CHEAT SHEET

- *Lead the way.* The efficacy of arbitration is dependent on guidance from in-house counsel in two key areas: (1) with clients at the point of the negotiation of business contracts, and (2) with outside counsel.
- *Selecting the best.* Arbitrator selection is one of the most important aspects of the process. Ensure that the arbitrators you hire have strong project management experience.
- *Slow motion.* Carefully assess what motions will increase efficiency and what motions will extend the process. This ensures productivity and sets the tone for the rest of the process.
- *An open mind.* Corporate counsel should pledge to keep business-to-business lines of communication open to promote the possibility of a settlement.

REASSESSING COMMERCIAL ARBITRATION:

MAKING IT WORK FOR YOUR COMPANY

By Steven M. Greenspan and Conna A. Weiner Handling disputes that have strayed beyond the ability of both parties to negotiate a solution by themselves presents a variety of strategic and logistical challenges.[1] While many in-house counsel have come to appreciate the business benefits of non-binding mediation, even at an early stage, the fact is that binding arbitration often remains suspect, especially outside of the international arena where the process makes obvious sense for reasons of cross-border neutrality and enforcement.[2] This often occurs because of a lack of information, one-off personal experiences, or — most tellingly — failure to design and plan a good arbitration process that fully exploits the many flexible and customizable options available to parties and counsel.

With our many collective years of in-house counsel experience, we are all too familiar with the need for law departments to increase efficiency and firmly manage litigation matters so that they do not interfere with business objectives and finances. In this context, it is critical that both inside and outside counsel reassess commercial arbitration to take advantage of its benefits in the context of complex business disputes. This article provides even the most skeptical counsel with a framework for taking a closer, more objective look at the issues. It is based upon an analysis of the facts, the available efficiency enhancing resources and tools, and our own experiences shaped by numerous discussions with colleagues who each carry differing views on the subject.[3]

The litany of concerns raised about commercial arbitration is well-known: It is a dispute resolution mechanism that's supposed to be quicker, easier, and more cost-efficient but often becomes a cumbersome and expensive process without the procedural predictability of litigation. At times, arbitration may end in a compromise or even a nonsensical rogue award without any real avenue for appellate review. Accordingly, many in-house corporate lawyers favor litigation over arbitration to resolve business disputes, going so far as to adopt a "default" rule that binding arbitration should be used only in rare circumstances, where confidentiality is paramount. Such a default rule is misguided, and does a significant disservice to business clients.

These concerns do not adequately consider the empirical facts. We forget to examine what it really means in terms of time, and thus cost, to litigate instead of arbitrate. What is the difference in the cost and time required between litigation and arbitration — particularly if it involves a jury and appeals? How often are litigated cases actually appealed? In the course of those appeals, how often is the result at the trial level reversed? In other words, if we avoid arbitration in order to preserve our right to appellate review, just how valuable is this option anyway? Would an unattractive business arbitration result have been any different in a litigation setting? And if so, how often and why?

These types of concerns do not fully address the many thoughtful and creative responses to user complaints that key dispute resolution think tanks and providers have developed in recent years. At the very least, in-house counsel should educate themselves about these process and logistical innovations.

Simply put, if the process is well designed by the parties and their well-informed inside and outside counsel, arbitration of commercial disputes is often far superior to traditional court litigation. The speed of achieving final resolution, the sense of confidentiality, the predictability, and the ability to customize the process by choosing your adjudicators are some of the key factors here. The parties should strive, and — with the right attitude and professionals at the table — be able to jointly develop a binding arbitration process that will best achieve three core objectives: fair resolution, efficiency, and timeliness.

There is an important caveat to all of this — the efficacy of the process depends entirely on the parties. Strong leadership and guidance from in-house counsel is a must in two key areas: (1) with clients at the point of the negotiation of business contracts, and (2) with outside counsel once an arbitration is on the horizon. Many commercial arbitrations are compelled by a contractual provision, which was likely agreed to long before a dispute arose. In-house counsel must stress to their business clients the importance of taking the time to think about the types of disputes that might arise in connection with any particular arrangement — an assessment greatly assisted by an analysis of the common causes of disputes in connection with similar agreements in the past. The contract and specific dispute resolution clauses should be negotiated accordingly.[4] The notion that dispute resolution provisions are just legal boilerplate for which a form can be used for the miscellaneous section of a contract is wrong and has fueled much of the criticism of arbitration over the years. The clause can and should contain appropriate provisions to streamline the process, and we set forth specific suggestions below. Of course, we are mindful that negotiating the terms of an arbitration provision at the outset can be awkward, but spending time on the process while the parties are not embroiled in a dispute is paramount.

Once an arbitration is on the horizon, clauses that are insufficient in some way can be "fixed" or modified with the agreement of the parties

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The authors would like to thank John Kiernan of Debevoise & Plimpton in New York and David Evans of Murphy & King in Boston for their many contributions in connection with a panel discussion about arbitration.

and the arbitrator to "fit the forum to the fuss."[5] At the preliminary hearing, a project-management minded arbitrator will help guide the parties in customizing the process for a particular dispute in a way that makes sense. Strong in-house guidance is necessary at this stage as well.

In-house counsel should choose outside counsel for their arbitration experience, stress that they chose arbitration for a reason, and make it clear that a full-scale litigation mindset and approach will not meet the client's goals. They should be directly involved in the all-important preliminary hearing before the arbitrator(s), where the process is shaped and gaps in the arbitration clause can be filled. In-house counsel should be present when agreeing to appropriate limits on discovery and when the arbitrator memorializes those limits in the scheduling order.[6]

Arbitration works most effectively to resolve good faith commercial disputes only when each party seeks a fair resolution, efficient both in time and cost, and when there is a willingness to collaborate to customize the process. After all, are there really any commercial disputes where the actual business clients should not seek to achieve such sensible goals?

The facts

Statistics provided by US federal courts and some of the major providers supply a stark reminder of the differences between litigation and arbitration.

According to figures available from the US federal court system, of the 341,813 cases pending in federal court in 2015, nearly half were pending for over a year, with a full quarter pending for more than two years. In addition, by the end of 2015, the median time to get a federal civil case to trial was 27.2 months. In-house counsel should examine the situation in their state and local courts when they assess alternatives.[7]

In contrast, American Arbitration Association (AAA) figures show that the median time to an award — which of course includes all prehearing, hearing, and any post-hearing activities, such as the submission of any post-hearing briefs — was 197 days in 2014-2015.[8] A recent survey by the International Institute for Conflict Prevention and Resolution (CPR), a corporate user dispute resolution think tank and provider, showed that the average time to an arbitration award was nine months.[9] There are concerns that arbitrators have an incentive to drag out proceedings because a longer process results in more pay. Good arbitrators are well aware of these concerns and know that arbitration is often chosen because parties want efficiency. Today's arbitrators want to develop and maintain a reputation for being efficient. Those who don't will not get business.

We also need to remember the disruption that full-scale litigation can have on business, especially with regard to discovery. People fail to adequately take this into account when assessing litigation versus arbitration. Avoiding the worst parts of litigation is critical to an acceptable arbitration.

Another common fear is losing the right to an appeal. However, the standards for reversal are high, and the money and the time spent to get through a trial and appeal can be staggering. It seems that many parties make the decision to move on, with a relatively small number of cases going to appeal and an even smaller number resulting in reversal. A remand for further proceedings consistent with a favorable appeal result may seem like a win to the lawyers. However, years into litigation, the business may not view it the same way.[10] Is this a broad and inexact brush? Yes. Is it food for thought about the need to preserve an appellate option in litigation? Again, yes.

With respect to our experience with the "compromise verdict" issue, we, and many of our inside and outside counsel, including our neutral colleagues, have found this to be more urban legend than reality. Again, responsible arbitrators are well aware that this is a criticism of the process, and strive to render clear and decisive awards with a careful legal basis — or risk not being hired the next time. The American Arbitration Association has also analyzed the extent to which arbitrators issue awards that seem to represent compromise awards, or "split the baby." In a 2015 study of their 2,384 business-to-business commercial arbitration cases with monetary claims, the AAA found that that more than 93 percent were in favor of one party or the other (defined as outside the midrange of 41-60 percent of their filed claimed amount), with 30.75 percent of claims amounts denied and 40.94 percent of claims awarding more than 80 percent of the relief requested.[11] Further, in-house counsel must always examine the litigation alternative in connection with criticisms of arbitration. Disbelief must also be suspended to conclude that juries and judges never reach compromised decisions.

This type of data should encourage inside and outside counsel to carefully

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examine the actual facts in their state and federal courts and more broadly across arbitration results obtained in their companies and by colleagues in other firms. Simply put, one or two examples is an insufficient data set.

How to get the arbitration that you want

It is useful to group arbitration planning and management techniques into two key areas: (1) methods to keep the cost and length of arbitration under control; and (2) methods to improve your odds of getting a just result — or at least making a favorable business resolution more likely.

One of the single most important resources to consider on both of these subjects is the College of Commercial Arbitrators' 2010 "Protocols for Expeditious, Cost Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Providers,"[12] which is available at no cost on the internet. It outlines the criticisms of arbitration and then encourages each significant player to assume responsibility for specific, practical steps to improve the arbitration process. Every lawyer who is considering or participating in arbitration should become intimately familiar with this resource.

In addition, virtually all of the major arbitration providers have developed thoughtful discovery protocols and expedited arbitration procedures and rules designed to streamline arbitration and turn it back from the litigation-lite abyss. They also have developed ways to appeal arbitration awards to panels of senior arbitrators. Corporate counsel should familiarize themselves with these resources and consider adopting aspects of these creative ideas where appropriate in their agreements, or as part of the preliminary hearing discussion.[13]

Inside counsel who have failed to educate themselves about the latest thinking on the arbitration process are in a weak position to advise clients — or accept advice from outside counsel — on this subject.

Arbitrator selection is one of the most important — if not the most important — aspects of building a successful arbitration case. The process differs from a litigation setting, where parties have little control over the judge assigned to the case and a relatively weak level of control over jury selection.

Arbitrator selection: Key for both controlling cost and length, and ensuring a just or business friendly result

Because it is a critical aspect of both types of planning and management techniques and of such overall significance to the process, it is useful to focus on arbitrator selection separately from the other mechanisms outlined below.

Arbitrator selection is one of the most important — if not the most important — aspects of building a successful arbitration case. The process differs from a litigation setting, where parties have little control over the judge assigned to the case and a relatively weak level of control over jury selection.

Counsel should carefully evaluate prospective candidates and consider their experience and philosophy. In terms of keeping the cost and length of arbitration under control, choosing a single rather than a three-member panel of arbitrators is critical and should be chosen as often as possible. The logistics of intrapanel relations and deliberation are inherently more time-consuming than those of a single arbitrator. The American Arbitration Association has developed compelling statistics that show that a three-member panel process takes longer and is more expensive.[14] Those wanting to reduce the risk of putting all of their eggs in one basket should test this concern by making sure they do not believe that they can come up with a selection process that will yield an individual arbitrator with the requisite experience and knowledge to make them comfortable. They should then consider reserving three-member panels for very high-value disputes. The risk of a single arbitrator also can be ameliorated by the adoption of one of the optional appellate arbitration rules available from the major dispute resolution providers, discussed below.

In addition, arbitrators should have strong project management experience — running arbitrations efficiently is one indicator of the requisite experience. Managing teams and projects inside corporations or in business, where the "rules" are not set forth in an overall framework such as the US Federal Rules of Civil Procedure, is another.

Another important point in connection with arbitration cost and length is arbitrator availability. Today's arbitrators are taught the importance of consecutive hearing days. Many arbitrations have run aground because of the need to accommodate arbitrator schedules. The schedules of outside counsel are difficult enough. The arbitrators should be ready to go, day after day, when everyone else is.

Arbitrator selection is also critical to ensuring a just result — or at least a business friendly one. While not outcome dispositive, the ability to choose the arbitrator assures the parties that the qualifications possessed by their arbitrator are those that are necessary, or at least helpful, to resolving the dispute, whether it is industry, judicial, educational, or through another point

of experience. Substantive experience with particular types of disputes or industries and/or significant general commercial/business experience with complex commercial transactions makes the presentation of the case easier and can significantly improve your chances of securing a result that fits legal/business expectations and norms. It also enhances the likelihood that the arbitrator will be interested in the subject matter, and, importantly, makes the parties comfortable with the process when an award is rendered. But, one important warning when drafting an arbitration provision is not to narrowly define the desired qualifications of the arbitrator. It will make it too difficult to find candidates and the eventual dispute might deviate from the expectations of the parties at the time the business deal was reached.

Other key methods to keep the cost and length of arbitration under control

In-house counsel leadership

It is worth repeating: In-house counsel must be involved in the dispute resolution process from the beginning. Because the process can and should be customized and flexible, it will require more work and focus to get the best process — but it will be worth it. It is vital to understand what the case is about and what you think it will require in terms of discovery. Scrutinize the choice of the arbitrator and participate in the preliminary hearing and status conferences.

Outside counsel selection

A contributing factor to the negative view of arbitrations held by some in-house counsel is that some outside counsel lack sufficient experience in arbitration, and that their resulting lack of comfort with the process leads them not to recommend, or to be less enthusiastic about it. Lawyers without sufficient experience can not only diminish the efficiency of arbitration, but can also produce less favorable outcomes that trial lawyers blame on the process. Arbitration is not a game for beginners. It requires extensive experience and the confidence on the part of outside counsel to forgo a "no stone unturned" litigation mentality in favor of efficiently resolving a dispute, with less emphasis on formal rules and discovery. Arbitrations are special proceedings and demand different lawyering skills.

It is vital, therefore, to engage counsel with significant trial and arbitration experience. While some lawyers possess overlapping skills, many superb courtroom trial lawyers cannot effectively navigate in arbitration. An assessment of what discovery is crucial and should be fought for is one example requiring experience and judgment. In addition, some arbitrators ask parties to consider different types of processes that differ from the traditional litigation setting, such as submitting direct examination in writing, with only cross- and redirect examinations conducted at the hearing. This puts greater emphasis on written storytelling skills, with redirect examination that's even more important than in courtroom trials. And, it certainly improves the efficiency of the hearing process. Even the physical surroundings of arbitration demand different skills, as odd as it may sound. It is far less confrontational to cross-examine a witness while sitting down across a conference room table than in a courtroom with the witness all alone in a witness box.

Outside counsel must also be able to be conciliatory in the process. Disputes regarding administrative and procedural matters are not often brought to a court for resolution, but many outside counsel impair their credibility by fighting irrelevant procedural battles before the arbitrator. Advocacy should be reserved for the hearing. Otherwise, every experienced arbitrator expects the parties to be mutually engaged in a process that's designed to resolve the dispute fairly, timely, and efficiently. Lawyers seeking to gain a procedural edge will usually be unsuccessful in arbitration. Arbitrators don't embrace counsel who seek to make the arbitration process look like litigation — it makes them look unsophisticated and inexperienced. The risks severely impair the entire process.

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Limit the time from the appointment of the arbitrator to the rendering of the arbitration award

This technique is one of the single best ways to control the cost and length of the arbitration process and encourage more focus on your matter. Barring unforeseen circumstances such as changes in counsel, most commercial arbitrations can be done within 12 months. Shorter time frames may be reasonable depending on the size of the disputes expected to arise in a business relationship. As a matter of fact, CPR's newly administered arbitration rules (available at *www.cpradr.org*) require that the parties and the arbitrator seek approval from CPR of any scheduling orders and extensions that would result in the final award being rendered more than 12 months from the initial pre-hearing conference. If your case is marching toward

a final resolution in under a year, outside counsel will have to assemble a team that is available and can do the job.

Do not adopt the Federal Rules of Civil Procedure, including their discovery standards; in fact, limit discovery to what is essential to resolve the case

Suffice it to say that even without the advent of e-discovery, adopting the rules of civil procedure, particularly their discovery standards and processes, will quickly turn your arbitration into a litigation-like procedure. This will defeat two of the primary benefits of arbitrations: efficiency and quicker final resolution.

Do your own thorough early-case assessment so that you understand why your dispute arose. Consider the views of a large pharmaceutical company legal department that has adopted an "80 percent rule," which goes something like this: The company will know 80 percent of what it will ever know about a case after 60 days. They might not know everything, but they will know enough to provide their business partners with key factual, legal, financial, "next step," and other relevant information to allow them to make expedited yet informed decisions regarding disputes.[15]

Consider a required initial production of all documents that each side needs in the arbitration. Carefully assess the appropriate standards for document requests. There are many alternatives to litigation standards.[16] Eliminate interrogatories and requests to admit unless they obviously contribute to efficiency (i.e., by reducing a perceived need for broad document discovery). Limit e-discovery by restricting the number of custodians, discouraging the need to search back up files, and other ways discussed in the literature. Learn to live either without or with a restricted number of depositions of fact witnesses. An extensive deposition schedule is not appropriate for a commercial arbitration.

In addition, do not adopt rules of evidence. Experienced arbitrators know what weight to give evidence that may be flawed by hearsay or lack of foundation; they are not a jury that needs this kind of guidance. While highlighting evidentiary infirmities may be appropriate — and certainly expected in connection with the reliability of expert testimony in any event — objections to admissibility based upon evidence rules, especially motions in limine, complicate commercial arbitration unnecessarily. Arbitration is meant to be different — a more informal, and therefore efficient, process that takes advantage of its "bench trial" context.

Manage motion practice

Carefully assess what motions will increase efficiency and what motions will instead unnecessarily extend the process. Discovery motions should be avoided. Limiting discovery in the first place will naturally limit disputes in this area. Today's arbitrators generally insist upon strong meet and confer obligations and frown upon tactics designed to delay the process and demonstrate a lack of collaboration between counsel. Arbitrators will also generally require that they be asked for permission to file a dispositive motion. The trend, however, is decidedly against a knee-jerk reaction to these types of mechanisms for streamlining disputes. There is an inclination in favor of considering, and even granting, summary judgment motions on the right issues. In addition, many arbitrators will take it upon themselves to ask the parties to help them flesh out the basic issues to be decided early on. This helps shape any appropriate discovery and may unearth innovative ways of structuring the hearings.

Efficient management of the hearing

Ascertaining what will help the arbitral tribunal get what they need in a fair, efficient manner to decide your case is paramount. A robust pre-hearing conference shortly before the hearing — in which inside counsel participates — is very helpful, but the process should be agreed well before that.

- **Consider written direct testimony of witnesses:** It can be a very useful tool for shortening the hearing borrowed from international arbitration settings.
- **Controls on expert testimony:** To fact-finders, the presentation of expert testimony can feel like a ships-passing-in-the-night exercise. There are many useful tools to reduce the time it takes to present the expert testimony and focus it in a useful way. Have the experts testify by topic, one after another, rather than present their complete testimony at one point in the hearing, and the opposing expert days, or even weeks, later. More unusual (in a domestic context) techniques like "hot-tubbing," in which the experts are sworn in simultaneously and testify about the same topics together, should also be considered.[17]
- **Hearing logistics:** There are a litany of other logistical steps that can be taken to smooth the flow of the arbitration hearing. Consider joint exhibit binders, the use of a chess clock to manage time, consecutive hearing days, and other strategies set forth in the CCA Protocols.

Other key methods to increase your odds of getting a just result

We now turn to key techniques, in addition to careful arbitrator selection, that will improve your odds of getting a just result, or at least your chances of getting a business friendly one.

Consider adoption of optional appellate rules

Arbitration providers have heard the concerns about the finality of arbitrations loud and clear. CPR, the AAA, and JAMS all offer optional arbitration appeals procedures to a panel of senior arbitrators with strict time limits to keep this additional process under control. Grounds for reversal or correction vary, as do the details of how the rules operate in practice, but these tools, developed in response to user concerns, should be carefully examined for their risk mitigation potential.[18]

Keep open settlement pathways and provide incentives to settle

Corporate counsel should pledge, from the outset, to seek ways to settle the arbitration and keep business-to-business lines of communication open. The retention of a neutral mediator who follows the course of the arbitration and is available to assist the parties in settling the matter, or who can help the parties resolve issues that are then removed from the arbitration by agreement, can also help to ensure an acceptable result. In-house counsel can play a critical, almost neutral role, in trying to achieve a commercial settlement, even while the arbitration proceedings are ongoing. The idea that it's a show of weakness to raise the notion of settlement in the midst of an arbitration proceeding is misguided. In fact, providing confidence to the pace of the proceedings often makes settlement discussions focus on real settlement value and risk, rather than the pointless posturing that often accompanies settlement discussions in a typical litigation matter.

On the hammer side of the equation, careful assessment might lead in-house counsel to call off the "American Rule" and provide in the dispute resolution clause that the prevailing party will be entitled to attorneys' fees.

Consider reining in possible results with hi-low or baseball arbitration techniques

Either in the dispute resolution clause or in connection with preparing for the arbitration preliminary hearing, in-house counsel should consider various techniques to rein in the possible results of the arbitration hearing where the relief sought will be an award of money. Limiting the permissible range for such relief, or adopting a form of "baseball arbitration," which requires an arbitrator to select either the claimant or respondent's number after hearing the evidence, are ways to reduce this risk. If the dispute resolution clause does not provide for such mechanisms, in-house counsel should determine whether or not to raise these issues during the course of the arbitration.

When is litigation better than arbitration?

We could not leave this subject without a few thoughts regarding when litigation may be better than arbitration. Here are some that occur to us:

Your best chance of winning is before a jury – and you are confident that you can predict success.

Be careful about the second part of this sentence, as appeals to emotion can backfire.

You are absolutely certain that full-scale discovery will help you.

This is difficult to assess in advance. In connection with complex business disputes, the need for full-scale discovery to get to the bottom of things is often significantly overstated.

There is a complicated legal issue or split of authority on a key legal issue that is outcome determinative in your matter and important to your business. You also prefer an evaluation by a judge and an appellate court as necessary.

Of course, arbitral awards have collateral estoppel and res judicata effect, but only between the parties. If you have a broader business need to set a precedent or fix the law in an uncertain area, this cannot be achieved in arbitration.

In-house counsel can play a critical, almost neutral role, in trying to achieve a commercial settlement, even while the arbitration proceedings are ongoing. The idea that it's a show of weakness to raise the notion of settlement in the midst of an arbitration is misguided.

Conclusion

In-house counsel who are hesitant about the use of arbitration in complex business disputes should re-examine the facts and the tools available to them to craft an efficient and fair process. With attention invested up front and along the way, you can get a timely, fair, and efficient process that enables your company to get back to business. **ACC**

NOTES

1 Conna Weiner developed a panel outline on these subjects and participated in presenting it at the New England Legal Foundation in November 2016. Messrs, Kiernan, and Evans also served as panelists, along with Steven Greenspan. Preparation for the panel, including highly useful sessions during which we all shared our views. Evans and his associate, Steven Veenema, assisted with some of the underlying research for the panel (see acknowledgements throughout). Kiernan is a partner and co-chair of the litigation department at Debevoise and Plimpton, and has years of arbitration experience as both an advocate and an arbitrator. He is also the chairman of the board of CPR and the current president of the New York City Bar Association (see his full biography at *www.debevoise.com*). Evans is an experienced arbitrator and

attorney, and co-chair of the litigation department at Murphy & King. He has been active in leadership roles with the AAA and currently serves as a member of its board of directors (see his full biography at *www.murphyking.com*).

2 Inside counsel, in consultation with outside counsel, should take all available steps to avoid the need for a binding third party adjudicatory process in the first place, be it through arbitration or litigation. Appropriate drafting of contracts to avoid creating areas of dispute, implementing built-in dispute resolution committees and teams, using standing neutrals who can provide informed, real time assistance, facilitated settlement discussions, participating in very early mediation (before a lawsuit is filed), applying the more familiar use of "waterfall" or "step" resolution clauses, and many other techniques are available. Weiner presents talks and workshops on the need to systemically manage dispute risk and "plan for failure in order to succeed" in connection with commercial relationships.

3 Stipanowich, Tomas J. and Lamare, J. Ryan: *Living with ADR: Evolving Perceptions and the Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Companies.* 2013 Pepperdine University School of Law Legal Studies Research Paper Series, Paper No. 2013/16 Electronic copy available at: *www.ssrn.com/abstract=2221471*.

4 We should note that inside counsel should not hesitate to suggest arbitration as a more sensible solution to their colleagues on the other side even without a pre-existing clause. We also reiterate the caveats set forth in n. 2 above.

5 Frank E. A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* 10 Negot. J. 49 (1994); see also additional developments of these thoughts, Frank E. A. Sander, Lukasz Rozdeiczer, *Matching Cases And Dispute Resolution Procedures: Detailed Analysis Leading To A Mediation-Centered Approach, Harvard Negotiation Law Review* Spring 2006.

In-house counsel who are hesitant about the use of arbitration in complex business disputes should re-examine the tools available to them to craft an efficient and fair process. With attention invested up front and along the way, you can get a timely, fair, and efficient process that enables your company to get back to business.

6 The preliminary hearing is the point in the arbitration where the map of the process is confirmed and set. Weiner regularly requests that parties/inside counsel — the entities paying the bills — attend to ensure their understanding of and buy-in to the process.

7 Thanks to David Evans, Esq. and his colleague Steven Veenema for this information; they analyzed data tables available through the Administrative Offices of the United States Courts at *www.uscourts.gov* (see especially the data tables in B and C). These tables are worth a careful look, along with any available state analogues.

8 Thank you to David Evans, who researched and spoke to AAA staff to obtain these results.

9 Thank you to CPR's Helena Erickson for this information about the CPR survey. In response to our query, JAMS did not have general figures from time of award available.

10 Various litigation colleagues have shared with us their views on the relatively low rates of appeals and reversals. A look at the extensive information available from the Administrative Office of the US Courts (*www.uscourts.gov*) provides interesting data on these subjects. Table B-5 under "Statistics and Reports – Data Tables" tab shows low percentages of outright reversals on appeal in the federal courts ("Other Private Civil" outside of Private Prisoner Petitions, Bankruptcy and certain other appeals shows a 13.4 percent reversal rate for the 12 month period ending December 31, 2014, for example.)

11 Thank you to David Evans for providing information about this study, which is also available through the AAA. *www.adr.org.*

12 Stipanowich, Thomas J. editor-in-chief, available at *www.thecca.net/cca-protocols-expeditious-cost-effective-commercial-arbitration*.

13 A careful look at the websites of the major providers will reveal a wealth of materials and ideas for clauses and protocols that will streamline arbitration, in addition to the CCA Protocols cited above. A detailed analysis of those tools is beyond the scope of this article, but representative resources include CPR's Fast Track Arbitration Rules,

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Leading Practices: Finding the Best Workflow Allocation for Your Team (Oct. 2016). *www.accdocket.com/articles/leading-practices-best-workflow-allocation-team.cfm*

Commentary on Beijing Arbitration Commission Arbitration Rules (March 2016). *www.accdocket.com/articles/resource.cfm?show=1424665*

Meeting in the Middle: The Advantages of Commercial Arbitration (May 2015). *www.accdocket.com/articles/resource.cfm?show=1398891*

QuickCounsel

Could Consumer Contracts Contain Arbitration Clauses? (March 2014). *www.acc.com/legalresources/quickcounsel/cccac.cfm*

Program Material

Arbitration vs. Litigation: A Corporate Counsel View (June 2015). *www.acc.com/legalresources/resource.cfm?show=1405260*

Arbitration v. Litigation, You decide (June 2015). *www.acc.com/legalresources/resource.cfm?show=1405266*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

Protocol of Disclosure of Documents, and the Presentation of Witnesses in Commercial Arbitration and Guidelines on Early Disposition of Issues in Arbitration (see *www.cpradr.org*); JAMS' Streamlined Arbitration Rules and their Arbitration Discovery Protocols (*www.jamsadr.com*) and the AAA's Fast Track Arbitration Rules (*www.adr.org*).

14 *www.adr.org* and conversations with David Evans, presentations by AAA personnel.

15 This description is based upon conversations Weiner has had with colleagues in that company.

16 The AAA requires that requested documents be "relevant and material to the outcome of the disputed issues;" borrowing from an international context, Article 3 (3) of the International Bar Association's 2010 "IBA Rules on the Taking of Evidence in International Arbitration" requires that a request to produce documents contain: (a) (i) a description of each requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist (with further specifics required for e-documents); (b) a statement regarding how the documents requested are relevant to the case and material to its outcome, and (c) (i) a statement that the documents requested are not in the possession, custody, or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and (ii) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody, or control of another party.

17 A good and balanced post, "Room in American Courts for an Australian Hot Tub?", is available here: *www.jonesday.com/room_in_american_courts/.*

18 Under the CPR procedure (the first provider to adopt an optional appellate route), an award may be set aside by the appellate panel for any reason available under the US Federal Arbitration Act. In addition, if the award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis or is based upon factual finding clearly unsupported by the record; under the JAMS procedures, the appeal panel applies the same standard of review that the first-level court in the jurisdiction would apply to an appeal from the trial court decision; and under the AAA rules, the award must show an error of law that is material and prejudicial or determinations of fact that are clearly erroneous. See *www.cparadr.org*, *www.jamsadr.org* and *www.adr.org* to locate the appellate rules for each of these providers and examine the details of how these rules operate. Also note that there has been discussion of whether or not adopting a state law that permits an expanded judicial review of arbitration awards is workable under US Supreme Court precedent; this line of thinking is worth pursuing with outside counsel. See a summary of cases and statutes (such as New Jersey's expanded judicial review) by Merril Hirsh and Nicholas Schuchert, "Writing Arbitration Clauses to Get the Arbitration that You Want" Law 360 8/9/16.