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COMMENTS

VOLUNTARY COMMERCIAL ARBITRATION: CAREFULLY CONSTRUCTED CONTRACT CLAUSES CAN CURE COUNTLESS CONFLICTS

INTRODUCTION

Conflict is a fact of business life. In response to this matrix of commercial interaction, business people have invoked various methods for resolving disputes.¹ While the traditional method has

1. STEPHEN P. DOYLE & ROGER S. HAYDOCK, WITHOUT THE PUNCHES - RESOLVING DISPUTES WITHOUT LITIGATION 7 (1991). The three most common methods parties use to resolve disputes aside from litigation are negotiation, mediation and arbitration. *Id.* Negotiation is a process whereby disputing parties communicate with one another in an attempt to reach a settlement or agreement of some matter. *Id.* at 107-15. *See also* ROGER FISHER & WILLIAM L. URY, GETTING TO YES (1983). Mediation is a non-binding, voluntary process where a neutral third party facilitates negotiations between disputants in an attempt to reach an agreement that all sides will accept. DOYLE & HAYDOCK, *supra*, at 9 and 69. *See also* ROBERT COULSON, AMERICAN ARBITRATION ASSOCIATION, BUSINESS MEDIATION - WHAT YOU NEED TO KNOW (1988); Roger Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U.L. REV. 591, 594-95 & nn.22-25 (1988). Arbitration, on the other hand, is a process whereby parties submit their dispute to a neutral third party for a binding decision. *Id.* at 592-94. *See also* DOYLE & HAYDOCK, *supra*, at 8-9 and 19-67. This comment will focus on the flexibility of the procedures available in voluntary, binding arbitration and the control the parties to a dispute can exert over the process by customizing their arbitration agreements.

Various other dispute resolution methods exist. Med-Arb is a combination of both mediation and arbitration. DOYLE & HAYDOCK, *supra*, at 9. Initially, the parties and a mediator attempt to mediate a dispute. *Id.* If mediation fails, or only resolves some of the issues, the parties then submit the remaining issues to binding arbitration. *Id.*

Mini-trials are formal presentations of evidence and arguments to representatives of the respective parties. *Id.* at 10-11. The representatives issue non-binding decisions based on the presentations which the parties may use in subsequent settlement negotiations. *Id.* *See also* Patterson, *supra*, at 591, 595 & n.26. Summary jury trials are where attorneys present abbreviated versions of their case to mock juries. DOYLE & HAYDOCK, *supra*, at 10. These mock juries deliberate and return non-binding advisory verdicts which may give the parties an indication of what a real jury would do after a complete trial. The parties may then use the advisory verdict in settlement negotiations, or proceed to a full trial. *Id.* *See also* Patterson, *supra*, at 591, 596. Private judging is where the parties refer their dispute to a third party, usually a retired judge, for a binding decision. DOYLE AND HAYDOCK, *supra*, at 11. The parties may select a judge based on his particular experience and the parties may design the proceedings

been litigation,² voluntary arbitration³ provides a viable alternative for the successful resolution of numerous business conflicts.⁴

Due to the current environment of overcrowded court dockets and the increasing costs of litigation,⁵ an increasing number of industries and companies are using arbitration as an alternative means of dispute resolution ("ADR").⁶ Arbitration is a private, in-

to fit their particular needs. *Id.* See also Patterson, *supra*, at 591, 597. Expert fact finding is where a neutral expert reviews a case, and then issues a report identifying contested and uncontested facts. *Id.* at 597-98. The expert recommends non-binding, alternative solutions which the parties may use during settlement negotiations, but the expert does not make any decisions for the parties. *Id.* & nn.35-37. See also DOYLE & HAYDOCK, *supra*, at 11. A moderated settlement conference is where attorneys present their cases to a panel of neutrals who render non-binding advisory opinions. *Id.* See also WILLIAM L. URY ET AL, GETTING DISPUTES RESOLVED, DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988) (discussing multi-step process to creating dispute resolution systems); STUART S. NAGEL & MIRIAM K. MILLS, MULTI-CRITERIA METHODS FOR ALTERNATIVE DISPUTE RESOLUTION, WITH MICROCOMPUTER SOFTWARE APPLICATIONS (1990) (discussing multi-variable mathematical formulations and computer applications to resolve disputes).

2. Patterson, *supra* note 1, at 591 (litigation is the traditional mechanism for dispute resolution). See also WALL ST. J., Aug. 5, 1991, at B3, col. 2 (chart showing results of a survey of 1000 of the largest public companies indicating that litigation accounted for 23.3% of corporate legal costs).

3. BLACK'S LAW DICTIONARY 96 (5th ed. 1979). Voluntary arbitration is the reference of a dispute to an impartial third person by mutual and free consent of the parties. *Id.*

4. Patterson, *supra* note 1, at 592-94 (discussing the arbitration alternative). See also Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 24 LOY. L.A. L. REV. 473, 474 (1990) (discussing the relative advantages of arbitration versus litigation); Stephen A. Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78-79. According to American Arbitration Association President Robert Coulson, "more commercial claims are arbitrated than tried before a jury." *Id.* See also Geraldine S. Brown, *Differences Between Private Arbitration and Mandatory Court-Annexed Arbitration*, CBA REC., Apr./May 1991, at 20-23 (reviewing the differences between private voluntary arbitration and mandatory court-annexed arbitration).

5. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986) (commentary focusing on the caseload problems of the judicial system). See also *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59 (2d Cir. 1983) (one purpose of the United States Arbitration Act is to ease the workload of the courts); *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367 (D.D.C. 1972) (two basic purposes of the United States Arbitration Act are to relieve parties from costly litigation and help ease congested court dockets).

6. The American Arbitration Association has published rules and procedures covering the following industries and disputes: American Fats and Oils Association, Inc. - Arbitration Rules; Arbitration Rules for the Interpretation of Separation Agreements; Arbitration Rules of the General Arbitration Council of the Textile and Apparel Industries; Commercial Arbitration Rules; Commercial Mediation Rules; Construction Industry Arbitration Rules; Construction Industry Mediation Rules; Election Rules; Employee Benefit Plan Claims Arbitration Rules; Family Mediation Rules; Fish and Seafood Arbitration Rules; Grain Arbitration Rules; Home Warranty Arbitration Rules; International Arbitration Rules; Judicial Reference Procedures; Labor - Management Grievance Mediation; Mini-Trial Procedures; Multi-Employer Pension Plan Arbitration Rules for Withdrawal Liability Disputes; Patent Arbitration Rules; Plan for

formal process where all of the respective parties agree to submit their controversy to one or more impartial persons, called arbitrators.⁷ The arbitrator's ultimate responsibility is to resolve the controversy by rendering a final and legally binding decision. Most importantly, courts will almost always enforce an arbitrator's decision.⁸

Voluntary Arbitration of Freight Loss and Damage Claim Disputes Between Rail Carriers and Claimants; Procedures for Cases under the UNCITRAL Arbitration Rules; Real Estate Valuation Arbitration Rules; Reglamento de Procedimientos de la Comision Interamericana de Arbitraje Comercial; Regles d'Arbitrage Commercial; Regles de Mediation Commercial; Representation Election Rules; Resolving Employment Disputes - Model Employment Arbitration Procedures; Rules for Impartial Determination of Union Fees; Rules of Procedure of the Inter-American Commercial Arbitration Commission; Securities Arbitration Rules; Supplementary Procedures for International Commercial Arbitration; Title Insurance Arbitration Rules; Voluntary Labor Arbitration Rules; AAA Procedures for New York State No-Fault Master Arbitration; AAA Rules for New York State No-Fault Arbitration; AAA Dispute Resolution Procedures for Insurance Claims; AAA Dispute Resolution Program for Insurance Claims: A Procedural Guide; Accident Claims Arbitration Rules (Including Mediation).

The following list includes business associations which have established their own arbitration forums: New York Stock Exchange, American Stock Exchange, Philadelphia Stock Exchange, Chicago Board of Trade, Chicago Board of Options Exchange, Midwest Stock Exchange, Mid-American Commodity Exchange, Chicago Mercantile Exchange, International Chamber of Commerce, National Futures Association, National Association of Securities Dealers, and, Municipal Securities Rulemaking Board.

In 1984, The Center for Public Resources, Inc., a non-profit alternative means of dispute resolution (ADR) organization based in New York, developed the CPR Corporate Policy Statement on Alternatives to Litigation. This pledge commits subscribing CEO's and General Counsel to agree to explore negotiations or other forms of ADR if disputes arise with other signers of the pledge. "The CPR Corporate Policy Statement has been endorsed by over 600 of the nation's largest companies (and 1800 subsidiaries) . . . which account for about one-half of the gross national product." Letter from James F. Henry, President, *CPR Legal Program*, to CPR Member Firms 1 (1991) (on file with author). See also Catherine Cronin-Harris & James F. Henry, *ADR Contract Clauses*, ACCA DOCKET, Spring 1988, at 31 ("If you are negotiating a contract with General Mills, and you are not willing to include an ADR clause, you might as well leave the bargaining table").

7. AMERICAN ARBITRATION ASSOCIATION, *A COMMERCIAL ARBITRATION GUIDE FOR BUSINESS PEOPLE* 3 (1991). The leading reference on commercial arbitration is Domke on Commercial Arbitration. MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* (Gabriel M. Wilner rev. ed. 1990)[hereinafter *DOMKE ON COMMERCIAL ARBITRATION*]. See also Patterson, *supra* note 1, at 592 n.5.

8. See, e.g., Jiang, *supra* note 4, at 474 (discussing the final and binding nature of voluntary arbitration); Patterson, *supra* note 1, at 592-93 (arbitration decisions are generally meant to be final). But see *DOMKE ON COMMERCIAL ARBITRATION*, *supra* note 7, §§ 32:00-02 (discussing nonjudicial challenge of awards) and §§ 33:00-05 (discussing judicial challenge of awards). Under certain circumstances, courts may vacate an award, or order a modification or correction of an award. See *infra* text accompanying notes 158-60 for a discussion of appealing an arbitration award, and the text of section 10 (grounds for vacating an award). See also United States Arbitration Act § 11, 9 U.S.C. §§ 10-11 (1988) (grounds for modifying or correcting an award).

To meet business' increasing demand for arbitration, law firms are integrating ADR into their corporate practices.⁹ Law schools are adding specialized ADR courses to their curricula. Corporations are even designing their own in-house dispute resolution systems.¹⁰ Numerous ADR organizations now exist to facilitate the administration of this increasing demand.¹¹

When handled properly, arbitration provides a prompt and efficient resolution of disputes, without the expense, delays, or complications associated with litigation.¹² The key is that the parties to an arbitration agreement have the power to negotiate the specific terms to facilitate the settlement of future disputes. Since business people rely on their attorneys to draft these agreements, attorneys, as well as business people, must become familiar with arbitration¹³ and how to construct an arbitration agreement that effectively addresses both the attendant substantive and procedural issues.¹⁴

9. Dana H. Freyer, *The Integration of ADR into Corporate Law Firm Practice*, 45 ARB. J. 3 (Dec. 1990) (discussing how Skadden, Arps, Slate, Meagher & Flom views ADR as a necessary legal service to be offered to corporate, industrial and financial clients).

10. See, e.g., R. CLIFFORD POTTER, *DISPUTE MANAGEMENT AND RESOLUTION: AN INTRODUCTION* (1988) (discussing the need for in-house counsel to establish dispute resolution systems); WILLIAM L. URY ET AL, *GETTING DISPUTES RESOLVED, DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988) (encouraging in-house counsel to develop and implement alternative forms of dispute resolution).

11. See ROBERT COULSON, *AMERICAN ARBITRATION ASSOCIATION, BUSINESS ARBITRATION - WHAT YOU NEED TO KNOW* (4th ed. 1991) (list of major arbitral institutions from around the world). See also *supra* note 6 for a list of business associations which have established their own arbitration forums, and *infra* Appendix I for detailed information on significant ADR organizations in the United States.

12. A committee of the United States House of Representatives made the following comments while discussing the passage of voluntary patent arbitration legislation, 35 U.S.C. § 294 (1988):

[Arbitration] is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices; and, arbitrators are frequently better versed than judges and juries in the area of trade customs and the technologies involved in these disputes.

H.R. REP. No. 542, 97th Cong., 2d Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 756, 777. See, e.g., *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985). See generally, Robert D. Raven, *Alternative Dispute Resolution: Expanding Opportunities*, 43 ARB. J. 44 (June 1988).

13. See, e.g., AMERICAN ARBITRATION ASSOCIATION, *A COMMERCIAL ARBITRATION GUIDE FOR BUSINESS PEOPLE* (1991); COULSON, *supra* note 11; DOYLE & HAYDOCK, *supra* note 1; STEVEN LAZARUS ET AL, *AMERICAN MANAGEMENT ASSOCIATION, RESOLVING BUSINESS DISPUTES - THE POTENTIAL OF COMMERCIAL ARBITRATION* (1965).

14. See ROBERT M. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS*, WEST'S HANDBOOK SERIES (1984); George H. Friedman, *Checklist for Commercial Arbitration*, 37 ARB. J. 10 (Sept. 1982); C. Evan Stewart, *How to Construct*

This comment explores the development of the current national policy favoring arbitration as a method of settling controversies and some of the numerous considerations which should be addressed in constructing an arbitration agreement. Part I examines the history and development of arbitration in the United States. Part II sets forth the contractual nature of voluntary arbitration and the control each side has in negotiating the specific terms under which future disputes will be settled. Part III addresses the construction of arbitration agreements as they pertain to specific pre-hearing issues and procedures. Part IV addresses similar drafting concerns pertaining to specific evidentiary hearing issues and procedures. Lastly, Part V addresses specific post-hearing issues and procedures. Throughout this comment, suggested clauses and portions of clauses are presented to illustrate how the practitioner can incorporate the various considerations into customized dispute resolution agreements. Finally, this comment will conclude that an arbitration agreement should be constructed to include a parties' specialized objectives thereby providing them with certain advantages and benefits.

I. HISTORICAL PERSPECTIVE

Arbitration in the United States is rooted in the English common law.¹⁵ In adopting the English common law, the early American courts also acquired the English courts' hostility toward enforcing executory arbitration agreements.¹⁶ In essence, early United States courts considered executory arbitration agreements to be either revocable, invalid or unenforceable.¹⁷ In justification of this formalism, courts explained that executory arbitration agreements were barred by public policy because such agreements supplanted the court's jurisdiction.¹⁸ The result was that a party to an

Better Arbitration Clauses, 36 PRAC. LAW. 79 (Dec. 1990); Richard D. Yeomans, *Counseling the Client on Commercial Arbitration Clauses*, 36 PRAC. LAW. 17 (Jan. 1990); A. Marco Turk, *Spell Out the Details when Drafting Contracts*, L.A. DAILY J., Mar. 24, 1991, at 7 col. 1 (referring to arbitration clauses).

15. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-84 (2d Cir. 1942) (for an indepth discussion of the history of the judicial attitude toward arbitration). See generally Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240 (1927); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595 (1928); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

16. *Kulukundis*, 126 F.2d at 984 (discussing English hostility toward enforcing executory arbitration agreements).

17. *Id.* at 984-85.

18. *Kulukundis*, 126 F.2d at 983; *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915). "[S]pecific enforcement of an arbitration agreement improperly ousts the courts of jurisdiction. Attempts by contract to foreclose judicial inquiry were against public policy." E.E. Tripp Ex-

executory arbitration agreement would not be granted specific performance if a suit were filed to enforce the agreement.¹⁹

In the early 1900's, public policy changes altered the court's initial hostility toward arbitration.²⁰ This public policy change was embodied by the passage of both state²¹ and federal²² arbitration statutes which recognized the validity, irrevocability, and enforceability of executory arbitration agreements.²³ With the passage of the original United States Arbitration Act in 1925,²⁴ Congress moved to reverse centuries of judicial hostility toward arbitration

cavating Contractor, Inc. v. County of Jackson, 230 N.W. 2d 556, 567 (Mich. 1975).

19. *Kulukundis*, 126 F.2d at 984. The common law, however, was not hostile toward enforcing arbitration awards. *Id.* at 983. See, e.g., *Burchell v. Marsh*, 58 U.S. 344 (1854) (a presumption exists in favor of the validity of an arbitration award).

20. The policy against arbitration began eroding in the early 20th century as the federal courts undertook their "obligation to shake off the old judicial hostility to arbitration." *Kulukundis*, 126 F.2d at 985. See, e.g., *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319, 321-22 (S.D.N.Y. 1921)(comments of Mack, J.), *aff'd*, 5 F.2d 218 (2d Cir. 1924); *United States Asphalt R. Co. v. Trinidad Petroleum Co.*, 222 F. 1006, 1007-11 (S.D.N.Y. 1915)(remarks of Hough, J.). See also *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *appeal dismissed per stipulation*, 364 U.S. 801 (1960).

The Supreme Court stated in *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27.

21. The first state to pass general legislation addressing arbitration was New York, in 1920. Arbitration Act, 1920 N.Y. Laws 803 (codified as amended at N.Y. CIV. PRAC. L. & R. § 7501 (McKinney 1980)). See *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288 (N.Y. 1921) for a review of the statute. This statute was the precursor to the United States Arbitration Act ("USAA"). See *infra* note 22 for legislative history of USAA.

22. The USAA was first enacted February 12, 1925. Act of Feb. 12, 1925, ch. 213, § 1, 43 Stat. 883 (1925)(current version at 9 U.S.C. §§ 1-208 (1988)). It was codified in Title 9 of the *United States Code* in 1947. Act of July 30, 1947, ch. 392, § 1, 61 Stat 669. Congress added chapter 2 in 1970. Act of July 31, 1970, Pub. L. No. 91-368, § 1, 84 Stat. 692. Section 15 (inapplicability of Act of State doctrine) was added in November of 1988. Act of November 16, 1988, Pub. L. No. 100-669, § 1, 102 Stat. 3969. A second section 15 (providing for appellate review of arbitrability determinations) was added three days later. Act of November 19, 1988, Pub. L. No. 100-702, title X, § 1019(a), 102 Stat. 4670. E.g., *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058 (5th Cir. 1990) (USAA "is congressional declaration of national policy in favor of arbitration, and requires courts to rigorously enforce agreements to arbitrate").

23. Section 2 of the USAA provides:

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 (1988)(emphasis added).

24. See *supra* note 22 for legislative history of the USAA.

agreements in the federal courts.²⁵ Similarly, the Uniform Arbitration Act²⁶ codified at the state level the policy of encouraging voluntary resolution of disputes through arbitration.²⁷

25. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974)(citing *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 648 Before the Joint Committee of the Subcommittee on the Judiciary*, H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924); S. REP. No. 536, 68th Cong., 1st Sess. (1924)).

Courts have identified a variety of purposes behind the enactment of the USAA. *See, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)(to ensure judicial enforcement of privately made arbitration agreements); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)(to move the parties to a properly arbitrable dispute out of court and into arbitration as quickly and easily as possible); *Prudential Lines Inc. v. Exxon Corp.*, 704 F.2d 59 (2d Cir. 1983)(to ease the workload of the courts); *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176 (11th Cir. 1981)(to provide parties with an alternative method of resolving disputes that would be speedier and less costly than litigation); *Seymour v. Gloria Jeans' Coffee Bean Franchising Corp.*, 732 F. Supp. 988 (D. Minn. 1990)(to address the traditional hostility of courts at common law toward arbitration).

26. The Uniform Arbitration Act ("UAA") is one of the most important modern arbitration statutes adopted by the states. The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the UAA in 1955. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 1-229 (1985). Section 1 provides: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable[.]" UNIF. ARBITRATION ACT § 1, 7 U.L.A. 5 (1985).

27. Thirty four states and the District of Columbia have adopted the UAA. UNIF. ARBITRATION ACT, 7 U.L.A. §§ 1-25 (1985). Some of these states have adopted variations of the official text to comply with local practice. *E.g.*, ALASKA STAT. §§ 09.43.010 - 09.43.180 (1983); ARIZ. REV. STAT. ANN. §§ 12-1501 to 12-1518 (1982); ARK. CODE ANN. §§ 16-108-201 to 16-108-224 (Michie 1987); COLO. REV. STAT. ANN. §§ 13-22-201 to 13-22-223 (West 1990); DEL. CODE ANN. tit. 10, §§ 5701 - 5725 (1975); D.C. CODE ANN. §§ 16-4301 to 16-4319 (1989); FLA. STAT. ANN. §§ 682.01 - 682.22 (West Supp. 1989); IDAHO CODE §§ 7-901 to 7-922 (1979); ILL. REV. STAT. ch. 10 para. 101-123 (1987); IND. CODE ANN. §§ 34-4-2-1 to 34-4-2-22 (Burns 1986); IOWA CODE ANN. §§ 679A.1 - 679A.19 (West 1987); KAN. STAT. ANN. §§ 5-401 to 5-422 (1982); KY. REV. STAT. ANN. §§ 417.045 - 417.230 (Michie/Bobbs-Merrill 1988); ME. REV. STAT. ANN. tit. 14, §§ 5927 - 5949 (West 1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to 3-234 (1984); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (West 1988); MICH. COMP. LAWS ANN. §§ 600.5001 - 600.5035 (West 1988); MINN. STAT. ANN. §§ 572.08 - 572.30 (West 1988); MO. ANN. STAT. §§ 435.350 - 435.470 (Vernon Supp. 1989); MONT. CODE ANN. §§ 27-5-111 to 27-5-324 (1989); NEB. REV. STAT. §§ 25-2601 to 25-2622 (Supp. 1988); NEV. REV. STAT. ANN. §§ 38.015 - 38.205 (Michie 1987); N.M. STAT. ANN. §§ 44-7-1 to 44-7-22 (Michie 1978); N.C. GEN. STAT. §§ 1-567.1 to 1-567.20 (1983); N.D. CENT. CODE §§ 32-29.2-01 to 32-29.2-20 (Supp. 1989); OKLA. STAT. ANN. tit. 15, §§ 801 - 818 (West Supp. 1989); 42 PA. CONS. STAT. ANN. §§ 7301 - 7320 (1982); S.C. CODE ANN. §§ 15-48-10 to 15-48-240 (Law. Co-op. Supp. 1988); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to 21-25A-38 (1987); TENN. CODE ANN. §§ 29-5-301 to 29-5-320 (Supp. 1988); TEX. REV. CIV. STAT. ANN. arts. 224 to 238-6 (West Supp. 1989); UTAH CODE ANN. §§ 78-31a-1 to 78-31a-18 (1987); VT. STAT. ANN. tit. 12, §§ 5651 - 5681 (Supp. 1989); VA. CODE ANN. §§ 8.01-581.01 to 8.01-581.016 (Michie Supp. 1989); WYO. STAT. §§ 1-36-101 to 1-36-119 (1988).

The Illinois appellate court stated, "[t]he basic intention of our Arbitration Act is to discourage litigation and foster the voluntary resolution of disputes in a forum created, controlled and administered by the agreement to arbitrate and

Now, because court dockets have become increasingly crowded and the costs of litigation have risen, business people have de-

by the statute." *Ramonas v. Kerelis*, 243 N.E.2d 711, 715 (Ill. 1981)(quoting *Flood v. Country Mutual Ins. Co.*, 232 N.E.2d 32 (Ill. App. Ct.), *rev'd on other grounds*, 242 N.E.2d 149 (Ill. 1968)). See also *Kostakos v. KSN Joint Venture No. 1*, 491 N.E.2d 1322, 1325 (Ill. 1986) (Illinois Arbitration Act manifests a strong policy favoring arbitration); *J & K Cement Constr., Inc. v. Montalbano Builders*, 456 N.E.2d 889, 893 (Ill. 1983); *Brennan v. Kenwick*, 425 N.E.2d 439, 441 (Ill. 1981).

The remaining sixteen states have modern arbitration statutes, but have not adopted the UAA. *E.g.*, ALA. CODE §§ 6-6-1 to 6-6-16 (1975)(prohibits the enforcement of arbitration agreements covering future controversies not within the purview of the United States Arbitration Act); CAL. CIV. CODE §§ 1280 - 1298.8 (West 1980 & Supp. 1989)(covers general provisions including enforcement of arbitration agreements, conduct of arbitration proceedings, enforcement of awards and general provisions related to judicial proceedings); CONN. GEN. STAT. ANN. §§ 52-408 to 52-424 (West 1960)(covers arbitrator's subpoena powers, substitution of arbitrators after commencement of hearings, and timing of awards); GA. CODE ANN. §§ 7-101 to 7-324 (Supp. 1989)(does not apply to agreements relating to medical malpractice claims, collective bargaining agreements between employers and labor unions, insurance contracts, subject matter covered by an arbitration statute, any loan or consumer financing agreement of \$25,000 or less, any contract for the purchase of consumer goods, any contract involving consumer acts or practices or involving consumer transactions, any residential real estate sales or loan agreement unless all signatories initial the agreement at the time of the execution, any contract relating to terms and conditions of employment, or any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort); HAW. REV. STAT. §§ 658-1 to 658-12 (1985)(provides that parties may specify the judicial circuit in which the judgment shall be entered, else, the judgment may be entered in any judicial circuit); LA. REV. STAT. ANN. §§ 4201 - 4217 (West 1983) (arbitrations are to be administered by a single arbitrator unless otherwise provided in the parties' agreement); MISS. CODE ANN. §§ 11-15-101 to 11-15-143 (Supp. 1988) (applies to construction contracts); N.H. REV. STAT. ANN. §§ 542:1 - 542:10 (1974) (Statute does not apply to arbitration agreements between employers and employees, or between employers and associations of employees unless such agreement specifically provides that it shall be subject to the act. The court determines if the case shall be heard by one or three arbitrators. If the court decides on one, but the parties want three, the court pays the fees and expenses of the one and the parties pay the fees and expenses of the other two); N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (West 1987)(arbitration proceedings shall be by a single arbitrator unless the parties agree otherwise and the award must be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate and delivered to the parties or their attorneys); N.Y. CIV. PRAC. L. & R. §§ 7501 - 7514 (McKinney 1980) (The court shall not pass on the merits of the dispute. A party may assert a statute of limitation as a bar to arbitration. If an arbitration concerns money due or to become due, an award may be made by confession. Arbitration proceedings may be started or continued after the death of a party where it relates to real property upon application of a distributee or devisee who succeeds to the interest in the real property); OHIO REV. CODE ANN. §§ 2711.01 - 2711.24 (Anderson 1981)(arbitrations shall be conducted by a single arbitrator unless the agreement provides otherwise, the award must be signed by a majority of the arbitrators and must be delivered to each of the parties in interest without delay); OR. REV. STAT. §§ 36.210 - 36.300 (1987) (Statute does not apply to agreements to arbitrate the terms or conditions of employment under collective contracts between employers and employees or between employers and associations of employees. Arbitrations shall be conducted by a single arbitrator unless agreement provides otherwise. Awards must be made by a majority of the arbitrators. If the arbitrators can not agree

manded alternatives to litigation.²⁸ This movement away from litigation has spurred the practicing bar to become more familiar with arbitration as a way of meeting clients' needs. Presently, the practicing bar's unfamiliarity with arbitration has led to reluctance in recommending and utilizing arbitration as an alternative method of dispute resolution.²⁹ Accordingly, when lawyers have used arbitration, they have experienced frustration due to the differences between the formal rules of court procedure and the less formal procedures of arbitration.³⁰ Therefore, attorneys must become more familiar with the "nuts and bolts" of arbitration, and the construction of arbitration agreements in order to continue to meet the clients' needs.

II. THE CONTRACTUAL NATURE OF ARBITRATION

The passage of the United States Arbitration Act³¹ placed exec-

on the outcome of the proceedings, then their compensation shall be made by the circuit court. Otherwise, the arbitrators' compensation is paid as set out in the arbitration agreement. The costs of witness fees and other fees are assessed against the losing party. The arbitration must take place in Oregon in order for the arbitration clause to be used); R.I. GEN. LAWS §§ 10-3-1 to 10-3-21 (1985) (Statute does not apply to collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment. In all contracts of insurance, where the arbitration provision is not placed immediately before the testimonium clause or the signature of the parties, the arbitration procedure may be enforced at the option of the insured. Where the insured chooses to exercise this option to arbitrate, the provisions of the Rhode Island Act are the exclusive remedy available. Unless otherwise specified, arbitration shall be by one arbitrator); WASH. REV. CODE ANN. §§ 7.04.010 - 7.04.220 (West 1961) (Statute does not apply to arbitration agreements between employers and employees or between employers and associations of employees. If the arbitration agreement is silent as to the number of arbitrators, three shall be appointed by the court); W. VA. CODE §§ 55-10-1 to 55-10-8 (1981) (requires that the arbitration clause be "knowingly bargained for," and, in a suit for any debt, a defendant is allowed to prove, and have allowed against such debt, any payment or setoff); WIS. STAT. ANN. §§ 788.01 - 788.18 (West 1981) (Statute does not apply to contracts between employers and employees, or between employers and association of employees. Arbitrations shall be conducted by a single arbitrator, unless otherwise provided. Three arbitrators are appointed in actions to recover damages for injuries to the person arising from any treatment or operation performed by or any omission by any person who is required to be licensed, registered, or certified to treat the sick. Of the three, one is appointed from a list prepared by the State Bar of Wisconsin, of attorneys with trial experience, one is appointed from a list of health professionals prepared by the appropriate statewide organization of health professionals, and one is appointed who is not an attorney or a health professional).

28. See *supra* note 1 for sources referring to various alternatives to litigation.

29. Patterson, *supra* note 1, at 591. See also Marguerite Milhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOTIATION J. 29 (1987) (for a discussion of client and attorney resistance to ADR).

30. See *infra* notes 116-18 and accompanying text for a discussion of the informality of arbitration hearings.

31. 9 U.S.C. §§ 1-15 (1988). See *supra* note 22 for the legislative history of the USAA.

utory arbitration agreements on equal footing with other contracts.³² Consequently, arbitration agreements are now specifically enforceable and binding upon the parties.³³

The scope of an arbitration agreement determines what disputes may be subject to arbitration.³⁴ The agreement determines

32. See *supra* note 25 for cases interpreting the legislative intent behind the passage of the USAA.

33. See, e.g., *C.H.I., Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762 (9th Cir. 1991) (courts will enforce the language of an arbitration agreement as binding upon the parties); *Yorkaire, Inc. v. Sheet Metal Workers Int'l Ass'n Local Union No. 19*, 758 F. Supp. 248 (E.D. Pa. 1990), *aff'd*, 931 F.2d 53 (3d Cir. 1991); *Smith Wilson, Co. v. Trading and Dev. Est.*, 744 F. Supp. 14 (D.D.C. 1990); *Sterling Foundations, Inc. v. Merritt-Chapman & Scott Corp.*, 134 F. Supp. 327 (E.D.N.Y. 1955). See generally *Lucy V. Katz, Enforcing An ADR Clause - Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575 (1988) (arbitration agreements are backed by statutory enforcement mechanisms).

34. The USAA makes provisions for a stay of court proceedings where an issue that is otherwise arbitrable is brought in a federal court by one of the parties to an arbitration agreement. 9 U.S.C. § 3 (1988). Section 3 provides:

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.

Id. Additionally, Section 4 empowers the federal courts to issue an order to compel a party to arbitrate under a valid arbitration agreement. 9 U.S.C. § 4 (1988). Section 4 provides:

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 . . . 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.

Id. See generally *Alison Brooke Overby, Note, Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986).

Section 2 of the Uniform Arbitration Act contains similar provisions regarding state court proceedings to compel or stay arbitrations. UNIF. ARBITRATION ACT, § 2, 7 U.L.A. 68-9 (1985). Section 2 provides:

(a) On application of a party showing an agreement described in Section 1 [a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties], and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith

not only what issues are arbitrable,³⁵ but also what issues are specifically excluded from arbitration.³⁶ Therefore, attorneys must recognize the importance of constructing dispute resolution agreements with great care.³⁷

The parties may negotiate a narrowly tailored arbitration agreement that includes numerous clauses addressing all of the various aspects of a future arbitration, or conversely, the parties may negotiate a broad agreement that simply states "any disputes between the parties shall be settled by arbitration."³⁸ To avoid unnecessary litigation concerning what substantive issues are arbitrable, the parties should consider incorporating a broad arbitration clause into their contract.³⁹ A broad clause will permit the parties to refer

and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

Id.

35. *See, e.g.,* Albers Milling Co. v. Barge Antone F., 487 F. Supp. 37 (D. Wash. 1980) (explaining that there can be no valid arbitration unless parties have expressly contracted for this method of adjudication of their dispute); Eddie S.S. Co. v. Czarnikow-Rionda Co., 480 F. Supp. 731 (S.D.N.Y. 1979) (holding that arbitration is a matter of contract, and parties cannot be required to submit to arbitration any dispute they have not agreed to submit); Flood v. Country Mutual Ins. Co., 242 N.E.2d 149 (Ill. 1968) (holding that arbitration agreements will not be extended by construction or implication).

36. *See, e.g.,* Ballay v. Legg Mason Wood Walker, Inc., 878 F.2d 729 (3d Cir. 1989) (stating that USAA does not prevent parties from agreeing to exclude matters from arbitration if they so desire). *Accord* Kadow v. A.G. Edwards and Sons, Inc., 721 F. Supp. 201 (W.D. Ark. 1989).

37. *See* DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 5:02. "The parties should be sufficiently specific so as to permit the smooth functioning of the arbitration process. They should, in their agreement, set forth the type of detail that they would benefit from if they had referred to the rules of a bona fide arbitration administering agency." *Id.*

38. Caribbean S.S. Co. v. Sonmez Denizcilik Ve Ticaret A.S., 598 F.2d 1264 (2d Cir. 1979). This language sufficiently indicates the parties' intent to arbitrate and adequately permits a court to enforce this intent. *Id.* at 1266. *See also* China Resource Prod. (U.S.A.) Ltd. v. Fayda Int'l, Inc., 747 F. Supp. 1101 (D. Del. 1990) (the intent of the parties to an arbitration agreement controls).

39. Stena Line (U.K.) Ltd. v. Sea Containers Ltd., 758 F. Supp. 934 (S.D.N.Y. 1991) (broad arbitration clauses purport to refer all disputes arising out of contract to arbitration, while narrow arbitration clauses limit arbitration to specific types of disputes).

The standard arbitration clause suggested by the American Arbitration Association is as follows:

Any controversy or claim arising out of or relating to this contract, or the 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.

AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES 5 (as amended and in effect January 1, 1991) [hereinafter AAA COMMERCIAL ARBITRATION RULES]. *See supra* note 6 for a listing of rules available from the American Arbitration Association and the names of other arbitration forums

all disputes arising out of the contract to arbitration.⁴⁰ Alternatively, if the parties wish to limit the arbitrable issues, they should include a narrowly tailored clause specifying the exact issues covered by the agreement.⁴¹

The arbitration agreement may also be used to specify the particular procedures for conducting arbitration hearings.⁴² Absent an agreement between the parties, the federal and state arbitration statutes provide basic procedural guidelines for conducting arbitrations.⁴³ To assert greater control, attorneys may advise their clients to incorporate the rules of a neutral administrative body or trade group into their agreement to govern the procedural aspects.⁴⁴ To effectuate the greatest control over the procedural aspects of the arbitration, business people and their attorneys should negotiate the specific procedures to be followed.⁴⁵

that have their own rules. *See also infra* Appendix I for the names of other significant ADR organizations in the United States.

Tort, fraud and statutory claims are generally considered arbitrable under a broad clause. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (statutory claims may be the subject of an arbitration agreement); *UMC Petroleum Corp. v. J & J Enter., Inc.*, 758 F. Supp. 1069 (W.D. Pa. 1991) (RICO, tort and fraud claims were subject to arbitration under clause allowing arbitration of any dispute or controversy arising out of or relating to joint venture agreement); *Kerr-McGee Refining Corp. v. Triumph Tankers Ltd.*, 740 F. Supp. 288 (S.D.N.Y.) (arbitrators could consider claim for treble damages under the RICO Act), *modified*, 924 F.2d 467 (1990), *cert. denied* 112 S. Ct. 81 (1991). *See also* Stephen P. Bedell et al., *Compulsory Arbitration of Securities and RICO Claims*, in *ARBITRATION PRACTICE* § 8 (Ill. Inst. of CLE, 1989).

40. *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). *See* *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985) (recognizing that policy can side favor a broad construction of arbitration agreements).

41. *Stena Line (U.K.) Ltd. v. Sea Containers Ltd.*, 758 F. Supp. 934 (S.D.N.Y. 1991) (narrow arbitration clauses limit arbitration to specific types of disputes); *Layne-Minnesota v. Regents of the Univ. of Minnesota*, 123 N.W.2d 371, 375 (Minn. 1963) ("[T]he parties may narrowly limit arbitrability or they may comprehensively provide that all disputes, whether arising under the terms of the contract or growing out of their relationship - even though not cognizable in a court of law or equity - may be referable to arbitration.")

42. *See* DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 5:02. The parties should state the number of arbitrators, the method of their appointment, the place of the arbitration and preferably the law to be applied, and the rules they wish to have adopted by the arbitrators. *Id.*

43. *See infra* notes 116-18 for specific provisions in the USAA and the UAA governing procedural guidelines for conducting arbitration hearings. *See also supra* note 27 for a list of applicable state arbitration statutes.

44. *See supra* note 6 for a list of industry rules available from the American Arbitration Association, as well as other sources. *See also* DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 5:03, listing additional institutional arbitration forums, and *infra* Appendix I for additional ADR organizations in the United States.

45. *See infra* notes 49-141 and accompanying text for a discussion of specific pre-hearing and hearing procedures which may be addressed in a customized arbitration agreement.

Just as the parties may regulate the substantive and procedural issues of their future arbitrations, they may also regulate the form and substance of the arbitration award.⁴⁶ Since arbitration agreements are contractual in nature, it is ultimately within the parties' control to specify the issues, terms and conditions of the entire arbitration process,⁴⁷ even if the rules of an established ADR organization are incorporated into the agreement.⁴⁸

III. PRE-HEARING ISSUES AND PROCEDURES

To avoid unnecessary delays in commencing the evidentiary hearings, the parties should address as many preliminary matters in their agreement as possible. The parties may pre-determine such issues as how to notify the other party of a dispute, the intent to arbitrate the dispute, and where to hold the evidentiary hearings. Equally important at this stage are provisions dealing with the selection procedures of a future arbitrator and a delineation of that arbitrator's power. Therefore, the parties should include in their arbitration agreement, procedures to dispense with all preliminary matters in their arbitration agreement.

A. Notice, Service, and Conditions Precedent

The agreement should address the procedures for notifying the other party that a dispute exists as well as the procedures for notifying them of an intent to arbitrate the dispute.⁴⁹ Additionally, the type of service for that notice should be considered.⁵⁰ The parties

46. See *infra* notes 142-57 and accompanying text for a discussion of the form and scope of the arbitration award.

47. See *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418 (11th Cir. 1990) (arbitration agreements are creatures of contract); *Marchetto v. DeKalb Genetics Corp.*, 711 F. Supp. 936 (N.D. Ill. 1989) (courts must vigorously enforce arbitration clauses in commercial contracts); *Ramonas v. Kerelis*, 243 N.E.2d 711 (Ill. App. Ct. 1968) (same).

48. See AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 1 ("The parties, by written agreement, may vary the procedures set forth in these rules.").

49. The responsibility for commencing arbitration, absent contract language to the contrary, rests with the party seeking relief. See *Necchi Sewing Mach. Sales Corp. v. Carl*, 260 F. Supp. 665 (S.D.N.Y. 1966); *Lane-Tahoe Inc. v. Kindred Const. Co.*, 536 P.2d 491 (Nev. 1975); *Mamlin v. Susan Thomas, Inc.*, 490 S.W.2d 634 (Tex. 1973). The notice of intention to arbitrate must contain the names of the parties, the relevant arbitration clause, the nature of the dispute and the relief sought. DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 14:01. See *Rodman*, *supra* note 14, § 4.118 for a Notice of Intention to Arbitrate form.

50. Arbitration proceedings usually utilize liberal service requirements. See *Waterspring, S.A. v. Trans Marketing Houston Inc.*, 717 F. Supp. 181 (S.D.N.Y. 1989) (agreement to arbitrate in New York constituted consent to submit to personal jurisdiction of courts of New York, and such consent included consent to service by any method consistent with due process); *County of Rockland v. Primiano Const. Co.*, 409 N.E.2d 951 (N.Y. 1980) (parties can stip-

may agree to service of the demand for arbitration by ordinary mail,⁵¹ registered or certified mail,⁵² personal service, or service upon a party's representative.⁵³ Moreover, after an alleged claim arises, the parties may stipulate to a time limit for demanding arbitration.⁵⁴ The parties may also address whether certain conditions

ulate to the manner in which service of the demand for arbitration shall be made).

Section 40 of the AAA Commercial Arbitration Rules provides:

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 . . . 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 the party.

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.

AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 40. See also DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 14:02 (discussing the manner of service of the demand for arbitration); RODMAN, *supra* note 14, § 8.16, for a clause governing service of the demand for arbitration.

51. See *Weilwood Fabrics Int'l, Inc. v. Zerbi*, 454 N.Y.S.2d 439 (1st Dep't 1982) (where parties agreed to arbitrate in accordance with the rules of the AAA, which provide for service of the demand by ordinary mail, such service is sufficient absent a showing of prejudice); *Thermasol, Ltd. v. Drieske*, 420 N.E. 2d 401 (N.Y. 1980) (service by ordinary mail was proper where the parties had agreed to arbitrate under the AAA rules, even though § 7503(c) of New York's Civil Practice Law & Rules provided for service of a demand for arbitration by certified or registered mail).

52. *E.g.*, Section 7503(c) of New York's Civil Practice Law & Rules provides for service of a demand for arbitration by certified or registered mail. N.Y. CIV. PRAC. L. & R. 7503(c) (McKinney 1980).

53. See, *e.g.*, *York Research Corp. v. Landgarten*, 927 F.2d 119 (2d Cir. 1991) (attorneys were agents of party for purposes of receiving papers relevant to arbitration); *Matter of Initial Trends, Inc. (Campus Outfitters, Inc.)*, 447 N.E.2d 48 (N.Y. 1983) (service of the arbitration demand to the opposing party's counsel, rather than to the opposing party, was defective only in that it tolled the time limit for motions to stay the proceedings, but did not render the demand void).

54. AMERICAN ARBITRATION ASSOCIATION, DISPUTE RESOLUTION CLAUSES BOOKLET (First Draft 1991) (manuscript at 9, on file with author)[hereinafter AAA CLAUSES BOOKLET]. The following language can be used to impose a contractual time limit for demanding arbitration after an alleged claim arises:

Demand for arbitration shall be made within three months after the issue or other matter in question has arisen, but in no event after the date when institution of legal or equitable proceedings based upon such issue or other matter would be barred by any applicable statute of limitation.

Any aggrieved Party shall serve a written demand for arbitration to any and all opposing Parties and to an American Arbitration office . . . within 45 days after a dispute has arisen. A dispute is deemed to have commenced upon receipt of a written demand or service of judicial process. Failure to serve a demand for arbitration within the time specified above shall be deemed a waiver of the aggrieved Party's right to compel arbitration of such claim.

Id. Failure to comply with a contractual time requirement may result in a waiver of the right to arbitrate. *E.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d

must be fulfilled before a dispute may be arbitrated, such as the exhaustion of other contractually established procedures.⁵⁵

B. *Locale and Choice of Law*

The parties should include language specifying the city where the arbitration hearing will be held.⁵⁶ If this is not addressed in the parties' agreement, the arbitrator,⁵⁷ or administrative agency selected by the parties,⁵⁸ may make the locale determination, thus

1023 (2d Cir. 1982); *Pioneer Acceptance Corp. v. Irving Coven Const.*, 350 N.E.2d 466 (Mass. 1976); *Jordan v. Freidman*, 165 P.2d 728 (Cal. 1946); *Duke Lab., Inc. v. Albert A Lutz Co.*, 168 N.Y.S.2d 998 (1957). See RODMAN, *supra* note 14, § 8.17 (for a discussion of time limitations for filing demands) and § 6.2 (for a discussion of failure to comply with time requirements); DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, §§ 15:01-02 (for a discussion of time limits for demanding arbitration); Matthew A. C. Zapf, *Waiver of Right To Arbitrate, in ARBITRATION PRACTICE* § 9.6 (Ill. Inst. for CLE, 1989) (for a discussion of the effects from the failure to comply with express time provisions).

55. AAA CLAUSES BOOKLET, *supra* note 54, at 9. The following language can be used to incorporate contractual conditions precedent to arbitration:

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 . . . before resorting to arbitration, litigation, or some other dispute resolution procedure.

In the event of any dispute, claim, question, or difference 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 differences. To this effect, they shall consult and negotiate with each other, in good faith and understanding of their mutual interest, 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.

Id. at 10-11. See, e.g., THE AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION §§ 4.4-4.5 (1987). (conditions and procedures which must be followed prior to filing for arbitration).

56. The following language can be used to specify locale: "The arbitration proceeding shall be conducted in [Chicago, Illinois]." AAA CLAUSES BOOKLET, *supra* note 54, at 11. "The arbitration shall be held in [Chicago, Illinois], or at such other place as may be selected by mutual agreement of the parties." *Id.* See also RODMAN, *supra* note 14, § 19.4 for a clause providing for the hearing locale.

57. The Uniform Arbitration Act provides, "[u]nless otherwise provided by the [parties'] agreement, the arbitrators shall appoint a time and place for the hearing. . ." UNIF. ARBITRATION ACT, § 5a, 7 U.L.A. 99 (1985). There is no similar provision in the United States Arbitration Act. See also DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 16:03 (for a discussion of the fixing and review of the locale by the arbitrator and by the court).

58. Section 11 of the AAA Commercial Arbitration Rules provides:

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 ten 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.

depriving the parties of controlling this element of their proceeding.

In selecting a locale, the parties should consider the location of the parties, witnesses and documents.⁵⁹ Additionally, the parties should consider the relative costs of attending a hearing in any chosen location.⁶⁰ The parties should also consider the place of performance of the contract⁶¹ and the location of the most qualified pool of arbitrators⁶² and attorneys.⁶³

An attorney drafting the arbitration agreement may advise the parties to consider incorporating a choice of law provision to govern the arbitration agreement and proceedings.⁶⁴ This is recommended to relieve uncertainty over the applicable law. The parties should consider a choice of law provision because if the hearings are conducted in a particular state, the laws of that forum may control the procedural and substantive rights of the parties.⁶⁵

AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 11. *See, e.g.*, *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973) (the court is not precluded from making a limited inquiry as to whether the AAA's locale determination was in accordance with a minimum standard of fair dealing when Association fixed New York as appropriate locale after parties failed to reach an agreement); *Pauly v. Biotronik, GmbH*, 738 F. Supp. 1332 (D. Or. 1990) (forum selection was enforceable even if plaintiffs would be inconvenienced, absent showing that locale would be so inconvenient that for all practical purposes plaintiffs would be deprived of their day in court); *Three States Trucking, Inc. v. Arco Leasing Corp.*, 470 F. Supp. 1075 (E.D. Mo. 1979) (by agreeing to arbitrate pursuant to the rules of the AAA, the plaintiff consented to permitting the Association to determine the locale of the arbitration); *Dan River, Inc. v. Cal-Togs, Inc.*, 451 F. Supp. 497 (S.D.N.Y. 1978) (AAA's determination of locale was final and binding and not subject to review); *Stancioff v. Hertz*, 406 N.E.2d 1318 (Mass. 1980) (an AAA determination as to the proper locale for the arbitration was final and binding on the parties, who had agreed to arbitrate under the rules of the Association).

59. *RODMAN*, *supra* note 14, § 19.2 (listing factors considered by the AAA when called upon to make a locale determination).

60. *Id.*

61. *Id.*

62. *See infra* notes 73-78 and accompanying text for a discussion of qualifications of arbitrators.

63. The availability of qualified attorneys may be important if an out of state attorney must secure local counsel.

64. The following language can be used to designate a choice of law to govern the contract and the arbitration proceeding. "This agreement shall be governed by the laws of the state of [Illinois]." AAA CLAUSES BOOKLET, *supra* note 54, at 12. "The parties consent to the jurisdiction of the courts of the state of [Illinois] to enforce the provisions of this clause and to confirm any award rendered by the arbitrator." *Id.*

65. *DOMKE ON COMMERCIAL ARBITRATION*, *supra* note 7, § 16:01. The following clause can designate the procedural and substantive laws of the arbitration proceeding: "In rendering the award, the arbitrator shall determine the rights and obligations of the parties according to the substantive and procedural laws of [Illinois], as though the arbitrator was a court of competent jurisdiction in [Illinois]." AAA CLAUSES BOOKLET, *supra* note 54, at 12-13. *See Cardona Tirado v. Shearson Lehman American Express, Inc.*, 634 F. Supp. 158 (D.P.R. 1986) (a choice of law provision in a contract is not determinative of the arbitra-

C. Consolidations

When there are more than two parties to a contract, or where the underlying transaction involves multiple contracts, the drafter of the arbitration agreement should recommend a clause permitting the consolidation of all claims arising from the same transaction into a single arbitration.⁶⁶ Consolidation of arbitration proceedings is deemed appropriate where common issues of law and fact are present.⁶⁷ Consolidation offers several benefits. First, consolidation reduces the possibility of conflicting awards from different panels of arbitrators.⁶⁸ Second, consolidation reduces the parties' expenses by avoiding multiple arbitrations. Third, consolidation saves time for both parties and witnesses.⁶⁹ A clause permitting consolidation can also reduce the complications of obtaining a court order mandating consolidation.⁷⁰

tion locale without a similar choice of forum provision). *See also* RODMAN, *supra* note 14, § 4.70 for a clause requiring application of a particular locale's law.

66. The following language can be used to permit consolidations: "Any arbitration may be consolidated with the arbitration of any other dispute arising out of or relating to the same project." AAA CLAUSES BOOKLET, *supra* note 54, at 18.

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, or, if the arbitrator fails to make such an order, the parties may apply to any court of competent jurisdiction for such an order.

Id.

67. *See Elmarina, Inc. v. Comexas, N.V.*, 679 F. Supp. 388 (S.D.N.Y. 1988) (consolidation is appropriate where there are common issues of law and fact); *Plaza Dev. Services v. Joe Harden Builder, Inc.*, 365 S.E.2d 231, 233 (S.C. 1988) (where instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties). *But see In re We're Assoc. Co.*, 557 N.Y.S.2d 932 (2d Dep't 1990) (court denied application for consolidation where responding party sought to join a third party on theory of indemnification where no contract for indemnification existed). *See also* DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 27:02 (discussing consolidation of arbitration proceedings); RODMAN, *supra* note 14, §§ 16.1-.6 (discussing consolidation or severance of proceedings); Gail P. Burroughs, *Consolidation of Arbitrations*, in *ARBITRATION PRACTICE* § 20 (Ill. Inst. for CLE, 1989).

68. *See Cable Belt Conveyors, Inc. v. Alumina Partners of Jam.*, 669 F. Supp. 577 (S.D.N.Y. 1987) (consolidation reduces the possibility of conflicting awards from different arbitration panels); *Bock v. Drexel Burnham Lambert, Inc.*, 541 N.Y.S.2d 172 (N.Y. Sup. Ct. 1989) (same).

69. *Bock v. Drexel Burnham Lambert, Inc.*, 541 N.Y.S.2d 172 (N.Y. Sup. Ct. 1989) (consolidation saves time and promotes efficiency).

70. There is a split of authority concerning whether federal courts will grant a motion to consolidate separate arbitration proceedings. Several circuits have held that federal courts lack the authority to consolidate separate arbitrations absent express contractual authorization or consent of the parties. *See, e.g., Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989); *Del*

D. Arbitrator Selection

Both the United States Arbitration Act and the Uniform Arbitration Act indicate that the method chosen by the parties for selecting arbitrators should be followed.⁷¹ Absent an agreement between the parties, the statutes authorize the court to appoint an arbitrator upon a request by either party.⁷² Therefore, to control the arbitrator selection process, the parties should either incorporate into their contract an administrative body's rules regarding arbitrator selection,⁷³ or develop their own procedures to fit their particular circumstances.⁷⁴

E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984).

Other circuits are more liberal in granting consolidations pursuant to the Federal Rule of Civil Procedure 42 (a). See, e.g., New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988); Maxum Found., Inc. v. Salus Corp., 817 F.2d 1086 (4th Cir. 1987); Compania Espanola de Petroleos, S.A. v. Nerus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975); Hoover Group, Inc. v. Probala & Assoc., 710 F. Supp. 677 (N.D. Ohio 1989); Elmarina, Inc. v. Comexas, N.V., 679 F. Supp. 388 (S.D.N.Y. 1988).

71. The USAA provides that the selection method chosen by the parties shall be followed. 9 U.S.C. § 5 (1988). The Act reads, in pertinent part, "[i]f 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." *Id.* ACCORD UNIF. ARBITRATION ACT, § 3, 7 U.L.A. 96 (1985). ILL. REV. STAT. ch. 110, para. 103 (1987).

72. The USAA provides, in pertinent part:

if no method be provided [in the agreement], 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 . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators. . . (emphasis added).

9 U.S.C. § 5 (1988). See also UNIF. ARBITRATION ACT § 3, 7 U.L.A. 96 (1985). Compare Illinois Arbitration Act, ILL. REV. STAT. ch. 110, para. 103 (1987). "If the method of appointment of arbitrators is not specified in the agreement and cannot be agreed upon by the parties, the entire arbitration agreement will terminate." *Id.*

73. Under the AAA Commercial Arbitration Rules, the parties are provided a list of proposed arbitrators from the AAA's national panel of neutrals. The parties may specify particular qualifications that should be considered by the administrator when compiling the list. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 13. See also DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 20:01 (discussing arbitrator appointment by administrative agency).

74. See, e.g., McMahon v. Shearson/American Express, Inc., 709 F. Supp. 369 (S.D.N.Y. 1989), *rev'd on other grounds*, 896 F.2d 17 (2d Cir. 1990) (explicit and unambiguous method agreed to by the parties for naming arbitrator is controlling, absent any grounds for revoking the agreement). The following clauses may be used to address the number and qualifications of arbitrators: "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 Florida, actively engaged in the practice of law for at least ten years." AAA CLAUSES BOOKLET, *supra* note 54, at 14. "The arbitrator shall be a certified public accountant." *Id.* "The arbitrator shall be a retired judge of the California Superior Court." *Id.* "The panel of three arbitrators shall consist of one contractor,

There are many factors to be considered regarding the selection of arbitrators when drafting the arbitration agreement.⁷⁵ The parties should specify the number of arbitrators to hear the dispute,⁷⁶ and who will select the arbitrators.⁷⁷ To facilitate the selection process, the parties may specify particular qualifications the arbitrators should possess, including special professional, educational, or training requirements.⁷⁸

The drafting attorney may recommend that the parties select the number of arbitrators based on the dollar amount in controversy, the potential complexity of the issues, or the number of involved parties.⁷⁹ The United States Arbitration Act, for instance,

one architect and one construction attorney." *Id.* "Arbitrators must be members of the Hawaii State Bar actively engaged in the practice of law with expertise in the process of deciding disputes and interpreting contracts (in the particular field of law involving the subject controversy)." *Id.* at 15. "The arbitrators will be selected from a panel of persons having experience with and knowledge of electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney." *Id.*

75. Michael D. Rosenbaum & Edward S. Weil, *The Arbitration Proceeding*, in ARBITRATION PRACTICE § 10.4 (Ill. Inst. for CLE, 1989). These factors include the number of arbitrators to be appointed, who will select the arbitrators, the number and procedures to challenge the appointment of an arbitrator, methods for substituting and disqualifying an arbitrator, rules to be followed in selecting the arbitrator, and back-up procedures so the court will not have to intervene if an arbitrator is unable to perform his duties. *Id.*

76. The USAA reads, in pertinent part, "unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." 9 U.S.C. § 5 (1988). See also UNIF. ARBITRATION ACT, § 3, 7 U.L.A. 96 (1985); AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 17 ("[i]f 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").

77. See *supra* note 72 for statutory provisions regarding the appointment of the arbitrators in the absence of an agreement between the parties. The parties' agreement may designate a particular individual to serve as arbitrator. *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 53 A.2d 441 (Del. 1947)(parties named their attorney to serve as arbitrator). If the parties cannot agree on a particular individual, the agreement may call for the parties to select an arbitrator from a list provided by an organization that maintains a list of qualified arbitrators. See Rosenbaum & Weil, *supra* note 75, § 10.3 for a list of some of the organizations that maintain lists of qualified arbitrators.

78. RODMAN, *supra* note 14, § 9.3 (parties should examine the education, training, background and experience of a prospective arbitrator); *American Almond Prod. Co., v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 450 (2d Cir. 1944) ("In trade disputes one of the chief advantages of arbitration is that the arbitrators can be chosen who are familiar with the practices and customs of the calling."). See also Rosenbaum & Weil, *supra* note 75, §§ 10.7-11 (qualifications of arbitrators include impartiality, lack of bias, past rulings, independence, and particularized expertise). Partiality and bias are grounds for disqualifying an arbitrator, and possibly vacating an award. See *infra* notes 90-93 and accompanying text for a discussion of challenging and disqualifying arbitrators, and filling vacancies in the event of disqualification.

79. AMERICAN ARBITRATION ASSOCIATION, GUIDELINES FOR EXPEDITING LARGER, COMPLEX COMMERCIAL ARBITRATIONS 3 (1990). "Larger complex commercial arbitrations are usually heard by a panel of three arbitrators, unless the

states that a single arbitrator will determine all disputes.⁸⁰ However, it is not uncommon for disputes to be heard by a panel of three.⁸¹

If the parties elect to utilize a three-member panel, there are several effective methods available to select the panel members. The parties may use three neutral arbitrators.⁸² Alternatively, there is the party-appointed method.⁸³ In this method the respective parties select an arbitrator,⁸⁴ then the two arbitrators jointly select a third, neutral arbitrator.⁸⁵ This method, however, is not recommended because it raises questions as to whether the party-appointed arbitrator is a neutral arbitrator, or if he is on the panel to advocate the position of the party who appointed him.⁸⁶ Therefore, if the parties elect to use this method, they should stipulate that the party-appointed arbitrators swear to serve in the same neutral capacity as the impartial arbitrator.⁸⁷

parties agree otherwise or the parties' arbitration agreement is to the contrary." Allen Poppleton, *The Arbitrator's Role in Expediting the Large and Complex Commercial Case*, 36 ARB. J. 6 (Dec. 1981).

The following clause may be used when there are three parties to an agreement:

There being three parties to the [contract], each party shall select an arbitrator, each of whom shall be an attorney with experience in [commercial] matters and each to be charged to consider the matter fairly and objectively and without favor for the interest of the party who shall have appointed him or her. . .

AAA CLAUSES BOOKLET, *supra* note 54, at 17.

80. See *supra* note 76 for pertinent text of Section 5 of the USAA.

81. DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 20:03 (discussing the tripartite tribunal).

82. *E.g.*, AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 17 (the AAA has discretion to determine the number of neutral arbitrators appointed to hear a dispute); DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 20:03 (the use of three neutral arbitrators has grown).

83. DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 20:03 (discussing the tripartite tribunal); COULSON, *supra* note 11, at 32 (because of weaknesses in the party-appointed system, it has been dying out in the United States).

84. *Anderson v. Nichols*, 359 S.E.2d 117 (W.Va. 1987) (the ability of a party to appoint its own arbitrator in a three-member panel is a valuable contractual right).

85. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 15 (Appointment of Neutral Arbitrator by Party-Appointed Arbitrators or Parties).

86. COULSON, *supra* note 11, at 32. See JOINT COMMITTEE OF THE AMERICAN ARBITRATION ASSOCIATION AND THE AMERICAN BAR ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VII - Ethical Considerations Relating to Arbitrators Appointed by One Party (1977).

87. The courts may vacate an award if an arbitrator demonstrates partiality or bias. The USAA reads in pertinent part:

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 . . . (b) Where there is evident partiality or corruption in the arbitrators.

The parties' agreement should also include a time limit within which the appointment of the neutral arbitrator must be accomplished by the party-appointed arbitrators.⁸⁸ If the neutral is not appointed within the allotted time, provisions should be made for the parties to petition the court, or chosen administrative agency, to fill the position.⁸⁹

The parties should also specify procedures to challenge the appointment of an arbitrator⁹⁰ and, correspondingly, procedures to disqualify an arbitrator in case of partiality, bias or if other misbe-

9 U.S.C. § 10(b)(1988).

See, e.g., Barcon Assoc., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214 (N.J. 1981)(a party-appointed arbitrator is required to disclose all relationships that might create an appearance of bias or the arbitration award will be vacated). *But see* United States Wrestling Fed'n v. Wrestling Div. of AAU, Inc., 605 F.2d 313 (7th Cir. 1979)(chairman of a three-member panel was under no duty to disclose the existence of an indirect and tenuous relationship that his law firm had with one of the parties, therefore the connections at issue were not sufficiently direct to have imposed a duty to disclose).

88. *See, e.g.,* Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268 (2d Cir. 1971)(where there had been an inordinate delay in the selection of a neutral arbitrator, the AAA had the authority to submit a list to the party-appointed arbitrators and require them to make the selection); Weavercraft, Inc. v. Mil-Jay, 205 N.Y.S.2d 545 (Sup. Ct. N.Y. Cty. 1950) (reasoning that the AAA properly appointed a neutral arbitrator after the party-appointed arbitrators had failed to select the third arbitrator in seven days).

89. The following clauses may be used to impose time limitations for appointing the neutral arbitrator, and to provide a procedure in the event the neutral is not named within the allotted time:

Within fifteen days after the delivery of the [demand for arbitration], each party shall select one person to act as arbitrator, and the two selected shall select a third arbitrator within ten days of their appointment; if the arbitrators selected by the parties hereto are unable to agree upon the third arbitrator within such fifteen days, the third arbitrator shall be selected by the Chief Judge of the United States Court of Appeals for the [Seventh] Circuit.

AAA CLAUSES BOOKLET, *supra* note 54, at 16.

The arbitrator selected by the claimant and the arbitrator selected by the respondent, within 10 days of their appointment, select a third neutral Arbitrator. In the event that they are unable to do so, the attorneys for the parties may petition the American Arbitration Association for the appointment of a third neutral Arbitrator. Prior to the commencement of hearings, each of the arbitrators appointed shall take an oath of neutrality.

Id. at 17.

90. An arbitrator may be disqualified for bias, interest in the subject matter, lack of impartiality, or prejudice. ROSENBAUM & WEIL, *supra* note 75, § 10.8. Accordingly, arbitrators have a duty to disclose prior relationships with either party to the arbitration agreement. Ormsbee Dev. Co. v. Grace, 668 F.2d 1140 (10th Cir. 1982). *See also* DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 21:03 for a discussion of the arbitrator's duty to disclose. After any disclosures by an arbitrator, a party may challenge the appointment based on the disclosure. The following language may be used to challenge an appointment of an arbitrator: "The claimant in the above arbitration challenges the appointment of _____ as an arbitrator, and requests that another arbitrator be designated to act in his place, on the grounds that [specify]." RODMAN, *supra* note 14, § 9.14.

havior or misconduct occurs.⁹¹ For example, the parties can specify that if a party has knowledge of facts that would disqualify an arbitrator and fails to challenge that appointment the party waives his right to object later.⁹² Lastly, the parties should specify procedures to fill any vacancy, or to continue with fewer arbitrators, in the event an arbitrator is disqualified or is unable to perform his duties.⁹³

E. Empowering the Arbitrator

The most powerful tool the parties to an arbitration agreement have is their unrestricted ability to designate the extent of the arbitrators' powers.⁹⁴ By delineating the specific powers delegated to the arbitrators, as well as the relief which they are authorized to award,⁹⁵ a well-drafted arbitration agreement effectively eliminates potential ambiguities. By eliminating potential ambiguities, the

91. *E.g.*, AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 19. After the AAA receives any disclosure from an arbitrator, the information is communicated to the parties. *Id.* If either party objects to the disclosure, the AAA determines whether the arbitrator should be disqualified. *Id.* The USAA and the UAA contain no provisions regarding remedies available to parties in advance of the making of the award. United States Arbitration Act, 9 U.S.C. § 10 (1988); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 140-41 (1985). Both Acts do, however, contain specific provisions for vacating awards on grounds of partiality, bias, corruption, fraud, misconduct, or any other behavior which may have prejudiced the rights of any party. *Id.*

92. *Siegel v. Lewis*, 358 N.E.2d 484 (N.Y. 1976) (explaining that where a party assents to the choice of an arbitrator with knowledge of a prior relationship between that arbitrator and the other side, the right to object is effectively waived).

93. Absent agreement of the parties, the United States Arbitration Act and the Uniform Arbitration Act allow either party to petition the court to appoint an arbitrator to fill a vacancy. 9 U.S.C. § 5 (1991); UNIF. ARBITRATION ACT § 3, 7 U.L.A. 96 (1985). *Compare* Illinois Arbitration Act, ILL. REV. STAT. ch. 110, para. 103 (1989) (if the original arbitrator is unable to act as arbitrator, the successor should be appointed in the same manner as the original arbitrator). The AAA Commercial Arbitration Rules provide, "[i]n the event of a vacancy in a panel of neutrals 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." AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 20.

94. *See* *Holman v. Trans World Airlines, Inc.*, 737 F. Supp. 527 (E.D. Mo. 1989) (the scope of the arbitrator's authority is determined by the arbitration agreement); *Globe Transport & Trading (U.K.) Ltd. v. Guthrie Latex, Inc.*, 722 F. Supp. 40 (S.D.N.Y. 1989) (parties may consent to confer additional authority on arbitrators beyond that granted in arbitration clause in contract); *Malecki v. Burnham*, 435 A.2d 13 (Conn. 1980) ("arbitration is a creature of contract and the parties themselves, . . . define the powers of the arbitrators.").

95. *Chameleon Dental Prod., Inc. v. Jackson*, 925 F.2d 223 (7th Cir. 1991) (holding that that a decision by the arbitrators to terminate the Training Program Agreement, where the contract did not provide remedies for a breach, was within the arbitrator's discretion to fashion an appropriate remedy). *See infra* notes 99-109 and accompanying text for a discussion of remedies available in commercial arbitrations.

parties may eliminate the potential for clarification through litigation.

The parties' agreement should specifically empower the arbitrators to make threshold determinations regarding the arbitrability of the parties' dispute.⁹⁶ The arbitrability question arises when the parties cannot agree whether the dispute falls within the scope of their agreement. Ordinarily, it is within the courts purview to make arbitrability determinations,⁹⁷ unless the parties provide otherwise.⁹⁸ Therefore, the parties should specifically delegate this power to the arbitrators.

The parties' agreement may also empower the arbitrators to issue various forms of relief,⁹⁹ including preliminary or interim relief, to preserve the status quo during arbitration.¹⁰⁰ Specifically, along with compensatory damages,¹⁰¹ the agreement may authorize the arbitrators to award consequential damages,¹⁰² liquidated damages,¹⁰³ equitable relief,¹⁰⁴ specific performance,¹⁰⁵ or punitive

96. See *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299 (D. Haw. 1991) (holding that although the parties' agent did not specifically assign the determination of arbitrability to the arbitrator, their incorporation of the ICC into their agreement, suggested that the parties did bargain for the arbitrator's determination of arbitrability and therefore would not be overruled).

97. *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989) (although the general rule, under the USAA, is that arbitrability of a dispute is to be determined by the court; where parties have contracted otherwise the agreement will not be disturbed). See, e.g., *Peerless Importers, Inc. v. Wine, Liquor, & Distillery Workers Union Local One*, 903 F.2d 924 (2d Cir. 1990); *Paine Webber, Inc. v. Hartmann*, 921 F.2d 507 (3d Cir. 1990); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339 (8th Cir. 1990); *Sheet Metal Workers Int'l Ass'n Local No. 162 v. Jason Mfg., Inc.*, 900 F.2d 1392 (9th Cir. 1990). Cf. *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990).

98. *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299 (D. Haw. 1991) (parties may specifically contract to submit issues of arbitrability to arbitrator).

99. Donald L. Carper, *Remedies in Business Arbitration*, 46 ARB. J. 49 (Sept. 1991) (exploring recent case law regarding remedies available in state and federal commercial arbitrations).

100. See *infra* notes 123-26 and accompanying text for a discussion of interim relief.

101. *Dino de Laurentiis v. Cinematografica de las Americas*, 174 N.E.2d 736 (N.Y. 1961) (compensatory damages may be included in an arbitrator's award).

102. *Arthur Richards, Ltd. v. Brampton Textiles, Ltd.*, 399 N.Y.S.2d 111 (1977) (consequential damages may be included in an award where it is within the scope of the arbitration agreement).

103. See *Bruno v. Pepperidge Farm*, 256 F. Supp. 865 (E.D. Pa. 1966) (liquidated damages may be awarded if provided for in the arbitration agreement, but they must be compensatory in nature and not in the form of a penalty).

104. *Sperry Int'l Trade, Inc. v. Gov't of Isr.*, 532 F. Supp. 901 (S.D.N.Y.) (arbitrators did not exceed their authority in rendering an award that required that the funds represented by a letter of credit be placed in escrow by the parties), *aff'd*, 689 F.2d 301 (2d Cir. 1982); *Ruppert v. Egelhofer*, 148 N.E.2d 129 (N.Y. 1958) (the ability of an arbitrator to issue equitable relief depends on the language of the arbitration agreement). See also Stephen P. Bedell and Louis K. Ebling, *Equitable Relief in Arbitration*, in ARBITRATION PRACTICE § 18 (Ill. Inst. for CLE, 1989).

damages.¹⁰⁶ Conversely, the parties' agreement may preclude the arbitrators from awarding any of the aforementioned remedies,¹⁰⁷ or the agreement may contain a damage limitation clause.¹⁰⁸ Lastly, the agreement should provide for either the awarding or apportioning of costs, expenses and fees attributable to the arbitration.¹⁰⁹

105. *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984)(the incorporation of the AAA Rules in an arbitration agreement authorized arbitration to provide for the remedy of specific performance); *Sperry Int'l Trade, Inc. v. Gov't of Isr.*, 532 F. Supp. 901 (S.D.N.Y.) (arbitrators did not exceed their authority in rendering an award that required that the funds represented by a letter of credit be placed in escrow by the parties), *aff'd*, 689 F.2d 301 (2d Cir. 1982); *Staklinski v. Pyramid Elec. Co.*, 160 N.E.2d 78 (N.Y. 1959)(court upheld arbitrator's decision to grant specific performance when arbitrator ordered petitioner's reinstatement after corporation terminated employment contract on grounds of permanent disability). The AAA Commercial Arbitration Rules § 43 states, "[t]he 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." THE AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 43.

106. *See, e.g., Raytheon Co. v. Automated Business Sys.*, 882 F.2d 6 (1st Cir. 1989)(arbitrators were authorized to award punitive damages); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988); *Barbier v. Shearson Lehman Hutton, Inc.*, 752 F. Supp. 151 (S.D.N.Y. 1990). *See generally* Stephen P. Bedell et al, *Current Developments in Arbitration: Arbitrability and Punitive Damages*, 22 J. MARSHALL L. REV. 603 (1989).

107. The following clause may be used to exclude certain matters from arbitration: "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 finding or award that does not conform to the terms and conditions of the Agreement." AAA CLAUSES BOOKLET, *supra* note 54, at 8.

108. The following clause may be used to limit the relief the arbitrator may award:

In the event the arbitrator denies the claim or awards an amount less than the minimum amount of —, then this minimum amount shall be paid to claimant. Should the Arbitrator's award exceed the maximum amount of —, 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.

AAA CLAUSES BOOKLET, *supra* note 54, at 22.

109. *E.g., Towey v. Catling*, 743 F. Supp. 738 (D. Haw. 1990)(prevailing party is entitled to recover attorneys fees and costs). The following clauses apportioning costs, expenses and fees may be included in the parties' agreement: "All fees and expenses of the arbitration shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proof." AAA CLAUSES BOOKLET, *supra* note 54, at 24; "The prevailing party shall be entitled to an award of reasonable attorney's fees." *Id.* "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." *Id.* "The parties shall each bear her, his, or its own costs and expenses and an equal share of the arbitrators and administrative fees of arbitration." *Id.* at 25.

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 pre- and post-award expenses of the arbitration, including the arbitra-

F. Discovery

Neither the United States Arbitration Act nor the Uniform Arbitration Act contain any specific rules regarding pre-hearing discovery,¹¹⁰ therefore, there is a great deal of uncertainty regarding the applicability of pre-hearing discovery procedures in arbitration. If the parties' agreement to arbitrate is silent on this issue, courts may deny a party's request to engage in discovery,¹¹¹ reasoning that discovery hinders the expeditious and informal nature of arbitration.¹¹²

In contrast, where the parties have agreed to make discovery available, courts will enforce the agreement.¹¹³ Accordingly, the parties' agreement should contain some method or guidelines regarding pre-hearing discovery,¹¹⁴ including empowering the arbitra-

tors' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees and attorneys' fees."

Id.

110. Section 7 of the USAA empowers arbitrators to issue subpoenas and subpoenas duces tecum, but only as they relate to attendance at the evidentiary hearing. 9 U.S.C. § 7 (1988). Similarly, section 7 of the UAA contains the same provisions, but also permits the arbitrator to order an evidence deposition of a witness who cannot be subpoenaed or is unable to attend the hearing. UNIF. ARBITRATION ACT, § 7, 7 U.L.A. 114 (1985).

111. *See, e.g.*, *Oriental Commercial & Shipping Co., v. Rosseel, N.V.*, 125 F.R.D. 398 (S.D.N.Y. 1989) (although discovery "in aid of arbitration" is generally denied, it may be permitted where the party can demonstrate "extraordinary circumstances"); *Penn Tanker Co. v. C.H.Z. Rolimpex, Warszawa*, 199 F. Supp. 716 (S.D.N.Y. 1961) (rejecting a party's attempt to require the taking of depositions and interrogatories in action brought under the USAA). Only "upon a showing of true necessity because of an exceptional situation" will courts intervene to permit discovery in aid of arbitration. *Id.* at 718. *See also*, *Stanton v. Paine Webber, Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988) (section 7 of USAA does not limit arbitrators to only compel witnesses at hearings, but may also permit arbitrators to compel prehearing appearances).

112. *E.g.*, *Forsythe Int'l, S.A. v. Gibbs Oil Co.* 915 F.2d 1017 (5th Cir. 1990) ("Parties . . . may not super-impose rigorous procedural limitations on the very process designed to avoid such limitations."); *Int'l Ass'n of Machinists and Aerospace Workers v. Pratt & Whitney*, 329 F. Supp. 283 (D. Conn. 1971) ("Arbitration has never afforded to litigants complete freedom to delve into and explore at will, the adversary party's files under the pretense of pre-trial discovery.")

113. *Local 99, ILGWU v. Clarise Sportswear Co.*, 255 N.Y.S.2d 282 (Sup. Ct. N.Y. Cty. 1964).

114. If the parties incorporate the AAA Commercial Arbitration Rules in their contract, section 10 would provide for a preliminary hearing with the arbitrator and the parties' representatives. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 10. The purpose of the preliminary hearing is (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, (4) to establish "the extent of and schedule for the production of relevant documents and other information." *Id.* (emphasis added)

The parties may designate specified forms of pre-hearing discovery in the arbitration agreement. The following language can serve this purpose: "Limited civil discovery shall be permitted for the production of documents and taking of depositions. All discovery shall be governed by the Federal Rules of Civil

tor to rule on specific discovery requests.¹¹⁵

IV. EVIDENTIARY HEARING ISSUES AND PROCEDURES

After attending to the preliminary matters, the attorney should advise his client to consider how the arbitrators should conduct the evidentiary hearings. Unlike the Federal Rules of Civil Procedure and the Federal Rules of Evidence, the rules governing evidentiary hearings under the United States Arbitration Act¹¹⁶ and Sections 5¹¹⁷ and 7¹¹⁸ of the Uniform Arbitration Act are relatively straight-

Procedure." AAA CLAUSES BOOKLET, *supra* note 54, at 20. "The parties shall have the right to discovery in accordance with the [Illinois Code of Civil Procedure]." *Id.* at 19. "The parties agree that each side may take no more than three depositions of any witnesses. Discovery by means of interrogatories and requests for admission shall not be permitted." *Id.* "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." *Id.* at 20.

115. The following language can also address discovery issues: "The parties agree to discovery as provided in the Federal Rules of Civil Procedure. Any disputes concerning discovery shall be referred to the arbitrator(s)." AAA CLAUSES BOOKLET, *supra* note 54, at 19. "The arbitrators shall have the discretion to order a pre-hearing 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 and third party witnesses." *Id.* at 20. "In any arbitration hereunder, discovery shall be permitted in accordance with [the Illinois Rules of Civil Procedure]. Scheduling of such discovery shall be subject to scheduling by the arbitrators, and any discovery disputes shall be finally determined by the arbitrators." *Id.* See also RODMAN, *supra* note 14, §§ 17.4-9 for additional clauses permitting discovery.

116. Section 7 of the USAA provides the following guidance in conducting evidentiary hearings:

The arbitrators . . . 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.

9 U.S.C. § 7 (1988). Section 10, which relates to the grounds for vacating an award, provides the following guidance:

[T]he 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 -

(c) 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.

9 U.S.C. § 10(c)(1988).

117. Section 5 of the UAA provides the following guidance in conducting evidentiary hearings:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five 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 con-

forward and flexible. Arbitration hearings are normally conducted informally, and arbitrators are given a great deal of latitude in conducting the hearings. If the parties want to impose any formalities upon the proceedings, then they must do so by mutual agreement.¹¹⁹

A. *Ex Parte* Hearings

The parties' agreement should specifically address the possibility of conducting the hearings in the absence of a party who has been put on notice and subsequently fails to appear for the hearings.¹²⁰ The Uniform Arbitration Act¹²¹ and the Commercial Rules of the American Arbitration Association¹²² specifically authorize

sent 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 application [of either party] may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

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

(c) 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.

UNIF. ARBITRATION ACT, § 5, 7 U.L.A. 99-100 (1985).

118. Section 7 of the UAA provides the following guidance:

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(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.

Id.

119. However, courts are not in favor of imposing rigorous procedural limitations on voluntary arbitration proceedings. *Forsythe Int'l, S.A. v. Gibbs Oil Company of Texas*, 915 F.2d 1017, 1022 (5th Cir. 1990).

120. *See Kentucky River Mills v. Jackson*, 206 F.2d 111, 120 (6th Cir. 1953), *cert. denied*, 346 U.S. 887 (1953) (*ex parte* award confirmed inasmuch as the parties expressly contracted for *ex parte* arbitration); *Waterspring, S.A. v. Trans Marketing Houston Inc.*, 717 F. Supp. 181 (S.D.N.Y. 1989) (*ex parte* arbitration under terms of arbitration clause is valid and award is enforceable against non-showing party bound by clause).

121. Section 5 of the UAA provides: "The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear." UNIF. ARBITRATION ACT, § 5, 7 U.L.A. 99-100 (1985).

122. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 30. "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." *Id.* *See Standard Magnesium Corp. v. Fuchs*, 251 F.2d

arbitrators to proceed in the event a party fails to appear. However, the United States Arbitration Act has no similar provision. Thus, the parties' agreement should include a provision specifically authorizing or precluding *ex parte* hearings.

B. Interim Relief

There is a split of authority regarding the ability of a party to petition the court for interim relief pending arbitration.¹²³ Some courts will not grant interim relief pending arbitration, reasoning that this is a decision for the arbitrator to make.¹²⁴ Therefore, the parties' agreement should include a provision specifically empowering the arbitrator to issue interim relief.¹²⁵ By including this type

455 (10th Cir. 1957) (ex parte award upheld pursuant to agreement incorporating AAA rules); *Thermasol, Ltd. v. Dreiske*, 78 A.D.2d 838 (N.Y. App. Div. 1980) (where the parties agreed to arbitrate under the AAA rules and adverse party was given sufficient notice of the demand for arbitration and refused to participate, an award was given to the initiating party based upon its uncontested evidence), *aff'd*, 420 N.E. 2d 401 (N.Y. 1981), *cert. denied*, 454 U.S. 826 (1981); *Polygon Co. v. Kotten Machine Co.*, 433 N.Y.S.2d 400 (N.Y. Dist. Ct., Suffolk Cty. 1980) (where party can prove good cause for its default, an award rendered *ex parte* against it is subject to vacatur).

123. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) (refusing to grant employer's motion for a preliminary injunction enjoining former employee from soliciting former employer's customers); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro*, 577 F. Supp. 616 (W.D. Mo. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert*, 577 F. Supp. 406 (M.D. Fla. 1983); *Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 575 F. Supp. 904 (N.D. Tex. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. de Liniere*, 572 F. Supp. 246 (N.D. Ga. 1983); *Klein Sleep Prod., Inc. v. Hillside Bedding Co.*, 563 F. Supp. 904 (S.D.N.Y. 1982) (denying preliminary injunctive relief in a copyright infringement action because it would invade the province of the arbitrator).

Other courts have granted interim relief to a party pending arbitration. See, e.g., *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986) (it is not an abuse of the court's discretion to issue preliminary injunction pending arbitration). *Accord* *RGI, Inc. v. Tucker & Assoc., Inc.*, 858 F.2d 227 (5th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726 (10th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1043 (4th Cir. 1985); *Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). See generally, Anthony S. Fiotto, Note, *The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute*, 66 B.U. L. REV. 1041 (1986) (tracing courts' treatment of motions for preliminary injunctions under the Act and advocating the use of preliminary injunctions).

124. E.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert*, 577 F. Supp. 406 (M.D. Fla. 1983); *Klein Sleep Prod., Inc. v. Hillside Bedding Co.*, 563 F. Supp. 904 (S.D.N.Y. 1982).

125. *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980) A distributorship agreement containing a specific provision for the preservation of the status quo between the parties pending arbitration will be upheld. *Id.* at 472. See also *Intermar Overseas, Inc. v. Argocean S.A.*, 503 N.Y.S.2d 736 (App. Div. 1986) (court permitted *ex parte* attachment of an Argentine corporation's bank accounts where arbitration agreement existed). *But*

of provision, the parties will be able to preserve the status quo during the arbitration proceedings.¹²⁶

C. Rules of Evidence and Procedure

Arbitrators generally conduct hearings in an expeditious and informal way,¹²⁷ unless the parties desire otherwise. Similarly, unless expressly required by the arbitration agreement, arbitrators are not bound to observe formal rules of evidence or procedure,¹²⁸ and may rely instead upon their own knowledge and common sense in structuring the hearings.¹²⁹ This absence of evidentiary and procedural rules is perhaps the most apparent distinction between an arbitration hearing and a court trial.¹³⁰ Accordingly, it may be in

see *JAB Indus., Inc. v. Silex S.P.A.*, 601 F. Supp. 971, 979 (S.D.N.Y. 1985) (“[g]enerally, with the exception of maritime cases, provisional remedies such as attachments or compulsory bond are not available in arbitration.”).

126. If the parties incorporate the AAA Commercial Arbitration Rules into their agreement, section 34 specifically authorizes the arbitrator to issue interim measures. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 34. Few cases have specifically considered whether an arbitrator may award provisional remedies. *But see* *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984) (interim award was proper and within the power of the arbitrators).

The following language may be used to empower the arbitrator to grant interim relief: “Either party may apply to [the arbitrator] and seek injuncti[ve] relief so as to main[tain] the status quo of the parties until such time as the arbitration award is rendered [or] the controversy is otherwise resolved.” AAA CLAUSES BOOKLET, *supra* note 54, at 24. “Either party may. . . seek [from the arbitrator] any interim or provisional relief that may be necessary to protect the rights or property of that party pending the arbitral tribunal’s determination of the merits of the controversy.” *Id.* at 23.

127. *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990) (“[p]arties may not impose rigorous procedural limitations on process designed to avoid such limitations”)

128. *See, e.g.*, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 (1956); *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985); *Chasser v. Prudential-Bache Sec.*, 703 F. Supp. 78, 80 (S.D. Fla. 1988); *Checkrite of San Jose, Inc. v. Checkrite, Ltd.*, 640 F. Supp 234 (D. Colo. 1986); *Lentine v. Fundaro*, 278 N.E.2d 633 (N.Y. 1972). *See also* AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 31. “[T]he arbitrator[s] shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.” *Id.*

129. *E.g.*, *National Post Office Mailhandlers Amalgamated Local No. 304 v. United States Postal Service*, 751 F.2d 834 (6th Cir. 1985); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981).

130. Hearsay testimony may be admissible in arbitration hearings. *E.g.*, *IBEW Local 396 v. Central Tel. Co.*, 581 P.2d 865 (Nev. 1978). Indiana’s arbitration statute provides that rules of evidence do not apply to arbitration proceedings and that hearsay is admissible in evidence. IND. CODE ANN. § 34-4-2-6(b) (Burns 1986). Section 5 of the UAA does not specifically exclude hearsay. UNIFORM ARBITRATION ACT, § 5, 7 U.L.A. 99-100 (1985). *See also* Colorado Arbitration Act, COLO. REV. STAT. § 13-22-207(d) (1987) (“the arbitrator shall not give undue weight to hearsay or other improper or unsubstantiated evidence”). Parole evidence may also be admissible. *E.g.*, *Todd Shipyards Corp. v. Cunard*

the parties' best interest to either follow the rules of an administrative agency,¹³¹ or to fashion customized rules of evidence and procedure for the arbitrator to follow during the arbitration hearing.¹³²

The parties may adopt the federal rules, or a particular state's rules, of evidence and/or procedure for the hearing. However, this may actually frustrate the basic purpose of arbitration, which is to dispose of disputes quickly, inexpensively, and informally.¹³³

Alternatively, the parties may elect to waive oral hearings entirely, and agree to submit the dispute to the arbitrators by written submissions only.¹³⁴ This may be accomplished by filing with the arbitrators, and the opposing party, preliminary memoranda or statements of issues and claims, and then filing responsive documents. This procedure may also permit the filing of surreply and rebuttal documents. If the parties agree to such documentary submissions, the parties' agreement should specify page limits for each document and time limits for filing the documents.

D. Independent Investigations by the Arbitrator

The parties' agreement may authorize the arbitrators to conduct an independent investigation, or to consult independent experts to verify certain facts.¹³⁵ If the parties authorize the arbitrators to perform their own investigation, or authorize the use of outside technical assistance, the agreement should provide compensation for such services.¹³⁶ Additionally, the agreement should address whether or not the parties will be permitted to review and

Line Ltd., 735 F. Supp. 1463 (N.D. Cal. 1989) (arbitrator could consider parole evidence when arbitrator found that written contract was incomplete).

131. See *supra* note 6 and *infra* Appendix I for lists of administrative agencies.

132. The parties may contract for the admission of affidavits in evidence. Rosenbaum & Weil, *supra* note 75, § 10.41. See also RODMAN, *supra* note 14, § 4.71 (outlining a clause authorizing arbitrators to take affidavits and documents as evidence). The AAA Commercial Arbitration Rules also provides for the arbitrator to consider the evidence of witnesses by affidavit or other documents. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 32.

133. Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir. 1990).

134. See AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 37. Section 37 provides, "[t]he parties may provide, by written agreement, for the waiver of oral hearings in any case." *Id.*

135. DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 24:04. Any independent investigation by an arbitrator without the knowledge and consent of the parties would be improper. See, e.g., Hutchins Const. Co., v. Bell, 396 F. Supp. 1262 (D. V.I. 1975); Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 230 S.E.2d 380 (N.C. 1976); Tassinari v. Loyer, 189 So. 2d (Fla. 1966). See also AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 33 (specifically authorizing arbitrators ". . . to make an inspection or investigation in connection with the arbitration").

136. DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 24:05 ("an agreement of the parties allowing the use of outside technical assistance should be in writing and should also provide for payment for such services").

comment on any information obtained from an outside source.¹³⁷

E. Making a Record

Neither the United States Arbitration Act nor the Uniform Arbitration Act address making a record of the oral arbitration hearing.¹³⁸ The parties may want to arrange for a tape recording or written transcript to preserve the record, particularly where the case is complex, where the amount in controversy is large, or where the information presented at the hearing is technical in nature.¹³⁹ The record may serve as a basis for modifying, confirming or vacating an award.¹⁴⁰ If a record is desired, the parties' agreement should address how to apportion the cost of this service.¹⁴¹

V. POST-HEARING ISSUES AND PROCEDURES

The parties should consider the procedures the arbitrators should follow after the conclusion of the oral or evidentiary hearings. The parties' agreement should provide the arbitrators with guidance regarding such issues as the form of the award, the scope of the remedy which the arbitrators are authorized to award, and whether or not the parties may appeal to the arbitrators once the award is rendered.

A. Form and Substance of the Award

Unless otherwise provided in the parties' agreement, arbitrators are not required to disclose the basis for making their awards.¹⁴² However, the arbitrators' award must conform to the

137. *Id.* ("the [parties' agreement] should state whether or not the parties are to be given the opportunity to comment on any report submitted by an outside individual or agency").

138. Rosenbaum & Weil, *supra* note 75, § 10.36. ". . . Indiana, North Carolina, and South Carolina, have amended the Uniform Act to require the recordation of the hearing in a manner sufficient for appeal, upon a party's request." *Id.*

139. *Id.* See also DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 24:07.

140. Rosenbaum and Weil, *supra* note 75, § 10.36. A transcript of the arbitration hearing is not a prerequisite to appeals. See, e.g., *Malibu Pools of New Mexico, Inc. v. Harvard*, 637 P.2d 537, 538 (N.M. 1981); *House Grain Co. v. Qbst*, 659 S.W.2d 903 (Tex. 1983).

141. AAA COMMERCIAL ARBITRATION RULES, *supra* note 39, § 23 (provides that the requesting party or parties shall pay the cost of the record).

142. See, e.g., *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6, 8 (1st Cir. 1989); *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283, 291 (S.D.N.Y. 1991); *Barbier v. Shearson Lehman Hutton, Inc.*, 752 F. Supp. 151, 163 (S.D.N.Y. 1990); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Burke*, 741 F. Supp. 191, 194 (N.D. Cal. 1990); *Antwine v. Prudential-Bache Sec., Inc.*, 735 F. Supp. 1331, 1333 (S.D. Miss. 1989), *aff'd*, 899 F.2d 410 (5th Cir. 1990); *Atlantic Shores Resort Joint Venture v. Martin*, 731 F. Supp. 1279, 1285 (D.S.C. 1990). The Uniform Arbitration Act merely requires that the award be in writ-

express contractual provisions of the parties' agreement.¹⁴³ Therefore, the parties' agreement should specifically address the form and substance of the award which the arbitrators are authorized to render.¹⁴⁴

The parties may require that the award be in one of several forms. First, the parties may require the arbitrators to render an award simply identifying the prevailing party and the relief granted.¹⁴⁵ Second, the parties may require the arbitrators to issue findings of fact and conclusions of law.¹⁴⁶ Third, the parties may require the arbitrators to render a formal written opinion explaining their rationale for their decision.¹⁴⁷ A formal opinion, however, is not recommended because it may identify areas for a losing party to attack in a subsequent court proceeding.¹⁴⁸

B. Scope of the Award

An arbitration panel may grant any remedy or relief that it deems just and equitable as long as the award is within the scope of the parties' agreement.¹⁴⁹ However, if the award exceeds the scope

ing and signed by the arbitrators joining in the award. UNIF. ARBITRATION ACT, § 8, 7 U.L.A. 116 (1985).

143. *Delta Queen Steamboat Co. v. District 2 Marine Eng'r Beneficial Ass'n*, 889 F.2d 599, 603 (5th Cir. 1990), *reh'g denied*, 897 F.2d 746 (5th Cir. 1990)(*per curiam*) (award contrary to express contractual provisions will not be upheld by the courts).

144. *See, e.g., Meharry v. Midwestern Gas Transmission Co.*, 430 N.E.2d 1138, 1140 (Ill. 1981) (the parties' agreement may require the arbitrator to disclose his reasoning or specific findings of law or fact).

145. *See supra* note 142 and accompanying text for a discussion indicating that arbitrators do not have to disclose the reasoning behind the awards.

146. The following language can be used to direct the arbitrators to include findings of fact and conclusions of law in the award: "The arbitrator's award shall include findings of fact and conclusions of law." AAA CLAUSES BOOKLET, *supra* note 54, at 26. "The arbitration award shall be in writing and shall specify the factual and legal bases for the award." *Id.*

147. The following language can be used to direct the arbitrators to render a formal written opinion: "The award of the arbitrators shall be accompanied by a reasoned opinion." AAA CLAUSES BOOKLET, *supra* note 54, at 26.

148. *See COULSON, supra* note 11, at 30. Mr. Coulson quotes an unidentified judge's instruction to arbitrators:

The thing we must look at is the face of the award itself, and see whether it is in excess of the powers of the arbitrator . . . Although technical precision is not required in an award of arbitrators, I would urgently suggest that arbitrators follow the form of award provided by the American Arbitration Association. In the event they [arbitrators] feel impelled by some uncontrollable urge, literary fluency, good conscience, or mere garrulosity to express themselves about a case they have tried, the opinion should be a separate document and not part of the award itself.

Id.

149. *Lawrence v. Flazarano*, 402 N.E.2d 1017 (Mass. 1980). An arbitrator has broad authority to order any relief that does not offend "public policy or which directs or requires a result contrary to express statutory provision or otherwise

of the parties' agreement,¹⁵⁰ violates public policy,¹⁵¹ or is incomplete¹⁵² or ambiguous,¹⁵³ the courts will not enforce it. Therefore, the parties should clearly specify the type of relief which the arbitrator is authorized to award, or is precluded from awarding.¹⁵⁴

Finally, because an arbitration award is not self-enforcing,¹⁵⁵ the parties should include an entry-of-judgment clause in their agreement.¹⁵⁶ This will ensure that the award may be entered in any court having jurisdiction over a party to the arbitration.¹⁵⁷

C. Appeals

By agreeing to submit to voluntary, binding arbitration, the parties agree to accept a final and non-reviewable award.¹⁵⁸ This is reflected by the fact that the United States Arbitration Act and the Uniform Arbitration Act provide very limited grounds for judicial review of an arbitration award.¹⁵⁹ However, the parties and their

transcends the limits [of the arbitration agreement].” *Id.* at 1024 (citations omitted).

150. *Supermarkets Gen. Corp. v. Local 919, United Food and Commercial Workers Union*, 645 F. Supp. 831 (D. Conn. 1986) (if the award exceeds the scope of the parties' agreement, it is unenforceable).

151. *Office of Professional Employees Int'l Union, Local 2 v. Washington Metro. Area Transit Auth.*, 724 F.2d 133, 140 (D.C. Cir. 1983) (courts will not enforce an arbitration award that is contrary to public policy).

152. *Harris v. Allied Am. Ins. Co.*, 504 N.E.2d 151, 152 (Ill. 1987) (trial court properly refused to confirm award where the arbitrators found for plaintiff on liability and damages, but made no determination as to whether any or all of the damages were due under the uninsured motorist policy provision).

153. *Americas Ins. Co. v. Seagull Compania Naviera, S.A.*, 774 F.2d 64, 67 (2d Cir. 1985) (an ambiguous award will be remanded to the arbitrator for clarification); *Board of Trustees of Junior College Dist. No. 508 v. Cook County Teachers Union Local 1600*, 422 N.E.2d 115, 119 (Ill. 1981) (same).

154. See *supra* notes 99-109 and accompanying text for a discussion of the types of remedies available in commercial arbitration.

155. William W. Yotis, III & Sheldon M. Katz, *The Arbitration Award*, in, *ARBITRATION PRACTICE* § 12.6 (Ill. Inst. for CLE, 1989).

156. *DOMKE ON COMMERCIAL ARBITRATION*, *supra* note 7, § 6:02. *Oklahoma City Ass'n v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 795 (10th Cir. 1991) (USAA confirmation process applies if parties include in their arbitration agreement a provision that judgment of court shall be entered on the award made pursuant to arbitration).

157. *Oklahoma City Ass'n*, 923 F.2d at 793 (federal courts do not have jurisdiction to confirm an award under the USAA if such jurisdiction is not part of the arbitration agreement).

158. *COULSON*, *supra* note 11, at 29-30.

159. Judicial review of arbitration awards is limited to defects in the arbitration procedure, not with the merits of the case. *Coulson*, *supra* note 11, at 30-31. Section 10 of the USAA specifies the limited grounds for vacating an award or ordering a rehearing. 9 U.S.C. § 10 (1988).

In either 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 -

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

attorneys may want to provide an option for appealing the award to appellate arbitrators, instead of the courts, for either a correction, modification, or clarification of the award.¹⁶⁰ Therefore, it is in the parties' best interest to include a provision for appealing the arbitration panel's award to appellate arbitrators.¹⁶¹

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

(c) 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.

(d) 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.

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

Id. The Uniform Arbitration Act has similar provisions for vacating an award, but includes a 90-day window within which such application must be made. UNIF. ARBITRATION ACT § 12, 7 U.L.A. 140-41 (1985). Both Acts also contain provisions for requesting judicial modification or correction of an award. 9 U.S.C. § 11 (1988); UNIF. ARBITRATION ACT § 13, 7 U.L.A. 201-02 (1985). Section 11 of the USAA provides:

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.

9 U.S.C. § 11 (1988). The Uniform Arbitration Act includes a 90-day window within which such application must be made. UNIF. ARBITRATION ACT § 13, 7 U.L.A. 201-02 (1985). Additionally, the UAA contains a provision which allows the arbitrators to modify, clarify, or correct the award upon application of either party within 20 days after delivery of the award to the applicant. *Id.* § 9.

160. *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215 (5th Cir. 1990) (once an arbitrator renders the award, he becomes "functus officio" and his authority is terminated, thus protecting the finality of the arbitrator's decision), *cert. denied*, 111 S. Ct. 2799 (1991); *United Mine Workers of America Local No. 1568 v. Island Creek Coal Co.*, 630 F. Supp. 1278 (W.D. Va. 1986). See also DOMKE ON COMMERCIAL ARBITRATION, *supra* note 7, § 22:01 (discussing functus officio concept).

161. The following language may be included to provide for an appeal of the arbitrator's award to a panel of appellate arbitrators:

The arbitration panel's Findings of Fact, Conclusions of Law and Award may be appealed by either party to an appeal panel of three arbitrators, consisting of former or retired judges, at least two of whom shall be former or retired judges of courts of record in Wyoming. The appeal panel shall be selected from two lists. List "A," comprising retired or former Wyoming judges, shall consist of four names from which each party shall strike one name. List "B," comprising retired or former judges of courts of record in

VI. CONCLUSION

The Congressional enactment of the United States Arbitration Act and the adoption of modern arbitration statutes by the states, reflect a strong policy promoting the use of arbitration as an alternative means of dispute resolution. This policy favors enforcement of arbitration agreements and the resulting awards. Honoring parties' agreements is one of the most important goals of the policy favoring arbitration.

The purpose of an arbitration agreement is to dispel disputes, not create them. If disagreements arise over the intent of the arbi-

states other than Wyoming, shall consist of three names from which each party will strike one name. In the event either party appeals, the following procedure shall apply: the party desiring to appeal shall file with the American Arbitration Association a notice of intention to appeal within thirty days after the Findings of Fact, Conclusions of Law and Award is received by that party. Thereafter, the appeal procedure shall be governed by the Wyoming Rules of Appellate Procedure except as modified herein. The appeal Panel selected shall have the power to reverse any erroneous Conclusions of Law, or any Finding of Fact not supported by the evidence. In addition, the appeal panel may remand to the hearing panel with instructions.

AAA CLAUSES BOOKLET, *supra* note 54, at 26-27.

Either party may appeal the arbitration panel's award to an appellate arbitrator(s) by filing with the AAA, within twenty 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 brief shall request one or three appellate arbitrators. The opposing party shall file with the AAA and serve on the appealing party, within twenty days after receiving the appeal brief, an opposition brief, not to exceed 20 pages. If the appealing party has not requested a three arbitrator panel, the opposing party may do so in its brief. If desired, the appealing party may file and serve a reply brief within 10 days thereafter, not to exceed 5 pages. Upon receiving the opposition brief, the AAA shall submit to the parties a list of five (or, in the case of three arbitrators, seven) potential appellate arbitrators who meet the qualifications set forth in Section B above, not to include any of the arbitral panel members involved in the case being appealed. The parties shall follow the strike and ranking procedure and the AAA shall appoint the appellate arbitrator(s) as described in Section B above. Either party may request oral argument which must be conducted within 14 days following the submission of the final brief. The appellate arbitration panel's decision shall be based only on the record of the initial hearing and oral argument, if any. The appellate arbitrator(s) shall render a written decision affirming, reversing, modifying or remanding the arbitral panel's decision within twenty days after receiving the final appellate submissions. The appellate arbitrator(s) 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 is not supported by substantial evidence;
3. If the award contains material errors of applicable law;
4. If the award is arbitrary or capricious.

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

Id. at 27-28.

tration agreement, it is often because its language failed to address the particular needs of the contract and the parties. Therefore, attorneys should consider using the suggestions and sample clauses contained herein to construct customized arbitration agreements for their clients. Drafting an effective arbitration agreement is the first step on the road to successful dispute resolution.

Barry C. Silverman

SIGNIFICANT ADR ORGANIZATIONS

NAME	HQ	ESTAB.	NO. OF OFFICES	ORGAN. STRUCT.	SVCS. OFFERED	FREE STRUCTURE	TYPES OF NEUTRALS	MARKETS SERVED
American Arbitration Association	New York, NY	1926	35	Not for Profit	All ADR Processes, Educational Elections	Min. \$300-Arbitration Min: \$300-Mediation	All types Attorneys & Non Attorneys	All
American Intermediation Service	San Francisco, CA	1981	5*	For Profit	Mediation	\$150 filing fee; Claim under: \$100,000- \$550/party; \$101,000- \$250,000 - \$650/party; above \$250,000 - \$750/party; if not pre-agreed + \$150; Additional mediations - \$250/hr. shared by parties	Full time staff mediators all attorneys	Complex multi-part cases, general comm., const., securities, ins., real estate, employment
Arbitration Forums, Inc.	Tarrytown NY	1943	2**	Non-profit	Arbitration, Mediation, Educational	\$100 fee + \$100 min. per hour for mediation. \$250 fee/co. + \$100/hr. for each panel	Executives & specialists within industry, former judges & attorneys	General comm., auto accident, exec. ins., med. malp., wkr. comp., UM
Center for Dispute Settlement	Washington, DC	1971	1	Non-profit	Mediation, Facilitation, Training, Assessing Courts, R & D	Flat rate for up to 4 hours (Comm) some admin. fee 1 hourly rate for neutrals	Prof. staff Attorneys & mediators	Comm., labor, gov't, courts individual, small business disputes
Center for Public Resources	New York, NY	1979	1	Non-profit	ADR, R & D, Educational, Publications, National lists of neutrals available	No case fee for filing Charge at CPR staff participater is \$150 per hour	Respected attorneys, retired judges, law prof. technical exp	Major complex and/or public policy disp. Acts as facilitator of ADR
Endispute	Washington, DC	1982	4	For Profit	Mainly mediation, arbitration, consulting, minitrial, training, MT reputation	Hourly rate for mediators \$100 Sub-mission fee + \$150 per party per half day	Retired judges, attorneys, and people, staff people	Const., comm., ins., real estate, non-union emp, P.I., etc.

* American Intermediation Service is owned by Judicate
** 159 Locations

NAME	HQ	ESTAB.	NO. OF OFFICES	ORGAN. STRUCT.	SVCS. OFFERED	SEE STRUCTURE	TYPES OF NEUTRALS	MARKETS SERVED
Judicial Arbitration & Mediation Services, Inc.	Orange, CA	1979	16	For Profit	Settlement conf., arbitration, mediation, minitrial, am jury trial, special master, judge pro tem	Admin. fee-\$100 per party 2-party cases (2 hr. max.) \$300 flat fee per party more than 2 hrs. Per party rate: 2 parties - \$200/party/hour 3 parties - \$150/party/hour 4 parties - \$125/party/hour Reading/research time by judge \$300/hr. by Briefing Atty. \$175/hr.	Retired appellate and trial court judges	Individual, businesses, gov't entities, employment, ins., maritime, const., real estate
Judicate	Philadelphia, PA	1985	2	For Profit	Judicial hearings arbitration & mediation	Admin. Fee: Settled after submission \$150/filing party; Up on agreement \$150/non-filing party; Half day judicial arb. \$450/party; One hr. exp. \$150/party; Judicial med. \$150/party/hr.	Former federal, state & local judges	Ins., gen. comml., business disp., securities, non-labor emp., etc.
National Academy of Conciliators	Bethesda, MD	1980	4	Non-profit	Mediation conciliation, & other processes, training & certification of neutrals.	_____	Presumably, mainly non-attorneys	Residential, const., real estate, HOW program, labor/management, fair housing, EEO, insurance

NAME	HQ	ESTAB.	NO. OF OFFICES	ORGAN. STRUCT.	SVCS. OFFERED	FEE STRUCTURE	TYPES OF NEUTRALS	MARKETS SERVED
United States Arbitration & Mediation, Inc.	Seattle, WA	1984	40 and abroad	For Profit	Primarily mediation, also arbitration, mini-trials, sum. jury trial	***Mediation flat fee/party 2-3 parties - \$750/ party/day 4-5 parties - \$650/ party/day 6-7 parties - \$600/ party/day 8 or more parties - \$550/party/day Cases that settle before mediation - \$175/party if min. of 1 hr. spent on case	Attorneys and retired judges	Genl., comml., ins., emp., med. malp., securities, environmental, const., etc.

*** Texas schedule.
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