

Administered US Domestic Arbitration with the CPR Institute: A Step-by-Step Guide

MARA WEINSTEIN, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, INC.,
WITH PRACTICAL LAW ARBITRATION

A Practice Note describing the necessary steps for conducting arbitration under the rules of the International Institute for Conflict Prevention and Resolution (CPR). This Note reflects the rules effective July 1, 2013.

This Note provides a step-by-step guide to US-based arbitration under the CPR Administered Arbitration Rules effective July 1, 2013 (the Rules). For international cases, see *Practice Note, Administered International Arbitration with the CPR Institute: A Step-By-Step Guide* (<http://us.practicallaw.com/2-615-4368>).

CPR

CPR is one of the principal US arbitral institutions (see AAA, JAMS and CPR Comparison Chart for US Domestic Arbitrations (<http://us.practicallaw.com/5-557-1285>)). It provides rules and administrative services for arbitration, mediation and other dispute resolution proceedings.

On July 1, 2013, CPR issued its first set of rules for administered arbitration. Although CPR had historically performed many of the functions of administered arbitration on an à la carte basis, before July, 2013, CPR's arbitration rules provided only a nonadministered option. Based on CPR's Non-Administered Arbitration Rules, the new rules are designed to be "administration lean," providing what is necessary from an overseeing administrative body and nothing more for business-to-business arbitration.

CPR can provide support with:

- Appointing mediators and arbitrators.
- Providing users with information on dispute resolution options, including mediation.
- Acting as the appointing authority in, as well as administering, arbitrations under the UNCITRAL rules.

PRELIMINARY STEPS FOR THE CLAIMANT AND RESPONDENT

Before a dispute ever arises, be sure to carefully provide for dispute resolution by drafting a clause that works for both sides (see *Model Clauses*). Describe carefully any negotiated processes that deviate from the Rules.

Take stock of the procedural timeline, either as prescribed by the Rules (particularly Rules 3 and 15.8) or as agreed by the parties, and ensure that parties meet the due dates. This is especially important if the parties have drafted a multi-step clause that calls for escalating stages of dispute resolution (for example, direct negotiation or mediation, followed by arbitration). (For more information on multi-step clauses, see *Practice Note, Hybrid, Multi-tiered and Carve-out Dispute Resolution Clauses* (<http://us.practicallaw.com/9-384-8595>)). The qualifications to request in neutrals should also be considered (for example, experience, geographic location and hourly rate).

Unless the parties otherwise agree, the Administered Rules and any amendment later adopted by CPR apply in the form in effect at the time the arbitration is commenced. If the parties have provided for CPR arbitration without specifying either the Non-Administered or Administered Rules, the CPR Administered Rules apply to any arbitration agreement dated July 1, 2013, or later. The Administered Rules govern the arbitration except when in conflict with a mandatory provision of applicable arbitration law.

SETTLEMENT AND MEDIATION

CPR's mission to redefine winning includes saving everyone time and money, and keeping business relationships intact. CPR strongly supports party autonomy over dispute resolution. Therefore, Rule 21 allows for either party to propose settlement negotiations to the other party at any time. This Rule also allows the arbitral tribunal to suggest that the parties explore settlement when appropriate.

With the consent of the parties, the tribunal may, at any stage of the proceeding, request that CPR arrange for the mediation of some or all the claims asserted by a mediator acceptable to the parties. The mediator cannot be a member of the tribunal and this provision cannot be waived. Unless the parties agree otherwise, the mediation is conducted under the CPR Mediation Procedure.

Rule 21.3 provides that the tribunal will not be informed of any settlement offers or other statements made during these negotiations (unless both parties consent). Rule 21.4 states that if the settlement negotiations are successful, the arbitration is terminated. The tribunal may record the settlement in the form of an award on consent and the arbitrators are not required to give reasons for the consent award.

COMMENCING AN ARBITRATION

Date of Commencement

To commence the arbitration, claimant must deliver to respondent a notice of arbitration with an electronic copy to CPR and must deliver to CPR the filing fee. The date on which CPR has received both the notice of arbitration and the filing fee is deemed the commencement date.

Review the Arbitration Clause

The claimant must first locate the relevant arbitration clause in the contract and review its provisions. If the contract contains a recommended CPR arbitration clause, it is likely to have a sufficiently broad scope to encompass most claims and disputes arising out of the contract. If the arbitration clause is not in the recommended form, jurisdictional challenges may be more likely and the parties or the arbitrators must determine whether the claims fall within the scope of the agreement.

In domestic cases, there is a presumption that the Rules apply. If the case is international (involving parties from different countries or property or performance abroad), it is presumed that the Rules for Administered Arbitration of International Disputes apply for contracts dated December 1, 2014, or later, unless the arbitration clause clearly provides for the Rules.

If the clause provides for CPR arbitration but does not specify either the Non-Administered or Administered Rules, the CPR Administered Rules apply to any agreement dated July 1, 2013 or later. The Non-Administered Rules apply for any agreement dated before July 1, 2013.

The parties may adapt how they apply the Rules by contract or written agreement. After appointment of the arbitrators, and subject to any mandatory rules applicable to arbitration proceedings at the arbitral seat, the arbitrators and the parties may agree to modify the proceedings to suit their needs.

Check Limitations and Conditions Precedent

Ensure that none of the claims to be asserted in the arbitration proceedings are time-barred. The most likely source of a time bar is the substantive law applicable to the case, but there may be contractual time limits written into the agreement or arbitration clause. If the limitation period is about to expire, the arbitration should begin as soon as possible.

Arbitration clauses in contracts sometimes require the parties to negotiate among themselves or engage in mediation before they commence arbitration proceedings. Before initiating an arbitration, therefore, identify whether there are conditions precedent or that they have been satisfied.

Prepare the Case

Arbitrations are usually won or lost on the facts, so it is never too early to start identifying records and other evidence needed in supporting the claims.

Preparing the factual aspects of the case usually includes:

- Locating and preserving any relevant documents.
- Identifying the documents on which the party wishes to rely in support of its claim.
- Identifying any documents that may be privileged.
- Taking statements from relevant witnesses.
- Identifying and retaining experts where necessary.
- Determining the law that governs the dispute and obtaining advice from foreign lawyers when necessary.

Decide on an Arbitrator

For arbitrations involving party-designated arbitrators, the claimant identifies its designated arbitrator when it initiates the proceedings with a Notice of Arbitration. Selecting an appropriate arbitrator may take some time (see *Practice Note: How Do I Appoint My Arbitrator?* (<http://us.practicallaw.com/4-204-0021>)), so as soon as arbitration appears likely, a claimant should begin considering and vetting names for potential arbitrators.

Notice of Arbitration

The Notice of Arbitration should include:

- The full names, addresses, telephone numbers and email addresses for the parties and their counsel.
- A demand that the dispute be referred to arbitration under the Rules.
- The text of the arbitration clause or arbitration agreement.
- A statement of the general nature of the claimant's claim(s).
- The remedies sought.
- The name, address, telephone number and email address of the arbitrator designated for appointment by the claimant, unless the parties have agreed that neither may designate an arbitrator or that the party-designated arbitrators must be screened under Rule 5.4, CPR's screened selection process.

The claimant delivers the notice of arbitration to the respondent with an electronic copy to CPR at the same time (*Rule 3*).

Notice of Defense

Before responding to a notice of arbitration, the respondent should consider each of the following points and take action as necessary. The respondent must first review the arbitration agreement and determine whether the disputes that have arisen fall within its scope and, therefore, whether there is any basis for challenging its application to the dispute. In addition, the respondent should check the clause for the application of any supplementary or optional rules. Finally, the respondent should determine whether the claims against it are timebarred. Parties may raise jurisdictional objections and time bars as defenses in the arbitration. Parties should always consult local forum law which may have mandatory provisions regarding where time bars or other defenses must be raised (see, for example, *Practice Note: Choosing an Arbitral Seat in the US: New York: Threshold Issues* (<http://us.practicallaw.com/1-501-0913>)).

The respondent has 20 days after the commencement date to respond to claims by delivering a notice of defense. CPR notifies the respondent of the date it is due (*Rule 3.5*). Failure to deliver a notice of defense does not delay the arbitration. In the absence of a notice of defense, all claims in the notice of arbitration are deemed denied (*Rule 3.6*). However, failure to deliver a notice of defense does not excuse the respondent from notifying the claimant and CPR, in writing, of its designated arbitrator, unless the parties have agreed that neither is choosing an arbitrator or that CPR is screening the party-designated arbitrators under *Rule 5.4*.

The notice of defense should include:

- The full names, addresses, telephone numbers and email addresses for the parties and their counsel.
- Any comment on the notice of arbitration that the respondent may deem appropriate.
- A statement of the general nature of the respondent's defense.
- The name, address, telephone number and email address of the arbitrator designated for appointment by the respondent, unless the parties have agreed that neither may designate an arbitrator or that the party-designated arbitrators must be screened under *Rule 5.4*.

The Notice of Defense may include any counterclaim that is within the scope of the arbitration clause.

Response to a Counterclaim

The claimant has 20 days after receipt of the Notice of Defense to respond to a counterclaim. CPR notifies the respondent of the date it is due (*Rule 3.9*). Failure to deliver a response to counterclaim does not delay the arbitration and, in its absence, the counterclaim is deemed denied (*Rule 3.9*).

The response to the counterclaim should include:

- Any comment on the counterclaim that the claimant may deem appropriate.
- A statement of the general nature of the claimant's defense.

Additional and Amended Claims and Counterclaims

Additional claims or counterclaims within the scope of the arbitration clause may be freely added, amended or withdrawn before the appointment of the tribunal and thereafter with the consent of the tribunal. Notices of defense or replies to added or amended claims or counterclaims must be delivered by the date CPR provides, which is typically within 20 days after CPR's receipt of the addition or amendment or another date CPR specifies or, if the tribunal has been appointed, by the date the tribunal specifies. (*Rule 3.9*.)

Interim Measures

The Rules provide for interim relief, either by a special arbitrator before the tribunal has been constituted (*Rule 14*), or by the tribunal afterward (*Rule 13*). Once the tribunal is constituted, the tribunal may modify or vacate an award or order rendered by the special arbitrator (*Rule 14.14*).

Applying for Emergency Measures of Protection

Rule 14 provides a procedure where any party may request, before the constitution of the tribunal, that CPR appoint a special arbitrator to consider an application for emergency relief. Any party seeking interim measures of protection must send a written application to CPR, entitled, Request for Interim Measures of Protection By a Special Arbitrator. The request should describe in reasonable detail:

- The relief sought.
- The party against whom relief is sought.
- The grounds for the relief, and, if practicable, the evidence and law supporting the request.

The party seeking interim measures of protection must notify all other parties of the request. The request for interim measures must be accompanied by an initial deposit payable to CPR as provided in the Schedule of Administered Arbitration Costs. CPR promptly determines whether any further deposit is due to cover the fee of CPR and the remuneration of the special arbitrator.

The parties may jointly designate the special arbitrator. If they do not agree on a special arbitrator within one business day of the request, CPR promptly appoints a special arbitrator from a list of arbitrators it maintains for that purpose.

Any challenge to the appointment of a special arbitrator must be made within one business day of the challenging party's receipt of CPR's notification of the appointment of the arbitrator and the arbitrator's disclosures, if any. A special arbitrator may be challenged if there is any circumstance that may give rise to justifiable doubt about the independence and impartiality of that arbitrator within the meaning of *Rule 7*.

The special arbitrator determines the procedure to be followed, which includes, whenever possible, reasonable notice to and an opportunity for hearing (in person, by teleconference or other appropriate means) for all affected parties. The special arbitrator must conduct the proceedings as expeditiously as possible and has the powers vested in the tribunal under *Rule 8*, including the power to rule on her own jurisdiction and on the applicability of *Rule 14*.

The ruling on the request for interim measures can be made by award or order and may provide for a specified amount in case of noncompliance with its terms. The award or order must specify the interim measures awarded or denied, determine the costs of proceedings (both CPR and the arbitrator's fees), and apportion costs as appropriate. Unless the parties otherwise agree, the award or order must be reasoned.

If the special arbitrator renders an award, it must first be sent in draft form to CPR for a limited review for format, clerical, typographical or computational errors. CPR promptly reviews the award, suggests any corrections to the special arbitrator, and then delivers executed copies of the award to the parties (*Rule 14.12*). Once the tribunal is constituted, the tribunal may modify or vacate the award or order rendered by the special arbitrator (*Rule 14.14*).

Applying to the tribunal for Interim Measures of Protection

Once the tribunal has been constituted, any party may request the tribunal to take interim measures, such as measures for the preservation of assets, the conservation of goods or the sale of perishable goods (*Rule 13*).

For a further discussion of interim measures, see *Practice Note, Interim, Provisional and Conservatory Measures in US Arbitration* (<http://us.practicallaw.com/0-587-9225>).

ARBITRATION BY SUBMISSION AGREEMENT

Where there was no arbitration clause or agreement before the dispute arose, parties may submit their dispute to arbitration by filing a Submission Agreement for Administered Arbitration. (See the *Model Submission Agreement*.)

APPOINTMENT OF THE TRIBUNAL

By the Parties

Unless the parties otherwise agree, the tribunal consists of three arbitrators, one designated by each of the parties in their initial notices (*Rules 3.2 and 3.7*) and the third who shall chair the tribunal selected by CPR with the parties' input (*Rule 5.2*). Whether the parties are following the default rule or have agreed to a sole arbitrator, CPR queries the parties' candidate(s) on their availability, willingness to serve and conflicts. On receipt of the query responses, CPR then circulates to the parties any disclosures the arbitrators have made.

Objection Process

Within ten days of receipt of the arbitrators' disclosures, the parties may object to any candidate on the grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party (*Rule 5.2(b)*). The other party may comment on the objection. CPR then decides on the objections or refers them to a challenge review committee pursuant to the CPR Challenge Protocol. If there is no objection, or CPR overrules the objection, the candidate is appointed. If there are additional objections, based on circumstances subsequently learned, CPR must refer them to a Challenge Review Committee under the CPR Challenge Protocol.

Sole Arbitrator

Where the parties have opted for a sole arbitrator in their contract, they should jointly present CPR with their designated arbitrator within 30 days after the Notice of Defense is due. CPR then queries the designated arbitrator, and sends any disclosures to the parties who can then object (*Rule 5.3*).

Where the parties have failed to jointly designate an arbitrator, CPR convenes a conference call with the parties to assist them with selection of the arbitrator. During the conference call, the following administrative case items are discussed:

- Review of the full CPR process and applicable rules.
- Venue for the proceedings.
- Estimated length of arbitration hearings.
- Likely calendar date range within which the proceedings should take place.
- Any additional names of individuals and entities for which the parties wish candidates to run a conflicts check.
- Preferred qualifications and experience of prospective candidates.
- Geographic area from which candidates are to be drawn.
- Any provisions in the parties' dispute resolution agreement that may need review.

- CPR and arbitrator fees and expenses.

CPR then sends a nomination letter to the parties listing the candidates with a brief statement of each candidate's qualifications and query response form. CPR lists at least five candidates. If the parties do not agree on the arbitrator, they send CPR ranked lists. CPR then computes the combined scores and advises the chosen candidate of his or her selection. If there is a tie between two candidates, CPR may appoint either candidate. If a party fails to participate, CPR appoints a person it deems qualified. (*Rule 6.2(b)*.)

Three Arbitrators

Under the default rule (*Rule 5.1*), each side proposes its arbitrator. CPR then queries each arbitrator candidate and sends any disclosures to the parties who can then object based on the Objection Process. When completed, CPR appoints the two party-designated arbitrators. Unless the parties agree that the party-appointed arbitrators select the chair, CPR selects the chair with the parties' input under Rule 6.

Screened Selection Process for Party Designated Arbitrators

CPR's Arbitration Rules contain an optional provision that enables the parties to agree to a screened selection of the party-designated arbitrators in a three-member tribunal. Under this process, CPR appoints the party-designated arbitrators who do not know which party has designated them. Under this procedure:

- CPR provides each party with a copy of a list of candidates from the CPR Panels together with the candidates' responses from the query.
- Within ten days after receipt of the CPR list, each party designates from the list three candidates, ranked in order of preference, for its party-designated arbitrator, and sends this list in writing to CPR and the other party.
- Within the same ten-day period after receipt of the CPR list, a party may also object (see Challenges) to the appointment of any candidate on the list on grounds of lack of independence or impartiality by written and reasoned notice to CPR, with a copy to the other party.
- CPR decides the objection after providing the non-objecting party with an opportunity to comment.
- If there is no objection to the first candidate designated by a party, or if the objection is overruled by CPR, CPR appoints the candidate as the arbitrator.
- Any later challenges of that arbitrator, are decided through the Challenge Protocol.

(*Rule 5.4*.)

Qualifications, Challenges and Replacement of Arbitrator(s)

Qualifications

Each arbitrator must:

- Be independent and impartial.
- Have time available to devote to the expeditious process prescribed by the Rules
- Agree to be bound by the CPR Rules, as modified by the parties.

Before appointment, each arbitrator must send to the parties and CPR disclosures about any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Circumstances include bias, interest in the result of the arbitration, and past or present relations as a neutral or advocate for a party or its counsel. If during the course of the arbitration circumstances arise that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality, the arbitrator must promptly disclose them in writing to CPR, which then informs the parties. A party may challenge its own designated arbitrator only for reasons about which it learned after making the designation.

No party or party representative is to have any ex parte communication concerning any matter relating to the proceeding with any arbitrator or arbitrator candidate. For party-designated arbitrators (except where *Screened Selection Process* is used):

- A party may advise an arbitrator candidate being considered for designation as its appointed arbitrator of the general nature of the case and discuss the candidate's qualifications, availability, independence and impartiality concerning the parties.
- If the party-designated arbitrators are to select the chair, a party also may confer with its designated arbitrator after the arbitrator's appointment by CPR regarding the selection of the chair of the tribunal.

(Rule 7.)

Challenges

If circumstances exist or arise that lead to justifiable doubt regarding an arbitrator's independence or impartiality and of which a party becomes aware **after** the appointment has been made, then an arbitrator may be challenged under the following procedure:

- The challenging party has 15 days to make a challenge after it:
 - receives notification of the appointment of the arbitrator; or
 - becomes aware of the circumstances giving rise to the challenge.
- The challenge must be in writing and state with specificity the reasons for the challenge.
- The challenge must be sent to CPR, the tribunal and the other party. If the appointment was made under the screened selection process, the challenge is sent to CPR and the other party, but not the tribunal. Under the screened selection process, CPR presents the tribunal with a redacted challenge for comments to screen the arbitrators from knowing which party challenged.

CPR follows the Challenge Protocol.

Once the challenge is submitted:

- The challenged arbitrator may voluntarily withdraw.
- The arbitrator is removed if both parties agree.
- If there is no agreed disqualification or voluntary withdrawal, CPR gathers comments from the other party and the tribunal and follows the Challenge Protocol to determine the outcome of the challenge.

Replacements

An arbitrator is replaced if the arbitrator:

- Dies.
- Resigns.
- Is successfully challenged.
- Fails to act or is prevented from duly performing the functions of an arbitrator. If the parties do not agree on whether the arbitrator has failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination.

The new arbitrator is appointed under the same procedure used to select the replaced arbitrator. If the arbitrator being replaced was party-designated, that party may choose a new arbitrator. If it fails to notify the tribunal and the other party of the substitute designation within 20 days of when it becomes aware of the opening, CPR appoints the substitute arbitrator.

(Rules 7.9 and 7.10.)

If it is a sole arbitrator or tribunal chair that is replaced, it is up to the newly appointed person to decide what must be repeated in the arbitral process. If a wing arbitrator is replaced, the tribunal then decides together what must be repeated.

If an arbitrator on a three-person tribunal fails to participate, the remaining two arbitrators can decide to continue and finish the arbitration without the third person, unless the parties agree otherwise. If they choose not to continue, a replacement is chosen as described above. In making this decision, the arbitrators consider:

- The stage of the arbitration.
- The reason, if any, expressed by the third arbitrator for this non-participation.
- Other matters they consider appropriate in the circumstances of the case

(Rules 7.11 and 7.12.)

Arbitrator Rates

The rates of CPR's neutrals are subject to a reasonable basis standard and vary by region, expertise and reputation. Neutrals disclose their rates up front during the query process of each case, so that parties may take this into consideration when selecting arbitrators.

JURISDICTIONAL ISSUES

The Power of the Arbitrators

It is a general principle of international arbitration law in most New York Convention countries that an arbitral panel has the power to decide its own jurisdiction. However, this is not necessarily the case for arbitrations seated in the US. US courts have held that unless the parties have granted the arbitrators the power to decide their own jurisdiction by "clear and unmistakable evidence," that power lies with the courts. (*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, at 945 (1995)).

What constitutes clear and unmistakable evidence varies significantly by US jurisdiction (see *Practice Note, Choosing an Arbitral Seat in the US: Threshold Issues* (<http://us.practicallaw.com/1-501-0913>)). Lower courts have varied on whether adopting Rules containing the kompetenz-kompetenz principle (under which the arbitrators have the power to determine their own jurisdiction) is sufficient. Parties are urged to consult the law of the arbitral seat or to include a provision in the arbitration clause regarding delegation to the tribunal.

Under the CPR Rules, the tribunal has the power to hear and determine all challenges to its jurisdiction. This includes any objections regarding the existence, scope or validity of the arbitration agreement or of the contract of which an arbitration clause forms a part (*Rule 8.1*).

When to Raise Objections

Objections to the jurisdiction of the arbitrators or to the arbitrability of a claim must be submitted no later than the filing of the answering statement to the claim or counterclaim giving rise to the objection (see *Challenges*). Any challenges to tribunal jurisdiction (except those based on the award itself) must be made no later than the notice of defense or if there is a counterclaim, the reply to the counterclaim (*Rule 8.3*). The arbitrators may rule on objections either as a preliminary matter or as part of the final award.

PROCEDURE

The CPR Rules give both the parties and the arbitrators broad discretion to shape and alter the arbitration procedure. The CPR Rules make few mandates, and the parties may usually deviate from the Rules by contract provisions or agreement.

PRE-HEARING PROCEDURES

Beyond a mandated *pre-hearing conference*, the CPR Rules require few pre-hearing procedures. They give the arbitrators and parties wide discretion to shape the procedures to fit the needs of their individual circumstances. Any procedures the contract or arbitration agreement mandate control the proceedings.

Pre-hearing Conference

Promptly after its constitution, the tribunal is required to hold an initial pre-hearing conference with the parties for the planning and scheduling of the proceedings. The Rules suggests that during the conference the tribunal consider all elements of the arbitration, including:

- Procedural matters:
 - bifurcation and/or consolidation of issues;
 - scheduling of conferences and hearings;
 - scheduling of pre-hearing memoranda;
 - need for and costs of translation;
 - need for and type of record, including transcripts;
 - amount of time allotted to each party for presentation of its case and rebuttal;
 - mode, manner and order for presenting evidence;
 - need for expert witnesses and how expert testimony should be presented; and

- need for any on-site inspection by the tribunal.
- Early identification and narrowing of the issues in the arbitration, including the possibility of early disposition of issues in accordance with the CPR Guidelines on Early Disposition of Issues in Arbitration.
- Stipulations of fact.
- Appointment of a neutral expert by the tribunal.
- Settlement negotiations, with or without the assistance of a mediator.
- Hearing locale.

(*Rule 9.*)

In connection with the pre-hearing conference, especially where experts may be required, parties and the tribunal should consult the CPR Guidelines for Arbitrators Conducting Complex Arbitrations and the CPR Protocol on Determination of Damages in Arbitration.

After the initial pre-hearing conference, any further conferences may be held as the tribunal deems necessary.

Applicable Law

The CPR Rules provide that the tribunal must apply the substantive law or rules of law the parties chose in the contract (*Rule 10.1*). 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 (*Rule 10.3*). This broad grant of authority is sufficient to grant the tribunal the power to award punitive damages in an appropriate case (see *Practice Note, Punitive Damages in US Arbitration: Authority of Arbitrators* (<http://us.practicallaw.com/w-000-1641>)).

If the parties wish to preclude the arbitrators from awarding punitive damages, they must include a provision to that effect in the arbitration 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."

Discovery

The tribunal may require and facilitate discovery as it deems appropriate under the circumstances, taking into account the parties' needs and the desirability of making disclosure quick and cost-effective. The tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed during the course of the arbitration.

(*Rule 11.*)

In shaping discovery, parties and their counsel may wish to consult the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

HEARING

To prepare for the arbitration hearing, parties should assemble all documents that are likely necessary at the hearing, as well as duplicates for the other parties and arbitrators, as early as practicable. A party's witnesses should be interviewed and where permissible, briefed on the issues on which they are likely to be cross-examined. Witnesses from the other side who are candidates for cross-examination should be identified. Determine early on which witnesses to cross-examine.

The laws of some jurisdictions, including those of many US states, authorize the arbitrators or other persons to subpoena documents and witnesses. Parties should consider whether subpoenas may be necessary and take steps to ensure compliance with local laws. The tribunal's powers concerning subpoenas are determined by applicable law and are not dealt with specifically in the Rules (see *Practice Notes, Choosing an Arbitral Seat in the US: Courts' Ability to Aid and Intervene in an Arbitration: Disclosure* (<http://us.practicallaw.com/1-501-0913>) and *Compelling Evidence from Non-parties in Arbitration in the US* (<http://us.practicallaw.com/1-586-9513>)).

The tribunal determines the manner in which the parties present their cases. The presentation of each party's case generally includes the submission of a pre-hearing memorandum that includes the following elements:

- Facts.
- Statement of each claim being asserted.
- Applicable law.
- Relief requested.
- Summary of evidence to be presented, including the basis for any damages claimed.

A hearing can be held at the request of any party or if the tribunal decides to hold one.

The tribunal determines whether testimony is presented in written or oral form. The tribunal is not required to apply the rules of evidence used in judicial proceedings and determines the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered. The tribunal may appoint neutral experts.

(Rule 12.)

Post-hearing Submissions

The Rules do not automatically require the submission of post-hearing briefs, but the tribunal may order the submission of briefs. Final oral argument may also be scheduled, either at the conclusion of the hearing or at a later date.

AWARD

The tribunal may make final, interim, interlocutory and partial orders and awards. When the tribunal makes an interim, interlocutory or partial award, it may state in its award whether it views it as final for purposes of any judicial proceedings in connection with that award. All awards must be reasoned and in writing. They are deemed to be made at the seat of the arbitration and must be dated.

The tribunal must submit a draft of the award for review to CPR. The review performed by CPR is limited to format, clerical, typographical or computational errors. CPR can suggest to the tribunal to correct any errors of this nature that it finds before the award is executed by the tribunal and delivered by CPR. The final award should in most circumstances be rendered within 12 months of the constitution of the tribunal. The tribunal and CPR are to use their best efforts to comply with this time requirement. CPR must approve any scheduling orders or extensions that may result in the final award being rendered more than 12 months after the constitution of the tribunal. CPR has the discretion to convene a call with the parties and arbitrators to discuss factors relevant to the request. An arbitrator who does not join in an award may issue a dissenting opinion, but that opinion does not constitute part of the award.

(Rule 15.)

COSTS AND FEES

CPR has a published fee schedule. CPR reserves the right to change this schedule at any time. Moreover, under Rule 18.1, CPR reserves the right in special circumstances to adjust the Administrative Fee based on developments in the proceeding.

Final awards must include a determination of fees, expenses and compensation, apportioned among the parties as the arbitrators deem appropriate. These fees include:

- The fees and expenses of the tribunal members.
- Costs of expert advice and other assistance engaged by the tribunal.
- Witness travel, translation and other expenses, if the tribunal deems it appropriate.
- Costs for legal representation, assistance and experts incurred by a party if the tribunal deems it appropriate.
- CPR's Administrative Fee.
- Transcript costs.
- Meeting and hearing facilities costs.

(Rule 19.)

The tribunal may also award interest at a rate and from a date as is appropriate taking into consideration the contract and applicable law (Rule 10.6).

MODIFICATION AND CLARIFICATION

Within 15 days of the receipt of the award, either party can request the tribunal to:

- Clarify the award.
- Correct any clerical, typographical or computational errors in the award
- Make an additional award for claims or counterclaims presented in the arbitration but not determined in the award

The tribunal has 30 days from the date of the request to clarify or correct the award or to submit an additional award for review to CPR. The award is then final and binding on the parties.

(Rule 15.6.)

OPTIONAL ARBITRATION APPEAL PROCEDURE

The Optional Arbitration Appeal Procedure provides for an optional high-level review of an arbitral award through a standardized appellate arbitration procedure. It is available to parties who have agreed or stipulated to its use.

INITIATING THE APPEAL

To initiate an appeal, a party must send a Notice of Appeal to the opposing party and CPR within 30 days of the date when it received the underlying award. The Notice of Appeal must include:

- The elements of the original award that are being appealed.
- The basis for the appeal.
- Portions of the record of proceedings that the appellant deems relevant to the appeal.
- A statement setting forth portion(s) of the original award being appealed and the errors alleged.

(*Appeal Procedure Rule 2.1*.)

THE APPEAL TRIBUNAL

Three appellate arbitrators are appointed from CPR's Appeal tribunal (consisting primarily of former federal judges, Appeal Procedure Rule 1.2) unless the parties agree to a single appellate arbitrator (*Appeal Procedure Rule 4.1*).

APPELLATE PROCESS

Once an appeal has been timely noticed, the underlying award is no longer final for purposes of seeking relief from a court. If the appellate tribunal affirms the award, it is deemed final as of the date of the affirmance. If the appellate tribunal does not affirm the award, the award on appeal is deemed the final arbitration award instead of the underlying award. If the appeal is withdrawn for any reason (other than a settlement), the underlying award is deemed final as of the date of withdrawal. (*Appeal Procedure Rule 2.3*.)

STANDARD ON APPEAL

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 Federal Arbitration Act (FAA) (*9 U.S.C. § 10*). Moreover, an unsuccessful appellant must reimburse the appellee's legal fees and other costs of the appeal, unless the appellate tribunal orders otherwise. The appellate tribunal may modify or set aside the original award but only if the award either:

- Contains material and prejudicial errors of law that lack any appropriate legal basis.
- Is based on factual findings clearly unsupported by the record.
- Is subject to one or more of the grounds set forth in Section 10 of the FAA for vacating an award.

(*Appeal Procedure Rule 8.2 (a) and (b)*.)

APPELLATE DECISIONS

The appellate panel may approve, reverse or modify an award (*Appeal Procedure Rule 8.2 and 8.3*).

MODEL CLAUSES

The following is a sample pre-dispute clause providing for administered arbitration:

"Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by [A SOLE ARBITRATOR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE APPOINTED BY CPR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE DESIGNATED BY THE TWO PARTY-APPOINTED ARBITRATORS] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE IN ACCORDANCE WITH THE SCREENED APPOINTMENT PROCEDURE PROVIDED IN RULE 5.4] [THREE ARBITRATORS, NONE OF WHOM SHALL BE DESIGNATED BY EITHER PARTY]. [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.] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be [CITY, STATE]."

The following is a sample agreement to submit an existing dispute to administered arbitration:

"We, the undersigned parties, hereby agree to submit to arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") the following dispute:

[DESCRIBE BRIEFLY]

We further agree that the above dispute shall be submitted to [A SOLE ARBITRATOR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE APPOINTED BY CPR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE DESIGNATED BY THE TWO PARTY-APPOINTED ARBITRATORS] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE IN ACCORDANCE WITH THE SCREENED APPOINTMENT PROCEDURE PROVIDED IN RULE 5.4] [THREE ARBITRATORS, NONE OF WHOM SHALL BE DESIGNATED BY EITHER PARTY]. We further agree that we shall faithfully observe this agreement and the Administered Rules and that we shall abide by and perform any award rendered by the arbitrator(s). [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.] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [CITY, STATE]."

The following is a sample pre-dispute multi-step clause providing for administered arbitration:

"Negotiation Between Executives (A) The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [AGREEMENT / CONTRACT] promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any person shall give the other party written notice of any dispute not resolved in the normal course of business. Within [15] days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within [30] days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

Mediation (B) If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [OR IF THE PARTIES FAILED TO MEET WITHIN [20] DAYS,] the parties shall endeavor to settle the dispute by mediation under the International Institute for Conflict Prevention & Resolution ("CPR") Mediation Procedure [currently in effect OR in effect on the date of this Agreement], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the [45 day] period.

Arbitration (C) Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by [A SOLE ARBITRATOR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE APPOINTED BY CPR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE DESIGNATED BY THE TWO PARTY-APPOINTED ARBITRATORS] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE IN ACCORDANCE WITH THE SCREENED APPOINTMENT PROCEDURE PROVIDED IN RULE 5.4] [THREE ARBITRATORS, NONE OF WHOM SHALL BE DESIGNATED BY EITHER PARTY]. [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.] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be [CITY, STATE]."

The following is a sample pre-dispute clause providing for administered arbitration with an appeal:

"Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administered Arbitration (the "Administered Rules" or "Rules") by [A SOLE ARBITRATOR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE APPOINTED BY CPR] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE, WITH THE THIRD ARBITRATOR TO BE DESIGNATED BY THE TWO PARTY-APPOINTED ARBITRATORS] [THREE ARBITRATORS, OF WHOM EACH PARTY SHALL DESIGNATE ONE IN ACCORDANCE WITH THE SCREENED APPOINTMENT PROCEDURE PROVIDED IN RULE 5.4] [THREE ARBITRATORS, NONE OF WHOM SHALL BE DESIGNATED BY EITHER PARTY]. [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.] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be [CITY, STATE].

An appeal may be taken under the CPR Arbitration Appeal Procedure from any final award of an arbitral panel in any arbitration arising out of or related to this agreement that is conducted in accordance with the requirements of such Appeal Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration."

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at practicallaw.com. For more information or to schedule training, call **888.529.6397** or e-mail training.practicallaw@thomsonreuters.com.