Drafting Dispute Resolution CLAUSES In Complex Business Transactions

The Supreme Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[1] reaffirmed the concept that under the United States Arbitration Act,[2] private arbitration is a creature of the agreement between the parties. Thus, the court ruled that a choice of law clause which specified New York law, which forbids arbitrators from awarding punitive damages, did not in itself establish that the parties agreed to limit the arbitral award to compensatory damages. The court remanded the case for a determination as to whether in fact the parties had so agreed. Thus, in a broad sense, the court's decision teaches that one must look first to the parties' agreement to arbitrate, to determine the nature of the proceeding and the powers of the arbitrators.

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Every year, millions of business contracts are written which include provisions which establish dispute resolution procedures for use by the parties. Many if not most of these predispute resolution provisions incorporate by reference the rules of an alternative dispute resolution (ADR) administrative agency, such as those promulgated by the American Arbitration Association (AAA).[3]

As the ADR movement continues to gain momentum,[4] increasingly complex business disputes, which formerly were resolved through litigation, will instead be resolved through some form of ADR. Given this probability, it is imperative that corporate counsel be knowledgeable and carefully draft the ADR provisions of complex transaction documents. A "one size fits all" approach will in all likelihood not be the best option, given the many issues that need to be addressed. Indeed, much litigation has been spawned from poorly-crafted arbitration provisions.

The purpose of this article is to review the matters which transaction lawyers should consider, and to provide a guide to drafting effective dispute resolution clauses for use in complex commercial contracts.[5] Quite often, a clause will provide for dispute resolution under the rules of an ADR provider.[6] Drafters

When writing an ADR clause, keep in mind that its purpose is to resolve disputes, not create them." This is not as obvious as it seems, say the authors. Each year, millions of business contracts are written. Many contain provisions that call for the use of alternative dispute resolution should disputes arise. Some of these provisions are inadequately drafted due to lack of experience or knowledge about ADR, generic "one size fits all" language, or even simple carelessness. Properly drafted provisions of dispute resolution agreements can be used to tailor the ADR process to the best interests of the parties. Aibel and Friedman provide a comprehensive guide to writing them.

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may not always be familiar with such rules, or with the administrative practices of the ADR organization. This article uses as a frame of reference the procedures of the AAA. It contains examples of clauses and portions of clauses that have been used by parties in cases filed with the AAA over its long history. There are, of course, other dispute resolution organizations which have also published rules. However, insofar as the matters reviewed are generic, the suggestions made are of general application, regardless of the rules chosen.

Major Features of Arbitration

Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding award.[7]

The major features of arbitration are:

1. *A written agreement to resolve disputes by the use of impartial arbitration.* Such a provision may be inserted in a contract for the resolution of future disputes, or may be a submission agreement to arbitrate an existing dispute.[8]

2. *Informal procedures.* Under the rules, the procedure is relatively simple; strict rules of evidence are not applicable;[9] there is no motion practice or formal discovery;[10] there are no requirements for transcripts of the proceedings[11] or for written opinions of the arbitrators.[12] Though there is no formal discovery, most of the rules adopted by the various arbitration centers, such as the AAA, allow the arbitrator to require the production of relevant documents.[13] The AAA's rules are flexible and can be varied by mutual agreement of the parties.

3. *Impartial and knowledgeable neutrals to serve as arbitrators.* Arbitrators are selected for specific cases because of their knowledge of the subject matter.[14] Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

4. *Final and binding awards which are enforceable in a court.* Court intervention and review are limited by applicable state or federal arbitration laws.[15]

Standard Arbitration Agreements

It is not enough to state that "disputes arising under the agreement shall be settled by arbitration." While this language indicates the parties' intent to arbitrate and may authorize a court to enforce the clause, it leaves many issues unresolved. Issues such as when, where, how, and before whom a dispute will be arbitrated, are subject to disagreement, with no way to resolve them except to go to court.

The standard arbitration clause suggested by the AAA addresses those questions. It has proven highly effective in over a million disputes. The parties can provide for the arbitration of future disputes by inserting the following in 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 {specify} in accordance with its {applicable} Arbitration Rules, and judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof."[16]

The 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 {specify} under its {applicable} Arbitration Rules, the following controversy {cite briefly}. We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award."[17]

The above clauses have consistently received judicial support. These clauses refer to time-tested rules, and are often quite appropriate to include in a basic form contract. By invoking such rules, these provisions meet the requirements of an effective arbitration clause:

1. *It makes clear that all disputes are arbitrable.* Thus, it minimizes dilatory court actions to avoid the arbitration process.

2. *It is self-enforcing.* Arbitration can continue despite an objection from a party,[18] unless the proceedings are stayed by court order or by agreement of the parties.

3. *It provides for a complete set of rules and regulations.* This feature eliminates the

need to spell out rules and regulations in the parties' agreement.

4. It provides for the appointment of an impartial neutral. Arbitrators are selected by the parties from a large pool of available experts. Moreover, under such rules, a procedure is available to disqualify an arbitrator for bias.[19]

5. It settles disputes over the locale of the administration. When the parties disagree, locale determinations are made by the AAA as administrator, alleviating the need for direction from the courts.[20]

6. It establishes time limits to assure prompt disposition of disputes. An additional feature of various business arbitration rules are time limits by which the parties must accomplish certain steps, such as selection of the neutral.[21]

7. It insulates the arbitrator from the parties. Under the vast majority of rules which provide for the resolution of business disputes, the administering body channels communications between the parties and the arbitrator, which serves to protect the continued neutrality of the arbitrator and the process.[22]

8. It establishes a procedure for the serving of notices. Depending on the rules used and the type of case, notices can be served by regular mail, addressed to the party or its representative at the last known address.[23] Under most of the rules, the parties and the administering agency may use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by the rules.[24]

9. It gives the arbitrator the power to decide matters equitably and to fashion any appropriate relief, including specific performance. Most of the commonly used rules allow the arbitrator to 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.[25]

10. It allows ex parte hearings. A hearing can be held in the absence of a party who was given due notice. Thus, a party cannot avoid an adverse award by merely refusing to appear.[26] One important "drafting pointer" should be noted here. If, in a domestic transaction as distinguished from an international transaction, the parties desire that an arbitration clause be final and binding, and subject to enforcement in a court of appropriate jurisdiction, it is essential that the clause

In Mastrobuono v. Shearson Lehman Hutton, a securities case, the Supreme Court reaffirmed the concept under the Arbitration Act that private arbitration is a creature of the agreement between the parties. Below, the New York Stock Exchange.

contain an "entry of judgment" provision, such as that found in the standard arbitration clause ("... and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof").

Negotiation

The parties may wish to provide that an attempt be made to resolve their disputes through negotiation prior to arbitration. A sample of a clause which provides for negotiation follows:

- "In the event of any dispute, claim, question, or disagreement arising out of or relating to the Agreement or the breach thereof, the parties hereto shall use their best efforts to settle such disputes, claims, questions, or disagreement. To this effect, they shall consult and negotiate with each other, in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then upon notice by either party to the other, disputes, claims, questions, or differences shall be finally settled by arbitration in accordance with the provisions, for example, of the Commercial Arbitration Rules of the {specify}."

The parties may wish to provide that an attempt be made to resolve their disputes through negotiation prior to arbitration.

The Mini-Trial

The mini-trial is a structured dispute resolution method in which senior executives of the parties involved in legal disputes meet in the presence of a neutral advisor and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement.[27] This procedure might be especially useful in a major reinsurance dispute, or a multi-party, large, complex dispute involving insurers. A clause providing for mini-trial might read:

- "Any controversy or claim arising out of or relating to this contract shall be submitted to {specify} under its Mini-Trial Procedures."

The Mediation Technique

The parties may wish to attempt mediation before submitting their dispute to arbitration. This can be accomplished by making reference to mediation in the arbitration clause. To be most effective, the mediation clause can specify the use of an existing set of rules or procedures, such as the AAA's Commercial or Construction Industry Mediation Rules.[28]

- "If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of {specify}, before resorting to arbitration, litigation, or some other dispute resolution procedure."

- "The parties hereby submit the following dispute to mediation under the Commercial Mediation Rules of {specify}. {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.}"

Mediation/Arbitration

A clause can be inserted into a contract that provides first for mediation. If the mediation is unsuccessful, the dispute would then go to arbitration. A sample of such a clause follows:

- "If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through direct discussions, the parties agree to first endeavor to settle the dispute in an amicable manner by mediation under the Commercial Mediation Rules of {specify}, before resorting to arbitration. Thereafter, any unresolved controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

Arbitration/Mediation

Just as the parties can provide for mediation prior to arbitration, they can also do the reverse: *i.e.*, establish a conventional arbitration system, with a mediation component at the end. The system works as follows: The parties complete the arbitration process, with the arbitrator rendering the award and returning it to the administrator, who holds it. For a specified time period, the parties then mediate the case, before a different neu-

tral. Having completed an arbitration, and having been exposed to strengths and weaknesses in their own case, as well as their adversary's, and knowing that the administrator has an award in hand, the parties are more likely to come to a mediated settlement. If the mediation process fails, however, the administrator releases the award. The language below can accomplish that purpose:

- "Any dispute arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by {specify} in accordance with its {applicable} Arbitration Rules. Upon the close of the arbitration hearing, the administrator shall appoint a mediator pursuant to its Commercial Mediation Rules.

"The arbitrator's award shall be delivered to {specify}, which shall promptly notify the parties of receipt of the award. Within seven days of such notice, the parties shall attend a mediation session, for the purpose of settlement of the dispute. If an impasse is reached, or if no settlement is reached within a period of thirty days following the administrator's notice to the parties that the award had been received, then the administrator shall immediately release the arbitrator's award to the parties, and judgment upon the award rendered by the arbitrator may be entered in any court(s) having jurisdiction thereof."

Drafting the perfect clause.

Governing Law

It is not uncommon for parties to specify the law that will govern the contract and/or the arbitration proceedings. Some examples follow:

- "...shall be resolved by arbitration in accordance with Title 9 of the U.S. Code (Federal Arbitration Act) and the Commercial Arbitration Rules of {specify}."

- "This contract shall be governed by the laws of the State of {specify}."

- "...shall be settled by arbitration in accordance with {state} Arbitration Law and under the Rules of {specify}."

- "In rendering the award, the arbitrator shall determine the rights and obligations of the parties according to the substantive and procedural laws of {state}."

- "The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The Federal Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement."

In international cases, where the parties have not provided for the law applicable to the substance of the dispute, the AAA's International Arbitration Rules contain specific guidelines for arbitrators in applying such law(s).[29]

Provisional Remedies

While many business arbitration rules, such as the AAA's, give the arbitrator the authority to grant interim relief,[30] the parties may wish to make this power explicit, or give themselves the option of applying to court for provisional remedies, in conjunction with the arbitration process. This can be accomplished as follows:

- "Any provisional remedy which would be available from a court of law, shall be available from the arbitrator to the parties to this agreement pending arbitration."

- "Either party may make an application to the arbitrator seeking injunctive relief to maintain the status quo of the parties until such time as the arbitration award is rendered or the controversy is otherwise resolved."

- "Either party may, without inconsistency with this agreement, seek from a court any interim or provisional relief that may be necessary to protect the rights or property of that party pending the establishment of the arbitral tribunal {or pending the arbitral tribunal's determination of the merits of the controversy}."

- "Either party may apply to any court having jurisdiction hereof and seek injunctive relief so as to maintain the

Private arbitration is a creature of the agreement between the parties.

status quo until such time as the arbitration award is rendered or the controversy is otherwise resolved."

Escrow Provision

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods or the subject matter of the arbitration. A sample of such a clause providing for escrow follows:

- "Pending the outcome of the arbitration {name of party} shall place in escrow with {law firm, institution or administering agency} as escrow agent, {the sum of _______, letter of credit, goods, or subject matter in dispute}. The escrow agent shall be entitled to release such {funds, letter of credit, goods or subject matter in dispute} as directed by the arbitrator(s) in the award, unless the parties agree otherwise in writing."

Locale Provisions

Parties may want to add language specifying the place of the arbitration. Some arbitral rules are quite specific about locale issues. For example, the AAA's Uninsured Motorist Rules state;

- "Either the county of residence of the insured or the county where the accident occurred may be designated by the insured as the locale in which the hearing is to be held. Only if all parties agree shall the hearing be held in some other locale."[31]

Examples of other locale provisions which may appear in an arbitration clause follow:

- "Any controversy relating to this agreement or any modification or extension of it, shall be resolved by arbitration in the city of {specify}, under the then prevailing rules of {specify}."

- "The arbitration proceedings shall be conducted in {city}, {state}."

- "The site of the arbitration shall be {city} {state}."

- "The arbitration shall be held in {city}, {state}, or at such other place as may be selected by mutual agreement."

- "...shall be settled by arbitration in {city}, {state}, under the rules then obtaining of {specify}."

In specifying a locale, parties also should consider: (1) the convenience of the location (*e.g.*, availability of local counsel, transportation, hotels, meeting facilities, etc.); (2) the available pool of qualified arbitrators within the geographical area; and, (3) the applicable procedural and substantive law. As noted in § 1:24, *infra*, of particular importance in international cases is the applicability of a convention providing for the recognition and enforcement of arbitral agreements and awards, and the arbitration regime at the chosen site.

Language

In matters involving multi-lingual parties, the arbitration agreement often specifies the language in which the arbitration will be conducted. An example of such language follows:

- "The language(s) of the arbitration shall be {specify}."

- "The arbitration shall be conducted in the {specify} language [but at the request and expense of a party, documents and testimony shall be translated into {specify language}]."

- "The arbitration shall be conducted in the language in which the contract was written."

Such arbitration clauses could also deal with the selection and cost of an interpreter.

Number and Qualifications of Arbitrators

Parties often have very definite ideas about the qualifications of an arbitrator appointed to a dispute. The qualifications requirements may include specific educational, professional or training experience. Parties concerned about the number of arbitrators appointed in a case can predetermine whether the dispute shall be heard by one arbitrator or by a panel of three arbitrators. In the absence of specific language to the contrary, under both the AAA's Commercial Arbitration Rules[32] and the AAA's Large Complex Case Program (LCCP),[33] one arbitrator will be appointed. Typical additions to an arbitration clause dealing with such matters are:

- "The arbitrator shall be a certified public accountant."

- "The arbitrator shall be a retired judge of the {specify} Court."

- "The arbitration proceedings shall be

conducted before a panel of three neutral arbitrators, all of whom shall be members of the Bar of the State of {specify}, actively engaged in the practice of law for at least ten years."

- "The panel of three arbitrators shall consist of one insurance executive, one customer's attorney, and one actuary."

- "Arbitrators must be members of the {specify} State Bar actively engaged in the practice of law with expertise in the process of deciding disputes and interpreting contracts in reinsurance matters.

- "The arbitrators will be selected from a panel of persons having experience with and knowledge of aviation insurance, and at least one of the arbitrators selected will be an attorney."

- "One of the arbitrators shall be a member of the Bar of the State of {specify}, actively engaged in the practice of law, or a retired member of the state or federal judiciary."

- "The arbitration shall be before one neutral arbitrator to be selected in accordance with the Commercial Rules of {specify} and shall proceed under the Expedited Procedures of said rules, irrespective of the amount in dispute."

- "In the event any party's claim exceeds $1 million, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators."

Nationality of Arbitrator

Parties may wish to specify that the arbitrator should or should not be a national or citizen of a particular country. The following examples can be added to the arbitration clause to deal with this concern:

- "The arbitrator appointed to hear and decide disputes under this provision shall be a citizen of {country}."

- "The arbitrator shall be a national of {country}."

- "The arbitrator shall not be a national of either country of the parties to the dispute."

The arbitrator clause can be specifically worded to limit the remedial power of the arbitrator.

Arbitrator Selection

Under the AAA's arbitration rules, arbitrators are generally selected using a listing process.[34] The AAA administrator provides each party with a list of proposed arbitrators who are generally familiar with the subject matter involved in the dispute. Each side is provided 10 days to strike a limited number of names deemed unacceptable, number the remaining names in order of preference, and return the list to the Association.[35] The AAA then invites arbitrators to serve from among those names remaining on the list, in the designated order of mutual preference.[36]

Under the LCCP, the AAA will follow the agreed-upon arbitrator selection method specified in the parties' contract.[37] If the contract is silent, the AAA is authorized to follow the arbitrator-appointment method contained in the rules under which the case is being administered (since the LCCP procedures are meant to supplement whatever arbitration rules the parties are using).[38] As a practical matter, this issue is discussed early on by the senior AAA administrator and the parties at the administrative conference.[39]

The parties may use other arbitrator appointment systems, such as the party-appointed method in which each side designates one arbitrator, and the two thus selected appoint the chair of the panel.[40] This method is not recommended because use of partisan arbitrators can delay the process and produce compromise awards or deadlocks. One way to attempt to ameliorate those problems is to agree that party-appointed arbitrators serve in a neutral capacity, and once appointed, may not have ex parte with the appointing party.

The parties' arbitration clause can also specify by name the individual the parties want as their arbitrator.

All of these issues and others can be dealt with in the arbitration clause. Some illustrative provisions are noted below:

- "In the event arbitration is necessary, {name of specific arbitrator} shall act as the arbitrator."

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Drafting Dispute Resolution Clauses

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- "The arbitrator selected by the claimant and the arbitrator selected by respondent shall, within 10 days of their appointment, select a third neutral arbitrator. In the event that they are unable to do so, the parties or their attorneys may request {specify} to appoint the third neutral arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall take an oath of impartiality."

- "Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall select a third arbitrator within 10 days of their appointment; if the arbitrators selected by the parties hereto are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by {specify}."

A clause can be inserted into a contract that provides first for mediation.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which same must be accomplished. Also, in many jurisdictions, the law permits the court to appoint arbitrators where privately agreed means fail. Such a result may be time-consuming, costly and unpredictable. Parties who seek to establish an ad hoc method of arbitrator appointment may be well advised to provide a fallback, such as, should the particular procedure fail for any reason, "arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules."

Consolidation

Where there are multiple parties with disputes arising from the same transaction, complications may often be reduced by the consolidation of all disputes. Parties can provide for the consolidation of two or more separate arbitrations into a single proceeding or permit the intervention of a third party in an arbitration. In a construction dispute, consolidated proceedings may eliminate the need for duplicative presentations of claims and avoid the possibility of conflicting rulings from different panels of arbitrators. Conversely, consolidating claims might be a source of delay and expense. Examples of language which can be included in an arbitration clause follow:

"Arbitration proceedings under this agreement may be consolidated with arbitration proceedings pending between other parties if the arbitration proceedings arise out of the same transaction or relate to the same subject matter. Consolidation will be by order of the arbitrator, in any of the pending cases, or if the arbitrator fails to make such an order, the parties may apply to any court of competent jurisdiction for such an order."

Discovery

Discovery frequently is time-consuming and expensive. While it is seldom recommended in simple, smaller arbitrations, information exchange can be beneficial in large, complex cases. For such cases, the AAA's various commercial arbitration rules provide for an administrative conference with the AAA staff, and/or a preliminary hearing with the arbitrator. The purposes of such meetings are: (1) to clarify the issues to be resolved; (2) to specify the claims of each party; (3) to identify any witnesses to be called; and at a preliminary hearing, (4) to establish the extent of and schedule for the production of relevant documents and other information.[41]

The LCCP goes somewhat further than the standard AAA arbitration rules, specifically permitting arbitrators to "provide for and place such limitations on the conduct of such discovery as the arbitrators may deem appropriate.[42] The procedures also provide, under limited circumstances, for depositions.[43]

In addition to the information exchanges facilitated by the AAA rules, some parties favor traditional discovery. The following language can serve this purpose:

- "The arbitrator shall have the discretion to order a prehearing exchange of information by the parties, including, without limitation, production of requested documents, exchange of summaries of testimony of proposed witnesses, and examination by deposition of parties."

The holding of depositions can be conditioned upon a finding by the arbitrator that "good cause" has been shown. An example of "good cause" is the nonavailability of a witness to testify at the hearing.

- "The parties shall allow and participate in discovery in accordance with the Federal Rules of Civil Procedure for a period of ninety (90) days after the filing of the answer or other responsive pleading. Unresolved discovery disputes shall be brought to the attention of the chair of the arbitration panel and may be disposed of by the chair of the panel."

- "Limited civil discovery shall be permitted for the production of documents and taking of depositions. All discovery shall be governed by the {specify} Rules of Civil Procedure. All issues regarding conformation with discovery requests shall be decided by the arbitrator."

If the parties do agree to discovery, they might include time limitations as to when all discovery should be completed. The parties also should provide for resolution of outstanding discovery issues by the arbitrator.

Confidentiality

While the confidentiality of the hearings is protected by the AAA's rules,[44] and while the arbitrator should adhere to ethical standards concerning confidentiality (see AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI), parties may also wish to impose limits on themselves as to how much information regarding the dispute may be disclosed outside the hearing. The following language may serve this purpose:

- "Neither party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties."

The above language could also be modified to restrict the disclosure of only certain information (*i.e.*, "trade secrets").

Remedies

Under a broad arbitration clause and most arbitral rules, the arbitrator may grant "any remedy or relief that the arbitrator deems just and equitable" within the scope of the parties' agreement. Sometimes, parties want to specifically include or exclude certain remedies.[45] Particular care, however, should be given to this type of arbitration provision, to avoid unnecessary litigation about what issues are arbitrable. Samples of clauses dealing with remedies appear below:

- "The arbitrator shall have the authority to award any remedy or relief that a court of this state could order or grant, including, without limitation, specific performance of any obligation created under the agreement, the awarding of punitive damages, the issuance of an injunction, or the imposition of sanctions for abuse or frustration of the arbitration process."

- "The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Agreement."

- "Arbitrators shall be empowered to impose sanctions and to take such other actions with regard to the parties as the arbitrators deem necessary to the same extent a judge could, pursuant to the Federal Rules of Civil Procedure, the {state} Rules of Civil Procedure and applicable law."

It is not uncommon for parties to specify the law that will govern the contract and/or the arbitration proceedings.

Award Provisions

The arbitration clause can be specifically worded to limit the remedial power of the arbitrator, even if the evidence indicates that greater relief might be warranted. For example, the clause may establish high and low figures beyond which the arbitrator may not award. This is called "high-low" arbitration. In some agreements, the arbitrator is made aware of the high-low figures; in others this information is not provided to the arbitrator, but is contained in a separate "control

AAA Reviews Commercial Panels

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"I am excited about this opportunity," said Scanza. "This is an important step in a continuing process of evaluating the AAA's critical operations and reshaping them in direct response to the needs of our clients. The results of this panel review will have an impact on our work in commercial disputes worldwide."

Parties will be given easy access to the views of users as to how well a neutral has performed in the past. Each list provided to parties will include the names, addresses and telephone numbers of counsel in the neutral's recent cases.

The Association has also established a Panels Relationship Committee to make recommendations on policies involving neutrals, including training, fees and payments, as well as roster selection. The committee is chaired by Andrea S. Christensen, a partner in Kaye, Scholer, Fierman, Hays & Handler.

When providing for direct appointment of the arbitrator(s) by the parties, it is best to specify a time frame within which same must be accomplished.

contract" between the parties. Another variation is "last best offer" arbitration, also known as "baseball" arbitration. In this system, the parties negotiate to their final positions, and the arbitrator is compelled to select the figure of one party or the other—nothing in between, above, or below. While provisions such as these are permissible and sometimes appropriate, they have the potential to produce results that are unusual or unintended. Such provisions should only be adopted with careful forethought and negotiation. Examples of such arbitration clauses follow.

1. High/Low or Control Clause; Arbitrator Not Informed of Limits:

- "...In the event the arbitrator denies the claim or awards an amount less than the minimum amount of {specify}, then this minimum amount shall be paid to claimant. Should the arbitrator's award exceed the maximum amount of {specify}, then this maximum amount shall be paid to the claimant. It is further understood between the parties that if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator."

2. High/Low Clause; Arbitrator Informed of Limits

- "Any award of the arbitrator in favor of and against {specify party} shall be at least {specify dollar amount} but shall not exceed {specify dollar amount}. {Specify party} expressly waives any claim in excess of {specify dollar amount} and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by {specify party}.

3. Last Best Offer or "Baseball Clause":

- "...Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last best offers. The arbitrator shall be limited to awarding only one or the other of the two figures submitted."

Written Opinions

In the past, arbitrators in business disputes rendered a brief decision without an opinion, with the exception of international and labor relations cases. AAA rules and practice did not encourage commercial arbitrators to write opinions that gave reasons for the award in garden variety cases, on the theory that a lengthy written opinion could prolong a proceeding and might open avenues for attack by the losing party.[46]

The LCCP, having been expressly developed for larger, more complex disputes, however, expressly provides for the issuance of an opinion, either where the parties agree, or where the arbitrators determine that it is appropriate to do so.[47]

Parties who know that they will desire an award with written findings can provide for same by using the following language in their ADR agreement:

- "The arbitration award shall be in writing and shall specify the factual and legal bases for the award."

- "The award of the arbitrators shall be accompanied by a reasoned opinion."

- "Upon the request of a party, the arbitrator's award shall include findings of fact and conclusions of law."

Appeal

Experienced parties and their attorneys rarely write arbitration clauses which allow for appeal of the arbitrator's award. Parties generally appreciate the advantage of arbitral finality and recognize that appeals will delay the ultimate resolution of the dispute. However, the parties may provide for an appeal of the arbitrator's award. An example of such language is:

- "Either party may appeal the arbitration panel's award to an appellate arbitrator by filing with the AAA, within 20 days of the award, a written brief, not to exceed 20 pages, stating the reasons why the panel's decision should be reversed or modified. The opposing party shall file with the AAA and serve on the appealing party, within 20 days after receiving the appeal brief, an opposition brief, not to exceed 20 pages.

The appellate arbitrator shall be appointed directly by the AAA, without submission of lists of proposed arbitrators, and shall be a retired judge of a court of record in the state in which the arbitration was held.

Either party may request oral argument which must be conducted within

14 days following the submission of the final brief. The appellate arbitration shall be based only on the record of the initial hearing and oral argument, if any. The appellate arbitrator shall render a written decision affirming, reversing, modifying or remanding the arbitral panel's decision within 20 days after receiving the final appellate submissions. The appellate arbitrator may reverse, modify or remand the matter for further proceedings by the arbitral panel only on one of the following grounds:

1. Any ground specified in 9 U.S.C. sections 10 or 11;

2. If the award contains material errors of applicable law;

3. If the award is arbitrary or capricious.

The appellate arbitrator may render a final decision on appeal or remand the matter for further proceedings by the arbitral panel."

Fees and Expenses

Arbitration rules generally provide that the administrative fees be borne as incurred and that the arbitrators' compensation be allocated equally between the parties, but this can be modified by agreement of the parties.[48]

The LCCP procedures are quite specific with respect to fees and expenses, expressly authorizing arbitrators to allocate in their award interest, AAA fees, arbitrator compensation, and, under certain circumstances, attorney's fees.[49] These issues can also be dealt with in the arbitration clause. Some typical language dealing with fees and expenses follow:

- "All fees and expenses of the arbitration shall be borne equally by the parties. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs."

- "The prevailing party shall be entitled to an award of reasonable attorney's fees."

- "The arbitrator(s) is authorized to award any parties such sums as shall be deemed proper for the time, expense, and trouble of arbitration, including arbitration fees and attorney's fees."

- "The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. 'Costs and fees' means all reasonable preaward expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees and attorney's fees."

- "The parties shall each bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration."

- "The arbitrators shall award costs and expenses of the arbitration proceeding in accordance with the provisions of the loan agreement, promissory note and/or other loan documents relating to the credit which is the subject of the arbitrated claim or dispute."

International Disputes

The American Arbitration Association administers international commercial cases under various arbitration rules either within or outside the United States. The AAA administers cases under its own International Arbitration Rules, as well as under the International Arbitration Rules of the Asia/Pacific Center and the UNCITRAL Rules. The following are samples of arbitration clauses which relate to international disputes:

- "Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association."

- "Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the Asia/Pacific Center."

- "Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the American Arbitration Association. The case shall be administered by the American Arbitration Association in accordance with its "Procedures for Cases Under the UNCITRAL Arbitration Rules."

The holding of depositions can be conditioned upon a finding by the arbitrator that "good cause" has been shown.

- "The arbitration proceedings shall be conducted in {city}, {country}."

- "The language(s) of the arbitration shall be {specify}."

- "The arbitrator appointed to hear and decide disputes under this provision shall be a citizen of {country}."

The parties may wish to expand any of these clauses by adding a requirement regarding the number of arbitrators appointed to the dispute.

The parties may also submit an international dispute under the AAA's commercial and other specialized arbitration rules, as supplemented by the Supplementary Procedures for International Commercial Arbitration. These procedures do not supersede any provision of the applicable rules but merely codify various procedures customarily used in international arbitration. Included among them are provisions specifying the neutrality of arbitrators, consecutive hearing days, the language of hearings, and opinions. The thrust of the procedures is to expedite international proceedings and keep them as economical as possible.

An inadequate clause may produce as much delay, expense and inconvenience as a traditional lawsuit.

The enforcement of international awards is addressed by the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by more than 80 nations, and in the hemisphere by the recently adopted Inter-American Convention on International Commercial Arbitration. The situs choice for the arbitration should be made only after considering whether the country where the arbitration takes place and the county where enforcement may be sought are signatories to such an appropriate reciprocal treaty.

Large, Complex Cases

In February 1993, the AAA launched its Large Complex Case Program, in an effort to improve its case administration services for larger, more complicated business disputes involving claims of at least $1 million.[50] The key ingredients of the LCCP were: (1) the selection of arbitrators and mediators that satisfied rigorous criteria to insure that the panel was an extremely select one, and the training, orientation and coordination of those neutrals in a manner designed to facilitate the LCCP; (2) the establishment of new procedures for the administration of those cases that elect to be included in the LCCP; (3) the flexibility of those parameters so that parties may more speedily and efficiently resolve their disputes; and (4) administration of large, complex cases by trained, senior AAA staff.[51]

The Supplementary Procedures for Large, Complex Commercial Disputes (Procedures) were designed to address the unique procedural problems presented by large cases.[52] Administered by senior staff, the overall purpose of these Procedures is to provide for the efficient, economical, and speedy resolution of larger disputes. As the name implies, the Procedures complement whatever set of arbitration rules the parties have elected to use.[53] They are used upon the agreement of the parties, or where a court or other authorized body directs their application.[54]

The Procedures provide for an early administrative conference with the AAA,[55] and a preliminary hearing with the arbitrators.[56] Cases are heard by one arbitrator, unless the parties agree otherwise,[57] who serves at his or her customary rate of compensation.[58] Documentary exchanges and other essential exchanges of information are facilitated,[59] as is the preparation of a statement of reasons accompanying the award.[60]

Conclusion

To be of maximum benefit, an ADR clause should address the special needs of the parties involved. An inadequate clause may produce as much delay, expense and inconvenience as a traditional lawsuit. When writing an ADR clause, keep in mind that its purpose is to resolve disputes, not create them. If disagreements arise over the meaning of the ADR clause, it is often because it failed to address the particular needs of the parties. Drafting an effective ADR agreement is the first step on the road to successful dispute resolution.

After a dispute arises, parties can request an administrative conference with a senior staff member of the AAA to assist them in establishing appropriate procedures necessary for their unique case. Such conferences can expedite the arbitration proceedings in many cases. ■

ENDNOTES

Sections of a chapter by George H. Friedman in the American Arbitration Association's *Insurance ADR Manual*, published by Shepard's/McGraw-Hill, have been incorporated, with the permission of the publisher, in this article.

1 _U.S._, No. 94-18, 63 LW 4195 (Mar. 7, 1995).

2 9 U.S.C. §§ 1 et seq. (1994).

3 See, for example, American Arbitration Assn., *Commercial Arbitration Rules,* at back cover (Nov. 1, 1993) [hereinafter cited as "CAR"]. As of Jan. 1, 1996, the AAA had offices located in the following cities: Atlanta, Baltimore, Boston, Charlotte, Chicago, Cincinnati, Cleveland, Dallas, Denver, Detroit, Garden City (NY), Hartford, Honolulu, Houston, Kansas City, Las Vegas, Los Angeles, Miami, Minneapolis, Nashville, Orange County (CA), New Orleans, New York, Orlando, Philadelphia, Phoenix, Pittsburgh, St. Louis, Salt Lake City, San Diego, San Francisco, Seattle, Somerset (NJ), Syracuse, Washington, White Plains.

Note: the AAA has a variety of rules, all of which are tailored to the specific industry, trade, or profession that utilizes them. For purposes of illustration in this chapter, the Commercial Arbitration Rules are used because they are the AAA's rules of general application to business disputes of all sorts. CAR at 3-4.

4 See generally American Arbitration Ass'n, *Annual Report* (1994). The AAA reported that case filings grew from 45,141 to 59,424, a 31% increase, between 1985 and 1994. Statistical data provided by Barbara Brady, AAA Director of Case Administration.

5 For a general discussion of ways of drafting ADR clauses, see American Arbitration Ass'n, *Drafting ADR Clauses: A Practical Guide* (1994).

6 See American Arbitration Ass'n, *A Guide to Business Arbitration* (1994) p. 3.

7 See generally M. Domke, *Domke on Commercial Arbitration,* § 1:01 (G. Wilner, ed. 1994).

8 CAR, *supra*, note 3, at 3 - 4.

9 *Id.* at § 28. The pertinent part of the rule reads as follows:

> "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. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.
>
> "The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and 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."

10 CAR, *supra,* note 3, at § 10, ¶ 2 does permit the arbitrator to order a documentary exchange, but stops short of full-blown discovery. The rules are devoid of any reference to motion practice.

11 *Id.* at § 23. The rule states:

> "Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other party of these arrangements in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator."

12 *Id.* at § 42. The award, however, must be in writing, and signed by a majority of the arbitrators. As a matter of administrative practice, if the parties want the arbitrator(s) to prepare an opinion, they will generally do so. Where the parties disagree, the arbitrator(s) decide whether they will issue a reasoned award. See, for example, American Arbitration Ass'n, *A Guide for Commercial Arbitrators* (1991) p. 24.

13 CAR, *supra*, note 3 at § 10, ¶ 2. The rule states in pertinent part:

> "In large or complex cases, at the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify the issues to be resolved, to stipulate to uncontested facts, and to consider any other matters that will expedite the arbitration proceedings. Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information, (ii) the identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute."

Parties concerned about the number of arbitrators appointed in a case can predetermine whether the dispute shall be heard by one arbitrator or by a panel of three arbitrators.

14 *Id.* at §§ 12, 13. The former provides for arbitrator neutrality, unless the parties agree otherwise. The latter establishes that lists of proposed arbitrators will be sent to the parties.

15 The statutory grounds for vacatur of arbitration awards contained in the United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (1994), are typical:

- evident partiality or corruption in the arbitrators. See, for example, *Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145, 89 S. Ct. 337 (1968), *cert. den.* 393 U.S. 1112, 89 S. Ct. 848 (1969) (failure of arbitrator to disclose significant relationship with a party found to be an indication of bias). But see *Coughlan Construction Co. v. Town of Rockport*, 23 Mass. App. Ct. 994, 505 N.E.2d 203 (1987) (arbitrator's undisclosed relationship with attorney for one of the parties did not amount to "evident partiality or corruption" where the relationship was purely professional and did not relate to the arbitration).

- fraud in the making of the award. See, for example, *Kalgren v. Central Mutual Insurance Co.*, 68 A.D.2d 549, 418 N.Y.S.2d 1 (1st Dep't 1979) (failure of party and counsel, in an insurance case, to inform arbitrator of prior payment of benefits to the plaintiff by her own insurer, while not "outright fraud," did require vacatur and remand to the arbitrator).

- misconduct in refusing to grant a reasonable request to postpone a hearing or refusing to hear pertinent and material evidence, or other miscon-

duct which prejudices the rights of a party. See, for example, *Ministrelli Construction Co. v. Sullivan Bros. Excavating*, 89 Mich. App. 111, 279 N.W.2d 593 (Mich. 1979) (award vacated for misconduct where arbitrators engaged in ex parte contacts with witnesses for a party, after the hearings put prior to the issuance of the award). Also, *Matter of Woodco Mfg. Co.* (G.R.& R. Mfg., Inc.), 51 A.D.2d 531, 378 N.Y.S.2d 504 (3rd Dept. 1976) (award overturned where respondent, who dismissed counsel on the eve of the hearing, was denied a postponement in order to obtain substitute counsel). But see *Northern State Construction Co. v. Banchero*, 63 Wash. 245, 383 P.2d 675 (1963) (arbitrator did not abuse discretion in denying a postponement, where there was no showing that the evidence thus excluded was material).

- arbitrators acting in excess of their authority. See, for example, *Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841 (Ky. 1984) (arbitrators exceeded their authority by awarding on a matter not submitted to them). See also *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182 (1953) (award will be set aside if it demonstrates "manifest disregard" of the law); *Lentine v. Fundaro*, 29 N.Y.2d 382, 328 N.Y.S.2d 418 (1972) (award may be vacated if it is "completely irrational").

For a discussion of the relative finality of arbitration, and the limited scope of judicial review, awards, see M. Hoellering, "Arbitral Finality," *N.Y.L.J.*, (Apr. 10, 1987) p. 1, col. 1.

[16] CAR, *supra*, note 3, at 2–3.

[17] *Id.* at 4.

[18] *Id.* at § 30. The rule states:

"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."

[19] *Id.* at § 19. The rule states:

"Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, 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. 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. Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive."

[20] *Id.* at § 11. The rule states:

"The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 10 days after notice of the request has been mailed to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding."

[21] *Id.* at §§ 53 - 57. The Expedited Procedures of the CAR provide for shorter response times, limited striking of proposed arbitrators, and the use of the telephone as the primary means of notice transmittal.

[22] *Id.* at § 29, ¶ 6. The rule states:

"There shall be no direct communication between the parties and a neutral arbitrator other than at oral hearing, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to the neutral arbitrator shall be directed to the AAA for transmittal to the arbitrator."

[23] *Id.* at § 40. The rule states:

"Each party shall be deemed to have consented that 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 thereto has been granted to the party."

[24] *Id.* The pertinent section of the rule states:

"The AAA and the parties may also use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by these Rules."

[25] *Id.* at § 43. The pertinent section of the rule states:

"The arbitrator may grant any remedy or relief which 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."

[26] *Id.* at 30. The rule states:

"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."

[27] See, for example, American Arbitration Ass'n, *Mini-Trial Procedures* (1993).

[28] See, for example, American Arbitration Ass'n, *Commercial Mediation Rules* (Jan. 1, 1992).

[29] American Arbitration Ass'n, *International Arbitration Rules* (March 1, 1993).

[30] CAR, *supra*, note 3, at § 34. The rule states:

"The arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute."

[31] American Arbitration Ass'n, *Accident Claims Arbitration Rules* § 7 (July 1, 1993).

[32] CAR, *supra*, note 3, at § 17. The rule states:

"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 a greater number of arbitrators be appointed."

[33] For a description of the AAA's Large, Complex Case Program, see § 1.25 and accompanying notes *infra*. See also American Arbitration Ass'n, *Supplementary Procedures for Large, Complex Commercial Disputes* § 3(a) (March 1, 1993).

[34] See, for example, CAR § 13. The rule states:

"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: immediately after the filing of the demand or submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the panel.

"Each party to the dispute shall have 10 days from the mailing date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. In a single-arbitrator case, each party may strike three names on a peremptory basis. In a multi-arbitrator case, each party may strike five names on a peremptory basis. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. 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 upon 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 panel without the submission of any additional lists."

[35] *Id.*

[36] *Id.*

[37] LCCP, *supra*, note 33, at § 3(b).

[38] *Id.* at § 1(a).

[39] *Id.* at § 2(b).

[40] CAR, *supra*, note 3, at § 31.

[41] *Id.* at § 10, ¶ 2.

[42] LCCP, *supra*, note 33, at § 5(c).

[43] *Id.* at § 5(d).

[44] CAR, *supra*, note 3, at § 25. The pertinent section reads as follows:

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

[45] The U.S. Supreme Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc., supra,* note 1, would appear to permit the awarding of punitive damages even under a contract calling for the application of New York law.

[46] American Arbitration Assn., *Arbitrator's Guide* (1994) p. 5.

[47] LCCP, *supra*, note 33, at § 6.

[48] CAR, *supra*, note 3, at § 43 (allocation of administrative fees and arbitrator compensation), and § 51 (deposits). See also introduction to administrative fee schedule in CAR, which reads in pertinent part as follows:

"Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award."

[49] LCCP, *supra*, note 33, at § 7. This section states:

"The award of the arbitrators may include: (a) interest at such rate and from such date as the arbitrators may deem appropriate; (b) an apportionment between the parties of all or part of the fees and expenses of the AAA and the compensation and expenses of the arbitrators; and (c) an award of attorney's fees if all parties have requested or authorized such an award."

[50] LCCP, *supra*, note 33, at § 1(a). The rule reads in pertinent part:

"The Supplementary Procedures for Large Complex Commercial Disputes (hereinafter 'Procedures') shall apply to all cases administered by the AAA under any of its rules in which the claim or counterclaim of any party is at least $1 million exclusive of interest, costs and fees or is undetermined, and in which either: (1) all parties have elected to have the Procedures apply to the resolution of their dispute; or (2) a court or governmental agency of competent jurisdiction has determined that a dispute should be resolved before the AAA pursuant to the Procedures. Parties may also agree to use the Procedures in cases involving less than $1 million."

[51] *Id.* at 2.

[52] *Id.* at 3.

[53] *Id.* at § 1(a). The rule reads in pertinent part:

"The Procedures are designed to complement the rules selected by the parties to govern their dispute. To the extent that there is any variance between such rules and these Procedures, the Procedures shall control."

[54] *Id.*

[55] *Id.* at § 2. The rule reads in pertinent part:

"Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless it determines the same to be unnecessary, conduct an administrative conference with the parties or their attorneys or other representatives, either in person or by conference call, at the discretion of the AAA. 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; and (c) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate."

[56] *Id.* at § 4. The rule reads in pertinent part:

"As promptly as practicable after the selection of the arbitrators, a preliminary hearing shall be held among the parties or their attorneys or other representatives and the arbitrators. With the consent of the arbitrators and the parties, the preliminary hearing may: (1) be conducted by the chairman of the panel of arbitrators rather than all the arbitrators; and/or (2) be conducted by telephone conference call rather than in person; or (3) be omitted. At the preliminary hearing the matters that may be considered shall include, without limitation by specification: (a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrators; (b) stipulations to uncontested facts; (c) exchange and premarking of those documents which each party believes may be offered at the hearing; (d) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate; (e) whether, and the extent to which, any sworn statements and/or depositions shall be permitted; (f) whether a stenographic or other official record of the proceedings shall be maintained; and (g) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution."

[57] *Id.* at § 3(a). The rule reads in pertinent part:

"Large, Complex Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators, then one arbitrator shall hear and determine the case unless the AAA shall determine otherwise."

[58] *Id.* at § 3(b). The rule reads in pertinent part:

"The AAA shall appoint arbitrators as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators as provided in the rules under which the case is being administered."

[59] *Id.* at § 5. The rule states:

"Management of Proceedings

(a) Arbitrators shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrators consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrators may provide for and place such limitations on the conduct of such discovery as the arbitrators may deem appropriate.

(d) At the request of a party, the arbitrators may order the conduct of the deposition of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrators to be necessary to a determination of a Large Case and who will not be available to testify at the hearings."

[60] *Id.* at § 6. The rule states:

"If requested by all parties, the award of the arbitrators shall be accompanied by a statement of the reasons upon which such award is based. If requested by one party the arbitrators may, in their discretion, issue such a statement."