

# International Arbitration in the United States

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# Summary of Contents

Editors	v
Contributors	ix
PART I	
The United States as a Place of Arbitration	1
Introduction	
<i>Laurence Shore, Tai-Heng Cheng, Jenelle La Chuisa, Lawrence Schaner, &amp; Mara V.J. Senn</i>	3
PART II	
The Legal Framework	13
PART II.A	
The Federal Arbitration Act	13
CHAPTER 1	
Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration	
<i>Victoria Shannon Sahani</i>	15
CHAPTER 2	
The Federal Arbitration Act and State Arbitration Acts: Impact of Federalism on International Arbitration in the U.S.	
<i>E. Alexandra Dosman &amp; Clara Flebus</i>	31
PART II.B	
United States Based Arbitral Institutions	55

## Summary of Contents

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CHAPTER 3	
The ICDR International Arbitration Rules	
<i>James M. Hosking &amp; Gretta L. Walters</i>	57
CHAPTER 4	
The Rules of the CPR Institute	
<i>Helena Tavares Erickson &amp; Olivier P. André</i>	85
CHAPTER 5	
ICC Arbitration in Review: A Focus on the United States	
<i>José Ricardo Feris</i>	101
CHAPTER 6	
Confidentiality in International Arbitration in the United States	
<i>Baiju S. Vasani &amp; Benjamin T. Jones</i>	125
PART III	
Jurisdictional Issues	153
CHAPTER 7	
Drafting Clauses Providing for International Arbitration in the United States	
<i>Damien Nyer &amp; Jade Harry</i>	155
CHAPTER 8	
The Resolution of Arbitrability Disputes in the United States	
<i>Georgina Fabian</i>	173
CHAPTER 9	
Enforcing Agreements to Arbitrate	
<i>Steven Smith, Marcus Quintanilla &amp; Paul Hines</i>	189
PART IV	
Conducting an International Arbitration	209
CHAPTER 10	
A General Overview of the Conduct of International Arbitration Proceedings in the United States	
<i>Edna Sussman</i>	211
CHAPTER 11	
Constituting the Arbitral Tribunal: FAA, Chapter 1, Section 5, and Challenges to Arbitrators	
<i>Timothy G. Nelson &amp; Colm P. McInerney</i>	225

CHAPTER 12	
Interim Measures: Arbitral Tribunals and Courts	
<i>Lucas Bento &amp; Michael Peng</i>	239
CHAPTER 13	
Dispositive Motions and the Summary Disposition of Claims in International Arbitration	
<i>James P. Duffy IV</i>	275
CHAPTER 14	
Anti-suit Injunctions in International Arbitration	
<i>Julie Bédard</i>	289
CHAPTER 15	
Witnesses, Subpoenas, Documents and the Relationship Between the FAA and State Law	
<i>Claudia T. Salomon &amp; Sandra Friedrich</i>	317
CHAPTER 16	
Electronic Discovery in International Arbitration	
<i>Delyan M. Dimitrov &amp; Dorit Ungar Black</i>	359
CHAPTER 17	
28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings	
<i>Hagit Muriel Elul &amp; Rebeca E. Mosquera</i>	393
CHAPTER 18	
Damages in International Arbitration: Understanding the Theories and Methods of Damages Valuation and Compensation	
<i>Mara V.J. Senn, Dawn Yamane Hewett &amp; Stephanie I. Fine</i>	413
PART V	
The Arbitral Award	443
CHAPTER 19	
Recovery of Fees and Costs	
<i>Tai-Heng Cheng</i>	445
CHAPTER 20	
Awarding Interest in International Arbitration	
<i>Jenelle E. La Chuisa</i>	455

## Summary of Contents

---

CHAPTER 21	
Recognition and Vacatur of Foreign Arbitral Awards in the United States	
<i>Jennifer L. Permesly &amp; Yasmine Lahlou</i>	471
CHAPTER 22	
FAA Section 10 Applications to Vacate an Award (Including “Manifest Disregard”)	
<i>Victoria R. Orlowski</i>	503
CHAPTER 23	
Modifications or Corrections of International Arbitral Awards	
<i>L Andrew S. Riccio</i>	541
CHAPTER 24	
Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA	
<i>Rocío Ines Digón &amp; Paula F. Henin</i>	553
CHAPTER 25	
The Panama Convention in the United States: Chapter 3 of the FAA	
<i>Christian Leathley &amp; Florencia Villaggi</i>	599
CHAPTER 26	
Enforcement of ICSID Awards	
<i>Oliver J. Armas &amp; Samaa A.F. Haridi</i>	617
CHAPTER 27	
The Res Judicata Effect of Arbitral Awards	
<i>Quinn Smith</i>	635
CHAPTER 28	
Class Action Arbitration under U.S. Jurisprudence	
<i>David M. Orta, Matthew A. Lee &amp; Brian Rowe</i>	649
CHAPTER 29	
Construction Disputes under U.S. Law: A Guide for Non-U.S. Lawyers	
<i>Troy L. Harris</i>	667
CHAPTER 30	
Arbitration of Insurance Disputes	
<i>David M. Kroeger &amp; Daniel A. Johnson</i>	687

CHAPTER 31	
International Arbitration of Intellectual Property Disputes in the United States	
<i>Maria Chedid &amp; Amy Endicott</i>	695
CHAPTER 32	
International Investment Arbitration and the United States Model BIT	
<i>E. Whitney Debevoise II &amp; Brian Bombassaro</i>	721
CHAPTER 33	
FINRA Arbitration	
<i>Gilbert R. Serota</i>	749
CHAPTER 34	
SMA Arbitration	
<i>André Pereira da Fonseca</i>	759
Index	799



# Table of Contents

Editors	v
Contributors	ix
PART I	
The United States as a Place of Arbitration	1
Introduction	
<i>Laurence Shore, Tai-Heng Cheng, Jenelle La Chuisa, Lawrence Schaner, &amp; Mara V.J. Senn</i>	3
The Editors	3
I Why Do Parties Choose Arbitration over Litigation?	3
II The Laws Applicable to Arbitrations in the U.S.	5
III The Heightened Role of Case Law and Its Pro-arbitration Policy	7
IV The Enforcement of International Awards in the U.S.	9
V Conclusion	12
PART II	
The Legal Framework	13
Part II.A	
The Federal Arbitration Act	13
CHAPTER 1	
Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration	
<i>Victoria Shannon Sahani</i>	15
I Introduction	15
II The Historical Context of the FAA and the UNCITRAL Model Law	16

## Table of Contents

---

III	Key Differences Between the FAA and the Model Law	19
	[A] Scope	20
	[B] Selection and Number of Arbitrators	22
	[C] Arbitral Tribunal’s Power to Rule on Its Own Jurisdiction	22
	[D] Modification or Correction of Award	23
	[E] Grounds for Vacating or Setting Aside the Award	24
IV	What Is Not in the FAA?	25
	[A] Tribunal Designations of Seat, Language, and Governing Law	26
	[B] Provisional or Interim Measures	26
	[C] Conduct of the Arbitration Proceedings	27
	[D] Arbitrator Disclosures and Challenging Arbitrators	27
	[E] The Format of the Arbitral Award	28
V	Federalism and the Applicability of State Arbitration Laws	28
VI	Conclusion	29

### CHAPTER 2

#### The Federal Arbitration Act and State Arbitration Acts: Impact of Federalism on International Arbitration in the U.S.

*E. Alexandra Dosman & Clara Flebus* 31

I	The U.S. Judicial System	32
	[A] Federal and State Courts	32
	[B] Federal and State Laws	33
II	The FAA: A National Statute	34
	[A] Precursors to the FAA	34
	[B] The FAA of 1925	35
	[C] The “Nationalization” of Domestic Commercial Arbitration	37
III	The FAA: An International Statute	38
	[A] The New York Convention and FAA Chapter Two	39
	[B] The Panama Convention and FAA Chapter Three	40
	[C] The Modern FAA	41
IV	State Arbitration Acts in Support of International Arbitration	42
	[A] Typology of State International Arbitration Statutes	43
	[B] Applicability of State International Arbitration Statutes	47
	Bibliography	52

### Part II.B

United States Based Arbitral Institutions 55

### CHAPTER 3

#### The ICDR International Arbitration Rules

*James M. Hosking & Gretta L. Walters* 57

I	Introduction to ICDR Arbitration	57
	[A] Overview of the Institution	57

	[1] The AAA	57
	[2] The ICDR: The International Division of the AAA	58
	[3] Statistics on AAA and ICDR Arbitration	59
	[B] The ICDR International Dispute Resolution Procedures	60
II	Overview of the ICDR International Arbitration Rules	61
	[A] Scope of the ICDR Rules (Article 1)	61
	[B] Commencing a Claim and Filing Defenses (Articles 2-5, 9 and 10)	62
	[C] Emergency Measures of Protection (Article 6)	64
	[D] Joinder and Consolidation (Articles 7 and 8)	66
	[E] Appointment of the Tribunal (Articles 11-15)	68
	[F] Place of Arbitration, Conduct of Proceedings and Hearing (Articles 16-20, 23-25)	71
	[G] Exchange of Information (Articles 21, 22, 25)	73
	[H] Closing the Hearing (Articles 26-28)	75
	[I] The Award (Articles 24, 29-33)	75
	[J] Costs, Fees and Deposits (Articles 34-36, Administrative Fees Schedule)	78
	[K] Confidentiality and Other Provisions (Articles 37-39)	79
III	Other Important AAA/ICDR Innovations	79
	[A] International Expedited Procedures	79
	[B] Optional Appellate Rules	81
	[C] Code of Ethics for Arbitrators	83
	[D] Specialized Rules and Panels of Arbitrators	84
	[E] Publications and Other Resources	84
CHAPTER 4		
The Rules of the CPR Institute		
<i>Helena Tavares Erickson &amp; Olivier P. André</i>		
		85
I	Introduction	85
II	Non-Administered Rules	86
III	Administered Rules	87
IV	Rule 3. Commencement of Arbitration	88
V	Rule 5. Selection of the Arbitrators by the Parties	89
VI	Rule 6. Selection of the Arbitrator(s) by CPR	91
VII	Rule 8. Challenges to the Jurisdiction of the Tribunal	91
VIII	Rule 9. General Provisions	91
IX	Rule 10. Applicable Law(s) and Remedies	93
X	Rule 11. Disclosure	93
XI	Rule 12. Evidence and Hearings	94
XII	Rule 14. Interim Measures of Protection by a Special Arbitrator	95
XIII	Rule 15. The Award	96
XIV	Rule 16. Failure to Comply with Rules	97
XV	Rules with Respect to Costs and Fees	97

## Table of Contents

---

XVI	Miscellaneous Administered Rules	98
XVII	Arbitration Appeal Procedure	99
CHAPTER 5		
ICC Arbitration in Review: A Focus on the United States		
	<i>José Ricardo Feris</i>	101
I	Introduction	101
II	The ICC Court and Its Secretariat	102
III	The ICC Court's Experience in the U.S.	102
	[A] General Overview	102
	[B] Parties from the U.S.	103
IV	The ICC Rules	106
	[A] General Features of the ICC Rules and the 2012 Reform	107
	[1] Efficiency and Case Management	107
	[2] Complex Arbitrations	108
	[a] Article 6(3) and 6(4) of the Rules	108
	[b] Requests for Joinder	110
	[c] Consolidation	111
	[3] Emergency Arbitrator	112
	[4] Arbitration Involving States and State Entities	113
	[5] Constitution of the Arbitral Tribunal	113
	[a] General Characteristics	113
	[b] Confirmation of Arbitrators	114
	[c] Challenges	115
	[6] Scrutiny of Arbitral Awards	116
	[a] Issues Related to the Application or Influence of U.S. Procedural Law	117
	[b] <i>Iuria Novit Curiae</i>	117
	[c] Reasoning of Decisions	117
	[d] Issues Related to Costs	118
	[e] Interest	119
	[B] The 2017 Version of the ICC Rules	119
	[1] The Expedited Procedure Provisions	119
	[2] Other 2017 Amendments	120
V	Policies of the ICC Court	121
	[A] Awards	122
	[B] Arbitral Tribunals	122
	[C] Conflicts of Interest	123
	[D] Communication of Reasons Behind the ICC Court's Decisions	123
VI	Conclusion	124

## CHAPTER 6

## Confidentiality in International Arbitration in the United States

*Baiju S. Vasani & Benjamin T. Jones*

		125
I	Introduction	125
II	The Concept of Confidentiality in International Arbitration	126
III	Sources of Confidentiality Obligations for International Arbitrations in the U.S.	128
	[A] Party Autonomy	128
	[1] Express Confidentiality Agreements	129
	[2] Incorporation by Reference of Arbitration Rules Containing Confidentiality Provisions	129
	[a] 2014 JAMS Comprehensive Arbitration Rules and Procedures	130
	[b] 2013 CPR Administered Arbitration Rules	130
	[c] 2014 ICDR International Dispute Resolution Procedures	130
	[d] 2014 WIPO Arbitration Rules	131
	[e] 2012 ICC Rules of Arbitration	132
	[3] Incorporation by Reference of Ethical Guidelines Containing Confidentiality Provisions	133
	[a] ABA Code of Ethics	133
	[b] IBA Rules of Ethics	134
	[B] Governing Law	134
	[1] The Law Governing the Arbitration Agreement	135
	[2] The Procedural Law of the Arbitration	136
	[3] The Law Governing the Underlying Contract	137
IV	The U.S. Position on Confidentiality in International Arbitration	137
	[A] The FAA and State International Arbitration Statutes Are Silent Regarding Arbitral Confidentiality	137
	[B] U.S. Courts Will Enforce Express Confidentiality Agreements, but Have Expressed Skepticism Toward Implied Confidentiality Obligations	138
	[C] Exceptions to Enforcement of Confidentiality Agreements	140
	[1] Refusal to Enforce Arbitral Confidentiality Agreements Where Deemed Unconscionable under State Law	140
	[2] Refusal to Enforce Confidentiality Obligations Where Discovery of Arbitration Materials Is Sought	143
	[3] Refusal to Enforce Confidentiality Agreements in the Context of Proceedings to Confirm Arbitration Awards	147
	[4] Refusal to Enforce Confidentiality Agreements Where Deemed to Violate Public Policy	149
V	Conclusion	151

## Table of Contents

---

### PART III

Jurisdictional Issues	153
-----------------------	-----

### CHAPTER 7

#### Drafting Clauses Providing for International Arbitration in the United States

<i>Damien Nyer &amp; Jade Harry</i>	155
-------------------------------------	-----

I	Introduction	155
II	Governing Legal Framework	156
III	The Agreement to Arbitrate	158
	[A] Mandatory Nature	158
	[B] Broad Scope	159
IV	Recommended Elements	160
	[A] Arbitral Institution and Arbitration Rules	160
	[B] Composition of the Arbitral Tribunal	161
	[C] Applicable Law	163
	[D] Language	163
	[E] Competence-Competence	164
	[F] Entry of Judgment	164
V	Optional Elements	165
	[A] Exclusion of Punitive Damages	165
	[B] Cost Allocation	166
	[C] Information Exchange	167
	[D] Interim Relief	168
	[E] Confidentiality	169
VI	Multi-Tiered Dispute Resolution Clauses	169

### CHAPTER 8

#### The Resolution of Arbitrability Disputes in the United States

<i>Georgina Fabian</i>	173
------------------------	-----

I	Introduction	173
II	Substantive Arbitrability	175
	[A] If the Arbitration Agreement Is Silent, Courts Must Decide Substantive Arbitrability Questions	175
	[B] Other Issues That Courts Have Analyzed When Reviewing Arbitrability Substantive Questions	177
	[1] Can Non-signatories Be Bound?	178
	[2] Surviving the Termination of the Underlying Agreement	179
	[3] Bad Faith in Setting Arbitration Procedures	179
	[4] Statutory Claims and the Selection of an International Forum	180
	[5] Class Action Arbitration	180

III	Procedural Arbitrability	183
	[A] Procedural Arbitrability Cases Should Be Decided by the Arbitrator	183
	[B] Cases Involving Waiver of Arbitration Due to Litigation Conduct	184
	[C] Cases Involving the Fulfillment of a Condition Precedent to Arbitration	185
	[D] Cases Involving Whether Investments Are Covered by Agreements to Arbitrate	186
IV	Conclusion	187
CHAPTER 9		
Enforcing Agreements to Arbitrate		
<i>Steven Smith, Marcus Quintanilla &amp; Paul Hines</i>		189
I	Introduction	189
II	The Statutory Basis for the Enforcement of International Arbitration Agreements in the U.S.	190
III	Legal Defenses to Enforcement of International Arbitration Agreements	192
	[A] Fraud	193
	[B] Mistake	195
	[C] Waiver	196
	[D] Duress	197
IV	Procedural Mechanisms to Enforce International Arbitration Agreements	198
	[A] Right to a Federal Forum	198
	[B] Stays of Litigation and Other Interim Measures of Protection	199
	[C] Order Compelling Arbitration	201
	[D] Anti-suit Injunctions Against Foreign Courts in Support of Arbitration	202
V	Enforcement of Arbitration Agreements Involving Non-signatories	204
	[A] Incorporation by Reference and Assumption of Arbitration Agreements	205
	[B] Enforcing Arbitration Agreements Through Agency and Alter Ego Theories	206
	[C] Enforcing Arbitration Agreements Through Equitable Estoppel	207
	[D] Arbitration Involving Third-Party Beneficiaries	208
PART IV		
	Conducting an International Arbitration	209

## Table of Contents

---

### CHAPTER 10

#### A General Overview of the Conduct of International Arbitration Proceedings in the United States

*Edna Sussman* 211

I	Introduction	211
II	Constitution of the Tribunal	213
III	The Prehearing Phase	216
	[A] The Prehearing Conference	216
	[B] From the Prehearing Conference to the Hearing	219
IV	The Hearing	220
V	The Award	222
VI	Conclusion	223

### CHAPTER 11

#### Constituting the Arbitral Tribunal: FAA, Chapter 1, Section 5, and Challenges to Arbitrators

*Timothy G. Nelson & Colm P. McNerney* 225

I	Introduction	225
II	Appointing the Arbitrators	225
III	Arbitrator Qualifications	229
IV	Arbitrator Independence and Impartiality	230
V	Challenges to the Appointment of an Arbitrator	234

### CHAPTER 12

#### Interim Measures: Arbitral Tribunals and Courts

*Lucas Bento & Michael Peng* 239

I	Introduction	239
II	Interim Relief from Arbitral Tribunals	241
	[A] The Arbitral Tribunal's Authority to Issue Interim Relief	241
	[B] Types of Relief Available from Arbitral Tribunals	243
	[C] Procedures and Standards for Obtaining Interim Relief from Arbitral Tribunals	246
	[1] Preliminary Relief from Merits Panels	246
	[2] Preliminary Relief Pursuant to Emergency Arbitrator Provisions	247
	[D] Court Enforcement of Arbitral Interim Measures	249
III	Obtaining Preliminary Relief in Aid of Arbitration from U.S. Courts	253
	[A] Introduction	253
	[B] Jurisdiction of the Courts to Issue Interim Relief in Aid of International Arbitration	253
	[C] Common Forms of Court-Ordered Preliminary Measures	259
	[1] Preliminary Injunctions and Temporary Restraining Orders	259

[a]	Authority and Procedural Requirements for Injunctions and Temporary Restraining Orders in Aid of Arbitration	260
[b]	Substantive Requirements for a Preliminary Injunction	261
[c]	Substantive Requirements for a Temporary Restraining Order	264
[2]	Attachments	265
[a]	Authority and Procedure for Attachments in Aid of Arbitration	265
[b]	Substantive Requirements for Attachments in New York Courts	266
[c]	Attachments in Other Courts	270
[3]	Preservation of Evidence	270
[4]	Anti-suit Injunctions	272

CHAPTER 13

Dispositive Motions and the Summary Disposition of Claims in International Arbitration

*James P. Duffy IV* 275

I	Introduction	275
II	The Historical View of Dispositive Motions and Summary Disposition in International Arbitration	275
III	The History of Dispositive Motions in the U.S. Courts and Domestic Arbitral Systems	277
IV	The Perceived Problem with Dispositive Motions and Summary Disposition in International Arbitration	279
V	Increased Institutional Acceptance of Dispositive Motions and Summary Disposition	281
[A]	Summary Disposition under the ICSID Rules	281
[B]	Summary Disposition under the Revised SIAC Rules	283
[C]	Summary Procedures under the SCC Rules	284
[D]	Summary Procedures under Other Institutional Rules	285
VI	The Introduction of Dispositive Motions under the AAA Commercial Arbitration Rules	286
VII	Conclusion	287

CHAPTER 14

Anti-suit Injunctions in International Arbitration

*Julie Bédard* 289

I	Introduction	289
II	Anti-suit Injunctions in Context	290
[A]	Comity and Arbitration: Mostly Foes, Sometimes Friends	290

## Table of Contents

---

	[B] Anti-suit Injunctions Enjoining Foreign Litigation	291
	[1] Enjoin Duplicative and Vexatious Suits or Sparingly Protect U.S. Judicial Jurisdiction and Policies?	291
	[2] Likelihood of Success, Irreparable Harm, and Balance of Hardships	293
III	Foreign Litigation and the Arbitration Agreement	294
	[A] Enjoining Foreign Litigation in Favor of Arbitration: Where, How, and to What Extent	294
	[B] Building from the Anti-suit Litigation Jurisprudence	295
	[1] Laker Applied to International Arbitration	295
	[2] Additional Factors	296
	[C] Enjoining the Evasion of the Arbitration Agreement	297
	[1] Threshold Issue as to the Existence of an Arbitration Agreement	297
	[2] Protecting a District Court’s Finding That the Arbitration Agreement Is Valid	298
	[3] Protecting a U.S. Arbitration Tribunal’s Finding of Jurisdiction	299
	[4] Enjoining a Foreign Litigation Interfering with a New York Arbitration	299
	[5] Anti-anti-suit Injunction in Favor of New York Arbitration	300
	[6] Protecting a Foreign Arbitration by Granting an Anti-suit Injunction	301
	[D] Allowing Parallel Proceedings When Arbitration Is Not Threatened or Undermined	301
	[1] Invalidity of Subscription Rights	302
	[2] Antitrust and Public Accounting Proceedings Distinct from Arbitration	302
	[3] Attempted Preemptive Strikes Ahead of a Potential Foreign Anti-suit Injunction	303
	[E] Discernible Trends in the Second Circuit	304
IV	Challenges to the Arbitral Award	305
	[A] The New York Convention Contemplates Parallel Proceedings Challenging the Award	305
	[B] Attempts to Thwart Enforcement	307
	[C] Blocking Foreign Anti-suit Injunctions in Aid of U.S. Enforcement of Foreign Awards	307
	[D] Protecting a District Court’s Confirmation of an Arbitral Award and Avoiding Judicial Claims Duplicative of Arbitration	308
V	Arbitral Anti-suit Injunctions	309
	[A] Arbitrators’ Authority to Issue Anti-suit Injunctions	310
	[B] Challenge to a Partial Arbitral Award Granting an Anti-suit Injunction	311
	[C] Challenges to Final Awards Granting Anti-suit Injunctions	312

	[1] Rintin Corp., S.A. v. Domar, Ltd.	312
	[2] Telenor Mobile Communications AS v. Storm LLC	312
VI	Anti-international Arbitration Injunctions	313
	[A] Concomitant Power under the FAA?	314
	[B] Enjoining Arbitration in the Absence of an Agreement to Arbitrate	315
	[C] Role of Comity	315
VII	Conclusion	316
CHAPTER 15		
Witnesses, Subpoenas, Documents and the Relationship Between the FAA and State Law		
	<i>Claudia T. Salomon &amp; Sandra Friedrich</i>	317
I	Introduction to Disclosure in International Arbitration: Differences in Scope and Availability	317
	[A] Disclosure in Civil and Common Law	318
	[B] Disclosure in Litigation and International Arbitration Proceedings in the United States	320
II	Disclosure Powers of International Arbitral Tribunals in the U.S.	322
	[A] Relevant Statutory Arbitration Provisions	322
	[1] The FAA	323
	[2] State Arbitration Statutes	325
	[3] The Relationship Between the FAA and State Arbitration Statutes	328
	[B] Relevant Arbitration Rules	332
	[1] Institutional Arbitration Rules	332
	[a] The International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”)	332
	[b] The Arbitration Rules of the London Court of Arbitration (“LCIA Rules”)	333
	[c] The Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”)	333
	[2] Ad Hoc Arbitration Rules	334
	[a] Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”)	334
	[b] The Rules for Non-Administered Arbitration of International Disputes of the International Institute for Conflict Prevention and Resolution (“CPR Rules”)	334
	[3] Specific Rules on Disclosure in Arbitration: The International Bar Association’s Rules on the Taking of Evidence in International Arbitration (“IBA Rules”)	335

## Table of Contents

---

	[C] Overview of Tribunal’s Disclosure Powers as to Parties and Nonparties to Arbitral Proceedings	337
	[1] Disclosure Powers as to Parties to Arbitral Proceedings	337
	[a] Document Disclosure	337
	[b] Witness Testimony	340
	[2] Disclosure Powers as to Nonparties to Arbitral Proceedings	343
	[a] Nonparty Disclosure at a Hearing	345
	[b] Nonparty Disclosure Before a Hearing	345
	[c] Nonparty Deposition Before a Hearing	350
	[D] Tribunal’s Power to Draw Adverse Inferences	351
III	Judicial Assistance U.S. Courts May Provide to Disclosure in International Arbitration Proceedings	352
	[A] Judicial Assistance to the Tribunal in Enforcing a Disclosure Order	353
	[B] Judicial Assistance to a Party to Arbitral Proceedings in Taking Evidence	356
IV	Conclusion	357
CHAPTER 16		
Electronic Discovery in International Arbitration		
	<i>Delyan M. Dimitrov &amp; Dorit Ungar Black</i>	359
I	Introduction	359
II	What Is E-Discovery? How Is It Different from Paper Discovery?	361
	[A] The “Terminology Battle:” Do We Call It E-Discovery, E-Disclosure, Production of Electronic Documents? Does It Even Matter?	361
	[B] What Makes Electronic Documents Unique?	363
	[1] Volume of Electronic Documents	364
	[2] Dispersibility: E-Data Is All Around Us	365
	[3] Durability: The Issue of Residual Data	366
	[4] Electronic Documents Are Dynamic	366
	[5] Electronic Documents Are Transient	367
III	Authority of Arbitral Tribunals to Order or Limit E-Discovery	367
	[A] The Arbitration Agreement Controls	368
	[B] Statutory Framework: The Federal Arbitration Act and State Law	369
	[1] Section 7 of the FAA	370
	[2] State Statutes	372
	[C] The Major Arbitration Rules and E-Discovery	373
	[1] The 2010 IBA Rules	374
	[2] The 2012 ICC Rules	376
	[3] The ICDR Rules	379

	[4] The LCIA Rules	381
	[5] The UNCITRAL Arbitration Rules	382
	[6] The Rules of the International Institute for Conflict Prevention and Resolution (CPR)	383
	[7] The International Center for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings	384
IV	Interface Between U.S. Courts and International Arbitration: A Backdoor to U.S. Style E-Discovery	385
	[A] Enforcing New York Convention Awards in the U.S.: An Avenue for Full-Blown U.S. E-Discovery	386
	[B] U.S. Style Discovery in Aid of International Arbitration Seated Outside the U.S.	387
V	The “Thorny” Question of the Scope of E-Discovery: What Is Appropriate? What Is Not?	388
	[A] The “Fine Art” of Balancing	388
	[B] Helpful Principles in Dealing with Issues of Electronic Disclosure in International Arbitration	389
	[C] Addressing the “Twin” Threats of E-Discovery	390
VI	Conclusion	392
CHAPTER 17		
28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings		
	<i>Hagit Muriel Elul &amp; Rebeca E. Mosquera</i>	393
I	Introduction	393
II	The Text of 28 U.S.C. 1782	394
III	The Notion of Discovery in the U.S.	395
IV	Legislative History of Section 1782	395
V	Core Components of Section 1782 of the U.S.C.	396
	[A] Any Interested Person Can Make an Application under Section 1782: A Broadly Construed Standard	397
	[B] Who Is the Target of Section 1782?	397
	[1] When the Evidence Is Testimonial	398
	[2] When the Evidence Is Documentary	399
	[3] What Type of Evidence Is Available under Section 1782?	400
	[C] What Is ‘a Foreign or International Tribunal’ under Section 1782?	401
VI	Discretionary Power of U.S. Courts in Granting Application under Section 1782	401
	[A] Whether the Person from Whom Discovery Is Sought Is a Participant in the Foreign Proceeding	402
	[B] Whether There Is a Discoverability Requirement under Section 1782	403

## Table of Contents

---

	[C] Whether a Section 1782 Request Conceals an Attempt to Circumvent Foreign Poof-Gathering Restrictions or Other Policies of a Foreign Country or the U.S.	404
	[D] Whether the Subpoena Contains Unduly Intrusive or Burdensome Requests	405
VII	Some Practical Matters to Consider When Filing an Application Pursuant to Section 1782	406
	[A] Should a 1782 Application Be Made after Exhausting All Discovery Remedies?	406
	[B] Must the Applicant Notify Opposing Party That a 1782 Request Has Been Filed?	407
	[C] Must the Matter Be Pending in a Foreign Court or Foreign or International Tribunal in Order to Make a 1782 Application?	407
	[D] In General: How to Oppose a 1782 Application?	408
VIII	Section 1782 and Its Availability in Aid of International Arbitration Proceedings	408
IX	Conclusion	411
CHAPTER 18		
Damages in International Arbitration: Understanding the Theories and Methods of Damages Valuation and Compensation		
	<i>Mara V.J. Senn, Dawn Yamane Hewett &amp; Stephanie I. Fine</i>	413
I	Introduction	413
II	Overarching Theories for Obtaining Damages: “Heads of Damages”	414
	[A] Compensation/Reparation	414
	[1] Damnum Emergens	416
	[2] Lucrum Cessans	418
	[B] Punitive/Exemplary Damages	419
	[C] Liquidated Damages	420
	[D] Restitution	421
	[E] Unjust Enrichment	421
III	Methods of Valuation and Compensation of Damages under International Law	422
	[A] Valuation Methods	423
	[1] Market Approach	424
	[a] Market Value	424
	[b] Market Comparison	425
	[2] Income Approach	426
	[a] Discounted Cash Flow	427
	[i] Estimating Future Cash Flow	428
	[ii] Calculating a Discount Rate	428
	[iii] Strengths and Weaknesses of the DCF Method	429
	[b] Capitalized Cash Flow	430

	[c] Excess Cash Flow	430
	[3] Asset Approach	431
	[a] Net Assets Basis	432
	[b] Adjusted Net Assets Basis	433
	[c] Actual Investment	433
	[4] Replacement Value	434
	[5] Liquidation Value	434
IV	Mitigation of Damages	435
	[A] Introduction to the Duty to Mitigate	435
	[B] Defining the Duty to Mitigate	436
	[C] When the Duty to Mitigate Arises and How It Can Be Satisfied	437
	[D] Intersection of Damages and the Duty to Mitigate	439
V	Conclusion	440
PART V		
	The Arbitral Award	443
CHAPTER 19		
	Recovery of Fees and Costs	
	<i>Tai-Heng Cheng</i>	445
I	Fees and Costs Expressly Contemplated by Parties' Agreement	446
II	Fees and Costs Expressly Authorized by Law or Arbitral Rule	447
	[A] Fees and Costs Authorized by Law	447
	[B] Fees and Costs Authorized by Arbitral Rules	448
III	Fees and Costs for Bad-Faith Conduct	452
IV	Conclusion	453
CHAPTER 20		
	Awarding Interest in International Arbitration	
	<i>Jenelle E. La Chuisa</i>	455
I	Introduction	455
II	Arbitral Tribunals Have Discretion to Award Pre-award Interest	456
III	Considerations When Determining an Award of Pre-award Interest	458
IV	What Interest Rate Applies?	462
V	Simple Versus Compound Interest	464
VI	U.S. Court's Have Discretion to Award Post-Award / Pre-judgment Interest	465
VII	Post-Judgment Interest on Judgments Confirming Arbitration Awards: Mandatory Application of 28 U.S.C. § 1961, the Federal T-Bill Rate	467
VIII	Conclusion	470

## Table of Contents

---

### CHAPTER 21

#### Recognition and Vacatur of Foreign Arbitral Awards in the United States

*Jennifer L. Permesly & Yasmine Lahlou*

471

I	Introduction	471
II	Distinction Between Domestic Awards Governed by Chapter 1 of the FAA and Foreign Awards Governed by Chapters 2 and 3 of the FAA	472
III	Confirmation and Recognition of Foreign Arbitral Awards under Chapters 2 and 3 of the FAA	474
	[A] Procedure	474
	[B] Subject Matter and Personal Jurisdiction	475
	[C] Doctrine of Forum Non Conveniens	477
	[D] Enforcement of Awards Against Sovereigns and the Doctrine of Sovereign Immunity	479
	[E] Grounds to Refuse Recognition of a Foreign Arbitral Award	480
	[1] Article V(1)(a): Incapacity of Party or Invalidity of Arbitration Agreement	482
	[2] Article V(1)(b): Lack of Proper Notice or Inability to Present Case	482
	[3] Article V(1)(c): Award Beyond Scope of Arbitration Agreement	483
	[a] Exception for Challenges to Existence of or Consent to Arbitration Agreement	484
	[b] Substantive Arbitrability Versus Procedural Arbitrability	486
	[4] Article V(1)(d): Irregularities in the Composition of the Arbitral Tribunal or the Arbitration Procedure	486
	[5] Article V(1)(e): Award Not Binding or Set Aside or Suspended	487
	[6] Article V(2): Public Policy	488
	[7] Effect of Successful Confirmation	489
IV	Procedure and Grounds to Vacate a Foreign Arbitral Award	490
	[A] Procedure	490
	[B] Grounds for Vacatur	491
	[1] Section 10(a)(1): Fraud, Corruption, or Undue Means	492
	[2] Section 10(a)(2): Partiality or Corruption of the Arbitrators	492
	[3] Section 10(a)(3): Misconduct or Prejudicial Misbehavior	493
	[4] Section 10(a)(4): Excess of Powers	494
	[5] “Common Law” Grounds for Vacatur: Manifest Disregard of the Law	495
	[C] Limiting Judicial Review of Awards by Contract	498
	[D] Effects of Successful Challenge	498

V	Additional Considerations	498
	[A] Partial and Interim Awards	498
	[B] Modification or Correction of a Foreign Arbitral Award and the Doctrine of <i>Functus Officio</i>	500
	[C] Recognition and Enforcement of Non-Convention Awards	502

CHAPTER 22

FAA Section 10 Applications to Vacate an Award (Including “Manifest Disregard”)

	<i>Victoria R. Orlowski</i>	503
--	-----------------------------	-----

I	Introduction	503
II	Vacating International Arbitral Awards Before U.S. Courts	505
	[A] The Power of U.S. Courts to Vacate International Arbitral Awards	505
	[B] Practical Consideration Regarding Applications to Vacate International Arbitral Awards	511
III	The Statutory Grounds for Vacating Awards under Section 10 of the FAA	513
	[A] Section 10(a)(1) – Where the Award Was Procured by Corruption, Fraud or Undue Means	513
	[B] Section 10(a)(2) – Evident Partiality or Corruption of Arbitrators	515
	[C] Section 10(a)(3) – Misconduct in Refusing to Postpone the Hearing, upon Sufficient Cause Shown, or in Refusing to Hear Evidence Pertinent and Material to the Controversy	521
	[D] Section 10(a)(4) – Exceeded or Imperfectly Executed Powers	525
IV	Manifest Disregard and the Other Judicially Created Grounds for Vacating Awards	528
	[A] Manifest Disregard of Law	529
	[B] Other Common Law Grounds	537
V	Conclusion	539

CHAPTER 23

Modifications or Corrections of International Arbitral Awards

	<i>L Andrew S. Riccio</i>	541
--	---------------------------	-----

I	Introduction	541
II	The FAA	542
III	Modification of Awards Pursuant to the FAA	543
IV	FAA Section 11 and Treaties on the Recognition and Enforcement of Arbitral Awards	544
V	Case Law Interpreting Section 11, 9 U.S.C.	545
VI	Conclusion	550

## Table of Contents

---

### CHAPTER 24

#### Enforcing New York Convention Awards in the United States:

##### Chapter 2 of the FAA

*Rocío Ines Digón & Paula F. Henin* 553

I	Introduction	553
II	Scope of Application of Chapter 2 of the FAA	555
	[A] “Foreign or Non-domestic” Awards	555
	[B] The U.S.’ Reservations to the New York Convention	557
	[C] The New York Convention and the Panama Convention	558
	[D] Rules Applicable to Motions to Vacate a <i>Bergesen</i> Award	559
	[E] Federalism and the FAA’s Scope of Application	563
III	Preliminary Requirements for the Enforcement of a Convention Award: Formalities, Jurisdiction and Procedure	563
	[A] Formal Requirements: Article IV of the Convention	564
	[B] Applicable Rules of Procedure under Article III of the Convention: Jurisdiction and Venue	565
	[C] Applicable Rules of Procedure under Article III of the Convention: Other Procedural Issues	572
IV	Grounds to Resist the Enforcement of a Convention Award	574
	[A] Article V(1) of the New York Convention	576
	[1] Article V(1)(a): Invalidity or Nonexistence of the Arbitration Agreement	576
	[2] Article V(1)(b): Violation of Arbitral Due Process	580
	[3] Article V(1)(c): Tribunal’s Excess of Authority	583
	[4] Article V(1)(d): Defect in the Composition of the Arbitral Tribunal or the Arbitral Procedure	585
	[5] Article V(1)(e): The Arbitral Award Is Not Yet Binding on the Parties, or Has Been Suspended or Set Aside at the Seat of the Arbitration	587
	[B] Article V(2) of the New York Convention	593
	[1] Article V(2)(a): Subject Matter Not Capable of Settlement by Arbitration	593
	[2] Article V(2)(b): Public Policy	595
V	Concluding Remarks	596

### CHAPTER 25

#### The Panama Convention in the United States: Chapter 3 of the FAA

*Christian Leathley & Florencia Villaggi* 599

I	Introduction	599
II	Scope of Application of the Panama Convention	601
	[A] International Commercial Arbitration	602
	[B] Reciprocity	604
	[C] Nationality of the Parties and Hierarchy Between Conventions	605

	[D] Arbitration Proceedings	608
III	Enforcement of an Arbitration Agreement under the Panama Convention	608
IV	Default Institutional Arbitration of the IACAC under the Panama Convention	609
V	Enforcement of Awards under the Panama Convention	612
VI	Conclusion	615
CHAPTER 26		
Enforcement of ICSID Awards		
<i>Oliver J. Armas &amp; Samaa A.F. Haridi</i>		
		617
I	Introduction	617
II	Recognition, Enforcement, and Execution of ICSID Arbitration Awards	619
	[A] Effects of a Final ICSID Award	620
	[B] Recognition and Enforcement	621
	[C] Execution	622
	[D] Recent Discrepancies in U.S. Courts Regarding Enforcement of ICSID Awards	622
III	Defenses to Enforcement of ICSID Awards	624
	[A] Defenses to Enforcement of ICSID Awards Before U.S. Courts	627
	[B] Conclusion	628
IV	The Sovereign Immunity Exception from Execution	628
	[A] Execution in the U.S.: Foreign Sovereign Immunities Act	629
	[B] Sovereign Immunity Exception in the ICSID Convention	630
	[C] Sovereign Immunity Exception in the New York Convention	632
V	Conclusion	633
CHAPTER 27		
The Res Judicata Effect of Arbitral Awards		
<i>Quinn Smith</i>		
		635
I	Res Judicata, Its Origins in Court Practice and Its Inherent Limitations	636
II	When Does an Unconfirmed Arbitration Award Receive Res Judicata Effect?	637
	[A] At the State Level, Unconfirmed Awards Can Have the Same Res Judicata Effect as Judgments	638
	[B] At the Federal Level, It Is Unlikely That Unconfirmed Awards Have the Same Status or Res Judicata Effect as Judgments	639
	[C] When Do Unconfirmed Awards Have Res Judicata Effect on Later Court Proceedings?	640
	[D] What Res Judicata Effect Do Unconfirmed Awards Have on Later Arbitration Proceedings?	642

## Table of Contents

---

	[E] In light of the Decisions, What Solutions Exist?	643
III	What Is the Res Judicata Effect of a Confirmed Arbitration Award?	643
IV	Who Decides the Res Judicata Effect of an Arbitration Award?	644
	[A] Should Arbitration Tribunals Decide the Res Judicata Effect of Awards in Later Arbitrations?	644
	[B] Should Courts Decide on the Preclusive Effect of Awards in Later Arbitrations?	646
V	Can an Award Lose Its Res Judicata Effect?	647
VI	Concluding Remarks	648
CHAPTER 28		
Class Action Arbitration under U.S. Jurisprudence		
<i>David M. Orta, Matthew A. Lee &amp; Brian Rowe</i>		
		649
I	A Brief History of Class Arbitration in the U.S.	651
II	Agreement, Consent, and <i>Stolt-Nielsen</i>	654
III	Class Arbitration Waivers and <i>AT&amp;T Mobility v. Concepcion</i>	656
IV	Oxford: An Arbitrator Does Not Exceed His Authority Even If He “Erroneously” Construes an Agreement as Authorizing Class Arbitration	658
V	American Express: The Supreme Court Holds Steady in Applying the Parties’ Agreement to Waive Class Arbitration Even Where Doing So Left Claimants Without an Effective Remedy	661
VI	Protection of Investors and <i>Abacat</i>	664
VII	Practical Guidance	664
CHAPTER 29		
Construction Disputes under U.S. Law: A Guide for Non-U.S. Lawyers		
<i>Troy L. Harris</i>		
		667
I	Introduction	667
II	The A201 in Context	669
	[A] Dispute Resolution Procedures	669
	[B] Substantive Rules Regarding the Design Professional	672
	[C] Substantive Rules Regarding the Contractor	674
	[D] Substantive Rules Regarding the Owner	678
	[E] Remedies	680
	[F] Rules of Contract Interpretation	682
III	Conclusion	684
CHAPTER 30		
Arbitration of Insurance Disputes		
<i>David M. Kroeger &amp; Daniel A. Johnson</i>		
		687
I	Introduction	687

II	Arbitration of Insurance Disputes in General	687
III	Arbitration of International Insurance Disputes	688
IV	Arbitration of Reinsurance Disputes	692
V	Conclusion	693

## CHAPTER 31

## International Arbitration of Intellectual Property Disputes in the United States

	<i>Maria Chedid &amp; Amy Endicott</i>	695
--	--	-----

I	International Commercial Arbitration of IP Disputes	696
	[A] The Shift to Arbitration of IP Disputes	696
	[B] Expert Decision-Makers	698
	[C] Procedural Safeguards	700
	[1] Interim Injunctive Relief	701
	[2] Emergency Arbitrators	703
	[3] Expedited Procedures	705
	[4] Confidentiality Provisions	706
	[D] Finality of the Arbitration Award	708
	[E] Commercial Arbitration of IP Disputes - Limitations	710
	[1] Contract-Based Limitations	710
	[2] Arbitrability Limitations	710
II	The International Multilateral Framework Protecting IPR	711
III	International Arbitration of IPR under Bilateral Investment Treaties and Regional Trade Agreements	713
	[A] IPR as an “Investment”	715
	[B] Fair and Equitable Treatment Claims	716
	[C] Claims of Unlawful Expropriation	717
	[D] National Treatment Clauses	718
	[E] Most-Favored-Nation Clauses	718
	[F] Compliance with Other Obligations	719
IV	Conclusion	719

## CHAPTER 32

## International Investment Arbitration and the United States Model BIT

	<i>E. Whitney Debevoise II &amp; Brian Bombassaro</i>	721
--	---	-----

I	Introduction	721
II	U.S. International Investment Arbitration: Origins	722
III	U.S. International Investment Policy: Political Competence	724
IV	U.S. International Investment Policy: Introduction to the U.S. Model BIT	726
V	2012 U.S. Model BIT: Provisions	727
	[A] 2012 U.S. Model BIT: Scope of Application	728
	[1] “Investor” (Article 1)	728

## Table of Contents

---

	[2]	“Investment” and “Covered Investment” (Article 1)	728
	[3]	Retroactive Application of the BIT (Article 2)	729
	[4]	Application of the BIT to Political Subdivisions and State Enterprises (Article 2)	729
	[5]	Entry into Force, Duration, and Termination of the BIT (Article 22)	729
[B]	2012	U.S. Model BIT: Substantive Protections for Investment	730
	[1]	National Treatment (Article 3)	730
	[2]	Most-Favored Nation Treatment (Article 4)	731
	[3]	Minimum Standard of Treatment, Including Fair and Equitable Treatment and Full Protection and Security (Article 5)	731
	[4]	Expropriation (Article 6)	732
	[5]	Transfers (Article 7)	733
	[6]	Performance Requirements (Article 8)	734
	[7]	Senior Management and Boards of Directors (Article 9)	734
	[8]	Publication of Laws and Decisions Respecting Investment (Article 10)	735
	[9]	Transparency (Article 11)	735
	[10]	Investment and Environment (Article 12)	736
	[11]	Investment and Labor (Article 13)	737
[C]	2012	U.S. Model BIT: Exceptions to Substantive Protections for Investment	737
	[1]	Non-conforming Measures (Article 14)	737
	[2]	Special Formalities and Information Requirements (Article 15)	738
	[3]	Non-derogation (Article 16)	738
	[4]	Denial of Benefits (Article 17)	738
	[5]	Essential Security (Article 18)	739
	[6]	Disclosure of Information (Article 19)	739
	[7]	Financial Services (Article 20)	739
	[8]	Taxation (Article 21)	740
[D]	2012	U.S. Model BIT: Procedures for Disputes	741
	[1]	Institution of an Investor-State Arbitration Proceeding and the Constitution of a Tribunal (Articles 23-27 and Article 36)	741
	[2]	Conduct of an Investor-State Arbitration Proceeding (Articles 28-35)	743
	[3]	State-to-State Arbitration (Article 37)	745
VI		Trans-Pacific Partnership: Chapter on Investment	746

## CHAPTER 33

## FINRA Arbitration

*Gilbert R. Serota* 749

I	Introduction	749
II	Jurisdiction	750
III	Governing Rules	750
IV	The Parties, the Claim and the Answer	751
V	Pre-hearing Procedures	753
	[A] Selection of Arbitrators	753
	[B] Pre-hearing Conference	753
	[C] Mandatory Disclosure and Discovery	754
	[D] Non-discovery Motions	755
	[E] “20-Day” Disclosure Obligations and Explained Award Election	756
VI	Conduct of the Hearing	756
VII	Issuance of the Award	757
VIII	Pros and Cons of FINRA Arbitration	757

## CHAPTER 34

## SMA Arbitration

*André Pereira da Fonseca* 759

I	Introduction	759
II	Background and History of Maritime Arbitration in New York	760
III	SMA Arbitration	764
	[A] Overview of the SMA Rules	764
	[B] The SMA Rules and the FAA	766
	[C] The Agreement to Arbitrate	767
	[D] Commencing the Arbitration	769
	[E] Consolidation of Disputes and Class Action	771
	[F] Appointment of Arbitrators, Disclosure and Challenges	774
	[1] Who Are the Arbitrators?	774
	[2] Appointment	775
	[3] Disclosure and Challenges	776
	[G] General Conduct of the Proceedings	778
	[H] Taking of Evidence	780
	[I] Pre-award Security	783
	[J] SMA Awards	786
	[1] Form and Scope	786
	[2] Confirmation, Enforcement and Vacation of the Award	790
	[K] SMA Shortened Arbitration Procedure	792
	[L] SMA Alternative Dispute Resolution	794
	[1] Mediation	794

## Table of Contents

---

	[2] Conciliation	796
IV	Conclusion	797
	Index	799

## CHAPTER 4

# The Rules of the CPR Institute

*Helena Tavares Erickson & Olivier P. André*

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The International Institute for Conflict Prevention & Resolution (“CPR”) is an educational not-for-profit corporation that promotes excellence and innovation in public and private dispute resolution of business-related disputes. For nearly forty years, CPR has connected practitioners to best practices in Alternative Dispute Resolution. Its member corporations, law firms, neutrals, and public, academic, and governmental institutions from around the world, use CPR as the definitive resource for lawyers seeking creative strategies and valuable insight regarding current trends in conflict resolution and management. Over the course of the last three decades, CPR has been involved in groundbreaking ADR innovations, including various sets of non-administered arbitration rules, industry protocols, and other programs. More recently, CPR has responded to the needs and concerns of the global business community with new Rules for *Administered* Arbitration—both domestic and international. The new rules, developed by expert in-house and law firm arbitration practitioners, are designed to assure the expeditious and economical conduct of proceedings and address other issues in arbitration, such as arbitrator impartiality, lengthy time frames to reach resolution, and burdensome and unpredictable administrative costs and requirements.

## I INTRODUCTION

The primary objective of arbitration is 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. This objective is 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.
- Cooperate on procedural matters even while acting as effective advocates on substantive issues.

Both CPR's Non-Administered Rules and its Administered Rules were developed with those objectives in mind. While CPR's Non-Administered Rules are briefly outlined below, more time is spent on the Administered Rules as most parties to international disputes are likely to prefer an administering authority. More extensive commentary on all of CPR's rules is available on its website.

## II NON-ADMINISTERED RULES

CPR's Rules for Non-Administered Arbitration (the "Non-Administered Rules") (Rev. 2007)<sup>1</sup> were developed by CPR to provide procedures to facilitate the conduct of the arbitration process by parties fairly, expeditiously, and economically. The parties together with the Tribunal "administer" the proceeding, and there is, generally, no need for an administering authority. Although, the Non-Administered Rules are designed to be easily understood, they are intended in particular for the complex case. 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 speedy and economical—factors that tend to go hand in hand. The Rules were designed with each of these objectives in mind.

The Non-Administered Rules provide generally for service of pleadings and selection of the arbitrators by cooperation of the parties. Where the procedures fail, recourse can be had to CPR which will step in to select or complete selection of the arbitrator or Tribunal who will then assume the administering role (*see generally* Non-Administered Rule 6).

The complexity of cases will vary greatly. In rules of general application, it is not appropriate to fix hard and fast deadlines. Non-Administered Rule 15.7 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 prehearing conference and that the final award will be rendered within one month thereafter. Non-Administered 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.

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1. CPR has also promulgated Rules for Non-Administered Arbitration of International Disputes (Rev. 2007) which can be used with the appointing authority ("Neutral Organization") of the parties' choice. These International Rules are substantially the same as the Non-Administered Rules but contain longer deadlines, omit the screened selection procedure contained in Non-Administered Rule 5.4 and provide for a waiver of punitive damages. Counsel should carefully study both sets of Rules to determine those most suited to the contractual or other relationships at hand. Parties seeking to arbitrate disputes in the Construction or IP sectors might also consider the Rules for Expedited Arbitration of Construction Disputes and the Rules for Non-Administered Arbitration of Patent & Trade Secret Disputes, both available at [www.cpradr.org](http://www.cpradr.org).

The parties may have recourse to the courts for emergency relief (Rule 13) but Non-Administered Rule 14 also allows for interim measures by a special arbitrator prior to Tribunal selection and is more fully explained below.

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. Non-Administered Rule 17.3 empowers the arbitrators in apportioning costs to take into account, *inter alia*, “the circumstances of the case” and “the conduct of the parties during the proceeding.” This broad power is intended to permit the arbitrators to apportion a greater share of costs than they otherwise might to a party that has employed tactics the arbitrators consider dilatory, or in other ways has failed to cooperate in assuring the efficient conduct of the proceeding.

While CPR’s Non-Administered Rules provide a comprehensive roadmap for parties, CPR will also aid parties who draft customized clauses requesting CPR’s intervention as an appointing authority.<sup>2</sup> Hallmark features of Non-Administered or ad hoc rules include management of the process by the Tribunal and counsel, without the need for the involvement of a separate administering entity. Parties may, however, customize their agreements and provide for additional CPR intervention if they so desire. To aid participants in a non-administered process when necessary, CPR offers customized services, such as arbitrator selection, fund holding, and a challenge procedure. For a full menu of such services, please refer to CPR’s website, [www.cpradr.org](http://www.cpradr.org).

### III ADMINISTERED RULES

CPR maintains its commitment to non-administered processes. However, mindful of the benefits that an arbitral institution can provide in appropriate cases, CPR has promulgated two sets of administered arbitration rules to increase parties’ range of option: The CPR Rules for Administered Arbitration (July 1, 2013) (“Administered Rules”)<sup>3</sup> for domestic disputes and the CPR Rules for Administered Arbitration of International Disputes (December 1, 2014) (“International Administered Rules”). Both sets of administered arbitration rules provide parties with the same well-designed procedures and high-quality arbitrators as CPR’s non-administered option, while also allowing the parties to avail themselves of CPR’s quality staff and resources when an administered process is desired. Differences between the Administered Rules and the International Administered Rules, if any, will be noted below. The Rule numbering is identical in the Administered Rules and the International Administered Rules unless otherwise specified below.

Because it is assumed that sophisticated counsel will properly denominate the rules applicable to their contracts, where, after July 1, 2013, parties simply refer to “CPR arbitration,” “CPR Arbitration Rules” or “CPR Commercial Arbitration Rules;”

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2. CPR is also available as an Appointing Authority under the UNCITRAL Rules.

3. As with the Non-Administered Rules, CPR anticipates promulgating in 2014 a version of the Administered Rules optimized for international disputes. Anticipated differences in the Rules will be footnoted here.

CPR will apply the CPR Administered Arbitration Rules to the proceeding. For contracts entered into after December 1, 2014, the International Administered Rules will apply if parties have simply referred to “CPR arbitration,” “CPR Arbitration Rules,” or “CPR Commercial Arbitration Rules” in their contract where the parties reside in different countries or where the contract involves property or calls for performance in a country other than the parties’ country of residence.

The Administered Rules are intended to govern administered arbitration proceedings. However, parties also may wish to incorporate pre-arbitral negotiation or mediation phases in their contract provisions. Parties desiring to use such multi-step procedures should consult the CPR Mediation Procedure and CPR’s Dispute Resolution Clauses (available on CPR’s website at [www.cpradr.org](http://www.cpradr.org)).

Below are highlights of the Administered Rules.

#### **IV 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. Rules 3.1-3.4 provide the particulars of how an arbitration is commenced. Rule 2 governs how notices are to be made, and authorizes service of notices and other communications by registered mail, courier, telex, facsimile transmission, email, or any other means of telecommunication that provides a record thereof.

Under Rule 3.6, 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. Rule 3.10 governs the addition or amendment of claims after the notice of arbitration is filed; defenses, too, may ordinarily be freely added or amended, unless the Tribunal determines otherwise.

A submission agreement entered into after a dispute has arisen may include all or some of the material called for by Rules 3.2 and 3.7 and may eliminate the need for a notice of arbitration and a notice of defense. Rule 3.11 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.

The International Administered Rules have provisions for consolidation and joinder. Under International Administered Rule 3.13, two or more arbitrations may be consolidated into a single arbitration unless the arbitration agreement prohibits consolidation. When arbitrations are consolidated, they are consolidated into the arbitration that commenced first, unless otherwise agreed by the parties or determined by CPR. In its discretion, CPR may refer any issues relating to consolidation to the CPR International Arbitration Council (the “Council”) for determination. Information about the Council is available on CPR’s website.

International Administered Rule 3.12 provides for the joinder of additional parties to the arbitration. After reviewing all claims and counterclaims, any party can file a Request for Joinder with CPR if it considers that one or more additional

party—not initially named in the arbitration—should be joined. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree (International Administered Rule 3.12(a)).

## V RULE 5. SELECTION OF THE 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 designated 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.<sup>4</sup> Unless the parties agree that the third arbitrator who shall chair the Tribunal shall be selected jointly by the party-appointed arbitrators, CPR selects the third arbitrator with the parties' input pursuant to Rule 6. While the parties designate their appointees it is CPR which solicits their availability and disclosures and makes the ultimate appointment after ruling on any objections. All of CPR's rules provide that all arbitrators, regardless of the selection method are to remain independent and impartial. Non-neutral arbitrators are not permitted.

Rule 5.4 adopts the unique “screened” procedure for constituting a three-member Tribunal, two of whom are designated by the parties without knowing which party designated each of them. The procedure, which was first promulgated in the 2000 version of the Non-Administered Rules, is intended to offer the benefits, while avoiding some of the drawbacks, of having party-appointed arbitrators. On the one hand, parties are able to designate arbitrators whom they consider to be well qualified to sit on the Tribunal. On the other hand, any tendency (subtle or otherwise) of party-appointed arbitrators to favor or advocate the position of the parties who appointed them is avoided because those arbitrators are approached and appointed by CPR rather than the parties and are not told which party designated each of them. The Rules governing *ex parte* communications (Rule 7.4), challenges (Rule 7.6), and resignations (Rule 7.9) contain specific provisions designed to preserve the “screen” for the party-designated arbitrators under Rule 5.4 throughout the arbitration. The parties may choose the “screened” selection procedure in their pre-dispute arbitration clause (see standard pre-dispute clause) or agree to the screened procedure once a dispute arises.

CPR recognizes that, as a practical matter, some party-designated arbitrators selected pursuant to Rule 5.4 may deduce or learn which parties designated them—*i.e.*, the “screen” may not, in all instances, be perfect. This may be particularly true in the international context where one might have a tendency to appoint a national of one's own country. CPR nevertheless believes that the screened procedure is worthy of consideration by parties as a means to enhance the integrity of arbitrations involving party-appointed arbitrators. Any party-designated arbitrator who does, in fact, learn

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4. Given the expense of a panel of three arbitrators, parties who anticipate claims not in the millions of dollars should seriously consider the appointment of a sole arbitrator.

which party appointed him or her should disclose that fact to each of the parties and the other members of the Tribunal in order to ensure a level playing field. In the event an arbitrator discovers who appointed him or her, such knowledge would not be a basis for disqualification or challenge per se, and the arbitration can continue uninterrupted on a “non-screened” basis.

For many parties, 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. CPR believes that at least the chair of the Tribunal usually should be a respected attorney or former judge 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. When asked by CPR, they should be truthful as to their time commitments and decline to be considered where their schedules do not permit taking on additional work.

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, in its CPR Panels of Distinguished Neutrals (“CPR Panels”). CPR’s lists of panelists are available to members on the CPR website ([www.cpradr.org](http://www.cpradr.org)) or on a fee for service basis from CPR. Panel members may also be contacted directly. CPR currently has panelists throughout North America, Europe, China, Brazil, and selected other countries where its members do business.

Unless parties otherwise agree, Rule 5.1 requires that any arbitrator, not appointed by a party, shall be a member of the CPR Panels. This requirement ensures the orderly proceeding of the arbitration by a chair familiar with the CPR Rules.

It should be noted that scheduling hearings on dates on which all three arbitrators (and counsel and the parties) are available frequently presents considerable difficulties and may well result in delays. Moreover, the need to have two or three arbitrators agree on the text of an award may also cause delay and additional expense. Consequently, a proceeding conducted by a sole arbitrator may be more expeditious and less expensive.

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 5.5 deals with the constitution of three-member Tribunals in the multiparty context. It provides that, if there is more than one Claimant or one Respondent, and the parties’ arbitration clause contemplates each party appointing an arbitrator, then the multiple Claimants or multiple Respondents can jointly appoint an arbitrator. If they are unable or unwilling to do so, CPR shall appoint all of the arbitrators following the procedures of Rule 6.2.

## **VI RULE 6. SELECTION OF THE ARBITRATOR(S) BY CPR**

If the parties' selection process fails, either party may request CPR's assistance at the time and in the manner specified in Rule 6.

In accordance with Rule 6.2(a), CPR will convene the parties and discuss the selection of arbitrators. Thereafter, CPR will submit a list of candidates to the parties. If the parties do not agree on the Tribunal, they 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. Where a party has failed to appoint its party-appointed arbitrator, CPR shall appoint a person whom it deems qualified (Rule 6.3).

The parties will be encouraged to inform CPR of the qualifications they seek in an arbitrator. These can include subject-matter expertise, geographic location and/or billing rates. Individuals nominated by CPR will be members of CPR's Panels, absent a special reason to go beyond the CPR Panels compelled by the particular circumstances of the arbitration. All arbitrator candidates will be queried for disclosures, rates, and availability. Where the parties wish to put special queries to the candidates, these too will be accommodated. Similarly, CPR can arrange for interviews, if desired. In short, CPR will work with the parties to make the best selection for their needs.

## **VII RULE 8. CHALLENGES TO THE JURISDICTION OF THE TRIBUNAL**

Rule 8 of the Administered Rules expresses the generally accepted principle that arbitrator(s) have the competence initially to determine their own jurisdiction, both over the subject matter of the dispute and over the parties to the arbitration. Accordingly, any objections to the existence, scope, or validity of the arbitration agreement, or the arbitrability of the subject matter of the dispute, are decided, at least in the first instance, by the Tribunal consistent with the U.S. Supreme Court's precedent,<sup>5</sup> or any other applicable law.

Because the arbitrator(s) will decide whether the arbitration proceeds in the face of a jurisdictional challenge, CPR will work with the parties to select a Tribunal without prejudice to the jurisdictional objections of a party. Whether procedural conditions precedent have been met are similarly questions for the Tribunal.

## **VIII RULE 9. GENERAL PROVISIONS**

Under Rule 9.1, the Tribunal may conduct the arbitration as it deems appropriate, taking into consideration any mandatory provisions of applicable arbitration law (Rule 1.2). Such mandatory provisions could include, for example, provisions of arbitration law at the seat of arbitration requiring arbitrators and/or witnesses to take oaths. CPR arbitrators are expected to familiarize themselves with any such requirements.

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5. See *First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995) and progeny.

Rule 9.1 further provides that the chair 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 chair’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 chair is to keep CPR informed of developments. The Tribunal is encouraged to consult the CPR Guidelines for Arbitrators Conducting Complex Arbitrations.<sup>6</sup> The Guidelines, which were drafted by a committee of experienced neutrals and arbitration counsel, provide guidance with respect to the organization of a complex arbitration.

The Rules give the Tribunal a 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 prehearing conference(s) held pursuant to Rule 9.3 and that following the conference(s) the Tribunal will issue a schedule for the conduct of the arbitration. The prehearing conference prescribed by Rule 9.3 should ordinarily be held in person in order to maximize the benefits of the conference, but may also be held by telephone or other form of electronic or teleconference where considerations of efficiency so dictate. 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 by motion for partial summary judgment. At the prehearing conference, the desirability of the Tribunal’s ruling on such issues before the hearings commence can be considered. For guidance, counsel and the Tribunal should consult the CPR Guidelines on Early Disposition of Issues in Arbitration.<sup>7</sup> This document delineates the circumstances when early resolution might be beneficial notwithstanding the desire for a single efficient hearing.

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 12.3, although this should be used only sparingly and can be discussed at the prehearing conference. Often, the use of arbitrators with subject-matter expertise will obviate the need for such an expert.

In the appropriate case, 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. In arbitration, often parties have process options not available to a judge.

During the arbitrator selection process set forth in Rule 6, it may be necessary for CPR to query the parties preliminarily on certain matters that will be formally addressed at the Rule 9.3 conference and by the Tribunal under Rule 9 such as timing of disclosure and hearings. This is done to ensure that the Tribunal appointed has the time to appropriately address the parties’ needs during the arbitral process.

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6. <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/Arbitration%20Award%20Slimjim%20for%20download.pdf>.

7. <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/744/CPR-Guidelines-on-Early-Disposition-of-Issues-in-Arbitration.aspx>.

A prehearing conference may well give the arbitrators an opportunity to suggest settlement discussions or mediation, as contemplated by Rule 21. Simply bringing the attorneys together for purposes of a conference may lead to such discussions.

## **IX RULE 10. APPLICABLE LAW(S) AND REMEDIES**

Under Rule 10, unless the parties shall have agreed in their contract or otherwise as to which law shall govern, the Tribunal is free to apply the law(s) or rules of law as it determines to be appropriate to govern the dispute. Rule 10.3 makes clear that the Tribunal can grant any remedy or relief available under the contract and applicable law, including equitable relief such as specific performance and injunctive relief. Indeed, arbitrators have been held to have even greater latitude than courts in fashioning appropriate equitable relief. Arbitrators may not simply do as they please; however, any remedy or relief granted must be permissible under the contract and applicable law, and Rule 15.2 requires arbitrators to explain the reasoning on which their awards rest.<sup>8</sup>

The Tribunal and counsel should also consult the CPR Protocol on Damages in Arbitration which addresses various alternatives for the treatment of damages testimony and evidence in arbitration.<sup>9</sup>

## **X RULE 11. DISCLOSURE**

Under Rule 11, the Tribunal “may require 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 prehearing disclosure is incompatible with the goals of efficiency and economy and generally accepted practices in international arbitration. Discovery should be limited to those items for which a party has a substantial, demonstrable need. Rule 12.2 provides

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8. The U.S. Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 512 U.S. 52, 115 S. Ct. 1212 (1995), held that, unless the parties expressly agree otherwise, arbitrators are authorized to award punitive damages. The Administered Rules do not specifically address 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. A suggested provision to that effect is:

The arbitrator(s) are not empowered to award damages in excess of compensatory damages and each party expressly waives and foregoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.

On the other hand, the International Administered Rules provide that the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner (International Administered Rule 10.5).

9. <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/704/CPR-Protocol-on-Determination-of-Damages-in-Arbitration.aspx>.

for the application of the attorney-client privilege and the work product immunity. That protection is intended to apply to prehearing disclosure as well as to hearings.

It is desirable for the parties' counsel to agree, preferably before the initial prehearing conference, on a plan and schedule for the exchange of documents and to submit the same to the Tribunal for its approval. Counsel are encouraged to consult CPR's Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.<sup>10</sup>

A party may encounter difficulties if it needs to secure documents or testimony from an uncooperative third party. In the U.S., the arbitrators may well be of assistance in such a situation through the exercise of their U.S. 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. If permissible, a video deposition may be an acceptable substitute for hearing testimony. Applicable law should be reviewed to assess whether arbitrators also have the power to issue enforceable subpoenas to third parties to obtain prehearing discovery. In proceedings taking place outside the United States where documents are located within the U.S., 28 U.S.C. §1782 may well prove helpful.<sup>11</sup>

## XI RULE 12. EVIDENCE AND HEARINGS

Neither the Administered, International Administered nor the Non-Administered Rules establish a detailed mandatory hearing procedure. Rather, they permit the Tribunal to determine the procedure. At least the main features should be established during the prehearing 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 12.2).<sup>12</sup>

Self-authentication of documentary exhibits, the authenticity of which are 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. Sworn statements would be admissible in evidence unless the Tribunal rules otherwise. The parties and Tribunal are encouraged to consult CPR's Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration as to best practice.<sup>13</sup>

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10. <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx>.

11. A. Douglas, "Section 1782 Discovery: Are International Arbitration Proceedings 'Legal Tribunals?'" 32 *Alternatives* 58 (April 2014).

12. The Tribunal and the parties should agree on the language of the arbitration and the need for translation services if any. *CF.* Rules 12.4 of the Rules for Non-Administered Arbitration of International Disputes and of the Rules for Administered Arbitration of International Disputes.

13. <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx>.

The Tribunal should consider at the prehearing 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. Ordinarily, procedural details, including hearing times, are set forth in one or more procedural orders.

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 could drag on quite unnecessarily. The Tribunal should keep to an agreed upon schedule except where extraordinary circumstances warrant a change.

Rule 12.3 empowers the Tribunal to appoint neutral experts. CPR expects this power to be exercised sparingly, and only following 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 prehearing conference, to agree on the joint appointment of a neutral expert.<sup>14</sup>

The Rules do not automatically require the submission of post-hearing briefs, but the Tribunal may order the submission of such briefs. Due regard should be had, however, to the cost of such submissions in light of the amounts at stake in the matter. Final oral argument may also be scheduled, either at the conclusion of the hearing or at a later date.

The Tribunal's powers with respect to subpoenas or other methods of compelling the attendance of witnesses or the production of documents are determined by applicable law and are not dealt with specifically in the Rules.

## **XII RULE 14. INTERIM MEASURES OF PROTECTION BY A SPECIAL ARBITRATOR**

Administered, International Administered, and Non-Administered Rule 14 establish a procedure pursuant to which a special arbitrator may be appointed within a short time frame at the request of a party in order to adjudicate a claim for interim measures prior to the constitution of the Tribunal. This procedure is available where the parties have selected CPR's Rules to govern their proceeding. Ordinarily, a special arbitrator can be appointed in a matter of days. As with any relief granted by the Tribunal, a remedy or relief granted by the special arbitrator must be permissible under the contract and applicable law.

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14. If necessary, the Tribunal can appoint an expert from CPR's E-Discovery Panel of Distinguished Neutrals to aid the parties and the Tribunal in fashioning narrow and appropriate inquiries when the bulk of the parties' documents are electronically stored.

Non-Administered Rule 14.12 and Administered and International Administered Rule 14.13 provide that a request for interim relief by a party to a court shall not be deemed incompatible with the agreement to arbitrate. However, these provisions are not intended to permit a party to seek relief in one forum if it is denied elsewhere.

### **XIII RULE 15. THE AWARD**

Rule 15.2 provides: “All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise.” Most parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision. CPR, 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 15.2 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 CPR’s view, the risk that a reasoned award will be successfully challenged normally is small and outweighed by the other considerations mentioned above.

Where there are three arbitrators, a majority of the arbitrators must sign the award. Occasionally, a Tribunal of three arbitrators experiences great difficulty in developing a position to which a majority can subscribe. Certain other arbitration rules empower the chair of the Tribunal to make an award singly under such circumstances, notwithstanding the (usually slight) risk of a rogue chair ruling unreasonably. The parties are free to modify the Rules to grant such authority to the chair, if desired.

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

Administered Rule 15.8(a) 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 prehearing conference, and for the Tribunal to submit the final award to CPR within thirty days after the close of the hearing. CPR will conduct a limited review of the award as provided under Rule 15.4 and thereafter render the award to the parties promptly.

International Administered Rule 15.8 provides that the final award should in most circumstances be rendered within twelve months of the constitution of the Tribunal. Under the rule, the Tribunal and CPR shall use their best efforts to comply with this time requirement. CPR must approve any scheduling orders or extensions that would result in the final award being rendered more than twelve months after the constitution of the Tribunal. When CPR must approve such a request, it has the

discretion to convene a call with the parties and arbitrators to discuss factors relevant to the request. Under International Administered Rule 15.4, CPR performs a limited review of the draft award for format, clerical, typographical, and computational errors before issuing the final award to the parties.

The Rules do not deal expressly with confirmation of an award, as in the U.S., the matter is covered by the Federal Arbitration Act (FAA), its state counterparts, and, abroad, the laws of the forum nations. For most users of arbitration, the finality of the arbitration award is a significant advantage of arbitration over court litigation. But parties to major cases are occasionally concerned about the possibility of an aberrant award and would like the option of a private appeal to a tribunal of outstanding appellate arbitrators. In response to that concern, CPR has promulgated the CPR Arbitration Appeal Procedure discussed below.<sup>15</sup>

#### **XIV RULE 16. FAILURE TO COMPLY WITH RULES**

Rule 16 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 provided, although such awards may only be made after the production of evidence and supporting legal argument by the non-defaulting party. Pursuant to Rule 19.2, the Tribunal also may take a party's conduct during the proceeding into account in assessing costs.

#### **XV RULES WITH RESPECT TO COSTS AND FEES**

CPR believes that highly qualified arbitrators are entitled to be fully compensated for their service as arbitrators. If an arbitrator is a member of a law firm, he or she is likely to expect compensation at approximately the hourly rates normally charged for his or her services. The rates payable to party-appointed arbitrators should be agreed to between the appointee and the appointing party (except where the screened procedure of Rule 5.4 is being used to designate party-appointed arbitrators, in which case the rates will be disclosed during the query procedure and administered by CPR). 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. In any event, the compensation for each of the arbitrators should be fully disclosed to all Tribunal members and parties.

Normally, the parties are expected to make advances for costs to a fund pursuant to Rule 17.2, and the arbitrators' fees, as well as other expenses, would be paid from such fund. The Tribunal shall determine the necessary advances on arbitrator(s) fees and expenses and advise CPR which, unless otherwise agreed by the parties, shall invoice the parties in equal shares.

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15. The Appeal Procedure is available on the CPR website ([www.cpradr.org](http://www.cpradr.org)) or upon request from CPR.

The “costs of arbitration” enumerated in Rule 19.1 include the costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate. In accordance with Rule 19.2, 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.” The arbitrator(s) may take into account tactics by either party that unreasonably interfered with the expeditious conduct of the proceeding.

CPR Administrative Fees are set forth in the Schedule of Administered Arbitration Costs available on the CPR website at [www.cpradr.org](http://www.cpradr.org) and are payable as set out in Rule 18. The parties are jointly and severally liable to CPR for such fees. CPR reserves the right to adjust such fee based on developments in the proceeding. The Schedule is based on a proceeding that concludes within twelve months of the Rule 9.3 preliminary conference. As the average CPR proceeding concludes within an eleven-month time frame, it is expected that the Schedule will govern the majority of proceedings. Additional Administrative Fees will be imposed on cases requiring longer periods to resolve.

## **XVI MISCELLANEOUS ADMINISTERED RULES**

Unless the parties agree otherwise, the parties, the arbitrators, and CPR must treat the proceedings, and any related discovery and the decision of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration. (Rule 20)

A high percentage of civil lawsuits and business arbitration proceedings are disposed of before a trial or hearing takes 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 suggestion to explore settlement by the Tribunal at one or more appropriate junctures in the proceeding should launch such negotiations without either party’s bearing the onus of being the proposer (Rule 21).

A skilled mediator can play a critical role in bringing about agreement between adversaries, even where unaided negotiations did not result in agreement. If the Tribunal believes that mediation may result in a settlement, the Tribunal may suggest that the parties engage in such a process and, if the parties agree, assist in arranging the same. The parties should consider suspending the arbitration proceedings 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 more creative than the payment of money. Business executives are likely to be best able to explore such options.

As a general rule, members of the Tribunal should not serve as mediator.<sup>16</sup> The parties may hesitate to confide in an arbitrator serving as mediator, and an arbitrator would be inhibited in making settlement proposals or giving advice to the parties. Moreover, an arbitrator serving as mediator may no longer be able to serve as an impartial arbitrator if the mediation fails to resolve the dispute. The Tribunal can nevertheless be helpful by proposing well-qualified candidates to serve as a mediator.

If a settlement does not come about, the terms of any settlement offers should not be admitted into evidence at the hearings or otherwise disclosed to the Tribunal. If the parties enter into a settlement agreement, they may request that the Tribunal issue an award incorporating the settlement terms. If all of the parties make such a request and this request is accepted by the Tribunal, then the Tribunal may record the settlement in the form of an award. The Tribunal is not obliged to give reasons for such an award.

## **XVII ARBITRATION APPEAL PROCEDURE**

Most users of arbitration find the finality of an arbitration award appealing. But some parties to major cases are concerned about the possibility of an aberrant award and would like to be able to appeal from such an award to a tribunal of outstanding appellate arbitrators. In response to that concern, CPR has adopted the CPR Arbitration Appeal Procedure (“Appeal Procedure”) which is set forth, together with a Commentary.<sup>17</sup> The Procedure may be invoked whether or not the original arbitration was conducted under CPR Rules in any proceeding venued in the U.S..

CPR does not wish to encourage widespread appeals from arbitration awards. The Appeal Procedure (Rule 8.2) establishes relatively narrow grounds for appeal beyond the statutory grounds under section 10 of the FAA. Moreover, an unsuccessful appellant is required to reimburse the appellee’s legal fees and other costs of the appeal, unless the tribunal orders otherwise.

CPR has also organized a panel of appellate arbitrators consisting entirely of former federal or state judges who are also experienced arbitrators and who already serve on CPR panels. When the Appeal Procedure is invoked, CPR will arrange for the selection of an appellate tribunal.<sup>18</sup>

Whether parties opt for the CPR Non-Administered, Administered, or International Administered Rules or any of its specialty rules, CPR remains committed to working with the parties to select the best decisionmaker(s) for their process and to give them the support they need or desire. Further information on the CPR Rules and other procedures can be found at [www.cpradr.org](http://www.cpradr.org).

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16. Indeed, in some jurisdictions, they may be barred from doing so, and ethical concerns permeate such proceedings. See [www.mediate.com/warshauer/docs/TheNeutralinMultipleRoles.pdf](http://www.mediate.com/warshauer/docs/TheNeutralinMultipleRoles.pdf). As a result Rule 21.2 provides that a mediator shall be a person other than a member of the Tribunal.

17. <http://www.cpradr.org/Resources/ADRTTools/CPRRules>.

18. For more information on the CPR Arbitration Appeal Procedure see H. Erickson, *So You Still Want Judicial Review of Your Arbitration Award?*, 26 *Alternatives* 121 (June 2008).