

## Administered ARBITRATION RULES

### General Commentary for CPR Administered Arbitration Rules

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

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

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

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

The International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Administered Arbitration (the “Administered Rules” or “Rules”) (Eff. July 1, 2013) were developed by CPR to provide procedures to facilitate the conduct of administered arbitration fairly, expeditiously and economically. The Rules are designed to be easily comprehended. The Rules are intended, in particular, for complex cases, but are suitable regardless of the complexity of the 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 which tend to go hand in hand. The Rules were designed with each of these objectives in mind.

The complexity of cases will vary greatly. In rules of general application, it is not appropriate to fix hard and fast deadlines. Rule 15.8 (a) commits the parties and the arbitrator(s) to use their best efforts to assure that the dispute will be submitted to the Tribunal for decision within six months after the initial pre-hearing conference, and that the final award will be submitted to CPR within 30 days after the close of the hearing. Rule 15.8(b) provides that CPR must approve any scheduling orders or extensions that would result in a final award being rendered more than 12 months after the initial pre-hearing conference. Rule 9.2 empowers the arbitrator(s) to establish time limits for each phase of the proceeding, including specifically the time allotted to each party for presentation of its case and for rebuttal.

Counsel are expected to cooperate fully with the Tribunal and with each other to assure that the proceeding will be conducted with civility in an efficient, expeditious and economical manner. Rule 19.2 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.

## **Types of Disputes**

The Rules are designed to encompass disputes of any nature, including, for example, commercial disputes, construction disputes, disputes between manufacturers and distributors or franchisees, insurance disputes and disputes between joint venturers. The Rules may also be adopted by parties that do not have a contractual or other business relationship. The Rules may even be employed to adjudicate a dispute between a government agency and a private entity, subject to any legal restraints on that government's submission to arbitration. The parties may find it appropriate to modify the Rules to adapt the Rules to a specific type of dispute.

While most arbitrations involve two parties, the Rules are also suitable for proceedings among three or more parties. References to "Claimant," "Respondent" and "other party" should be construed to encompass multiple Claimants, Respondents or other parties in such multi-party proceedings. Where necessary, the Rules specifically address particular issues raised in the multiparty context. For example, Rule 5.5 deals with the constitution of the Tribunal where the arbitration agreement entitles each party to appoint an arbitrator when there is more than one Claimant or Respondent to the dispute.

## **Administered vs. Non-Administered Arbitration**

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

- providing a set of rules which the parties can adopt in a pre-dispute agreement or for an existing dispute;
- providing staff to render services required for case handling;
- providing lists of persons from which arbitrators may be chosen;
- appointing the arbitrator(s) if necessary;
- deciding arbitrator conflict of interest challenges if necessary;
- coordinating billing for arbitrator fees and expenses; and
- conducting limited review of awards.

The charges of administering organizations typically are related to the amount in dispute, but rates vary. Many arbitration practitioners and arbitrators see a need for administered arbitration, but others favor non-administered or "ad hoc" arbitration. Whether an administered or ad hoc process is used depends on a range of factors, including sophistication of parties and counsel, and administrative fees charged.

Since the release of its first set of CPR Rules for Non-Administered Arbitration, CPR has offered party-administered or ad hoc arbitrations as opposed to institutionally administered proceedings. This stance has been based upon CPR's confidence in the users of ADR to manage the process with the arbitrator. However, CPR has always been available to assist parties at certain junctures in the arbitration, such as, the arbitrator selection phase and has administered proceedings upon request. Over the decades, CPR has continually added to its assisted arbitration services as disputes have become more complex, parties more adversarial and counsel more diverse. The natural culmination of the ongoing and increasing demand for CPR's assistance is the release of the CPR Administered Arbitration Rules to better serve the users of arbitration.

A vast majority of arbitrations take place pursuant to the parties' binding commitment in their business agreement to submit possible future disputes to arbitration in accordance with specified rules. Once a dispute has arisen, it is usually much more difficult for the parties to agree on any alternative to litigation. CPR recommends the inclusion of a dispute resolution clause in most business agreements. Parties should also consider whether to provide for administered or non-administered arbitration.

## **Salient Features of the Administered Rules**

The CPR Administered Rules differ in numerous respects from other organizations' administered arbitration rules, particularly as outlined below:

1. The administered portions of the arbitration are only for those areas where parties need assistance from an administering organization and no more. The Rules themselves are built upon CPR's experience with ad hoc/self-administered arbitration and incorporate CPR knowledge about where and how parties, counsel and arbitrators need assistance during the process.
2. Experienced attorneys on CPR staff will be involved in the "administrative" tasks.
3. The Rules require the expeditious conduct of the proceeding, empowering the arbitrator(s) to establish time limits for each phase of the proceeding (Rule 9.2), and to penalize a party engaging in dilatory tactics (*see* Rule 19.2).
4. All arbitrators, including those appointed by either party, are required to be independent and impartial (Rule 7.1). Such a requirement enhances the integrity of the arbitration process. Rule 5.4 offers parties, as an option, a "screened" procedure for selecting party-appointed arbitrators without the arbitrators knowing which party appointed them, thereby even further enhancing the integrity of the process .
5. The parties are given ample opportunity to select a sole arbitrator or a panel of three arbitrators with CPR's role limited to querying candidates for their availability and requesting disclosures about circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality. If parties do not want to jointly select arbitrators, or cannot do so, either party may request CPR's assistance (Rule 6.1). CPR will jointly convene the parties by telephone to discuss the selection and thereafter provide lists of candidates from the CPR Panels for ranking (Rule 6.2).
6. The Tribunal may decide challenges to its jurisdiction (Rule 8). This should allow arbitrators to decide all issues, including arbitrability questions, without the necessity for court intervention.
7. The chair of the Tribunal is assigned responsibility for the organization of conferences and hearings and arrangements with respect to the functioning of the Tribunal (Rule 9.1).
8. The Tribunal is required to hold at least one pre-hearing conference to plan and schedule the proceeding (Rule 9.3). The chair shall keep CPR informed of such arrangements throughout the proceedings. The pre-hearing conference should result in the smooth scheduling of the case, and may aid possible settlement.
9. The Tribunal is required to apply the substantive law chosen by the parties to govern the merits of their dispute (Rule 10.1). The Tribunal is also specifically empowered to grant any remedy, including specific performance and injunctive relief, within the scope of the parties' agreement and permissible under applicable law (Rule 10.3).
10. The Tribunal is given great leeway in matters of procedure. The Tribunal is specifically empowered, for instance, to:
  - establish time limits for each phase of the proceeding (Rule 9.2);
  - limit the time allotted to each party for presentation of its case (Rule 9.2);
  - make pre-hearing orders (Rule 9.4);

- require such discovery as it deems appropriate (Rule 11);
- require the submission of pre-hearing memoranda (Rules 9.4 and 12.1);
- require evidence to be presented in written or oral form (Rule 12.2).

11. The Tribunal is empowered to appoint neutral experts (Rule 12.3).

12. The Tribunal may take interim measures as it deems necessary, including for the preservation of assets (Rule 13.1).

13. Unless the parties agree otherwise, the Rules set forth a procedure for applications for interim relief to a Special Arbitrator appointed prior to the constitution of the Arbitral Tribunal (Rule 14).

14. The Tribunal is required to state the reasoning on which its award rests unless the parties agree otherwise (Rule 15.2). CPR believes the parties are entitled to know how the decision was reached. The requirement that the award be reasoned also discourages any tendency for arbitrators to “split-the-baby” without a principled basis for doing so.

15. Each arbitrator is to be fully compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator (Rule 17.1).

16. The Tribunal is empowered to apportion costs, including attorneys’ fees and other costs incurred by the parties, between the parties, taking into account the circumstances of the case, the conduct of the parties during the proceeding and the result (Rule 19.2).

17. The proceedings are confidential, with limited exceptions (Rule 21).

18. The Tribunal may suggest at any time that the parties explore settlement (Rule 21.1).

19. The Tribunal may arrange for mediation of the dispute at any time with the consent of the parties (Rule 21.2).

20. The Rules are intended primarily for disputes between responsible parties who will not attempt to obstruct the process. However, the Rules do permit the process to go forward even if a Respondent fails to deliver a notice of defense, fails to participate in selection of the Tribunal, or ultimately fails to appear at a hearing. (See Rules 3, 6 and 16).

## **COMMENTARY ON STANDARD CONTRACTUAL PROVISIONS**

CPR recommends that in most instances, business agreements include a multistep ADR scheme with three sequential stages of dispute resolution:

- (i) a Negotiation Phase between executives with decisionmaking authority who are at a higher level than the personnel involved in the dispute;
  - (ii) a Mediation Phase to facilitate settlement by employing a skilled neutral, not to impose a solution, but to assist the parties in reaching agreement; and
  - (iii) a Final Binding Arbitration Phase in case the non-binding phases produce no settlement, or, Litigation if the non-binding phases produce no settlement and private binding arbitration is not selected. See CPR’s website for sample clauses ([www.cpradr.org](http://www.cpradr.org)).

The suggested standard pre-dispute clause and submission agreement which precede the Rules may be modified or supplemented. It is desirable that the parties specify the number of arbitrators and the place of arbitration. The governing law should also be specified, preferably in a separate section. If a governing law is specified, it may be advisable to state whether or not the conflict of laws rules of that law are included. Drafters may also wish to consult the CPR Protocol on Disclosure of Documents and Presentations of Witnesses in Commercial Arbitration.

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

- **Sole Arbitrator**
  - **Option One:** Sole arbitrator jointly designated by the parties. If the parties are unable to agree, CPR makes the appointment using a list process with parties' participation.
  - **Option Two:** Sole arbitrator selected by CPR using a list process with the parties' participation.
  
- **Three Arbitrators**
  - **Option One:** Each party designates one arbitrator and the two appointed arbitrators designate the Chair. If parties are unable to agree on a Chair, CPR makes the appointment using a list process with the parties' participation.
  - **Option Two:** Each party designates one arbitrator and the Chair is appointed by CPR using a list process with the parties' participation (also Default Rule).
  - **Option Three:** Each party designates an arbitrator, however, arbitrator does not know which party selected them – the screened procedure. Chair appointed by CPR using a list process with parties' participation.
  - **Option Four:** All three arbitrators jointly selected by the parties. If parties are unable to agree, CPR makes the appointment using a list process with the parties' participation.
  - **Option Five:** All three arbitrators selected by CPR using a list process with the parties' participation.

Such an election made in a pre-dispute clause may be changed by further agreement once a specific dispute has arisen. If the parties fail to make an election, the party-appointed model where each party appoints an arbitrator and the Chair is appointed by CPR using a list process with the parties' participation is the default rule. (Rules 5 and 6 govern the selection of arbitrators.) The parties may also elect, through the pre-dispute clause, to opt out of the Special Arbitrator procedure established by Rule 14. If the parties do not expressly opt out of that procedure, it shall be deemed part of any arbitration clause or agreement entered on or after November 1, 2007, where parties agree to arbitrate under the CPR Rules.

Pursuant to *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248 (1989) and its progeny, CPR has inserted language in the standard pre-dispute clause and submission agreement to the effect that the arbitration shall be governed by the Federal Arbitration Act. If parties choose to use a different law, or in the rare event that the federal law does not apply (where, for example, the underlying transaction is not "in commerce"), another law should be specified. It is essential for the parties to stipulate that judgment may be entered upon the award, in order to comply with the requirement of the Federal Arbitration Act, 9 U.S.C. §9.

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. 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.”*

**Appeals** – Parties wishing to authorize an appeal to the CPR Arbitration Appeal Tribunal under the CPR Arbitration Appeal Procedure should include the following language in their arbitration clauses or post-dispute arbitration agreement:

*“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 Procedure. Unless otherwise agreed by the parties and the appeal tribunal, the appeal shall be conducted at the place of the original arbitration.”*

## **COMMENTARY ON INDIVIDUAL RULES**

### **A. General and Introductory Administered Rules**

#### **Rule 3. Commencement of Arbitration**

Rule 3 sets forth the procedure to be followed when a proceeding is commenced pursuant to a pre-dispute arbitration clause. 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.

#### **Rule 4. Representation**

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

Under the laws of certain jurisdictions, representation of a party in an arbitration proceeding may constitute the practice of law, in which case representation by an attorney would be required. If the parties are represented by legal counsel, such counsel need not be a member of the local bar at the seat of the arbitration unless local law or regulation at the seat of the arbitration so requires.

## **B. Rules with Respect to the Tribunal**

### **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 appointed by the parties and a third arbitrator who shall chair the Tribunal, unless the parties have agreed on a Tribunal consisting of a sole arbitrator or three arbitrators not appointed by the parties.

Rule 5.4 presents a 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 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. 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 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 experienced in arbitration.

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

Sophisticated counsel representing the parties are likely to know of individuals, especially of attorneys, who are well qualified and who meet the “independent and impartial” standard of Rule 7.1. CPR has established panels of leading members of the bar, including former judges, who are highly qualified to serve as arbitrators, in its CPR Panels of Distinguished Neutrals (“CPR Panels”). CPR’s lists of panelists are available to members on the CPR website ([www.cpradr.org](http://www.cpradr.org)) or upon request from CPR, and panel members may be contacted directly.

Unless parties otherwise agree, Rule 5.1 requires that any arbitrator, not appointed by a party, shall be a member of the CPR Panels.

It should be noted that scheduling hearings on dates on which all three arbitrators 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 multi-party 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.

### **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 in writing. The parties are required to rank the nominees in order of preference. The nominee(s) willing to serve for whom the parties collectively have indicated the highest preference will be selected. 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. 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.

### **Rule 7. Qualifications, Challenges and Replacement of Arbitrators**

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

The rationale for party appointment is to enable each party to select an individual it considers well qualified. A party may not have *ex parte* communications relating to the case (other than of a purely ministerial nature) with any arbitrator or arbitrator candidate, except that a party may discuss the case in general terms with an individual before appointment to determine his or her suitability and availability to serve as arbitrator, and may confer with its appointee regarding the selection of the chair of the Tribunal (Rule 7.4). No *ex parte* communications whatsoever are allowed with arbitrators or arbitrator candidates who have been or may be designated pursuant to the screened selection procedure of Rule 5.4.

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

Rules 7.3 and 7.5 - 7.8 set forth a formal procedure for disclosure of "circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality," and for a challenge for "justifiable doubt," after the Tribunal has been constituted. It is anticipated that normally an individual's possible conflicts of



interest would be disclosed and resolved before selection, and that it would rarely become necessary to invoke the formal procedure.

In general, CPR believes all arbitrators should be held to high ethical standards and urges arbitrators to consult any potentially applicable ethical rules at the place of arbitration or elsewhere, as well as appropriate codes and guidelines. In that connection, CPR endorses the Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA 2004) to the extent not inconsistent with the CPR Rules.

If an arbitrator is formally challenged by a party, Rule 7.8 provides that CPR will decide the challenge in accordance with the CPR Challenge Protocol (excluding its fee requirement) after providing the challenged arbitrator, the other members of the Tribunal and the non-challenging party with an opportunity to comment on the challenge. The CPR Challenge Protocol provides that challenges are decided by a designated Challenge Officer within CPR or, where appropriate in light of the difficulty, complexity or other relevant factors, by a Challenge Review Committee consisting of three members drawn from a CPR Challenge Review Board of CPR Panelists. For further information on the CPR Challenge Protocol, *see* [www.cpradr.org](http://www.cpradr.org).

Decisions on challenges will be made and communicated to the parties and Tribunal expeditiously. The basis and reasons underlying the decision, however, are not communicated to the parties or the Tribunal, consistent with the confidential and administrative nature of the decision and the desire to avoid or minimize interlocutory proceedings in the courts.

Rules 7.9 - 7.11 provide for the event that an arbitrator must be replaced due to a successful challenge, resignation, failure to act, or death. In that event, a substitute arbitrator is selected pursuant to the procedure by which the arbitrator being replaced was selected. In recognition of the (usually slight) risk that party-appointed arbitrators might resign to delay the proceedings, the Rules are designed to minimize the impact of such tactics. Rule 7.9 allows the party that appointed the resigning arbitrator only 20 days to appoint a replacement, after which CPR is empowered to make the appointment. Moreover, under Rule 7.11, the remaining majority of the Tribunal have discretion not to repeat any previously held hearings once the substitute arbitrator is appointed.

Rule 7.12 provides that two arbitrators of a three member Tribunal have the power to continue arbitral proceedings and issue an award, notwithstanding any failure by the third arbitrator to participate, if the two arbitrators deem it appropriate to do so. This rule is designed to ensure the efficient conduct of the proceedings and protect the enforceability of an award rendered by two arbitrators from any later challenges.

## **Rule 8. Challenges to the Jurisdiction of the Tribunal**

This Rule expresses the generally accepted principle that arbitrator(s) have the competence initially to determine their own jurisdiction, 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 decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995).

The arbitrator(s) will decide whether the arbitration proceeds in the face of a jurisdictional challenge.

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

### **Rule 9. General Provisions**

Under Rule 9.1, the 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.

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 CPR Guidelines for Arbitrators Conducting Complex Arbitrations at

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

The Rules give the Tribunal wide latitude as to the manner in which the proceeding will be conducted. It is expected that the procedure will be determined in large part during the pre-hearing conference(s) held pursuant to Rule 9.3 and that following the conference(s) the Tribunal will issue a schedule or the conduct of the arbitration. The pre-hearing 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 pre-hearing 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 CPR Guidelines on Early Disposition of Issues in Arbitration

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

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 pre-hearing conference.

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 options not available to a judge or to arbitrators.

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.

A pre-hearing 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.

## **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.

*Punitive Damages* – 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.

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.”*

The Tribunal and counsel should consult CPR Protocol on Damages in Arbitration at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/704/CPR-Protocol-on-Determination-of-Damages-in-Arbitration.aspx>.

## **Rule 11. Discovery**

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 discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need. Rule 12.2 provides for the application of the attorney-client privilege and the work product immunity. That protection is intended to apply to discovery as well as to hearings.

It is desirable for the parties’ counsel to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval. Counsel should consult CPR’s Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx>.

A party may encounter difficulties if it needs to secure documents or testimony from an uncooperative third party. The arbitrators may well be of assistance in such a situation through the exercise of their subpoena power or in other ways. If the third party’s location is beyond subpoena range, holding a hearing at that location may be an option. Applicable law should be reviewed to assess whether arbitrators also have the power to issue enforceable subpoenas to third parties to obtain prehearing discovery.

## **Rule 12. Evidence and Hearings**

The Rules do not establish a detailed mandatory hearing procedure but permit the Tribunal to determine the procedure. At least the main features should be established during the pre-hearing conference(s). The Tribunal need not apply rules of evidence used in judicial proceedings, except that the Tribunal is required to apply the attorney-client privilege and the work product immunity when it determines that the same are applicable (Rule 12.2).

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. Affidavits 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 at <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 pre-hearing conference the imposition of time limits on case presentation, as authorized by Rule 9.2. If necessary, any such limits can be extended. The Rules do not provide specifically for the notice the parties are to be given of hearing dates and times. It is assumed that the Tribunal will give notice in such form and with such lead time as is reasonable under the circumstances.

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

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 pre-hearing conference, to agree on the joint appointment of a neutral expert.

The Rules do not automatically require the submission of post-hearing briefs, but the Tribunal may order the submission of such briefs. 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 are determined by applicable law and are not dealt with specifically in the Rules.

## **Rule 14. Interim Measures of Protection by a Special Arbitrator**

Rule 14 establishes 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. 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.

Rule 14.12 provides that a request for interim relief by a party to a court shall not be deemed incompatible with the agreement to arbitrate. However, this provision is not intended to permit a party to seek relief in one forum if it is denied elsewhere.

### **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.

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.

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 pre-hearing conference, and for the Tribunal to submit the final award to CPR within 30 days after the close of the hearing. CPR shall conduct a prompt limited review of the award as provided under Rule 15.4 and thereafter render the award to the parties promptly.

The Rules do not deal expressly with confirmation of an award, as the matter is covered by the Federal Arbitration Act and its state counterparts. 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, which is available on the CPR website ([www.cpradr.org](http://www.cpradr.org)) or upon request from CPR.

### **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.

#### **D. 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 agreed to between the appointees and 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. The "costs of arbitration" enumerated in Rule 19.1 include the costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate.

In accordance with Rule 19.2, unless the parties otherwise agreed, the Tribunal may apportion the costs of arbitration between the parties "in such manner as it deems reasonable taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration." The arbitrator(s) may take into account tactics by either party that unreasonably interfered with the expeditious conduct of the proceeding.

CPR Administrative Fees are set forth in the Schedule of Administered Arbitration Costs available on the CPR website at [www.cpradr.org](http://www.cpradr.org) and are payable as set out in Rule 18. The parties are jointly and severally liable to CPR for such fees. CPR reserves the right to adjust such fee based on developments in the proceeding.

#### **E. 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. 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.