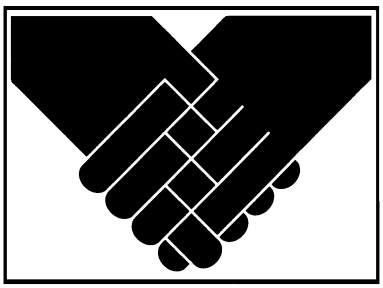
CPR MODEL ADR PROCEDURES AND PRACTICES



Arbitration

CPR Institute for Dispute Resolution

The **CPR Institute for Dispute Resolution** is a nonprofit alliance of global corporations and the nation's leading law firms to develop alternatives to the high costs of litigation facing business and public institutions:

- **CPR Members –** 500 general counsel of major corporations, senior partners of major firms, prominent legal scholars and selected public institutions are actively engaged in the work of the program.

- **CPR Panels of Neutrals –** 600 nationally and internationally prominent attorneys, former judges, legally-trained executives and academics serve on CPR's national, regional, international and specialized panels of neutrals.

- **CPR Pledge Signers –** 850 corporations and 2,800 corporate subsidiaries have signed the CPR Corporate Policy Statement on Alternatives to Litigation© and 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation©.

Since its founding in 1979 as the Center for Public Resources/CPR Legal Program, our mission has been to integrate alternative dispute resolution, or ADR, into the mainstream of law department and firm practice. To fulfill its mission, CPR is engaged in an integrated agenda of research and development, education, advocacy and conflict resolution.

My particular thanks go to the CPR Member Advisory Committee that played a key role in developing this volume of the new ***CPR Model ADR Procedures and Practices (MAPP) series***. The MAPPs replace CPR's original Practice Guide series. Thanks also to Vice President Catherine Cronin-Harris for overall direction of the MAPP project, to Vice President Peter Kaskell for overseeing development of the model ADR procedures that form the core of many MAPPs, to Vice President Susan Scott for designing the new publications as a user-friendly resource for practitioners, business executives and judges, to the CPR staff editor of each volume and to administrator Anne Ferguson for outstanding production assistance.

James F. Henry, President

Arbitration

Contents

Scope

The **CPR Model ADR Procedures and Practices (MAPP)** series provides in each volume state-of-the-art information and practice tools on a specific substantive or procedural aspect of ADR. Most volumes in the series contain model ADR procedures or dispute resolution clauses that practitioners can readily apply or adapt.

This volume contains rules (including commentary) specifically designed for the non-administered arbitration of business disputes. Additional volumes in this series, containing arbitration rules crafted for particular types of substantive disputes, include ***Technology Disputes*** and ***Employment ADR***.

Part IV of this volume provides a version of these arbitration rules specifically adapted by CPR for international disputes and CPR's important text on Dispute Resolution Clauses.

CPR Advisory Committee

These individuals advised CPR on the development of this Arbitration volume of the MAPP series.

Part I
Model ADR Procedure: Non-Administered Arbitration Rules & Commentary
(Revised 1995)

Non-Administered Arbitration Rules & Commentary

Revision History

1989 *CPR published* ***Rules and Commentary for Non-Administered Arbitration for Business Disputes.***

1993 *Significant CPR revision of selected provisions of the Rules.*

1994 *New title:* ***Non-Administered Arbitration Rules & Commentary.***

1995 *Changes made to paragraphs 5.1, 6.4(b) & 1st paragraph on I-28 regarding use of CPR Panels of Distinguished Neutrals.*

CPR Institute for Dispute Resolution

Non-Administered Arbitration Rules & Commentary

(Amended 1993)

Introduction

CPR's Non-Administered Arbitration Rules & Commentary (the "Rules") were developed in 1989, and amended in 1993, by a Committee of leading arbitrators and practitioners convened by the CPR Institute for Dispute Resolution ("CPR") and have been adopted by CPR. CPR itself will not undertake to function as an administrative body with respect to the Rules. Under the Rules, CPR's responsibilities are limited to acting as the appointing authority in certain circumstances (see Rule 6) and deciding challenges to an arbitrator and certain other matters (see Rule 7.7).

Arbitration practice has changed rapidly over the past decade. Dissatisfaction with binding arbitration by corporate counsel and lawyers representing corporations is common. Nevertheless, it remains an indispensable alternative to litigation.. As the 1998 revision of the arbitration rules and commentary was being prepared for release, CPR convened an Arbitration Commission to examine how processes might be improved. The commission is directed by Thomas Stipanowich, a law professor at the University of Kentucky, who is one of the leading constructive critics of arbitration and a co-author of a five-volume treatise on federal arbitration law.

The commission, which includes practitioners and academics, expects to publish a report highlighting the best arbitration practices based on the commission's work.

Standard Provisions

The Rules for Arbitration are intended in particular for use in complex commercial arbitrations and are designed to assure the expeditious and economical conduct of proceedings. The Rules may be adopted by parties wishing to do so by using one of the following standard provisions:

A. Pre-dispute Clause

"Any controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be settled by arbitration in accordance with the ***CPR Non-Administered Arbitration Rules***, by (a sole arbitrator) (three arbitrators, of whom each party shall appoint one) (three arbitrators, none of whom shall be appointed by either party). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award rendered by the Arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state)."

B. Existing Dispute Submission Agreement

"We, the undersigned parties, hereby agree to submit to arbitration in accordance with ***CPR's Non-Administered Arbitration Rules*** (the "Rules") the following controversy:

[Describe briefly]

We further agree that the above controversy shall be submitted to (a sole arbitrator) (three arbitrators, of whom each party shall appoint one) (three arbitrators, none of whom shall be appointed by either party). We further agree that we shall faithfully observe this agreement and the Rules and that we shall abide by and perform any award rendered by the arbitrator(s). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1-16, and judgment upon the award may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state)."

The Rules are designed to provide a procedural basis for settling disputes. They are not intended to change substantive provisions of applicable law. Therefore, it is recommended that parties consider including in their agreement specific clauses as to the law governing the contract and the arbitration. It is also advisable to state whether or not the tribunal is empowered to award punitive damages.

Rules for Arbitration

A. General and Introductory Rules

Rule 1. Scope of Application

1.1 Where the parties to a contract have provided for arbitration under the Rules, they shall be deemed to have made these Rules a part of their arbitration agreement, except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Rules. These Rules, and any amendment thereof adopted by CPR, shall apply in the form obtaining at the time the arbitration is commenced.

1.2 These Rules shall govern the arbitration except that where any of these Rules is in conflict with a mandatory provision of applicable law, that provision of law shall prevail.

Rule 2. Notices

2.1 Notices shall be given in writing at the address specified in writing by the recipient or, if no address has been specified, to the then business or residence address of the recipient. Notices may be given by mail, telex or facsimile transmission. Notices shall be deemed to have been received on the date of delivery.

2.2 Time periods specified by these Rules or established by the Arbitral Tribunal (the "Tribunal") shall start to run on the day a notice is received, unless the Tribunal shall specifically provide otherwise.

Rule 3. Commencement of Arbitration

3.1 The party commencing arbitration (the "Claimant") shall address to the other party (the "Respondent") a notice of arbitration.

3.2 The arbitration shall be deemed commenced on the date on which the notice of arbitration is received by the Respondent.

3.3 The notice of arbitration shall include in the text or in attachments thereto:

(a) The full names, descriptions and addresses of the parties;

(b) A demand that the dispute be referred to arbitration pursuant to the Rules;

(c) The verbatim text of the arbitration clause or the separate arbitration agreement that is involved;

(d) A statement of the general nature of the claimant's claim;

(e) The relief or remedy sought; and

(f) The name and address of the arbitrator appointed by the Claimant, unless the parties have agreed that neither shall appoint an arbitrator.

3.4 Within twenty days after receipt of the notice of arbitration, the Respondent shall deliver to the Claimant a notice of defense. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the demand shall be deemed denied.

3.5 The notice of defense shall include:

(a) Any comment on items (a), (b), and (c) of the notice of arbitration that the Respondent may deem appropriate;

(b) A statement of the general nature of the Respondent's defense; and

(c) The name and address of the arbitrator appointed by the Respondent, unless the parties have agreed that neither shall appoint an arbitrator.

3.6 The Respondent may include in its notice of defense any counterclaim within the scope of the arbitration clause. If it does so, the counterclaim in the notice of defense shall include items (a), (b), (c), (d) and (e) of Rule 3.3.

3.7 If a counterclaim is asserted, within twenty days after receipt of the notice of defense, the Claimant shall deliver to the Respondent a reply to counterclaim which shall have the same elements as provided in Rule 3.5 for the notice of defense.

3.8 Claims or counterclaims may be freely added or amended prior to the establishment of the Tribunal and thereafter with the consent of the Tribunal. Notices of defense or replies to amended claims or counterclaims shall be delivered within 20 days after the addition or amendment.

3.9 If a dispute is submitted to arbitration pursuant to a submission agreement, Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement.

Rule 4. Representation

4.1 The parties may be represented or assisted by persons of their choice.

4.2 Each party shall communicate the name, address and function of such persons in writing to the other party and to the Tribunal.

B. Rules with Respect to the Tribunal

Rule 5. Selection of Arbitrators by the Parties

5.1 Unless the parties have agreed in writing on a Tribunal consisting of a sole arbitrator or of three arbitrators not appointed by parties, the Tribunal shall consist of two arbitrators appointed by the parties and a third arbitrator, who shall chair the Tribunal, selected as provided in Rule 5.2. Unless otherwise agreed, any arbitrator not appointed by a party shall be a member of the CPR Panels of Distinguished Neutrals.

5.2 As soon as possible after the appointment of two party-appointed arbitrators and delivery of the notice of defense provided for in Rule 3.4 and in any event within 15 days thereafter, the party-appointed arbitrators shall discuss potential candidates for the third arbitrator and shall proceed to select the third arbitrator. They shall attempt to make their selection within 20 days of their initial discussion, but they may extend their selection process until one or both of them have concluded, and have so advised the appointing parties, that a deadlock has been reached. In this event, the third arbitrator shall be selected as provided in Rule 6.

5.3 If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be appointed by either party, as soon as possible after delivery of the notice of defense provided for in Rule 3.4 and in any event within 20 days thereafter, the parties' representatives shall discuss potential candidates for the arbitrator(s) and shall proceed to select the arbitrator(s). They shall attempt to make their selection within 20 days of their initial discussion, but they may extend their selection process until one or both of them have concluded that a deadlock has been reached. In this event, the arbitrator(s) shall be selected as provided in Rule 6.

Rule 6. Selection of Arbitrator(s) by CPR

6.1 Whenever (i) a party has failed to appoint the arbitrator to be appointed by it; (ii) the parties have failed to appoint the arbitrators to be appointed by them acting jointly; (iii) the party-appointed arbitrators have failed to appoint the third arbitrator; or (iv) the parties have provided that one or more arbitrators shall be appointed by CPR, the arbitrator(s) required to complete the Tribunal shall be selected as provided in Rule 6, and either party may request CPR in writing, with copy to the other party, to proceed pursuant to Rule 6.

6.2 The written request may be made as follows:

(a) If a party has failed to appoint the arbitrator to be appointed by it, or the parties have failed to appoint the arbitrator(s) to be appointed by them through agreement, at any time after such failure has occurred.

(b) If the party-appointed arbitrators have failed to appoint the third arbitrator, as soon as the procedure contemplated by Rule 5.2 has been completed.

(c) If the arbitrator(s) are to be appointed by CPR, as soon as the arbitration has been commenced.

6.3 The written request shall include complete copies of the notice of arbitration and the notice of defense or, if the dispute is submitted under a submission agreement, a copy of the agreement supplemented by the notice of arbitration and notice of defense if they are not part of the agreement.

6.4 CPR shall then proceed as follows:

(a) Promptly following receipt by it of the request provided for in Rule 6.3, CPR shall convene the parties in person or by telephone one or more times to attempt to select the arbitrator(s) by agreement of the parties.

(b) If the procedure provided for in (a) does not result in the selection of the required number of arbitrators, CPR shall submit to the parties a list, from the CPR Panels of Distinguished Neutrals, of not less than five candidates if one arbitrator remains to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR. Any party failing without good cause to return the candidate list so marked within ten days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall designate as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who does not appear to have a conflict of interest. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the required number of arbitrators, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

Rule 7. Qualifications, Challenges and Replacement of Arbitrators

7.1 Each arbitrator shall be independent and impartial.

7.2 By accepting appointment, each arbitrator shall be deemed to be bound by these Rules and any modification agreed to by the parties, and to have represented that he or she has the time available to devote to the expeditious process contemplated by these Rules.

7.3 Each arbitrator shall promptly disclose in writing to the Tribunal and the parties any circumstances that might cause doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.

7.4 Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, provided that a party may challenge an arbitrator whom it has appointed only for reasons of which it becomes aware after the appointment has been made.

7.5 A party may challenge an arbitrator only by a notice in writing to the Tribunal, with copy to the other party, given no later than fifteen days after (i) the parties have been notified that the Tribunal has been constituted, or (ii) the challenging party has become aware of the circumstances specified in Rule 7.4, whichever shall last occur. The notice shall state the reasons for the challenge with specificity.

7.6 When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. Neither of these actions implies acceptance of the validity of the challenge.

7.7 If neither agreed disqualification nor voluntary withdrawal occurs, the challenge shall be decided as follows:

(a) By unanimous vote of the remaining members of the Tribunal;

(b) If the Tribunal consists of a sole Arbitrator or fails or refuses to decide the challenge, by the President of CPR.

7.8 In the event of death, resignation or successful challenge of an arbitrator not appointed by a party, a substitute arbitrator shall be selected pursuant to the procedure by which the arbitrator being replaced was selected. In the event of the death, resignation or successful challenge of an arbitrator appointed by a party, that party may appoint a substitute arbitrator; provided, however, that should that party fail to notify the Tribunal and the other party of its appointment within twenty days from the date on which the opening arose, that party's right of appointment shall lapse and the Tribunal shall promptly request CPR to appoint a substitute arbitrator forthwith.

7.9 In the event that an arbitrator fails to act or is *de jure* or *de facto* prevented from duly performing the functions of an arbitrator, the procedures provided in Rule 7.8 shall apply to the selection of a replacement. If the Tribunal consists of a sole arbitrator and the parties do not agree on whether the arbitrator has

failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination forthwith. If the Tribunal consists of three arbitrators and the parties do not so agree, such determination shall be made by a majority of the Tribunal.

7.10 If the sole arbitrator or the chairman of the Tribunal is replaced, the successor shall decide the extent to which any hearings held previously shall be repeated. If any other arbitrator is replaced, the Tribunal in its discretion may require that some or all prior hearings be repeated.

Rule 8. Challenges to the Jurisdiction of the Tribunal

8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction.

8.2 The Tribunal shall have the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part, and/or of the arbitration clause itself. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made not later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim.

C. Rules with Respect to the Conduct of the Arbitral Proceedings

Rule 9. General Provisions

9.1 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chairman shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal.

9.2 The proceedings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each phase of the proceeding, including without limitation the time allotted to each party for presentation of its case and for rebuttal. In setting time limits, the Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible.

9.3 Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf shall have any *ex parte* communication with any arbitrator with respect to any matter of substance relating to the proceeding, or on any matter with the arbitrator it appointed, except that a party and the arbitrator it appointed may confer regarding the selection of the chairman of the Tribunal.

9.4 As promptly as possible after the selection of the Tribunal, the Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following:

(a) Procedural matters such as setting specific time limits for, and manner of, any required discovery; the desirability of bifurcation or other separation of the issues in the arbitration; the scheduling of conferences and hearings; the scheduling of pre-hearing memoranda; the need for and type of record of conferences and hearings, including the need for transcripts; the amount of time allotted to each party for presentation of its case and for rebuttal; the mode, manner and order for presenting proof; the need for expert witnesses and how expert testimony should be presented; and the necessity for any on-site inspection by the Tribunal;

(b) The early identification and narrowing of the issues in the arbitration;

(c) The possibility of stipulations of fact and admissions by the parties solely for purposes of the arbitration, as well as simplification of document authentication; and

(d) The possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator.

After the initial conference, further pre-hearing or other conferences may be held as the Tribunal deems appropriate.

9.5 In order to define the issues to be heard and determined, the Tribunal may *inter alia* make pre-hearing orders for the arbitration and instruct the parties to file more detailed statements of claim and of defense and pre-hearing memoranda.

9.6 Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix the place of arbitration. The award shall be deemed made at such place. Hearings may be held and the Tribunal may schedule meetings, including telephone meetings, wherever it deems appropriate.

Rule 10. Discovery

The Tribunal shall permit and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

Rule 11. Evidence and Hearings

11.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements:

(a) A statement of facts;

(b) A statement of each claim being asserted;

(c) A statement of the applicable law upon which the party relies;

(d) A statement of the relief requested, including the basis for any damages claimed; and

(e) A statement of the evidence to be presented, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for the witness' direct testimony.

11.2 Evidence may be presented in written or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

11.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint experts whose testimony shall be subject to cross examination and rebuttal.

11.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

Rule 12. Interim Measures of Protection

12.1 At the request of a party, the Tribunal may take such interim measures as it deems necessary with respect to the subject matter of the dispute, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require security for the costs of such measures.

12.2 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

Rule 13. The Award

13.1 The Tribunal may make final, interim, interlocutory and partial awards. An award may grant any remedy or relief which the Tribunal deems just and equitable and within the scope of the agreement of the parties, including but not limited to specific performance of a contract. With respect to any interim, interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

13.2 All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. When there are three arbitrators, the award shall be made and signed by at least a majority of the arbitrators; and if the award decides a number of issues, the part of the award relating to each issue shall be made and signed by at least a majority of the arbitrators.

13.3 A member of the Tribunal who does not join in an award may file a dissenting opinion. Such opinion shall not constitute part of the award.

13.4 Executed copies of awards and of any dissenting opinion shall be delivered by the Tribunal to the parties.

13.5 Within fifteen days after receipt of the award, either party, with notice to the other party, may request the Tribunal to correct in an award any errors in computation, any clerical or typographical errors, or any errors of a similar nature.

Within thirty days after the delivery of an award to the parties, the Tribunal may make corrections on its own initiative and corrections requested by either party. All such corrections shall be in writing, and the provisions of Rule 13 shall apply to them.

13.6 After expiration of the thirty-day period provided in Rule 13.5, awards shall be final and binding on the parties, and the parties will undertake to carry out awards without delay.

13.7 The dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference required by Rule 9.4. The final award should in most circumstances be rendered within one month thereafter. The parties and the arbitrators shall use their best efforts to comply with this schedule.

D. Miscellaneous Rules

Rule 14. Failure to Comply with Rules

Whenever a party fails to comply with these Rules in a manner deemed material by the Tribunal, the Tribunal shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default the Tribunal may require the non-defaulting party to produce evidence and legal argument in support of its contentions, which the Tribunal may receive without the defaulting party's presence or participation.

Rule 15. Costs

15.1 Each arbitrator shall be compensated at an hourly rate determined at the time of appointment for all time spent in connection with the proceeding and shall be reimbursed for any travel and other expenses.

15.2 The Tribunal shall fix the costs of arbitration. The costs of arbitration include:

(a) The fees and expenses of members of the Tribunal;

(b) The costs of expert advice and other assistance engaged by the Tribunal;

(c) The travel and other expenses of witnesses to such extent as the Tribunal may deem appropriate;

(d) The costs for legal representation and assistance and experts of the successful party to such extent as the Tribunal may deem appropriate;

(e) The charges and expenses of CPR with respect to the arbitration;

(f) The costs of a transcript; and

(g) The costs of meeting and hearing facilities.

15.3 Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

15.4 The Tribunal may request each party to deposit an equal amount as an advance for the costs referred to in Rule 15.2, except those specified in subparagraph (d), and, during the course of the proceeding, it may request supplementary deposits from the parties. Any such funds shall be held and disbursed in such a manner as the Tribunal may deem appropriate.

15.5 If the requested deposits are not paid in full within twenty days after receipt of the request, the Tribunal shall so inform the parties in order that jointly or severally they may make the required payment. If such payment is not made, the Tribunal may suspend or terminate the proceedings.

15.6 After the award has been rendered, the Tribunal shall return any unexpended balance from deposits made to the parties as may be appropriate.

Rule 16. Confidentiality

The parties and the arbitrators shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with a judicial challenge to, or enforcement of, an award, and unless otherwise required by law.

Rule 17. Settlement and Mediation

17.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate and shall suggest that they do so at or before conclusion of the hearing. The Tribunal shall give such assistance in settlement negotiations as the parties may request and the Tribunal may deem appropriate.

17.2 With the consent of the parties, the Tribunal at any stage of the proceeding may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties. The Mediator shall be a person other than a member of the Tribunal, unless the parties request and the Tribunal agrees that a member of the Tribunal designated by the parties may serve as Mediator. The Tribunal may provide the Mediator with whatever factual and legal material developed in the arbitration it deems appropriate and may permit the Mediator to attend conferences and hearings held in connection with the arbitration. Unless the parties agree otherwise, any such mediation shall be conducted under the ***CPR Model Mediation Procedure for Business Disputes*.**

Rule 18. Actions against CPR or Arbitrators

Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

Rule 19. Waiver

A party knowing of a failure to comply with any provision of these Rules and neglecting to state its objections promptly waives any objection thereto.

General Commentary on CPR's Non-Administered Arbitration Rules

Introduction

The CPR Institute for Dispute Resolution ("CPR") brings a distinct viewpoint to the field of business dispute resolution. Its tenets:

1. Most business disputes are best resolved privately and by agreement.

2. Executives should play a key role in business dispute resolution and should approach a dispute as a problem to be solved, not a contest to be won.

3. A skilled and respected neutral third party can play a critical role in bringing about agreement.

4. Efforts should first be made to reach agreement by unaided negotiation.

5. If such efforts are unsuccessful, resolution by a non-adjudicative procedure, such as mediation or the minitrial, should be pursued next. These procedures remain available even while litigation or arbitration is pending.

6. If adjudication by a neutral third party is required, a well-conducted arbitration proceeding usually is preferable to litigation.

7. During an arbitration proceeding, the door to settlement should remain open; arbitrators should encourage the parties to discuss settlement; if appropriate, employing a mediator.

8. Arbitration proceedings often can be conducted efficiently by the Arbitral Tribunal without administration by a neutral organization, or limiting the role of such an organization to assistance in arbitrator selection, if required.

Features of Well-Managed Arbitration Proceedings

Primary objectives of arbitration are to arrive at a just and enforceable result, based on a private procedure that is:

- fair,
- expeditious,
- economical, and
- less burdensome and adversarial than litigation.

The above objectives are most likely to be achieved if the parties and their attorneys:

- adopt well-designed rules of procedure;
- select skilled arbitrators who are able and willing to actively manage the process;
- limit the issues to focus on the core of the dispute; and
- cooperate on procedural matters even while acting as effective advocates on substantive issues.

General Commentary on the Rules

CPR's Non-Administered Arbitration Rules (the "Rules") were developed by a Committee (the "Committee") of leading arbitrators and practitioners convened by CPR to develop procedures to facilitate the conduct of arbitration fairly, expeditiously and economically. The Rules are designed to be easily comprehended. The Rules are intended in particular for the complex case, but are suitable regardless of the complexity of the case or the amount in dispute.

The Rules reflect CPR's view that disputants should make all reasonable efforts to resolve their dispute by agreement. Rule 16 requires the Arbitral Tribunal (the "Tribunal") to suggest at or before conclusion of the hearing that the parties engage in settlement negotiations, and authorizes the Tribunal to arrange mediation with the consent of the parties.

The standard arbitration clauses in the Rules have been drafted to make proceedings under the Rules subject to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. If parties want to use a different law, or if the federal law does not apply (where, for example, the underlying transaction is not "in commerce"), another law should be specified. [See reference to Volt v. Stanford below at page 7.]

Every disputant wants to have a reasonable opportunity to develop and present its case. Parties that choose arbitration over litigation do so in large part out of a need or desire for a proceeding that is also speedy and economical—factors which tend to go hand in hand. The Rules were designed with each of these objectives in mind.

The complexity of cases will vary greatly. In rules of general application, it is not appropriate to fix hard and fast deadlines. Rule 13.7 commits the parties and the arbitrator(s) to use their best efforts to assure that the dispute will be submitted to the Tribunal for decision within six months after the initial pre-hearing conference, and that the final award will be rendered within one month thereafter. Rule 9.2 empowers the arbitrator(s) to establish time limits for each phase of the proceeding, including specifically the time allotted to each party for presentation of its case and for rebuttal.

Counsel are expected to cooperate fully with the Tribunal and with each other to assure that the proceeding will be conducted with civility in an efficient, expeditious and economical manner. Rule 15 empowers the arbitrators in apportioning costs to take into account "the circumstances of the case." This broad power is intended to permit the arbitrators to apportion a greater share of costs than they otherwise might to a party which has employed tactics the arbitrators consider dilatory, or in other ways has failed to cooperate in assuring the efficient conduct of the proceeding.

The Rules may be modified by written agreement. The Rules are designed for an arbitration between two parties but may be amended to provide for a proceeding among three or more parties.

Types of Disputes

The Rules are designed for "business disputes". This term is intended to encompass disputes of any nature between business enterprises, including not only "commercial" disputes but also, by way of example, construction disputes, disputes between manufacturers and distributors or franchisees, and disputes

between joint venturers. The Rules may be adopted by parties which did not have a contractual or other business relationship. The Rules may even be employed to adjudicate a dispute between a government agency and a contractor, subject to any legal restraints on that government's submission to arbitration. The parties may find it appropriate to modify the Rules to adapt them to a specific type of dispute.

It is to be noted that CPR has published an additional set of arbitration rules, *CPR's Non-Administered International Arbitration Rules & Commentary,* which appear at Tab _ of Volume I.

Administered vs. Non-Administered Arbitration

The principal functions normally performed by an organization administering arbitration proceedings are to:

- provide a set of rules which the parties can adopt in a pre-dispute agreement or for an existing dispute;
- provide administrative staff to render impartial services required for smooth case handling and to insulate arbitrators from parties;
- provide lists of persons from which arbitrators may be chosen;
- appoint the arbitrator(s) if necessary;
- decide arbitrator conflict of interest challenges if necessary;
- determine arbitrator fees and bill the parties for such fees;
- schedule hearings and send notices of hearings;
- provide hearing rooms;
- distribute documents;
- review awards for procedural comments.

The charges of administering organizations typically are related to the amount in dispute, but rates vary.

Many arbitration practitioners and arbitrators see a need for administered arbitration, but others favor non-administered or "ad hoc" arbitration, particularly for large or complex cases. They believe that the arbitrator(s) and the parties' advocates are capable of performing most of the functions generally performed by the administering organization, and that the arbitrator(s) and advocates often may be better able to control the conduct of the proceeding than

such an organization. The fees charged by an administering organization may also be a factor. The assistance of a neutral third party may be needed in selecting the Tribunal or deciding a conflict of interest challenge to an arbitrator. Under the Rules, CPR is available to perform these limited functions.

More than 90 percent of arbitrations take place pursuant to the parties' binding commitment in their business agreement to submit possible future disputes to arbitration in accordance with specified rules. Once a dispute has arisen, it is usually much more difficult for the parties to agree on any alternative to litigation. Our Committee recommends the inclusion of a dispute resolution clause in most business agreements. The parties should also consider whether to provide for administered or non-administered arbitration. Rules for administered arbitration have long been available for incorporation by reference. The availability of rules well-designed for the efficient conduct of a non-administered proceeding will facilitate the choice between these alternative procedures.

The Rules are intended primarily for disputes between responsible parties who will not attempt to obstruct the process. However, the Rules do permit the process to go forward even if a respondent fails to deliver a notice of defense, fails to participate in selection of the Tribunal, or ultimately fails to appear at a hearing.

Salient Features of the Rules

The Rules differ in numerous respects from arbitration rules promulgated by other organizations. Features that our Committee considers particularly significant are:

1. The Rules call for non-administered arbitration.

2. The Rules require the expeditious conduct of the proceeding, empowering the arbitrator(s) to establish time limits for each phase of the proceeding (Rule 9.2), and to penalize a party engaging in dilatory tactics (Rule 15.3).

3. All arbitrators, including those appointed by either party, are required to be independent and impartial (Rule 7.1). Such a requirement enhances the acceptability of the arbitration process, albeit a departure from existing U.S. practice.

4. The parties are given ample opportunity to select a sole arbitrator or a panel of three arbitrators without intervention of CPR. If they fail, either party may request CPR's assistance (Rule 5).

5. CPR will first convene the parties to attempt to select the arbitrator(s) by agreement of the parties. Only if that attempt fails will CPR submit a list of candidates to the parties for ranking (Rule 6.4).

6. The Tribunal may decide challenges to its jurisdiction (Rule 8). This should allow arbitrators to decide all issues, including arbitrability questions, without the necessity for court intervention.

7. The chairman of the Tribunal is assigned responsibility for the organization of conferences and hearings and arrangements with respect to the functioning of the Tribunal (Rule 9.1).

8. The Tribunal is required to hold at least one pre-hearing conference to plan and schedule the proceeding (Rule 9.4). Such conference should result in the smooth scheduling of the case, and may aid possible settlement.

9. The Tribunal is given great leeway in matters of procedure. The Tribunal is specifically empowered, for instance, to:

- establish time limits for each phase of the proceeding (Rule 9.2);
- limit the time allotted to each party for presentation of its case (Rule 9.2);
- make pre-hearing orders (Rule 9.5);
- permit such discovery as it deems appropriate (Rule 10);
- require the submission of pre-hearing memoranda (Rule 11.1);
- require evidence to be presented in written form (Rule 11.2).

10. The Tribunal is empowered to appoint neutral experts (Rule 11.3).

11. The Tribunal may take interim measures for the preservation of assets or other interim measures (Rule 12.1).

12. The Tribunal is required to state the reasoning on which its award rests unless the parties agree otherwise (Rule 13.2). Our Committee believes the parties are entitled to know how the decision was reached.

13. Each arbitrator is to be fully compensated at an hourly rate determined at the time of appointment for all time spent in connection with the proceeding (Rule 15.1).

14. The Tribunal is empowered to apportion costs, including attorneys' fees and other costs incurred by the successful party, between the parties, taking into account the circumstances of the case, the conduct of the parties during the proceeding and the result (Rule 15.3).

15. The proceedings are confidential (Rule 16).

16. The Tribunal may suggest at any time that the parties engage in settlement negotiations and shall make that suggestion at or before conclusion of the hearing (Rule 17.1).

17. The Tribunal may arrange for mediation of the dispute at any time with the consent of the parties (Rule 17.2).

International Arbitration

The Rules were designed for disputes between parties located in the United States. The ***CPR Non-Administered International Arbitration Rules & Commentary,*** published in 1991, represent an adaptation of the Rules for disputes involving persons or business enterprises of different nationalities or located in different countries.

Standard Contractual Provisions

The suggested standard pre-dispute clause and submission agreement which precede the Rules may be modified and may be supplemented. It is desirable that the parties specify the place of arbitration and the law governing the contract and the arbitration. If a governing law is specified, it may be advisable to state whether or not the conflict of laws rules of that law are included.

In light of the decision of the United States Supreme Court in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 109 S. Ct. 1248 (1989), our Committee has inserted language in the standard pre-dispute clause and submission agreement to the effect that the governing law for the arbitration shall be the Federal Arbitration Act.

The laws of various jurisdictions differ on the question of whether arbitrators are empowered to award punitive damages. ***If the parties wish to preclude the arbitrators from awarding punitive damages, it would be advisable to include a provision to that effect in the pre-dispute clause or the submission agreement.***

As stated above, CPR as a rule considers it highly desirable for disputants to attempt to resolve their dispute without adjudication. Suggested contract clauses calling for negotiation or mediation before a dispute is submitted to arbitration are contained in CPR's ***Dispute Resolution Clauses: A Drafter's Guide*** at Tab _ of Volume I.

The pre-dispute clause and the submission agreement call for an election as to whether the Tribunal will be composed of:

- three arbitrators, of whom each party appoints one, and the two arbitrators thus appointed attempt to select the third,
- three arbitrators, none of whom are appointed by the parties, or
- a sole arbitrator.

Such an election made in a pre-dispute clause may be changed by further agreement once a specific dispute has arisen. If the parties fail to make an election, the first mentioned procedure will apply in accordance with Rule 5.1.

Rules 5 and 6 govern the selection of arbitrators not appointed by either party.

It is essential for the parties to stipulate that judgment may be entered upon the award, in order to comply with the requirement of the Federal Arbitration Act, 9 U.S.C. § 9.

Commentary on Individual Rules

A. General and Introductory Rules

Rule 3. Commencement of Arbitration

Rule 3 sets forth the procedure to be followed when a proceeding is commenced pursuant to a pre-dispute arbitration clause. Under Rule 3.4, the arbitration will proceed even if the respondent should fail to file a timely notice of defense. If the pre-dispute clause required each party to appoint an arbitrator, and either

party fails to do so, the other party may request CPR to step in pursuant to Rule 6. A submission agreement entered into after a dispute has arisen may include all or some of the material called for by Rules 3.3 and 3.5 and may eliminate the need for a notice of arbitration and a notice of defense. Rule 3.9 provides that "Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement." If the parties so desire, the submission agreement can provide that Rule 3 notices will not be required or will be modified.

Rule 4. Representation

It is assumed that parties normally would be represented by a law firm or an individual attorney; however, the Rules permit parties to be represented or assisted by any persons of their choice.

Under the laws of certain jurisdictions, representation of a party in an arbitration proceeding may constitute the practice of law, in which case representation by an attorney would be required.

B. Rules With Respect to the Tribunal

Rule 5. Selection of Arbitrators by the Parties

Most practitioners, when confronted with a large or complex dispute, have greater confidence in a panel of three arbitrators than in a single arbitrator. Moreover, they usually prefer to permit each party to appoint an arbitrator. Rule 5.1 provides, therefore, that the Tribunal shall consist of two arbitrators appointed by the parties and a third arbitrator who shall chair the Tribunal, unless the parties have agreed on a Tribunal consisting of a sole arbitrator or three arbitrators not appointed by the parties.

For many companies the ability to select a Tribunal well qualified to hear and decide their dispute is a primary motivation to opt for arbitration. The selection of highly qualified, experienced arbitrators is critical, the more so if the amount in dispute is large and the issues are complex. Our Committee believes that at least the chairman of the Tribunal usually should be a respected attorney experienced in arbitration.

The arbitrators should be persons able and willing to control the course of the proceeding and to make definitive rulings on substantive and procedural matters.

Sophisticated counsel representing the parties are likely to know of individuals, especially of attorneys, who are well qualified and who meet the "independent and impartial" standard of Rule 7.1. CPR has established Panels of leading members of the bar, including former judges, who are highly qualified to serve as arbitrators. CPR's lists of panelists are available on request, and panel members may be contacted directly. Unless parties otherwise agree, Rule 5.1 requires that any arbitrator, not appointed by a party, shall be a member of the CPR Panels of Distinguished Neutrals.

Tribunals of two arbitrators have been used on occasion, typically in complex technological disputes in which the objective was to structure a *modus vivendi* rather than only to arrive at conclusions as to liability and damages. The Rules may be modified to provide for a two-arbitrator Tribunal.

Rule 6. Selection of Arbitrator(s) by CPR

Selection of arbitrators by the parties is the preferred course, and the parties are given ample opportunity to select a Tribunal without CPR's assistance. However, if they fail, either party may request CPR's assistance at the time and in the manner specified in Rules 6.2 and 6.3.

In accordance with Rule 6.4(a), CPR then will convene the parties and will propose candidates in an attempt to complete the Tribunal in this informal and speedy manner. If this procedure is not wholly successful, CPR will submit a list of candidates to the parties in writing. The parties are required to rank the nominees in order of preference. The nominee(s) willing to serve for whom the parties collectively have indicated the highest preference will be selected.

The parties will be encouraged to inform CPR of the qualifications they seek in an arbitrator. Individuals nominated by CPR are likely to be members of CPR's Panels.

Rule 7. Qualifications, Challenges and Replacement of Arbitrators

The degree of independence expected of a party-appointed arbitrator in the United States is not always clear. Parties often expect the arbitrator they appoint to act as their advocate on the panel. Our Committee does not favor this approach. The Committee believes that the advocacy role should be performed exclusively by each party's counsel or other representative, and that permitting arbitrators to play such a role is prejudicial to the disinterested and candid deliberations in which the panel should engage. Consequently, Rule 7.1 states that "Each arbitrator shall be independent and impartial."

The rationale for party appointment is to enable each party to select an individual it considers well qualified and whom it expects in turn to select a capable chairman of the Tribunal. A party may discuss the case in general terms with an individual before appointment, and the appointee may discuss the selection of the chairman with that party. Once the Tribunal has been constituted, no further *ex parte* communication is permitted between a party and the arbitrator it appointed (Rule 9.3).

Rule 7.2 recognizes that other time commitments of arbitrators may well delay the proceeding, particularly if the Tribunal consists of more than one arbitrator. The Rule provides that by accepting appointment each arbitrator is deemed to represent that he or she has the time available to devote to the expeditious process contemplated by the Rules.

Rules 7.3 - 7.7 set forth a formal procedure for disclosure of "circumstances that might cause doubt regarding the arbitrator's independence or impartiality," and for a challenge for "justifiable doubt," after the Tribunal has been constituted. It is anticipated that normally an individual's possible conflicts of interest would be disclosed and resolved informally before selection, and that it would rarely become necessary to invoke the formal procedure. In general, we believe all the arbitrators should be held to the standards for independent arbitrators promulgated in the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes.

Rule 8. Challenges to the Jurisdiction of the Tribunal

This Rule expresses the generally accepted principle that arbitrator(s) have the competence initially to determine their own jurisdiction. The arbitrator(s) will decide whether the arbitration proceeds in the face of a jurisdictional challenge.

C. Rules with Respect to the Conduct of the Arbitral Proceedings

Rule 9. General Provisions

Under Rule 9.1 the chairman is "responsible for the organization of the arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal."

The efficiency of the proceeding will depend in large part on the chairman's taking the lead in asserting the Tribunal's control over critical aspects of the procedure, including the setting of time limits as authorized by Rule 9.2.

The Rules give the Tribunal wide latitude as to the manner in which the proceeding will be conducted. It is expected that the procedure will be determined in large part during the pre-hearing conference(s) held pursuant to Rule 9.4 and that following the conference(s) the Tribunal will issue one or more orders on procedural matters.

Narrowing issues to those central to the controversy, fact stipulations and admissions should be strongly encouraged by the Tribunal in the interest of focusing on core issues and simplifying the proceeding.

Some controversies hinge on one or two key issues of law which in litigation may be decided early on motion for partial summary judgment. At the pre-hearing conference, the desirability of the Tribunal's ruling on such issues before the hearings can be considered.

Other controversies hinge on a key issue of a technical nature on which a neutral expert can be helpful in bringing about a resolution. The appointment by the Tribunal of such an expert is authorized by Rule 11.3 and also can be discussed at the pre-hearing conference.

The Tribunal may bifurcate the proceeding. If the proceeding is bifurcated to first decide the issue of liability, the parties then may well be able to agree on the remedy. Often parties have options not available to a judge or to arbitrators.

A pre-hearing conference may well give the arbitrators an opportunity to encourage settlement discussions or mediation, as contemplated by Rule 17. Simply bringing the attorneys together for purposes of a conference may lead to such discussions.

Rule 10. Discovery

These Rules specifically empower the Tribunal:

> "to permit and facilitate such discovery as it shall determine is appropriate in the circumstances taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."

Arbitration is not for the litigator who will "leave no stone unturned." Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to that for which a party has a substantial, demonstrable need. Rule 11.2 provides for the application of the attorney-client privilege and the work product immunity. That protection is intended to apply to discovery as well as to hearings.

It is desirable for the parties' counsel to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval.

A party may encounter difficulties if it needs to secure documents or testimony from an uncooperative third party. The arbitrators may well be of assistance in such a situation through the exercise of their subpoena power or in other ways. If the third party's location is beyond subpoena range, holding a hearing at that location may be an option.

Rule 11. Evidence and Hearings

The Rules do not establish a detailed mandatory hearing procedure but permit the Tribunal to determine the procedure. At least the main features should be established during the pre-hearing conference(s). The Tribunal need not apply rules of evidence used in judicial proceedings, except that the Tribunal is required to apply the attorney-client privilege and the work product immunity when it determines that the same are applicable (Rule 11.2).

Self-authentication of documentary exhibits, the authenticity of which is not disputed, is a widely used practice which reduces hearing time. In cases in which voluminous testimony is expected, the hearings will be expedited considerably if the Tribunal requires the direct testimony of all or most witnesses to be submitted in written form before the witness is to appear. This procedure also enables opposing counsel to better prepare for cross-examination. Depositions and affidavits would be admissible in evidence unless the Tribunal rules otherwise.

The Tribunal should consider at the pre-hearing conference the imposition of time limits on case presentation, as authorized by Rule 9.2. If necessary, any such limits can be extended.

The Rules do not provide specifically for the notice the parties are to be given of hearing dates and times. It is assumed that the Tribunal will give notice in such form and with such lead time as is reasonable under the circumstances.

The efficiency of the proceeding will be enhanced substantially if hearings are held consecutively. If the Tribunal heeds every schedule conflict claim and adjournment request by either counsel, the hearings may drag on quite unnecessarily.

The Tribunal and/or the parties are likely to request a hearing transcript.

Rule 11.3 empowers the Tribunal to appoint neutral experts. We would expect this power to be exercised sparingly, and usually upon consultation with the parties as to the need for a neutral expert, the scope of the assignment, and identification of well qualified candidates. It is not intended that the expert give advice to the Tribunal *ex parte*; indeed, the Rule entitles the parties to cross examine and to rebut the expert. The conflicting views of partisan experts can lead to confusion rather than enlightenment of arbitrators. In appropriate cases the arbitrators might encourage the parties early on, e.g. at the pre-hearing conference, to agree on the joint appointment of a neutral expert.

The Rules do not automatically require the submission of post-hearing briefs, but it is likely that the Tribunal will order the submission of such briefs. Final oral argument may also be scheduled.

The Tribunal's powers with respect to subpoenas are determined by applicable law and are not dealt with specifically in the Rules.

Rule 13. The Award

Rule 13.2 provides:

> "All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. When there are three arbitrators, the award and any part thereof shall be made and signed by at least a majority of the arbitrators; ..."

Most parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision. Our Committee, moreover, considers it good discipline for arbitrators to require them to spell out their reasoning. Sometimes this process gives rise to second thoughts as to the soundness of the result. The Rule 13.2 mandate gives the arbitrator(s) greater leeway than would a requirement to state "conclusions of law and findings of fact."

Some parties hesitate to arbitrate out of a concern that arbitrators are prone to "split the baby", i.e. to make compromise awards. Any tendency on the part of arbitrators to reach compromise awards should be restrained by the requirement of a reasoned award.

Certain administering organizations and practitioners favor "bare" awards without explanation of any sort, in the belief that such awards are the least likely to be challenged and overturned by a court. In the Committee's view, the risk that a reasoned award will be successfully challenged normally is small and is outweighed by the other considerations mentioned above.

If an award consists of two or more parts, it is sufficient if any two out of three arbitrators approve each part, even if the same two arbitrators do not approve each part.

Unless the parties shall have agreed in their business agreement or otherwise as to which law shall govern, the Tribunal is free to determine the law which is to govern the award.

Rule 13.7 requires the parties and the arbitrators to use their best efforts to submit the dispute to the Tribunal for decision within six months of the initial pre-hearing conference, and to render the final award within one month following such submission.

The Rules do not deal expressly with confirmation of an award, as the matter is covered by the Federal Arbitration Act, 9 U.S.C. § 9 and its state counterparts.

Rule 14. Failure to Comply with Rules

Rule 14 empowers the Tribunal to impose a remedy it deems just whenever a party materially fails to comply with the Rules. The power to make an award on default is specifically included. Pursuant to Rule 15.3 the Tribunal also may take a party's conduct during the proceeding into account in assessing costs.

Rule 15. Costs

Our Committee believes that highly qualified arbitrators are entitled to be fully compensated for all time devoted to the arbitration. If an arbitrator is a member of a law firm, he is likely to expect compensation at approximately the hourly rates normally charged for his services. The rates payable to party-appointed arbitrators should be agreed to between the appointee and the

appointing party. The rates of other arbitrators should be established by agreement with both parties. The members of a three-member Tribunal are likely to be compensated at different rates, but gross variations may present problems.

Normally, the parties are expected to make advances for costs to a fund pursuant to Rule 15.4, and the arbitrators' fees, as well as other expenses, would be paid from such fund.

The "costs of arbitration" enumerated in Rule 15.2 include the costs for legal representation and assistance and experts of the successful party to such extent as the Tribunal may deem appropriate.

In accordance with Rule 15.3, unless the parties otherwise agreed, the Tribunal may apportion the costs of arbitration between the parties "in such manner as it deems reasonable taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration." As stated above, the arbitrator(s) may take into account tactics by either party which unreasonably interfered with the expeditious conduct of the proceeding.

Rule 17. Settlement and Mediation

More than 90 percent of civil lawsuits and a high percentage of business arbitration proceedings are disposed of before a trial or hearings take place, most by settlement. Yet often each party is reluctant to propose settlement negotiations, if only out of concern that the proposal will be seen as a sign of weakness. A proposal to that effect by the Tribunal at one or more appropriate junctures in the proceeding should launch negotiations without either party's bearing the onus of being the proposer.

A skilled mediator can play a critical role in bringing about agreement between adversaries, even if bilateral negotiations did not bring them within reach of agreement. If the Tribunal believes that mediation may result in a settlement, the Tribunal is encouraged to urge the parties to engage in such a process and to assist in arranging the same. As a rule, arbitration proceedings should be suspended while mediation is in progress, at least for a limited time.

It may well be desirable for senior executives to play an active role in a mediation proceeding. Often, the parties have settlement options that are business-oriented and less onerous than the payment of money. Business executives are likely to be best able to explore such options.

The members of the Tribunal will be thoroughly familiar with the case, and an arbitrator not appointed by either party may well be able to serve as mediator. However, the parties may hesitate to confide in an arbitrator, and an arbitrator would be inhibited in making settlement proposals or giving advice to the parties. As a rule, therefore, it would be preferable for an individual not an arbitrator in the case to serve as mediator. The Tribunal can be helpful by proposing well qualified candidates and by familiarizing the mediator with the case.

It is assumed that if a settlement does not come about, the terms of any settlement offers will not be admitted into evidence at the hearings. If the parties enter into a settlement agreement, they may wish to request the Tribunal to issue an award incorporating the settlement terms.

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