (pre-hearing issues)
10. Hearing on the Merits (including witness issues)
11. Post-Hearing Briefs

1. REQUEST FOR ARBITRATION

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (Article 4 of the ICC Rules of Arbitration). In all cases, the Request must contain the information required by Article 4(3) of the Rules. That provision is intended to elicit sufficient information to enable the respondent to respond to the claimant's claims, as required by Article 5(1) of the Rules, and for the International Court of Arbitration to fulfil its functions under the Rules with respect to the constitution of the arbitral tribunal and the setting in motion of the arbitration.

Issue: Should the Request contain only the minimum requirements of the Rules or provide a more elaborate statement of the case?

OPTIONS

A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends.

PROS AND CONS

A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the

arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

In all circumstances, the claimant should seriously consider conducting an early assessment of the nature, strengths and weaknesses of its case before filing a Request. This will allow it to determine, in the first instance, whether the claims are sufficiently strong to warrant bringing the arbitration or whether it would be better to seek a settlement of the dispute. If it decides to proceed with the arbitration, the early case assessment will help to ensure that the Request does not contain errors and that the claimant's claims are correctly described and set forth in the most effective manner. While this assessment requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

If the claimant decides to proceed with the arbitration, it must determine whether to file a shorter or longer Request. The decision on how comprehensive the Request should be will be heavily influenced by the circumstances of the case and strategic considerations. Some time and cost may be saved by drafting a shorter Request although this may be a temporary saving if the claimant is ultimately required to supplement such a Request with additional detailed information. When the Request and the Answer respectively constitute a full statement of the case and a full statement of defence, time and cost can be saved by avoiding one or more further rounds of submissions. However, in complex cases this may not be possible, and the Request and Answer may be ultimately superseded by subsequent written submissions.

If a primary purpose for filing a Request is to elicit settlement discussions, consideration should be given to whether this is best accomplished with a shorter or a longer Request. A shorter Request may be preferable if the respondent is unlikely to discuss settlement unless an arbitration has been commenced and the substantive aspects of the claim would be best dealt with in the

settlement discussions. A longer Request may be preferable if the goal is to show the respondent in writing the strengths of the claimant's case before commencing settlement discussions.

QUESTIONS TO ASK

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?

2. Are there any valid reasons for not conducting an early case assessment?

3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request for any of the reasons described above?

4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request and consequently whether it should be shorter or longer?

OTHER POINTS TO CONSIDER

In certain cases, questions of timing may militate in favour of a shorter Request. For example, a Request may need to be filed quickly to avoid being barred by a statute of limitations. A Request may also have to be filed within ten days of receipt by the Secretariat of an application for emergency measures pursuant to Article 1 of the Emergency Arbitrator Rules (Appendix V to the Rules).

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made without the authorization of the arbitral tribunal. It is therefore prudent for the claimant to make all of its claims prior to the signing of the Terms of Reference.

Article 5(6) of the Rules provides that the claimant shall submit a reply to any counterclaim raised by the respondent pursuant to Article 5(5) of the Rules. The topic sheet relating to the Answer and counterclaims offers guidance on this matter.

2. ANSWER AND COUNTERCLAIMS

PRESENTATION

The respondent is required to file an Answer to the Request for Arbitration with the Secretariat (Article 5 of the ICC Rules of Arbitration). In all cases, the Answer must contain the information required by Article 5(1) of the Rules. The Answer may contain a counterclaim pursuant to Article 5(5) of the Rules.

Issue: How detailed or extensive should the Answer and any counterclaim be, above and beyond what is required by the Rules?

OPTIONS

A. File a short Answer that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Answer that constitutes a full statement of defence, including evidentiary exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing an Answer that provides a level of content and evidence anywhere between those two ends.

In deciding on the appropriate length of the Answer, the respondent should consider whether or not to match the length and level of detail chosen by the claimant. Specifically, the respondent may choose between the following options:

a) File an Answer that reflects the approach taken by the claimant (e.g. a shorter or a longer document).

b) File an Answer in a form that is different from the form of the Request filed by the claimant.

C. Assert a counterclaim, irrespective of the length and content of the Answer. The raising of a counterclaim is subject to considerations similar to those described in the topic sheet on the Request for Arbitration.

PROS AND CONS

The pros and cons of filing a shorter or a longer Answer may vary depending on the form of the Request filed by the claimant. If the claimant has filed a shorter Request and the respondent reciprocates with an equally short Answer, the arbitration should be able to proceed more expeditiously to the Terms of Reference and the case management conference, in part because the respondent is less likely to need an extension of time for filing the Answer pursuant to Article 5(2) of the Rules. On the other hand, if the claimant files a longer and more detailed Request, then the respondent may be required to seek an extension of time in order to respond with a detailed Answer.

A shorter and less comprehensive Answer can be prepared more economically and more quickly than a more comprehensive document.

If the claimant has filed a comprehensive Request and the respondent decides to file a comprehensive Answer, this may avoid the need for multiple rounds of subsequent submissions and thereby expedite the arbitration.

In addition, providing more information may increase the impact of the Answer. Additional detail may also increase the ability of the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

To the extent possible in the time available, the respondent should conduct an early assessment of the nature, strengths and weaknesses of its case before filing an Answer. This will allow it to determine, in the first instance, whether the case should be defended or whether settlement should be pursued. If the respondent decides to defend the arbitration, and possibly assert counterclaims, the early case assessment will help to ensure that the Answer does not contain errors and that the respondent's defence and/or counterclaims are correctly described and set forth in the most effective manner. While this assessment

requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

An additional consideration for the respondent is the limited amount of time available under the Rules for making an early case assessment and filing its Answer. If the respondent has prior knowledge of the dispute, then it may be able to undertake an early case assessment before receiving the Request for Arbitration. If, on the other hand, the receipt of the Request for Arbitration is the respondent's first real opportunity to assess the claimant's claims, the time available to it under the Rules for this purpose will be limited.

Depending on the circumstances described above, the respondent must decide whether to file a shorter or a longer Answer. The decision on how comprehensive the Answer should be will be heavily influenced by the circumstances of the case, strategic considerations and the limited time available for submitting the Answer under the Rules. Some time and cost may be saved by drafting a shorter Answer although this may be a temporary saving if the respondent is ultimately required to supplement such an Answer with additional detailed information.

If the claimant has filed a full statement of the case in its Request and if in the time available it is possible to file a full statement of defence in the Answer, time and cost can be saved by avoiding one or more rounds of further submissions. However, this may not be possible in complex cases.

Consideration should be given to whether filing a shorter or a longer Answer might facilitate settlement discussions. A shorter Answer may be preferable if the substantive aspects of the settlement would best be dealt with in negotiations and there is a reasonable prospect of a settlement. A longer Answer may be preferable if the goal is to show the claimant in writing the strengths of the respondent's defence and any counterclaims for purposes of settlement discussions.

QUESTIONS TO ASK

1. Are there any real cost savings or any other advantages in filing a shorter Answer? Would they be outweighed by the benefits of filing a longer Answer for any of the reasons described above?

2. Is there sufficient time to conduct an early assessment of the defence and file the Answer within the 30 days specified in the Rules, or is it necessary to request an extension of time for filing the Answer pursuant to Article 5(2)?

3. Are there any serious counterclaims that can and should be raised in the arbitration? Should they comply with only the minimum requirements set out in the Rules or be more detailed and accompanied by evidentiary exhibits?

OTHER POINTS TO CONSIDER

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made, without the authorization of the arbitral tribunal. It is therefore prudent for any counterclaims to be made by the respondent prior to the signing of the Terms of Reference.

If the respondent wishes to join an additional party pursuant to Article 7(1) of the Rules, it must be careful to do so within the time limits specified in that Article.

If there are serious objections to jurisdiction, the respondent may consider keeping the Answer short with respect to the merits.

3. MULTIPARTY ARBITRATION

PRESENTATION

Under the ICC Rules of Arbitration, an arbitration having more than two parties may occur when all of the parties have so agreed. Multiparty arbitrations may result from various procedural choices:

- A claimant may commence an arbitration pursuant to Article 4 of the Rules against two or more respondents.
- Two or more claimants may commence an arbitration pursuant to Article 4 of the Rules against one or more respondents.
- Before the confirmation or appointment of any arbitrator, any party may join another party to the arbitration pursuant to Article 7 of the Rules.
- Upon any party's request, two or more pending arbitrations may be consolidated into a single arbitration by the Court, subject to the requirements of Article 10 of the Rules.

Issue: When is it beneficial to choose a multiparty arbitration?

OPTIONS

A. A single arbitration that includes all relevant parties when they have all so agreed.

B. Two or more separate arbitrations.

PROS AND CONS

A single multiparty arbitration, when possible, results in more comprehensive proceedings and avoids duplication. It also avoids the risk of conflicting decisions in separate arbitrations.

On the other hand, a single multiparty arbitration may result in more complex proceedings, which could increase the length and cost of the arbitration. For example, a party with a small role in the dispute may not wish to participate in a multiparty arbitration and could

refuse to do so in the absence of a binding arbitration agreement. Further, in an arbitration where there is to be a three-member arbitral tribunal, choosing to have more than two parties in the arbitration may deprive the parties of their ability to choose a co-arbitrator, because the ICC International Court of Arbitration may decide to appoint the entire tribunal pursuant to Article 12(8) of the Rules.

COST/BENEFIT ANALYSIS

Consideration should be given to whether a single multiparty arbitration, as opposed to two or more separate arbitrations, would save time and money. While a single arbitration will usually be more cost-efficient, there could be situations in which separate arbitrations may still be the more efficient option for one or more parties.

If a single multiparty arbitration is the more time- and cost-efficient option, the parties should consider whether the time and cost benefits outweigh any of the potential disadvantages, such as the risk of losing the opportunity to choose a co-arbitrator because the International Court of Arbitration may find it necessary to appoint the arbitral tribunal pursuant to Article 12(8) of the Rules.

Another important factor to consider in deciding whether a single multiparty arbitration would be beneficial is the contractual role of each party and the specific interests flowing from that role. Arbitration of your dispute with one party may weaken your position with respect to another party. Where, for example, parties share potential liability with respect to their contractual counterparty, it may be tactically imprudent for them to have their internal disputes heard in the arbitration with the contractual counterparty, since their allegations against each other may support the counterparty's case against them.

4. EARLY DETERMINATION OF ISSUES

PRESENTATION

Issue: In what circumstances would it be beneficial to break out certain issues for early determination by the arbitral tribunal in a partial award?

Various kinds of issues lend themselves to such treatment:

First, there may be threshold issues that could be dispositive of the entire arbitration. Such issues might include:

- whether the tribunal has jurisdiction over the dispute;
- whether the dispute is barred by an applicable statute of limitations;
- whether there is liability;
- whether the dispute is arbitrable;
- whether the parties have capacity to sue or be sued.

For example, were a tribunal to decide that it lacks jurisdiction over the entire dispute, that would result in a final award dismissing all claims made in the arbitration. If the tribunal decides that it has jurisdiction, that decision would result in a partial award and the arbitration would continue, unless the tribunal's decision leads to a settlement. The same pattern would apply, *mutatis mutandis*, to the other examples given above.

Second, there may be discrete issues which could be usefully broken out and decided in a partial award, even though their resolution would not be dispositive of the entire arbitration. The early resolution of a particular issue may narrow or simplify the issues to be decided in the remainder of the arbitration or may facilitate settlement. Such issues may include:

- a decision on the meaning of a contractual provision;
- a decision on the applicable law;
- a decision on certain key facts in dispute;

- a decision on an issue that may significantly affect a party's exposure to one or more claims, such as determination of the types of recoverable damages.

For example, a decision on applicable law may save the parties from having to incur time and cost pleading their case on the basis of alternative applicable laws. The same analysis applies to the other examples above.

OPTIONS

A. Do not break out any issues for early determination.

B. Break out one or more issues for early determination by means of an award.

PROS AND CONS

The early determination of one or more issues in a partial award may resolve the entire dispute, simplify the remainder of the arbitration or facilitate settlement. However, if the award does not achieve one of those objectives, the early determination procedure may result in added time and cost. In addition, breaking out a discrete issue rather than having it decided along with the other issues may affect the way the tribunal decides one or more of the issues.

COST/BENEFIT ANALYSIS

Breaking out issues that could be dispositive of the entire arbitration

A cost/benefit analysis of this question is complicated by the fact that the decision has to be made in the face of important unknowns. When deciding whether or not to break out an issue, the parties cannot know what the arbitral tribunal's decision will be. For example, in a case involving issues of liability and damages, if the issue of liability is broken out and the tribunal decides that there is no liability, a great deal of time and cost will be saved since there will be no need to exchange briefs and hold hearings on damages. On the other hand, if the tribunal finds that there is liability, unless such finding encourages the parties to settle the case, there will have to be a damages phase, and the breaking out of the issue of liability may then actually add to the overall time and cost of the proceedings.

Given these unknowns, the cost/benefit analysis must turn on an appreciation of probabilities and an estimate of potential cost. In deciding whether to break out an issue, it may be useful to estimate likely outcomes as well as time and cost in answer to certain specific questions:

- What is the likelihood that the tribunal's decision will be dispositive of the entire arbitration?
- If the tribunal's decision will not be dispositive of the entire arbitration, what is the likelihood that the tribunal's early determination of the issue may result in a settlement of the case?
- What is the added time and cost likely to result from early determination of the issue in comparison with the likely overall cost, i.e. how much more time and cost would there be if the arbitration were conducted in two parts rather than one?

The answers to these questions can help in deciding whether or not to break out an issue for early determination. The following factors would tend to favour the breaking out of an issue for early determination:

- the likelihood of a dispositive determination is high;
- the likelihood of a settlement, even if there is no dispositive determination, is high;
- the remaining phases are likely to be long and expensive;
- the additional cost caused by early determination is low.

A decision on whether to break out an issue can be made by weighing these factors in relation to each other.

Breaking out issues in a partial award not dispositive of the entire arbitration

A similar type of cost/benefit analysis would apply here, although the relevant questions are slightly different:

- What is the likelihood that the tribunal's early determination of a particular issue will significantly narrow or simplify the other issues to be decided in the remainder of the arbitration?

- What is the likelihood that early determination of a particular issue may result in a settlement of the case?
- What is the additional time and cost likely to result from early determination of a particular issue?

Once again, weighing the answers to those questions against each other can help in deciding whether it is beneficial to break out a particular issue for early determination.

QUESTIONS TO ASK

1. Does the case contain any threshold or discrete issues that could be determined in a separate award?

2. Would the early determination of those issues by the arbitral tribunal be beneficial, in light of the cost/benefit analysis discussed above?

3. Would early determination (a) potentially resolve the entire dispute, (b) facilitate settlement or (c) simplify the rest of the arbitration?

OTHER POINTS TO CONSIDER

Article 38(5) of the Rules permits the arbitral tribunal, when allocating the costs of the arbitration, to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The arbitral tribunal might allocate some amount of costs against a party that loses in the early determination of a potentially dispositive issue if that party is considered to have acted in bad faith or otherwise not to have acted in an expeditious and cost-effective manner.

There may be logistical reasons for breaking out one or more issues for early determination, such as the availability of witnesses, hearing facilities, counsel or arbitrators. In addition, it may allow a complex case to be conducted in a more orderly manner.

There may be compelling reasons for deciding certain issues early in an arbitration, e.g. whether claims made under different arbitration agreements may be heard together in a single arbitration. The breaking out of an issue for decision in a partial award could be agreed upon by the parties or determined by the arbitral tribunal in the absence of an agreement by the parties.

5. ROUNDS OF WRITTEN SUBMISSIONS

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration (Article 4 of the ICC Rules of Arbitration). Thereafter, the respondent files an Answer (Article 5). If the Answer contains a counterclaim, the claimant files a reply (Article 5). The Terms of Reference for the arbitration are then established (Article 23).

Issue: How many subsequent rounds of written submissions are appropriate in a particular arbitration?

OPTIONS

A. No further written submissions are necessary, since the Request and the Answer sufficiently state the case.

B. One subsequent round of written submissions.

C. Two or more subsequent rounds of written submissions.

D. Post-hearing briefs (assuming there is a hearing).

PROS AND CONS

Additional rounds of written submissions enable the parties to articulate their positions more extensively and respond to the developing arguments on each side.

However, additional rounds of briefs may lead to unnecessary repetition, excessive detail or dilatory tactics.

COST/BENEFIT ANALYSIS

Each round of written submissions increases the length and cost of the arbitration. It is therefore essential to determine whether, in a particular case, the benefits of an additional round are worth the extra time and cost.

Additional submissions may be particularly useful in certain cases, e.g. where there are complicated issues of fact or law or issues of strategic importance for a party. In such cases, it is very common to have two rounds of pre-hearing written submissions after the initial submissions.

QUESTIONS TO ASK

1. Does the case justify the extra time and cost caused by additional written submissions?

And, in particular,

2. Are additional rounds of submissions genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of such additional rounds?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the number of pages of written submissions.

Consider limiting the scope of such submissions, e.g. to issues raised by the other side in its immediately preceding submission.

Consider having the arbitral tribunal indicate issues on which it wishes the parties to focus in any further round of submissions.

Consider whether any subsequent rounds of submissions should be simultaneous or sequential. For example, it may be efficient for post-hearing briefs to be filed simultaneously.

Consider whether post-hearing briefs are genuinely useful or necessary, or whether one round of pre-hearing briefs and one round of post-hearing briefs are sufficient.

The foregoing suggestions could be put into effect either through an agreement between the parties or in an order from the arbitral tribunal upon a party's request.

6. DOCUMENT PRODUCTION

PRESENTATION

Document production can involve substantial time and cost. Obviously, every party may unilaterally submit documents to support its case. Document production refers to the extent to which one party may demand that another party produce documents.

The ICC Rules of Arbitration contain no specific provisions governing document production. Article 19 of the Rules allows the parties to agree upon the procedures to be applied and empowers the tribunal to decide in the absence of an agreement of the parties. Article 22(4) requires the arbitral tribunal to ensure that each party has a reasonable opportunity to present its case. Article 25(1) provides that the arbitral tribunal shall establish the facts of the case by all appropriate means and Article 25(5) allows it to summon any party to provide additional evidence.

In short, the Rules leave the question of whether and how much document production will occur to the parties and the arbitrators, provided that the parties are treated fairly and impartially and that each party has a reasonable opportunity to present its case. When document production is to occur, the manner in which the process is executed and the degree of production can have a significant impact on time and cost.

In-house counsel or other party representatives, working with outside counsel, should consider whether and to what extent document production is genuinely useful and cost-beneficial. When document production is to occur, time and cost can be significantly reduced by establishing an efficient document production procedure.

Issue: Is document production desirable and, if so, how much document production should there be?

OPTIONS

Options range from no document production at all to full document production.

A. No document production.

- The parties may decide to seek no documents from each other and to rely solely on the documents each of them possesses.
- The parties are always free to submit their own documents.
- The parties are also free to request the arbitral tribunal to order the production of specific documents.

B. Production limited to specific documents or narrow categories of documents, which are relevant and material to deciding an issue in the arbitration.

Consider using:

- the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") as a standard;
- the suggestions in the report of the ICC Commission on Arbitration and ADR entitled "Controlling Time and Costs in Arbitration";
- the report of the ICC Commission on Arbitration and ADR entitled "Managing E-Document Production".

C. Broad document production as used in some common law jurisdictions.

- The parties may agree upon broad requests for documents.
- In rare cases, the parties may agree to common law style "discovery" including depositions and/or interrogatories.

When document production is to occur, the parties may agree upon the ground rules for requesting documents from and producing documents to each other.

If the parties cannot agree on whether to have document production or on the extent of document production or the ground rules for such production, the tribunal will decide.

PROS AND CONS

Document production can be very expensive and time-consuming and the broader the document production the more expensive and time-consuming it

tends to be. It requires time and expenditure from the party that searches for and produces documents as well as from the party that must study and analyse the documents that are produced.

On the other hand, if one of the parties has sole possession of documents needed by the other party, document production may be essential. Moreover, document production can provide the parties and the tribunal with a more complete understanding of the case. Given that parties are unlikely to submit documents spontaneously when they are detrimental to their own case, document production puts them under an obligation to do so.

COST/BENEFIT ANALYSIS

In view of the time and cost required for document production, a cost/benefit analysis is necessary in order to decide whether to seek document production at all and, if so, to determine the desired extent of such production. The parties should explore whether they can effectively meet their burden of proof with the documents that are already in their possession and whether the other side is likely to have documents that are genuinely useful for the first party to make its case.

Each party should then estimate the extra time and cost caused by document production and weigh this against the likelihood that document production will genuinely assist it in making its case. For example, if document production is estimated to cost USD 500,000 and it is considered that there is at best a 10% chance that it will yield valuable results, the question arises as to whether that 10% chance is worth the expense of USD 500,000. This is a decision that can best be made jointly by the party, typically represented by in-house counsel, and outside counsel. Many factors may come into play, such as the amount in dispute, whether there are policy issues, whether there is concern about precedent and whether the benefit of obtaining documents from the other side may be outweighed by the detriment of being required to produce documents oneself.

QUESTIONS TO ASK

1. Are any requests for document production genuinely useful or necessary for a party to make its case or can the party rely effectively on the documents in its possession?

2. What extent of document production is genuinely useful and necessary?

3. When should document production occur?

4. What is the estimated cost of searching for and producing documents, as well as the cost of reviewing and analysing documents that have been produced?

5. Is the benefit of document production worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider whether it is appropriate to deal with document production in the arbitration clause, for example by agreeing that there will be no document production (e.g. in contracts where it is relatively certain that document production will not assist in resolving potential disputes); by agreeing to limited document production in accordance with the IBA Rules; or by agreeing to broad document production or "discovery".

Consider whether document production should occur once or more than once. Consider whether it should occur prior to or after written submissions.

Consider whether it is appropriate to limit documents transmitted to the arbitral tribunal to a manageable quantity.

Take into account any costs of translation when estimating the cost of document production.

Consider the ground rules to be adopted for implementing document production, including the use of a Redfern Schedule and the setting of the shortest reasonable time frames for production.

Special considerations may be needed if the parties agree upon or the tribunal orders the production of electronic documents. In such cases, the report of the ICC Commission on Arbitration and ADR entitled "Managing E-Document Production" can be used to assist in choosing the most efficient methods of e-document production.

7. NEED FOR FACT WITNESSES

PRESENTATION

Article 25(1) of the ICC Rules of Arbitration requires the arbitral tribunal to establish the facts of the case by all appropriate means. This can include the hearing of fact witnesses. Article 25(3) of the Rules specifically allows the arbitral tribunal to decide to hear witnesses. However, Article 25(6) allows the arbitral tribunal to decide the case solely on documents, unless a party requests a hearing. This would permit an arbitration with no hearing and no fact witnesses.

Issue: Is there a genuine need for fact witnesses?

OPTIONS

A. No fact witnesses at all.

B. One or more fact witnesses.

- Identify the issues on which fact witness testimony is necessary.
- Identify the appropriate fact witnesses for the issues.

PROS AND CONS

Fact witnesses can be essential to proving a case. However, they significantly increase the length and cost of an arbitration, since there will typically be one or more written witness statements for each witness and the oral testimony of each witness may be required at a hearing.

COST/BENEFIT ANALYSIS

Fact witnesses may be genuinely necessary in order to prove disputed facts or to present a broader picture of the circumstances surrounding the dispute. In determining whether fact witnesses are needed, the following issues can be considered:

- Are there any disputed facts? It may appear from the pleadings that there are disputed facts, but it may turn out after discussion between the parties that those facts are not really disputed. In addition, a party may agree not to contest certain disputed facts in order to save time and cost when the dispute over those facts is not sufficiently important.
- If there are disputed facts, are they relevant and material for deciding an issue in the dispute? There is no need to incur the extra time and cost involved in having a fact witness testify on disputed facts that will not affect the determination of an issue in the dispute.
- If there are disputed facts that are relevant and material, can they be proved by documents alone or do they genuinely need to be proved through fact witnesses?
- Is it useful to call fact witnesses to make a general presentation on the circumstances of the dispute?

When a party has decided to use fact witnesses, time and cost can be reduced by avoiding having many witnesses testify as to the same facts and by carefully focusing the scope of the testimony of each witness.

QUESTIONS TO ASK

1. Is there a genuine need for fact witnesses at all?

2. If so, who should they be? What should be the scope of their testimony? How many fact witnesses are genuinely necessary to establish a particular fact or present the circumstances of the case?

OTHER POINTS TO CONSIDER

Consider using videoconferencing for oral witness testimony to save time and cost.

Consider what is the most effective way of examining the fact witnesses at a hearing: e.g. direct examination and cross-examination; opening presentation by the witness followed by cross-examination; use of the witness's written statement as a substitute for direct examination and proceeding straightaway with cross-examination; questioning of fact witnesses by the tribunal only or by the tribunal followed by questions from counsel.

Determine whether it is preferable for a given witness to testify in the language of the arbitration or in his or her native language. When a witness is testifying in a language other than the language of the arbitration, appropriate translation will often need to be arranged, which will increase time and cost.

8. FACT WITNESS STATEMENTS

PRESENTATION

Issues arising when a party has decided to present fact witness evidence: Should witness statements be submitted? What should their scope be? When should they be submitted?

OPTIONS

Form

A. No written witness statements.

B. Brief summary of the scope of witness evidence (witness summary).

C. Full witness statements.

Scope of full witness statements

A. Lengthy and comprehensive statement.

B. Short statement limited to key factual issues in dispute.

Number and timing

A. One or more rounds of witness statements.

B. Witness statements submitted with written submissions.

C. Witness statements submitted following the exchange of written submissions.

D. Witness statements submitted simultaneously or sequentially.

PROS AND CONS

Form

Written witness statements increase the length and cost of the pre-hearing phase, but can reduce the length and cost of the hearing by replacing direct examination and allowing for a more focused cross-examination. The absence of witness statements, or the submission of witness summaries only, will reduce pre-hearing costs but can increase the length and cost of the hearing.

Scope

Comprehensive witness statements can be a valuable part of case presentation, allowing witnesses to tell the story of the dispute and place documentary evidence in its context. However, lengthy witness statements will increase time and cost as well as the scope of cross-examination.

Number and timing

More than one round of witness statements provides witnesses with the opportunity to rebut the evidence of other witnesses, but will increase time and cost prior to the hearing.

Submitting witness statements with the written submissions provides direct proof of the facts at the time they are alleged. It also allows the parties to identify and progressively narrow down the factual issues, which may make for shorter, more targeted submissions later.

Submitting witness statements only after the exchange of written submissions may allow the parties to narrow down the factual issues in dispute before preparing and submitting witness statements, which may consequently be more focused on the disputed issues.

COST/BENEFIT ANALYSIS

While witness statements can provide valuable evidence in support of a party's position, they can add significantly to time and cost. The importance of the evidence to be presented must therefore be weighed against the time and expense required to present it. For example, if alternative sources of evidence are available (e.g. contemporaneous documentary evidence), there may be no cost justification for providing a witness statement on those facts. Similarly, if a witness is submitting a statement on a given fact, the submission of another witness statement evidencing the same fact may not be cost-justified, particularly if the fact is of little importance.

Full witness statements require more work and are therefore more expensive to prepare than witness summaries. However, they may subsequently save time and cost during a hearing by obviating the need for lengthy direct examination of the witness at the hearing.

The case management techniques set out in Appendix IV to the Rules include limiting the length and scope of written witness evidence so as to avoid repetition and focus on key issues. In line with Appendix IV, parties may wish to consider how to structure their fact witness evidence as efficiently as possible.

QUESTIONS TO ASK

1. In light of the other sources of evidence available, is the preparation of a given witness statement justified in terms of time and cost?

2. Is a witness statement required to prove a disputed question of fact or provide necessary background information? Is more than one witness statement necessary to accomplish this? Is there a good reason not to limit the witness statement to the key factual issues in dispute?

3. Should the witness evidence be presented in the form of full witness statements or witness summaries?

4. Is it necessary to have more than one round of witness statements?

5. Should the witness statements be filed concurrently with, or only after, the parties' written submissions?

9. EXPERT WITNESSES (PRE-HEARING ISSUES)

PRESENTATION

Article 25(3) of the ICC Rules of Arbitration contemplates the possibility of experts appointed by the parties, while Article 25(4) provides that, after consulting the parties, the arbitral tribunal may appoint one or more experts, define their terms of reference, and receive their reports.

Issues: Is there a genuine need to appoint experts? Should they be appointed by the parties, the tribunal, or both? How should they be selected? How should the written expert reports be produced?

OPTIONS

Whether and how to appoint experts

A. No experts at all.

B. Party-appointed expert(s) only.

C. Tribunal-appointed expert(s) only.

D. Both party-appointed and tribunal-appointed experts.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the tribunal's selection of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.
- These reports can be produced either simultaneously or sequentially.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based upon the terms of reference.

PROS AND CONS

Certain technical issues may need to be presented through expert opinions. In some cases, expert opinions can be decisive for a case. However, expert witnesses significantly increase the length and cost of an arbitration.

If there are to be experts, the pros and cons of party-appointed experts and/or tribunal-appointed experts must be considered. In particular cases, a tribunal-appointed expert may be the most persuasive expert for arbitrators from certain legal cultures, but reliance on a tribunal-appointed expert deprives the parties of some degree of control. Whether a tribunal-appointed expert should be requested is an important matter of strategy to be considered on a case-by-case basis.

Recourse to a tribunal-appointed expert alone, with no party-appointed experts, will no doubt be the least expensive option. However, there may be cases where a tribunal-appointed expert's views cannot be adequately questioned or tested by the parties without the assistance of party-appointed experts. Recourse to both will increase time and cost.

COST/BENEFIT ANALYSIS

Whether and how to appoint experts

Whether or not to appoint experts can be a complex question requiring consideration of a number of factors, including the nature of the issues, the legal and cultural background of the tribunal, the availability of experts, case strategy and the impact on time and cost. A key consideration will be whether the cost and time associated with expert witnesses is justified by a genuine need in the case at hand.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel

In order to present evidence on issues requiring expertise, the parties or their counsel may select an outside expert to produce an expert report. Alternatively, evidence on such issues can be presented by the parties' in-house technical experts. The in-house experts may be very knowledgeable in their field and have hands-on knowledge of the specific technical matters at issue. Yet, there is a risk that the tribunal could perceive them as being partial. Outside experts are more expensive and more time-consuming but, depending on their qualifications and professional demeanour, could be viewed as more impartial.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

The ICC International Centre for ADR offers parties and tribunals a service of finding experts from a wide range of sectors and countries. This may speed up the process of identifying experts and minimize the cost. In addition, the fact that a party-appointed expert has been identified by the ICC International Centre for ADR can reflect well upon the expert's qualifications, independence and impartiality.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the selection by the tribunal of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

The selection of an expert by the arbitral tribunal alone may be more expeditious and may avoid disputes between the parties over the suitability of their respective proposals. Moreover, the appointment of one expert will reduce time and cost. However, this method excludes the parties from the selection process and creates a risk that the chosen expert may fall short of the parties' expectations. From the parties' perspective, a further disadvantage is that the content of the expert's opinion may remain unknown to them until produced before the arbitral tribunal.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

This is a more time-consuming process than the appointment of an expert by the tribunal alone, but has the advantage of restricting selection to an expert acceptable to the parties and the tribunal. Moreover, the appointment of a single expert will reduce time and cost. However, a potential disadvantage from the parties' perspective will again be that the content of the expert's opinion remains unknown to the parties until produced before the arbitral tribunal.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.

  The submission of expert evidence with a party's briefs has the advantage of enabling a more comprehensive understanding of that party's case. It may help to focus the content of any subsequent briefs on the actual rather than the assumed areas in which expert evidence may be submitted. The disadvantage is that the expert evidence may not take account of any evidence introduced by the other party in subsequent witness statements, expert reports or subsequent briefs and may either be incomplete or create a need for supplemental expert evidence.

- These reports can be produced either simultaneously or sequentially.

In cases where the points of disagreement are sufficiently clear, simultaneous filings will generally be faster than sequential filings because there will be fewer rounds. However, when the points of disagreement are not sufficiently clear, simultaneous filings may result in expert reports that do not correspond or respond to each other, which could actually increase time and cost.

The ultimate choice will also depend upon tactical or strategic considerations that go beyond issues of time and cost.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

The production of written expert reports can be time-consuming and expensive. Reducing the scope of those reports will reduce time and cost. If the party-appointed experts are given the opportunity to meet and clearly identify the points over which they disagree, their reports can be shortened and focus on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based on the terms of reference.

It is important to ensure that the tribunal-appointed expert focuses and provides an opinion on the specific issues in dispute within the relevant area of expertise. The terms of reference are designed to serve this purpose. By being allowed to comment on and provide input into the terms of reference, the parties will have a degree of control over the process.

QUESTIONS TO ASK

1. Is there a genuine need to appoint experts or can the case be effectively made without expert evidence?

2. Should there be party-appointed experts, tribunal-appointed experts or both?

3. What is the appropriate method for selecting party-appointed experts or tribunal-appointed experts, as the case may be?

4. If there are to be party-appointed experts, how many experts are genuinely necessary?

5. When and in what form should expert reports be produced?

6. Should reports be submitted simultaneously or sequentially?

7. Should party-appointed experts be required to meet in order to determine points of agreement and disagreement?

8. If such a meeting is held, should counsel be present at the meeting?

OTHER POINTS TO CONSIDER

Consider avoiding more than one party-appointed expert per topic on each side.

Consider whether it is genuinely necessary to have an expert witness on issues of law. A great deal of time and cost can be saved if legal issues are argued by outside counsel in their briefs and at the hearing.

10. HEARING ON THE MERITS (INCLUDING WITNESS ISSUES)

PRESENTATION

Pursuant to Article 25(2) of the ICC Rules of Arbitration, a hearing must be held if requested by any party. In addition, pursuant to Articles 25(2) and 25(3), the arbitral tribunal may hear the parties, witnesses, experts or any other person, if it so decides of its own motion.

Hearings are expensive to hold and the longer they are, the more costly they become.

Issues: Is it genuinely necessary to hold a hearing at all? If so, is there a need for more than one hearing? What is the appropriate length for the hearing and how should it be organized?

OPTIONS

A. Hold no hearing and have the case decided solely on the documents submitted by the parties.

B. Hold one or more hearings, as appropriate.

When a hearing is to be held, a certain number of choices need to be made, including:

- appropriate location;
- dates;
- attendees;
- appropriate duration;
- allocation of time between the parties;
- whether there are to be opening and/or closing statements and their duration;
- whether there should be direct examination, cross-examination and/or witness conferencing for fact and expert witnesses;
- whether the hearing should be transcribed and if so, whether daily transcripts and/or live transcripts (i.e. real-time transcripts available electronically to participants during the hearing) should be made;

- when interpreting is needed, whether it should be consecutive or simultaneous;
- whether to use videoconferencing for all or part of the hearing.

PROS AND CONS

Oral hearings are often considered as a key opportunity for the parties to present their case and for the arbitrators to understand it and assess the evidence.

On the other hand, oral hearings are typically one of the most expensive and time-consuming phases of the arbitral process. Costs are generated by a number of factors, including the extensive preparation that is usually necessary and the number of people attending the hearing. In addition, the arbitration is often delayed by the difficulty of finding a mutually convenient time in the calendars of all relevant participants.

Cost and time can nevertheless be reduced by making appropriate choices with respect to the organization of the hearing.

COST/BENEFIT ANALYSIS

In deciding whether to request or agree upon a hearing, the parties should take various factors into consideration. Hearings tend to be most useful when there are disputed issues of fact to be addressed by fact and expert witnesses. Parties may consider proceeding without a hearing, for example, when:

- the case turns exclusively on questions of contract interpretation that do not require witness testimony;
- the case turns exclusively on a question of law;
- no respondent is participating;
- the value of the dispute is low;
- there is a need for a quick decision.

It should be determined whether the potential benefits of a hearing justify the associated time and cost. The choices made with respect to the organization of the hearing may reduce time and cost and may affect the decision on whether or not to hold a hearing at all.

Appropriate location

Pursuant to Article 18(2) of the Rules, hearings may be conducted at any location and not necessarily at the place of the arbitration. The cost of the hearing can be reduced if a location likely to be advantageous in terms of cost is chosen.

Dates

To avoid delay, the dates for the hearing should be set at the earliest reasonable opportunity and recorded in everyone's calendars. Ideally, the hearing dates should be fixed during the first case management conference.

Attendees

Attendees should be limited to those genuinely necessary for the conduct of the hearing.

Time and cost can be reduced if an informed and knowledgeable party representative with decision-making authority participates in the preparation of and attends the hearing. Such a person will be in a position to make cost/benefit decisions in consultation with outside counsel. For companies, the party representative is often an in-house counsel. For states or state entities, an individual with decision-making authority can be appointed.

Appropriate duration

Under the Rules, there is no prescribed length for hearings. In practice, parties often request hearings that are longer than necessary. However, the longer the hearing, the greater the cost. The length of the hearing should be carefully chosen so as to allow no more time than is necessary for adequately presenting the case.

Use and duration of opening/closing statements

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal's attention on the key issues. The longer the statement, the greater the cost. When the case has already been fully developed in briefs with supporting documents and witness statements, it may not be necessary to repeat these matters in an opening statement.

A closing statement is an opportunity to make a summary and a synthesis of what happened at the hearing. However, if the parties are not given sufficient time to prepare a closing statement, it may be of little use. Furthermore, it may not be necessary to have both a closing statement and a post-hearing brief, as they are likely to repeat each other and unnecessarily increase time and cost.

Direct examination, cross-examination, witness conferencing

In some legal systems, the questioning of witnesses is largely conducted by the arbitral tribunal, with counsel for each side being invited to ask follow-up questions. Under this approach there is no direct examination or cross-examination.

In other legal systems, and increasingly in international arbitration, the questioning of witnesses is largely conducted by counsel through direct examination and cross-examination, with the arbitral tribunal having the right to interject questions or ask questions at the end of the witness's testimony.

The first approach will often result in a shorter and less expensive hearing. The second approach will often allow a more comprehensive examination of the witnesses. Since the first approach leaves the arbitral tribunal largely in control, there is little scope for the parties to make cost/benefit decisions. While the overall duration and cost of the second approach will often be greater, a number of choices can be made to reduce the time and cost, as follows:

Direct examination

Direct examination is the questioning of a witness by the party presenting that witness. In international arbitration, witnesses often submit written witness statements setting forth their evidence. When such statements have been submitted, direct examination may be dispensed with entirely or kept short (e.g. 10 or 15 minutes). This will reduce the length and cost of the hearing.

Cross-examination

Cross-examination is the questioning of a witness presented by the opposing party. If each side is given an

overall allocation of time at the hearing, a party is free to determine how much time to use for each witness so long as the total time is not exceeded. Alternatively, time and cost can be reduced by setting time limits on the cross-examination of witnesses.

Consideration should also be given to the appropriate scope of cross-examination. Limiting its scope to matters covered in a witness's statement or in direct examination, if any, may reduce the length and cost of the hearing.

If it is not necessary to cross-examine certain witnesses who have provided statements for the other side, time and cost can be saved by not doing so. However, in that case, it may be necessary to obtain agreement from the other side or an order from the tribunal stipulating that the decision not to cross-examine a witness does not constitute an admission of the truth of that witness's written statement.

Witness conferencing

Witness conferencing can function as an alternative or an addition to cross-examination. In witness conferencing, two or more witnesses dealing with the same area of evidence are questioned together either by the arbitral tribunal first and then by counsel, or vice versa. The witnesses are also given the opportunity to debate with each other.

Witness conferencing (in particular of expert witnesses) can save time and cost insofar as it helps to focus on, clarify and resolve areas of evidential disagreement.

If the witness conferencing is directed by the arbitral tribunal, the arbitrators will need to prepare carefully beforehand in order to be able to fulfil their inquisitorial role effectively. It may deprive the parties of some control over the presentation of the case.

If the witness conferencing is directed by counsel, they retain greater control over the process and debate can still occur between the witnesses. In addition, the tribunal will have the opportunity to ask its own questions. However, some of the benefits of witness conferencing may be lost as the process is likely to be longer, more expensive and less focused.

Nature of transcripts, if needed

Transcripts are expensive, especially daily transcripts and live transcripts (i.e. real-time transcripts available electronically to participants during the hearing). A cost/benefit decision should be made on what is genuinely necessary. A transcript enables the parties and the tribunal to have a complete and accurate record of the evidence adduced at the hearing. It can be very helpful to the parties when preparing post-hearing briefs, if any, and to the tribunal when preparing the award. In very low value or simple cases, it may be possible to save the expense of a transcript at no great loss. In complex cases with many witnesses, the additional cost of daily transcripts and live transcripts may well be justified. They will facilitate effective cross-examination and be useful when preparing further witness questioning.

Consecutive or simultaneous interpreting, if needed

A choice must be made between simultaneous and consecutive interpreting.

Consecutive interpreting requires fewer interpreters and equipment, but is more than twice as long as simultaneous interpreting, which makes it more costly due notably to the extra time lawyers and experts will have to spend at the hearing. While it may be easier to control the accuracy of consecutive interpreting, that benefit must be weighed against the considerable time and cost it may add to the hearing.

Use of videoconferencing for all or part of the hearing

While it is generally preferable to hold hearings in the physical presence of the arbitrators, the parties and the witnesses, the significant time commitment and travel expenditure this may require from certain witnesses can be avoided by using videoconferencing.

QUESTIONS TO ASK

1. Is an oral hearing necessary for the fair determination of the issues in dispute so as to justify the extra time and cost it involves?

2. Is it necessary to test a written witness statement by cross-examining the witnesses at a hearing?

3. Is there a more convenient location for the hearing than the place of arbitration?

4. What is the earliest time at which dates for the hearing can be set?

5. Who genuinely needs to attend the hearing?

6. Should fact witnesses and/or expert witnesses be allowed to attend the hearing while other witnesses are giving testimony?

7. Taking into account the nature of the issues in dispute, the value of the dispute and the number of witnesses, what is the total number of days genuinely necessary for the hearing? Is the proposed length of the hearing justified in terms of cost?

8. How should the total time of the hearing be allocated between the parties?

9. Should there be an opening statement and if so, how long should it be? Is it genuinely necessary to have both a closing statement and a post-hearing brief? If there is to be a closing statement, how long should it be and how much time should be allocated for its preparation?

10. Does every witness need to be cross-examined?

11. Which areas of evidence require examination and what is the most efficient method of examination (cross-examination or witness conferencing)?

12. Should the hearing be transcribed and if so, should there be daily transcripts and/or live transcripts?

13. If interpreting is needed, should it be consecutive or simultaneous?

14. Should videoconferencing be used for all or part of the hearing?

11. POST-HEARING BRIEFS

PRESENTATION

Parties in an arbitration have the opportunity to present their legal arguments and the relevant facts in pre-hearing submissions and during the hearing itself. The issue here is whether it is necessary or useful for the parties to submit post-hearing briefs.

Post-hearing briefs may be used to draw the arbitral tribunal's attention to relevant facts that have emerged at the hearing and place them in the context of the parties' claims and defences. They may be drafted in a manner that assists the arbitral tribunal with drafting the arbitral award. In some cases, the arbitral tribunal may identify key issues to be addressed by the parties in their post-hearing briefs.

If closing statements are made at the end of a hearing, post-hearing briefs may be unnecessary. Conversely, if there are post-hearing briefs, closing statements may be unnecessary.

Issue: Should there be post-hearing briefs and/or closing statements?

OPTIONS

A. Proceed directly from the hearing to an award with no closing statements or post-hearing briefs.

B. Provide for closing statements immediately after the hearing or at some agreed time thereafter, but no post-hearing briefs.

C. Provide for post-hearing briefs but no closing statements.

D. Provide for both closing statements and post-hearing briefs.

E. Post-hearing briefs, if any, can be submitted simultaneously or sequentially, and there can be more than one round of post-hearing briefs.

PROS AND CONS

The submission of post-hearing briefs can serve a number of useful purposes, as mentioned above. In a

long and complex hearing, it may be useful for each party to sum up what they consider to have been demonstrated at the hearing. Post-hearing briefs can include valuable references to the hearing transcript and present a short final synthesis of the evidence and facts of the case, which can be of great value to the arbitral tribunal when drafting the award.

On the other hand, post-hearing briefs add to the cost of the arbitration and may delay the rendering of the award. In addition, they may be of little use if they merely repeat facts and arguments already well understood by the arbitral tribunal.

COST/BENEFIT ANALYSIS

The additional time and expense required for post-hearing briefs need to be balanced against the likelihood that they will genuinely serve one of the purposes indicated above. For example, post-hearing briefs will be especially useful where there are numerous witnesses, complicated or disputed facts, or extensive cross-examination. In all cases, the time and cost associated with post-hearing briefs should be weighed against their likely impact on the arbitral tribunal's decision.

The time and expense required for post-hearing briefs can often be reduced if measures are agreed to keep them relatively short and concise, e.g. limiting the number of pages.

QUESTIONS TO ASK

1. Does the case justify the extra time and expense required for post-hearing briefs, closing statements, or both?

And, in particular,

2. Are post-hearing briefs genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of preparing the post-hearing briefs?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the scope, length and timing of any post-hearing briefs.

Consider having post-hearing briefs filed simultaneously to save time.

In some cases, it may be genuinely necessary to allow each party a short period of time in which to reply briefly to the other party's post-hearing brief.

In some cases, simultaneous post-hearing briefs may have the undesirable consequence of creating a need for further rounds of submissions. Care should therefore be taken to define properly the parameters of post-hearing briefs.

Post-hearing briefs may include submissions on costs, which are normally not discussed at the hearing. This can also save time.

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The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission's products are published regularly in print and online.

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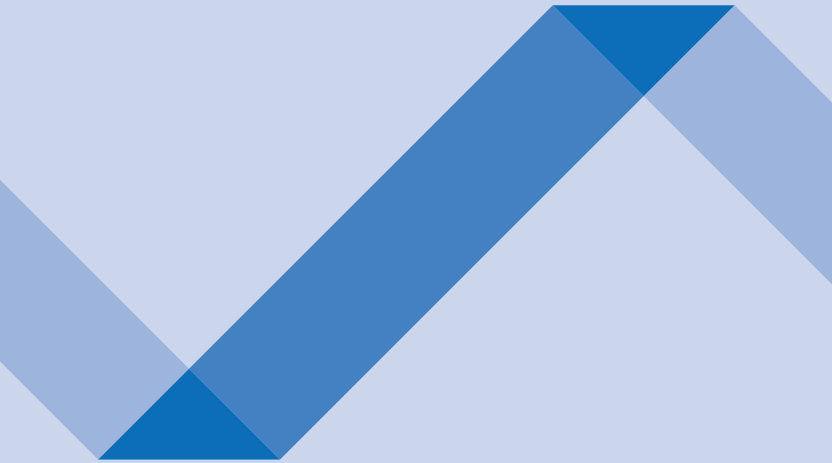

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ARTICLES

Ten Tips to Get the Most Out of U.S.-Based Business Arbitration

Learn how to lead more efficient and productive arbitrations for you and your clients.

By Conna A. Weiner – March 17, 2020

For cross-border, international disputes, experienced advocates generally accept the notion that arbitration, rather than litigation, is the more practical choice for a final adjudication: (1) Unlike a court judgment, an arbitration award will be widely enforceable in the many countries that are signatories to the New York Convention; (2) arbitration provides a neutral forum for companies of differing nationalities; and (3) the vagaries of local court systems are avoided in favor of a flexible, customizable process.

For litigators practicing in the United States, however, doubts persist regarding whether to recommend arbitration over litigation for disputes in the United States. The complaints about arbitration, whether real or perceived, are familiar: It is an "unpredictable" process; discovery is too limited; there is a lack of "appellate discipline" on an arbitrator who knows his or her award is unlikely to be overturned; arbitrators have a tendency to "split the baby" and reach a middle-ground decision; an arbitrator may have an incentive to drag out the proceedings because arbitrators are paid by the hour; and it may not result in actual savings of time and cost. In other words, many U.S. practitioners worry that arbitration's benefits have been seriously diluted or never existed in the first place and are outweighed by the perceived disadvantages.

All too often, however, these concerns stem from nervousness about the unfamiliar, untested myths about the process, or one bad experience. Accordingly, it is important for U.S. litigators to take another look at the process in light of the facts and process reforms from the major institutions over the past several years and the ever-increasing length and expense of litigation in the United States.

Ultimately, commercial arbitration can be a far better forum for the resolution of business disputes *if* it is done with adequate planning *and* an arbitration mind-set. Below are tips for achieving an arbitration that meets client expectations for efficiency and fairness, time and cost savings, and ensuring a reasonably just process and result.

1. Mediate First

This may seem counterintuitive, but before diving directly into arbitration, it can be immensely beneficial to invest first in a thorough mediation procedure. A key aspect is to mediate with a

knowledgeable neutral who focuses on preparation, the exchange of key information, and an effort to resolve as many issues as possible on a business basis. For more on the benefits of early mediation, see these articles.
Even if an early mediation "fails" to result in a global settlement, it will have forced the parties and their counsel to prepare, which positions the parties to hit the ground running in the ensuing arbitration. An added benefit to early mediation is that you will have learned much about your case, received valuable input from an independent neutral about the strengths and weaknesses of your case and your opponent's case, possibly weeded out non-issues (for example, disputes that may result from things like simple accounting mistakes or incorrect assumptions), and set the groundwork for future negotiations and communications. Rigorous time limits in a "step clause" can prevent gamesmanship and unnecessary delay.

2. Read the College of Commercial Arbitrators' Protocols
No lawyer should advise clients about arbitration without having studied a free, neutral resource that has been around for some time: the College of Commercial Arbitrators' *Protocols for Expeditious, Cost-Effective Commercial Arbitration*. This resource explores the issues that litigants have had with arbitration and invites all participants—outside counsel, in-house counsel, alternative dispute resolution (ADR) providers, and arbitrators—to be part of the solution. It also provides practical tips to help fulfill the promises of arbitration.

3. Soften Your Litigation/Jury Mind-Set: Be Comfortable with "Less"—Less Discovery, Less Motion Practice
Remember that arbitration can and should be a flexible, customizable process. If the parties insist on a litigation-type arbitration replete with full-fledged discovery and the application of cumbersome rules of civil procedure and evidence that inadequately take into account the bench trial context of an arbitration, and if they engage in strategic delay tactics (including numerous motions or failures to meet deadlines), the many advantages of arbitration quickly will be lost. In addition, the tribunal will not be impressed.

In short, the nature of the process is very much dependent on the ability of litigators to adopt an arbitration, as opposed to a litigation, mind-set that takes full advantage of the absence of a jury and the expertise of your tribunal. Invest in early case investigation and witness interviews to figure out the scope of discovery that is really necessary and treat the preliminary hearing with the level of importance it deserves because that will create the road map for your customized process and lay the groundwork for the rest of the arbitration. Be prepared with suggestions about how to streamline it and explanations for the discovery you argue you will need. Also, you should avoid insisting on the automatic right to bring dispositive motions. To do an arbitration right, you simply must be more prepared on the facts and law at the outset than in connection with a litigation and have the experience and judgment to make strategic choices; consider it an extremely vigorous application of the principle of "proportionality" now applied in federal courts, in connection with every aspect of the case. And as a corollary note to clients, make sure that your chosen counsel is very experienced with litigation *and* arbitration processes and is

comfortable making smart selections about what is necessary to put in a good case in an arbitration context.

One specific example of the "less can be more" principle is depositions—one of the key culprits in the enormous expense of U.S. pretrial discovery (number one being e-discovery). In international cases, depositions will be frowned upon (the rules of the American Arbitration Association's (AAA's) International Centre for Dispute Resolution specifically note that depositions, along with interrogatories and requests to admit, "generally are not appropriate procedures for obtaining information in an arbitration under these Rules" (Article 21(10)), and even in domestic cases, they are not automatic and will need to be justified (*see* AAA Commercial Rule L-3(f)). The domestic litigation expectation that all material witnesses at a trial will have been deposed beforehand is not appropriate in arbitration. You need to be able to explain to the arbitrator why you need them and why particular deposition witnesses are necessary. In arbitration, the idea is to get to the hearing efficiently.

4. Focus on Your Choice of Arbitrator and the Number of Arbitrators That Are Really Necessary

You can't choose your judge, but you can choose your arbitrator. The choice of arbitrators is the single most important decision for you and your client—it affects both time/cost and the fairness of the result. The ability to choose is one of the great advantages of arbitration over litigation. It can be very helpful, for example, to choose someone with business- or industry-specific knowledge, or at least a grasp of business negotiation, because these experiences will help the arbitrator understand your facts, assist in setting up a creative and streamlined arbitration process, and assess any expert testimony. A better business understanding can help inform a better result. You can and should interview candidates to assess style, philosophy, and availability—something you cannot do with a judge. Finally, three-arbitrator panels should be reserved for the biggest cases, and counsel should be prepared to arbitrate with a knowledgeable and experienced sole arbitrator for everything else. Having one decision maker is a fraction of the cost of a three-person panel, and any perceived risk associated with it can be mitigated by adopting optional appellate procedures.

5. Agree on a Time Limit Between the Appointment of the Arbitrators and the Award

Keep the time limit reasonable so that neither the parties nor their counsel are sorely tempted to agree to extensions. Counsel and arbitrators both should be chosen by clients with a view toward their ability to meet the timing requirements in the face of other commitments. Even complex cases can be resolved in under a year. Also note that, contrary to many perceptions, the statistics of the major providers show that arbitrations generally take much less time than court—the federal court average time to trial being over 27.2 months.

6. Consider Expedited Procedures

All of the major ADR providers now have adopted expedited procedures that parties may agree to use for any size case. Learn the options so that you can discuss them with your client.

7. Adopt Efficient Hearing Practices
There are many ways that the arbitration hearing can and should be structured to ensure time is used efficiently: Create joint, pre-marked exhibit binders that note any objections to admissibility so that time will not be taken up with marking exhibits and arguing about them during the hearing; insist on consecutive hearing days, and have additional days reserved ahead of time; consider creative ways to present fact and expert witness testimony efficiently, including direct testimony through a witness statement, expert testimony organized by topic, or expert witness panels so that experts can be questioned at the same time.

8. Control the Number and the Result: Keep Open Settlement Pathways; Consider "High-Low" Ranges or Baseball Arbitration for the Award or Even Issues-Based Baseball Arbitration
In-house counsel should keep open lines of communication about settlement as a matter of course as the arbitration proceeds—again, easier if you have started with a robust mediation—perhaps with the help of a stand-by mediator. In addition, consider agreeing on a "high-low" range or baseball arbitration (choosing one side's number or the other) for the award, which helps to keep the result in check. Parties can even consider issues-based baseball arbitration (asking the arbitrator to choose one outcome for a list of issues).

9. Consider Adopting Optional Appellate Arbitration Panel Reviews—and Examine the True Value of the Ability to Appeal to an Appellate Court
The major arbitration providers have all adopted optional appellate rules that permit the parties to appeal results to a group of senior arbitrators on an expedited time frame. These rules are relatively new and have not made their way into many agreements, and many litigators are not familiar with them. The adoption of such rules in an agreement or at the outset of a particular case helps mitigate risk of a so-called "runaway" award. In addition, have a frank discussion with your client about the likelihood that a decision in any litigation will be overturned on appeal—if an abuse of discretion standard would apply, the chances are slim.

10. Memorialize All of These Tips and More in a Well-Drafted Dispute Resolution Clause Adopting Administered Arbitration
The number of arbitrators, the length of the process, controlled discovery, and many other issues—choice of law, location, etc.—can and should be dealt with clearly and unambiguously in your arbitration clause. Draft it with a view toward avoiding disputes later. Choosing administered rules of the major providers is important to this endeavor because they will set forth procedures for choosing arbitrators and managing the process—and all of the major providers have robust clause-drafting tools. There is no need to start from scratch.

Conclusion
Following these tips will help you and your clients get more out of arbitration and will lead to a more productive and efficient arbitration process.

Conna A. Weiner is a mediator and arbitrator with JAMS and cochair of the ADR Subcommittee of the Commercial and Business Litigation Committee.

PRACTICE POINTS

Getting the Arbitration that You Want: Appeals? Really?

Tips for post-arbitration review

By Conna A. Weiner – June 8, 2018

Commercial arbitration sometimes gets a bad rap for seeming to be no less expensive or lengthy than a court proceeding, and well, arbitrary. The accuracy of these criticisms often is inadequately explored, and there are many things that can be done to make business arbitration the efficient and fair process that it should be: some can be previewed in an article the author of this Practice Point wrote with United Technologies Litigation Chief Steven Greenspan: "Reassessing Commercial Arbitration: Making It Work for Your Company," published in *ACC Docket,* Association of Corporate Counsel, March 2017, pp. 53–61.

This Practice Point briefly addresses what some practitioners find particularly alarming: the narrow grounds available under the Federal Arbitration Act for vacation of an arbitration award. *See* 9 U.S. Code § 10. Since most arbitrations are governed by the FAA, a commonly held view is that parties will be stuck with a "runaway" arbitration award if they agree to arbitration. Judicially created exceptions that are only available in some jurisdictions based upon "manifest disregard for the law"—sometimes justified as a gloss on the vacation ground in the FAA based upon an arbitrator exceeding his or her powers - provide insufficient comfort. (For a general discussion, see Liz Kramer's "Arbitration Nation" blog).

As discussed in the ACC Docket article cited above, there are many things that practitioners should do in connection with structuring their arbitration and arbitrator selection to ameliorate arbitration risks. Beyond that, however, attorneys should be aware of and explore with their clients at least two additional options:

1. Optional Arbitration Appeal Procedures

The major alternative dispute resolution providers—the American Arbitration Association (AAA), JAMS, and the Institute for Conflict Preservation and Resolution (CPR)—are well aware that attorneys sometimes avoid arbitration altogether because of the appealability concern. Starting with CPR in 1999, and followed by JAMS in 2003 and the AAA in 2013, each have adopted optional appellate rules—with varying procedures and standards of review—pursuant to which parties can agree in their arbitration clauses or later to provide for an appeal to a panel of senior arbitrators and avail themselves of an expanded standard of review by that panel on a reasonably expedited time frame. The rules, along with other model clauses and forms, are readily available on the provider websites, www.cpradr.org, www.adr.org and

www.jamsadr.com. Under the JAMS procedures, the arbitration appeal panel applies the same standard of review that the first-level court in the jurisdiction would apply to an appeal from a trial court decision. CPR and the AAA also permit expanded review of the factual and legal errors. Many attorneys may not be aware of these optional rules, but should be since it could impact their decision to pursue arbitration.

2. "The FAA is Not the Only Game in Town"

In *Hall Street Associates LLC v. Mattel Inc.*, 552 U.S. 576 (2008), the U.S. Supreme Court held that the FAA barred courts from honoring parties' agreements to have courts review an arbitration decision for legal error where the FAA applied. The Court explicitly noted, however, that the FAA "is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Id.* There are a number of options here. Carefully and expressly adopting in an arbitration clause a state arbitration statue which permits expanded judicial review beyond the grounds permitted by the FAA—and assuming the dispute has sufficient jurisdictional contacts with the state if that is required—may secure expanded judicial review of an award, for example. New Jersey is one such state (New Jersey Arbitration Act, N.J. Stat. § 2A: 23B-4c) and there are others, including Texas and California. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 98-101 (Tex. 2011) ("We hold that the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the [Texas Arbitration Act]"); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008) (parties may structure their agreement to allow for judicial review of legal error under California Arbitration Act). An excellent summary of the potential terrain left open by *Hall Street*—with appropriate cautionary notes concerning the changing landscape—is available in "Writing Arbitration Clauses to Get the Arbitration You Want," Merril Hirsh and Nicholas Schuchert, Law360 August 9, 2016 https://merrilhirsh.com/writing-arbitration-clauses-to-get-the-arbitration-you-want/. "As Hall Street suggests," the authors note, "the Federal Arbitration Act is not the only game in town" and the current state of play is certainly worth exploring in your jurisdiction.

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CHEAT SHEET

- *Lead the way.* The efficacy of arbitration is dependent on guidance from in-house counsel in two key areas: (1) with clients at the point of the negotiation of business contracts, and (2) with outside counsel.
- *Selecting the best.* Arbitrator selection is one of the most important aspects of the process. Ensure that the arbitrators you hire have strong project management experience.
- *Slow motion.* Carefully assess what motions will increase efficiency and what motions will extend the process. This ensures productivity and sets the tone for the rest of the process.
- *An open mind.* Corporate counsel should pledge to keep business-to-business lines of communication open to promote the possibility of a settlement.

REASSESSING COMMERCIAL ARBITRATION:

MAKING IT WORK FOR YOUR COMPANY

By Steven M. Greenspan and Conna A. Weiner Handling disputes that have strayed beyond the ability of both parties to negotiate a solution by themselves presents a variety of strategic and logistical challenges.[1] While many in-house counsel have come to appreciate the business benefits of non-binding mediation, even at an early stage, the fact is that binding arbitration often remains suspect, especially outside of the international arena where the process makes obvious sense for reasons of cross-border neutrality and enforcement.[2] This often occurs because of a lack of information, one-off personal experiences, or — most tellingly — failure to design and plan a good arbitration process that fully exploits the many flexible and customizable options available to parties and counsel.

With our many collective years of in-house counsel experience, we are all too familiar with the need for law departments to increase efficiency and firmly manage litigation matters so that they do not interfere with business objectives and finances. In this context, it is critical that both inside and outside counsel reassess commercial arbitration to take advantage of its benefits in the context of complex business disputes. This article provides even the most skeptical counsel with a framework for taking a closer, more objective look at the issues. It is based upon an analysis of the facts, the available efficiency enhancing resources and tools, and our own experiences shaped by numerous discussions with colleagues who each carry differing views on the subject.[3]

The litany of concerns raised about commercial arbitration is well-known: It is a dispute resolution mechanism that's supposed to be quicker, easier, and more cost-efficient but often becomes a cumbersome and expensive process without the procedural predictability of litigation. At times, arbitration may end in a compromise or even a nonsensical rogue award without any real avenue for appellate review. Accordingly, many in-house corporate lawyers favor litigation over arbitration to resolve business disputes, going so far as to adopt a "default" rule that binding arbitration should be used only in rare circumstances, where confidentiality is paramount. Such a default rule is misguided, and does a significant disservice to business clients.

These concerns do not adequately consider the empirical facts. We forget to examine what it really means in terms of time, and thus cost, to litigate instead of arbitrate. What is the difference in the cost and time required between litigation and arbitration — particularly if it involves a jury and appeals? How often are litigated cases actually appealed? In the course of those appeals, how often is the result at the trial level reversed? In other words, if we avoid arbitration in order to preserve our right to appellate review, just how valuable is this option anyway? Would an unattractive business arbitration result have been any different in a litigation setting? And if so, how often and why?

These types of concerns do not fully address the many thoughtful and creative responses to user complaints that key dispute resolution think tanks and providers have developed in recent years. At the very least, in-house counsel should educate themselves about these process and logistical innovations.

Simply put, if the process is well designed by the parties and their well-informed inside and outside counsel, arbitration of commercial disputes is often far superior to traditional court litigation. The speed of achieving final resolution, the sense of confidentiality, the predictability, and the ability to customize the process by choosing your adjudicators are some of the key factors here. The parties should strive, and — with the right attitude and professionals at the table — be able to jointly develop a binding arbitration process that will best achieve three core objectives: fair resolution, efficiency, and timeliness.

There is an important caveat to all of this — the efficacy of the process depends entirely on the parties. Strong leadership and guidance from in-house counsel is a must in two key areas: (1) with clients at the point of the negotiation of business contracts, and (2) with outside counsel once an arbitration is on the horizon. Many commercial arbitrations are compelled by a contractual provision, which was likely agreed to long before a dispute arose. In-house counsel must stress to their business clients the importance of taking the time to think about the types of disputes that might arise in connection with any particular arrangement — an assessment greatly assisted by an analysis of the common causes of disputes in connection with similar agreements in the past. The contract and specific dispute resolution clauses should be negotiated accordingly.[4] The notion that dispute resolution provisions are just legal boilerplate for which a form can be used for the miscellaneous section of a contract is wrong and has fueled much of the criticism of arbitration over the years. The clause can and should contain appropriate provisions to streamline the process, and we set forth specific suggestions below. Of course, we are mindful that negotiating the terms of an arbitration provision at the outset can be awkward, but spending time on the process while the parties are not embroiled in a dispute is paramount.

Once an arbitration is on the horizon, clauses that are insufficient in some way can be "fixed" or modified with the agreement of the parties

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The authors would like to thank John Kiernan of Debevoise & Plimpton in New York and David Evans of Murphy & King in Boston for their many contributions in connection with a panel discussion about arbitration.

and the arbitrator to "fit the forum to the fuss."[5] At the preliminary hearing, a project-management minded arbitrator will help guide the parties in customizing the process for a particular dispute in a way that makes sense. Strong in-house guidance is necessary at this stage as well.

In-house counsel should choose outside counsel for their arbitration experience, stress that they chose arbitration for a reason, and make it clear that a full-scale litigation mindset and approach will not meet the client's goals. They should be directly involved in the all-important preliminary hearing before the arbitrator(s), where the process is shaped and gaps in the arbitration clause can be filled. In-house counsel should be present when agreeing to appropriate limits on discovery and when the arbitrator memorializes those limits in the scheduling order.[6]

Arbitration works most effectively to resolve good faith commercial disputes only when each party seeks a fair resolution, efficient both in time and cost, and when there is a willingness to collaborate to customize the process. After all, are there really any commercial disputes where the actual business clients should not seek to achieve such sensible goals?

The facts

Statistics provided by US federal courts and some of the major providers supply a stark reminder of the differences between litigation and arbitration.

According to figures available from the US federal court system, of the 341,813 cases pending in federal court in 2015, nearly half were pending for over a year, with a full quarter pending for more than two years. In addition, by the end of 2015, the median time to get a federal civil case to trial was 27.2 months. In-house counsel should examine the situation in their state and local courts when they assess alternatives.[7]

In contrast, American Arbitration Association (AAA) figures show that the median time to an award — which of course includes all prehearing, hearing, and any post-hearing activities, such as the submission of any post-hearing briefs — was 197 days in 2014-2015.[8] A recent survey by the International Institute for Conflict Prevention and Resolution (CPR), a corporate user dispute resolution think tank and provider, showed that the average time to an arbitration award was nine months.[9] There are concerns that arbitrators have an incentive to drag out proceedings because a longer process results in more pay. Good arbitrators are well aware of these concerns and know that arbitration is often chosen because parties want efficiency. Today's arbitrators want to develop and maintain a reputation for being efficient. Those who don't will not get business.

We also need to remember the disruption that full-scale litigation can have on business, especially with regard to discovery. People fail to adequately take this into account when assessing litigation versus arbitration. Avoiding the worst parts of litigation is critical to an acceptable arbitration.

Another common fear is losing the right to an appeal. However, the standards for reversal are high, and the money and the time spent to get through a trial and appeal can be staggering. It seems that many parties make the decision to move on, with a relatively small number of cases going to appeal and an even smaller number resulting in reversal. A remand for further proceedings consistent with a favorable appeal result may seem like a win to the lawyers. However, years into litigation, the business may not view it the same way.[10] Is this a broad and inexact brush? Yes. Is it food for thought about the need to preserve an appellate option in litigation? Again, yes.

With respect to our experience with the "compromise verdict" issue, we, and many of our inside and outside counsel, including our neutral colleagues, have found this to be more urban legend than reality. Again, responsible arbitrators are well aware that this is a criticism of the process, and strive to render clear and decisive awards with a careful legal basis — or risk not being hired the next time. The American Arbitration Association has also analyzed the extent to which arbitrators issue awards that seem to represent compromise awards, or "split the baby." In a 2015 study of their 2,384 business-to-business commercial arbitration cases with monetary claims, the AAA found that that more than 93 percent were in favor of one party or the other (defined as outside the midrange of 41-60 percent of their filed claimed amount), with 30.75 percent of claims amounts denied and 40.94 percent of claims awarding more than 80 percent of the relief requested.[11] Further, in-house counsel must always examine the litigation alternative in connection with criticisms of arbitration. Disbelief must also be suspended to conclude that juries and judges never reach compromised decisions.

This type of data should encourage inside and outside counsel to carefully

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examine the actual facts in their state and federal courts and more broadly across arbitration results obtained in their companies and by colleagues in other firms. Simply put, one or two examples is an insufficient data set.

How to get the arbitration that you want

It is useful to group arbitration planning and management techniques into two key areas: (1) methods to keep the cost and length of arbitration under control; and (2) methods to improve your odds of getting a just result — or at least making a favorable business resolution more likely.

One of the single most important resources to consider on both of these subjects is the College of Commercial Arbitrators' 2010 "Protocols for Expeditious, Cost Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Providers,"[12] which is available at no cost on the internet. It outlines the criticisms of arbitration and then encourages each significant player to assume responsibility for specific, practical steps to improve the arbitration process. Every lawyer who is considering or participating in arbitration should become intimately familiar with this resource.

In addition, virtually all of the major arbitration providers have developed thoughtful discovery protocols and expedited arbitration procedures and rules designed to streamline arbitration and turn it back from the litigation-lite abyss. They also have developed ways to appeal arbitration awards to panels of senior arbitrators. Corporate counsel should familiarize themselves with these resources and consider adopting aspects of these creative ideas where appropriate in their agreements, or as part of the preliminary hearing discussion.[13]

Inside counsel who have failed to educate themselves about the latest thinking on the arbitration process are in a weak position to advise clients — or accept advice from outside counsel — on this subject.

Arbitrator selection is one of the most important — if not the most important — aspects of building a successful arbitration case. The process differs from a litigation setting, where parties have little control over the judge assigned to the case and a relatively weak level of control over jury selection.

Arbitrator selection: Key for both controlling cost and length, and ensuring a just or business friendly result

Because it is a critical aspect of both types of planning and management techniques and of such overall significance to the process, it is useful to focus on arbitrator selection separately from the other mechanisms outlined below.

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Counsel should carefully evaluate prospective candidates and consider their experience and philosophy. In terms of keeping the cost and length of arbitration under control, choosing a single rather than a three-member panel of arbitrators is critical and should be chosen as often as possible. The logistics of intrapanel relations and deliberation are inherently more time-consuming than those of a single arbitrator. The American Arbitration Association has developed compelling statistics that show that a three-member panel process takes longer and is more expensive.[14] Those wanting to reduce the risk of putting all of their eggs in one basket should test this concern by making sure they do not believe that they can come up with a selection process that will yield an individual arbitrator with the requisite experience and knowledge to make them comfortable. They should then consider reserving three-member panels for very high-value disputes. The risk of a single arbitrator also can be ameliorated by the adoption of one of the optional appellate arbitration rules available from the major dispute resolution providers, discussed below.

In addition, arbitrators should have strong project management experience — running arbitrations efficiently is one indicator of the requisite experience. Managing teams and projects inside corporations or in business, where the "rules" are not set forth in an overall framework such as the US Federal Rules of Civil Procedure, is another.

Another important point in connection with arbitration cost and length is arbitrator availability. Today's arbitrators are taught the importance of consecutive hearing days. Many arbitrations have run aground because of the need to accommodate arbitrator schedules. The schedules of outside counsel are difficult enough. The arbitrators should be ready to go, day after day, when everyone else is.

Arbitrator selection is also critical to ensuring a just result — or at least a business friendly one. While not outcome dispositive, the ability to choose the arbitrator assures the parties that the qualifications possessed by their arbitrator are those that are necessary, or at least helpful, to resolving the dispute, whether it is industry, judicial, educational, or through another point

of experience. Substantive experience with particular types of disputes or industries and/or significant general commercial/business experience with complex commercial transactions makes the presentation of the case easier and can significantly improve your chances of securing a result that fits legal/business expectations and norms. It also enhances the likelihood that the arbitrator will be interested in the subject matter, and, importantly, makes the parties comfortable with the process when an award is rendered. But, one important warning when drafting an arbitration provision is not to narrowly define the desired qualifications of the arbitrator. It will make it too difficult to find candidates and the eventual dispute might deviate from the expectations of the parties at the time the business deal was reached.

Other key methods to keep the cost and length of arbitration under control

In-house counsel leadership

It is worth repeating: In-house counsel must be involved in the dispute resolution process from the beginning. Because the process can and should be customized and flexible, it will require more work and focus to get the best process — but it will be worth it. It is vital to understand what the case is about and what you think it will require in terms of discovery. Scrutinize the choice of the arbitrator and participate in the preliminary hearing and status conferences.

Outside counsel selection

A contributing factor to the negative view of arbitrations held by some in-house counsel is that some outside counsel lack sufficient experience in arbitration, and that their resulting lack of comfort with the process leads them not to recommend, or to be less enthusiastic about it. Lawyers without sufficient experience can not only diminish the efficiency of arbitration, but can also produce less favorable outcomes that trial lawyers blame on the process. Arbitration is not a game for beginners. It requires extensive experience and the confidence on the part of outside counsel to forgo a "no stone unturned" litigation mentality in favor of efficiently resolving a dispute, with less emphasis on formal rules and discovery. Arbitrations are special proceedings and demand different lawyering skills.

It is vital, therefore, to engage counsel with significant trial and arbitration experience. While some lawyers possess overlapping skills, many superb courtroom trial lawyers cannot effectively navigate in arbitration. An assessment of what discovery is crucial and should be fought for is one example requiring experience and judgment. In addition, some arbitrators ask parties to consider different types of processes that differ from the traditional litigation setting, such as submitting direct examination in writing, with only cross- and redirect examinations conducted at the hearing. This puts greater emphasis on written storytelling skills, with redirect examination that's even more important than in courtroom trials. And, it certainly improves the efficiency of the hearing process. Even the physical surroundings of arbitration demand different skills, as odd as it may sound. It is far less confrontational to cross-examine a witness while sitting down across a conference room table than in a courtroom with the witness all alone in a witness box.

Outside counsel must also be able to be conciliatory in the process. Disputes regarding administrative and procedural matters are not often brought to a court for resolution, but many outside counsel impair their credibility by fighting irrelevant procedural battles before the arbitrator. Advocacy should be reserved for the hearing. Otherwise, every experienced arbitrator expects the parties to be mutually engaged in a process that's designed to resolve the dispute fairly, timely, and efficiently. Lawyers seeking to gain a procedural edge will usually be unsuccessful in arbitration. Arbitrators don't embrace counsel who seek to make the arbitration process look like litigation — it makes them look unsophisticated and inexperienced. The risks severely impair the entire process.

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Limit the time from the appointment of the arbitrator to the rendering of the arbitration award

This technique is one of the single best ways to control the cost and length of the arbitration process and encourage more focus on your matter. Barring unforeseen circumstances such as changes in counsel, most commercial arbitrations can be done within 12 months. Shorter time frames may be reasonable depending on the size of the disputes expected to arise in a business relationship. As a matter of fact, CPR's newly administered arbitration rules (available at *www.cpradr.org*) require that the parties and the arbitrator seek approval from CPR of any scheduling orders and extensions that would result in the final award being rendered more than 12 months from the initial pre-hearing conference. If your case is marching toward

a final resolution in under a year, outside counsel will have to assemble a team that is available and can do the job.

Do not adopt the Federal Rules of Civil Procedure, including their discovery standards; in fact, limit discovery to what is essential to resolve the case

Suffice it to say that even without the advent of e-discovery, adopting the rules of civil procedure, particularly their discovery standards and processes, will quickly turn your arbitration into a litigation-like procedure. This will defeat two of the primary benefits of arbitrations: efficiency and quicker final resolution.

Do your own thorough early-case assessment so that you understand why your dispute arose. Consider the views of a large pharmaceutical company legal department that has adopted an "80 percent rule," which goes something like this: The company will know 80 percent of what it will ever know about a case after 60 days. They might not know everything, but they will know enough to provide their business partners with key factual, legal, financial, "next step," and other relevant information to allow them to make expedited yet informed decisions regarding disputes.[15]

Consider a required initial production of all documents that each side needs in the arbitration. Carefully assess the appropriate standards for document requests. There are many alternatives to litigation standards.[16] Eliminate interrogatories and requests to admit unless they obviously contribute to efficiency (i.e., by reducing a perceived need for broad document discovery). Limit e-discovery by restricting the number of custodians, discouraging the need to search back up files, and other ways discussed in the literature. Learn to live either without or with a restricted number of depositions of fact witnesses. An extensive deposition schedule is not appropriate for a commercial arbitration.

In addition, do not adopt rules of evidence. Experienced arbitrators know what weight to give evidence that may be flawed by hearsay or lack of foundation; they are not a jury that needs this kind of guidance. While highlighting evidentiary infirmities may be appropriate — and certainly expected in connection with the reliability of expert testimony in any event — objections to admissibility based upon evidence rules, especially motions in limine, complicate commercial arbitration unnecessarily. Arbitration is meant to be different — a more informal, and therefore efficient, process that takes advantage of its "bench trial" context.

Manage motion practice

Carefully assess what motions will increase efficiency and what motions will instead unnecessarily extend the process. Discovery motions should be avoided. Limiting discovery in the first place will naturally limit disputes in this area. Today's arbitrators generally insist upon strong meet and confer obligations and frown upon tactics designed to delay the process and demonstrate a lack of collaboration between counsel. Arbitrators will also generally require that they be asked for permission to file a dispositive motion. The trend, however, is decidedly against a knee-jerk reaction to these types of mechanisms for streamlining disputes. There is an inclination in favor of considering, and even granting, summary judgment motions on the right issues. In addition, many arbitrators will take it upon themselves to ask the parties to help them flesh out the basic issues to be decided early on. This helps shape any appropriate discovery and may unearth innovative ways of structuring the hearings.

Efficient management of the hearing

Ascertaining what will help the arbitral tribunal get what they need in a fair, efficient manner to decide your case is paramount. A robust pre-hearing conference shortly before the hearing — in which inside counsel participates — is very helpful, but the process should be agreed well before that.

- **Consider written direct testimony of witnesses:** It can be a very useful tool for shortening the hearing borrowed from international arbitration settings.
- **Controls on expert testimony:** To fact-finders, the presentation of expert testimony can feel like a ships-passing-in-the-night exercise. There are many useful tools to reduce the time it takes to present the expert testimony and focus it in a useful way. Have the experts testify by topic, one after another, rather than present their complete testimony at one point in the hearing, and the opposing expert days, or even weeks, later. More unusual (in a domestic context) techniques like "hot-tubbing," in which the experts are sworn in simultaneously and testify about the same topics together, should also be considered.[17]
- **Hearing logistics:** There are a litany of other logistical steps that can be taken to smooth the flow of the arbitration hearing. Consider joint exhibit binders, the use of a chess clock to manage time, consecutive hearing days, and other strategies set forth in the CCA Protocols.

Other key methods to increase your odds of getting a just result

We now turn to key techniques, in addition to careful arbitrator selection, that will improve your odds of getting a just result, or at least your chances of getting a business friendly one.

Consider adoption of optional appellate rules

Arbitration providers have heard the concerns about the finality of arbitrations loud and clear. CPR, the AAA, and JAMS all offer optional arbitration appeals procedures to a panel of senior arbitrators with strict time limits to keep this additional process under control. Grounds for reversal or correction vary, as do the details of how the rules operate in practice, but these tools, developed in response to user concerns, should be carefully examined for their risk mitigation potential.[18]

Keep open settlement pathways and provide incentives to settle

Corporate counsel should pledge, from the outset, to seek ways to settle the arbitration and keep business-to-business lines of communication open. The retention of a neutral mediator who follows the course of the arbitration and is available to assist the parties in settling the matter, or who can help the parties resolve issues that are then removed from the arbitration by agreement, can also help to ensure an acceptable result. In-house counsel can play a critical, almost neutral role, in trying to achieve a commercial settlement, even while the arbitration proceedings are ongoing. The idea that it's a show of weakness to raise the notion of settlement in the midst of an arbitration proceeding is misguided. In fact, providing confidence to the pace of the proceedings often makes settlement discussions focus on real settlement value and risk, rather than the pointless posturing that often accompanies settlement discussions in a typical litigation matter.

On the hammer side of the equation, careful assessment might lead in-house counsel to call off the "American Rule" and provide in the dispute resolution clause that the prevailing party will be entitled to attorneys' fees.

Consider reining in possible results with hi-low or baseball arbitration techniques

Either in the dispute resolution clause or in connection with preparing for the arbitration preliminary hearing, in-house counsel should consider various techniques to rein in the possible results of the arbitration hearing where the relief sought will be an award of money. Limiting the permissible range for such relief, or adopting a form of "baseball arbitration," which requires an arbitrator to select either the claimant or respondent's number after hearing the evidence, are ways to reduce this risk. If the dispute resolution clause does not provide for such mechanisms, in-house counsel should determine whether or not to raise these issues during the course of the arbitration.

When is litigation better than arbitration?

We could not leave this subject without a few thoughts regarding when litigation may be better than arbitration. Here are some that occur to us:

Your best chance of winning is before a jury – and you are confident that you can predict success.

Be careful about the second part of this sentence, as appeals to emotion can backfire.

You are absolutely certain that full-scale discovery will help you.

This is difficult to assess in advance. In connection with complex business disputes, the need for full-scale discovery to get to the bottom of things is often significantly overstated.

There is a complicated legal issue or split of authority on a key legal issue that is outcome determinative in your matter and important to your business. You also prefer an evaluation by a judge and an appellate court as necessary.

Of course, arbitral awards have collateral estoppel and res judicata effect, but only between the parties. If you have a broader business need to set a precedent or fix the law in an uncertain area, this cannot be achieved in arbitration.

In-house counsel can play a critical, almost neutral role, in trying to achieve a commercial settlement, even while the arbitration proceedings are ongoing. The idea that it's a show of weakness to raise the notion of settlement in the midst of an arbitration is misguided.

Conclusion

In-house counsel who are hesitant about the use of arbitration in complex business disputes should re-examine the facts and the tools available to them to craft an efficient and fair process. With attention invested up front and along the way, you can get a timely, fair, and efficient process that enables your company to get back to business. **ACC**

NOTES

1 Conna Weiner developed a panel outline on these subjects and participated in presenting it at the New England Legal Foundation in November 2016. Messrs, Kiernan, and Evans also served as panelists, along with Steven Greenspan. Preparation for the panel, including highly useful sessions during which we all shared our views. Evans and his associate, Steven Veenema, assisted with some of the underlying research for the panel (see acknowledgements throughout). Kiernan is a partner and co-chair of the litigation department at Debevoise and Plimpton, and has years of arbitration experience as both an advocate and an arbitrator. He is also the chairman of the board of CPR and the current president of the New York City Bar Association (see his full biography at *www.debevoise.com*). Evans is an experienced arbitrator and

attorney, and co-chair of the litigation department at Murphy & King. He has been active in leadership roles with the AAA and currently serves as a member of its board of directors (see his full biography at *www.murphyking.com*).

2 Inside counsel, in consultation with outside counsel, should take all available steps to avoid the need for a binding third party adjudicatory process in the first place, be it through arbitration or litigation. Appropriate drafting of contracts to avoid creating areas of dispute, implementing built-in dispute resolution committees and teams, using standing neutrals who can provide informed, real time assistance, facilitated settlement discussions, participating in very early mediation (before a lawsuit is filed), applying the more familiar use of "waterfall" or "step" resolution clauses, and many other techniques are available. Weiner presents talks and workshops on the need to systemically manage dispute risk and "plan for failure in order to succeed" in connection with commercial relationships.

3 Stipanowich, Tomas J. and Lamare, J. Ryan: *Living with ADR: Evolving Perceptions and the Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Companies.* 2013 Pepperdine University School of Law Legal Studies Research Paper Series, Paper No. 2013/16 Electronic copy available at: *www.ssrn.com/abstract=2221471*.

4 We should note that inside counsel should not hesitate to suggest arbitration as a more sensible solution to their colleagues on the other side even without a pre-existing clause. We also reiterate the caveats set forth in n. 2 above.

5 Frank E. A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* 10 Negot. J. 49 (1994); see also additional developments of these thoughts, Frank E. A. Sander, Lukasz Rozdeiczer, *Matching Cases And Dispute Resolution Procedures: Detailed Analysis Leading To A Mediation-Centered Approach, Harvard Negotiation Law Review* Spring 2006.

In-house counsel who are hesitant about the use of arbitration in complex business disputes should re-examine the tools available to them to craft an efficient and fair process. With attention invested up front and along the way, you can get a timely, fair, and efficient process that enables your company to get back to business.

6 The preliminary hearing is the point in the arbitration where the map of the process is confirmed and set. Weiner regularly requests that parties/inside counsel — the entities paying the bills — attend to ensure their understanding of and buy-in to the process.

7 Thanks to David Evans, Esq. and his colleague Steven Veenema for this information; they analyzed data tables available through the Administrative Offices of the United States Courts at *www.uscourts.gov* (see especially the data tables in B and C). These tables are worth a careful look, along with any available state analogues.

8 Thank you to David Evans, who researched and spoke to AAA staff to obtain these results.

9 Thank you to CPR's Helena Erickson for this information about the CPR survey. In response to our query, JAMS did not have general figures from time of award available.

10 Various litigation colleagues have shared with us their views on the relatively low rates of appeals and reversals. A look at the extensive information available from the Administrative Office of the US Courts (*www.uscourts.gov*) provides interesting data on these subjects. Table B-5 under "Statistics and Reports – Data Tables" tab shows low percentages of outright reversals on appeal in the federal courts ("Other Private Civil" outside of Private Prisoner Petitions, Bankruptcy and certain other appeals shows a 13.4 percent reversal rate for the 12 month period ending December 31, 2014, for example.)

11 Thank you to David Evans for providing information about this study, which is also available through the AAA. *www.adr.org.*

12 Stipanowich, Thomas J. editor-in-chief, available at *www.thecca.net/cca-protocols-expeditious-cost-effective-commercial-arbitration*.

13 A careful look at the websites of the major providers will reveal a wealth of materials and ideas for clauses and protocols that will streamline arbitration, in addition to the CCA Protocols cited above. A detailed analysis of those tools is beyond the scope of this article, but representative resources include CPR's Fast Track Arbitration Rules,

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Leading Practices: Finding the Best Workflow Allocation for Your Team (Oct. 2016). *www.accdocket.com/articles/leading-practices-best-workflow-allocation-team.cfm*

Commentary on Beijing Arbitration Commission Arbitration Rules (March 2016). *www.accdocket.com/articles/resource.cfm?show=1424665*

Meeting in the Middle: The Advantages of Commercial Arbitration (May 2015). *www.accdocket.com/articles/resource.cfm?show=1398891*

QuickCounsel

Could Consumer Contracts Contain Arbitration Clauses? (March 2014). *www.acc.com/legalresources/quickcounsel/cccac.cfm*

Program Material

Arbitration vs. Litigation: A Corporate Counsel View (June 2015). *www.acc.com/legalresources/resource.cfm?show=1405260*

Arbitration v. Litigation, You decide (June 2015). *www.acc.com/legalresources/resource.cfm?show=1405266*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

Protocol of Disclosure of Documents, and the Presentation of Witnesses in Commercial Arbitration and Guidelines on Early Disposition of Issues in Arbitration (see *www.cpradr.org*); JAMS' Streamlined Arbitration Rules and their Arbitration Discovery Protocols (*www.jamsadr.com*) and the AAA's Fast Track Arbitration Rules (*www.adr.org*).

14 *www.adr.org* and conversations with David Evans, presentations by AAA personnel.

15 This description is based upon conversations Weiner has had with colleagues in that company.

16 The AAA requires that requested documents be "relevant and material to the outcome of the disputed issues;" borrowing from an international context, Article 3 (3) of the International Bar Association's 2010 "IBA Rules on the Taking of Evidence in International Arbitration" requires that a request to produce documents contain: (a) (i) a description of each requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist (with further specifics required for e-documents); (b) a statement regarding how the documents requested are relevant to the case and material to its outcome, and (c) (i) a statement that the documents requested are not in the possession, custody, or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and (ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody, or control of another party.

17 A good and balanced post, "Room in American Courts for an Australian Hot Tub?", is available here: *www.jonesday.com/room_in_american_courts/.*

18 Under the CPR procedure (the first provider to adopt an optional appellate route), an award may be set aside by the appellate panel for any reason available under the US Federal Arbitration Act. In addition, if the award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis or is based upon factual finding clearly unsupported by the record; under the JAMS procedures, the appeal panel applies the same standard of review that the first-level court in the jurisdiction would apply to an appeal from the trial court decision; and under the AAA rules, the award must show an error of law that is material and prejudicial or determinations of fact that are clearly erroneous. See *www.cparadr.org*, *www.jamsadr.org* and *www.adr.org* to locate the appellate rules for each of these providers and examine the details of how these rules operate. Also note that there has been discussion of whether or not adopting a state law that permits an expanded judicial review of arbitration awards is workable under US Supreme Court precedent; this line of thinking is worth pursuing with outside counsel. See a summary of cases and statutes (such as New Jersey's expanded judicial review) by Merril Hirsh and Nicholas Schuchert, "Writing Arbitration Clauses to Get the Arbitration that You Want" Law 360 8/9/16.

Mediating Complex Business Disputes Before Litigation: Making the Most of the Moment

by Conna A. Weiner[1]

Increasingly, business partners are exploring the mediation of complex business disputes before filing a lawsuit or arbitration. Sometimes this is required by a multi-step, or "waterfall" clause (negotiation, mediation, litigation) in the underlying contract, be it a simple vendor contract or global, highly technical research and development agreement. Businesses also choose to mediate voluntarily without a contractual requirement. Given the need to preserve current or possible future business relationships, the desire to avoid public fights with industry participants or customers and the acknowledged cost and business distraction of a full-fledged, public litigation, pre-litigation mediation makes tremendous sense in these contexts. Simply put, litigation can exacerbate conflict, takes on a life of its own and makes it that much harder to get back to the table to come up with a customized, sensible business solution within the parties' control – better to try mightily to settle early with the help of a knowledgeable neutral than miss the opportunity.

A pre-litigation business mediation requires special skills, tools, and participants. This article identifies practical steps based upon my business mediation experience (and prior inside counsel and litigation background) to increase the success of mediating before a litigation or arbitration is filed. Ultimately, the parties should focus on maximizing the benefits of not (yet) being in a litigation while using the mediation process to help make up for the absence of certain litigation tools that are in fact helpful in assessing one's best way forward. Although many of the approaches discussed here can be important for a business mediation after a litigation is commenced, they are particularly important in a pre-litigation context.

1. Where are the Parties on the Future Business Relationship Continuum?

A critical issue to consider from the beginning is the extent to which an on-going business relationship will exist after the mediation or may exist in the future.[2] The parties often find that there is a continuum of possible answers and focusing on this question will help them generate creative business options. The dispute may concern a relatively small part of a valuable on-going relationship; a fundamental misalignment or series of misunderstandings in connection with the parties' objectives requiring a rethinking of the structure and incentives of the business deal; or a negotiated termination where valuing the extent of "damages" owed by one party to another is really the point of the mediation. Even in the context of a negotiated termination, however, there may be ways to give value to the party who has already terminated or desires to terminate through the creation of a new or different relationship that will require on-going contacts between or among the parties (such as the sale of goods at a discount and on-going maintenance obligations). Many other scenarios are possible. Generally, the more likely there will be an on-going business relationship of any kind, the more critical it is that business people take a lead role in the mediation process as discussed in point 2 below. The possibility of an on-going relationship increases the likelihood that the parties will be able to find a mutually acceptable business solution and identify "pie-expanding" options to settlement other than cash to do this – business leads and inside counsel are well-suited to drive this effort.

2. Putting Aside a Litigation Mindset – The Role of a Litigator in a Pre-Litigation Business Mediation

Any sophisticated business mediation requires a willingness to compromise, look forward and avoid focusing on winning, accountability or right and wrong. In a pre-litigation situation -- and regardless of where in the relationship continuum the parties find themselves -- to reap the benefits of the absence of litigation, it is particularly important to keep the discussion focused on a business solution and on the business participants. The process has not yet escalated to the clearly adversarial stance of litigation, where positions harden and issues of who is right and wrong predominate in a process managed by lawyers; this fact in and of itself can be helpful in maintaining the willingness to look for a solution that makes business sense given the alternatives. Maximizing the opportunity to avoid, if possible, turning control of a dispute over to the litigation process will benefit tremendously from a willingness to view the mediation process as a meaningful negotiation of a business deal with the help of a neutral, knowledgeable third party rather than only a chance to argue over the merits and settlement value of a litigated case – or a "check-the-box" exercise on the way to litigation.

This means that the participants involved should to some extent mirror the participants in a negotiated deal. Consider having inside counsel and transactional lawyers lead the effort and having the litigators in the wings, staying on top of the action and actively participating in analysis of the potential litigation from behind the scenes, but not driving the process. Having inside counsel with transactional experience involved will be an asset should the mediation lead to a restructured or new business arrangement.

In addition, and as discussed further below, pre-litigation participants should be willing to share information voluntarily. This ideally requires extensive cooperation with the entity that might in the future be an adversary in litigation. This willingness to share does not come naturally

to lawyers locked in a litigator mindset.[3]

Similarly, the relatively open-ended and improvisational nature of a robust mediation process can also make some litigators uncomfortable. Simply put, if you've seen one mediation, you've seen one mediation. The process is absolutely a collaborative one developed by the parties and the mediator, but lawyers should be prepared to take a step back from an urge to control the overall process.[4] Most fundamentally, the litigator will not know the contents of the mediator's confidential communications with the other parties, and these can be extensive in the preparation steps recommended below. Today's attorneys understand this basic aspect of mediation processes – but it can be uncomfortable for ace trial lawyers who are accustomed to being (and feel it is their responsibility to be) on top of every detail. Sometimes this uneasiness leads to an unproductive focus on who is sharing more with themselves or the mediator and other perceived inequities in the process. As Yarko Sochynsky has noted, the lawyers and parties should keep in mind that the ultimate control over the process does, in fact, rest with them – no one is forcing them to sign an agreement. In the end they have much more control over their fate in a mediation than in an arbitration or litigation.[5]

As also discussed further below, particularly in the context of a complex business mediation, an experienced mediator will make recommendations regarding to whom they would like to speak, which participants should meet, etc. both in the preparation and in-person session phases and will ask the parties to make quick decisions about these issues. This may involve the mediator speaking to clients without the presence of their attorneys or having the business principles speak to each other without the presence of counsel, techniques that I have found can, in the right situation and at the right time, be very helpful in moving a business mediation process along – particularly pre-litigation. Overcoming a knee jerk reaction to maintain control of communications and, instead, facilitating mediator access to the right people at the right time can be important to the success of the effort to bring the parties closer together.

Finally, and stepping back from the details, the urge of a litigator is to persuade the mediator and, further, to win. That is healthy and appropriate at the right time and place. However, as Sochynsky has put it, litigators sometimes "view [a mediation] as a competition for the heart and mind of the mediator, thinking if they can persuade the mediator to their point of view through effective legal argument, the mediator will in turn prevail on the other side to throw in the towel." He goes on to note:

> …mediation is not a contest. It is a facilitated negotiation…the object is to get the other side to enter an agreement, not vanquish them. Changing roles from a litigation advocate to the lead negotiator in a mediation does not come naturally easily to everyone.[6]

There are, however, at least two critical roles for litigators (including in-house litigators) using their litigation lens in a pre-litigation mediation setting. I discuss fact-gathering and case assessment below. Litigators are, of course, essential to this important aspect of the proceedings. Here, I note that it is critical for a litigator, be it outside counsel, inside counsel expert in litigation or both, to have a clear-eyed, brutally honest conversation with clients – and themselves -- about the potentially negative general effect on business operations and the possibility of settlement once a litigation is filed. Parties often underestimate the effect of the very act of filing a litigation on the business and the attitudes of the parties. This sometimes leads them to question the value of putting the effort required into mediation preparation and sharing information because – in the case of an aggrieved potential plaintiff, for example – they believe that the other side "needs to see that we are serious" first by filing a lawsuit that will "give us leverage." It is critical for the litigators to acknowledge to themselves and their clients that once litigation is commenced it may well be harder to settle any time soon because of the effect of taking the next step into a highly adversarial, "us vs. them" process focusing on right and wrong. Positions harden, clients are insulted – "OK, they want to play it that way? I'm all in!" -- and litigations tend to take on a life of their own. Investing in settlement and resolution upfront rather than investing in litigation may be the best course.

In addition, litigators should carefully assess with their clients the actual value of any perceived leverage, and, importantly, the costs of getting it. Scratch out a realistic timeline and budget with the client. Litigation can be costly very quickly in many ways, well before the next settlement off ramp materializes. The first and immediate cost is a complaint and an answer (perhaps with a surprise counterclaim that the defendant would not have been motivated to raise as readily in the context of a pre-litigation business negotiation.)[7] In addition, your dispute, as well as any attendant accusations and characterizations of business competence – is now public, and the publicity risk involved should not be underestimated. Even the fact that a business partner could not resolve its disputes in a business-like way (without litigation, in other words) may be perceived as problematic by future potential partners.

In addition, disruptive document hold obligations (sometimes requiring holding onto to documents that can be harmful in subsequent cases) and corresponding document production – including e-discovery and the retention of an e-discovery vendor – can start early and require significant upfront expenditures. Overlay your timeline with the business objectives of the company over the next several years and note the distraction from those objectives required by a litigation. If the client is the potential plaintiff, carefully search for and assess the possibility of any "surprise" counterclaims. Point out that the median time to trial in federal court is over 2 years, with potentially years of appeals still to go, and the corresponding need to explain to senior management every fiscal quarter what you are doing with their money.[8]

3. Hire a Proactive Mediator with a Strong Commercial, Transactional Background as well as the Ability to Help the Parties Evaluate a Potential Litigation

As discussed above, in a pre-litigation business mediation, business people should consider taking a leading role. Selecting a mediator appropriate for a pre-litigation mediation of a business dispute requires identification of the type of skill set that works best in a business negotiation context.

The mediation may require a challenging two track analysis that simultaneously looks to the future and the past – an evaluation of business terms or consideration of a negotiated termination that make sense to both parties now, regardless of the previous arrangement, and an evaluation of any dispute about those past arrangements in a litigation context. It is very helpful to select a mediator who has both extensive experience with the negotiation of transactions and deal terms that can help the parties work around difficulties and commercial litigation and evaluation experience. Such a mediator can help guide a proactive process on both fronts and understand both the litigator and business mindsets. A mediator without hands-on business negotiation experience may have fewer tools with which to assist the parties to consider their options and reach a resolution or actively assist in running a mediation business negotiation session. In addition, hands-on experience with transactional and collaboration implementation issues can help the mediator contribute to both business solutions and case evaluation.

4. The Importance of Extensive Pre-Mediation Session Preparation by Lawyers, Clients, and Mediators

While mediating in a pre-litigation context has tremendous advantages if approached in the spirit of a business negotiation, there are certain gaps that need to be filled to help the parties assess their business position and the settlement value of their potential case. The right mediator can and should help with this process – and, if possible, the parties should even go so far as contractually to agree in their mediation agreement to engage in a reasonable preparation process. Ultimately, and particularly pre-litigation, the participants should think of preparation as just as or even more important than the in-person mediation session – or sessions. Ultimately, a business "mediation" of any kind should be thought of as a creatively structured process involving pre-joint meeting steps to prepare for discussions with the other parties, in-person sessions (and sometimes more than one) and a document negotiation process memorializing deal terms.[9]

What are the parties' basic positions?

In a litigation, and depending on where they are in the process, the parties have had to go to some lengths to define their respective claims and positions. There is a complaint, answer, possibly some discovery, and perhaps even motion practice that has whittled down some of the issues. Pre-litigation, this basic claim definition has not necessarily taken place.

The parties should consider:

- Carefully assessing with the mediator what the parties have said in emails/letters about the dispute and in attempting to whittle down the issues.
- Preparing for the mediator a joint binder of the most relevant documents (the contract, email exchanges, etc.) so that the parties and the mediator readily can refer to the appropriate materials.
- Exchanging (and sharing with the mediator) mediation statements about what facts are disputed, business issues, positions and needs and the law, perhaps even with an opportunity for an informal reply. This "public" exchange can be very important to crystalize what to talk about in the mediation and save time there. If only confidential statements are shared with the mediator, the mediator may end up trying to outline the issues for the first time in private pre-mediation conversations or the lawyers or the mediator do this at the first in-person session. This can waste tremendous amounts of time and potentially derail the entire session. The timing of this public statement should be considered – it may be wise to wait until after some of the steps are taken in part (b) below.
- Supplementing the public statement with confidential statements to the mediator candidly discussing strengths and weaknesses, settlement value and the range of possible business solutions – as well as impediments to settlement such as unrelated business barriers, antipathy amongst the parties or other personality issues.

What do we need to know?

Many litigators are concerned about mediating too early because they lack the information necessary to assess their case.

The literature in the dispute resolution field is replete with useful resources outlining the value of a systematic, early cases assessment process internally, and the view that the process can be quick and efficient (applying, for example, the 80/20 rule, namely that knowing only 80 percent of the relevant facts can give enough information to a business to make a reasonable plan for resolving the dispute).[10] Involving the mediator as a knowledgeable information exchange referee and participant can be helpful in getting the right information internally and from the other party in a business solution-driven way without litigating, and sophisticated business mediation participants regularly use mediators to help with information exchange. At a minimum, the goal should be to establish the basic undisputed facts so as not to argue in the mediation over topics that are relatively easy to resolve – such as how much money has already been paid to or by the parties. In such a case a bit of pre-mediation accounting work can help take

issues off the table and save time at the mediation session.

In this information-gathering process, consider having the mediator join internal interviews of key participants, internal "experts" in disputes about technology and otherwise participating in fact gathering – the litigators/clients will learn along with the mediator and, even more importantly, have an objective sounding board at the table. The mediator may also have expertise that can help spot problems or issues that may need to be resolved or taken into consideration.

The parties should also seriously consider retaining a joint expert to get a neutral view about critical, highly technical issues that need to be resolved or at least assessed before a resolution is possible (product defects, commercially reasonable efforts in connection with delivery schedules or marketing and sales efforts in complex technical markets, etc.). Such a joint neutral's report would not be usable in the event of later litigation unless the parties agreed. Even the retention of party experts in connection with mediation of technical disputes can be helpful in conducting a reality check both about a possible business deal or chances in litigation.

Term sheet/Agreement/Settlement Document

Depending on the extent of preparation and where the parties are in the process, the lawyers for each side independently should attempt to prepare an outline of settlement terms and conditions in advance of the mediation session. Even sketching out and exchanging draft possible term sheets before the in-person session can be helpful. This last technique is quite common in all business negotiations. It should be noted that mediators will be extremely reluctant to provide draft templates because the significant drafting should be left to the parties and their counsel, but they can certainly make recommendations.

5. The Pre-Litigation Mediation Session(s)

If we stick with our business negotiation analogy, it is easy to understand how the actual mediation of a business dispute can and should look different from the more common "joint session – off to caucuses" model.

Careful consideration should be given to who should attend the mediation sessions and who should speak for the clients. As recommended in this article, certainly business representatives and inside counsel should have taken a significant role in mediation preparation and similarly should be the focus of the in-person mediation session in a pre-litigation situation. In addition to the traditional emphasis on attempting to have a "decision-maker"[11] in the room, at least two other business functions should be at the table in a complex case; clients with knowledge of the facts (those involved in the dispute) and, if possible, a likely more objective business client such as a finance leader. The mediator may ask the business clients to make an "opening statement" about their business goals, disappointments and how to address them going forward. He or she may ask the parties to address issues privately with the mediator and then come back together in additional joint sessions to negotiate term sheets or particular issues face to face. This has the benefit of efficiency, keeping the parties talking – especially those familiar with the give and take of business negotiations -- and keeping the process in a business format. As discussed in point 2 above, litigators should be prepared to help facilitate a reasonably fluid communication process and rely on the mediator to develop a sense of how best to move the discussions forward based upon the mediator's communications with both sides.

The resolution of a complex business dispute will likely involve many terms, both monetary and non-monetary, and moving parts. It can be difficult to compare apples to apples in connection with the changing offers. In order to facilitate offer-to-offer comparison, make sure that there is internal team agreement on the next offer to be made and clarity about the terms, it is critical that the parties exchange reasonably detailed typed term sheets rather than simply reading off the offer to the mediator from notes. These term sheets should be prepared by the parties, not the mediator, and reviewed by the mediator to ensure that he or she understands the offer and can make suggestions. Consideration should be given to having a business person in the room with the mediator to present the offer – this reinforces the practical, business negotiation aspect of the process and keeps the conversation going.

In addition, it is more likely than not that it will take longer than one session to negotiate the basic deal. Despite all the preparation, a complex new amendment to an existing agreement may not be drafted in one day. As discussed, the parties should certainly exchange written, concrete terms sheets agreed by each side as their pre-mediation session position or mediation offers during the session, and every effort should be made to make as much progress as possible during the first in-person session – and a persistent, patient mediator will help keep the process going. Nevertheless, success can be had if the parties, based upon their robust preparation process, are able to identify sufficient common ground and establish a sufficient road map – outlined at least in a signed term sheet or statement of principles -- to justify continuing the mediation process.

During the post-session drafting stage, the parties should consider keeping the mediator in the loop during any additional discussions or documents drafting. A knowledgeable mediator with a contract negotiation background can serve as a silent (or active) observer and help ensure behind the scenes that agreements made during the mediation flow through to the documents and that the documents papering the resolution do not themselves generate the potential for additional disputes – a highly ironic outcome that should be avoided.

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Pre-litigation mediation of business disputes involves different planning, participants, and preparation than mediation of a case already in litigation where issues have

been joined through complaint, answer, and counterclaim. It takes work, time, and the willingness of the parties, with the help and if necessary intervention of the mediator, to step away from an adversarial mindset and cooperate in achieving the best business results. It also provides a unique opportunity to resolve a dispute before time and resources have been invested to the point that resolution becomes more difficult as a result of the difficult momentum created by hardened positions and an increased sense of the value of the battle for the battle's sake.

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Endnotes:

[1]The author would like to gratefully acknowledge her esteemed and valued colleagues Jack Esher and Yarko Sochynsky for their support, review and comments on this article and others referenced anonymously in these footnotes who shared their considerable wisdom.

[2]Even if a particular deal or arrangement cannot be salvaged, industry participants may often find the need to work with each other down the road. A supplier may need, in general, to preserve relationships with manufacturers or other customers; and customers may need help from suppliers in the future. These business considerations should be front and center in any assessment of acceptable mediation outcomes.

[3]The concept of a "settlement counsel" shadowing a trial team and leading settlement negotiations takes into account the understandable challenges that litigators can face in putting aside their litigation mindset.

[4]A sophisticated litigator – the chair of his firm's nationwide litigation practice – once somewhat ruefully remarked to me that in a pre-litigation business mediation situation his job was to "get out of the way" and let the business people do the talking. A federal district court magistrate judge who has run many, many mediations remarked flat out that lawyers tended to be "impediments" to the mediation process. With the right attitude and approach, there is no reason that litigators cannot adapt and eliminate such impressions.

[5]Sochynsky, Y. "Effective Mediation", published in the New York Law Journal and the San Francisco Attorney, 1999. Similarly, a federal district court magistrate judge with whom I have worked has noted that if she gets the feeling that the litigators are out to "win" the mediation, the likelihood of a successful negotiation Is greatly reduced.

[6]Id. Similarly, a federal district court magistrate judge with whom I have worked has noted that if she gets the feeling that the litigators are out to "win" the mediation, the likelihood of a successful negotiation Is greatly reduced.

[7]I once mediated a complex, highly technical false advertising case in which the a defendant representative told me that he would have been highly unlikely to have pursued a counterclaim independently if they had not sued him first. That counterclaim ended up overwhelming many of the plaintiff's claims in terms of time and attention in discovery and significantly changed the legal risk calculation for the plaintiff.

[8]Please see an article I co-wrote with Steven Greenspan, the global litigation head at United Technologies, entitled "Reassessing Commercial Arbitration: Making It Work for Your Company, published in the Docket magazine of the American Corporate Counsel Corporation, March 2017, for some interesting statistics comparing litigation and arbitration time tables. These statistics are relevant in considering the costs of litigation generally. This article is available in the article and resources section of my website: www.connaweineradr.com

[9]Note that business decisions and negotiations take place over a series of meetings with different stakeholders. This should be considered in mediating a business dispute, especially one that is not yet in litigation.

[10]See the materials prepared by the American Bar Association's Planned Early Dispute Resolution Task Force https://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html, and the early case assessment toolkit available from the International Institute for Conflict Prevention and Resolution, www.cpradr.org

[11]It is beyond the scope of this paper to discuss whether it is always realistic in connection with a complex business mediation involving large corporate clients to expect that further approvals will not be needed outside the mediation session. As explained to me by an inside counsel with a financial services company, part of her preparation involves extensive communication with absent company stakeholders to gather their thoughts and approval; but even then follow up work may well be required to sell a deal to the right people internally. Awareness of this fact of life will help set expectations about what can be achieved at the mediation itself.