



## **A Guide for Commercial Arbitrators**

Every year, thousands of busy members of the business community put aside their own concerns for a day or two to act as arbitrators of commercial controversies. They sit as private judges, selected by the parties to the dispute. The awards that they render are binding and enforceable.

Arbitrators come from many occupations, but all have this in common: they are experts in their own fields, they are known for their good judgment, they are respected for their fairness, and they are honored for putting time and talent at the disposal of others without thought of personal gain. The arbitrator's service is appreciated because the prompt and knowledgeable determination of disputes encourages good business relations and relieves the courts.

## **What It Takes to Be a Good Arbitrator**

The arbitrator should be a person of integrity, sound judgment, and specialized knowledge. He or she must be able to decide cases in accordance with the contractual agreement of the parties and the applicable rules of procedure.

The purpose of this guide is to supplement the arbitrator's substantive qualifications with helpful information about arbitration procedure and how to effectively manage and control it.

## **The Nature of the Arbitrator's Office**

The arbitrator is expected to decide the issues presented. Under prevailing arbitration laws, courts will not review awards (arbitrators' decisions) on their merits. This has long been a settled principle in the relationship between arbitration and the law.

Federal and state laws apply to agreements to arbitrate and to arbitrators' awards. The enforceability of an award could depend how the hearings were conducted. If the arbitrator has acted in accordance with the agreement of the parties and the applicable rules of the American Arbitration Association, the award will meet the standards prescribed by law.

## **The Importance of Impartiality**

An arbitrator should have no interest, financial or otherwise, in the outcome of the case. This is set forth in Section 19 of the Commercial Arbitration Rules.

If you discover, upon being asked to serve, some prior or present business connection with one of the parties and the contact is so close as to be disqualifying, you should decline to serve. Not every business relationship casts doubt on an arbitrator's impartiality. Often, it is enough for an arbitrator to disclose the connection before accepting the appointment. Arbitrators are advised, whenever a question as to such potentially disqualifying information arises, *to err in favor of disclosing it to the parties.*



When parties and their witnesses assemble in the hearing room, you might recall for the first time an association with a person involved. Prompt disclosure gives the parties an opportunity to waive their objections. If this happens, you should stop the proceedings and contact the AAA representative. Such a waiver will bar any subsequent objection to the award on grounds of bias.

An arbitrator is on safest ground when communications with the parties are avoided except in the presence of both parties. The arbitrator should decline luncheon invitations and avoid similar unilateral contacts during the pendency of the case.

Arbitrators must be impartial in both fact and appearance. You should be careful not to comment unfavorably about any party or witness. Feelings about the merits of a case should not be disclosed by an arbitrator. As an arbitrator, you do, however, have the responsibility to determine the relevance and materiality of any evidence or proof offered. You also have the discretion, in the interest of conducting the arbitration proceeding expeditiously, not to receive irrelevant, immaterial, or unnecessarily repetitive proof.

Occasionally, a neutral arbitrator will serve on a case with arbitrators appointed by the parties. For example, a panel might be composed of an arbitrator appointed by the claimant, an arbitrator appointed by the respondent, and the neutral arbitrator.

It is recommended that the neutral arbitrator ascertain from the party-appointed arbitrators the nature and extent of any relationship between that arbitrator and the party that appointed the arbitrator, and whether there will be any direct communication between such arbitrators and the parties that appointed them.

### **Updating Your Biographical Information**

While the AAA endeavors to conduct periodic updating of the biographical information about its arbitrators, we must rely on arbitrators to obtain up-to-date information on their professional backgrounds, potentially disqualifying relationships, and other relevant information. Toward that end, both the Panel Data Sheet and the Notice of Appointment contain language requiring the arbitrator to notify the AAA of any changes to the biographical information that we possess. For arbitrators currently serving, the local regional office must be advised, in addition to the national Panels Department. We urge arbitrators to promptly communicate all such information whenever they may learn of it, to the Association.

### **The AAA Staff Will Help**

When arbitration is conducted under the Commercial Arbitration Rules, the Association assigns a case administrator to help you in your duties as an arbitrator. The administrator will discover the wishes of the parties as to the time and place of hearings and report their preferences to you. In this way, you can then set a convenient date without having to be in personal contact with the parties. The same procedure applies when a party asks for a postponement, when letters or documents are exchanged, or when you are asked issue a subpoena. The administrator can answer questions about the rules at any time. The administrator will provide



you with a briefing sheet at the outset of the hearing; please read this briefing sheet fully. After the hearings are closed, the administrator will encourage you to decide the case and to render an award.

### **The Arbitrator's Authority**

The arbitrator's authority is created by the contract, subject to applicable arbitration law. In effect, the parties breathe life into arbitrator.

The arbitration clause is the provision of a contract by which parties agree that disputes arising in the future will be submitted to arbitration. A typical arbitration clause might read: "Any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be settled in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award may be entered in any court having jurisdiction thereof. "

Most arbitrations are initiated when one party to a contract containing such a clause demands arbitration, asking the arbitrator to order a remedy for the alleged violation. You must examine the contract to see whether the issue is subject to arbitration and whether the relief sought is within the granted authority.

The party against whom a demand for arbitration is served may deny the claim or file a counterclaim.

Disputes between parties not having a prior agreement to arbitrate may be submitted to arbitration. This is done by means of a submission agreement, signed by both parties.

The demand for arbitration and submission to dispute resolution can be found on the AAA's Web site.

Parties may refer to the Commercial Arbitration Rules of the American Arbitration Association. The effect of such a reference is to provide a comprehensive, self-executing method for proceeding.

### **Mediation**

It is important for arbitrators to remember the availability of mediation. Mediation is a process in which the parties submit their dispute to an impartial third party--the mediator--who attempts to draw them together to produce a settlement. Unlike an arbitrator, a mediator cannot impose a settlement on the parties. Section 10 of the rules provides for a voluntary mediation conference without payment of an additional administrative fee.

The AAA has published Commercial Mediation Rules. Where a case becomes unduly protracted, it might be appropriate for you to suggest mediation. While it is proper for an appointed arbitrator to serve as a mediator, bear in mind that, if you do so and the mediation fails, you more than likely would not be able to continue as an arbitrator. It is probably wiser to have the AAA appoint one of its trained mediators in such instances.



## **Expedited Procedures**

Under the Commercial Arbitration Rules, unless the AAA in its discretion determines otherwise, expedited procedures of commercial arbitration shall be applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs. Those rules were designed to help expedite settlement of arbitration cases of that size.

Parties in larger, more complicated cases may also agree to the expedited procedures, even if claims and counterclaims exceed \$75,000, by jointly requesting that their arbitration be processed under these expedited procedures. The expedited procedures, Sections e1 through e10 of the Commercial Disputes Resolution Procedures, provide for notice by telephone, the appointment of an arbitrator after the submission of one list, and the fixing of the time and place of the arbitration hearing and the time within which the arbitrator has to render the award, usually not later than 14 days from the date of the closing of the hearing.

## **Administrative Conferences**

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in accordance with Section 10 of the rules. The purpose of the administrative conference is to arrange for an exchange of information, the stipulation of any uncontested facts, and whatever other administrative details are necessary to help expedite the arbitration proceedings. Ask the case administrator whether an administrative conference was held and, if so, what the outcome was.

## **Guidelines for Expediting Larger, Complex Cases**

To facilitate the arbitration of larger, complex cases and to best address the unique procedural problems that sometimes accompany them, the arbitrator may refer to the Guidelines for Expediting Larger, Complex Commercial Cases. Although portions of these guidelines require the parties' agreement, many of the sections will provide valuable information on how the arbitration can be conducted as efficiently and expeditiously as possible.

## **Preliminary Hearing**

In larger, more complex cases, at the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing between the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator. This is also covered in Section 10 of the rules.

You, as arbitrator, first explain the purpose of the preliminary hearing to the parties, including your indication as to what the parties are expected to accomplish at the hearing. This includes establishing the extent of and



schedule for the production of relevant documents and other information, the identification of any witnesses to be called, and a schedule for further hearings to resolve the dispute. Most important, you should make a statement about your intention not only to accomplish these preliminary matters but also manage the entire arbitration case in a just-and-efficient manner consistent with the commonly accepted principle that arbitration is an economical-and-expeditious way to resolve disputes fairly. You should consider the following.

1. *A Brief Written Statement, Not to Exceed Five Pages, Setting Forth Each Party's Outline of Its Claims* You should give the parties an opportunity to describe the subject of the dispute briefly, which issues are expected to be resolved, and other brief comments that will educate you about the issues to be decided.

2. *Specification of Claims and Counterclaims* You should encourage the parties to specify the amounts involved in claims and counterclaims and advise the AAA of them.

3. *Stipulation of Uncontested Facts* Whichever facts the parties can stipulate should be reduced to writing, and each party should sign and receive a copy before the conclusion of the preliminary hearing. You should also keep a copy of the stipulated agreement and have one placed in the AAA's file.

4. *Exchanging of Information and a Schedule for the Exchange (Including Reports from Experts)* You should inform the parties that they are required to cooperate in committing to, conducting, and completing an exchange of information concerning their documents and witnesses. If they do not agree to exchange particular information, you should hear their disagreement and make a ruling on the issue. When the information to be exchanged has been specified, you should establish a schedule for the exchange.

While arbitrators do not have the authority to hold a party in contempt, most parties are reluctant to antagonize an arbitrator by refusing to obey his or her directive. Where the arbitrator's request is reasonable, no court will be inclined to disturb it. In some cases, arbitrators have enforced their orders by directing the case administrator to advise a recalcitrant party that failure to obey will result in their claim or counterclaim being stricken. Obviously, this should be a last resort and should first be discussed with the case administrator.

5. *Lists of Witnesses with Outlines of Testimony (Including Biographies of Expert Witnesses)* You should inform the parties that they will be required to provide each other with lists of intended witnesses arranged in the order in which they will be called. A summary by name for each witness, with the subject matter of the anticipated testimony of each, should also be submitted.

6. *Advance Filing and Advance Identification of Exhibits* You should inform the parties that they will be required to identify and exchange exhibits in advance of the evidentiary hearing.

7. *Estimated Length of the Case and the Schedule of Hearings* The parties should attend the preliminary hearing prepared to give a realistic estimate as to the number of hearing days needed to present their respective cases, and should be ready to agree to schedule for the evidentiary hearings as soon as feasible. Keeping in mind that a prompt award is an important part of arbitration, you should encourage the



scheduling of consecutive hearing days, including evenings or weekends if necessary (where permitted by law). Full hearing days should be scheduled with minimal lapses for lunch and breaks. Requests to postpone scheduled hearings will be granted only for just cause.

*8. The Number of Copies of Exhibits to Be Made* It will save time and effort if the parties know how many copies of exhibits and their evidence to provide (enough for each arbitrator and each party). You should raise this item and establish agreement.

*9. Briefs* You may discuss whether briefs will be required. When briefs are to be filed, the arbitrator will establish a schedule for their production.

*10. The Award* It is not required or customary for arbitrators to render written opinions with the awards; however, in some cases, factual findings, including a breakdown of amounts awarded, may be requested by the parties. You should accommodate this need if it exists.

*11. Conduct of the Evidential Hearing and Concluding Remarks* At the conclusion of the preliminary hearing, you should reiterate the opening remarks; namely, the goal to move the arbitration to a fair and speedy conclusion. Making the parties aware of their respective responsibilities will set the right tone and facilitate management of a case. This is the time for you to speak about how the evidentiary hearing is to be conducted. This is also the time to announce that documents and/or pictures will be self identifying wherever possible and that repetitious testimony and evidence will be interrupted. Whichever other time-saving devices you wish to impose should be indicated at this time.

*12. Arbitrators' Directive* Directions to exchange information can be confirmed in a directive issued by the arbitrator following the preliminary hearing. Any controversy regarding exchanges of information will be resolved by the arbitrator.

### **"Paper" Preliminary Hearing**

If you do not feel that a preliminary hearing is appropriate, but still desire the information requested on the preliminary hearing worksheet, you may direct the parties to complete some or all of the worksheet, and issue directives regarding any item that is necessary. This should be discussed in advance with the case administrator.

### **Discovery**

While there is no formal discovery in arbitration, Section 10 of the Commercial Arbitration Rules clearly gives the arbitrators authority to arrange for an exchange of documents in large, complex cases. Paragraph 2 of this section reads, in pertinent part, "Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and schedule for the production of relevant documents and other information, (ii) the identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute."



Although this rule vests in the arbitrators the discretion to direct documentary exchanges, it does not contemplate full-blown, litigationlike discovery. Also, Section 52 of the rules authorizes arbitrators to interpret the rules as they relate to powers and duties of arbitrators. Some arbitrators, albeit rarely, interpret the "other information" portion of Section 10 quoted above to provide for depositions.

One simple way for parties to obtain discovery in arbitration is to ask for it. This can take the form of an agreement that the parties make after their dispute arises or, and perhaps more appropriately, in the arbitration agreement itself. The American Arbitration Association's Commercial Arbitration Rules provide, in Section 1, "the parties, by written agreement, may vary the procedures set forth in these rules. " Thus, if the arbitration clause contains an express reference to discovery, the AAA will follow this in its administration of the arbitration.

Before making a ruling on discovery, the arbitrator must first ascertain whether the request is valid and reasonable. For this reason, parties might be asked to prepare briefs on the issue, citing precedents pro and con, so that the arbitrator can make an informed and reasoned decision.

The arbitrator's power to enforce directions to exchange documents is, by and large, limited to drawing negative inferences from a party's failure to comply. In some jurisdictions, the law gives arbitrators more explicit authority to impose sanctions.

### **The Arbitrator at the Hearing**

If the arbitration involves three neutral arbitrators, it is suggested that the chairperson be the arbitrator with the most experience in commercial arbitration and the best knowledge of the specific subject matter in dispute. If one of the arbitrators is an attorney, that fact alone does not automatically qualify that arbitrator to be the chairperson.

When the parties, their attorneys, and their witnesses convene at the hearing, the arbitrator is in charge. (Note 1) After the parties are introduced and witnesses sworn, you should require that the case move ahead expeditiously. It is important that you exercise firm control.

In some states, it is obligatory for arbitrators to take an oath of office. In others, it is optional with the parties. Many experienced arbitrators prefer to be sworn even when this is not required. (Note 2) When parties so desire, arbitration awards may be rendered on the basis of documents only, without oral hearing. The material from both parties is sent to the AAA, which then transmits all of the information to the arbitrator for consideration and a determination.

### **Compensation and Expenses of the Arbitrator**

Commercial arbitrators generally contribute their services in the smaller cases that take only a day of their time. In larger, more prolonged cases, the parties will agree to payment of a fee as provided for in Section 50





of the rules. The administrator will advise you of the parties' estimates as to the number of hearings expected. These are only estimates. The actual number of hearings required could differ.

You are cautioned not to raise the issue of compensation with the parties. The rules provide that any arrangements for compensation shall be made through the AAA, not directly between the parties and the arbitrator. All negotiations as to fees must be carried out between the AAA and the parties.

Where compensation is to be paid, the Association will secure a compensation agreement from the parties. You will be asked for your written consent. If it is impossible to obtain agreement, the AAA may establish an appropriate rate of compensation in accordance with its rules.

Arbitrators are usually invited to serve on cases where the hearing is to be held near their business or residence. In accordance with Section 49 of the rules, out-of-pocket expenses are reimbursed in those cases where an arbitrator is asked to travel to a hearing. Such expenses are generally reimbursed for travel at coach or business rates and for reasonable accommodations for lodging and meals.

### **Filing New Claims**

Sometimes, a party will want to modify a claim in some respect or add a new one. In accordance with Section 8 of the Commercial Arbitration Rules, new and different claims may be filed by the parties at any time before the appointment of the arbitrator. After arbitrator has been appointed, such changes may be made only with the arbitrator's consent.

There are various factors that you should take into account before deciding whether new issues should be consolidated into a single arbitration. Because arbitration is a voluntary process, it is improper for an arbitrator to rule on matters that the parties excluded from the scope of the agreement to arbitrate. When you believe, however, that the new claims relate to the dispute that gave rise to the original demand and that it would be consistent with the intention of the parties as expressed in their arbitration clause, new claims and counterclaims may be considered along with those contained in the original papers. (Note 3) Before coming to a decision on the question of new claims, you should ask both sides to state their positions.

### **Who Goes First?**

Arbitration hearings follow a logical pattern, with opening statements, introduction of the initiating documents, examination of witnesses, presentation of exhibits, and final summations. (Note 4) It is customary for the complaining party to be heard first. Section 29 of the rules gives arbitrators authority over the order of the proceedings; the order may therefore be varied when you think it necessary. Witnesses are usually sworn and are always subject to cross examination. (Note 5)

A party may wish to have a stenographic record made of the proceeding or may require the services of an interpreter. Such arrangements are made directly between that party and the stenographer or interpreter, and the opposing party should be so notified. The requesting party or parties shall assume the costs of the service.





At the hearing, a party may realize that they desire the presence of a stenographer or interpreter, but failed to make arrangements in advance, and request that the hearing be postponed pending the arrival of the stenographer or interpreter. After hearing the parties' positions and considering whether any party will be severely prejudiced by the delay, you must decide whether further testimony will be postponed pending the arrival of the reporter or whether the hearing will proceed in the absence of same. If the parties agree to temporarily suspend the hearing or if you decide to do so, it would be proper for you to inquire whether there are any procedural matters that can be discussed in the interim. Any arrangements arising out these discussions may then be placed on the record when the case proceeds.

Parties to an arbitration case often have important economic interests at stake; it is proper that they assert their positions energetically. A vigorous tone of argument and a strong objection to evidence hotly resisted by the responding party are common in arbitration.

You should have no difficulty maintaining order. A reminder that certain behavior serves no useful purpose is usually sufficient.

### **Some General Rules**

One of the reasons that parties resort to arbitration is their desire for privacy. You should therefore maintain the privacy of proceedings, unless both parties agree to open the hearings or unless a statute requires otherwise.

Persons directly concerned in an arbitration have the right to attend hearings. You may permit others to attend, with due regard to the right of privacy. You may require the retirement of a witness from the hearing room during the testimony of other witnesses. Refer to Section 25 of the rules regarding attendance at hearing.

Parties are usually represented by attorneys, although that is not required. In either event, the parties "bring the case to the arbitrator," presenting such evidence and arguments as they deem pertinent. You may directly question witnesses, but most experienced arbitrators let the parties develop the facts in their own way and then ask questions or call for the production of additional evidence as required.

At times, parties will become repetitious or wander from essential matters. You should insist on an expeditious presentation. Asking the disputants to stipulate mutually agreed facts is often an effective way to save time and clarify the issues.

### **How to Deal with Objections**

After a hearing gets under way and the flow of testimony begins, you might be asked to rule on the admissibility of evidence. This is addressed in Section 31 of the Commercial Arbitration Rules. Courtroom rules of evidence do not apply in arbitration, but you might still have to decide whether to permit a witness to continue, or document to be entered, after a party objects. One guiding principle must be kept in mind: *everything that could further an understanding of the case should be heard.*



Arbitration awards can be subject to attack when arbitrators refuse to hear material testimony or accept relevant evidence. Therefore, arbitrators often accept doubtful material but give it little weight. However, indiscriminate acceptance of irrelevant, repetitious, or immaterial evidence can be costly and delay the arbitration process.

Arbitrators should be sensitive to the type of evidence that might be offered by a party. An arbitrator might have to rule on an objection to evidence offered on the ground that it is "privileged" for being attorney-client communications or terms of settlement negotiations. There are public-policy reasons that encourage open attorney-client communications in the first instance and frank settlement negotiations in the latter instance. Occasionally, a person will testify about actions that they did not personally witness. An objection might be raised that this is "hearsay" evidence. There might also be times when an arbitrator is asked to accept evidence that one party alleges to contain "trade secrets." In such instances, arbitrators must rule on the objection raised, bearing in mind that conformity to legal rules of evidence is not required in arbitration.

You need not accept everything offered. When in doubt, you should ask the parties to present arguments. When one party has stated reasons for its objection and the other has answered, the arbitrator can decide whether the testimony or document is relevant or material. Even when evidence of doubtful relevance is accepted, the arbitrator can judge how much weight any piece of evidence is worth. Where two or more arbitrators are serving, rulings should be made by a majority of the panel.

### **Affidavits and Subpoenas**

Business people generally prefer arbitration because of its convenience. When witnesses are in a distant city and it would be costly to bring them to the hearing, parties may ask you to accept testimony in the form of affidavits. You may agree if convinced that there is good reason for the request. If there is an objection, you should hear arguments from both sides before making a decision. In evaluating affidavits, you should take into account the fact that witnesses were not subject to cross examination, as they would have been had they appeared in person.

Occasionally, one party will wish to put into the record a document held by the other party. The decision as to whether the document should be produced is made by you. Again, the parties should be asked to comment. If you are convinced that the document is essential, the party should be directed to produce it. This usually results in compliance because few parties in arbitration wish to risk the adverse conclusions that might be drawn from a refusal. When, as rarely happens, there is no compliance, you may either issue a subpoena or draw a negative inference. Pursuant to Section 31 of the rules, the arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

As the time approaches for you to reach a decision, a legal issue might require further clarification. You should not do independent research, but should ask counsel for each side to explain the law.

### **Investigations outside the Hearing Room**



When the issue turns on an expert's judgment of workmanship or quality of materials, you might want to resolve the matter by examining the merchandise, not just hearing it described. No difficulties are encountered when examination of material can be conducted in the hearing room, with both parties present. But, when it is necessary to visit a building site, for instance, or go to a warehouse to look at the materials, you are not permitted to make an unannounced investigation.

An on-the-scene investigation is an extension of a hearing. An arbitrator should not accept testimony from one side that the other has had no opportunity to hear, and comment on. Nor may an arbitrator receive evidence of any kind outside the hearing room without protecting the rights of both parties. An arbitrator who must make an inspection should inform both parties of the time, the date, the place, and the purpose of that inspection or investigation. The parties are then free to attend. If they choose not to do so, they waive their right to object at a later date. When the parties are not present, you are expected to make a verbal or written report and allow them an opportunity to comment.

### **Interim Relief**

On occasion, a party will request that you grant interim relief to safeguard the subject matter of the arbitration, in accordance with Section 34 of the rules. Interim orders may be used for a wide variety of disputes.

Having considered the parties' respective positions, whether at an oral hearing or in written form, you then make a ruling that may be made a part of the stenographic record, if any, or reduced to writing and transmitted to the parties through the case administrator.

### **Postponements**

Under Section 26 of the rules, you must accept postponements where the parties agree to them. You may postpone any hearing, either on your own initiative or, for good cause shown, at a party's request. In practice, requests for postponement must first be communicated by a party to its adversary. Should the adversary object to the postponement request, it becomes necessary for you to rule on the request through the case administrator. If time permits, the parties will indicate their positions in writing, which will be forwarded to you for review and consideration. Where there is insufficient time for this, the administrator will attempt to arrange a conference all involving counsel for the parties, the arbitrators, and the administrator, who monitors the call. A majority ruling of the arbitrators will prevail. This ruling should be communicated to the administrator, not to the parties directly.

The law requires that arbitrators act reasonably in considering requests for postponements. There are several factors to consider when ruling on postponements. Is this the party's first request? Can the hearings proceed in the absence of an unavailable witness (who can be brought back at a later date) or is that witness vital to the case? Will any party suffer extreme prejudice by the granting or denial of the postponement request?



A possible cure for numerous postponements is the "peremptory hearing," where the arbitrator sets a date that is simply not subject to postponement.

### **Delegation of Authority Is Not Permitted**

Arbitrators have broad powers to determine issues of fact, law, or procedure. This authority must be exercised by you; it may not be delegated to others. Occasionally, a question will arise that requires the services of an outside agency, such as a testing company or a firm of public accountants. Parties may permit you to engage such help. The cost of such an outside service will be subject to allocation in the award unless the parties agree otherwise. This is not a delegation of authority. The ultimate decision is still yours.

### **The Arbitrator Should Not Participate in Settlement Discussions**

During an arbitration, parties sometimes ask for a postponement to permit further negotiations. If they resolve the dispute, they may ask you to incorporate the settlement into your award. This is known as a consent award. This is permissible and can be a collateral advantage of arbitration.

You should not participate in settlement discussions. If the parties wish to discuss settlement, you should be excused from the room. If you are a party to settlement discussions or attempt to mediate unsuccessfully, a party might later challenge your impartiality on that basis. In appropriate situations, the AAA may appoint a mediator conduct mediation under the Commercial Mediation Rules.

### **The Closing of Hearing**

After all witnesses have been heard, counsel for each side should be given an opportunity for summation. You should then close the hearing. Unless briefs are to be filed, the time period for delivery of the award begins to run when the oral hearings are closed. The time limits in the contract are binding on the arbitrators. If parties have not set other limits, you have thirty days under AAA rules within which to render the award (14 days under the Expedited Procedures). It is vital that the award be rendered before time runs out. Otherwise, the parties could reject the award or even involve the arbitrators in litigation. Don't procrastinate!

At times, parties will want to provide you with briefs or with additional material not immediately available. You may agree to receive such material at a later date. You do not close the hearing until the date that has been set for such receipt, at which point the time limit starts running.

The procedure for briefs is simple. The parties deliver them to the AAA, which transmits them to you. Parties should be encouraged to exchange all correspondence, including posthearing briefs, directly. This procedure serves a double function: it makes it unnecessary for you to be in personal contact with the parties, and it ensures that each side receives the other's brief.



On occasion, a party will send an unsolicited response to a posthearing brief. It is wise practice to advise the parties in advance that it will not be permitted and that the administrator will be instructed to return such a response to its sender.

### **Reopening the Hearing**

Once the hearing is closed, it may not be reopened without the arbitrators' permission. You may reopen a hearing upon a showing of good cause by one of the parties, as long as the award has not yet been rendered. You may not reopen a hearing if it would delay the delivery of the award beyond the time in the contract, unless both parties agree to extend that limit. This rule of procedure, when arbitration is administered by the AAA, tends to ensure that the award will be rendered promptly. Once again, it is vital that the award be rendered on time.

### **The Award Must Be in Writing**

The award must be signed by the arbitrators and, under the laws of some states, be notarized or witnessed. If two or more arbitrators are involved, the award must have the signatures of a majority. Arbitrators usually meet after the last hearing to agree on the award. They might disagree on some points. Their conversations should be kept confidential. No arbitrator should disclose what any other member of the panel said during these conferences. The majority rules, but any arbitrator who disagrees may note a dissent on the award form or elect not to sign the award.

After deciding the award, you should communicate its substance to the case administrator, who will put it into correct form. Please provide the AAA with a draft of your award at least two weeks before the award's due date to allow us ample preparation time. Some experienced arbitrators are willing to prepare the award on their own. This is acceptable to the AAA, provided the award contains the necessary information. At a minimum, it must contain

- o a preamble;
- o the body of the award; and
- o a closing and affirmation.

Pursuant to the rules, the arbitrator must allocate the administrative fee(s) and arbitrator compensation, if any, in the award. As to the latter, it is essential that we have your bill for compensation prior to our preparation of the award.

The case administrator can provide model language for these basic elements. The closing must state in some form or another that the award is in full settlement of all claims (and counterclaims) submitted in the arbitration. It must be signed by a majority of the arbitrators and affirmed by each or notarized, depending on the jurisdiction of the arbitration.



When so requested by a party, you may include a breakdown of the items awarded. As an example, a general contractor might need an award specified or broken down by items to be able to deal more directly and competently with the subcontractors. (Note 6) When deciding on both claims and counterclaims, your award should clearly indicate your decision in regard to both claims.

When the award is signed, the AAA will deliver it to the parties. (Note 7)

### **Three Tests of a Good Award**

An arbitration award should have three chief characteristics: it should be clear and definite, leaving no doubt as to what the parties must do to comply; it should decide every issue put to the arbitrators; and it should not rule on anything outside the scope of the arbitrators' authority.

### **Money Damages and Other Relief**

The award must be consistent with the agreement of the parties. For instance, ruling on a claim by a building owner against a contractor who failed to do certain work according to specifications, you might award monetary damages or direct the contractor to do the work over again. You might also dismiss the claim. An award directing the contractor to reimburse the owner by landscaping the property would be improper, however, where landscaping was not contemplated in the contract.

Remedies do not necessarily take a monetary form. For example, you might direct specific performance of the contract. You might so grant injunctive relief, barring a person from continuing a violation of the contract.

The award should also include the arbitrators' final apportionment of administrative fees, expenses, and arbitrator compensation, any. In some cases, you are authorized by the parties' contract to award attorney fees.

### **No Written Opinion Is Required**

Commercial arbitrators are not required to explain the reasons for their decisions. As a general rule, the award consists of a brief direction to the parties on a single sheet of paper. One reason for brevity is that written opinions might open avenues for attack on the award by the losing party.

Courts will not review arbitrators' decisions on the merits of the case, even where the conclusions are different from those that a court might reach. But a carelessly expressed thought in a written opinion could afford an opportunity to delay enforcement of the award. The obligations to the parties are better fulfilled when the award leaves no room for attack. In situations where you feel it necessary to write such an opinion, it should be contained in a separate document.





## No Compromises

You should not compromise unless the dispute clearly calls for this result. Parties generally expect a decision on the issues. This does not mean that the award should grant "all or nothing." If it is your judgment that some percentage of a claim is justified, the award may so provide.

For example, a buyer of a disputed shipment might request a price allowance of one dollar per pound because of some allegedly inferior merchandise quality. The seller might deny that any allowance is warranted. If the arbitrator should find that the merchandise was substandard to an extent that justified a thirty-cent price reduction, that would be an appropriate award.

## The Arbitrator's Task is Completed with the Signing of the Award

When you sign the award and return it to the AAA for delivery to the parties, your task is completed. The arbitrator need have no further concern with the case. You become, in most jurisdictions, *functus officio* upon making an award. Arbitrators should not participate in further litigation in the matter. In fact, you should not discuss the award or respond to a request for clarification unless requested to do so by both parties. (Note 8) In some jurisdictions, arbitrators may modify awards in which there are technical or clerical errors. Your administrator will bring this to your attention where appropriate.

Your obligation to maintain the confidentiality of business affairs of the parties disclosed in the arbitration continues. It would be a breach of ethics for you not to keep such information confidential.

## Postaward Communications from the Parties and/or their Representatives

On occasion, a party or its representative will call an arbitrator after the award is issued, seeking an explanation of the decision. It is a poor idea to talk at all. Instead, refer the party or attorney to the AAA. One reason why an arbitrator should not answer these questions is that the award could still be subject to enforcement proceedings in court. A party might try to impeach the award by getting the arbitrator to divulge his or her reasoning or thought processes. Another reason is that, in rare instances, all or part of a case is remanded to the arbitrator for further consideration. You could be "tainted" by having had direct *ex-parte* communications with one party. Pursuant to the Code of Ethics for Arbitrators in Commercial Disputes, you are required to wait a "reasonable" period following the conclusion of the case before entering into any relationship with individuals involved in the arbitration.

## Conclusion

In this guide, we have called attention to some problems that you might encounter. The problems are usually few. Those that do arise can be readily resolved by you in a businesslike manner.



No attempt is made to impose a rigid formula. The proposed solutions represent methods that many arbitrators have found effective after years of experience.

You can usually rely on the cooperation of the parties. Parties come to the hearing prepared to accept the arbitrators' decisions on procedural and substantive matters, recognizing in advance that some of those decisions might not be to their liking. As an arbitrator, you should be firm, but fair.

The arbitrator who agrees to hear and decide a case finds that the task is mostly an agreeable one. The honor and respect accorded an arbitrator are pleasurable. There is, too, the personal satisfaction of having made a positive contribution to the business community, sparing its members any necessity of going to court.

Volunteer service offers few outlets for the exercise of talent and judgment for the public good to equal those available to the arbitrator of commercial disputes.

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### *Notes*

1. When the parties so desire, arbitration awards may be rendered without oral hearing. The rules then provide for written statements and documents to be transmitted by the parties to the AAA. The material from both parties is sent to the arbitrator by the AAA at the same time.
2. As administered by an AAA case administrator, the oath ends: "Do you solemnly swear (affirm) that you will faithfully and fairly hear and examine the matters in controversy and that you will make a just award to the best of your understanding?"
3. This problem arises when arbitration is initiated by one party in a demand for arbitration on the basis of a future-dispute arbitration clause of a contract. Where arbitration is initiated by both, parties jointly through a submission agreement, the issues before you are those agreed to by both parties in writing.
4. Arbitrators may proceed even in the absence of a party, if proper notice of the hearing was given. This does not mean, of course, that the absent party will lose the case by default. The other party must still produce proof to support the claim and you may not find in favor of the claimant solely by reason of the Respondent's failure to appear.
5. As administered by the AAA, the oath reads, "Do you solemnly swear (affirm) that the evidence you are about to give in this arbitration will be the truth, the whole truth, and nothing but the truth?"
6. Unless the agreement of the parties provides otherwise, an arbitrator rendering a monetary award may require interest to be paid. In that case, the award should instruct the parties clearly on how interest is to be



computed. It could be from the time the obligation was incurred to the date of the award, from date of the award to the date payment is made, or between any other pair of dates that you think equitable. In some states, the rate of interest specified by law.

7. Delivery consists of placing of the award in the mail by the AAA, addressed to the parties at their last known addresses, personal service, or any other, method permitted by law. If the state law requires that a copy of the award be deposited with a court, this will be done by the AAA.

8. In some states, the arbitration law provides the parties with an opportunity to resubmit the decision to the arbitrator for modification or correction. In such situations, the parties will correspond with the AAA, which will then forward the matter to the arbitrator for a decision.