DELAWARE STATE BAR ASSOCIATION

PRESENTS

PLANNING YOUR NEXT ARBITRATION: BEST PRACTICES AND PITFALLS 2021

LIVE SEMINAR AT DSBA WITH ZOOM OPTION

SPONSORED BY THE ALTERNATIVE DISPUTE RESOLUTION SECTION
OF THE DELAWARE STATE BAR ASSOCIATION

WEDNESDAY, DECEMBER 1, 2021 | 9:00 A.M. TO 12:45 P.M.

3.0 Hours CLE credit including 0.5 credit in Enhanced Ethics
for Delaware and Pennsylvania Attorneys

CLE

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

PLANNING YOUR NEXT ARBITRATION: BEST PRACTICES AND PITFALLS 2021

MODERATOR

Laura F. Browning, Esquire
Laura Forsythe Browning, Mediation & Arbitration
Chair of the ADR Section of the Delaware State Bar Association

PROGRAM

9:00 a.m. – 9:15 a.m.

Presentation of The 2021 Kimmel-Thynge Award to David A. White, Esquire

Presented By
Laura F. Browning, Esquire
Laura Forsythe Browning, Mediation & Arbitration
Chair of the ADR Section of the Delaware State Bar Association
Bernard G. Conaway, Esquire
Conaway-Legal LLC
Secretary of the ADR Section of the Delaware State Bar Association

9:15 a.m. – 10:00 a.m.

Choosing Your Next Arbitrator: Private Arbitrations vs. Administered Arbitrations

Panelists
William D. Johnston, Esquire
Young Conaway Stargatt & Taylor LLP
Brian M. Gottesman, Esquire
Gabell Beaver LLC
Bernard G. Conaway, Esquire
Conaway-Legal LLC
Jeffrey M. Weiner, Esquire
Law Offices of Jeffrey M. Weiner PA

10:00 a.m. – 10: 30 a.m.

Determining What Issues are Arbitrable and the Scope of the Arbitrator's Powers

Panelists
Brian M. Gottesman, Esquire
Gabell Beaver LLC
William D. Johnston, Esquire
Young Conaway Stargatt & Taylor LLP
Bernard G. Conaway, Esquire
Conaway-Legal LLC
Kathryn R. Fry, Esquire
Offit Kurman, Attorneys at Law

10:30 a.m. – 10:45 a.m. | Break

10:45 a.m. – 11:15 a.m.

Best Practices & Pitfalls to Avoid When Drafting Your Next Arbitration Clause

Panelists
Bernard G. Conaway, Esquire
Conaway-Legal LLC
William D. Johnston, Esquire
Young Conaway Stargatt & Taylor LLP
Kathryn R. Fry, Esquire
Offit Kurman, Attorneys at Law
Brian M. Gottesman, Esquire
Gabell Beaver LLC

11:15 a.m. – 12:15 p.m.

Case Law Update and Arbitration Trends

Panelists
William D. Johnston, Esquire
Young Conaway Stargatt & Taylor LLP
Brian M. Gottesman, Esquire
Gabell Beaver LLC
Bernard G. Conaway, Esquire
Conaway-Legal LLC

12:15 p.m. – 12:45 p.m.

Ethical Considerations in Arbitration

Panelists
David A. White, Esquire
Chief Disciplinary Counsel, Office of the Disciplinary Counsel
William D. Johnston, Esquire
Young Conaway Stargatt & Taylor LLP
Brian M. Gottesman, Esquire
Gabell Beaver LLC
Bernard G. Conaway, Esquire
Conaway-Legal LLC

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CLE credits will be submitted to the Delaware and Pennsylvania Commissions on CLE, as usual. Naturally, if you attend the seminar live, you must sign in and we will use your attendance as the means for reporting the live credit.

Moderator

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Presentation of The 2021 Kimmel-Thynge Award to David A. White, Esquire

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Choosing Your Next Arbitrator: Private Arbitrations vs. Administered Arbitrations

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Brian M. Gottesman, Esquire
Gabell Beaver LLC

Planning Your Next Arbitration:

Best Practices & Pitfalls

Sponsored by the ADR section of the Delaware State Bar Association

Moderator:

Laura Forsythe Browning, Esq.

Section 1 Panelists:

William D. Johnston, Esquire
Young Conaway Stargatt & Taylor LLP

Brian Gottesman, Esquire
Gabell Beaver LLC

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Jeffrey M. Weiner, Esquire
Law Offices Of Jeffrey M. Weiner, P.A.

Section 1-Topics

- Quick Overview of Arbitration & Different Forms
- Considerations in choosing You Next Arbitrator
- Administered v. Unadministered Arbitration

Arbitration

A method of dispute resolution involving one or more neutral third parties who are chosen by or agreed to by the disputing parties and whose decision is binding.

Black's Law Dictionary

Arbitration vs. Mediation

Types of Arbitration

1. Contractual Arbitration

2. Statutory Arbitration

3. Superior Court Rule 16.1 Arbitration

Contractual Arbitration

1. The parties have at some point made a written contract to resolve any future disputes through the arbitration process.

2. The parties can contract very broadly with a blanket statement to go to arbitration, or with very specific detail regarding all aspects of the arbitration, which can include:

- Arbitrates: Can select an Arbitrator, or designate a specific List of Arbitrators
- Rules: AAA, DUAA, FAA
- Timetable
- Discovery
- Administered v. Non-Administered
- Payment: Who pays for the Arbitration

Statutory Arbitration

1. Parties must arbitrate their dispute in accordance with a code or statute.
2. There is less flexibility by the parties and most things are determined by the statute or the arbitrator.
3. Examples of Statutorily required arbitration:

    1. Insurance Cases: Some Insurance Statutes Require Arbitration
    2. Delaware: Delaware's Rent Justification Act, *25 Del. C. § 7050-56*
    3. Superior Court Rule 16.1-Non-Binding Arbitration
    4. Medical Billing Cases: Several States have required arbitration to determine Out of Network Cases.

Court Ordered Arbitration-Rule 16.1

Rule 16.1 Mandatory Non-Binding Arbitration.

(a) Actions Subject to Mandatory Non-Binding Arbitration ("MNA"). Notwithstanding and in addition to the ADR provisions contained in Rule 16, all civil actions, except those actions listed in subsection (b) hereof, in which (1) trial is available; (2) monetary damages are sought; (3) any nonmonetary claims are nominal; and (4) counsel for claimant has made an election on the Civil Case Information Sheet for mandatory non-binding arbitration (hereinafter "MNA"), are subject to mandatory non-binding arbitration. The jurisdictional authority of the arbitrator for any case in which such election has been made shall be limited to **fifty thousand dollars ($50,000)**, exclusive of costs and interest.

(b) Link to Rule 16.1--download.aspx (delaware.gov)

Rule 16.1- Continued

(b) Civil Actions Not Subject to MNA. The following civil actions shall not be referred to MNA but the parties may stipulate to a form of ADR: (1) An action involving a matter listed in Superior Court Civil Rules 23 and 81(a); 2 (2) A replevin, declaratory judgment, foreign or domestic attachment, interpleader, summary proceedings, or mortgage foreclosure action; (3) Any in forma pauperis action where the claims are substantially non-monetary; or (4) An action to enforce a statutory penalty. Link to Rule 16.1--download.aspx (delaware.gov)

Rule 16.1-Selection of Arbitrator

1. The parties must agree to an arbitrator within 20 days of the close of all initial pleadings. (R. 16.1(f)). "Close of all initial pleadings" includes the answer, any cross-claims or counter-claim and responses thereto. The "close of all pleadings" will also include the disposition of motions pertaining to defendants who do not appear. However, parties may agree to proceed prior to a final disposition on parties who did not appear.

2. Notice of Selection of Arbitrator. Plaintiff shall file the Notice of Selection of Arbitrator form. (**See Attached Materials)**. This form will provide notice to the Court and others to proceed with scheduling the arbitration. Also, it will provide notice to File and Serve of the selected arbitrator in each case. The selected arbitrator will not incur filing fees on the case where he or she is identified on the Notice of Selection of Arbitration form.

3. Motion to be heard by the Arbitrator. Certain motions may be heard by the Arbitrator. (R. 16.1 (g)). The Notice of Motion to be Heard by Arbitrator form (**See Attached Materials**) should be filed with any motion where the parties have determined that the Arbitrator will hear and decide the motion. This notice page will assist Prothonotary staff to distinguish those motions from motions that must be scheduled before a judicial officer.

Cont. Rule 16. 1

1. Arbitration under Rule 16.1 will satisfy the Court's requirement that parties participate in ADR. (R. 16.1(m)(2)).

2. Arbitrators shall have civil liability immunity unless there is bad faith with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety and property of another. (R. 16.1(q)).

3. More on the Rule 16. 1 Process here: Guidelines for Arbitration in Superior Court - Alternative Dispute Resolution (ADR) - Superior Court - Delaware Courts - State of Delaware

Contractional Arbitration Administered v. Private Arbitration

Administrated/Institutional Arbitration: The arbitration agreement will incorporate the rules of one of the recognized arbitral institutions and will be conducted under the rules/codes of that arbitral institution. Different types of Arbitral Institutions include:

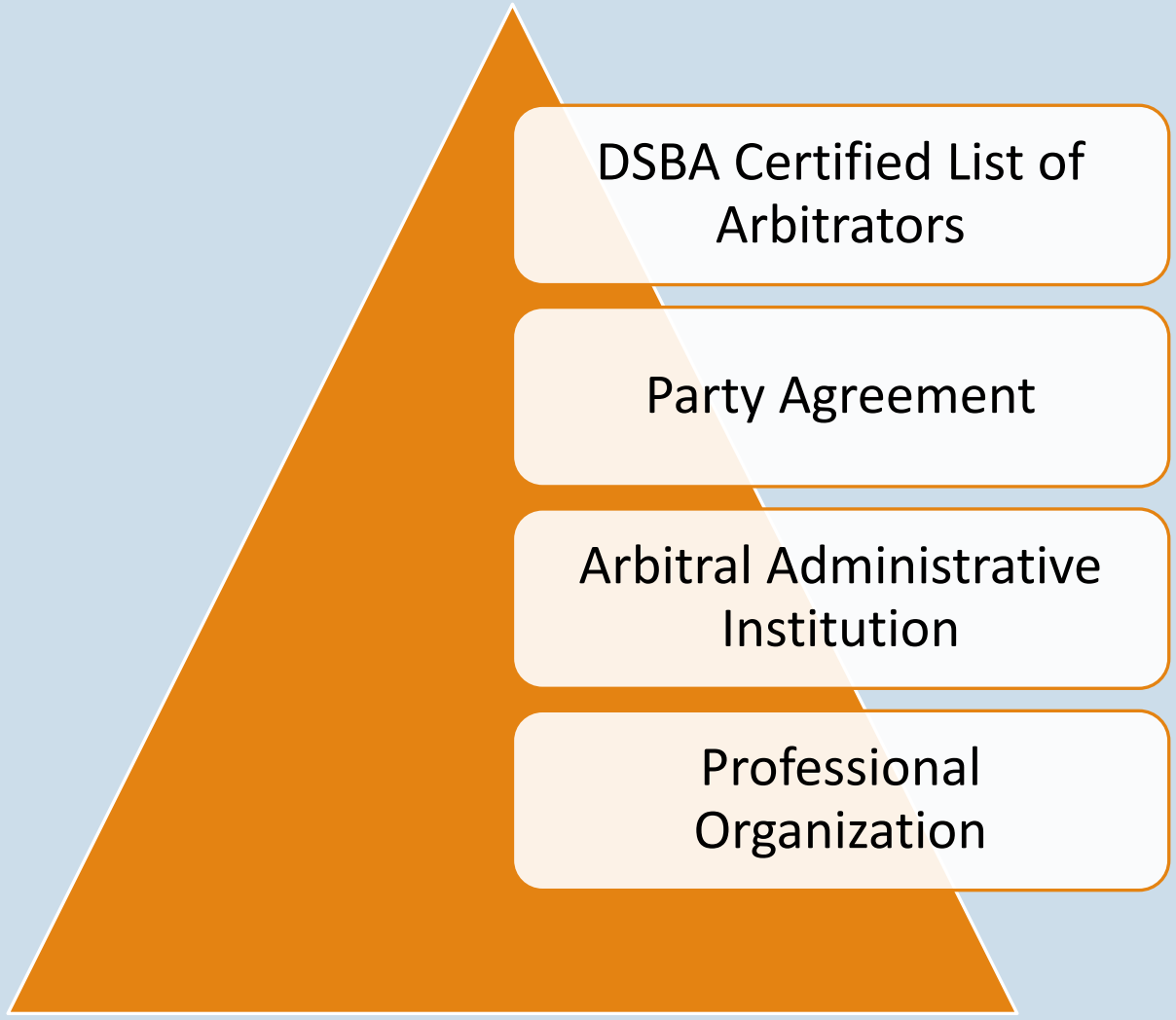
- AAA: American Arbitration Association (www.adr.org)
- CPR: International Institute for Conflict Prevention Resolution (www.cpradr.org)
- NADN: National Academy of Distinguished Neutrals (www.nadn.org)
- NAM: National Arbitration and Mediation (www.namadr.com)
- JAMS: (www.Jamadr.com)
- ICDR: International Centre for Dispute Resolution.
- ICC: International Court of Arbitration of the International Chamber of Conference

Cont. –Administered v. Private Arbitration

Non-administered Arbitration/ 'Ad Hoc'/Private Arbitration: The arbitration agreement may specify its own rules or adopt the arbitration rules of a trade, industry association, or statute. Sometimes the arbitrator will have their own separate rules as well.


The other side said they want a jury trial!
But they forgot about the Arbitration Clause!
But now we need to find an Arbitrator.
But where to start?
imgflip.com

Where to find your next Arbitrator?



Certified DSBA Arbitrators

1. Delaware State Bar Association List of Arbitrators:

    a. Listed arbitrators have completed arbitration training with the Delaware State Bar Association and upon completion are certified by DSBA.

    a. List is located online on the Delaware Court website, and the list is separated by areas of law. Click here to view the list: List_of_Certified_DSBA_Arbitrators.pdf

    b. Can by used for private/ad hoc arbitration, statutory arbitration, or Superior Court Rule 16.1 arbitration.

Party Agreement

--Parties to a dispute mutually agree to use a particular arbitrator.

Arbitral Administrative Institutions

1. Arbitral Administrative Institutions:

    a. Organizations that administer arbitrations—Non-Profit v. For Profit.

    b. Groups include:
        a. Non-Profit: AAA & CPR
        b. For Profit: JAMS, NAM, & FEDARB.

    c. **Administrated v. Non-Administered:** Sometimes, parties decide to use an arbitrator listed with the organization without having the organization administer the arbitration. This done for various reasons: costs & time. Example: Clause requires AAA arbitrator, but silent as to if AAA will administer the process of the Arbitration.

Professional Organizations

Professional Organizations:

a. There are professional organizations that maintain lists and panels of “qualified” arbitrators.

b. Often have a Code of Ethics and a complaint process for members.

c. Examples of Professional Organizations:

1. National Academy of Distinguished Neutrals: National Academy of Distinguished Neutrals (nadn.org)

2. National Academy of Arbitrators: NAARB | Serving the U.S. and Canada Since 1947

3. Association of Attorney Mediators: Association of Attorney-Mediators - Home

Discussion

- AAA: William Johnston, Esq.
- CPR: Brian Gottesman, Esq.
- Private Arbitration/DSBA Certified List: Bernard Conaway, Esq.
- Litigator's Perspective: Jeffery Weiner, Esq.

AAA

William Johnston, Esquire

CPR

Brian Gottesman, Esquire

Del. Superior Court List/Private

Bernard Conaway, Esquire

Litigator's Perspective

Jeffrey Weiner, Esquire

Litigator's Perspective

GOAL: Neutral and Competent

AAA Resumes: Experience, Issues, Work History, Education, etc.

Beyond Resumes: website, awards (internet or elsewhere), comments from previous parties and counsel

Selection: Striking, Prioritizing and Responding by deadline

Litigator's Perspective
AAA-Rule 18 (b)

R-18. Disqualification of Arbitrator:

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

i. partiality or lack of independence,

ii. inability or refusal to perform his or her duties with diligence and in good faith, and

iii. any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive. CommercialRules_Web-Final.pdf (adr.org)

Questions:

1. Litigator Question: If you have a clause that has the Arbitrator must be listed as an AAA arbitrator, but is silent as to whether the arbitration should be administered by AAA, what are your thoughts on whether to administer or not adminster the arbitration through AAA.

Section 2:

Determining What Issues Are Arbitrable and the Scope of the Arbitrator's Powers

Sponsored by the ADR section of the Delaware State Bar Association

Presenter:

Brian Gottesman, Esquire

Partner at Gabell Beaver LLC

Section 2 Panelists:

William D. Johnston, Esquire
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Part 1: Scope of Arbitrability

WHAT ISSUES ARE ARBITRABLE?

- The general trend in federal and state law has long been to give maximum deference to agreements to arbitrate.
- As a general rule, virtually all issues are arbitrable.
- Recently, some state legislatures have stepped in to prohibit mandatory arbitration in certain kinds of disputes.

FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 *ET SEQ.*

- First adopted in 1925.
- "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Uniform Arbitration Act

- First adopted by the National Conference of Commissioners on Uniform State Laws in 1955; substantially revised and updated by the Uniform Law Commission in 2000.
- Twenty-two states, including Delaware, adopted the original version of the UAA.
- Twenty-two states, and the District of Columbia, have adopted the revised version.

PENNSYLVANIA REVISED UNIFORM ARBITRATION ACT

- "An agreement to arbitrate a controversy on a nonjudicial basis shall be conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration) unless the agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or any other similar statute, in which case the arbitration shall be governed by this subchapter." 42 Pa. Stat. § 7302(a).

- "A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract." 42 Pa. Stat. § 7303.

LIMITATIONS ON ARBITRATION – EMPLOYMENT ISSUES

- N.Y. C.P.L.R. § 7515 (2018)
  - Prohibited the use of arbitration agreements for claims of sexual harassment regardless of the FAA.
  - In *Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985 (S.D.N.Y., June 26, 2019), the court held that a state law ban on mandatory arbitration in sexual harassment cases filed under federal law was preempted by the FAA.

Cal. Lab. Code § 432.6 (2020):

(a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.

Cont: Cal. Lab. Code § 432.6 (2020):

(d) In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees.
(e) This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization.
(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).
(g) This section does not apply to postdispute settlement agreements or negotiated severance agreements.

Cont: Cal. Lab. Code § 432.6 (2020):

Other provisions of the California Code (*e.g.,* Labor Code § 433 and Government Code § 12953) made violations of § 432.6 a misdemeanor offense and opened an employer to further civil sanctions.

Chamber of Commerce of the United States v. Bonta, 20-15291 (9th Cir. Sep. 15, 2021).

- Appeal of a District Court decision enjoining the enforcement of Section 432.6 on federal preemption grounds, as to disputes governed by the FAA.
- The panel reversed, in part, the district court's conclusion that Section 432.6 is entirely preempted by the Federal Arbitration Act.
- The panel further affirmed the district court's determination that the civil and criminal penalties associated with Section 432.6 were preempted; vacated the district court's preliminary injunction enjoining Section 432.6's enforcement; and remanded for further proceedings.
- The panel held that California Labor Code § 432.6 did not (1) conflict with the language of § 2 of the FAA, or (2) create a contract defense by which executed arbitration agreements could be invalidated or not enforced.

Chamber of Commerce of the United States v. Bonta, 20-15291 (9th Cir. Sep. 15, 2021).

- Rather, the panel noted that while mandating that employer-employee arbitration agreements be consensual, § 432.6 specifically provides that nothing in the section was intended to invalidate a written arbitration agreement that was otherwise enforceable under the FAA. The panel determined that § 432.6 applied only in the absence of an agreement to arbitrate and expressly provided for the validity and enforceability of agreements to arbitrate. The panel held that because the district court erred in concluding that § 432.6(a)-(c) were preempted by the FAA, it necessarily abused its discretion in granting Appellees a preliminary injunction.

- Dissent by Judge Ikuta stated that the provision has a disproportionate impact on arbitration agreements by making it a crime for employers to require arbitration provisions in employment contracts.

Kindred Nursing Centers Ltd. Partnership v. Clark, 137 S.Ct. 1421, 1425 (2017)

Held that the FAA invalidates state laws that impede the formation of arbitration agreements.

Delaware Uniform Arbitration Act
10 *Del. C.* § 5701 *et seq.*

"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, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment on an award. In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives, except as otherwise provided in § 5725 of this title." 10 *Del. C.* § 5701.

Delaware Uniform Arbitration Act

Delaware law favors the enforcement of arbitration agreement:

- "In short, the public policy of this state favors the resolution of disputes through arbitration" *Graham v. State Farm Mut. Auto Ins. Co.,* 565 A.2d 908, 911 (Del. 1989).
- "Delaware's public policy strongly favors arbitration[.]" *Julian v. Julian,* 2009 Del. Ch. LEXIS 164, at *3 (Del. Ch.).
- "Delaware public policy ... favors resolving disputes through arbitration." *IMO Indus., Inc. v. Sierra Int'l, Inc.,* 2001 Del. Ch. LEXIS 120, at *2 (Del. Ch.).

Federal Acquisition Regulation (FAR) 252.222-7006

- Implementing Section 6 of the 2014 executive order, Fair Pay and Safe Work Places
- Requires that in contracts estimated to exceed $1,000,000, that are not contracts for commercial goods, the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise.

Types of Arbitrability

Procedural Arbitrability - Have the parties complied with the requirements of the arbitration agreement such that they have the right to arbitrate?

Generally, determined by the arbitrator.

Substantive Arbitrability - Is a particular dispute subject to the arbitrator's review under the terms of the arbitration agreement?

Generally, determined by the court.

E.g., *ORIX LF, LP v. InsCap Asset Mgmt*., LLC, 2010 Del. Ch. LEXIS 70, at **3-4 (Del. Ch.)

Exceptions to the Rule

The applicable arbitration provision clearly provides that "any" disputes "arising under or relating to" the agreement will be arbitrated under the rules of the American Arbitration Association (the "AAA"). Per the Delaware Supreme Court's *Willie Gary* decision and its progeny, that language is a clear indication that the parties intended that any issue of substantive arbitrability is to be decided by an arbitrator. And, as required under this court's McLaughlin decision, so long as the defendants have a colorable [*4] argument that their claims are arbitrable, the arbitrator -- not this court -- must determine the ultimate question of substantive arbitrability.

ORIX LF, LP v. InsCap Asset Mgmt., LLC, No. 5063-VCS, 2010 Del. Ch. LEXIS 70, at *3-4 (Ch. Apr. 13, 2010)

UNITED STATES SUPREME COURT
Henry Schein, Inc., et al. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019)

HELD: The "wholly groundless" exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court's precedent.

ARBITRABILITY: **"**Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also " 'gateway' questions of 'arbitrability.' Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless."

"Under our cases, courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'"

Part 2: Power of Arbitrator

POWERS LIMITED BY CONTRACT:

- Procedural restrictions may be imposed by contract, in the agreement to arbitrate or elsewhere:
  - "The Arbitration shall be generally governed by the 2018 CPR Non-Administered Arbitration Rules (the "Rules"), as modified by this Agreement or otherwise by agreement of the parties. The Rules are available at https://www.cpradr.org/resource-center/rules/arbitration/non-administered/2018-cpr-non-administered-arbitration-rules."
  - "The parties shall be limited to no more than five (5) depositions, totaling not more than 20 hours in aggregate length."
  - "The parties may make objections to the introduction of any evidence based on the Delaware Rules of Evidence or other applicable law. The Arbitrator shall give due consideration to any objection, and shall factor any such applicable Rule of Evidence or other applicable law in rendering his verdict."

SUBSTANTIVE RESTRICTIONS

- Carveouts restricting the arbitrator's power to adjudicate certain substantive issues or claims or to apply remedies otherwise available must be expressly set forth in the arbitration agreement. *Medicis Pharm. Corp. v. Anacor Pharm., Inc.* 2013 Del. Ch. LEXIS 206, at *21 (Del. Ch.). Some examples:
- "Arbitrator is not free to apply *amiable compositeur* or natural justice and equity, or similar principles to craft extraordinary remedies."
- "Arbitrator shall not have the power to adjudicate any claim for injunctive relief under this Agreement, and any such claim may be brought before a court having competent jurisdiction over the parties."

LIMITS ON ARBITRATOR'S POWER – EXTRAORDINARY RELIEF

Arbitrator may probably not grant relief otherwise unavailable to the Parties under applicable law or their contractual arrangements.

LIMITS ON ARBITRATOR'S POWER – EXTRAORDINARY RELIEF 10 DEL. C. § 5714(A):

Upon complaint or application of a party in an existing case, the Court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral except where the award was by confession, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706 of this title, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection; or

(5) There was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection[.]

Limits on Arbitrator's power – Issues covered in arbitration

- The parties usually do not include limitations on the scope of matters to be resolved via binding arbitration. For example, a typical LLC Agreement provision provides plenary authority to an arbitrator to resolve "all" disputes "arising under or relating to" the LLC Agreement.
- What happens when new disputes are brought up after the arbitration demand and are fully argued in the arbitration proceding?
- Not addressed in extant Delaware case law.

LIMITS ON ARBITRATOR'S POWER – ISSUES COVERED IN ARBITRATION

- One arbitrator noted in an arbitration award:
  - "Defendant argues that my power must necessarily be limited to the scope of Plaintiff's Demand. But this argument fails in the face of the aforementioned legal precedent. It also fails to recognize the reality that this arbitration proceeded extremely expeditiously, and that a great many assertions were made by both Parties. Were I to withhold judgment on a claim brought before me during the course of this arbitration, where the facts had been fully and completely presented or were not in dispute, it would create the absurd result of the Parties being left with an incomplete ruling, and having to begin the arbitration process from the beginning in order to re-arbitrate matters which had already been fully presented. Such a result would not be to the benefit of the Parties or in keeping with Delaware law. See, e.g., *Rubick v. Security Instrument Corp.,* 766 A.2d 15, 18-19 (2000); *First Merchants Acceptance Corp. v. J.C. Bradford & Co.,* 198 F.3d 394, 403 (1999)."

QUESTIONS:

Section 3:

Best Practices & Pitfalls to Avoid When Drafting Your Next Arbitration Clause

Sponsored by the ADR section of the Delaware State Bar Association

Presenter:

Bernard Conaway, Esquire

Conaway-Legal LLC

Section 3 Panelists:

William D. Johnston, Esquire
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Katherine Witherspoon Fry, Esquire
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The Basics—It's Contract Treat it as Such

Arbitration agreements/clauses are contracts. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248 1253, 103 L.Ed.2d 488 (1989); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204 1207, 163 L.Ed.2d 1038 (2006); 9 USC § 2; 10 DEL. C. § 5701.

As such they are subject to the same rules of construction, the same defenses and overarching public policy considerations.

Golden Rule 1:

Arbitration agreements or clauses should never be the product of a cut and paste, boiler plate language approach.

Golden Rule 2:

Never Take Your Eye off the Cookie.

Golden Rule 2-Continued:

A. *Do Not Lose Sight of the Client's Focus/Purpose*

When drafting an arbitration clause or agreement, focus on the client's function or purpose for arbitrating a claim. Why does the client want arbitration over litigation?

- a need for efficacy
- a need prompt relief
- a need to control costs
- to protect critical business relationships
- to limit discovery
- to maintain confidentiality
- preserve a business relationship
- to leverage some advantage
- to secure some other goal

Golden Rule 3:

An arbitration clause should always contemplate who else might *need* to enforce contractual rights, who might need to be included in an arbitration, and who else *might try to enforce* arbitration.

Golden Rule 3-Continued:

A. *Who is Covered by the Arbitration Agreement?*

Two dimensions to consider here. First, does the nature of the underlying transaction/contract involve the participation of, or performance by, critical third parties. If so, how are those third parties tied to the arbitration obligation.

Golden Rule 3-Continued:

Example: Produce Supply contracts. The farmer/the supplier/the bulk seller/the end user/the consumer. Chi-Chi's bankruptcy. Bad onions from Mexico, purchased by Castellini Company (Delaware LLC) distributed by Sysco, delivered to Chi-Chi's Restaurant, customers sick including some that died from hepatitis A. The relationship between each of these entities was defined by separate contracts – only one of which contained an arbitration clause. Eventually Sysco was sued under the Adulterated Food Act 21 U.S.C. § 342 by Chi-Chi's. Sysco's contractual relationship with Castellini contained no arbitration provision. *Sysco Corp. v. Chi-Chi's, Inc. (In re Chi-Chi's, Inc.)*, 338 B.R. 618, 620-24 (2006) (describing factual background). Sysco ended up litigating its claim against Castellani in a California court and arbitrating the Chi-Chi's claim in arbitration. This two-part epoxy-type mess, however, bounced in and out of several courts before unfortunate clarity was revealed – think thousands of dollars, year in litigation, lawyers on two sides of the country and the ever-present possibility of inconsistent outcomes.

Golden Rule 3-Continued:

Example: Asset Purchase Agreements. Asset purchase agreements often utilize a series of related agreements, each with a discrete purpose, often involving different parties to the transaction – buyer, seller, financing entity, lienholder, third-party executory contracts. The failure to incorporate an arbitration agreement directly or by reference can leave critical parties outside the reach of an arbitrated resolution. *AppForge, Inc. v. Extended Sys.*, 2005 U.S. Dist. LEXIS 5039, *8-10, *15-16 (D. Del. 2005) (two license agreements - an Incorporation License Agreement and a Reseller Agreement – dispute whether a claim was arbitrable because it arose under one agreement and not the other). Keep in mind that there is a bias in favor of arbitrability.

Golden Rule 3-Continued:

Third parties or non-signatories ordinarily are neither bound by an arbitration agreement nor can they compel a signatory to arbitrate. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001).

Despite that, it is well-established that "non-signatories to an arbitration agreement may nevertheless be bound [to arbitrate] according to ordinary principles of contract and agency." *McAllister Bros. v. A & S Transportation*, 621 F.2d 519, 524 (2nd Cir., 1980). Those contract/agency exceptions include incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, succession in interest or assumption by conduct. The law governing the contract (or putative contract) is potentially relevant in such cases, as is the law of the place of incorporation and the law of the arbitral seat. *Orn v. Alltran Fin., L.P.*, 779 F. App'x 996, 998-99 (3d Cir. 2019) (non-party trying to enforce arbitration under South Dakota contract law); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (1990) (acknowledging that a third party can enforce arbitration agreements if they are a third-party beneficiary – performance of contract intentionally confers a benefit upon a third party, and that benefit should be a material part of the contract's purpose.)

Golden Rule 4:

Avoid getting bogged down trying to set out separate consideration for an arbitration clause. It is unnecessary and just as likely to create confusion, i.e., never overlook the opportunity to shut up, or put the pen down.

Golden Rule 4-Continued:

It is common practice to include a savings or severability clause in a contract, *i.e.*, if any portion of this agreement is determined to be unenforceable, then the court shall . . ... For example:

In the event that any part of this Agreement is declared by any court or other judicial or administrative body to be null, void or unenforceable, said provision shall survive to the extent it is not so declared, and all of the other provisions of this Agreement shall remain in full force and effect only if, after excluding the portion deemed to be unenforceable, the remaining terms shall provide for the consummation of the transactions contemplated hereby in substantially the same manner as originally set forth at the later of the date this Agreement was executed or last amended.

Golden Rule 4-Continued:

An arbitration clause is severable and independently enforceable from the rest of the contract in which it is contained.

Under the severability rule, a party cannot avoid arbitration by attacking the contract as a whole. Rather, the party opposing arbitration must challenge the arbitration clause itself. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) (establishing the "severability doctrine" as to arbitration clauses.); *MXM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 397 (3d Cir. 2020) (applying *Prima Paint*). Under the severability rule, a party cannot avoid arbitration by attacking the contract as a whole. Rather, the party opposing arbitration must challenge "the arbitration clause itself." *Prima Paint*, 388 U.S. at 403.

Golden Rule 5:

If it's Important Say It – Don't Leave it to an Arbitrator or Court to Devine Important Intent or Meaning

Golden Rule 5-Continued:

A. *Don't Make Someone Guess – You'll be Sorry ~~Sued~~*

The parties' intent should never be a secret. This is especially true if something is critically important to your client. Make that meaning or intent crystal clear. *This cardinal rule is observed more in the breach than in compliance*. Do not leave it to chance.

Golden Rule 5-Continued:

Example: In Delaware, "where the arbitration clause provides that the arbitration will be conducted in accordance with the rules of the American Arbitration Association (AAA), that statement constitutes clear and unmistakable evidence of the parties' intent to have an arbitrator determine substantive arbitrability. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006).

Golden Rule 5-Continued:

In a recent 2nd Circuit case, the court confirmed a district court order denying substantive arbitrability. *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308 (2nd Cir 2021). The decision was based, in part of that court's conclusion that the following arbitration clause language did not reflect the "parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator."

> (b) Arbitration. The parties unconditionally and irrevocably agree that, with the exception of injunctive relief as provided herein, and except as provided in Section 16(c), all Disputed Matters that are not resolved pursuant to the mediation process provided in Section 16(a) **may be submitted by either Member to binding arbitration administered by the American Arbitration Association ("AAA") for resolution in accordance with the Commercial Arbitration Rules and Mediation Procedures of the AAA then in effect**, and accordingly they hereby consent to personal jurisdiction over them and venue in New York, New York. The demand for arbitration shall be made within a reasonable time after the conclusion of the mediation process by delivery of a written notice (an "Arbitration Notice") by the electing Member to the other, and in no event shall it be made after two years from the conclusion of the mediation process. . ..

Id. at 312-13.

Golden Rule 5-Continued:

The district court rejected Williams-Sonoma's assertion that incorporation of the AAA Commercial Rules alone was sufficient to evince the parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator. On appeal, the 2nd Circuit affirmed. Contrast the result in *Williams-Sonoma* to *Willie Gary*.[2]

---

[2]Ironically, the *Wille Gary* court followed what it described as the majority federal rule meaning that reference to the AAA Rules reflects clear and unmistakable evidence of the parties' intent to have an arbitrator determine substantive arbitrability. *Willie Gary*, 903 A.2d at 79-81.

Golden Rule 5-Continued:

Example: Recently, mandatory arbitration agreements contained in employment agreements have come under federal and state scrutiny. Federal legislation is pending that may prohibit the practice. (To be discussed further in Section 4 of this CLE.)

In 2019 California passed legislation that makes it an unlawful employment practice to require employees or applicants to "waive any right, forum, or procedure for a violation of" the California Fair Employment and Housing Act or the Labor Code. Contrast that limitation with Delaware's Uniform Arbitration Act which specifically applies to arbitration agreements between employers and employees or between their respective representatives, except [labor contracts]." If you represent an employer in a breach of employment contract, what happens if the employee is a Californian employed by a Delaware company? Does the result change if the arbitration agreement specifically invokes Delaware law, or invokes Delaware law and Delaware's Uniform Arbitration Act, or says nothing?

Arbitration Agreement Matrix		
Client Issues – What does the Client Need/Require from Arbitration **See above**		
Process/Substantive Issues **See below**		
	Procedural Considerations	Substantive Considerations
Who	Who selects arbitrator? Will arbitrator be appointed or selected? Who can serve as arbitrator? How many arbitrators? Minimum arbitrator qualifications/certification/license Must certain parties attend an arbitration?	Who decides arbitrability? Do you really want an unknown entity/person serving as arbitrator? Do you want the arbitrator to have authority to decide all arbitration related issues, or not? Who decides whether an enforceable arbitration agreement exists? Who is covered by the arbitration agreement? Who is not covered by the agreement?

What	**What disputes will be arbitrated?** **What will not be arbitrated?**	**Distinguishing relief requested expedited, irreparable harm, or injunctive matters.** **Distinguishing the relief requested from the subject matter of the arbitration**
Where	Where will the arbitration physically take place? What about virtual arbitration?	What law will control the arbitration process and substantive law questions?

Where	Where will the arbitration physically take place? What about virtual arbitration?	What law will control the arbitration process and substantive law questions?
Why	Under what circumstances will arbitration be mandatory? Will arbitration be limited to certain, defined circumstances? What are they?	Is the imprimatur of a judicial necessary or preferred for enforcement of an issue? Outside the Delaware Court of Chancery, can the client tolerate an arbitration process that requires additional post award/decision steps to implement enforcement? Is the power of judicial enforcement likely to be necessary to adequately protect the client's interests?

Money	**How much and who pays the arbitrator?** **When must the arbitrator, or arbitration administer be paid?**	**What can the arbitrator award/not award, i.e., no punitive damages, non-economic damages.** **Can the arbitrator award fees to a prevailing party absent a contractual fee shifting provision?** **Can the arbitrator impose sanctions?**
Substance	There are few areas that the law prohibits the use of arbitration. The area of law/subject matter of the arbitration will often impose other considerations on the arbitration. For example, some matters cannot be arbitrated such as interstate family law/right disputes. State law may impose other limitations or restraints – consumer/warranty class actions. Federal law may likewise impose similar limitations.	
Practice Pointer	If it is important, make sure that concern is clearly and unambiguously articulated. Do not rely upon good luck, intuition, or a “how could they see it otherwise” mindset, or case precedent from another jurisdiction to support a conclusion.	

Sample Clauses

--Handout--*Best Practices & Pitfalls To Avoid When Drafting Your Next Arbitration Clause,* Page 9 of 13.

--Section III-Handout located at page 224.

Section 4:

Case Law Update And Arbitration Trends

Sponsored by the ADR section of the Delaware State Bar Association

Moderator/ Presenter:

Laura Forsythe Browning, Esquire

Browning ADR, LLC

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Bernard G. Conaway, Esquire
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Case Law Update & Arbitration Trends

1) Current United States Supreme Court Arbitration Cases.

2) Overview of FAIR Act and consequences of its passage.

3) 2021 Delaware Arbitration Cases.

4) Early Dispute Resolution.

United States Supreme Court Rulings on Arbitration

-2019- *Henry Schein, Inc., et al. v. Archer & White Sales, Inc.,* 139 S. Ct. 524 (2019).

Arbitrability: **"**Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63, 67. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also 'gateway' questions of 'arbitrability.' Id., at 68– 69. Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless." *Henry Schein*, at 524.

Upheld: "Under our cases, courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'"

Note: The U.S.S.C. once again leans favorably towards the parties' right to enter a contract for arbitration.

Henry Schein on Remand to 5th Circuit:

After remand from Supreme Court, the 5th Circuit in *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), 16-41674-CV1.pdf (uscourts.gov), ruled on *two issues*:

1. **Incorporation of AAA Rules & Arbitrability:**

"As we held in *Petrofac,* an agreement that incorporates AAA Rules presents clear and unmistakable table evidence the parties agreed to arbitrate arbitrability." *Id,* 279-280.

The 5th Circuit noted, "Under AAA 7(a), 'the arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counter claim.'" *Id,* 279-280.

Henry Schein on Remand to 5th Circuit:

2. **Carve Out Language:**
   - The carve out for injunctive relief was interpreted that the party's case would be litigated by the courts.
   - The agreement language: "Any dispute arising under or related to this agreement (Except for actions seeking injunctive relief and disputes related to trademarks, trace secrets, or other intellectual property of the [predecessor]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Arbitration Association." Id,* at 280.

Henry Schein on Remand to 5th Circuit*:*

On remand, the 5th Circuit noted that they were to interpret the agreement as it was written. They found the "placement of the carve-out here is dispositive." *Id*, at 281. The 5th Circuit noted that, "[t]he plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out." *Id.* The court noted that given the carve out, they could not, "say that the Dealer Agreement evinces a 'clear and unmistakable' intent to delegate arbitrability." *Id.*

The 5th Circuit summed up their position by noting, "[t] the parties could have unambiguously delegated this question, but they did not, and we are not empowered to re-write their agreement." *Id,* at 282. (See Also, *Bernard C. Conaway's Golden Rule 5:* If it's Important, Say It.)

Back to Supreme Court….

-December 2020: After the 5th Circuit ruled on remand, Henry Schein appealed again, and the case went back to the Supreme Court on the issue of who decides whether a case is arbitrated, a court or an arbitrator. The Case was argued before the Supreme Court for an hour. The arguments & transcripts before the Court can be heard at this link: Argument Audio (supremecourt.gov)

-On January 25, 2021, the Supreme Court issued the following: "The writ of certiorari is dismissed as improvidently granted. It is so ordered." (Slip Opinion) 592 U. S. ____ (2021).

- March 2021, the case was dismissed citing an agreement between the parties.

United States Supreme Court Rulings on Arbitration

--June 28, 2021—Petition Denied on *Shivkov v. Artex Risk Sols. Inc.*, 974 F.3d 1051 (9th Cir. 2020) (available at Shivkov v. Artex Risk Sols., 974 F.3d 1051)

--In *Shivkov,* the Supreme Court denied cert in *Shivkov v. Artex Risk Solutions Inc.*, 20-1313, where an appeals court, compelling arbitration, also held that "the availability of class arbitration is a gateway issue that a court must presumptively decide," but because the agreements "do not clearly and unmistakably delegate that issue to the arbitrator," and "[b]ecause the Agreements are silent on class arbitration, they do not permit class arbitration."

--**Of Note:** Discussion about having a case "before AAA," and if that incorporates AAA rules, thus incorporating a AAA rule allowing AAA arbitrator to determine arbitrability. Video of 9th Cir. Arguments: 19-16746 Dimitri Shivkov v. Artex Risk Solutions, Inc. - YouTube

United States Supreme Court Upcoming Cases on Arbitration

Case No. 20-1143--**Badgerow v. Walters**

Decision Below: 975 F.3d 469, *cert. granted* 5/17/2021

Question Presented: This case presents a clear and intractable conflict regarding an important jurisdictional question under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16. As this Court has repeatedly confirmed, the FAA does not itself confer federal question jurisdiction; federal courts must have an independent jurisdictional basis to entertain matters under the Act. In Vaden v. Discover Bank, 556 U.S. 49 (2009), this Court held that a federal court, in reviewing a petition to compel arbitration under Section 4 of the Act, may "look through" the petition to decide whether the parties' underlying dispute gives rise to federal-question jurisdiction. In so holding, the Court focused on the particular language of Section 4, which is not repeated elsewhere in the Act. After Vaden, the circuits have squarely divided over whether the same "look through" approach also applies to motions to confirm or vacate an arbitration award under Sections 9 and 10. In Quezada v. Bechtel OG & C Constr. Servs., Inc., 946 F.3d 837 (5th Cir. 2020), the Fifth Circuit acknowledged the 3-2 "circuit split," and a divided panel held that the "look-through" approach applies under Sections 9 and 10. In the proceedings below, the Fifth Circuit declared itself "bound" by that earlier decision, and applied the "look-through" approach to establish jurisdiction. That holding was outcome determinative, and this case is a perfect vehicle for resolving the widespread disagreement over this important threshold question.

The question presented is: Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question.

United States Supreme Court Upcoming Cases on Arbitration

Case No. 21-328--**Morgan V. Sundance, Inc.**

Decision Below: 992 F.3d 711, *cert. granted* on 11/15/2021.

Question Presented: Waiver is the intentional relinquishment of a known right and, in the context of contracts, occurs when one party to a contract either explicitly repudiates its rights under the contract or acts in a manner inconsistent with an intention of exercising them. In the opinion below, the Eighth Circuit joined eight other federal courts of appeals and most state supreme courts in grafting an additional requirement onto the waiver analysis when the contract at issue happens to involve arbitration-requiring the party asserting waiver to show that the waiving party's inconsistent acts caused prejudice. Three other federal courts of appeal, and the supreme courts of at least four states, do not include prejudice as an essential element of proving waiver of the right to arbitrate.

Question presented: Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court's instruction that lower courts must "place arbitration agreements on an equal footing with other contracts?" AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).


FAIR ACT IS COMING
....MAYBE....?
imgflip.com

Forced Arbitration Injustice Repeal Act

- Proposed comprehensive legislation to prohibit forced mandatory arbitration provisions in employment, consumer or civil rights disputes.
- Introduced in the 115th Congress in 2011. Expired without further action
- Re-introduced in the 116th Congress in 2019, approved by the House of Representatives, but not acted on by the Senate.
- Re-introduced again in 2021 in the Senate. H.R. 963. Presently just passed Judicial Committee. See Slides below.
- "Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.“
- Link to Bill: Text - H.R.963 - 117th Congress (2021-2022): FAIR Act | Congress.gov | Library of Congress

H.R.-963-Forced Arbitration Injustice Repeal Act.

"§402. No validity or enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

"(b) APPLICABILITY.—

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

Nov. 3—Passes Judiciary Committee

Rep. Johnson's Bipartisan FAIR Act That Ends Forced Arbitration & Restores Accountability, Passes Judiciary Committee

November 3, 2021 | Press Release

One of Congressman Johnson's signature pieces of legislation with more than 200 cosponsors heads to full House for vote

WASHINGTON, D.C. — Today, Congressman Hank Johnson's (GA-04) bipartisan Forced Arbitration Injustice Repeal (FAIR) Act — H.R. 963 — that re-establishes everyday Americans' 7th Amendment right to seek justice and accountability through the court system, passed the House Judiciary Committee.

"My bill would restore fairness to the American justice system by reasserting individuals' right to access the court system," said Rep. Johnson. "The FAIR Act would ensure that men and women contracting with more powerful entities aren't forced into private arbitration, where the bigger party often has the advantage of choosing the arbitrator in an unappealable decision."

The House bill would eliminate forced arbitration clauses in employment, consumer, and civil rights cases, and allow consumers and workers to agree to arbitration after a dispute occurs. The bill was marked up and voted out of committee. The House bill has more than 200 cosponsors.

Cont. Nov. 3 Press Release

"Arbitration clauses have permeated American life in recent decades," continued Rep. Johnson. "They've seeped into our cell phone contracts, our medical paperwork and our employee handbooks with opaque language, written by well-paid corporate attorneys. The clauses are hidden in updated terms and conditions, incorporated into mid-year employee reviews, and implicit in purchase contracts. And they all prevent us from having our day in court. It is time for this to change. I'm in Congress to stand up for the voiceless and the powerless, and this bill, the Forced Arbitration Injustice Repeal Act, or the FAIR Act, is a testament to that. I appreciate my colleagues' support as this bill moves to the full House for a vote."

Rep. Matt Gaetz (FL-01) is the Republican lead on the legislation.

"The Powerful in America shouldn't be able to escape taxpayer-funded justice in Article III courts," said Rep. Gaetz. "They shouldn't be able to force workers into private-sector dispute resolution slanted in their favor. Most importantly, sexual harassers shouldn't be able to pick their juries in advance. I'm proud to be the Republican lead on the FAIR Act to ensure equal justice for all."

H.R. 4445-

Shown Here:
Introduced in House (07/16/2021)

117TH CONGRESS
1ST SESSION

H. R. 4445

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Cont. H.R. 4445

"§402. No validity or enforceability

"(a) IN GENERAL.—Except as provided in subsection (c), and notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to a sexual assault dispute or a sexual harassment dispute.

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

"(c) EXCEPTION FOR COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.".

Question:

1) If the Forced Arbitration Injustice Repeal Act (“FAIR Act”) is passed, what kind of effect do you think it will have on arbitrations in general and future litigation?

Question:

2) What, if anything, should attorneys (plaintiff or defense) do now in anticipation of the passage of the FAIR Act?

Question:

2) What, if anything, are *companies* doing in anticipation of the passage of the FAIR Act?

2021-Delaware Arbitration Cases:

1. *Wild Meadows MHC, LLC v. Weidman*, 250 A.3d 751 (Del. 2021). Download.aspx (delaware.gov)

2. *Geraci v. Uber Techs.*, C. A. N21C-07-151 CLS (Del. Super. Ct. Oct. 29, 2021) Download.aspx (delaware.gov)

Early Dispute Resolution

Early Dispute Resolution or "EDR": is a rigorous, comprehensive process for fairly and rapidly settling disputes, building on mediation and collaborative law practices that facilitate cooperation in an adversarial process. The goal of EDR is to resolve most disputes within 30 to 60 days from inception.

The EDR Institute is a non-profit organization created to deliver interactive, in-depth training covering EDR procedures and protocols. Upon completion of EDR training, litigators and in-house counsel will be able to meet their clients' demands for innovative solutions to slash the time and cost of litigation, and neutrals will be certified to guide the entire process.

EDR Protocols: The EDR Institute drafted protocols it implement EDR.
Latest Protocols – EDRinstitute.org

Questions

Section 5:

Ethical Considerations in Arbitration

Sponsored by the ADR section of the Delaware State Bar Association

Moderator:

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Arbitration Ethics Resources

- Delaware Lawyer's Rules of Professional Conduct
- ABA/AAA: The Code of Ethics for Arbitrators in Commercial Disputes
- The Delaware Judges' Code of Judicial Conduct

The Delaware Lawyers' Rule of Professional Conduct

1. DLRPC: Applies to all Attorneys, whether in the role of Arbitrator or Advocate.
2. Rule 2.4: Lawyer Serving as Third-Party Neutral:

(a) a lawyer serves as a third party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) Lawyer served as a third-party neutral form that is representing them. When the lawyer knows or relational partner stand the lawyers role in the matter, but lately difference between lawyers roll a party neutral and a lawyer as well as one who presents a client.

The Delaware Lawyers' Rule of Professional Conduct

3. Rule 2.4 Comment Section: Discusses the role of the attorney in the ADR proceeding at length and the role of a neutral turned representative.

The Delaware Judicial Code of Judicial Conduct

Canon

1. A judge should uphold the integrity and independence of the judiciary.

2. A judge should avoid impropriety and the appearance of impropriety in all activities.

3. A judge should perform the duties of the office impartially and diligently.

4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.

5. A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.

6. A judge should regularly file reports of compensation received for law-related and extra-judicial activities.

7. A judge should refrain from political activity inappropriate to the judge's judicial office. Compliance with the Code of Judicial Conduct.

ABA/AAA: The Code of Ethics for Arbitrators in Commercial Disputes

1. The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association.

2. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

3. Labor: The Code notes that it provides ethical guideline for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

4. The ABA/AAA Code has not been adopted by Delaware but is mentioned in the comment section of the DLRPC Rule 2.4.

AAA/ABA-CANNON I:

CANNON I: An Arbitrator should uphold the integrity and fairness of the Arbitration Process.

Question:

How does an Arbitrator ensure fairness in arbitration process?

Question:

Why is fairness in the process so important in arbitration and any potential review of an arbitration award?

Question:

In the purview of DLRPC Rule 2.4, should an attorney acting as a neutral (Mediator/Arbitrator) have a *pro se* party to the proceeding sign a document acknowledging the neutral (Mediator/Arbitrator) is not a legal representative, or is an oral instruction enough?

AAA/ABA-Cannon II:

Cannon II: An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

Question:

What kind of disclosures should an arbitrator make to parties?

Question:

Social Media:

1. Should an Arbitrator disclose if they are linked on Social Media (Facebook, Instagram, or LinkedIn)?

2. If an attorney and an arbitrator are linked and/or are “friends” on social media, does that preclude the arbitrator from arbitrating a case with said attorney?

AAA/ABA-Canon III:

Canon III: An Arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

Question:

Any thoughts or comments on communicating with the parties during an ongoing arbitration?

Is there anytime *ex parte* communication may be appropriate?

Should an Arbitrator make an order or rule on how the parties will communicate during an arbitration?

AAA/ABA-Canon IV:

Canon IV: An Arbitrator should conduct the proceedings fairly and diligently.

Question:

How do you ensure that each party has had the opportunity to be fairly heard?

Should the Arbitrator participate in settlement discussions?

AAA/ABA-Canon V:

CANON V: An Arbitrator should make decisions in a just, independent, and deliberate manner.

Question:

Do you ever look outside the evidence that was presented in deciding a case?

If so, when and why?

AAA/ABA-Canon VI:

Canon VI: An Arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

Question:

With more and more proceedings held via video conferencing, what are you doing to ensure that arbitrations conducted online remain confidential?

AAA/ABA-Canon VII:

Canon VI: An Arbitrator should adhere to standards and fairness when making arrangements for compensation and reimbursement of expenses.

Question:

Have there ever been issues with payment of an arbitration fee, if so, how is that handled in a fair manner?

How is payment handled in *ad hoc/private* arbitration v. an administered arbitration ?

Question:

What if any way, can an arbitrator avoid payment/compensation issues in an ethical manner?

Questions

DSBA—ADR Section

1) In 2021- The DSBA ADR Section meets every third Wednesday via Zoom. Come Join Us!
2) Find out about Mediation Opportunities and Network.
3) Panelists for Next Fall—Arbitrating your Case. (Rapid Arbitration Act, Arbitration and Discovery, Writing your Next Arbitration Ruling, Update on FAIR Act).
4) Questions or Comments: Laura Browning, Esq.— DSBA ADR Section Chair,
   Email: Browningmediation@outlook.com or Call me at 302-399-5427

TABLE OF CONTENTS

PANELIST INFORMATION

BERNARD G. CONAWAY, Esquire
Conaway-Legal LLC

1007 North Orange Street, Suite 400 • Wilmington DE 19801
302.428.9350 • bgc@conaway-legal.com • conaway-legal.com

Managing Member: Conaway-Legal LLC. Thirty-one years of court experience including twenty-seven in alternate dispute resolution, and judicial service by appointment. Practice focused on equitable remedies and corporate matters before the Chancery Court of Delaware, corporate bankruptcy and reorganization before Bankruptcy Court of the District of Delaware, and commercial litigation in the District of Delaware and Superior Court of Delaware.

Annually mediate/arbitrate approximately 125/80 cases, respectfully, including multi-party, multi-level insurance coverage, construction, bankruptcy, environmental, employment, law firm break-up, corporate/alternate entity governance contests, stockholder disputes, inter-company contract disputes, other commercial and personal injury matters.

St. John's University/ABI Bankruptcy - Certified Mediator. Certified Commercial Mediator - Superior Court of Delaware. Certified Arbitrator/Mediator – Delaware State Bar Association. Superior Court of Delaware, Certified Mediator.

WILLIAM D. JOHNSTON

William D. Johnston is a partner in the Wilmington, Delaware-based law firm of Young Conaway Stargatt & Taylor, LLP. His practice concentration is corporate and other business litigation and counseling. He is a past chair of Young Conaway's Corporate Litigation and Counseling Section.

Mr. Johnston serves as a special master and as an expert witness. He also has substantial ADR experience, both as counsel and as a mediator and arbitrator. He has been certified as a mediator by the Superior Court of Delaware (including advanced mediation training and re-certification training). He is a member of the Panel of Distinguished Neutrals of CPR: International Institute for Conflict Prevention and Resolution. In addition, he is a member of the American Arbitration Association's Roster of Commercial Arbitrators.

Mr. Johnston is a past chair of the Business Law Section of the American Bar Association, and is an invited member of that section's Corporate Laws Committee. He is State Delegate from Delaware to the ABA House of Delegates. He is a Sustaining Life Fellow of the American Bar Foundation and is a former state chair for Delaware. He is a past president of the American Counsel Association and continues to serve on the Board of the ACA. He is immediate past chair of the ADR Section of the Delaware State Bar Association. He is a former member of the Executive Committee of the Richard S. Rodney Inn of Court. He is a past president of the Delaware State Bar Association and is a past member of the Board of Bar Examiners of the Delaware Supreme Court. He is a past president of the American Judicature Society.

Mr. Johnston served for 24 years as a member of the Delaware State Human Relations Commission, by gubernatorial appointment. At Young Conaway, he co-chaired the firm's Diversity Committee, and he continues to serve as a member of that committee.

Mr. Johnston currently is serving a second four-year term as a member of the Wilmington Ethics Commission, having been appointed by the Mayor and confirmed by the City Council, and he is the elected Chair of the Commission.

Mr. Johnston is an Eagle Scout and is a former member of the Executive Board of the Del-Mar-Va Council, Boy Scouts of America.

Mr. Johnston is a graduate of Colgate University and of The Washington and Lee University School of Law. He served as Law Clerk to The Honorable Daniel L. Herrmann, Chief Justice of the Delaware Supreme Court.

Mr. Johnston is married to The Honorable Mary Miller Johnston, a Judge of the Delaware Superior Court. They have two adult daughters.

Mr. Johnston may be contacted by phone at (302) 571-6679 (office) or (302) 530-8697 (cell), and by e-mail at wjohnston@ycst.com. For additional information, please see his biographical outline on the firm's website, www.youngconaway.com.

December 2021

Brian M. Gottesman

bgottesman@gabellbeaver.com
(302) 893-5208
Gabell Beaver LLC
1207 Delaware Ave, Suite 2
Wilmington, DE 19806

Work Experience:

Gabell Beaver LLC (Partner, 2021-present)

Berger Harris LLP (Partner, 2010-2021)

Connolly Bove Lodge & Hutz LLP (Associate, 2003-2010)

Education

- J.D., Harvard Law School (2003)
- B.A., University of Rochester (Magna Cum Laude, 2000)

Admitted to Practice

- Delaware
- U.S. Court of Appeals for the Third Circuit
- District of Columbia
- U.S. District Court for the District of Delaware

Memberships

- Delaware State Bar Association
    - Member of the Alternative Entities Subcommittee, 2010-2015
    - Member of the Statutory Trusts Subcommittee, 2010-present
    - Member of the Alternative Dispute Resolution Committee, 2021-present
- Panel of Distinguished Neutrals, International Institute for Conflict Prevention and Resolution
- Harvard Law School Association
- Richard S. Rodney Inn of Court
- Carpenter-Walsh Pro Bono Inn of Court
- Phi Alpha Theta
- Phi Beta Kappa

Public Service

- Delaware Board of Bar Examiners (Associate Member 2004-2009)

• Board of Trustees, Albert Einstein Academy (2017-2020)

• Attorney guardian *ad litem* for the Delaware Office of the Child Advocate (2005-present)

Publications

- Brian Gottesman, *Karabag*, Encyclopedia of Modern Asia, Vol. 3 (Charles Scribner's Sons, 2002).
- Brian Gottesman, *Piracy*, Encyclopedia of World Trade: From Ancient Times to the Present, Vol. 3 (M.E. Sharpe, 2005).
- Brian Gottesman and Richard Levin, *Delaware Entities and Opinion Letters*, Commercial Real Estate Financing 2006: What Borrowers and Lenders Need to Know (Practising Law Institute, 2006).
- Brian Gottesman, *Gudmund's Solution*, The Bencher: The Magazine of the American Inns of Court (March/April 2006).
- Brian Gottesman, *The Silent Wife*, In Re: The Journal of the Delaware State Bar Association (November 2006).
- Brian Gottesman and Scott Swenson, *More than Bargained For? Topics for Consideration in the Issuance and Acceptance of Delaware LLC Opinions*, 81-FEB N.Y. St. B. J. 20 (2009).
- Brian Gottesman, et al., *Delaware Statutory Trusts Manual* (Matthew Bender, 2010).
- Brian Gottesman, et al., *Litigating the Business Divorce* (BNA, 2016)
- Brian Gottesman, et al., *Litigating the Business Divorce: 2017 Supplement* (BNA, 2017)

Katherine Witherspoon Fry, Esq.

kwitherspoonfry@offitkurman.com | 302.351.0902

For over 27 years, Katherine has provided her clients with robust representation in matters of employment and related business law. Katherine represents and counsels employers and executives in all facets of the employment relationship, including non-competes, COVID issues, hiring, termination, discrimination, non-competition, Fair Labor Standards Act matters, issues regarding Family and Medical Leave and other leaves, whistleblowers' complaints, and regulatory matters. As a certified mediator and arbitrator and court-appointed hearing officer herself, she understands the immense value of alternative dispute resolution and early settlement of controversies.

Nevertheless, when called upon to do so, she has pursued cases all the way to the U.S. Supreme Court as well as the Third Circuit Court of Appeals and the Delaware Supreme Court. As a litigator, she is well aware of the nuances of law necessary to draft effective restrictive covenants, severance agreements, and employment contracts. She represents companies and non-profit organizations of all sizes. She has defended companies under investigation by both U.S. and state Departments of Labor and handled multiple matters before the EEOC. Katherine assists executives in negotiating severance agreements and employment agreements; review of other corporate agreements; and resolving disputes of all kinds with employers. Expedient resolution of disputes prior to trial or hearing is a strength for Katherine.

Offit | Kurman®
Attorneys At Law

Katherine Witherspoon Fry

Principal
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kwitherspoonfry@offitkurman.com

View My Bio »»

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Wilmington, DE 19801
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offitkurman.com

LAURA FORSYTHE BROWNING, ESQ.:

Ms. Browning is the principal owner of Browning ADR, LLC located in Henderson, Texas. Since, 2016 her practice has comprised of only mediation and arbitration serving Texas. Ms. Browning received her J.D. from South Texas College of Law in 2003, and her B.A. from Louisiana State University in 2000. She is a licensed attorney in Delaware (2004) and Texas (2008).

Prior to her ADR practice, she practiced as an associate attorney with the law firm of Grady & Hampton, LLC (2003-2007), in Dover, Delaware. In private practice, her work focused on employment law, civil rights, personal injury, and family law matters. Later, she served as a Deputy Attorney General with the Department of Justice for the State of Delaware in the Criminal Division in Sussex County (2010-2013). As an adjunct professor, Ms. Browning taught property law and legal research at Wesley College in Dover, Delaware from 2006-2007.

In 2013, her spouse, who serves in the United States Air Force, was stationed at Laughlin Air Force Base in Del Rio, Texas. In 2015, after she completed the University of Houston Law Center-Mediation Program, she began mediating cases along the border counties in West Texas. Since 2016, Ms. Browning has completed over 200 hours of advanced mediator & arbitration training. Today via Zoom, Ms. Browning mediates cases throughout the entire State of Texas from Houston to Abilene. She also arbitrates medical billing disputes as a panelist for the Texas Department of Insurance and arbitrates property tax cases as appointed by the State of Texas Comptroller. In 2021, she has arbitrated over 200 medical billing cases and began arbitrating medical billing cases in Virginia.

Ms. Browning is a current member of the Association of Attorney Mediators, the ADR Section of State Bar of Texas, the ADR Section of the Delaware State Bar Association, the American Bar Association-ADR Section (active member with both the ABA mediation committee and ABA Women in Dispute Resolution Committee). In 2020, she reached the status of credentialed mediator with the Texas Mediator Credentialing Association.

Since the Pandemic, Ms. Browning's ADR practice is conducted only via the Zoom platform. Ms. Browning primarily only mediates cases in which parties are represented by counsel. In 2020, she completed the Delaware Superior Court Mediator Training and the Delaware Family Court Mediation Training.

LAURA FORSYTHE BROWNING, ESQ.:
BROWNING ADR, LLC
WWW.LAURABROWNING.COM
P.O. BOX 2046
HENDERSON, TEXAS 75653
(830) 308-7555 (OFFICE)
(302) 399-5427 (CELL)

SECTION I-
LITIGATOR'S HANDOUTS

American Arbitration Association

Kenneth Egger
Vice President
3 Executive Drive, Suite 150
Somerset, NJ 08873

October 11, 2021

Dear Parties:

On September 28, 2021 this office received a demand for arbitration filed in accordance with a collective bargaining agreement that contains an arbitration clause providing for administration by the American Arbitration Association (the AAA). Please note that this arbitration will be administered under the AAA's Labor Arbitration Rules, which are available on our website: www.adr.org.

Pursuant to Section 10 of the Rules, enclosed is list of names selected from our Panel of Labor Arbitrators. This list is due to the AAA by October 21, 2021 If a party does not return the List for Selection of Arbitrator on or before the due date, all names will be deemed acceptable. If the parties are unable to agree on a mutually acceptable arbitrator from this first list, an additional administrative appointment list will be provided. In order to expedite the administration of the case, the parties are requested to complete the scheduling preference section on the list form.

If you are interested in additional administration services, please do not hesitate to contact me. Also, we want to make you aware that experienced AAA election experts provide impartial, accurate, cost-effective, and timely election administration services to labor unions, from ballot preparation to tabulation and results certification (which is produced within 24 hours). For more information, contact Ken Egger, Vice President of Election Services via email at eggerk@adr.org.

For your convenience, we have attached the Labor Arbitration Information Sheet, AAA-ICDR® Best Practices Guide for Maintaining Cybersecurity and Privacy, and AAA-ICDR Cybersecurity Checklist, which provide basic information about the AAA's arbitration process.

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Labor Arbitration Information Sheet

This document provides important information regarding AAA's policies and procedures.

Answer to the Demand for Arbitration
Pursuant to Section 8 of the Rules, the Respondent's Answer must be submitted within ten (10) calendar days from the date of this letter, otherwise, we will assume that the claim is denied.

Exchange of Correspondence
The parties must exchange copies of all correspondence during the course of the arbitration except for the arbitrator list.

Timeliness of Filings
Please note that much of the correspondence received from the AAA will contain deadlines. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA. Without the consent of the parties, Case Managers only have the authority to grant one seven (7) day extension per deadline, provided that the request is reasonable and necessary. Any additional extensions can only be granted by an AAA Supervisor.

Communication with Arbitrator
It is very important that parties do not engage in any ex-parte communications with the arbitrator. To minimize the potential of such communications, all written communication from the parties to the arbitrator will be directed to the AAA for transmittal to the arbitrator.

Labor Arbitrator's Code of Professional Responsibility
This document is made available on our website for review. Advocates can increase their effectiveness in representing clients during labor-management disputes with a greater understanding of the Code and how it applies to the arbitration process and arbitrator responsibilities.

Subpoenas
Copies of correspondence or other information with respect to subpoenas are to be exchanged between the parties unless both parties agree not to exchange subpoena requests. For additional information, please feel free to review the Subpoena Fact Sheet for Labor cases available on our website at www.adr.org.

AAA Webfile
Parties are also encouraged to visit our website to learn more about the AAA online services WebFile provides the flexibility to work with your cases at any time even outside normal business hours. Some features of WebFile include: file new Demands, review status of pending cases, rank acceptable arbitrators, review hearing dates, locations and times, view invoices and submit payments. An additional feature is to upload hearing exhibits in a dedicated space activated by the arbitrator. Please feel free to contact the undersigned with any questions regarding our website or WebFile.

Cybersecurity
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AAA Administrative Fees
AAA initial administrative fees are nonrefundable. Parties entering settlement negotiations at any time after the AAA has opened its file should take into consideration the nonrefundable fees. AAA initial fees remain due and payable when parties settled or withdraw a matter after the filing of the demand for arbitration or submission. For the parties' convenience, invoices can be paid using any method of payment they chose including the use of a credit card. Please contact your case manager for details on payment by credit card or to discuss alternative methods of payment.

AMERICAN ARBITRATION ASSOCIATION

DATE LIST SUBMITTED: October 11, 2021
CASE MANAGER: Suzanne B Singer

LIST FOR SELECTION OF ARBITRATOR

****

After striking the name of any unacceptable arbitrator, please indicate your order of preference by number. We will try to appoint a mutually acceptable arbitrator who can hear your case promptly. Leave as many names as possible. Biographical information is attached. If the list is not received on or before October 21, 2021 all names will be deemed acceptable. If the parties are unable to agree on a mutually acceptable arbitrator from this first list, an additional administrative appointment list will be provided.

****

Party: _____

By: _____ Title: _____

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Vice President
3 Executive Drive, Suite 150
Somerset, NJ 08873

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Somerset, NJ 08873

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Sincerely,

Suzanne Singer

Suzanne B Singer
Case Administrator
Direct Dial: (732)667-2027
Email: suzannesinger@adr.org
Fax: (732)560-8850

Enclosures

cc :

Labor Arbitration Information Sheet

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AMERICAN ARBITRATION ASSOCIATION

DATE LIST SUBMITTED: October 11, 2021
CASE MANAGER: Suzanne B Singer

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****

Party: _____

By: _____ Title: _____

SCHEDULING PREFERENCES

In order to expedite the scheduling of the hearing(s), the parties are requested to complete the following:

Preferred months / dates: _____

Number of hearings expected: _____

Preferred hearing location: _____

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Deborah L. Murray-Sheppard

Current Employer-Title	Delaware Public Employment Relations Board - Executive Director and Chief Hearing Officer
Labor Experience	Extensive hearing and decision-writing experience, including quasi-judicial hearings, evaluate evidence and argument, and issue decisions in unfair labor practice, representation, declaratory judgment, interest and grievance arbitration cases. Specialized experience in mediating labor/management impasses, facilitating resolution of unfair labor practice and binding interest arbitration disputes. Extensive experience administering Delaware's three public sector collective bargaining laws, including representation elections, collective bargaining disputes. Extensive adjudicative and investigative experience. Developed and administered collaborative bargaining training program for Delaware public school employers and unions. Personally resolved 95% of binding interest arbitration cases brought to Delaware PERB between 2000-2011. Arbitration Intern with Charles D. Long, Jr., Esq., and Walter deTreux.
Issues	Contractual interpretation, discipline, arbitrability, scope of bargaining, duty of fair representation, unilateral change, duty to bargain, ability to pay, wages and benefits, working conditions, scheduling of work, training, drug and alcohol issues, hours of work, grievance procedure, union animus, discrimination, performance evaluation, classification, preservation of work, work jurisdiction, parity, community of interest, comparability, bargaining unit appropriateness, supervisory and confidential status.
Industries	Public Sector (including state, county and municipal), Education, Post-secondary education, police, firefighters, emergency services, food service, custodial and maintenance, health care, maritime, construction, transportation, food service, environmental, health and social services, communications.
Permanent Arbitrator	SEPTA & TWU Local 234 - Expedited Arbitration.
Work History	Executive Director and Chief Hearing Officer/Deputy Director/Hearing Officer, Delaware Public Employment Relations Board, 1988-present; Adjunct Professor, Labor Relations, University of Delaware, 2004-08.
Education	University of Delaware (BS, Economics & Political Science; Masters in Public Administration; Paralegal Certification).
Professional Associations	Association of Labor Relations Agencies; Labor & Employment Relations Association (Philadelphia Chapter).
Publications and Speaking Engagements	Speeches on effective labor negotiations, dispute resolution, and grievance and interest arbitration before: Municipal employer associations; Delaware State FOP; Delaware State Education

	Association; Delaware Bar Association - Labor and Employment section; Delaware School Boards Association; AFSCME Council 81; Delaware Management Fellows; Delaware Public Employment Labor Relations Association.
Alternative Dispute Resolution Training	AAA Keeping It Real: How Arbitrators Handle Witness Credibility, 2017: AAA Essential Mediation Skills for the New Mediator, 2013; AAA Essential Mediation Skills for the New Mediator, 2012; AAA Webinar, The Labor Arbitrator's Code of Professional Responsibility - What Every Effective Advocate Should Know, 2011; AAA Labor Arbitrator II Workshop, 2010; AAA - Labor Arbitrator I, 2009; FMCS, Labor Arbitrator Training, 2005; University of Delaware, Mediation & Facilitation Training, 2004.
Citizenship	United States of America
Languages	English
Locale	Wilmington, Delaware, United States of America

Compensation

Hearing:	$1400.00/Day
Study:	$1400.00/Day
Cancellation:	$1400.00/Day
Cancellation Period:	21 Days
Comment:	Cancellation Notice Required: 21 Business Days

AMERICAN ARBITRATION ASSOCIATION®

REQUEST FOR ARBITRATOR SELECT: LIST AND APPOINTMENT

Date:
Case Type (Check one.): ☐ Commercial ☐ Construction ☐ Employment
Number of Arbitrators to be provided on List (Check one.): ☐ 5: $750 plus the cost of arbitrator(s) appointment* ☐ 10: $1,500 plus the cost of arbitrator(s) appointment* ☐ 15: $2,000 plus the cost of arbitrator(s) appointment* **There is a $500 fee for each arbitrator appointed. Fees are payable at the time of submission of this form.*
Desired Qualifications for Arbitrators: *Please include requests for professional and/or industry expertise, geographic limitations and/or locations, and any other pertinent information. Parties may include a separate sheet if desired.*
Listing for Conflicts Checks *Please attach a list of all interested parties in this case, including, but not limited to witnesses, consultants, and attorneys. In order to avoid conflicts of interest, parties are requested to also list subsidiary and other related entities. This list will be used by the potential arbitrator(s) to check for conflicts and make disclosures.*
Additional Case Information
Dollar Amount of Claim:
Dollar Amount of Counterclaim (if any):
Nature of Dispute :

American Arbitration Association® ("AAA®") Authority

By requesting the "List and Appointment" services of the AAA, the parties authorize the AAA to appoint the requested number of arbitrators and administer any immediate challenges to the appointment(s) as follows:

Disclosure

1. Any person appointed or to be appointed as an arbitrator shall disclose any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
2. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
3. In order to encourage disclosure by arbitrators, disclosure of information pursuant to this section is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

Disqualification of Arbitrator

1. Any arbitrator appointed through this service shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
   (i) partiality or lack of independence,
   (ii) inability or refusal to perform his or her duties with diligence or in good faith, or
   (iii) any grounds for disqualification provided by applicable law.
2. Upon objection of a party to the continued service of an arbitrator within seven days of the arbitrator's appointment, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

Continued on the next page

Termination of AAA Authority

Under **Arbitrator Select: List and Appointment,** the AAA's authority to address challenges to an arbitrator's appointment under this service terminates upon the appointment of an arbitrator who makes no disclosures or upon the reaffirmation of an arbitrator who makes a disclosure upon appointment. While the arbitrator's obligation to make disclosures is ongoing for the duration of his or her appointment, the AAA will have no authority under this service to address subsequent challenges to an arbitrator's continued service.

In addition, because AAA services conclude with the appointment and/or reaffirmation of the arbitrator(s), AAA services do not include, among other things, the handling of fees charged by the arbitrator(s), performance-related matters, disclosure issues outside of initial disclosures made upon appointment and/or award-related matters or any other issue that might arise during the arbitration proceeding.

Exclusion of Liability

a. The parties agree that neither the AAA nor any arbitrator listed or appointed under this service is a necessary or proper party in judicial proceedings related to either the parties' arbitration or the provision of services under the AAA's Arbitrator Select.

b. The parties agree that neither the AAA nor any arbitrator listed or appointed under this service shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with the parties' arbitration or the provision of AAA's Arbitrator Select.

c. The parties further agree not to call the arbitrator, the AAA or AAA employees as a witness in litigation or any other proceeding relating to the arbitration for which the AAA's Arbitrator Select has been utilized. The arbitrator, the AAA and AAA employees are incompetent to testify as witnesses in any such proceeding.

Credit toward Future Case Management Fees

If within six months after utilizing Arbitrator Select, parties decide to receive full service case administration, they may file a case under the Standard Commercial Fee Schedule. Full credit for the amount paid for this service will be reflected in the reduced filing fee paid at the time of submission.

Refunds

There is a minimum non-refundable search fee of $750. If the AAA, in its sole discretion, is unable to compile an appropriate list of arbitrators after completing a search, the balance of the fees paid will be refunded. If arbitrators meeting the criteria spelled out on the submission form are identified, and parties strike all or do not move forward to appointment, service would be deemed granted and fees will not be refunded.

Requesting Parties and Representatives

By executing the form below, all parties and their representatives acknowledge that they agree to be bound by the terms of this submission form. If additional parties or representatives are involved in the arbitration, their contact information and signatures may be provided on a separate page.

Party:			Party:		
Nature of Business:			Nature of Business:		
Party's Representative Name:			Party's Representative Name:		
Firm/Organization Name:			Firm/Organization Name:		
Address:			Address:		
City:	State:	Zip Code:	City:	State:	Zip Code:
Phone:	Fax:		Phone:	Fax:	
Email Address:			Email Address:		
Signature (required):			Signature (required):		
You may fill out this form online and email to your local AAA office or download it, fill it out, and mail it. A listing of local offices can be found at **www.adr.org/contact.**					
Questions? Please call Customer Service at **1.800.778.7879.**					

AMERICAN ARBITRATION ASSOCIATION® REQUEST FOR ARBITRATOR SELECT: LIST ONLY

Date:
Case Type (Check one.): ☐ Commercial ☐ Construction ☐ Employment
Number of Arbitrators to be provided (Check one.): ☐ 5 ($750) ☐ 10 ($1,500) ☐ 15 ($2,000) *Fees are payable at the time of submission of this form.*
Desired Qualifications for Arbitrator(s): *Please include requests for professional and/or industry expertise, geographic limitations and/or locations, and any other relevant information.*
Additional Case Information
Dollar Amount of Claim:
Dollar Amount of Counterclaim (if any):
Nature of Dispute:

Termination of AAA Authority

With **Arbitrator Select: List Only,** AAA services conclude with the provision of the arbitrator list. Therefore, AAA services do not include, among other things, the handling of fees charged by the arbitrator(s), inviting arbitrator(s) to serve, performance-related matters, conflict checks and disclosures, scheduling, award-related matters or any other issues that might arise during the arbitration proceeding.

Exclusion of Liability

a. The parties agree that neither the AAA nor any arbitrator listed or appointed under this service is a necessary or proper party in judicial proceedings related to either the parties' arbitration or the provision of services under the AAA's Arbitrator Select.

b. The parties agree that neither the AAA nor any arbitrator listed or appointed under this service shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with the parties' arbitration or the provision of AAA's Arbitrator Select.

c. The parties further agree not to call the arbitrator, the AAA or AAA employees as a witness in litigation or any other proceeding relating to the arbitration for which the AAA's Arbitrator Select has been utilized. The arbitrator, the AAA and AAA employees are incompetent to testify as witnesses in any such proceeding.

Credit toward Future Case Management Fees

If within six months after utilizing Arbitrator Select, parties decide to receive full service case administration, they may file a case under the Standard Commercial Fee Schedule. Full credit for the amount paid for this service will be reflected in the reduced filing fee paid at the time of submission.

Refunds

There is a minimum non-refundable search fee of $750. If the AAA, in its sole discretion, is unable to compile an appropriate list of arbitrators after completing a search, the balance of the List Only service fees will be refunded.

Requesting Party and Representative

By executing the form below, all parties and their representatives acknowledge that they agree to be bound by the terms of this submission form.

Party:	Nature of Business:	
Party's Representative Name:	Firm/Organization Name:	
Address:		
City:	State:	Zip Code:
Phone:	Fax:	
Email Address:		
Signature (required):		
You may fill out this form online and email to your local AAA office or download it, fill it out, and mail it in. A listing of local offices can be found at www.adr.org/contact.		
Questions? Please call Customer Service at **1.800.778.7879.**		

Arbitrators & Mediators

The AAA National Roster of Arbitrators and Mediators: EXPERTISE MATTERS

Choosing the right arbitrator or mediator is one of the most important decisions parties make in the dispute resolution process. Parties need arbitrators and mediators who understand the intricacies, vulnerabilities, and variances of their cases and industries. The AAA tailors its panels for these qualifications.

Expertise--knowledge, prowess, mastery, proficiency in a particular field—is crucial because of what is at stake. AAA panels are comprised of

- accomplished attorneys with exceptional subject-matter expertise;
- former federal and state judges; and
- business owners who understand the essence of the dispute.

Not only do AAA panelists have expertise in focused topics of their disciplines, but they also are required to take ongoing education in the art and science of arbitration.

The use of arbitration and mediation has become a significant part of the justice system, and the AAA is cognizant that its arbitrators and mediators undertake serious responsibilities and ethical obligations to the public as well as to the parties.

Parties can be assured that stringent standards of ethics and experience are required by any member serving on the **AAA National Roster of Arbitrators and Mediators**.

Primary Panels of the AAA

Commercial

Construction

Employment

International

Labor

Specialty Panels

Aerospace, Aviation, and National Security (https://go.adr.org/aans-panel.html?utm_source=website&utm_medium=click&utm_campaign=aans_panel)

Construction Mega Project (https://www.adr.org/constructionmegapanel/faces/FeaturedPanelists)

Cyber Security

eDiscovery Special Master Select (https://go.adr.org/eDiscovery_Special_Master.html?utm_source=website&utm_medium=click&utm_campaign=ediscovery_special_master)

Energy

Healthcare (/sites/default/files/document_repository/AAA196_AAA_Healthcare_ADR_Services.pdf)

Intellectual Property

Mergers and Acquisitions and Joint Ventures (https://go.adr.org/ma-jointventure-panels.html?

utm_source=website&utm_medium=click&utm_campaign=ma-jointventure-panels)

Judicial (https://go.adr.org/Judicial_Panel.html?utm_source=website&utm_medium=click&utm_campaign=judicial-panel)

Large Complex Cases

Contact Us

Rules, Forms & Fees

Rules, Forms & Fees (/Rules)

(https://go.adr.org/split-the-baby)

Other Links

- Application Process for Admittance to the AAA National Roster of Arbitrators >
- The AAA's National Roster of Arbitrators >
- Qualification Criteria for Admittance to the AAA Panel of Mediators >
- AAA Code of Ethics for Arbitrators in Commercial Disputes >
- Qualification Criteria AAA Panel of Construction Arbitrators >
- Qualification Criteria and Responsibilities for Members of the AAA Panel of Employment Arbitrators >
- Qualification Criteria for Admittance to the AAA Labor Panel >
- Qualification Criteria and Responsibilities for Members of the AAA Judicial Settlement Conference Panel >
- Application Information International Centre for Dispute Resolution International Panel of Arbitrators and Mediators >
- Why the AAA's Roster of Arbitrators is Not Publicly Available >

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FEDERAL ARBITRATION ACT

CHAPTER 1—GENERAL PROVISIONS

Editorial Notes

Amendments

1990—Pub. L. 101–650, title III, §325(a)(2), Dec. 1, 1990, 104 Stat. 5120, added item 15 "Inapplicability of the Act of State doctrine" and redesignated former item 15 "Appeals" as 16.

1988—Pub. L. 100–702, title X, §1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91–368, §3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as "Chapter 1" and added heading for Chapter 1.

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

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

(July 30, 1947, ch. 392, 61 Stat. 670.)

Derivation

Act Feb. 12, 1925, ch. 213, §1, 43 Stat. 883.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a

contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

Derivation

Act Feb. 12, 1925, ch. 213, §2, 43 Stat. 883.

§3. Stay of proceedings where issue therein referable to arbitration

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

(July 30, 1947, ch. 392, 61 Stat. 670.)

Derivation

Act Feb. 12, 1925, ch. 213, §3, 43 Stat. 883.

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

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

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, §19, 68 Stat. 1233.)

Derivation

Act Feb. 12, 1925, ch. 213, §4, 43 Stat. 883.

Editorial Notes

References in Text

Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

Amendments

1954—Act Sept. 3, 1954, brought section into conformity with present terms and practice.

§5. Appointment of arbitrators or umpire

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

(July 30, 1947, ch. 392, 61 Stat. 671.)

Derivation

Act Feb. 12, 1925, ch. 213, §5, 43 Stat. 884.

§6. Application heard as motion

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

(July 30, 1947, ch. 392, 61 Stat. 671.)

Derivation

Act Feb. 12, 1925, ch. 213, §6, 43 Stat. 884.

§7. Witnesses before arbitrators; fees; compelling attendance

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

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

Derivation

Act Feb. 12, 1925, ch. 213, §7, 43 Stat. 884.

Editorial Notes

Amendments

1951—Act Oct. 31, 1951, substituted "United States district court for" for "United States court in and for", and "by law for" for "on February 12, 1925, for".

§8. Proceedings begun by libel in admiralty and seizure of vessel or property

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

(July 30, 1947, ch. 392, 61 Stat. 672.)

Derivation

Act Feb. 12, 1925, ch. 213, §8, 43 Stat 884.

§9. Award of arbitrators; confirmation; jurisdiction; procedure

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

(July 30, 1947, ch. 392, 61 Stat. 672.)

Derivation

Act Feb. 12, 1925, ch. 213, §9, 43 Stat. 885.

§10. Same; vacation; grounds; rehearing

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

(1) where the award was procured by corruption, fraud, or undue means;

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

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

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

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, §5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, §5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, §1, May 7, 2002, 116 Stat. 132.)

Derivation

Act Feb. 12, 1925, ch. 213, §10, 43 Stat. 885.

Editorial Notes

Amendments

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, §1(1)–(3), substituted "where" for "Where" and realigned margins in pars. (1) to (4), and substituted a semicolon for period at end in pars. (1) and (2) and "; or" for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, §1(5), substituted "If an award" for "Where an award", inserted a comma after "expired", and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, §1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, §1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted "section 580" for "section 590" and "section 572" for "section 582".

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted "In any" for "In either", redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: "The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award

upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

§11. Same; modification or correction; grounds; order

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

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

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

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

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

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §11, 43 Stat. 885.

§12. Notice of motions to vacate or modify; service; stay of proceedings

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

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §12, 43 Stat. 885.

§13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

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

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

(b) The award.

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

The judgment shall be docketed as if it was rendered in an action.

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

(July 30, 1947, ch. 392, 61 Stat. 673.)

Derivation

Act Feb. 12, 1925, ch. 213, §13, 43 Stat. 886.

§14. Contracts not affected

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

(July 30, 1947, ch. 392, 61 Stat. 674.)

Derivation

Act Feb. 12, 1925, ch. 213, §15, 43 Stat. 886.

Editorial Notes

Prior Provisions

Act Feb. 12, 1925, ch. 213, §14, 43 Stat. 886, former provisions of section 14 of this title relating to "short title" is not now covered.

§15. Inapplicability of the Act of State doctrine

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

(Added Pub. L. 100–669, §1, Nov. 16, 1988, 102 Stat. 3969.)

Editorial Notes

Codification

Another section 15 of this title was renumbered section 16 of this title.

§16. Appeals

(a) An appeal may be taken from—

(1) an order—

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

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

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

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

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

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

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

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

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

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

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

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

(Added Pub. L. 100–702, title X, §1019(a), Nov. 19, 1988, 102 Stat. 4670, §15; renumbered §16, Pub. L. 101–650, title III, §325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)

Editorial Notes

Amendments

1990—Pub. L. 101–650 renumbered the second section 15 of this title as this section.

DELAWARE UNIFORM ARBITRATION ACT

TITLE 10

Courts and Judicial Procedure

Special Proceedings

CHAPTER 57. Uniform Arbitration Act

§ 5701. Effect of arbitration agreement.

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, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment on an award. In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives, except as otherwise provided in § 5725 of this title.

10 Del. C. 1953, § 5701; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5702. Jurisdiction; applications; venue; statutes of limitations.

(a) *Jurisdiction of the Court; applications to the Court.* — The term "Court" means the Court of Chancery of this State, except where otherwise specifically provided. The making of an agreement described in § 5701 of this title specifically referencing the Delaware Uniform Arbitration Act [§ 5701 et seq. of this title] and the parties' desire to have it apply to their agreement confers jurisdiction on the Court to enforce the agreement under this chapter and to enter judgment on an award thereunder, except as provided in § 5718 of this title. Action shall be commenced by an initial complaint and shall be heard in the manner and upon the notice provided by law or rule of court on any civil action. Notice of an initial complaint shall be served in the manner provided by law for the service of summons in an action.

(b) *Venue.* — An initial complaint shall be made to the Court with the Register in Chancery in and for the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the complaint shall be filed with the Register in Chancery in the county where the adverse party resides or has a place of business or, if the adverse party has no residence or place of business in this State, to the Register in and for any county. All subsequent pleadings or applications for an order made under this chapter shall be filed in the Court hearing the initial complaint unless the Court otherwise directs.

(c) *Court of Chancery jurisdiction over arbitration-related disputes in cases not governed by the Delaware Uniform Arbitration Act.* — Unless an arbitration agreement complies with the standard set forth in subsection (a) of this section for the applicability of the Delaware Uniform Arbitration Act, any application to the Court of Chancery to enjoin or stay an arbitration, obtain an order requiring arbitration, or to vacate or enforce an arbitrator's award shall be decided by the Court of Chancery in conformity with the Federal Arbitration Act [9 U.S.C. § 1 et seq.], and such general principles of

law and equity as are not inconsistent with that Act. In such cases, the other provisions of this Delaware Uniform Arbitration Act are without standing and cases shall be adjudicated in accordance with the Court of Chancery's Rules of Procedure.

(d) *Jurisdiction of the Court of Common Pleas.* — Notwithstanding anything to the contrary in this Chapter 57 of this title, the term "Court" in this chapter shall refer to the Court of Common Pleas with respect to all actions arising from an arbitration agreement in or relating to a contract to provide consumer credit, and the making of such an agreement to arbitrate issues arising from the extension of consumer credit shall confer jurisdiction on the Court of Common Pleas, and not the Court of Chancery, to enforce the agreement and to enter judgment on an award. Any action brought under this Chapter 57 of this title relating to an agreement to arbitrate issues arising from the extension of consumer credit filed in the Court of Chancery shall not therefore be dismissed, but shall be transferred to the Court of Common Pleas for resolution there as though filed originally in that Court.

10 Del. C. 1953, § 5702; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186); 76 Del. Laws, c. 34, § 1 (https://legis.delaware.gov/SessionLaws?volume=76&chapter=34); 77 Del. Laws, c. 8, §§ 2, 3 (https://legis.delaware.gov/SessionLaws?volume=77&chapter=8);

§ 5703. Proceedings to compel or enjoin arbitration; notice of intention to arbitrate.

(a) *Proceeding to compel arbitration.* — A party aggrieved by the failure of another to arbitrate may file a complaint for an order compelling arbitration. Where there is no substantial question whether a valid agreement to arbitrate in this State was made or complied with the Court shall order the parties to proceed with arbitration. Where any such question is raised it shall be tried forthwith in said Court. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in the Court of Chancery in the State the application shall be made therein. If the application is granted, the order shall operate to stay the pending or any subsequent action, or so much of it as is referable to arbitration. Any action or proceeding in any other court of the State, involving an issue subject to arbitration, shall be stayed if an order for arbitration or a complaint or an application therefor has been made in the Court of Chancery under this chapter or, if the issue is severable, the stay may be with respect thereto only.

(b) *Application to enjoin arbitration.* — Subject to subsection (c) of this section, a party who has not participated in the arbitration and who has not been made or served with an application to compel arbitration may file its complaint with the Court seeking to enjoin arbitration on the ground that a valid agreement was not made or has not been complied with.

(c) *Notice of intention to arbitrate.* — A party must serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to enjoin the arbitration within 20 days after such service such party shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with. Such notice shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. A complaint seeking to enjoin arbitration must be made by the party served within 20 days after service of the notice or the party shall be so precluded. Notice of the filing of such complaint shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.

10 Del. C. 1953, § 5703; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186); 77 Del. Laws, c. 8, §§ 4-6 (https://legis.delaware.gov/SessionLaws?volume=77&chapter=8);

§ 5704. Appointment of arbitrators by Court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and the arbitrator's successor has not been duly appointed, the Court on complaint or on application in an existing case of a party shall appoint 1 or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

10 Del. C. 1953, § 5704; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5705. Majority action by arbitrators.

The powers of the arbitrators shall be exercised by a majority unless otherwise provided by the agreement.

10 Del. C. 1953, § 5705; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5706. Hearing.

Unless otherwise provided by the agreement:

(1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered or certified mail, return receipt requested, not less than 5 days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The Court, on complaint or on application in an existing action, may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(3) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

10 Del. C. 1953, § 5706; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5707. Representation by attorney.

A party has the right to be represented by an attorney, and may claim such right at any time at any proceeding or hearing under this chapter. A waiver thereof prior to the proceeding or hearing is ineffective. If a party is represented by an attorney, papers to be served on the party shall be served upon the party's attorney.

10 Del. C. 1953, § 5707; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5708. Witnesses; subpoenas; depositions.

(a) The arbitrators may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths. An arbitrator and any attorney of record in any arbitration proceeding shall have the power to issue subpoenas in his or her own name. Subpoenas so issued shall be served by any sheriff, deputy sheriff, constable or other person, in the manner provided by law for the service and enforcement of subpoenas in a civil action and in accordance with the provisions of Chapter 21 of this title.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be in accordance with § 8903 of this title.

10 Del. C. 1953, § 5708; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5709. Award generally.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered or certified mail, return receipt requested, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the Court orders on complaint or application of a party in an existing case. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless the party notifies the arbitrators of such objection prior to the delivery of the award. The arbitrators shall deliver a copy of the award to each party in the manner provided in the agreement, or if no provision is so made, personally or by registered or certified mail, return receipt requested.

10 Del. C. 1953, § 5709; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5710. Award by confession.

(a) *When available.* — An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement, verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.

(b) *Time of award.* — The award shall be made at any time within 3 months after the statement is verified and has been served upon the arbitrators or the agency or person or persons named by the parties to designate the arbitrators. Such service shall be made personally or by registered or certified mail, return receipt requested.

(c) *Persons or agency making award.* — The award may be made and entered on the judgment roll by the arbitrators or by the agency or person or persons named by the parties to designate the arbitrators.

10 Del. C. 1953, § 5710; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5711. Modification of award by arbitrators.

On written application of a party to the arbitrators within 20 days after delivery of the award to the applicant, or, if an application to the Court is pending under § 5713, 5714 or 5715 of this title, on submission to the arbitrators by the Court under such conditions as the Court may order, the arbitrators may modify or correct the award upon the grounds stated in § 5715(a)(1) and (3) of this title, or for the purpose of clarifying the award. Written notice of such application to the arbitrators shall be given forthwith to the opposing party, delivered personally or by registered or certified mail, return receipt requested, stating that the party must serve his or her objections thereto, if any, within 10 days from the date of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within 30 days after either written objection to modification has been served on them or the time for serving such objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration. The award so modified or corrected by the arbitrators is subject to the provisions of §§ 5713, 5714 and 5715 of this title.

10 Del. C. 1953, § 5711; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5712. Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The Court, on complaint or on application in an existing case, may reduce or disallow any fee or expense which it finds

excessive, or may allocate it as justice requires.

10 Del. C. 1953, § 5712; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5713. Confirmation of an award.

The Court shall confirm an award upon complaint or application of a party in an existing case made within 1 year after its delivery to the party, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the Court shall proceed as provided in §§ 5714 and 5715 of this title.

10 Del. C. 1953, § 5713; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5714. Vacating an award.

(a) Upon complaint or application of a party in an existing case, the Court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral except where the award was by confession, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706 of this title, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection; or

(5) There was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection;

but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in paragraph (a)(5) of this section, the Court may order a rehearing and determination of all or any of the issues, before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the Court in accordance with § 5704 of this title, or, if the award is vacated on grounds set forth in paragraphs (a)(3) and (4) of this section, the Court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 5704 of this title. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the Court shall confirm the award.

10 Del. C. 1953, § 5714; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 77 Del. Laws, c. 8, § 7 (https://legis.delaware.gov/SessionLaws?volume=77&chapter=8);

§ 5715. Modification or correction of award by Court.

(a) Upon complaint or on application in an existing case made within 90 days after delivery of a copy of the award to the applicant, the Court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or,

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the Court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the Court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

10 Del. C. 1953, § 5715; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5716. Judgment or decree on award.

Upon the granting of an order confirming, modifying or correcting an award, except in cases where the award is for money damages, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the Court.

10 Del. C. 1953, § 5716; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5717. Judgment roll; docketing with Register in Chancery.

(a) On entry of judgment or decree in cases other than an award for money damages, the Register shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying or correcting the award; and

(4) A copy of the final judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

10 Del. C. 1953, § 5717; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5718. Transfer of money damage award to Superior Court; lien on real estate.

(a) Upon the granting of an order confirming, modifying or correcting an award for money damages, a duly certified copy of the award and of the order confirming, modifying or correcting the award shall be filed with the prothonotary of the Superior Court in the county where the arbitration was conducted and the award made. The prothonotary shall enter in his or her judgment docket the names of the parties, the amount of the award, the time from which interest, if any, runs, and the amount of the costs, with the true date of such filing and entry. A confirmed award, so entered, shall constitute a judgment or decree on the docket with the same force and effect as if rendered in an action at law.

(b) Any confirmed award so transferred as authorized by subsection (a) of this section, shall, from that date, become and be 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 that Court.

10 Del. C. 1953, § 5718; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5719. Appeals.

(a) Appeals may be taken from:

(1) A final order denying a complaint seeking to compel arbitration made under § 5703(a) of this title;

(2) An order granting an application to enjoin arbitration made under § 5703(b) of this title;

(3) A final order confirming or denying confirmation of an award;

(4) A final order modifying or correcting an award;

(5) A final order vacating an award without directing a rehearing; or

(6) A final judgment or decree entered pursuant to the provisions of this chapter.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

10 Del. C. 1953, § 5719; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5720. Uniformity of interpretation.

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

10 Del. C. 1953, § 5720; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5721. Short title.

This chapter may be cited as the “Delaware Uniform Arbitration Act.”

10 Del. C. 1953, § 5721; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 77 Del. Laws, c. 8, § 8 (https://legis.delaware.gov/SessionLaws?volume=77&chapter=8);

§ 5722. Death or incompetency of a party.

Where a party dies after making a written agreement to submit a controversy to arbitration, the proceedings may be begun or continued upon the application of, or upon notice to, the party’s executor or administrator, or, where it relates to real property, the party’s distributee or devisee who has succeeded to the party’s interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetency of a party, the Court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a judgment or decree has been rendered.

10 Del. C. 1953, § 5722; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382); 70 Del. Laws, c. 186, § 1 (https://legis.delaware.gov/SessionLaws?volume=70&chapter=186);

§ 5723. Arbitration of contracts of State and municipalities.

It shall be lawful to include in any contract hereinafter executed by or on behalf of the State, or any department or agency thereof or by or on behalf of any county, municipal corporation, or other division of the State, a provision that any matter in dispute arising under the said contract shall be submitted to arbitration in accordance with this chapter or such sections thereof as may be set forth in such contract, except as provided in § 5725 of this title.

10 Del. C. 1953, § 5723; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5724. Application of chapter to state and municipal contracts.

This chapter applies to any written contract to which the State or any agency or subdivision thereof, or any municipal corporation or political division of the State shall be a party, except as provided in § 5725 of this title.

10 Del. C. 1953, § 5724; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

§ 5725. Exclusion of collective bargaining labor contracts with public and private employers.

Notwithstanding anything contained in this chapter by word or inference to the contrary, this chapter shall not apply to labor contracts with either public or private employers where such contracts have been negotiated by, or the employees covered thereby are represented by, any labor organization or collective bargaining agent or representative.

10 Del. C. 1953, § 5725; 58 Del. Laws, c. 382, § 2 (https://legis.delaware.gov/SessionLaws?volume=58&chapter=382);

SUPERIOR COURT RULE 16.1
AND RELATED FORMS

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ORDER ADOPTING A NEW RULE 16.1 OF THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

This 7th day of December, 2017, **IT IS SO ORDERED** that:

1. A new Superior Court Civil Rule 16.1 is adopted as follows:

Rule 16.1 Mandatory Non-Binding Arbitration.

(a) *Actions Subject to Mandatory Non-Binding Arbitration ("MNA")*. Notwithstanding and in addition to the ADR provisions contained in Rule 16, all civil actions, except those actions listed in subsection (b) hereof, in which (1) trial is available; (2) monetary damages are sought; (3) any nonmonetary claims are nominal; and (4) counsel for claimant has made an election on the Civil Case Information Sheet for mandatory non-binding arbitration (hereinafter "MNA"), are subject to mandatory non-binding arbitration. The jurisdictional authority of the arbitrator for any case in which such election has been made shall be limited to fifty thousand dollars ($50,000), exclusive of costs and interest.

(b) *Civil Actions Not Subject to MNA*. The following civil actions shall not be referred to MNA but the parties may stipulate to a form of ADR:

(1) An action involving a matter listed in Superior Court Civil Rules 23 and 81(a);

(2) A replevin, declaratory judgment, foreign or domestic attachment, interpleader, summary proceedings, or mortgage foreclosure action;

(3) Any *in forma pauperis* action where the claims are substantially non-monetary; or

(4) An action to enforce a statutory penalty.

(c) *Definition-Arbitration*. Arbitration is a process by which a qualified neutral individual ("arbitrator") hears all sides of a controversy and renders a fair decision based on the evidence and the law. If the parties stipulate in writing, the decision shall be binding.

(d) *Filing Requirements*. Each plaintiff filing an action subject to MNA and each defendant filing a responsive pleading and/or motion shall simultaneously file the interrogatories and sworn statements required by Civil Rule 3(h) and 5(b), subject to the following conditions:

(1) In an action in which counsel for plaintiff(s), or a plaintiff, if unrepresented, certifies to the Court that a potential defendant(s) cannot be ascertained at the time of the filing of the complaint, the case shall not be subject to MNA until ninety (90) days after the filing of all initial responsive pleadings, during which ninety (90) day period any party may conduct discovery limited to the identity of a potential defendant(s); (*See* Form 33.)

(2) All parties alleging personal injuries must file a responsive and complete answer to Form 30 Interrogatory Number 7, if applicable, and all defendants must file a responsive and complete answer to Form 30 Interrogatory Number 6. Parties are under a continuing obligation to update these answers as additional information becomes known.

(3) All parties alleging personal injuries shall provide to the defending party(s) a medical authorization which complies with HIPPA requirements within five (5) days of the filing of the Answer to the Complaint. Such parties shall also provide, upon request, such additional authorizations which are required to obtain records. The defendant shall notify all other parties of the receipt of all records and shall provide copies of all such records to the party who has alleged the personal injuries. The defendant shall also provide copies to all other parties upon request. All parties who receive copies of the records, except for the party(s) alleging the personal injuries, shall pay a pro-rated share of the costs incurred to obtain and reproduce the records.

(4) The party alleging personal injuries shall, within five (5) days of the entry of appearance by the defendant, serve Defendant with all medical records and reports required by Superior Court Civil Rule 3(h).

(5) All expert witness reports in existence at the time of the filing of the Complaint, upon which a party intends to rely at the arbitration, shall be provided to

opposing party(s) within five (5) days after service of the Answer under Superior Court Civil Rule 5(b). Expert reports received thereafter, upon which either party intends to rely at the arbitration, shall be provided to the opposing party(s) within five (5) days of receipt.

(e) *Discovery*.

(1) The defendant may issue subpoenas *duces tecum* pursuant to Superior Court Civil Rule 45 for records of health care providers who have provided medical care or services to the party alleging personal injuries. The defendant shall notify all other parties of the receipt of all records and shall provide copies of all such records to the party who has alleged the personal injuries. The defendant shall also provide copies to all other parties upon request and all parties who request copies of records shall pay a pro-rated share of the cost incurred to obtain and reproduce the records.

(2) Defendant(s) may not request a medical examination of the plaintiff prior to the arbitration hearing, but may have a medical records review performed.

(f) *Selection of the Arbitrator*. The Parties shall confer and select an arbitrator within twenty (20) days of the filing of the close of all initial pleadings by the parties. Unless otherwise ordered by the Court, if an arbitrator is not selected within twenty (20) days, the parties may not utilize arbitration under this rule. Counsel must confer as to arbitrators in good faith following the filing of the initial pleadings.

(g) *Motions*. The arbitrator shall hear and decide all motions filed by the parties related to the case except:

(1) All case dispositive motions, which, subject to subsection (o), are stayed until after the arbitration has been held;

(2) Motions to compel a party to comply with the selection of an arbitrator or the scheduling of arbitration; and

(3) Motions for relief pursuant to subsections (k) and (o) of this Rule.

(h) *Scheduling*.

(1) Unless otherwise ordered by the Court, an arbitration shall be held within one hundred twenty (120) days of the close of all initial pleadings by the parties.

(2) A Case Scheduling Order will be issued by the assigned Judge in accordance with that Judge's preferences. At the Court's discretion, a conference may be held to arrange for the trial date and, if arbitration has not taken place, the parties will provide a written status report as to when the arbitration will take place. Subject to the Court's discretion, failure to proceed to arbitration within one hundred twenty (120) days of the close of all initial pleadings, shall not prevent the assignment of a trial date.

(i) *Ethics*. Arbitrators shall follow the Delaware Lawyers' Rules of Professional Conduct and shall follow Canon 3(C)(1) of the Delaware Judges' Code of Judicial Conduct.

(j) *Compensation*.

(1) Unless otherwise stipulated in advance by the parties, the arbitrator appointed, except nonretired members of the State Judiciary, shall receive compensation from the parties for services for a minimum of three (3) hours of hearing time at a reasonable rate set by the arbitrator. Each party shall pay that party's share of the total MNA fee in advance of the hearing. It is the obligation of each attorney, or any party appearing pro se, to timely pay any arbitrator's fee when billed. Any attorney who refuses or neglects to pay the arbitrator's fee, after second notice, may be subject to a loss of civil case filing privileges. (*See* Civil Rule 77(h)(E)).

(2) An arbitrator who certifies that he or she has performed services in excess of three (3) hours may receive additional compensation from the parties for such additional time, provided that the arbitrator provides the terms for additional compensation to the parties in writing in advance of the hearing and all parties agree to those terms. Fee agreements will be enforced by the Court upon a Motion filed by the arbitrator.

(k) *The Arbitration Hearing*. Unless otherwise ordered by the Court, the arbitration shall be scheduled and completed as soon as practicable and within the time allowed for conducting MNA by these Rules. Written guidelines setting forth the arbitration procedures, forms and frequently asked questions will be available on the Court's website prior to the effective date.

(1) Unless the date of the hearing is agreed upon by all parties, the arbitrator shall give at least ten (10) days written notice of the hearing to all parties.

(2) The arbitrator, in the arbitrator's discretion, may schedule an informal preliminary conference with the parties.

(3) The arbitration may proceed in the absence of any party who fails to appear, after notice, but an award of damages shall not be based solely upon the failure of a party to appear.

(4) The Rules of this Court may be used to compel the attendance of witnesses and production of documents.

(5) Unless waived by all parties, the testimony shall be under oath or affirmation, administered by a notary public.

(6) The Delaware Uniform Rules of Evidence shall be used as a guide to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be delivered to the arbitrator and all parties at least ten (10) days prior to the hearing. Any party that fails to deliver all

exhibits at least (10) days prior to the date set for hearing forfeits any right to costs allowable under this Rule. The arbitrator shall consider such exhibits without formal proof, unless the arbitrator and the parties have been notified at least five (5) days prior to the hearing that an adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrator may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered to an adverse party as provided herein. The arbitrator, in his or her discretion, may view or inspect exhibits or the locus involved in the action either with or without the parties and/or their attorneys.

(7) A party at its expense may, with at least ten (10) days prior written notice to the arbitrator and adverse party, have a recording or transcript made of the arbitration hearing.

(8) An arbitrator, in his or her discretion, may limit testimony in the arbitration hearing.

(9) An arbitrator, in his or her discretion, may adjourn the hearing for not more than ten (10) days.

(10) Each party and each attorney, unless excused by the arbitrator, shall appear and participate in the arbitration hearing.

(A) A party, who without being excused, fails to appear at an arbitration hearing shall not be entitled to demand a trial de novo, except upon payment of the total arbitrator's fee and all Court costs incurred by all parties to date.

(B) Failure to appear and participate without just cause by any person whose attendance is required shall subject the offender to sanctions under Superior Court Civil Rule 37(d).

(l) *Arbitrator's Order*. The arbitrator shall certify as part of the order that he or she has not examined and is not familiar with the amount of insurance coverage, unless such was necessary for the arbitration decision, and is not disqualified under Canon 3(C)(1) of the Delaware Judge's Code of Judicial Conduct. In addition:

(1) The arbitrator shall electronically file the original written arbitration order, or notice with the Prothonotary with copies to each party within five (5) days following the close of the arbitration hearing.

(2) The arbitration order shall be entered as an order of judgment by any judge of the Court, upon motion of a party, after the time for requesting a trial de novo has expired. A judgment so entered shall have the same force and effect of a judgment of the Court in a civil action, but shall not be subject to appeal.

(m) *Time for Arbitration Hearing and Appeal-Trial De Novo*. Within twenty (20) days after the electronic filing of the arbitration order any party may

electronically file a written demand for a trial de novo. A demand for a trial de novo is the sole remedy of any party in any action subject to arbitration under this Rule.

(1) Any right of trial by jury shall be preserved inviolate. The stay of motions and discovery provided by this Rule shall automatically terminate upon the service and filing of a demand for trial de novo or the placement of the case upon the Court's trial calendar following the expiration of the time allowed for MNA. The time for responses to motions and discovery shall commence upon the date of the filing of the demand for trial de novo or the placement of the case upon the Court's trial calendar following the expiration of the time allowed for MNA.

(2) Participation by the parties in an arbitration pursuant to this Rule also constitutes compliance with the ADR requirements of Rule 16. In any case not arbitrated, either within the time allowed by this Rule or within the time allowed by the Court, the parties must comply with the ADR provisions of Rule 16.

(3) At the trial de novo, the Court shall not admit evidence that there has been an arbitration proceeding, the nature or amount of the order, nor consider any other matter concerning the conduct or outcome of the arbitration proceeding, except recorded testimony taken at the arbitration hearing may be used in the same manner as testimony taken at a deposition.

(4) If the party who demands a trial de novo fails to obtain a verdict from the jury or judgment from the Court, exclusive of interests and costs, more

favorable to the party than the arbitrator's order, that party shall be assessed the costs of arbitration, and the arbitrator's total compensation. In addition:

(A) If the plaintiff obtains a verdict from the jury or judgment from the Court equal to or more favorable than the arbitrator's order, and the defendant demanded a trial de novo, interest on the amount of the arbitrator's award shall be payable in accordance with the interest provisions of 6 *Del. C.* §2301(a) beginning with the date of the order.

(B) If the defendant obtains a defense verdict or a verdict from the jury or judgment from the Court equal to or more favorable than the arbitrator's order, and the plaintiff demanded a trial de novo, the defendant shall be awarded costs, as described in Superior Court Civil Rule 68, incurred after the date of the arbitrator's order.

(5) An election to participate in an arbitration under this Rule shall not be considered for any purpose, other than as specifically provided under this Rule.

(n) *Judgments*. In the event that no request for trial de novo is timely filed and a judge upon motion has entered an order of judgment, the Prothonotary shall record the order of judgment in the proper docket and judgment index.

(o) *Motions for Relief and Enforcement*. Subject to the other Civil Rules, any party subject to this Rule may file with the Court a motion for relief from or to enforce compliance with any part of this Rule, in part or in its entirety, for good

cause shown including, but not limited to, motions to compel, motions to bypass arbitration, motions requesting additional discovery, and motions to enlarge the time allowed for conducting arbitration. No motion for enlargement of time for the trial date may be filed by a party subject to this Rule.

(p) *Collateral Estoppel*. Awards entered pursuant to arbitration proceedings under this Rule shall not have collateral estoppel effect in any other judicial proceedings.

(q) *MNA Civil Immunity*. All arbitrators shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in MNA, unless an 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. No arbitrator shall be compelled to give testimony in any subsequent proceeding in connection with any hearing or conference over which the arbitrator presided, unless so directed by the Court.

2. This Rule shall take effect on January 1, 2018.

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Matthew P. Denn, Attorney General
J. Brendan O'Neill, Public Defender
Court Administrators
Michael Ferry, Director of Operations
Carolyn Meier, LexisNexis
Law Libraries

SAMPLE RULE 16.1 FORM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JANE SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. NXXC-XX-XXX (EMD)
	)	Trial by Jury of Twelve Demanded
JOHN DOE,	)	
	)	
Defendant.	)	

NOTICE OF SELECTION OF ARBITRATOR

PLEASE TAKE NOTICE that the parties have selected _____ to arbitrate the claims in this case.

/s/ Best Plaintiff's Attorney Ever
Best Law Firm Ever
8 Contingency Fee Road
Wilmington, DE 19801

Dated: _____

EXHIBIT 2

SAMPLE RULE 16.1 FORM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JANE SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. NXXC-XX-XXX (EMD)
	)	Trial by Jury of Twelve Demanded
JOHN DOE,	)	
	)	
Defendant.	)	

NOTICE OF MOTION TO BE HEARD BY ARBITRATOR

PLEASE TAKE NOTICE that the attached Motion to _____ shall be heard and decided by the selected arbitrator in this case.

/s/ Best Plaintiff's Attorney Ever
Best Plaintiff's Firm Ever
8 Contingency Fee Road
Wilmington, DE 19801

or

/s/ Best Defendant's Attorney Ever
Best Defense Firm Ever
Zero Value Lane
Wilmington, DE 19801

Dated: _____

EXHIBIT 3

SAMPLE RULE 16.1 FORM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JANE SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. NXXC-XX-XXX (EMD)
	)	Trial by Jury of Twelve Demanded
JOHN DOE,	)	
	)	
Defendant.	)	

DEMAND FOR TRIAL DE NOVO

Plaintiff/Defendant, by their undersigned counsel, hereby demand a trial de novo in the above captioned action from the Arbitrator's Order, dated _____. A trial in the Superior Court is expected to last ___ number of days.

/s/ Best Plaintiff's Attorney Ever
Best Plaintiff's Firm Ever
8 Contingency Fee Road
Wilmington, DE 19801

or

/s/ Best Defendant's Attorney Ever
Best Defense Firm Ever
Zero Value Lane
Wilmington, DE 19801

Dated: _____

EXHIBIT 5

List of DSBA Certified Arbitrators

List of Certified DSBA Arbitrators

These individuals have completed the core arbitration seminar on arbitration techniques and ethics and at least one additional arbitration specialized subject as listed below. Certification extends until the date noted:

COMMERCIAL LAW:

Barron, Loren R. (2024)
Bifferato, Ian Connor (2024)
Bookout, Anne E. (2024)
Ciociola, Robert L (2024)
Conaway, Bernard G. (2024)
Costello, Patrick A. (2024)
Dargitz, Stephen D. (2024)
Emmert, Christophe Clark (2024)
Klein, Julia B. (2024)
Kovach, Thomas H. (2024)
Lemisch, Raymond H. (2024)
Liston, Ian R. (2024)
McTaggart, Michael F. (2024)
Pincus, Kathryn A. (2024)
Proctor, Vernon R. (2024)
Raphael, Jarrod N. (2024)
Ridgely, Henry duPont (2024)
Schwartz, Benjamin A. (2024)
Weinblatt, Richard C. (2024)

EMPLOYMENT & LABOR LAW:

Albert, Alan (2024)
Fasic, G. Kevin (2024)
Gottesman, Brian Michael (2024)
Preston, Thomas P. (2024)
Reid, Donald E. (2024)
Shapiro, Aaron M. (2024)
Stoner, Ronald L. (2024)
Witherspoon, Katherine R. (2024)

FAMILY LAW:

Arrington, Michael W. (2025)
Heckert, Carl W. (2025)
Laffey, Kathryn J. (2025)
Walls, William J. Jr. (2025)
Yeager, Julie H. (2025)

PERSONAL INJURY LAW:

Adams, Wade Allen III (2024)
Bennett, Daniel P. (2024)
Chong, Jimmy C. (2024)
Collins, Robert C. II (2024)
Hampton, Stephen A. (2024)
Hauske, Susan List (2024)
Huff, Kelley M. (2024)
Jones, Francis J. “Pete” (2024)
McTaggart, Michael F. (2024)
Milewski, Shari L. (2024)
Schwartz, Benjamin A. (2024)
Stratton, Barbara H. (2024)
Wetzel, Benjamin C. (2024)

SECTION II-ARBITRABILITY

CASE LAW

SUPREME COURT OF THE UNITED STATES

No. 17–1272

HENRY SCHEIN, INC., ET AL., PETITIONERS *v.* ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 8, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 68–70 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943–944 (1995).

Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly

groundless." The question presented in this case is whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a "wholly groundless" exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.

I

Archer and White is a small business that distributes dental equipment. Archer and White entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton and Crane's equipment. The relationship eventually soured. As relevant here, Archer and White sued Pelton and Crane's successor-in-interest and Henry Schein, Inc. (collectively, Schein) in Federal District Court in Texas. Archer and White's complaint alleged violations of federal and state antitrust law, and sought both money damages and injunctive relief.

The relevant contract between the parties provided:

> "Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina." App. to Pet. for Cert. 3a.

After Archer and White sued, Schein invoked the Federal Arbitration Act and asked the District Court to refer the

parties' antitrust dispute to arbitration. Archer and White objected, arguing that the dispute was not subject to arbitration because Archer and White's complaint sought injunctive relief, at least in part. According to Archer and White, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part.

The question then became: Who decides whether the antitrust dispute is subject to arbitration? The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions. Schein contended that the contract's express incorporation of the American Arbitration Association's rules meant that an arbitrator—not the court—had to decide whether the arbitration agreement applied to this particular dispute. Archer and White responded that in cases where the defendant's argument for arbitration is wholly groundless—as Archer and White argued was the case here—the District Court itself may resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the District Court agreed with Archer and White about the existence of a "wholly groundless" exception, and ruled that Schein's argument for arbitration was wholly groundless. The District Court therefore denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

In light of disagreement in the Courts of Appeals over whether the "wholly groundless" exception is consistent with the Federal Arbitration Act, we granted certiorari, 585 U. S. ___ (2018). Compare 878 F. 3d 488 (CA5 2017) (case below); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F. 3d 522 (CA4 2017); *Douglas* v. *Regions Bank*, 757 F. 3d 460 (CA5 2014); *Turi* v. *Main Street Adoption Servs., LLP*, 633 F. 3d 496 (CA6 2011); *Qualcomm, Inc.* v. *Nokia Corp.,* 466 F. 3d 1366 (CA Fed. 2006), with *Belnap* v. *Iasis Healthcare*, 844 F. 3d 1272 (CA10 2017); *Jones* v. *Waffle*

House, Inc., 866 F. 3d 1257 (CA11 2017); *Douglas*, 757 F. 3d, at 464 (Dennis, J., dissenting).

II

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center,* 561 U. S., at 67. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.,* at 68–69; see also *First Options*, 514 U. S., at 943. We have explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U. S., at 70.

Even when the parties' contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the "wholly groundless" excep-

tion enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.

We conclude that the "wholly groundless" exception is inconsistent with the text of the Act and with our precedent.

We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649–650 (1986). A court has "'no business weighing the merits of the grievance'" because the "'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.'" *Id.,* at 650 (quoting *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960)).

That *AT&T Technologies* principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

In an attempt to overcome the statutory text and this Court's cases, Archer and White advances four main arguments. None is persuasive.

First, Archer and White points to §§3 and 4 of the Federal Arbitration Act. Section 3 provides that a court must

stay litigation "upon being satisfied that the issue" is "referable to arbitration" under the "agreement." Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

Archer and White interprets those provisions to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. *First Options*, 514 U. S., at 944 (alterations omitted); see also *Rent-A-Center*, 561 U. S., at 69, n. 1. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U. S. C. §2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Second, Archer and White cites §10 of the Act, which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers." §10(a)(4). According to Archer and White, if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable. The dispositive answer to Archer and White's §10 argument is that Congress designed the Act in a specific way, and it is not our proper role to redesign the statute. Archer and White's §10 argument would mean, moreover, that courts presumably also should decide frivolous merits questions that have been delegated to an arbitrator. Yet we have already rejected that argument: When the parties' contract assigns a matter to arbitration, a court may not

resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. *AT&T Technologies*, 475 U. S., at 649–650. So, too, with arbitrability.

Third, Archer and White says that, as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless. In cases like this, as Archer and White sees it, the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. So why waste the time and money? The short answer is that the Act contains no "wholly groundless" exception, and we may not engraft our own exceptions onto the statutory text. See *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 556–557 (2005).

In addition, contrary to Archer and White's claim, it is doubtful that the "wholly groundless" exception would save time and money systemically even if it might do so in some individual cases. Archer and White assumes that it is easy to tell when an argument for arbitration of a particular dispute is wholly groundless. We are dubious. The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

Fourth, Archer and White asserts another policy argument: that the "wholly groundless" exception is necessary to deter frivolous motions to compel arbitration. Again, we may not rewrite the statute simply to accommodate that policy concern. In any event, Archer and White overstates the potential problem. Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable. And under certain circumstances, arbitrators may be able to respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration. We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

In sum, we reject the "wholly groundless" exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options,* 514 U. S., at 944 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Positive

As of: November 24, 2021 1:28 AM Z

ORIX LF, LP v. InsCap Asset Mgmt., LLC

Court of Chancery of Delaware

January 14, 2010, Submitted; April 13, 2010, Decided

C.A. No. 5063-VCS

Reporter

2010 Del. Ch. LEXIS 70 *; 2010 WL 1463404

ORIX LF, LP, Plaintiff, v. INSCAP ASSET MANAGEMENT, LLC, ISM ADVISORS, LLC, LIFE INSURANCE FUND ELITE LLC, AND HARISH RAGHAVAN, Defendants.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Core Terms

arbitrability, parties, disputes, initiating, appointed, arbitration provision, arbitration clause, motion to dismiss, defendants', invest, condition precedent, life insurance, proceedings, breached, courts, crisis

Case Summary

Procedural Posture

Plaintiffs, first and second investors, filed a motion for summary judgment and defendants, investment fund and its management company, filed motions to dismiss the investors' action for complaint seeking to enjoin arbitrations commenced by the defendants under *Del. Code Ann. tit. 10, § 5703*.

Overview

Although the parties differed on the precise causes of the fund's troubles, they agreed that the 2008 financial crisis complicated its investment strategy. Rather than bringing a derivative claim alleging breach of contract and fiduciary duties against the investors, the defendants brought two arbitrations directly against them. The court found, inter alia, that the applicable arbitration provision clearly provided that "any" disputes "arising under or relating to" the agreement would be arbitrated. The arbitration demands clearly alleged that the investors breached the fund agreement. The second investor had to address its arguments about substantive arbitrability to the arbitrator. Accordingly, the substantive and procedural issues of whether the defendants' claims were appropriately committed to arbitration under *§ 5703* was a question for the arbitrator to decide.

Outcome

The motion for summary judgment was denied, and the motions to dismiss were granted without prejudice.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN1[] **Arbitration, Arbitrability**

So long as parties have a colorable argument that their claims are arbitrable, an arbitrator--not a court--must determine the ultimate question of substantive arbitrability.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

HN2[] **Arbitration, Arbitrability**

Under Delaware law, issues of procedural arbitrability are to be decided by arbitrators, not courts. Delaware courts consider the satisfaction of conditions precedent to be issues of procedural arbitrability.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

In considering a motion to dismiss for lack of subject matter jurisdiction under Del. Ch. Ct. R. 12(b)(1), a court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A court is confined to the allegations of a complaint and exhibits thereto, which must be accepted as true for purposes of a motion to dismiss.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

HN5[] **Arbitration, Arbitrability**

A court of chancery will not accept jurisdiction over claims that are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN6[] **Arbitration, Arbitrability**

Delaware law favors the enforcement of arbitration clauses.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN7[] **Arbitration, Arbitrability**

As to whether a dispute is covered by the scope of an arbitration clause, Delaware courts ordinarily resolve any doubts in favor of arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN8[] **Arbitration, Arbitrability**

If a claim is arbitrable, i.e., properly committed to arbitration, a court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN9[] **Arbitration, Arbitrability**

Any doubt as to arbitrability is to be resolved in favor of arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN10[] **Arbitration, Arbitrability**

Procedural arbitrability issues are presumptively for an arbitrator to decide.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Evidence > Inferences & Presumptions > Presumptions

HN11[] **Arbitration, Arbitrability**

Substantive arbitrability issues are gateway questions about the scope of an arbitration provision and its applicability to a given dispute. A court presumes that parties intended courts to decide issues of substantive arbitrability. The opposite presumption applies to procedural arbitrability issues, such as waiver, or satisfaction of conditions precedent to arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Evidence > Inferences & Presumptions > Presumptions

HN12[] **Arbitration, Arbitrability**

On the issue of substantive arbitrability, there is a presumption that a court, not an arbitrator, is to decide. But, where there is clear and unmistakable evidence that the parties intended otherwise, that presumption does not apply, and an arbitrator should decide the issue of substantive arbitrability.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN13[] **Arbitration, Arbitrability**

In a substantive arbitrability context, the clear and unmistakable standard can be met even when an agreement does not explicitly state that the arbitrator should decide issues of substantive arbitrability if two

conditions are satisfied. Those conditions are: (1) the contract generally refers all disputes to arbitration; and (2) the contract refers to a set of rules that would empower arbitrators to decide arbitrability.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN14[] **Arbitration, Arbitrability**

When an action is commenced under *Del. Code Ann. tit. 10, § 5703* to either compel or enjoin arbitration, a question of substantive arbitrability is to be decided by a court of chancery.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN15[] **Arbitration, Arbitrability**

In an arbitrability context, the use of both "arising out of" and "relating to" language in an arbitration provision is a broad mandate.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN16[] **Arbitration, Arbitrability**

When a court is examining predicate issues such as procedural and substantive arbitrability, making a final determination on the scope of an agreement would be improper.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN17[] **Arbitration, Arbitrability**

A signatory to an agreement vesting questions of substantive arbitrability to an arbitrator must resolve disputes about arbitrability before the arbitrator, unless the signatory can show that the opposing party's contention is wholly groundless.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN18[] **Arbitration, Arbitrability**

Absent a clear showing that a party desiring arbitration has essentially no non-frivolous argument about substantive arbitrability to make before an arbitrator, a court should require the signatory to address its arguments against arbitrability to the arbitrator.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN19[] **Arbitration, Arbitrability**

In an arbitrability context, procedural questions are clearly for an arbitrator.

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Judges: STRINE, Vice Chancellor.

Opinion by: STRINE

Opinion

MEMORANDUM OPINION

STRINE, Vice Chancellor.

I. Introduction

This matter involves a dispute between the defendants -- an investment fund, Life Insurance Fund Elite LLC (the "Fund"), and its management -- and the investors **[*2]** who contributed the Fund's capital. The parties even dispute whether they are now feuding because the market in which the Fund must invest soured during the recent financial crisis, shortly after the Fund was formed, or because two of the Fund's investors, ORIX LF, LP ("Orix") and Swiss Re Financial Products Corporation ("Swiss Re") have themselves suffered during the capital markets crisis. In any event, according to the defendants, Orix and Swiss Re allegedly want to find a way out of their investments in the Fund, which cannot dissolve for ten years, and have therefore neglected their duties by (1) removing the co-CEO they originally appointed to manage the Fund and refusing to name a successor, and (2) rejecting the defendants' requests to change the Fund's investment model to adapt to new market conditions.

Rather than bringing a derivative claim alleging breach of duties against Orix and Swiss Re, the defendants have instead brought two arbitrations directly against them, apparently using the Fund's resources to pay for the cost of the proceedings. In response, Orix has filed a complaint requesting that this court enjoin those arbitrations because the defendants failed to obtain **[*3]** Swiss Re's consent to initiate the arbitrations, which Orix claims is required under one of the contracts the parties executed when forming the Fund. The defendants, on the other hand, have pointed to a different contract, which includes a broad arbitration provision, as the agreement they are seeking to enforce and as support for their argument that their claims were properly committed to arbitration. Therefore, this case is a fight over the forum in which the parties' dispute will be adjudicated.

For the reasons set forth below, I find that the issue of whether the defendants' claims were appropriately committed to arbitration is a question for the arbitrator to decide. The applicable arbitration provision clearly provides that "any" disputes "arising under or relating to" the agreement will be arbitrated under the rules of the American Arbitration Association (the "AAA"). Per the Delaware Supreme Court's *Willie Gary* decision [1] and its progeny, [2] that language is a clear indication that the

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[1] *James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76 (Del. 2006)*.

[2] *See, e.g., Lefkowitz v. HWF Holdings, LLC, 2009 Del. Ch. LEXIS 194, 2009 WL 3806299 (Del. Ch. Nov. 13, 2009)*; *Julian v. Julian, 2009 Del. Ch. LEXIS 164, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009)*; *Carder v. Carl M. Freeman Cmtys., LLC, 2009 Del. Ch. LEXIS 2, 2009 WL 106510 (Del. Ch. Jan. 5, 2009)*; *McLaughlin v. McCann, 942 A.2d 616 (Del. Ch. 2008)*;

parties intended that any issue of substantive arbitrability is to be decided by an arbitrator. And, as required under this court's *McLaughlin* decision, *HN1*[] so long as the defendants have a colorable **[*4]** argument that their claims are arbitrable, the arbitrator -- not this court -- must determine the ultimate question of substantive arbitrability. [3] Furthermore, *HN2*[] under Delaware law, issues of procedural arbitrability are to be decided by arbitrators, not courts. [4] Delaware courts consider the satisfaction of conditions precedent, such as the consent purportedly required here, to be issues of procedural arbitrability. [5] Therefore, the question of whether Swiss Re's consent was required before the arbitrations could be brought is a procedural question for the arbitrator to decide. Thus, whether one views the interpretive issues here as questions of substantive or procedural arbitrability, Orix's arguments are for the arbitrator to consider, and I therefore dismiss Orix's complaint without prejudice under *Rule 12(b)(1)*.

II. Factual Background

These are the facts as drawn from the complaint and the documents it incorporates.

A. Orix, Swiss Re, And InsCap Form A Fund To Invest In Life Insurance New Issues

On August 10, 2007, Orix, Swiss Re, and InsCap Asset Management, LLC ("InsCap") created ISM Advisors, LLC ("ISM"), which was formed by an LLC Agreement (the "ISM Agreement"). ISM was formed for the purpose of **[*6]** owning an interest in and managing the Fund, which was created contemporaneously with the formation of ISM through the execution of another LLC Agreement (the "Fund Agreement"). Since its inception, the Fund has invested in the life insurance new issues market.

Orix and Swiss Re contributed $ 170 million of the Fund's $ 180 million in total equity commitments. In return for these contributions, Orix and Swiss Re were given minority stakes in ISM. Orix has a 6% equity interest in ISM and no voting interest. Swiss Re has a 49% voting interest and approximately 46% economic interest in ISM. InsCap has a 51% voting interest in ISM.

B. A Number Of Related Contracts Were Executed Simultaneously With The Formation Of ISM And The Fund

1. The ISM Agreement

The ISM Agreement, which is dated August 10, 2007, contains a number of provisions relevant to the dispute at hand. First, Section 3.1(b) of the ISM Agreement provides that InsCap and Swiss Re each have the right

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*Brown v. T-Ink, LLC, 2007 Del. Ch. LEXIS 174, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007)*; **[*5]** *Nutzz.com, LLC v. Vertrue, Inc., 2006 Del. Ch. LEXIS 137, 2006 WL 2220971 (Del. Ch. July 25, 2006)*.

[3] *McLaughlin, 942 A.2d at 625-27*; *see also Carder, 2009 Del. Ch. LEXIS 2, 2009 WL 106510, at *6-7* (following *McLaughlin* and deferring to the arbitrator where there is a non-frivolous argument regarding substantive arbitrability); *Lefkowitz, 2009 Del. Ch. LEXIS 194, 2009 WL 3806299, at *10* (concluding that "to the extent there is any basis for doubt about the above findings, I conclude that, consistent with the holding in *McLaughlin,* this Court 'should defer to arbitration, leaving the arbitrator to determine what is or is not before her'").

[4] *Willie Gary, 906 A.2d at 79*; *see also T-Ink, 2007 Del. Ch. LEXIS 174, 2007 WL 4302594, at *10*.

[5] *See SBC Interactive, Inc. v. Corp. Media Partners, 714 A.2d 758, 762 (Del. 1998)*; *Burton v. PFPC Worldwide, Inc., 2003 Del. Ch. LEXIS 110, 2003 WL 22682327, at *2-3 (Del. Ch. Oct. 20, 2003)*.

to appoint one CEO under the ISM Agreement, [6] and Section 3.1(a) of the ISM Agreement provides that "management and control of the business and affairs of [ISM] shall be vested exclusively with the CEOs." If the CEOs deadlock, the tie [*7] is broken by InsCap. [7] Section 3.1(d) of the ISM Agreement further provides that "[t]he CEOs will have no authority" without the approval of Swiss Re to, among other things: "(v) [make] any determination *to initiate any litigation or other proceeding or to settle litigation with third parties, or other regulatory inquiries,* in excess of $ 1.0 million or that could significantly and adversely affect the regulatory standing, as determined by such party in good faith, or industry reputation of the affected party." [8]

Second, the ISM Agreement also contains a merger clause, which provides the following:

> This Agreement, *together with the separate written agreements referenced herein,* embodies the entire agreement and understanding of the parties hereto in respect to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants or undertakings, other than those expressly set forth or referred to herein. Except as expressly [*8] provided herein, this Agreement and such separate written agreements supersede all prior agreements and understandings between the parties with respect to such subject matter. [9]

And, the ISM Agreement makes explicit reference to the Fund Agreement, which the ISM Agreement dubs the "Operating Agreement." [10] Therefore, the Fund Agreement is one of the "separate written agreements" mentioned in the merger clause.

Finally, and perhaps most importantly, the ISM Agreement does not include an arbitration provision. But, it does include a provision that provides in relevant part as follows:

> The parties agree that any process or notice of motion or other application to a court, and any paper *in connection with any arbitration,* may be served by certified mail, return receipt requested, or by personal service or in such manner as may be permissible under the rules of the applicable court or *arbitration tribunal,* provided a reasonable time for appearance is allowed. [11]

Therefore, the ISM Agreement contemplates service of process upon the parties in connection with an arbitration initiated by one of the parties.

2. The Fund [*9] Agreement

The Fund was created contemporaneously with ISM, pursuant to an LLC agreement also dated August 10, 2007 (the aforementioned "Fund Agreement"). The Fund Agreement provides that the Fund will have a ten-year life, [12] members have no right to seek to dissolve the Fund, [13] and members' ability to transfer their interest in the Fund is severely circumscribed. [14] Day-

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[6] Pursuant to this provision, Swiss Re appointed Jamshid Ehsani as its co-CEO, and InsCap appointed defendant Harish Raghavan as its co-CEO.

[7] Compl. Ex. A. at § 3.1(c) (the "ISM Agreement").

[8] *Id.* at § 3.1(d) (emphasis added).

[9] *Id.* at § 10.8 (emphasis added).

[10] *Id.* at § 1.1.

[11] *Id.* at § 10.2 (emphasis added).

[12] Fotak Aff. Ex. 1 at Art. IV (the "Fund Agreement").

[13] *Id.* at §§ 10.6, 15.1.

[14] *Id.* at § 11.2.

to-day management of the Fund is vested in ISM, [15] and Orix and Swiss Re's participation in management is limited to their membership in the Fund's Advisory Committee. [16]

ISM can be removed as the Fund's manager only after a 75% vote of the Fund's members following a "special arbitration" proceeding outlined in Section 16.11 that establishes that ISM committed at least one of six enumerated forms of misconduct. [17] That special arbitration is a simplified proceeding to be completed within 60 days of the Advisory Committee's written request for arbitration. [18] Before such special arbitration is to commence, the Advisory Committee and ISM are to agree on a particular **[*10]** set of procedures to govern the adjudication (*e.g.,* procedures regarding the timeframe for discovery, number of witnesses, etc.). [19]

For other types of disputes, the Fund Agreement includes the following provision, which states in relevant part:

> Except for matters subject to Section 16.11, *any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or validity thereof, shall, on the demand of any party, be finally settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association* ("AAA") then in effect (the "Rules") . . . . There shall be three arbitrators, one of whom shall be appointed by [ISM] within 45 days after the receipt of the demand for arbitration, one of whom shall be appointed by the party or parties (which may include Members in their capacity as such) bringing such action (or if the Managing Member or the Company is bringing such action, the party or parties against whom such action is brought) and the third of whom, who shall chair the arbitral tribunal, shall be appointed by the AAA. [20]

The Fund Agreement states no conditions before any party may invoke **[*11]** this section.

Finally, Appendix D to the Fund Agreement sets forth the Investment Guidelines that the Fund is to follow. The Fund is permitted to invest in two types of instruments:

> 80% to 100% of the committed capital of the Company will be invested in the life insurance new issues market, including, without limitation, premium finance programs and structured premium finance programs. Each distinct new issues investment program (or any material variation of a prior program) in which the Company may invest is referred to herein as a "Program." These percentages will be adjusted on an opportunistic basis based on opportunities in the Life Settlement Market in line with Company Investment Guidelines at the discretion of the Advisory Committee. [21]

The structured premium finance program involved "Collateral Support Arrangements," or CSAs. CSAs are complex instruments, entered into in connection with the issuance of new life insurance policies, under which the provider supplies collateral to secure a premium finance loan. CSAs, it is alleged, generally have a projected

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[15] *Id.* at §§ 5.3(a), 9.1(a), 10.2, 10.10(a), 12.1.

[16] *Id.* at § 9.8.

[17] *Id.* at § 16.11.

[18] *Id.*

[19] *Id.*

[20] *Id.* at § 16.15 (emphasis added).

[21] *Id.* at Appendix D.

probable internal rate of return of 9-10%. [22]

C. A Dispute **[*12]** Arises, And ISM And The Fund Commence Arbitration

Although the parties differ on the precise causes of the Fund's troubles, both parties agree that the financial crisis that erupted in 2008 has complicated the Fund's investment strategy. Orix argues that, since the crisis set in, ISM has not successfully marketed the Fund's products, and that the Fund's business model is no longer economically viable. [23] The defendants argue that the real problem is Orix and Swiss Re's financial health, which led to their decision to pull their appointed CEO from ISM and not replace him with a successor, [24] as well as their unwillingness to adjust the Fund's investment strategy in light of the changes in the market. [25] In any event, a standoff has occurred.

On October 21, 2009, ISM commenced an arbitration proceeding against Swiss Re and Orix, and on November 4, 2009 the Fund commenced another arbitration proceeding against Swiss Re and Orix. Both arbitrations, which are functionally identical, seek to recover **[*13]** compensation through 2017 that ISM and the Fund were deprived of by Swiss Re and Orix's alleged breach of their obligations to adjust the Investment Guidelines to take advantage of market opportunities that have emerged since the advent of the credit crisis. The brief arbitration demands that were attached to the parties' briefs indicate that the arbitrations are brought for breaches of the Fund Agreement:

> THE NATURE OF THE DISPUTE: Breach of contract for failure to comply with the requirements of the terms of the Life Insurance Fund Elite LLC Agreement [the Fund Agreement] between the parties, including but not limited to Sections 5.3, 9.1, 9.3, 9.8, 10.2, 10.6, 10.10, 12.1, and 15.1, as well as breach of fiduciary duty. [26]

That is, the arbitrations allege breach of specific provisions of the Fund Agreement, and clearly fall under the "arising under" or "relating to" language of the arbitration provision in Section 16.15 of the Fund Agreement.

D. The Present Proceedings

In response to these arbitrations, Orix filed a complaint in this court requesting that this court enjoin the arbitration **[*14]** proceedings (Count I), alleging that InsCap and its appointee Raghavan breached the ISM Agreement by initiating the arbitrations (Count II), seeking a declaratory judgment that all of the defendants have breached the ISM Agreement by initiating the arbitrations without Swiss Re's approval (Count III), and alleging that InsCap and Raghavan breached their fiduciary duties (Count IV). Orix then filed a motion for a temporary restraining order and preliminary injunction. Following a scheduling conference with the court, the parties converted Orix's motion for a temporary restraining order and preliminary injunction into a motion for summary judgment. [27] On December 2, 2009, defendants ISM, Life Insurance Fund Elite, LLC, and Raghavan filed a motion to dismiss pursuant to *Rules 12(b)(1)*, *12(b)(6)*, and *23.1*, and to *6*

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[22] Fotak Aff. P 9.

[23] Compl. P 28.

[24] On December 22, 2008, Swiss Re removed the co-CEO of ISM that it had appointed. Fotak Aff. Ex. 8. Swiss Re has not appointed a successor. *Id.;* Fotak Aff. P 6.

[25] Fotak Aff. PP 13-23.

[26] Compl. Exs. B (Demand of Arbitration (Oct. 21, 2009)), C (Demand of Arbitration (Nov. 4, 2009)).

[27] *See ORIX LF, LP v. InsCap Asset Mgmt., LLC,* C.A. 5063-VCS (Nov. 25, 2009) (ORDER).

Del. C. §§ 18-1001 and *18-1003*. That same day, defendant InsCap filed a motion to dismiss pursuant to the same rules. [28]

On January 12, 2010, two days before the oral argument that was scheduled for January 14, 2010, Orix filed a new motion for a temporary restraining order and preliminary injunction. In that motion, Orix requested that this court enjoin the defendants from initiating or enforcing any capital drawdowns, [29] and that this court compel the defendants to participate in a special arbitration proceeding, which Orix commenced under Section 16.11 of the Fund Agreement on January 11, 2010. For the reasons stated in the hearing transcript, I denied Orix's motion. [30] Therefore, this opinion addresses Orix's remaining motion for summary judgment and the defendants' motions to dismiss.

III. Legal Analysis

A. Standard Of Review

I set forth below only the standard for determining this court's subject matter jurisdiction. Because I am dismissing this case under *Rule 12(b)(1)*, and therefore need not assess **[*17]** the movants' other grounds for disposing of this matter, I do not discuss the standards under *Rules 56*, *12(b)(6)*, and *23.1*.

HN3[] In considering a motion to dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1)*, "the court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate." [31] *HN4*[] The court is "confine[d] . . . to the allegations of the complaint and exhibits thereto, which must be accepted as true for purposes of the motion to dismiss." [32] *HN5*[] The Court of Chancery "will not 'accept jurisdiction over' claims that are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy." [33] *HN6*[]

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[28] InsCap's briefing largely adopted the argumentation that ISM presented in its briefs supporting its motion to dismiss, differing primarily in respect to the application of **[*15]** *Rule 12(b)(6)* in this case. *See* InsCap Op. Br. 1, n.1. The Fund's briefing did the same. *See* Fund Op. Br. 2.

[29] On December 29, 2009, the defendants issued a drawdown notice of $ 2.5 million from Orix by January 13, 2010. Orix Mot. for Temp. Rest. Order 3.

[30] *ORIX LF, LP v. InsCap Asset Mgmt., LLC,* C.A. No. 5063-VCS, at 102-07 (Del. Ch. Jan. 14, 2010) (TRANSCRIPT). There appears to be some confusion among the parties about whether my ruling applied only to Orix's request to enjoin the capital drawdown or also applied to **[*16]** Orix's request that this court compel the defendants to participate in the special § 16.11 arbitration. *Compare* Letter from R. Judson Scaggs, Esquire to the Hon. Leo E. Strine, Jr. (Mar. 24, 2010) *with* Letter from William D. Johnston, Esquire to the Hon. Leo E. Strine, Jr. (Mar. 26, 2010). As I stated in the transcript, Orix's entire motion, which requested equitable relief as to both the capital drawdown and the Section 16.11 arbitration, was denied because Orix had an adequate remedy at law -- namely, the AAA arbitrator could provide Orix the relief it sought. *ORIX LF, LP v. InsCap Asset Mgmt., LLC,* C.A. No. 5063-VCS, at 102-07 (Del. Ch. Jan. 14, 2010) (TRANSCRIPT). In any event, recent letters from the parties indicate that they have reached an agreement regarding the Section 16.11 arbitration. *See* Letter from William D. Johnston, Esquire to the Hon. Leo E. Strine, Jr. (Apr. 9, 2010); Letter from R. Judson Scaggs, Esquire to the Hon. Leo E. Strine, Jr. (Apr. 9, 2010).

[31] *Carder, 2009 Del. Ch. LEXIS 2, 2009 WL 106510, at *3*.

[32] *Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 287 (Del. 1999)*.

[33] *Dresser Indus. v. Global Indus. Techs., Inc., 1999 Del. Ch. LEXIS 118, 1999 WL 413401, at *4 (Del. Ch. Jun. 9, 1999)*; *see also Carder, 2009 Del. Ch. LEXIS 2, 2009 WL 106510, at *3* (*HN6*[] "If a claim is **[*18]** arbitrable, *i.e.,* properly

Delaware law favors the enforcement of arbitration clauses. [34] HN7[↑] As to whether a dispute is covered by the scope of an arbitration clause, Delaware courts "ordinarily resolve any doubts in favor of arbitration." [35]

B. The Issue Of Arbitrability Is For The Arbitrator To Decide

The threshold issue in this matter is whether this controversy was properly committed to arbitration, precluding this court from exercising subject matter jurisdiction. Orix contends that the arbitrations were improperly brought because InsCap's appointed CEO, Raghavan, violated Section 3.1(d)(v) of the ISM Agreement, which requires **[*19]** Swiss Re's consent before ISM's CEOs can decide "to initiate any litigation or other proceeding or to settle litigation with third parties, or other regulatory inquiries," [36] by unilaterally causing ISM to bring an arbitration without Swiss Re's approval. Orix argues that this court, rather than an arbitrator, should decide that issue because determining whether Swiss Re's consent was required only implicates the ISM Agreement, which lacks an arbitration clause, and not the Fund Agreement. Orix further argues that the none of the defendants' underlying claims implicate the Fund Agreement. That is, Orix claims that the defendants dressed up disputes arising solely under the ISM Agreement as matters implicating the Fund Agreement in order to take advantage of the latter agreement's arbitration clause.

In responding, the defendants point out that they believe that Orix's position is weak on the merits. Thus, the defendants note their view that: (1) according to the plain language of the contract, Section 3.1(d)(v) only applies to arbitrations initiated against third parties, not against other parties to the contract; and (2) even if Section 3.1(d)(v) did apply, ISM **[*20]** and the Fund are excused from seeking Swiss Re's consent because (a) doing so would be futile, and (b) because Swiss Re has acquiesced to unilateral decisions made by InsCap's CEO by removing its own appointed CEO and failing to name a replacement. The defendants also argue that it is clear that their substantive claims arise under the Fund Agreement, not the ISM Agreement.

But the defendants argue that this court cannot address the merits of these arguments because these are issues of substantive and procedural arbitrability that must be determined by an arbitrator, not this court. In this regard, the defendants contend that, because the Fund Agreement's arbitration clause broadly provides that *any* disputes not only *arising out of* but also *relating to* the Fund Agreement are to be arbitrated, and because that clause calls for AAA arbitration, the parties clearly intended that any question of substantive arbitrability is for the arbitrator, not this court, to decide. Furthermore, the defendants argue that Section 3.1(d)(v) of the ISM Agreement is a condition precedent to Section 16.15 of the Fund Agreement. And, because the satisfaction of a condition precedent to an arbitration clause **[*21]** is an issue of procedural arbitrability, any question of whether

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committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.").

[34] *See* Graham v. State Farm Mut. Auto Ins. Co., 565 A.2d 908, 911 (Del. 1989) ("In short, the public policy of this state favors the resolution of disputes through arbitration."); Julian, 2009 Del. Ch. LEXIS 164, 2009 WL 2937121, at *3 (noting that "Delaware's public policy strongly favors arbitration"); IMO Indus., Inc. v. Sierra Int'l, Inc., 2001 Del. Ch. LEXIS 120, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001) ("Delaware public policy . . . favors resolving disputes through arbitration.").

[35] Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 155-56 (Del. 2002); *see also* SBC Interactive, 714 A.2d at 761 (HN9[↑] "Any doubt as to arbitrability is to be resolved in favor of arbitration.").

[36] *See supra* pages 4-5.

Swiss Re's consent was required is to be decided by an arbitrator.

In analyzing the question of whether this dispute should be committed to arbitration, I am of course guided by the Delaware Supreme Court, whose recent *Willie Gary* decision addressed the issues of whether substantive and procedural arbitrability are to be decided by an arbitrator, rather than the court. [37] As to HN10[↑] "procedural arbitrability" issues, the court re-affirmed its long-standing position that those issues are presumptively for the arbitrator to decide:

> The [United States Supreme Court] distinguished between issues of substantive arbitrability and procedural arbitrability. HN11[↑] Substantive arbitrability issues are gateway questions about the scope of an arbitration provision and its applicability to a given dispute. The court presumes that parties intended courts to decide issues of substantive arbitrability. The opposite presumption applies to procedural arbitrability issues, such as waiver, or satisfaction of conditions precedent to arbitration. [38]

Likewise, as the quote indicates, HN12[↑] on the issue of substantive arbitrability, the Delaware Supreme Court has **[*22]** held that the presumption is just the opposite -- namely, that the court, not the arbitrator, is to decide. [39] But, where there is "clear and unmistakable evidence that the parties intended otherwise," that presumption does not apply, and an arbitrator should decide the issue of substantive arbitrability. [40] The Delaware Supreme Court continued in *Willie Gary* to explain that HN13[↑] the clear and unmistakable standard can be met even when the agreement does not explicitly state that the arbitrator should decide issues of substantive arbitrability if two conditions are satisfied. Those conditions are: (1) the contract generally refers all disputes to arbitration; and (2) the contract refers to a set of rules that would empower arbitrators to decide arbitrability. [41]

Here, the record demonstrates to my satisfaction that not only issues of procedural arbitrability but also of substantive arbitrability are for the arbitrator to decide. First, Section 16.15 of the Fund Agreement clearly evidences that the parties intended the arbitrator to determine the issue of substantive arbitrability because it provides (1) that "*any* dispute" arising out of or relating to the Fund Agreement is to be arbitrated; and (2) that such arbitration will be held under the AAA's rules. [42] Therefore, Section 16.15 meets the "clear and unmistakable" standard set forth in *Willie Gary.* [43]

Seeking to escape the rule of *Willie Gary,* Orix argues that the dispute here only implicates the ISM

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[37] 906 A.2d at 78.

[38] Id. at 79; *see also* T-Ink, 2007 Del. Ch. LEXIS 174, 2007 WL 4302594, at *10 ("Unlike substantive arbitrability, questions of procedural arbitrability are presumptively for the arbitrator, and not the court, to decide.").

[39] *See also* DMS Props.-First, Inc. v. P.W. Scott Assocs., Inc., 748 A.2d 389, 391-92 (Del. 2000) (HN14[↑] "When an action is commenced under Section 5703 of the Delaware statute to either compel or enjoin arbitration, a question **[*23]** of substantive arbitrability is decided by the Court of Chancery.").

[40] Willie Gary, 906 A.2d at 78-79.

[41] *See* id. at 79-80 (finding a "clear and unmistakable" intention for an arbitrator to decide issues of substantive arbitrability "where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability").

[42] *See supra* page 7.

[43] *See supra* note 42.

Agreement, and not the Fund Agreement. But, despite **[*24]** Orix's arguments to the contrary, the arbitration demands clearly allege that Orix and Swiss Re breached the Fund Agreement. [44] And, Section 16.15 of the Fund Agreement is broad -- it requires "*any* dispute, controversy or claim *arising out of or relating to* this Agreement" to be arbitrated. [45] Delaware courts have found *HN15*[↑] the use of both "arising out of" and "relating to" language in an arbitration provision to be a broad mandate. [46] Therefore, even if I accept Orix's argument -- which I do not -- that ISM and the Fund have cast disputes relating only to the ISM Agreement as disputes arising under the Fund Agreement, the broad "relating to" language in the Fund Agreement's arbitration provision seems to encompass such disputes. That conclusion seems in order when one considers that (1) the ISM Agreement was executed on the same day as the Fund Agreement; [47] (2) the ISM Agreement provides that the ISM Agreement "together with the separate written agreements referenced herein, embodies the entire agreement and understanding of the parties hereto;" [48] (3) the ISM Agreement expressly refers to the Fund Agreement as the "Operating Agreement;" [49] and (4) the ISM Agreement provides for service **[*25]** of process for proceedings including arbitrations, even though the ISM Agreement does not itself include an arbitration provision, and thus appears to contemplate that disputes among the parties would be resolved by the arbitration provisions of the Fund Agreement executed that same day. [50] That close interdependence between the contracts suggests that any dispute under the ISM Agreement necessarily "relates to" the Fund Agreement. In other words, Section 16.15 of the Fund Agreement seem clearly broad enough to sweep in disputes under the ISM Agreement. But, I should not, and therefore do not, reach a final determination regarding that issue.

Orix's argument that the claims brought by ISM and the Fund have nothing to do with the Fund Agreement is also problematic because it is essentially **[*26]** an argument about the scope of the Fund Agreement's arbitration clause, Section 16.15. In other words, Orix is making an argument about *how* the issue of arbitrability should be decided. But, at this stage of the analysis, *HN16*[↑] when the court is examining predicate issues such as procedural and substantive arbitrability, making a final determination on the scope of Section 16.15 would be improper. In this procedural posture, the burden on defendants is not to *conclusively* prove that their claims are within the scope of Section 16.15, but rather that their claims are *arguably* arbitrable. As this court has noted:

> *HN17*[↑] A signatory to an agreement vesting questions of substantive arbitrability to the arbitrator must resolve disputes about arbitrability . . . before the arbitrator, unless the signatory can show that the [opposing party's] contention is 'wholly groundless.' In other words, *HN18*[↑] *absent a clear showing that the party desiring arbitration has essentially no non-frivolous argument about*

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[44] *See supra* page 9.

[45] Fund Agreement § 16.15 (emphasis added).

[46] *See, e.g.,* State v. Philip Morris USA, Inc., 2006 Del. Ch. LEXIS 203, 2006 WL 3690892, at *4 (Del. Ch. Dec. 12, 2006) (finding provision requiring arbitration of any dispute "arising out of or relating to" language to be a "broad arbitration clause"), *aff'd,* ***925 A.2d 504 (Del. 2007)***.

[47] *See supra* page 4.

[48] *See supra* page 5.

[49] *See supra* page 5.

[50] *See supra* pages 5-6.

> *substantive arbitrability to make before the arbitrator, the court should require the signatory to address its arguments against arbitrability to the arbitrator.* [51]

That is, unless Orix can show that the defendants' **[*27]** position on arbitrability is "wholly groundless" or "frivolous," the arbitrator and not the court must determine the question of substantive arbitrability. To do otherwise and to resolve good faith disputes about substantive arbitrability, would conflate the substantive arbitrability analysis with the arbitrability analysis proper, and usurp the role *Willie Gary* says belongs to the arbitrator. Orix must address its arguments about substantive arbitrability to the arbitrator. [52]

Moreover, in my view, the question of whether Swiss Re's consent was required under Section 3.1(d)(v) of the ISM Agreement for ISM and the Fund to bring the arbitrations is a question of procedural, not substantive, arbitrability for the arbitrator to decide. To argue that Section 3.1(d)(v) precludes ISM and the Fund from initiating proceedings against their contractual partners Orix and Swiss Re without Swiss Re's consent is to argue that a condition precedent to commencing arbitration has not been met. The question of whether the requirements of Section 3.1(d)(v) have been either met or excused because Swiss Re has abdicated its right to appoint its own co-CEO is analogous to a trial court's decision on whether to allow a derivative suit to proceed. Under our Supreme Court's jurisprudence, such *HN19*[↑] procedural questions are clearly for the arbitrator. [53] Therefore, the question of whether Section 3.1(d)(v) applies, and, if so, the related issue of whether demand would be excused because Swiss Re would not rationally consent to being sued, are for the arbitrator, not this court, to decide.

IV. Conclusion

For the reasons stated above, plaintiffs' motion for summary judgment is DENIED and defendants' motions to dismiss are GRANTED. The plaintiffs' complaint is therefore dismissed without prejudice under *Rule 12(b)(1)*. IT IS SO ORDERED.

End of Document

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[51] *McLaughlin, 942 A.2d at 626-27* (emphasis added); *see also Carder, 2009 Del. Ch. LEXIS 2, 2009 WL 106510, at *6-7* (following *McLaughlin* and deferring to the arbitrator where there is a non-frivolous argument regarding substantive arbitrability); *Lefkowitz, 2009 Del. Ch. LEXIS 194, 2009 WL 3806299, at *10* (concluding that "to the extent there is any basis for doubt about the above findings, I conclude that, consistent with the holding in *McLaughlin,* this Court 'should defer to arbitration, leaving the arbitrator to determine what is or is not before her'").

[52] If I am incorrect in my analysis and the merits of the substantive arbitrability issue are committed to me, I would find that the defendants have demonstrated that this dispute implicates not only the **[*28]** ISM Agreement but also the Fund Agreement, and Orix's argument would be rejected on its merits.

[53] *See* **[*29]** *SBC Interactive, 714 A.2d at 762* (finding that application of a condition precedent was a procedural issue for the arbitrator to decide); *Burton, 2003 Del. Ch. LEXIS 110, 2003 WL 22682327, at *2-3* (same).

SECTION III-
DRAFTING ARBITRATION CLAUSE

Delaware State Bar Association

SPONSORED BY THE

Alternative Dispute Resolution Section

Section Chair:
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BEST PRACTICES & PITFALLS TO AVOID WHEN DRAFTING YOUR NEXT ARBITRATION CLAUSE

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THE BASICS – IT'S A CONTRACT - TREAT IT AS SUCH

Arbitration agreements/clauses are contracts. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248 1253, 103 L.Ed.2d 488 (1989); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204 1207, 163 L.Ed.2d 1038 (2006); 9 USC § 2; 10 DEL. C. § 5701. As such they are subject to the same rules of construction, the same defenses and overarching public policy considerations.

GOLDEN RULE 1: Arbitration agreements or clauses should never be the product of a cut and paste, boiler plate language approach.

A. Writing Required

To be enforceable, an arbitration agreement must be in writing. 9 USC § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable."); New York Arbitration Convention[1] at ART. II, part 2 ("The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."); 10 DEL. C. § 5701 ("A written agreement to submit to arbitration . . . ")

Despite the writing requirement, US courts will interpret this requirement in a commercially practical manner. In some cases, courts have enforced arbitration agreements where, for example, the final contract was unsigned or where the agreement to arbitrate was entered into via email or in circumstances discussed in answer. *TMG Health, Inc. v. Unitedhealth Grp., Inc.*, 2007 U.S. Dist. LEXIS 31423, *6-7 (E.D. Pa. Apr. 26, 2007); *Raynor v. Verizon Wireless (VAW), LLC*, 2016 U.S. Dist. LEXIS 54678, *2 (D.N.J. Apr. 25, 2016) (both agreements unsigned – held enforceable nonetheless)

Personal injury arbitrations in Delaware often proceed without a written agreement. This likely flows from the fact that court rules essentially supplement the perceived need for a writing. In the complex personal injury cases, an unwritten arbitration agreement can leave too much to chance, *i.e.*, how liens might be handled, who handles them, dealing with disability insurance or government programs,

[1] The New York Arbitration Convention is formally known as the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award*s (New York, 10 June 1958). 9 USC § 202, *et. seq.* (adopting Convention). https://www.newyorkconvention.org/new+york+convention+texts. The Convention requires signatory States to recognize arbitration awards rendered outside their borders.

allocations, release issues, will a release be given.

Somewhat related - collegiality should not get in the way of entering into an arbitration agreement. In the current commercial transaction/litigation world, you are rarely, if ever, completely in charge – translation: the rug can be pulled out from under your client by another person on your side of the equation.

<u>GOLDEN RULE 2</u>: Never Take Your Eye off the Cookie.

B. Do Not Lose Sight of the Client's Focus/Purpose

When drafting an arbitration clause or agreement, focus on the client's function or purpose for arbitrating a claim. Why does the client want arbitration over litigation?

- a need for efficacy
- a need prompt relief
- a need to control costs
- to protect critical business relationships
- to limit discovery
- to maintain confidentiality
- preserve a business relationship
- to leverage some advantage
- to secure some other goal

Too often an arbitration clause completely and utterly fails to address the client's essential needs. For example, a client trying to protect IP rights ordinarily has fundamentally different concerns than a supplier of goods or services. On some level that conclusion seems obvious which raises the question why the same arbitration clause/ agreement would serve the needs of both clients.

See the discussion below regarding different types of arbitration clauses and potential problems with each.

<u>GOLDEN RULE 3</u>: An arbitration clause should always contemplate who else might *need* to enforce contractual rights, who might need to be included in an arbitration, and who else *might try to enforc*e arbitration

C. Who is Covered by the Arbitration Agreement?

Two dimensions to consider here. First, does the nature of the underlying transaction/contract involve the participation of, or performance by, critical third parties. If so, how are those third parties tied to the arbitration obligation.

<u>Example: Produce Supply contracts</u>. The farmer/the supplier/the bulk

seller/the end user/the consumer. Chi-Chi's bankruptcy. Bad onions from Mexico, purchased by Castellini Company (Delaware LLC) distributed by Sysco, delivered to Chi-Chi's Restaurant, customers sick including some that died from hepatitis A. The relationship between each of these entities was defined by separate contracts – only one of which contained an arbitration clause. Eventually Sysco was sued under the Adulterated Food Act 21 U.S.C. § 342 by Chi-Chi's. Sysco's contractual relationship with Castellini contained no arbitration provision. *Sysco Corp. v. Chi-Chi's, Inc. (In re Chi-Chi's, Inc.)*, 338 B.R. 618, 620-24 (2006) (describing factual background). Sysco ended up litigating its claim against Castellani in a California court and arbitrating the Chi-Chi's claim in arbitration. This two-part epoxy-type mess, however, bounced in and out of several courts before unfortunate clarity was revealed – think thousands of dollars, year in litigation, lawyers on two sides of the country and the ever-present possibility of inconsistent outcomes.

Example: Asset Purchase Agreements. Asset purchase agreements often utilize a series of related agreements, each with a discrete purpose, often involving different parties to the transaction – buyer, seller, financing entity, lienholder, third-party executory contracts. The failure to incorporate an arbitration agreement directly or by reference can leave critical parties outside the reach of an arbitrated resolution. *AppForge, Inc. v. Extended Sys.*, 2005 U.S. Dist. LEXIS 5039, *8-10, *15-16 (D. Del. 2005) (two license agreements - an Incorporation License Agreement and a Reseller Agreement – dispute whether a claim was arbitrable because it arose under one agreement and not the other). Keep in mind that there is a bias in favor of arbitrability.

Third parties or non-signatories ordinarily are neither bound by an arbitration agreement nor can they compel a signatory to arbitrate. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194 (3d Cir. 2001).

Despite that, it is well-established that "non-signatories to an arbitration agreement may nevertheless be bound [to arbitrate] according to ordinary principles of contract and agency." *McAllister Bros. v. A & S Transportation*, 621 F.2d 519, 524 (2nd Cir., 1980). Those contract/agency exceptions include incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, succession in interest or assumption by conduct. The law governing the contract (or putative contract) is potentially relevant in such cases, as is the law of the place of incorporation and the law of the arbitral seat. *Orn v. Alltran Fin., L.P.*, 779 F. App'x 996, 998-99 (3d Cir. 2019) (non-party trying to enforce arbitration under South Dakota contract law); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (1990) (acknowledging that a third party can enforce arbitration agreements if they are a third-party beneficiary – performance of contract intentionally confers a benefit upon a third party, and that benefit should be a material part of the contract's purpose.)

<u>GOLDEN RULE 4</u>: Avoid getting bogged down trying to set out separate consideration for an arbitration clause. It is unnecessary and just as likely to create confusion, i.e., never overlook the opportunity to shut up, or put the pen down.

D. Its Alive – Don't Kill It

It is common practice to include a savings or severability clause in a contract, *i.e.*, if any portion of this agreement is determined to be unenforceable, then the court shall . . ... For example:

> In the event that any part of this Agreement is declared by any court or other judicial or administrative body to be null, void or unenforceable, said provision shall survive to the extent it is not so declared, and all of the other provisions of this Agreement shall remain in full force and effect only if, after excluding the portion deemed to be unenforceable, the remaining terms shall provide for the consummation of the transactions contemplated hereby in substantially the same manner as originally set forth at the later of the date this Agreement was executed or last amended.

An arbitration clause is severable and independently enforceable from the rest of the contract in which it is contained.

Under the severability rule, a party cannot avoid arbitration by attacking the contract as a whole. Rather, the party opposing arbitration must challenge the arbitration clause itself. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) (establishing the "severability doctrine" as to arbitration clauses.); *MXM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 397 (3d Cir. 2020) (applying *Prima Paint*). Under the severability rule, a party cannot avoid arbitration by attacking the contract as a whole. Rather, the party opposing arbitration must challenge "the arbitration clause itself." *Prima Paint*, 388 U.S. at 403.

<u>GOLDEN RULE 5</u>: If it's Important Say It – Don't Leave it to an Arbitrator or Court to Devine Important Intent or Meaning

E. Don't Make Someone Guess – You'll be Sorry ~~Sued~~

The parties' intent should never be a secret. This is especially true if something is critically important to your client. Make that meaning or intent crystal clear. *This cardinal rule is observed more in the breach than in compliance*. Do not leave it to chance.

<u>Example</u>: In Delaware, "where the arbitration clause provides that the arbitration will be conducted in accordance with the rules of the American Arbitration Association

(AAA), that statement constitutes clear and unmistakable evidence of the parties' intent to have an arbitrator determine substantive arbitrability. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006).

In a recent 2nd Circuit case, the court confirmed a district court order denying substantive arbitrability. *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308 (2nd Cir 2021). The decision was based, in part of that court's conclusion that the following arbitration clause language did not reflect the "parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator."

> (b) Arbitration. The parties unconditionally and irrevocably agree that, with the exception of injunctive relief as provided herein, and except as provided in Section 16(c), all Disputed Matters that are not resolved pursuant to the mediation process provided in Section 16(a) **may be submitted by either Member to binding arbitration administered by the American Arbitration Association ("AAA") for resolution in accordance with the Commercial Arbitration Rules and Mediation Procedures of the AAA then in effect**, and accordingly they hereby consent to personal jurisdiction over them and venue in New York, New York. The demand for arbitration shall be made within a reasonable time after the conclusion of the mediation process by delivery of a written notice (an "Arbitration Notice") by the electing Member to the other, and in no event shall it be made after two years from the conclusion of the mediation process. . ..

Id. at 312-13.

The district court rejected Williams-Sonoma's assertion that incorporation of the AAA Commercial Rules alone was sufficient to evince the parties' clear and unmistakable intent to delegate questions of arbitrability to the arbitrator. On appeal, the 2nd Circuit affirmed. Contrast the result in *Williams-Somona* to *Willie Gary*.[2]

Example: Recently, mandatory arbitration agreements contained in employment agreements have come under federal and state scrutiny. Federal legislation is pending that may prohibit the practice.

In 2019 California passed legislation that makes it an unlawful employment practice to require employees or applicants to "waive any right, forum, or procedure for a violation of" the California Fair Employment and Housing Act or the Labor Code. Contrast that limitation with Delaware's Uniform Arbitration Act which specifically applies to arbitration agreements between employers and employees or between their respective representatives, except [labor contracts]." If you represent an employer in a

[2] Ironically, the *Wille Gary* court followed what it described as the majority federal rule meaning that reference to the AAA Rules reflects clear and unmistakable evidence of the parties' intent to have an arbitrator determine substantive arbitrability. *Willie Gary*, 903 A.2d at 79-81.

breach of employment contract, what happens if the employee is a Californian employed by a Delaware company? Does the result change if the arbitration agreement specifically invokes Delaware law, or invokes Delaware law and Delaware's Uniform Arbitration Act, or says nothing?

Arbitration Agreement Matrix		
Client Issues – What does the Client Need/Require from Arbitration *See above*		
Process/Substantive Issues *See below*		
	Procedural Considerations	Substantive Considerations
Who	Who selects arbitrator? Will arbitrator be appointed or selected? Who can serve as arbitrator? How many arbitrators? Minimum arbitrator qualifications/certification/license Must certain parties attend an arbitration?	Who decides arbitrability? Do you really want an unknown entity/person serving as arbitrator? Do you want the arbitrator to have authority to decide all arbitration related issues, or not? Who decides whether an enforceable arbitration agreement exists? Who is covered by the arbitration agreement? Who is not covered by the agreement?
What	What disputes will be arbitrated? What will not be arbitrated?	Distinguishing relief requested expedited, irreparable harm, or injunctive matters. Distinguishing the relief requested from the subject matter of the arbitration
Where	Where will the arbitration physically take place? What about virtual arbitration?	What law will control the arbitration process and substantive law questions?
Why	Under what circumstances will arbitration be mandatory? Will arbitration be limited to certain, defined circumstances? What are they?	Is the imprimatur of a judicial necessary or preferred for enforcement of an issue? Outside the Delaware Court of

		Chancery, can the client tolerate an arbitration process that requires additional post award/decision steps to implement enforcement? Is the power of judicial enforcement likely to be necessary to adequately protect the client's interests?
When	Will the arbitration be subject to a pre-determined timeline? Is the arbitrator required to render a decision within a specific time frame? Is a combination mediation and arbitration agreement appropriate?	Is there a contractual statute of limitations? Some agreements require a claim to be asserted within 30 days of the alleged breach. Does the issue(s) addressed by arbitration require expedited handling such that an arbitration administrator may take too long?
Money	How much and who pays the arbitrator? When must the arbitrator, or arbitration administer be paid?	What can the arbitrator award/not award, i.e., no punitive damages, non-economic damages. Can the arbitrator award fees to a prevailing party absent a contractual fee shifting provision? Can the arbitrator impose sanctions?
Substance	There are few areas that the law prohibits the use of arbitration. The area of law/subject matter of the arbitration will often impose other considerations on the arbitration. For example, some matters cannot be arbitrated such as interstate family law/right disputes. State law may impose other limitations or restraints – consumer/warranty class actions. Federal law may likewise impose similar limitations.	
Practice Pointer	If it is important, make sure that concern is clearly and unambiguously articulated. Do not rely upon good luck, intuition, or a "how could they see it otherwise" mindset, or case precedent from another jurisdiction to support a conclusion.	

SAMPLE CLAUSES

Contract language reviews always prompt questions that in the rear-view mirror always seem so obvious. To that end, below are arbitration clause that, for one reason or another failed.

1. **Any controversy or claim arising out of or relating to this agreement "shall be submitted to arbitration pursuant to the Federal Arbitration Act."**

Concerns:

1. The Federal Arbitration Act (hereafter the "Act"), 9 U.S.C. §1 *et seq*., is a substantive statute - it creates the framework for arbitration. It is not a procedural statute. As a result, the Act does not address procedural issues. Open issues:

a. The arbitrator selection or appointment process - Neither arbitration clause nor the Act say anything arbitrator appointment.

b. Hearing mechanics – Neither arbitration clause nor the Act address how, why, or where the arbitration might proceed.

c. Conduct of discovery - Neither arbitration clause nor the Act address any aspect of arbitration-related discovery, i.e., will it be limited in scope, completely unavailable, who/how will discovery disputes be addresses

d. Interim measures - Neither arbitration clause nor the Act address the potential need for expedited or equitable relief.

e. Form and timing of the award - Neither arbitration clause nor the Act impose any timeframe for completing the arbitration, the form of the outcome

f. venue of dispute

2. Is any arbitration administrator to be involved?

HD Brous & Co., Inc. v. Mrzyglocki, 2004 U.S. Dist. LEXIS 3095, *7 (S.D.N.Y. 2004); *In re Jim Walter Homes, Inc*., 207 S.W.3d 888 (Tx Appeals 2006) (both cases reviewing arbitration agreements that submitted to arbitration pursuant to the Federal Arbitration Act); John K. Boyce, III, *How to Write a Bad Arbitration Clause!* State Bar of Texas (Nov. 7-8, 2013) http://harryphillipsaic.com/wp-content/uploads/2012/09/14-How-To-Write-a-Bad-Arbitration-Clause.pdf.

2. **Arbitrations shall be governed by the Federal Arbitration Act, 9 U.S.C. §1 et seq., and administered under the AAA Commercial Arbitration Rules in effect on the date the Dispute is submitted to arbitration, except that the arbitrator shall be an architect experienced in tenant improvement design and construction or an experienced tenant improvement construction contractor, in each case as appropriate to the matter in dispute, and, in either case, such arbitrators will be professionally licensed or certified to practice in their respective fields by the State in which the Building is located.**

Concerns:

a. This clause is not clear whether there will be an administrator. There is a reference to the AAA but no indication that AAA is to serve an administrative function.

b. To say the least, the arbitrator selection criteria are confusing, i.e., what/who is "**experienced in tenant improvement design and construction."** How much experience is contemplated? What constitutes tenant improvement design and construction? What kind of construction experience? To add a further layer of confusion the clause adds another undefined qualification: **in each case as appropriate to the matter in dispute.**

c. This clause potentially narrows the universe of available arbitrators to a few, if that, persons.

d. The subject matter of the arbitration is construction. Why does the clause not refer to the AAA Construction Rules?

3. **Any controversy, dispute or claim arising out of or in connection with interpretation, performance or breach of this Agreement which cannot otherwise be resolved between the parties shall be resolved expediently and with the least possible cost and therefore agree to submit the foregoing to an impartial arbitrator. If any part of this section shall be held to be unenforceable, its unenforceability shall not affect the obligation to arbitrate thereunder.**

Concerns:

a. There is no reference to any procedural or substantive rules. This is a disaster waiting to unfold

b. The phrases "expediently and with the least possible cost" and "impartial arbitrator" are ambiguous. Another time bomb waiting to be released.

c. The last portion of the language is an invitation to pre and post arbitration litigation. The language is redundant and otherwise illogical. To wit: How can the arbitration be provision be deemed unenforceable and still **"not affect the obligation to arbitrate thereunder."**

4. **The duty to arbitrate shall extend to any officer, shareholder, principal, agent, trustee, third-party beneficiary, guarantor, or non-signatory to this Agreement.**

Concerns:

a. This clause takes a tremendous leap of faith, i.e., that non-signatories, potentially unaware of the clause, will be willingly bound by a document they did not sign. As a rule, a party is only bound to the contracts they sign/accept. Despite exceptions to the general rule, and without understanding the underlying contractual obligations, this clause represents a pre-arbitration ticket to litigation.

b. If your client really wants to obligate parties to arbitration, get their signature, or make their employment agreements subject to this arbitration agreement.

5. **The arbitrators shall be bound by the Federal Rules of Evidence and Federal Rules of Civil Procedure Arbitrator and shall have sole discretion to the amount and extent of pre-hearing discovery which is appropriate.**

Concerns:

a. This clause does not indicate what rules will control the arbitration process. That said, if the AAA Rules are contemplated, then this language conflicts with AAA R-22 ("The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses."). It also conflicts with AAA R-32 ("The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.")

b. Another level of conflict exists – how can the arbitrator be bound by the FRCP and FRE *and* still have discretion.

c. The reference to FRCP and FRE sets up an appeal. Notably, if the arbitrator exercises discretion, then does the arbitrator's exercise of that discretion serve as grounds for vacating the arbitration award

because the arbitrator failed to comply with the FRCP of FRE. 9 USC § 10(a)(4) provides that an arbitration award can be vacated "where the arbitrators exceeded their powers."

6. **Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration pursuant to the Federal Arbitration Act and administered by the American Arbitration Association under its Commercial Arbitration Rules with hearing thereon in Wilmington, Delaware, and judgment on the award rendered by the arbitrators (s) may be entered in any court having jurisdiction thereof.**

Concerns:

a. In the abstract (not knowing the subject matter or applicable law) this clause is otherwise clear and unambiguous.

b. The clause does not conflict with the rules/law that it purports to be subject to.

c. Arbitration venue is clear. Governing law is clear.

d. Reliance on the AAA Commercial Rules adds clarity – make sure that you want that clarity.

e. The language used here provides unrestricted coverage of claims. There is minimal risk of arbitrability challenges. It is the kind of language that courts will construe doubts in favor of arbitration.

Clause Drafting Resources:

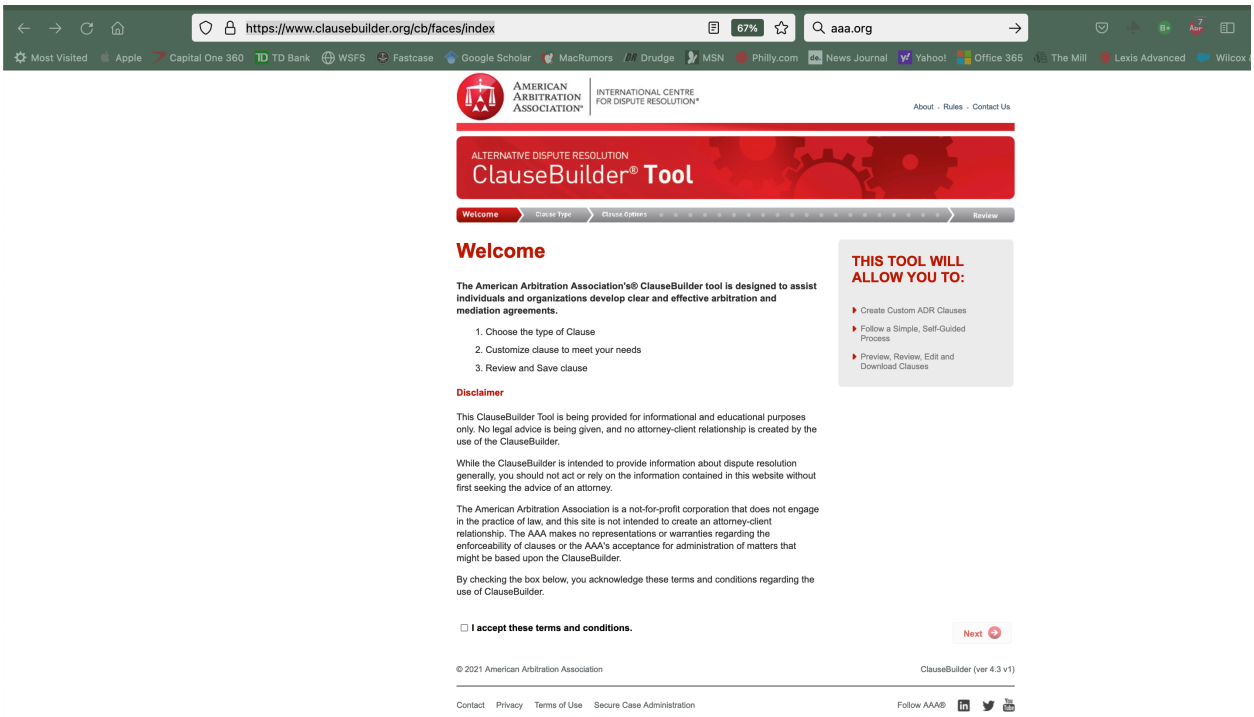
1. ***Colleagues*** – Collegiality has many benefits among them the willingness of other attorneys to lend a hand or ear. Call/email around. Every Delaware attorney that I've called to bounce a question off, or to talk through an issue, or to spit-ball, has helped without hesitation. The help is invaluable and often provides a new, informed perspective.

2. ***American Arbitration Association – clause builder.*** Walks the user through a series of questions that are intended to create an arbitration clause based upon the answers provided. https://www.clausebuilder.org/cb/faces/index The clause builder is flexible in terms of the types of disputes covered, the type of ADR (arbitration or mediation followed by arbitration)

3. ***AAA-ICDR Blog*** – the focus of this blog is international arbitration. Nonetheless, the blog does an exceptional job of raising and addressing arbitration issues. https://www.adr.org/blog/home

4. ***JAMS Clause Workbook*** – a excellent tool that provides arbitration clauses and discusses uses and limits. Be aware, however, the Workbook was published in 2018.

AAA CaseBuilder Tool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3. Review and Save clause
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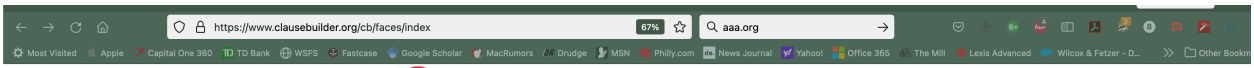

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H.R. 963 & HR. 4445

I

117TH CONGRESS
1ST SESSION

H. R. 963

To amend title 9 of the United States Code with respect to arbitration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2021

Mr. JOHNSON of Georgia (for himself, Mr. NADLER, Mr. CICILLINE, Mr. CARTWRIGHT, Mr. AGUILAR, Mr. AUCHINCLOSS, Ms. BARRAGÁN, Ms. BASS, Mr. BEYER, Mr. BLUMENAUER, Ms. BLUNT ROCHESTER, Ms. BONAMICI, Mr. BOWMAN, Mr. BRENDAN F. BOYLE of Pennsylvania, Mr. BROWN, Ms. BROWNLEY, Mr. BUTTERFIELD, Mr. CARBAJAL, Mr. CÁRDENAS, Mr. CARSON, Mr. CASTEN, Mr. CASTRO of Texas, Ms. CLARK of Massachusetts, Ms. CLARKE of New York, Mr. COHEN, Mr. CONNOLLY, Mr. COURTNEY, Mr. CRIST, Mr. DANNY K. DAVIS of Illinois, Ms. DEAN, Mr. DEFAZIO, Ms. DEGETTE, Ms. DELAURO, Ms. DELBENE, Mr. DELGADO, Mrs. DEMINGS, Mr. DESAULNIER, Mr. DEUTCH, Mrs. DINGELL, Mr. DOGGETT, Ms. ESCOBAR, Mr. ESPAILLAT, Mr. EVANS, Mrs. FLETCHER, Mr. FOSTER, Ms. LOIS FRANKEL of Florida, Mr. GALLEGO, Mr. GARAMENDI, Mr. GARCÍA of Illinois, Ms. GARCIA of Texas, Mr. GOMEZ, Mr. VICENTE GONZALEZ of Texas, Mr. GREEN of Texas, Mr. GRIJALVA, Mr. HASTINGS, Mrs. HAYES, Mr. HIGGINS of New York, Mr. HUFFMAN, Ms. JACKSON LEE, Ms. JAYAPAL, Mr. JEFFRIES, Ms. JOHNSON of Texas, Mr. JONES, Ms. KAPTUR, Mr. KEATING, Mr. KHANNA, Mr. KILDEE, Mr. KIM of New Jersey, Mrs. KIRKPATRICK, Mr. KRISHNAMOORTHI, Ms. KUSTER, Mr. LANGEVIN, Mr. LARSEN of Washington, Mr. LARSON of Connecticut, Mrs. LAWRENCE, Mr. LAWSON of Florida, Ms. LEE of California, Mr. LEVIN of Michigan, Mr. LEVIN of California, Mr. LIEU, Mr. LOWENTHAL, Mrs. LURIA, Mr. LYNCH, Mr. MALINOWSKI, Mrs. CAROLYN B. MALONEY of New York, Ms. MATSUI, Mrs. MCBATH, Ms. MCCOLLUM, Mr. MCEACHIN, Mr. MCNERNEY, Mr. MEEKS, Ms. MENG, Ms. MOORE of Wisconsin, Mrs. NAPOLITANO, Mr. NEGUSE, Ms. NEWMAN, Ms. NORTON, Mr. O'HALLERAN, Ms. OCASIO-CORTEZ, Mr. PALLONE, Mr. PANETTA, Mr. PAPPAS, Mr. PASCRELL, Mr. PAYNE, Mr. PERLMUTTER, Mr. PETERS, Mr. PHILLIPS, Ms. PINGREE, Mr. POCAN, Ms. PORTER, Ms. PRESSLEY, Mr. PRICE of North Carolina, Mr. QUIGLEY, Mr. RASKIN, Miss RICE of New York, Ms. ROSS, Mr. RUSH, Mr. RYAN, Ms. SÁNCHEZ, Mr. SARBANES, Ms. SCANLON, Ms. SCHAKOWSKY, Mr. SCHIFF, Mr. SCHRADER, Mr. SCOTT of Virginia, Mr. SHERMAN, Mr. SIRES, Mr. SMITH of Washington, Mr. SOTO, Ms. SPANBERGER, Ms. SPEIER, Mr. STANTON, Ms. STEVENS, Ms. STRICK-

LAND, Mr. SUOZZI, Mr. SWALWELL, Mr. TAKANO, Mr. THOMPSON of Mississippi, Mr. THOMPSON of California, Ms. TITUS, Ms. TLAIB, Mr. TONKO, Mr. TORRES of New York, Mrs. TORRES of California, Mrs. TRAHAN, Mr. TRONE, Mr. VEASEY, Mr. VELA, Ms. VELÁZQUEZ, Ms. WASSERMAN SCHULTZ, Mrs. WATSON COLEMAN, Mr. WELCH, Ms. WILD, Ms. WILLIAMS of Georgia, Mr. YARMUTH, and Ms. BUSH) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 9 of the United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Forced Arbitration Injustice Repeal Act'' or the ''FAIR Act''.

SEC. 2. PURPOSES.

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

"§ 401. Definitions

''In this chapter—

''(1) the term 'antitrust dispute' means a dispute—

''(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

''(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

''(2) the term 'civil rights dispute' means a dispute—

''(A) arising from an alleged violation of—

''(i) the Constitution of the United States or the constitution of a State;

"(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

"(B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(3) the term 'consumer dispute' means a dispute between—

"(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

"(B)(i) the seller or provider of such property, services, securities or other investments, money, or credit; or

"(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

"(4) the term 'employment dispute' means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work,

regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

''(5) the term 'predispute arbitration agreement' means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

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

"§ 402. No validity or enforceability

''(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

''(b) APPLICABILITY.—

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

''(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provi-

sion of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.''.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 1 by striking ''of seamen,'' and all that follows through ''interstate commerce'' and inserting in its place ''of individuals, regardless of whether such individuals are designated as employees or independent contractors for other purposes'';

(B) in section 2 by inserting ''or as otherwise provided in chapter 4'' before the period at the end;

(C) in section 208—

(i) in the section heading by striking ''**CHAPTER 1; RESIDUAL APPLICATION**'' and inserting ''**APPLICATION**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''; and

(D) in section 307—

(i) in the section heading by striking ''**CHAPTER 1; RESIDUAL APPLICATION**'' and inserting ''**APPLICATION**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''.

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections of chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

''208. Application.''.

(B) CHAPTER 3.—The table of sections of chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

''307. Application.''.

(3) TABLE OF CHAPTERS.—The table of chapters of title 9, United States Code, is amended by adding at the end the following:

''4. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes ..... 401''.

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises.

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117TH CONGRESS
1ST SESSION

H. R. 4445

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

IN THE HOUSE OF REPRESENTATIVES

JULY 16, 2021

Mrs. BUSTOS (for herself, Mr. GRIFFITH, Ms. JAYAPAL, and Mr. CICILLINE) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021''.

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

"§ 401. Definitions

''In this chapter:

''(1) PREDISPUTE ARBITRATION AGREEMENT.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

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

''(3) SEXUAL ASSAULT DISPUTE.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

''(4) SEXUAL HARASSMENT DISPUTE.—The term 'sexual harassment dispute' means a dispute relating to any of the following conduct directed at an individual or a group of individuals:

''(A) Unwelcome sexual advances.

''(B) Unwanted physical contact that is sexual in nature, including assault.

''(C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.

''(D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.

''(E) Retaliation for rejecting unwanted sexual attention.

''§ 402. No validity or enforceability

''(a) IN GENERAL.—Except as provided in subsection (c), and notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-

action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to a sexual assault dispute or a sexual harassment dispute.

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

''(c) EXCEPTION FOR COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under provision of the Constitution of the United States, a State constitution, or a

Federal or State statute, or public policy arising therefrom.''.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting ''or as otherwise provided in chapter 4'' before the period at the end;

(B) in section 208—

(i) in the section heading, by striking ''**Chapter 1; residual application**'' and inserting ''**Application**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''; and

(C) in section 307—

(i) in the section heading, by striking ''**Chapter 1; residual application**'' and inserting ''**Application**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''.

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

"4. Arbitration of disputes involving sexual assault and sexual harassment ..... 401".

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

○

2021 Delaware Arbitration Caselaw

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILD MEADOWS MHC, LLC,	§	
	§	
Petitioner Below,	§	No. 253, 2020
Appellant,	§	
	§	
v.	§	Court Below – Superior Court
	§	of the State of Delaware
DAVID J. WEIDMAN, ESQUIRE, ARBITRATOR,	§	
	§	
	§	C.A. No. K19M-07-003
Respondent Below,	§	
Appellee,	§	
	§	
and	§	
	§	
WILD MEADOWS HOMEOWNERS' ASSOCIATION	§	
	§	
	§	
Intervenor/ Respondent Below,	§	
Appellee.	§	

Submitted: February 10, 2021
Decided: April 14, 2021

Before **SEITZ**, Chief Justice; **VAUGHN** and **MONTGOMERY-REEVES**, Justices.

Upon appeal from the Superior Court of Delaware. **AFFIRMED**

Michael P. Morton, Esquire, Robert J. Valihura, Jr., Esquire, and David C. Zerbato, Esquire, MORTON, VALIHURA & ZERBATO, LLC, Greenville, Delaware; *Attorneys for Appellant, Wild Meadows MHC, LLC*.

James P. Sharp, Esquire, MOORE & RUTT, P.A., Georgetown, DE; *Attorney for Appellee, David J. Weidman, Esquire, Arbitrator.*

Olga Beskrone, Esquire, COMMUNITY LEGAL AID SOCIETY, INC., Wilmington, Delaware; *Attorney for Appellee Intervenor/Respondent Wild Meadows Homeowners' Association*.

MONTGOMERY-REEVES, Justice:

In this appeal, Wild Meadows MHC, LLC ("Wild Meadows") challenges the Superior Court's dismissal of its petition for a writ of prohibition. Wild Meadows contends that the Superior Court erroneously held that an arbitrator appointed under Delaware's Rent Justification Act has the authority to compel discovery and impose a confidentiality agreement upon parties concerning discovery material. For the reasons set forth below, we AFFIRM the judgment of the Superior Court.

I. BACKGROUND

The Wild Meadows manufactured home community (the "Community"), owned by appellant Wild Meadows, is located in Dover, Delaware.[1] Those living in the Community own their manufactured homes but pay rent for the land. Therefore, the Community is governed by the Manufactured Home Owners and Community Owners Act[2] and its subsection commonly known as the Rent Justification Act (the "Act").[3] Appellee Intervenor/Respondent Wild Meadows Homeowners' Association (the "HOA") represents these homeowners.

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[1] App. to the Opening Br. A018 (hereinafter "A . . .").

[2] *See* 25 *Del. C.* §§ 7001-67 (2013) (amended 2019). As the Superior Court noted the below, the Assembly redesignated (*i.e.*, renumbered) and amended the statutory provisions relevant to this appeal. *See* 82 Del. Laws ch. 38, § 42 (2019) (amending and redesignating statutory sections); *Wild Meadows MHC, LLC v. Weidman*, 2020 WL 3889057, at *1 n.3 (Del. Super. Ct. July 10, 2020). (providing that the Superior Court cited to the old codification). This opinion will cite the former statutes as they existed before the amendments because the issues in question arose before the Act's redesignation.

[3] *See* 25 *Del. C.* §§ 7040-7046 (current version at 25 *Del. C.* §§ 7050-56).

On October 31, 2018, Wild Meadows notified each homeowner with an expiring lease that lot rent would increase above the average annual increase of the Consumer Price Index (the "CPI-U") under the Act. Subsequently, Wild Meadows conducted the statutorily required meeting, under § 7043(b), to disclose and explain the reasons for the rent increase.[4] Multiple homeowners rejected Wild Meadows' rent increase and, through the HOA, filed a petition with the Delaware Manufactured Home Relocation Authority (the "Authority").[5]

The Authority appointed Appellee David J. Weidman, Esquire as the arbitrator under § 7043(c). Arbitration was scheduled for February 6, 2019.[6] Before the scheduled arbitration, the HOA requested financial information from Wild Meadows relating to the Community's recent revenue and costs.[7] Wild Meadows refused to provide this information.[8] The HOA filed a motion to compel discovery and a motion for summary judgment with Weidman.[9]

In his initial decision dated January 18, 2019, Weidman granted discovery of any financial documents that Wild Meadows intended to rely upon at arbitration, but he denied the HOA's motion to compel the production of additional financial documents from Wild

[4] A021.
[5] *Wild Meadows*, 2020 WL 3889057, at *1.
[6] A061.
[7] Intervenor Answering Br. 4.
[8] *Id.* at 4-5.
[9] A061.

Meadows.[10] The HOA submitted a motion for reconsideration of the first decision regarding four categories of documents:

> 1. Income statements from Wild Meadows for fiscal years 2016, 2017 and 2018.
>
> 2. Audited financial statements for Wild Meadows for FY 2016, 2017 and 2018.
>
> 3. The trial balances for Wild Meadows for FY 2016, 2017 and 2018.
>
> 4. Whatever else Wild Meadows intends to rely upon to establish at arbitration that the rent increase it seeks is "directly related to operating, maintaining or improving" the Wild Meadows community.[11]

In the interim, this Court issued its opinion in *Sandhill Acres MHC, LLC v. Sandhill Home Owners Association.*[12] Weidman, relying on our *Sandhill* decision, granted the HOA's requests for discovery of all four categories in his decision dated June 7, 2019.[13] Having determined that he could compel discovery, Weidman ordered Wild Meadows to submit a proposed confidentiality agreement and ordered the HOA to submit any comments on the draft.[14] He warned that if the parties could not come to a consensus, he would issue a final

[10] A064-66.
[11] A069.
[12] 210 A.3d 725 (Del. 2019).
[13] A070-72.
[14] A072.

confidentiality agreement.[15] Wild Meadows submitted its proposed confidentiality agreement, to which the HOA voiced numerous concerns.[16]

Weidman issued a final confidentiality agreement on June 26, 2019.[17] Weidman rejected many of the changes the HOA proposed, but he expanded the "attorney's eyes only provision" to include "any directors, officers, or Board representatives who are attending the arbitration on behalf of the Association, up to the five (5) person limit, and only if those persons execute the [confidentiality agreement] to keep any confidential material . . . confidential."[18] To further protect confidential information, the agreement provided:

> Recipients of any Confidential Material are prohibited from copying or permitting to be copied (whether by taking notes, photographs, Xerox machine or otherwise), or creating an electronic image of all or any portion of the Confidential Material, except for use by counsel for the parties for use in the Arbitration. Recipients shall not permit any person to review all or any portion of the Confidential Material, other than as provided in this Agreement. Further, Recipients shall not discuss or disclose any Confidential Material to any 3rd Party outside of the persons set forth in Paragraphs 5(A) through (E).[19]

Wild Meadows refused to sign the confidentiality agreement and, on July 3, 2019, filed for a writ of prohibition in the Superior Court.[20] In its writ of prohibition, Wild

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[15] *Id.*
[16] Opening Br. 15; Intervenor Answering Br. 6.
[17] A075.
[18] *Id.* ("This decision balances the need for confidentiality against the ability of the [HOA]'s representatives to meaningfully participate with counsel in preparing for the arbitration.").
[19] A080-81. This was just one of many safeguards Weidman included in the confidentiality agreement. *See* A079-84.
[20] *Wild Meadows,* 2020 WL 3889057, at *2.

Meadows argued that Weidman exceeded his authority by ordering Wild Meadows to (1) "produce documents and engage in discovery matters not to be used or relied upon by [Wild Meadows] in the arbitration" and (2) "agree to a Confidentiality [agreement] which [Wild Meadows] will not accept."[21] In response, both Weidman and the HOA filed separate motions to dismiss.[22] Wild Meadows filed a motion for judgment on the pleadings.[23] Oral arguments were held on June 18, 2020.[24]

On July 10, 2020, the Superior Court granted the motions to dismiss filed by both the HOA and Weidman.[25] The court ruled that Weidman had the authority, under the Act and this Court's caselaw, to compel discovery of the financial information.[26] The Superior Court also denied Wild Meadows' challenges to the confidentiality agreement, concluding that Weidman "properly wielded [that authority] to balance the HOA's right to access to the information with Wild Meadows' confidentiality and proprietary concerns."[27] Wild Meadows appeals this decision.

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[21] A031.
[22] A008-009 (The HOA filed its motion to dismiss on November 27, 2019. Weidman's was filed on January 31, 2020).
[23] A008.
[24] A090.
[25] *Wild Meadows*, 2020 WL 3889057, at *1.
[26] *Id*. at *6-10.
[27] *Id*. at *10-12.

II. ANALYSIS

Wild Meadows argues that the Superior Court erroneously dismissed its petition by incorrectly holding that the Rent Justification Act permits arbitrators to compel discovery of financial information and to impose a confidentiality agreement upon the parties in rent justification proceedings.

This Court reviews a decision granting a motion to dismiss *de novo*.[28] The standards governing a motion to dismiss for failure to state a claim are well settled: we (1) accept all well-pleaded factual allegations as true, (2) accept even vague allegations as "well-pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of non-moving party, and (4) do not affirm a dismissal unless the plaintiff/petitioner would not be entitled to recover under any reasonably conceivable set of circumstances.[29]

We also review a trial court's interpretation of the Act, like any other statutory interpretation, *de novo*.[30] Our role is to determine and give effect to the legislature's intent.[31] In doing so, we must "interpret the statutory language that the General Assembly actually adopt[ed], even if unclear and explain what [this Court] ascertain[s] to be the legislative intent without rewriting the statute to fit a particular policy position."[32] If the statute in

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[28] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs., LLC*, 27 A.3d 531, 535 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002)).
[29] *Savor, Inc.*, 812 A.2d at 896-97.
[30] *Sandhill Acres*, 210 A.3d at 728.
[31] *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).
[32] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 542 (Del. 2011); *Pub. Serv. Comm'n v. Wilm. Suburban Water Corp.*, 467 A.2d 446, 451 (Del. 1983) ("Judges must take the law as they find it,

question is unambiguous, this goal is accomplished by applying the plain, literal meaning of its words.[33] Stated differently, "[i]f a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written, unless the result of such a literal application could not have been intended by the legislature."[34]

A. Ability to Compel Discovery

Wild Meadows argues that an arbitrator lacks statutory authority to compel discovery because the text of the Act omits any reference to discovery proceedings. According to Wild Meadows, a community owner must produce whatever it intends to rely on to justify its rents.[35] If the homeowners request additional information to test the community owner's justifications and the community owner does not comply, then the community owner runs the risk that the arbitrator will find the rent increase unjustified. Thus, according to Wild Meadows, the community owner completely controls the flow of information in a rent justification proceeding.[36] We disagree with this interpretation of the Act.

An arbitrator may compel the production of documents under the Act and applicable provisions of the Delaware Administrative Code. The General Assembly, through the

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and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will.").

[33] *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012) (citing *Dennis v. State*, 41 A.3d 391, 393 (Del. 2012)).

[34] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1289 (Del. 2007) (citing *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000)).

[35] Opening Br. 22.

[36] *Id.* at 24-30.

Manufactured Home Owners and Community Owners Act, created the Authority.[37] The Authority was tasked with overseeing manufactured home communities and was granted the explicit power to "[a]dopt a plan of operation and articles, bylaws, and operating rules."[38] Under 25 *Del. C.* § 7011(c)(1), the Authority has the power to create regulations; the most relevant here are the Rent Increase Dispute Resolution Procedures.[39] Under 1 *Del. Admin. C.* § 202-1.0, the Authority recognized its obligation to "implement[] and oversee[] the process by which rent increase disputes are resolved . . . ."[40] To that end, the Authority promulgated § 202-7.10, which expressly allows an arbitrator to compel discovery of documents that are relevant to the rent increase at issue.

> The arbitrator is authorized to schedule an informal preliminary conference with the parties (in person or by telephone) as the arbitrator deems appropriate in order to narrow the issues and minimize the expense of the arbitration process. *The arbitrator is authorized to require the parties to exchange or provide to the other parties documents relevant to the rent increase at issue, including documents related to the standards set forth in* 25 *Del. C.* § 7042.[41]

This regulation is consistent with the overall purpose of the Act. The General Assembly enacted the Rent Justification Act to "protect the substantial investment made by manufactured homeowners, and enable the State to benefit from the availability of affordable

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[37] 25 *Del. C.* § 7011 (2013) (current version at 25 *Del. C.* § 7041).
[38] *Id.* § 7011(c)(1).
[39] *See* 1 *Del. Admin. C.* §§ 202-1.0 to 9.0.
[40] *Id.* § 202-1.0.
[41] *Id.* § 202-7.10 (emphasis added).

housing for lower-income citizens, without the need for additional state funding."[42] At the same time, the General Assembly recognized the property and other rights of manufactured home community owners and sought to provide them with fair return on their investment.[43] Therefore, the overarching purpose of the Act is to balance the conflicting interests of protecting manufactured homeowners from "unreasonable and burdensome . . . rental increases while simultaneously providing . . . community owners . . . a just, reasonable, and fair return on their property."[44]

To ensure a fair return on their property, community owners may raise a homeowner's rent in an amount greater than the CPI-U. But to protect the homeowners from an "unreasonable increase," a community owner must demonstrate that such an increase is justified.[45] To make this showing, the community owner must show that it "has not been found in violation of" health and safety regulations "during the preceding 12-month period," and that "[t]he proposed rent increase is "directly related to operating, maintaining, or improving the manufactured home community, and justified by 1 or more factors listed under subsection (c) . . . ."[46]

In *Bon Ayre II,* we explained the "directly related" inquiry as such:

> To impose an increase beyond CPI-U, the landowner must prove more. In particular, it must show that the increase is

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[42] 25 *Del. C.* § 7040.
[43] *Id.*
[44] *Id.*
[45] *Id.* § 7042(a).
[46] *Id.* § 7042(a)(2); *see id.* § 7042(c).

> "directly related to operating, maintaining or improving the manufactured home community." *That is, the landowner must show that its original expected return has declined, because the cost side of its ledger has grown.* If a landowner can show that its costs have gone up, that opens the door to a rent increase based on § 7042(c)'s factors, including market rent. If a landowner invests in its development, and therefore has "improve[ed]" the community, it can also reap the reward from that investment through higher-than-inflation rent increases. But, unless the landowner has seen its costs increase for "operating, maintaining or improving the manufactured home community," the Rent Justification Act preserves the initial relationship the landowner creates between its revenue and its costs. The homeowner with her home semi-permanently planted in the community is protected from material increases in rent unrelated to the benefits and costs of living in the community, and the landowner receives the return it originally anticipated.[47]

Thus, "[t]o make a *prima facie* case that a rent increase is directly related to improving the community—a requirement that we have previously described as 'modest'—it suffices for the community owner to offer evidence that in making some capital improvement, the community owner has incurred costs that are likely to reduce its expected return."[48] Once the community owner has established its *prima facie* case, homeowners are "entitled to rebut that *prima facie* case by offering evidence of [their] own that the expenditure did not in fact reflect any increase in costs—for example because the expenditure was offset by reduced

[47] *Bon Ayre Land, LLC v. Bon Ayre Cmty. Ass'n. (Bon Ayre II)*, 149 A.3d 227, 234-35 (Del. 2016).
[48] *Sandhill Acres*, 210 A.3d at 729 (citing *Bon Ayre II*, 149 A.3d at 235–36).

expenses in other areas . . . ."[49] Homeowners are allowed to "fairly test" the community owner's proffered justifications.[50]

If adopted, Wild Meadows' interpretation of the Act would negate a homeowner's ability to rebut a *prima facie* case, undermining the Act's stated goal of balancing the homeowner's and community owner's competing interests. If tenants are not allowed to compel the production of documents relevant to the proceedings, the process skews heavily in the favor of community owners, leaving the tenants little opportunity to reasonably vet the information selected and provided by the community owner. Permitting an arbitrator to compel production of documents, subject to reasonable confidentiality protections, furthers the Act's goals of ensuring a fair process for all parties in a rent justification dispute.

Furthermore, this Court has implicitly, if not explicitly, recognized the importance of a homeowner's ability to test a community owner's justifications. For example, in *Donovan Smith HOA v. Donovan Smith MHP, LLC*, we affirmed the arbitrator's holding that the increase in rent was justified.[51] But we expressly rejected the idea that nothing in the statute requires the community owner to expose its financial information (i.e. its underlying business records) to scrutiny.[52] We explained that "it is not the case that a landowner may proceed under the [Act] to argue that it is entitled to an above-inflation rent increase without

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[49] *Id.*
[50] *See Donovan Smith HOA v. Donovan Smith MHP, LLC*, 2018 WL 3360585, at *3 (Del. July 10, 2018).
[51] *Id.* at *2.
[52] *Id.* at *2-3.

also being willing to produce documents to contesting homeowners that allow them to *fairly test* that assertion."[53] Further, we recognized that the *arbitrator* may control the production of documents by imposing "appropriate conditions" to address confidentiality concerns and may "require production" of the relevant books and records if the homeowners "fairly demand" that discovery.[54]

This Court expanded its discussion of discovery in *Sandhill Acres MHC, LLC v. Sandhill Acres Home Owners Association*.[55] We explained that "both sides of the community owner's financial statements bear logically on whether and to what extent a rent increase is 'directly related to operating, maintaining or improving the manufactured housing community' under the Act."[56] Additionally, we emphasized that the parties to a case *should* shape the record by exchanging requests for information and stressed that

> a community owner seeking a rent *increase would not be in any equitable or legal position to resist a reasonable request for information about its costs and profit margins* . . . . As a bottom-line matter, the community owner must make a choice. *Refrain from seeking an increase above inflation and thus be able to keep its financial information to itself, or seek an increase and be willing to incur the concomitant requirement to justify that*

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[53] *Id.* at *3 (emphasis added).

[54] *See id.* ("To the extent that there is a legitimate basis for claiming confidentiality as to any business record—a status that has to be proven—the Superior Court, *or the arbitrator in the first instance*, may condition discovery and use of the document to appropriate conditions."); *id.* ("[T]he outcome could be quite different, especially if the homeowners fairly demand discovery of the landowner's books and records relevant to the question of whether the proposed above-inflation rent increase is 'directly related to operating, maintaining or improving the manufactured home community' and the arbitrator fails to require production of those records.").

[55] 210 A.3d at 731-32.

[56] *Id.* at 731.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MATTHEW ANTHONY GERACI, Plaintiff, v. UBER TECHNOLOGIES, INC., Defendant.	))))))))))))	C.A. No. N21C-07-151 CLS

Date Submitted: October 6, 2021
Date Decided: October 29, 2021

On Defendant's Motion to Dismiss and Compel Arbitration. **GRANTED, in part.**

ORDER

Matthew Anthony Geraci, Florence, Kentucky, 41042, *pro se*.

Henry E. Gallagher, Jr., Esquire, and Lauren P. DeLuca, Esquire, Connolly Gallagher LLP, Wilmington, Delaware, 19801, Attorneys for Defendant.

SCOTT, J.

> *increase*. On a complete record, that allows the tenants to make fair arguments and the arbitrator to assess whether *the proposed increase satisfies the directly related requirement in view of a balanced record taking into account both key factors: revenues and costs*.[57]

We have also acknowledged the arbitrator's power to oversee and direct such discovery by addressing legitimate confidentiality concerns through restrictions or by denying excessively burdensome requests.[58] Both *Donovan Smith* and *Sandhill Acres* acknowledge that a community owner's relevant business records are a necessary part of a homeowner's ability to rebut a community owner's *prima facie* case.

Thus, based on a plain reading of the Act, the applicable sections of the Delaware Administrative Code, and our jurisprudence, we conclude that the Superior Court correctly held that Weidman, as an arbitrator, possessed the authority to compel the production of documents. Furthermore, the Superior Court did not err in ruling that Weidman correctly compelled the discovery of Wild Meadows relevant financial information.

Wild Meadows cannot create a unilateral process where it, as the community owner, gets to singularly choose what documents make the record. If failing to obtain an above-inflation rent increase poses an "enormous risk for the community owner,"[59] then being assessed an above-inflation rent increase without a mechanism to test the community owner's assertions poses an enormous risk to homeowners, particularly given the deference

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[57] *Id.* (emphasis added).
[58] *Id.*
[59] Reply Br. 10-11.

that a reviewing court applies to an arbitrator's decision.[60] Imposing such an asymmetric burden on homeowners is contrary to the statute's purpose of "accommodate[ing] the conflicting interests" of homeowners and landowners.[61] Therefore, Weidman acted within his authority by compelling Wild Meadows to produce business records to afford the HOA a chance to fairly test Wild Meadows' justifications for its rent increase.

To raise rent above the CPI-U is a business decision that community owners should not take lightly. A community owner has two options—either keep rent adjustments at inflation and keep business records private or seek higher rent adjustments and bear the responsibility of justifying that increase.[62] Community owners have a modest threshold burden to justify the increase; but homeowners are afforded the opportunity to test that threshold. Here the community owner sought an increase above inflation; thus, it may be compelled to produce records relating to its revenues and costs.[63]

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[60] *See, e.g.*, *Sandhill Acres*, 210 A.3d at 731 n.37 ("The Rent Justification [Act] is somewhat unclear about the appellate standard of review, stating that the reviewing court must determine 'whether the record created in the arbitration is sufficient justification for the arbitrator's decisions and whether those decisions are free from legal error.' Considering substantially similar language in a prior version of the statute, we previously observed that this language sounds somewhat like substantial evidence review. . . . We therefore conclude that substantial evidence review is the appropriate standard of review for the arbitrator's factual findings." (quoting 25 *Del. C.* § 7044 (current version at § 7054)) (citing *Bon Ayre Land LLC v. Bon Ayre Cmty. Ass'n (Bone Ayre I)*, 133 A.3d 559, 2016 WL 747989, at *2 n.11 (Del. Feb. 25, 2016) (TABLE))).
[61] *See* 25 *Del. C.* § 7040.
[62] 210 A.3d at 731.
[63] *Id.*

B. Ability to Impose Confidentiality Agreement

Wild Meadows also argues the Superior Court erred in holding that Weidman had statutory authority to impose a confidentiality agreement that Wild Meadows contested. Specifically, Wild Meadows complains that:

> Petitioner is a privately-held business, and engages in its business in a highly competitive market which today, in Delaware, is dominated by large competitors. If Petitioner's internal financial information were made available generally or disclosed publicly, Petitioner would face incalculable irreparable harm. Petitioner's competitors would gain an enormous tactical and strategic advantage, to the permanent detriment of Petitioner and of the value of its investment in Wild Meadows. Thus, an "attorney's eyes-only level of protection was included in Petitioner's proposed confidentiality stipulation . . . .
>
> . . . .
>
> The Confidentiality Stipulation did not and could not have "reasonably protected" Petitioner's private, competitively sensitive and highly confidential financial documents without an attorney's eyes-only provision. If the arbitrator is imbued with the authority to compel discovery, a confidentiality agreement protecting the highly confidential documents of parties with an attorney's eyes-only tier must be offered and made available to the parties in the arbitration.[64]

We disagree.

The Authority, under 25 *Del. C.* § 7011(c)(1), has promulgated 1 *Del. Admin. C.* § 202-7.17. Under 1 *Del. Admin. C.* § 202-7.17:

> Any party may request that the arbitrator accord confidential treatment to some or all of the information contained in a document. If the claim of confidentiality is

[64] Opening Br. 16, 43.

> challenged by any party, then the party claiming confidential treatment must demonstrate to the arbitrator that the designated information is confidential as recognized by state law. Notwithstanding any claim of confidentiality, any party to the proceeding shall be allowed to inspect a copy of the confidential document upon the signing of a confidentiality agreement in a form approved by the arbitrator.[65]

Further, this Court has emphasized that "legitimate confidentiality and proprietary concerns should be addressed by the arbitrator through the imposition of use restrictions."[66] Thus, the arbitrator possessed the authority to impose a confidentiality agreement on the parties.

Wild Meadows contends that a confidentiality agreement without an attorney-eyes only provision insufficiently protected its interests and exposed it to "irreparable harm."[67] Yet Weidman recognized, and addressed, the need for confidentiality when dealing with Wild Meadows' business records. After taking input from both parties, Weidman crafted a confidentiality agreement in which he balanced the legitimate business interests of Wild Meadows against the HOA's interest in "fairly testing" Wild Meadows' justifications.

Section 5 of the contested agreement limits who may access confidential information:

> 5. Confidential Discovery Material may be disclosed, summarized, described, characterized, or otherwise communicated or made available in whole or in part only to the following persons:
>
> A. The Parties, and the directors, officers, or Board members of the Association who are attending the Arbitration and assisting counsel with decisions

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[65] 1 *Del. Admin. C.* § 202-7.17.
[66] *Sandhill Acres*, 210 A.3d at 731; *see also Donovan Smith*, 2018 WL 3360585, at *3 (citing Super. Ct. Civ. R. 26(c)(7); 1 *Del. Admin. C.* § 202-7.17).
[67] A129.

concerning the Litigation, to the extent deemed reasonably necessary by counsel of record for the purpose of assisting in the prosecution or defense of the Arbitration for use in accordance with this Stipulation, only if and after such directors, officers, or Board members of the Association execute Exhibit A attached hereto;

B. Counsel who represent Parties in this Arbitration (including in-house counsel), and the partners, associates, paralegals, secretaries, clerical, regular and temporary employees, and service vendors of such counsel (including outside copying and Arbitration support services) who are assisting with the Arbitration for use in accordance with this Stipulation;

C. Subject to Paragraph 7, experts or consultants assisting counsel for the Parties, and partners, associates, paralegals, secretaries, clerical, regular and temporary employees, and service vendors of such experts or consultants (including outside copying services and outside support services) who are assisting with the Arbitration;

D. The Arbitrator, persons employed by the Arbitrator, and court reporters transcribing any hearing in this Arbitration, and the Court, persons employed by the Court, and court reporters transcribing any hearing in any appeal therefrom; and

E. Any other person only upon (i) order of the Arbitrator entered upon notice to the Parties, or (ii) written stipulation of, or statement on the record by, the Producing Party who provided the Discovery Material being disclosed, and provided that such person signs an undertaking in the form attached as Exhibit A hereto.

Recipients of any Confidential Material are prohibited from copying or permitting to be copied (whether by taking notes, photographs, Xerox machine or

> **otherwise), or creating an electronic image of all or any portion of the Confidential Material, except for use by counsel for the parties for use in the Arbitration. Recipients shall not permit any person to review all or any portion of the Confidential Material, other than as provided in this Agreement. Further, Recipients shall not discuss or disclose any Confidential Material to any 3rd Party outside of the persons set forth in Paragraphs S(A) through (E).**[68]

These individuals may only receive confidential documents if they agree to sign this agreement.[69]

Section 12 adds that "[a]ll materials designated as Confidential Discovery Materials or filed pursuant to Paragraph 10 shall be released from confidential treatment only upon Order of a Court."[70] Additionally,

> [t]he Parties agree to be bound by the terms of this Stipulation pending the entry by the Court of this Stipulation, and any violation of its terms shall be subject to the same sanctions and penalties as if this Stipulation had been entered by a Delaware Court of competent Jurisdiction.[71]

Wild Meadows does not expressly address why the specific provisions of this agreement are inadequate. Instead, Wild Meadows vaguely argues that, as a private entity that engages in a competitive market, it faces "irreparable harm" if it is forced to disclose its business records.[72] The party claiming a need for confidentiality, or greater confidentiality, bears the burden of proof; business records are not entitled to an "attorneys' eyes only"

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[68] A079-80.
[69] A075.
[70] A083.
[71] A085.
[72] A129-30.

designation simply because they are business records. Wild Meadows' vague assertions are not useful in assessing the need for greater protection because they do not identify legitimate deficiencies in the actual language of the agreement. To the contrary, Weidman carefully balanced Wild Meadows' concerns in order to "reasonably protect" its sensitive information.

Therefore, we affirm the Superior Court's conclusion that Weidman possessed the statutory authority to impose this confidentially agreement on the parties.

III. CONCLUSION

For the reasons provided above, we AFFIRM the Superior Court's judgment.

INTRODUCTION

Before this Court is Uber Technologies, Inc.'s ("Defendant") Motion to Dismiss and Compel Arbitration. The Court has reviewed the parties' submissions and the record below. For the following reasons, Defendant's Motion to Compel Arbitration and to Dismiss is **GRANTED, in part** and Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.**

FACTS

This civil action arises from Matthew Anthony Geraci's ("Plaintiff") complaint filed on July 21, 2021, regarding his driver account associated with Defendant being deactivated due to Defendant's claims of misuse of trademark and harm to Defendant's brand.

Plaintiff voluntarily entered into two separate agreements with Rasier, LLC, a wholly owned subsidiary of Defendant, to participate as a driver in the ride sharing application as evidenced by Defendant's Exhibit E, containing Plaintiff's log of accepted agreements from Defendant's application.

One agreement was entered into on September 22, 2019, which contained an arbitration provision which "applies, without limitation, to all disputes… arising out of or related to this Agreement and disputes arising out of or related to Plaintiff's relationship with Defendant, including termination of the relationship. This

arbitration provision also applies, without limitation, to disputes regarding . . . termination, . . . federal and state statutory and common law claims."

The second agreement was entered into on January 6, 2020, which applied the arbitration provision to all claims whether brought by Plaintiff or Defendant and "applies, without limitation to disputes between Plaintiff and Defendant . . . arising out of or related to Plaintiff's application for and use of the account to use Defendant's Platform and Driver App as a driver, . . . Plaintiff's contractual relationship with Defendant or the termination of that relationship . . . federal state or local statutory, common law and legal claims."

Plaintiff had thirty (30) days from the time he entered into the agreements to opt out of the arbitration provisions. He failed to do so.

Defendant moves to dismiss Plaintiff's complaint, arguing the Court lacks subject matter jurisdiction because the matter is subject to binding arbitration pursuant to agreements signed by Plaintiff to work as a ride-sharing driver. In response, Plaintiff relies on an opinion rendered by the Canadian Supreme Court, which has no binding or persuasive authority to this Court.

STANDARD OF REVIEW

Defendant moves to dismiss based on Superior Court Civil Rule 12(b)(1), claiming that the Superior Court lacks subject matter jurisdiction over the claims in

the Complaint. It is well-settled in Delaware that the power to compel arbitration lies exclusively with the Court of Chancery.[1] Therefore, this Court cannot render an opinion on compelling arbitration.

However, this Court has held it has jurisdiction to determine whether a valid and enforceable arbitration agreement exists for purposes of determining whether it has subject matter jurisdiction.[2] The Court may dismiss a complaint for lack of subject matter jurisdiction after determining, at most, (1) whether a valid and enforceable arbitration agreement exists and (2) whether the scope of that agreement covers the plaintiff's claims.[3] In reviewing such a motion, a court may consider matters outside the pleadings, such as testimony and affidavits.[4] On a Motion to Dismiss under Rule 12(b)(1), the Court must accept every well-pled allegation as true and draw all reasonable inferences in the non-movant's favor.[5] A Motion to Dismiss should be denied unless it appears to a "reasonable certainty" that the

[1] 10 Del. C. § 5701.
[2] *Bruce Jones, et al. v. 810 Broom Street Operations Inc.*, 2014 WL 1347746 (Del Super. 2014); *Aquila of Delaware, Inc. v. Wilmington Trust Company*, 2011 WL 4908406 (Del. Super. 2011).
[3] *Jones*, 2014 WL 1347746, at *1.
[4] *Cecilia Abernathy, et al. v. Brandywine Urology Consultants, PA*, 2021 WL 211144 (Del. Super. 2021).
[5] *Donald H. Loudon, Jr., v. Archer-Daniels-Midland Co., et al.*, 700 A.2d 135, 140 (Del. Supr. 1997).

plaintiff would not be entitled to relief under any set of facts that could be proved to support them.[6]

DISCUSSION

This Court lacks subject matter over this claim because (1) Plaintiff entered into a valid and enforceable arbitration agreement and (2) the scope of the agreement cannot be determined by this Court.

The agreements before the Court are in the form of a valid "clickwrap" agreement. "A clickwrap agreement is an online agreement that requires a 'webpage user [to] manifest assent to the terms of a contract by clicking an 'accept' button in order to proceed.'"[7] Clickwrap agreements are routinely recognized by courts and are enforceable under Delaware law.[8] Here, Plaintiff clicked "YES, I AGREE" to the terms of the agreement to create an account and continue to use such account. Plaintiff agreed to the terms of the agreement and clickwrap agreements, such as the one present in this case, are enforceable, therefore, Plaintiff entered into a valid and enforceable arbitration agreement.

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[6] *Id.*
[7] *Newell Rubbermaid Inc. v. Storm*, 2014 WL 1266827, at *1 (Del. Ch. Mar. 27, 2014) (*citing Van Tassell v. United Mktg. Gp., LLC*, 795 F.Supp.2d 770, 790 (N.D. Ill. 2011)).
[8] *Newell Rubbermaid*, 2014 WL 1266827, at * 1.

Subsequently, the Court must determine whether the scope of the agreements covers the claims made by Plaintiff. Plaintiff's claims seem to be covered by the agreements because his claims arise from the termination of the relationship between Plaintiff and Defendant, which is specifically referenced in both agreements. However, ultimately, the arbitrator must decide whether Plaintiff's claims fall under the agreements because the Technology Services Agreement, Defendant's Exhibit C, delegates the issues of arbitrability to the arbitrator. "When ... parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[9] Parties can agree to arbitrate questions of "arbitrability"[10] and the agreement expressly provides issues of arbitrability would be subject to the arbitrator by providing:

> such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

[9] *Behm v. Am. Int'l Grp., Inc.*, 2013 WL 3981663, at *6 (Del. Super. Ct. July 30, 2013) (citations omitted).
[10] *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 2777, 177 L. Ed. 2d 403 (2010).

Plaintiff agreed to the arbitration agreements by assenting to the terms by clicking "YES, I AGREE" when prompted to, so he agreed to arbitrate questions of arbitrability. This Court cannot decide whether Plaintiff's claims fall under the agreements.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED, in part** and Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

DLRPC—Rule 2.4

Lawyer Serving as Third-Party Neutral

Rule 2.4. Lawyer serving as third-party neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

776 COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney□client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution 777 process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. [5] Lawyers who represent clients in alternative

dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT

DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT

2008

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PREAMBLE

This Code shall constitute the "Canons of Judicial Ethics" referenced in the Delaware Constitution, Article IV, Section 37.

This Code is designed to provide guidance to judges and nominees for judicial office. The Code will also establish standards of conduct for application in proceedings pursuant to Article IV, Section 37 of the Delaware Constitution, which provides, in pertinent part:

> "A judicial officer may be censured or removed by virtue of this section for wilful misconduct in office, wilful and persistent failure to perform his or her duties, the commission after appointment of an offense involving moral turpitude, or other persistent misconduct in violation of the Canons of Judicial Ethics as adopted by the Delaware Supreme Court from time to time."

It is not intended that disciplinary action would be appropriate for every violation of the Code's provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

Any person subject to this Code may request an advisory opinion on proper judicial conduct with respect to this Code. A judge who has requested and relied upon such an opinion shall be entitled to introduce that opinion in any proceeding in the Court on the Judiciary as evidence that conduct conforming to the opinion is *prima facie* permissible. See Delaware Judicial Ethics Advisory Committee Rules 4(a) and 5(c) and Court on the Judiciary Rule 13(c).

Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The Canons are rules of reason. They should be applied in a manner consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

This Code has been reformatted and its provisions renumbered to conform to the format and numbering of the American Bar Association 2007 Model Code of Judicial Conduct. Its text is based on Delaware's 1974 adaptation of the ABA's 1972 Model Code of Judicial Conduct, revised in 1993, following the promulgation of the ABA's 1990 Model Code of Judicial Conduct. The current text is revised only slightly from the Delaware Code of Judicial Conduct adopted in 1993.

TERMINOLOGY

"Compensation" means payment to a judge by another for services rendered but does not include moneys received by a judge from his investments or for services to a family business permitted under Rule 3.11(A) and (B).

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure.

"Domestic partner" means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.

"Economic interest" means ownership of a legal or equitable interest however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

> (i) ownership in a mutual or common investment fund that holds securities is not an "economic interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not an "economic interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is an "economic interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is an "economic interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian**.**

"Impartial," "impartiality," and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge**.**

"Impending matter" is a matter that is imminent or expected to occur in the near future**.**

"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality**.**

"Independence" means a judge's freedom from influence or controls other than those established by law.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character.

"Knowingly," "knowledge," "known," and **"knows"** mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law.

"Member of the judge's family" means persons related to the judge or the judge's spouse or domestic partner within the third degree of relationship calculated according to the civil law system, and any other relatives with whom the judge or the judge's spouse or domestic partner maintains a close familial relationship, and the spouse or domestic partner of any of the foregoing.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

"Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office**.**

"Third degree of relationship calculated according to the civil law system" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece**.**

APPLICATION

A. All judges, including justices of the peace, full-time masters and court commissioners, should comply with this Code.

B. A retired judge subject to recall who by law is not permitted to practice law, must comply with this Code during any period of recall, except for Rule 3.8 [acting as a fiduciary].

DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT
2008
CANON 1

A judge should uphold the integrity, independence and impartiality of the judiciary.

RULE 1.1 Compliance with the Law.

A judge should respect and comply with the law, including this Code of Judicial Conduct.

Comment:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they should comply with the law, as well as the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

The Canons are rules of reason. They should be applied in a manner consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. The Code may also provide standards of conduct for application in proceedings pursuant to Article IV, Section 37 of the Delaware Constitution, although it is not intended that disciplinary action would be appropriate for every violation of its provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

RULE 1.2 Promoting Confidence in the Judiciary.

(A) A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety in all activities.

Comment:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen, and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all improper acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful, although not specifically mentioned in the Code.

Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. A judge does not violate this Code merely because a personal or judicial decision of the judge may be erroneous.

A judge may initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge should act in a manner consistent with this Code.

(B) An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards, so that the integrity, independence and impartiality of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Comment:

Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

RULE 1.3 Avoiding Abuse of the Prestige of Judicial Office.

(A) A judge should not abuse the prestige of the judicial office to advance the personal or economic interests of the judge or others, and should discourage others from doing so.

(B) A judge should not convey and should discourage others from conveying the impression that they are in a special position to influence the judge.

Comment:

A judge should avoid lending the prestige of judicial office for the advancement of the private interests of the judge or others. For example, a judge should not use the judge's judicial position to gain advantage in litigation involving a friend or member of the judge's family.

CANON 2

A judge should perform the duties of judicial office impartially, competently and diligently.

RULE 2.1 Giving Precedence to the Duties of Judicial Office.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law.

RULE 2.2 Impartiality and Fairness.

A judge should be faithful to the law and maintain professional competence in it.

RULE 2.3 Bias, Prejudice and Impropriety.

(A) A judge should perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge should avoid impropriety and the appearance of impropriety in all activities.

Comment:

A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge should avoid conduct that may reasonably be perceived as prejudiced or biased.

Although a judge should be sensitive to possible abuse of the prestige of the office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation and may use judicial stationery to do so.

RULE 2.4 External Influences on Judicial Conduct.

(A) A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(B) A judge should not allow family, social, or other relationships to influence judicial conduct or judgment.

(C) A judge should not convey or permit others to convey the impression that they are in a special position to influence the judge.

RULE 2.5 Competence, Diligence, and Cooperation.

(A) A judge should perform the duties of the office impartially and diligently.

Comment:

Prompt disposition of the court's business requires a judge to devote adequate time to the judge's duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(B) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

Comment:

The duty to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities including the discharge of the judge's adjudicative and administrative responsibilities.

(C) A judge should dispose promptly of the business of the court.

Comment:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

RULE 2.6 Ensuring the Right to Be Heard.

(A) A judge should accord to every person who is legally interested in a proceeding, or to the person's lawyer, full right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle their matters in dispute but should not act in a manner that coerces any party into settlement.

Comment:

A judge should encourage and seek to facilitate settlement, but parties should not be coerced into surrendering the right to have their controversy resolved by the courts.

RULE 2.7 Responsibility to Decide.

(A) A judge should hear and decide matters assigned, unless disqualified.

(B) A judge should not use disqualification to avoid cases that present difficult, controversial or unpopular issues.

RULE 2.8 Decorum, Demeanor, and Communication with Jurors.

(A) A judge should require order and decorum in proceedings before the court.

(B) A judge should be patient, dignified, respectful and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of the judge's staff, court officials, and others subject to the judge's direction and control, including lawyers to the extent consistent with their role in the adversary process.

Comment:

The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

In court proceedings, judges or former judges participating as litigants or counsel should not be called by their current or former titles or treated with greater familiarity or deference than other participants.

RULE 2.9 *Ex Parte* Communications.

(A) A judge, except as authorized by law, should neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

Comment:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude considering and ruling upon emergency applications where circumstances require. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. It is not intended to preclude communications between a judge and lawyers, or parties if unrepresented by counsel, concerning matters which are purely procedural, such as those which pertain to scheduling, and which in no way bear on the merits of the proceeding. However, such communications should, as soon as practicable, be fully disclosed by the judge to all lawyers, or parties if unrepresented by counsel, involved in the proceeding. A judge should make reasonable efforts to ensure that this provision is not violated through law clerks or other staff personnel.

Except in the course of the judge's official duties, a judge should not initiate a communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information in response to a formal request.

(B) A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Comment:

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

(C) A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

RULE 2.10 Judicial Statements on Pending and Impending Cases.

(A) A judge should abstain from public comment on the merits of a pending or impending proceeding in any court, and should require similar abstention on the part of personnel subject to the judge's direction and control.

Comment:

The admonition against public comment about the merits of a pending or impending action continues until completion of the appellate process. If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Rule 1.2.

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by the Rules of Professional Responsibility.

(B) This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

Comment:

This provision does not restrict comments about proceedings in which the judge is a litigant in a personal capacity, but in mandamus proceedings when the judge is a litigant in an official capacity, the judge should not comment beyond the record.

(C) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except as authorized by a court rule or administrative directive which has been either promulgated or approved by the Delaware Supreme Court.

Comment:

Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

RULE 2.11 Disqualification.

(A) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(1) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) The judge or the judge's spouse or domestic partner, or a person within the third degree of relationship, calculated according to the civil law system, to either of them, or the spouse or domestic partner of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(d) is to the judge's knowledge likely to be a material witness in the proceedings.

(3) The judge knows that, individually or as a fiduciary, the judge or the judge's spouse or domestic partner or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

Comment:

This Rule, for example, would disqualify the judge if a parent, grandparent, uncle or aunt, brother or sister, or niece or nephew of the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of any of the foregoing were a party or lawyer in the proceeding, but would not disqualify the judge if a cousin were a party or lawyer in the proceeding.

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Rule 2.11(A), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Rule 2.11(A)(2)(c), may require the judge's disqualification.

(4) The judge

(a) served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it, or the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding;

(b) served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(B) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge disqualified by the terms of Rule 2.11, except a disqualification by the terms of Rule 2.11(A)(1) or Rule 2.11(A)(4), may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's disqualification. If the parties and their lawyers, after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Comment:

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the assurance of the lawyer on the record that his party's consent will be subsequently obtained.

RULE 2.12 Supervisory Duties.

A judge should require staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

RULE 2.13 Administrative Appointments.

(A) A judge should not make unnecessary appointments.

Comment:

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs.

(B) A judge should exercise the power of appointment only on the basis of merit, avoiding nepotism and favoritism.

(C) A judge should not approve compensation of appointees beyond the fair value of services rendered.

Comment:

Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

RULE 2.14 Disability and Impairment.

A judge, having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, should take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment:

"Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

RULE 2.15 Responding to Judicial and Lawyer Misconduct.

A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

Comment:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authorities.

CANON 3

A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.

RULE 3.1 Extra-judicial Activities in General.

A judge, subject to the proper performance of judicial duties, may engage in the following law-related activities if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially, independently and with integrity any issue that may come before the judge:

(A) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice (including projects directed to the drafting of legislation).

Comment:

In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

(B) A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the judge's office or interfere with the performance of the judge's judicial duties.

Comment:

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.

(C) A judge may engage in activities to improve the law, the legal system, and the administration of justice.

(D) A judge should not use judicial chambers, resources, or staff to engage in activities permitted by this Canon 3, except for uses that are *de minimis*.

RULE 3.2 Appearances before Governmental Bodies and Consultation with Government Officials.

(A) A judge may appear at a public hearing before or otherwise consult with an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice to the extent that it would generally be perceived that a judge's knowledge or experience as acquired in the course of the judge's judicial duties provides special expertise in the area.

Comment:

A judge may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

(B) A judge acting *pro se* may also appear before or consult with such officials or bodies in a matter involving the judge or the judge's legal or economic interest or when the judge is acting in a fiduciary capacity.

RULE 3.3 Testifying as a Character Witness.

A judge should not testify voluntarily as a character witness.

Comment:

The testimony of a judge as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be misunderstood to be an official testimonial. This Rule, however, does not afford the judge a privilege against testifying in response to an official summons. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

RULE 3.4 Appointments to Governmental Positions.

(A) A judge should not accept appointment to a governmental committee, commission, board, agency or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the judge's country,

state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Comment:

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

(B) A judge may serve as a member, officer, or director of an organization or governmental agency committee, board, commission or other governmental position devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in planning fund-raising activities and may participate in the management and investment of funds, but, except as provided herein, should not personally participate in fund-raising activities.

Comment:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Service on the board of a public, as well as private, law school is permissible.

A judge may attend fund-raising activities of a law-related organization although the judge may not be a speaker, guest of honor, or featured on the program of such an event.

(C) A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice. A judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority. A judge shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

RULE 3.5 Use of Nonpublic Information.

Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any purpose not related to the judge's judicial duties.

RULE 3.6 Affiliation with Discriminatory Organizations.

(A) A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation.

Comment:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Rule 3.6 refers to the current practices of the organization.

Whether an organization practices invidious discrimination is often a complex question to which a judge should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.

Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation persons who would otherwise be admitted to membership.

Although Rule 3.6 relates only to membership in organizations that invidiously discriminate on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Rules 1.1 and 1.2 and gives the appearance of impropriety. In addition, it would be a violation of Rules 1.1 and 1.2 for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 1 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Rule 1.2.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Rule 3.6(A) or under Rules 1.1 and 1.2, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

(B) A judge should not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of the Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices

RULE 3.7 Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's independence, integrity, impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(A) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

Comment:

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to re-examine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the judge's relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(B) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

(C) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Comment:

A judge's participation in an organization devoted to quasi-judicial activities is governed by Rule 3.1. A judge may attend fund-raising activities of the organization although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of an organization's letterhead for fund-raising or membership solicitation does not violate these Rules, provided the letterhead lists only the judge's name and position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

RULE 3.8 Appointments to Fiduciary Positions.

(A) A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

Comment:

Mere residence in the household of a judge is insufficient for a person to be considered a member of the judge's family for the purposes of this Rule. The person must be treated by the judge as a member of the judge's family.

(B) As a family fiduciary, a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to the judge in his or her personal capacity.

Comment:

A judge's obligation under this Rule and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Rule 3.8(B)(1).

RULE 3.9 Service as Arbitrator or Mediator.

A judge should not act as an arbitrator or mediator, or otherwise perform judicial functions apart from the judge’s official duties unless expressly authorized by law.

RULE 3.10 Practice of Law.

(A) A judge should not practice law.

(B) Notwithstanding this prohibition, a judge may:

(1) act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

(2) practice law pursuant to military service.

RULE 3.11 Financial, Business, or Remunerative Activities.

(A) A judge may hold and manage investments of the judge and members of the judge’s family.

(B) A judge should not serve as an officer, director, general partner, manager, advisor or employee of any business entity, except that a judge may manage or participate in:

(1) a business closely held and controlled by members of the judge's family.

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family.

(C) A judge's participation in a closely held family business may be prohibited if it takes too much time or involves misuse of or is demeaning to the judicial office or if the business is likely to come before the judge's court.

(D) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit or demean the judicial position, or involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves.

(E) A judge has the rights of an ordinary citizen with respect to financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of the judge's duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

RULE 3.12 Compensation for Extrajudicial Activities.

A judge may receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by this Code or other law, if the source of such payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(A) Compensation should not exceed a reasonable amount.

(B) A judge should not solicit or accept a fee, reimbursement of expenses, or a gift for solemnizing a marriage, except that a judge may accept a non-monetary gift, if the gift is fairly commensurate with the occasion and the judge's relationship with the persons involved.

RULE 3.13 Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value.

(A) Neither a judge nor a member of the judge's family residing in the judge's household should solicit or accept a gift, bequest, favor, or loan from anyone except for:

(1) a gift incident to a public testimonial to the judge, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and a family member or guest to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(2) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or domestic partner or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or domestic partner or other family member and the judge (as spouse or domestic partner or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(3) ordinary social hospitality;

(4) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(5) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require that the judge take no official action with respect to the case;

(6) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(7) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(8) any other gift, bequest, favor or loan, only if:

(i) the donor has not sought and is not seeking to do business with the court or other entity served by the judge; or

(ii) the donor is not a party or other person who has come or is likely to come before the judge or whose interests may be substantially affected by the performance or nonperformance of his or her official duties.

(B) A judge is not required by this Code to make financial disclosures except as provided by the Supreme Court.

RULE 3.14 Reimbursement of Expenses and Waivers of Fees or Charges.

Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or domestic partner or guest. Any payment in excess of such an amount is compensation.

Comment:

Reimbursement or direct payment of travel expenses may be a gift and, if so, its acceptance is governed by Rule 3.13. A judge or employee may receive as a gift travel expense reimbursement including the cost of transportation, lodging, and meals, for the judge and a guest incident to the judge's attendance at a bar-related function or at an activity devoted to the improvement of the law, the legal system, or the administration of justice.

RULE 3.15 Reporting Requirements.

(A) A judge should regularly file reports of compensation received for law-related and extra-judicial activities, as required by the Supreme Court.

(B) A judge should make financial disclosures as required by the Supreme Court.

CANON 4

A judge should refrain from political activity inappropriate to the judge's judicial office.

RULE 4.1 Political and Campaign Activities of Judges and Judicial Candidates.

(A) A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office;

(3) directly or indirectly solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

(B) A judge should resign the judicial office when the judge becomes a candidate either in a party primary or in a general election for a nonjudicial office.

(C) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice.

Comment:

Political contributions by the judge's spouse or domestic partner must result from the independent choice of the spouse or domestic partner and checks by which such contributions are made shall not include the name of the judge.

A person becomes a candidate as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support.

THE CODE OF ETHICS FOR ARBITRATOR'S IN COMMERCIAL DISPUTES

The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.**

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

- **(1)** any known direct or indirect financial or personal interest in the outcome of the arbitration;
- **(2)** any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
- **(3)** the nature and extent of any prior knowledge they may have of the dispute; and
- **(4)** any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;

(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);

(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

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

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

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

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

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Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at **www.adr.org.**

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

> *We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.*

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds $75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in

reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

> *If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

> *The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)*

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- A highly qualified, trained Roster of Neutrals;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

* *Beginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

(a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.

(b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

- **i.** The filing party shall include a copy of the court order.
- **ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
- **iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

(d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.

(e) Information to be included with any arbitration filing includes:

- **i.** the name of each party;
- **ii.** the address for each party, including telephone and fax numbers and e-mail addresses;
- **iii.** if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
- **iv.** a statement setting forth the nature of the claim including the relief sought and the amount involved; and
- **v.** the locale requested if the arbitration agreement does not specify one.

(f) The initiating party may file or submit a dispute to the AAA in the following manner:

- **i.** through AAA WebFile, located at **www.adr.org;** or
- **ii.** by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.

(g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

(h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

(i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds $75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

(a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

- **i.** partiality or lack of independence,
- **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and
- **iii.** any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.

(d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

(a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:

- **i.** require the parties to exchange documents in their possession or custody on which they intend to rely;
- **ii.** require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
- **iii.** require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

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

R-26. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

(a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

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

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

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

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

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.

(e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

(e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

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

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

- **i.** interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
- **ii.** an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and

the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.

(b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

- **(i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
- **(ii)** whether all necessary or appropriate parties are included in the arbitration;
- **(iii)** whether a party will seek a more detailed statement of claims, counterclaims or defenses;
- **(iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
- **(v)** which
  - **(a)** arbitration rules;
  - **(b)** procedural law; and
  - **(c)** substantive law govern the arbitration;
- **(vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
  - **(a)** any preconditions that must be satisfied before proceeding with the arbitration;
  - **(b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
  - **(c)** consolidation of the claims or counterclaims with another arbitration; or
  - **(d)** bifurcation of the proceeding.

(vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

(viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

(ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

(x) whether any measures are required to protect confidential information;

(xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

(xii) whether, according to a schedule set by the arbitrator, the parties will

(a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

(b) exchange and pre-mark documents that each party intends to submit; and

(c) exchange pre-hearing submissions, including exhibits;

(xiii) the date, time and place of the arbitration hearing;

(xiv) whether, at the arbitration hearing,

(a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

(b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

(xv) whether any procedure needs to be established for the issuance of subpoenas;

(xvi) the identification of any ongoing, related litigation or arbitration;

(xvii) whether post-hearing submissions will be filed;

(xviii) the form of the arbitration award; and

(xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.

(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.

(e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org.**

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

(i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.

(ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.

(iii) A brief statement of the nature of the dispute and the relief requested.

(iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

(i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.

(ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.

(iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

(i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

(ii) The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

(iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

(iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

(v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

(vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

(i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

(ii) Admissions made by a party or other participant in the course of the mediation proceedings;

(iii) Proposals made or views expressed by the mediator; or

(iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

(i) By the execution of a settlement agreement by the parties; or

(ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

(iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

(iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT ***www.adr.org/feeschedule.***

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JAMS
CLAUSE WORKBOOK

Local Solutions. Global Reach.™

JAMS Clause Workbook

A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts

EFFECTIVE JUNE 1, 2018

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

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

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

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

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

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

Standard Arbitration Clauses

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

JAMS Standard Arbitration Clause for Domestic Commercial Contracts

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

JAMS Standard Arbitration Clause for International Commercial Contracts

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

Resolution Prior to Arbitration

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

Clause Providing for Negotiation in Advance of Arbitration

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

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

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

Clause Providing for Mediation in Advance of Arbitration

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

Or in the Alternative

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

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

Appointment of an Emergency Arbitrator

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

Arbitrator Qualifications

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

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

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

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

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

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

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

Diversity and Inclusion

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

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

Party-Appointed Arbitrators

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

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

Optional

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

Confidentiality

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

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

Governing Law

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

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

Punitive Damages

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

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

Limitation of Liability

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

Fees and Costs to Prevailing Party

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

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

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

Appeal

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

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

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

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

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

Measures to Enhance Arbitration Efficiency–JAMS Optional Expedited Arbitration Procedures

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

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

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

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

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

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

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

More Limited Efficiency-Enhancing Provisions

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

Document Requests

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

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

E-Discovery

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

1. *There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.*
2. *Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.*
3. *The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.*
4. *Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award. (See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2).*

Interrogatories and Requests to Admit

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

Depositions

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

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

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

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

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

See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2.

Dispositive Motions

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

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

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

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

Deadlines for Completion of Arbitration and Interim Phases

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

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

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

Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.

Case Law Update and Arbitration Trends

Panelists

William D. Johnston, Esquire

Young Conaway Stargatt & Taylor LLP

Brian M. Gottesman, Esquire

Gabell Beaver LLC

Bernard G. Conaway, Esquire

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Ethical Considerations in Arbitration

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