International Arbitration in the United States

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Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: lrus.wolterskluwer.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Air Business Subscriptions
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-90-411-5016-5

e-Book: ISBN 978-90-411-9081-9
web-PDF: ISBN 978-90-411-5143-8

Printed in the United Kingdom.

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Marcus Quintanilla was born in Houston, Texas. After earning his bachelors at Georgetown, he studied at Harvard where he received his J.D. and a Master's degree in Ethics. He has practiced in California since 1999 and is currently a partner in the San Francisco office of Jones Day, where he focuses his practice on international arbitration and transnational litigation for multinationals in the energy, semiconductor, consumer goods, and infrastructure sectors. His representative matters include disputes over long-term fuel supply agreements, intellectual property licenses, and international joint ventures and distributorship arrangements. Marcus's matters typically implicate U.S., foreign, and international law and require coordinated direction of teams in multiple international jurisdictions. Marcus is a former member of the Executive Committee of the International Law Section of the State Bar of California and is actively involved in the Northern California International Arbitration Club, the Silicon Valley Arbitration and Mediation Center, and the St. Thomas More Society of San Francisco. He has lectured on international arbitration at Berkeley Law School, the University of California, Irvine, and the Universidad Nacional Autónoma de Mexico.

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Baiju Vasani is an international arbitration lawyer and arbitrator. He has served as counsel and arbitrator for parties from more than thirty countries on five continents, including international arbitrations involving ICSID, ICC, LCIA, ICDR, SIAC, UNCITRAL Rules, bilateral investment treaties (BITs), the Energy Charter Treaty, NAFTA, DR-CAFTA, and public international law. He also has advised States on the negotiation and drafting of treaties. Baiju has particular experience in energy (generation, transmission, and distribution), oil and gas (both upstream and downstream), mining (including coal, gold, silver, silica, and uranium), cement, and other large-scale project disputes in Eastern Europe, Africa, the Middle East, Central Asia, the Indian subcontinent, and Latin America. He currently serves as lead counsel on several investor-state arbitrations, including *Vladislav Kim and others v. Uzbekistan*, *Federal Elektrik and others v. Uzbekistan*, and *WWM v. Kazakhstan*, as well as on various complex international commercial arbitrations. His representations prior to joining Jones Day include two multimillion dollar merits awards at ICSID in *Duke Energy International Peru Investments No. 1, Ltd. v. Peru* (including a successful annulment challenge) and *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador* and a multimillion

dollar settlement in the ICC case of *UEG Araucaria Ltda. v. Companhia Paranaense de Energia Ltda*. Baiju is a Fellow of the Chartered Institute of Arbitrators and is on the arbitrator panels of various institutions worldwide. He previously served as an Adjunct Professor of Law at Georgetown University and also has given visiting lectures at, among other universities, Harvard, Northwestern, Vanderbilt, Columbia, and SOAS. He is currently a Visiting Lecturer on Investor-State Arbitration at the University of Bedfordshire.

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Gretta L. Walters represents individual and corporate clients in complex litigation matters in state and federal court and in arbitration in international and cross-border disputes. Gretta's recent cases have involved international commercial contracts, construction/engineering, re/insurance, energy/power projects, financial and lending agreements, securities claims, executive compensation, and maritime disputes. She has experience acting under the mediation and arbitration rules of the ICC, ICDR, SCC, JAMS, and SMA. Gretta is Secretary of the of International Commercial Disputes Committee of the New York City Bar and co-coaches the Foreign Direct Investment and Vis International Commercial Arbitration moot court teams at New York University Law School. She joined Chaffetz Lindsey in June 2014. Prior to joining Chaffetz Lindsey, Gretta was an associate at Mayer Brown, Legal Counsel at the Arbitration Institute of the Stockholm Chamber of Commerce, and a Visiting Lecturer at Stockholm University. She received an LLM in International Commercial Arbitration Law from Stockholm University in 2012, a J.D. from American University, Washington College of Law (magna cum laude) in 2010, and a BA from University of Maryland (cum laude) in 2005.

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CHAPTER 4

The Rules of the CPR Institute

Helena Tavares Erickson & Olivier P. André

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)[1] 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.

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.

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.[2] 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.

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")[3] 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;"

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).

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.[4] 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

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) 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,[5] 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.

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.[6] 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.[7] 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.

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.[8]

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.[9]

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

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.[10]

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.[11]

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).[12]

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.[13]

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.[14]

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.

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.[15]

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.

15. The Appeal Procedure is available on the CPR website (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 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.[16] 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.[17] 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.[18]

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.

16. Indeed, in some jurisdictions, they may be barred from doing so, and ethical concerns permeate such proceedings. *See* www.mediate.com/warshauer/docs/TheNeutralinMulitpleRoles.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/ADRTools/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).