American Bar Association
Section of Business Law
2010 Annual Meeting
San Francisco, CA

Program and Panel Discussion

THE CUTTING EDGE OF ARBITRATION: WHAT YOU NEED TO KNOW

Presented by the Business and Corporate Litigation Committee and the Dispute Resolution Committee of the Section of Business Law

Sunday, August 8, 2010 2:30-4:30pm.

Panelists: **Rob Friedman**
Littler Mendelson P.C.
Dallas, Texas

F. Peter Phillips
Business Conflict Management, LLC
Montclair, NJ

Deborah Rothman
Mediator and Arbitrator
Los Angeles, CA

Moderator: **Mark Trachtenberg**
Haynes and Boone, LLP
Houston, Texas

PROGRAM MATERIALS

Item	Description	Authors
I.	Speaker Biographies	
II.	Significant 2009-10 "Arbitrability" Cases in Federal Appellate Courts	Rob Friedman (Littler Mendelson P.C.) Mark Trachtenberg (Haynes and Boone, LLP) Christina Crozier (Haynes and Boone, LLP)
III.	ABA Drafting Checklist (excerpted from Drafting Dispute Management Clauses: A Practical Guide for the Transactional Lawyer) Sample Choice of Law/Venue clause	Dispute Resolution Committee of the ABA
IV.	Arbitration Consultants	Deborah Rothman
V.	Protocols for Expeditious, Cost Effective Commercial Arbitration (June 16, 2010 draft)	The College of Commercial Arbitrators

Mark Trachtenberg

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Areas of Practice

- Appellate
- Litigation/Trial Practice
- Bankruptcy and Insolvency Litigation
- Business Litigation

Education

- J.D., Yale Law School, 1998, Editor, *Yale Law Journal*
- B.A., University of Pennsylvania, 1994, *summa cum laude*; Phi Beta Kappa

Bar Admissions

- Texas

Judicial Clerkships

- Law Clerk, the Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas (1998-99)

Mark Trachtenberg's ability to craft a "big picture" legal strategy from the inception of litigation through the final appeal has led to his involvement in some of the most complex and high-stakes litigation in Texas, ranging from the landmark school finance case to a multi-billion dollar fraudulent transfer lawsuit in the Southern District of Texas. In the school finance case, he was the architect of a successful challenge to the constitutionality of the Texas school finance system, crafting a strategy that proved successful before a liberal trial judge and a conservative Texas Supreme Court. Because of his role in that case, he was profiled in the cover article of the *2010 Texas Super Lawyers* magazine - Rising Stars Edition.

Mr. Trachtenberg, a Yale Law School graduate, excels at collaborating with trial counsel to win either before trial (through dispositive motions and challenges to the opposing party's expert testimony), during trial (through jury charges and trial briefs), and after trial (through post-trial motions), while ensuring error is preserved. In the appellate courts, Mr. Trachtenberg identifies, develops, and presents his clients' most persuasive arguments.

Mr. Trachtenberg, who is board certified in civil appellate law by the Texas Board of Legal Specialization, has helped his clients achieve a successful resolution of their disputes in a wide range of matters, including the following representative examples:

- Persuaded the Texas Supreme Court to strike down the Texas public school finance system on constitutional grounds. This decision was the culmination of a four and one-half year effort, including a previous successful appeal to the Supreme Court and a successful five-week bench trial upon remand. *Neeley v. West Orange-Cove C.I.S.D.,* 176 S.W.3d 746 (Tex. 2005).
- Obtained reversal from the Texas Supreme Court of a $14 million products liability judgment arising out of a fire because the plaintiffs' expert's causation testimony was scientifically unreliable. *Whirlpool v. Camacho,* 298 S.W.3d 361 (Tex. 2009).
- Obtained reversal of class certification in a suit where appellees were authorized to represent a class of hundreds of thousands of Texas-based music club members who sought recovery of the late fees they had paid on their compact disc purchases.

- In a case involving a collegiate athlete's eligibility to participate in a swimming competition, persuaded the Texas Supreme Court to expressly disapprove of the lower courts' conclusion that the NCAA had no right to intervene in the litigation. The opinion significantly strengthens the NCAA's hand in ensuring that its interests and the interests of its member-institutions are protected in athlete eligibility litigation across the country.
- Obtained a writ of mandamus from the Houston Court of Appeals directing the trial court to compel the arbitration of claims against a brokerage firm in the face of plaintiffs' mental incapacity defense.
- Obtained reversal of a class action certification for class of 350,000 employees.

Professional Recognition

- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- Member, American Law Institute
- Profiled in cover article of *2010 Texas Super Lawyers* magazine - Rising Stars Edition
- Selected for inclusion in Texas Super Lawyers - Rising Stars Edition (2004-2010)
- Named as a Top Lawyer in Houston by *H Texas* magazine (2009, 2010)
- Named a “Top Professional on the Fast Track” (2005) and a “Lawyer on the Fast Track” (2004) by *H Texas* magazine

Professional Leadership

- Board member, *The Houston Lawyer* editorial board (2005-present)
- Fellow of the Texas Bar Foundation
- “Young Leader,” United Way of Texas Gulf Coast
- Frequent speaker at State Bar and Houston Bar Association Continuing Legal Education programs, on a variety of topics, including arbitration-related litigation, the Texas Supreme Court, and handling the media in a high-profile case

- Executive Board, Civil Rights Committee, and co-chair of Discrimination Subcommittee for the Anti-Defamation League
- Special Assistant Disciplinary Counsel, Texas Commission for Lawyer Discipline (2003-2004)
- Appointed as a Hearing Officer by Mayor Bill White for administrative appeals from denial or suspension of certain business permits

Selected Publications

- *"Arbitration-Related Litigation in Texas,"* CORPORATE COUNSEL REVIEW (to be published July 2010).
- *"Drop the Lifetime Tenure for Justices on High Court,"* Op-ed, Houston Chronicle, July 17, 2009.
- *"Arbitration-Related Litigation,"* Advanced Civil Trial Course, State Bar of Texas (October 2007).
- "*Webcasts Open a Window to Texas Supreme Court,"* Op-ed, Houston Chronicle, Mar. 30, 2007.
- "*Risky Business: Altering the Scope of Judicial Review of Arbitration Awards by Contract*," Texas Bar Journal, Vol. 69, No. 9 (October 2006).
- "*Arbitration-Related Litigation and Appeals,"* Advanced Civil Appellate Practice Course, State Bar of Texas (September 2006).
- "*Texas Supreme Court Update*," State Bar College Summer School (July 2005) (co-author)
- "The *Class Action Fairness Act of 2005: The Federalization of Class Actions*," The Appellate Advocate (Spring 2005).
- "*Civil Litigation: The Texas Supreme Court Continues to Tighten the Noose on Class Actions*," Texas Bar Journal (January 2003) (co-author).
- "*The Edgewood Saga: An Epic Quest for Education Equity*," 17 YALE L. & POL'Y REV. 607 (1999) (co-author)

Selected Presentations

- *"Fraudulent Conveyances – Lessons learned on the Frontlines,"* Panelist, Presentation to the HBA Bankruptcy Section (May 6, 2010).
- *"How to Bust or Follow Through with an Arbitration,"* Advanced Civil Trial Course, State Bar of Texas (October 2008).
- *"Arbitration-Related Litigation,"* Advanced Civil Trial Course, State Bar of Texas (October 2007).
- *"Arbitration-Related Litigation and Appeals,"* Advanced Civil Appellate Practice Course, State Bar of Texas (September 2006).
- *"Litigator's Workshop"* – Panelist, National Access Network's Quality Education Conference (June 4-5, 2006).
- *"A Toolbox for Complex Litigation"* – Panelist, HBA's Law & the Media 20th Annual Seminar (Feb. 25, 2006).
- *"Business Development and Marketing for the Appellate Lawyer,"* HBA Appellate Section Lunch (September 28, 2005).
- "*Texas Supreme Court Update*," State Bar College Summer School (July 21, 2005)

Rob Friedman

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Emphasis

Employment Discrimination
Fair Labor Standards Act
Wage & Hour Law
Class Action Defense
Appellate Law
Drafting and Enforcement of Arbitration Policies

Biography

Mr. Friedman is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. He advises and represents employers in virtually every aspect of the employee-employer relationship. Mr. Friedman's practice includes representing employers in litigation and administrative matters brought by employees and government agencies, as well as advising employers on employment related issues, policies and procedures.

Mr. Friedman regularly advises employers on employment arbitration issues and has argued arbitration enforcement issues before United States Courts of Appeals and the United States Supreme Court. Mr. Friedman also devotes a significant part of his practice to litigating complex wage and hour collective and class actions in state and federal courts throughout the United States.

Education

J.D., Southern Methodist University School of Law, *cum laude*, 1998

B.A. Government, University of Texas, 1991

Publications

Co-author: "Texas Association of Business and Chambers of Commerce Plant Closings and Mass Layoff Notice Requirements," (2000), (2001), (2002), (2003), (2004), (2005-2007), (2007-2009), (2009-2011)

Contributing Editor: Treatise Supplement, "The Fair Labor Standards Act," (2005), (2006), (2007), (2008), (2009)

Activities

American Bar Association
ABA - Federal Labor Standards Subcommittee
Dallas Bar Association

Cases/Courts/Judges

Texas State Bar
All Texas state courts
U.S. District Court for the Northern, Southern, and Eastern Districts of Texas
U.S. Court of Appeals for the Third, Fifth, Ninth, Tenth and Eleventh Circuits
U.S. Supreme Court

F. Peter Phillips, Esq.
ARBITRATOR | MEDIATOR

BUSINESS CONFLICT MANAGEMENT LLC, Montclair, New Jersey, 2008 to Present.
Arbitrator, Mediator and ADR Consultant to businesses and their legal advisors.

Experience:

Over 50 mediations and arbitrations since March 2009

Adjunct Professor, New York Law School

Panel Listings:

CPR Panels of Distinguished Neutrals (Insurance, Franchise, Entertainment and Employment)

American Arbitration Association Expedited Panel

Certified Mediator, International Mediation Institute

Accredited Mediator, New Jersey Association of Professional Mediators

FINRA Panel of Arbitrators

Mediation Panel, U.S. Bankruptcy Court (E.D.N.Y.)

Panel of Mediators, New Jersey Administrative Office of the Courts

Panel of Mediators, China Council for Promotion of International Trade

Panel of Arbitrators and Panel of Mediators, Beijing Arbitration Commission

International Mediator Panel, Milan Chamber of Commerce

Training:

"Mediating the Litigated Case," Straus Institute for Dispute Resolution, Pepperdine University School of Law, 2008

Chartered Institute of Arbitrators, 2008

FINRA Arbitrator Training, 2008

ICC International Court of Arbitration Workshop, 2008

"Arbitrating the Mega-Case," American Bar Association, 2008

Arbitrator Training, NJICLE, 2008

Cross-Cultural Negotiation, ITIM, 2007

Multiparty Negotiation Skills, CPR Institute/Harvard PON, 2007

Mediator Trainer, CPR Institute (Co-Trainer with Dwight Golann), Beijing, 2005

Mediator Training, CPR Institute (Lewis and Singer), 1998

Professional Affiliations:

Member, Chartered Institute of Arbitrators; Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution; New Jersey Association of Professional Mediators; American Bar Association, Business Law Section (Vice Chair, ADR Committee) and Dispute Resolution Section; Union International des Avocats, World Mediation Forum; International Bar Association (Arbitration and Mediation Committees)

Publications:

Books:

- *Alternative Dispute Resolution Practice Guide* (Roth, Wulff & Cooper, eds.) West 2010 Supp. Chapter 33, "International Mediation and Conciliation"
- *Managing Franchise Relationships Through Mediation* (2009)
- *Resource Book for Managing Employment Disputes* (2004)
- *How Companies Manage Employment Disputes* (2002)

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Articles and Monographs:

- "Recent Developments in Commercial Mediation in China" *New York Dispute Resolution Lawyer* (Spring 2010)
- "Corporate Social Responsibility and Non-Judicial Remedies for Human Rights Violations: Is It Time for the Dog that Didn't Bark?" *IBA Mediation Newsletter* (April 2009)
- "Diversity in ADR: More Difficult to Accomplish Than First Thought" *Dispute Resolution Magazine* Vol. 15 Issue No. 3 (Spring 2009)
- "Commercial Mediation in China: the Challenge of Shifting Paradigms" *Contemporary Issues in International Arbitration and Mediation: The 2008 Fordham Papers (2009)*
- "Managing Risk Through Drafting ADR Clauses," ALI/ABA *Practical Lawyer* (2009)
- "The European Directive on Commercial Mediation: What It Says, What it Means, and What It Doesn't" *New York State Bar Association Section of Dispute Resolution* (Fall 2008)
- "The Challenges of International Commercial Dispute Resolution" *Focus Europe* (June 2007)
- "New Protocol for Reinsurance Coverage Disputes" *Risk Management Magazine* (April 2007)
- "How to Stop Costly Litigation from Ruining Your Results" (with Paul Moss) *FAC* (February 2007)
- "How Conflict Resolution Emerged within the Commercial Sector" *Alternatives to the High Cost of Litigation* (January 2007)
- "Best Practices in Managing Reinsurance Disputes" (with Paul Moss) *Declarations* (Winter 2007)
- "ADR as a Tool for Management and for Corporate Governance" *International Bar Association Mediation Committee Newsletter* (December 2006)
- "ADR: It Remains a White, Male Game" *The National Law Journal* (November 27, 2006)
- "Success in China: Adjust Your Expectations and Be Ready to Change" *Global Link* (November 2006)
- "Ten Ways to Sabotage Dispute Management" *HR Magazine* (September 2004)

White Papers:

CPR Response to Questionnaire Concerning Proposal for Directive (2005)

Feasibility Study on Commercial Mediation in the Russian Federation (2002)

Response to European Commission's Green Paper on ADR in Civil and Commercial Disputes (2002)

Teaching and Public Speaking:

Adjunct Professor, New York Law School. Guest Lecturer: Fordham University School of Law, NYU School of Law, New York Law School, Pepperdine University School of Law.

Frequent speaker at programs for U.S. corporations, law firms and trade associations. Invited speaker at numerous international conferences (i.e., Geneva, Buenos Aires, Moscow, Beijing, Hong Kong, Chamonix, Shanghai, Paris, London, Warsaw, Lagos).

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (CPR Institute), New York, New York, 1998 to 2008

Senior Vice President and Secretary. Responsible for industry-specific initiatives, international initiatives, and periodic membership meetings. Secretary to corporation.

Interim President and CEO, April – October 2006. Responsible for all executive, fiscal and policy management of Institute, overseeing staff of 18 and budget of $3.01 million. Responsible to Board of Directors.

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- Convened committees that created applications of Alternative Dispute Resolution and mediation protocols in fields of Property-Casualty Insurance (Inter-Insurer Coverage, Construction Defect and Cedant/Reinsurer), Franchise, Employment, Privacy, Domain Name, Product Liability, E-Commerce
- Negotiated and administered U.S.-China Business Mediation Center with China Council for Promotion of International Trade.
- Responsible for initiatives in Europe, including convening corporate leadership, advising European Commission on Mediation Directive and Code of Ethics. Initiated efforts to form regional dispute resolution centers in Costa Rica and Russia.
- Responsible for planning, marketing and execution of CPR Meetings with faculty of international profile.

SCHULTE ROTH & ZABEL, New York, New York. **Associate,** 1993 to 1998.

CAHILL GORDON & REINDEL, New York, New York. **Associate,** 1987 to 1993.

- Extensive business litigation experience in federal and New York State courts. Participated in trials, hearings, arbitrations and special proceedings, preparing, examining and cross-examining witnesses. Conducted oral argument on motions and appeals in federal and state courts. Drafted Petitions for Certiorari and Briefs before the U.S. Supreme Court. Substantive areas included insurance defense, insurance rehabilitation, insurance coverage, securities, bankruptcy, general commercial, employment.

NON-LEGAL EXPERIENCE:

Professional Actor and Stage Director, 1972 to 1987. Acted on Broadway, in Regional Theatres, and on Television. Directed student and professional productions in New York, London, and in Regional and University Theatres.

EDUCATION:

NEW YORK LAW SCHOOL, J.D. magna cum laude, 1987. Class rank: 3/177. Full Merit Scholarship. Notes & Comments Editor, New York Law School Law Review.

ROYAL ACADEMY OF DRAMATIC ART, London, England. Diploma (Acting), 1975.

DARTMOUTH COLLEGE, A.B. cum laude, 1971, Honors (English)

ADMITTED:

New York State, Federal District Courts for Southern and Eastern Districts 1988; California 1992; United States Supreme Court 1993; New Jersey 1995

OTHER:

Member of the Corporation, American Friends Service Committee, 2007 - Present

Wagner Society of New York, Board of Directors and Secretary, 2004 - 2009

Cornwall Monthly Meeting, Religious Society of Friends (Clerk 2001 - 2005)

New York Yearly Meeting, Religious Society of Friends, 1984 - Present
(Clerk, Committee on Conflict Transformation; Member, Financial Services Committee)

Board of Trustees, New York Law School, 1991-1997

Montclair (NJ) Commission on Human Rights, 1996 - 2001

Deborah Rothman, Esq.

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EDUCATION:

June, 1971. B.A., Yale College, Magna cum Laude.
June, 1976. Juris Doctor, New York University.
June, 1976. Masters, Public Affairs, Woodrow Wilson School, Princeton University.
ADR Training: Extensive arbitration & mediation training: American Arbitration Assoc'n & L.A. Superior Ct.
Certified in mediation by L. A. County Bar Assoc. ("LACBA") Dispute Resolution Services ("DRS").
Trained by Army Corps of Engineers: construction partnering.
Trained by Department of Justice: mediation of ADA claims.

PRIOR WORK EXPERIENCE:

1991-present. Private dispute resolution.
1984-1988. CEO, Baby Fair Enterprises.
1976-1980. Litigation attorney, Manatt Phelps Rothenberg & Tunney.

MEDIATION & ARBITRATION EXPERIENCE:

• Remarkably high success rate in over a thousand mediations and settlement conferences in business, partnership, employment, real estate, commercial, construction, entertainment, torts, intellectual property, securities, probate, *Cumis* counsel fee disputes, banking and insurance law.

- CPR Panel of Neutrals—Franchise, Entertainment, Mediation.
- EEOC (L. A. District Office) Panel of Mediators.
- L. A. Superior Court Probate Mediation Panel.
- CA Dep't.of Insurance, Earthquake Claims Mediation Panel.
- U. S. Postal Service, REDRESS Program, Panel of Mediators.
- U. S. District Ct., Central District of CA, Attorney Settlement Officer.
- Smith Barney gender discrim'n class action, former ADR panelist, Duke Univ. Priv. Adjudication Ctr.
- Merrill Lynch gender discrim'n class action, former ADR panelist, Northwestern University, Chicago, IL
- NASD Panel of Arbitrators, Panel of Mediators.
- Formerly on: Sizzler bankruptcy mediation panel.• Piper Aircraft Mediation Panel.
- Former Prudential Life Insur. class action settlement Appeals Committee Reviewer.

PROFESSIONAL AFFILIATIONS:

- Member, National Roster of Neutrals", American Arbitration Association—
  Large Complex Case Panel, Commercial, Employment Law, eCommerce and Real Estate panels;
  Arbitrator in AAA Center for Responsible Appraisals and Valuations program.
- Panel of Arbitrators and Mediators, Judicate West.
- Former Chair ('05 – '06), Beverly Hills Bar Association Labor & Employment Law section.
- Former Chair ('04 – '05), Beverly Hills Bar Association ADR section.
- Board Member and Fellow, College of Commercial Arbitrators.
- Board Member, Dispute Resolution Services ("DRS"), LACBA.

OTHER:

Frequent speaker, author & trainer on ADR including American Bar Assoc., P.L.I., California Labor and Employment Law Section, The Rutter Group, LACBA and other bar associations, CEB, Matthew Bender, L. A. City Attorney's Office, American Arbitration Association, Boeing, UCLA & USC, ABOTA, major law firms, CAALA convention, PIHRA convention, LA Superior Court; and *California Labor & Employment Law Quarterly, Daily Journal, ABTL Report, CPR Alternatives.*

Strong background in psychology • Fluent in Spanish; some French and Italian.

SIGNIFICANT 2009-10 "ARBITRABILITY" CASES IN FEDERAL APPELLATE COURTS

ROB FRIEDMAN	MARK TRACHTENBERG	CHRISTINA CROZIER
LITTLER MENDELSON, P.C. 2001 Ross Avenue Suite 1500 Dallas, Texas 75201-2931 T: (214) 880-8100 rfriedman@littler.com	HAYNES AND BOONE, LLP 1221 McKinney St. Suite 2100 Houston, Texas 77010 T: (713) 547-2528 Mark.Trachtenberg@ haynesboone.com	HAYNES AND BOONE, LLP 1221 McKinney St. Suite 2100 Houston, Texas 77010 T: (713) 547-2268 Christina.Crozier@ haynesboone.com

Presented at:

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Program and Panel Discussion
THE CUTTING EDGE OF ARBITRATION:
WHAT YOU NEED TO KNOW

Courts typically deal with arbitration-related disputes in two circumstances. First, when a party to a contract with an arbitration clause resists arbitrating a dispute, the contracting parties often litigate the enforceability and scope of the arbitration clause (i.e. the "arbitrability" of the dispute) before any arbitration proceeding begins. Second, after an arbitration panel renders its decision and issues an award, parties frequently turn to the courts in an effort to confirm, modify, or vacate the arbitral award. Because recent ABA panels have focused extensively on the second category of cases and the impact of the United States Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 128 S. Ct. 644 (2007) on vacatur actions, the focus of this paper is on recent developments in the first category of cases regarding the "arbitrability" of disputes. This paper summarizes the "arbitrability" cases decided by the United States Supreme Court in the 2009-10 term, as well as the significant federal courts of appeals cases decided between January 2009 and June 2010, when this paper went to press.

I. UNITED STATES SUPREME COURT CASES (2009-10 TERM)

***Rent-A-Center, West, Inc. v. Jackson*, -- S. Ct. -- , 2010 WL 2471058 (U.S. June 21, 2010).**

Holding: A delegation clause in an arbitration agreement giving the arbitrator the authority to resolve enforceability challenges is presumptively valid.

Background and Analysis: The Supreme Court's decision settles an important question in which there was a conflict in the federal circuit courts of appeal, a conflict created by the Ninth Circuit's conclusion that parties cannot delegate authority to the arbitrator to decide issues of enforceability.

When he was hired by RAC, Antonio Jackson signed an agreement to arbitrate claims arising from his employment. The agreement also clearly and unmistakably required that any challenges to its enforceability likewise must be submitted to an arbitrator to decide. Despite the terms of his arbitration agreement, Jackson filed a complaint in the United States District Court for the District of Nevada alleging employment discrimination and retaliation. When RAC moved to dismiss Jackson's complaint and compel arbitration, Jackson alleged that the agreement was unenforceable because certain provisions in his view were unconscionable. RAC, relying on the language of the agreement, argued that the unconscionability issue was for the arbitrator to decide. Jackson disagreed, arguing that only a court could decide the issue, even though his agreement required that it be arbitrated. The district court agreed with RAC and held that Jackson's challenges to the enforceability of the Agreement must be decided by the arbitrator. The district court held alternatively that the Agreement was not unconsicionable, and was therefore enforceable. Jackson appealed to the Ninth Circuit.

In a 2-1 decision, the Ninth Circuit affirmed in part, reversed in part, and remanded to the district court. The Ninth Circuit acknowledged that it was undisputed that the agreement clearly and unmistakably assigned the question of contract enforceability to the arbitrator in the first instance. The majority opinion at the Ninth Circuit held that notwithstanding the clear language, the mere allegation that an arbitration agreement is unconscionable required the district court—and not the arbitrator—to decide the issue. The dissent stated that the majority's opinion "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to

determine an agreement's validity based on just the bare allegation of unconscionability, even when the contract language clearly and unmistakably chooses a different forum for that question." The Ninth Circuit, however, affirmed the district court's finding that the agreement's cost provision was not unconscionable, and remanded to the district court to decide two other unconscionability claims.

The Supreme Court reversed and held that Jackson's challenge to an arbitration agreement should be decided by an arbitrator chosen by the parties, and not a judge, because the agreement expressly delegated that authority to an arbitrator. The Supreme Court rejected arguments by Jackson and the Ninth Circuit's holding that the unconscionability issue must be one for the courts alone. The Court held that, if the delegation clause itself were undermined by other provisions of the arbitration agreement, then perhaps the clause could be attacked on that ground. Thus, for example, if provisions of the arbitration agreement other than that which delegated unconscionability to the arbitrator rendered it unreasonably difficult for the arbitrator to rule on the unconscionability question, then a court could intervene and refuse enforcement of the delegation clause.

However, that was not the case in Rent-A-Center, where Jackson challenged the arbitration agreement as a whole, contending that the agreement was both procedurally and substantively unconscionable. The Court noted that none of Jackson's substantive unconscionability challenges were specific to the delegation provision and that there were no other provisions of the arbitration agreement that would have rendered the delegation provision unconscionable.

***Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (Apr. 27, 2010).**

Holding: A class arbitration may be ordered only if there is a contractual basis for concluding that the parties agreed to submit to class arbitration.

Background and Analysis: The Supreme Court's decision reverses the opinion of the Second Circuit Court of Appeals, and addressed the issue whether parties can be forced to arbitrate class claims when the arbitration provision is silent—that is, where the provision neither authorizes nor prohibits class arbitration. The case arose in connection with a dispute between a shipping company and a customer regarding whether an agreement that was completely silent on the question of class arbitrations could be construed to permit them. The Supreme Court held that silence was not enough. It held instead that the agreement must affirmatively permit class actions in order for an arbitrator to preside over the case as a class action, as opposed to an individual dispute between the two parties to the agreement.

The case relies on two fundamental principles of the Federal Arbitration Act: (1) arbitration agreements are to be enforced as they are written; and (2) parties cannot be compelled to arbitrate disputes that they have not agreed to submit to arbitration. Both principles derive from the language of the FAA and the Supreme Court's long line of cases interpreting the FAA.

In focusing on the terms of the agreement itself, the Supreme Court expressly rejected reliance on purported public policies to undermine fidelity to the words of the arbitration

agreement. Accordingly, because the FAA preempts contrary state law, it is likely that parties will argue, based on this case, that the FAA preempts any state rules that would permit class arbitrations notwithstanding contractual language forbidding them or an agreement's silence on the issue.

Although the Stolt-Nielsen decision deals with silent arbitration agreements, those that do not address class actions, the opinion is likely to have significant impact on the interpretation of agreements that do expressly prohibit class actions. In cases involving arbitration agreements with express class action waivers (that is, arbitration agreements that expressly forbid class actions), it would appear that the decision in Stolt-Nielsen mandates that the agreements be enforced as written.

This issue likely will be addressed in the near future as motions are filed in pending class actions. Likewise, the Supreme Court recently granted certiorari in *AT&T Mobility v. Concepcion* (discussed on pages 9-10 below), in which it will be addressing the enforceability of an explicit class waiver contained in a consumer contract of adhesion.

***Granite Rock Co. v. Int'l Broth. of Teamsters*, -- S. Ct. --, 2010 WL 2518518 (June 24, 2010).**

Holdings:

- The question of whether and when parties formed an agreement containing an arbitration clause is generally an "issue for judicial determination," not an arbitrator (7-2).

- It was premature to recognize tortious interference by a non-signatory third party to a labor contract as a federal common law cause of action under Section 301(a) of the Labor-Management Relations Act (LMRA), assuming Section 301(a) authorizes such a cause of action. Other remedies may be available under federal, state and administrative law to remedy the interference of a third-party with a labor contract. The Court remanded for further litigation the federal breach of contract claims under an agency or alter-ego theory. (9-0).

Background and Analysis: The underlying dispute involved a June 2004 strike initiated by Teamsters Local 287 to force Granite Rock to accept its demands for a new labor contract. On July 2, 2004, while the strike was ongoing, the parties agreed on the terms of a new collective bargaining agreement. Local 287 submitted the new agreement to its membership for ratification which it is alleged occurred on that day.

The International Brotherhood of Teamsters (IBT) opposed the Local's decision to return to work with a back-to-work agreement shielding both the Local and the IBT from liability for past strike-related damages. In an effort to secure such an agreement, IBT instructed the Local and its members not to honor their agreement to return to work on July 5, and continue the strike to pressure the Company into accepting the immunity agreement. When Granite Rock refused the IBT and Local responded by announcing a company-wide strike impacting hundreds of employees including members of IBT Locals besides Local 287. Granite Rock then sought an injunction to end the strike in federal court under Section 301(a) of the LMRA. Initially the

District Court dismissed the lawsuit based on testimony that the new agreement had not been ratified. When employees later gave statements that ratification had occurred, Granite Rock made a motion for new trial. While this was pending a second ratification vote occurred on August 22 with the strike finally being called off on September 13, the day the District Court was scheduled to hear Granite Rock's motion. This mooted the need for injunctive relief, but the District Court ordered a new trial on whether the agreement was ratified on July 2 and damages. Local 287 claimed that the no-strike clause was not effective at least prior to August 22 and that the determination of when the contract was formed should be submitted to arbitration per the agreement's arbitration clause. With the ordering of a new trial and subsequent discover Granite Rock learned of the deep involvement of the IBT and amended the complaint to include them.

During the trial phase in the U.S. District Court for the Northern District of California, a number of Granite Rock employees came forward to testify that the union had in fact submitted the agreement to its membership for ratification on July 2. Accepting a unanimous jury verdict, the district court found the agreement to be in effect as of July 2.

Prior to the jury trial the District Court dismissed Granite Rock's claim of tortious interference against the IBT on the basis that Section 301 only recognizes a cause of action for breach of a labor agreement, and the IBT was not a signatory to the agreements in question. The Ninth Circuit affirmed the district court on the dismissal of the tortuous interference claim. The Ninth Circuit reversed the District Court, however, on the issue of whether the effective date of the collective bargaining agreement was subject to arbitration. The appellate court ruled that this issue was subject to arbitration and should not have been decided by the District Court. The Ninth Circuit explained that the language of the arbitration clause was not in dispute and accordingly the effective date should have been arbitrated. It cited the "national policy favoring arbitration" where ambiguities exist as to the scope of an agreement to arbitrate.

In a 7 to 2 decision authored by Justice Thomas, to which Justice Sotomayor dissented joined by Justice Stevens, the Supreme Court agreed with Granite Rock and overruled the Ninth Circuit, holding that, in the absence of clear and convincing evidence otherwise, contract formation and the date on which it occurs is properly decided by a court, not an arbitrator. The decision reinstated the unanimous jury verdict that the collective bargaining agreement containing a no-strike clause was ratified on July 2, and was in place when Local 287 resumed its strike. The dissent opined that, under the unique circumstances of the case, in which the parties later executed the same labor contract with an effective date prior to the strike, no contract formation dispute existed.

On the second issue, the Court unanimously rejected as premature a federal common law cause of action for tortious interference against the IBT. The Court remanded the case to allow Granite Rock to proceed against the IBT on the theory that the local union was acting as the IBT's agent (or alter ego) when it disavowed the collective bargaining agreement, finding nothing in the record to support the IBT's contention that these arguments had been waived. The Court also stated that a state law claim for tortious interference and administrative remedies through the National Labor Relations Board may remain viable remedies against the IBT for its alleged interference. The case was remanded for further proceedings consistent with the Supreme Court's opinion.

II. SIGNIFICANT UNITED STATES COURTS OF APPEALS CASES (JANUARY 2009 – JUNE 2010)

A. Cases Relating to the Enforceability of Arbitration Clauses

1. Who decides questions of arbitrability?

***Fallo v. High Tech Institute*, 559 F.3d 874 (8th Cir. 2009).**

Holding: Contracting parties' incorporation of AAA Rules constitutes clear and unmistakable evidence that they intend to allow an arbitrator to determine questions of arbitrability, removing these questions from the purview of a court. An arbitration provision's incorporation of AAA rules even supersedes a choice-of-law provision, where the law chosen (Missouri) requires a court to determine the question of arbitrability as a matter of law.

Background and Analysis: Students brought tort claims against a vocational school. Invoking the arbitration agreement in the enrollment agreements, the school moved to compel arbitration. That arbitration agreement incorporated the AAA Rules, one of which gives the arbitrator "the power to rule on his or her own jurisdiction." The district court denied the motion to compel, finding that it had the authority to determine questions of arbitrability and that the tort claims fell outside the scope of the arbitration clause. The Eighth Circuit reversed, finding that the incorporation of the AAA rules constituted "clear and unmistakable" evidence that the parties intended that questions of arbitrability would be resolved by the arbitrator. This is true even where the enrollment agreement contained a choice-of-law provision requiring application of Missouri law, which requires a court to determine questions of arbitrability as a matter of law.

Note: Cases discussing whether courts or arbitrators should adjudicate particular defenses to arbitration are set out in Section II.A.3 below.

2. Arbitration with Non-Signatories

a. Incorporation by Reference

***Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513 (3d Cir. 2009).**

Holdings:

- A party does not need to show that an arbitration agreement was "express" and "unequivocal" for the agreement to be enforceable, rather it must show that an agreement was formed under the standards applicable to contracts generally.

- A second-level reinsurer (Lloyd's) could compel arbitration in a dispute with the first-level reinsurer (Century), even though the retrocessional agreements between them did not contain an arbitration clause, because those agreements incorporated by reference underlying reinsurance treaties that did contain an arbitration clause.

Background and Analysis. Argonaut, the original insurer for various asbestos companies, entered into various reinsurance treaties with a predecessor of Century, all of which contained arbitration clauses. Century attempted to spread its exposure to risk through further reinsurance and did so by entering retrocessional agreements (i.e., reinsurance of reinsurance) with Lloyd's. The Lloyd's/Century retrocessional agreements did not contain arbitration clauses, but incorporated the underlying reinsurance treaties by reference. When Century sued Lloyd's over Lloyd's failure to pay for certain litigation expenses incurred by Argonaut, Lloyd's moved to compel arbitration. The district court granted the motion to compel. After an arbitration panel ruled in Lloyd's favor, Century sought to vacate the award on the ground that it had not agreed to arbitrate its dispute with Lloyd's.

The Third Circuit analyzed two threshold questions, finding that (1) the presumption of arbitrability applies to the question of whether the dispute falls within the scope of an arbitration agreement, but "probably" does not apply to the predicate question of whether there is a valid agreement to arbitrate between the parties in the first place; and (2) a party need not show that an arbitration agreement was "express" and "unequivocal" to be enforceable; rather it must show that an agreement was formed under the standards applicable to contracts generally.

Applying Pennsylvania contract law, the Third Circuit then turned to the question of whether Lloyd's, despite being a non-signatory to the reinsurance treaties containing the arbitration clause, could nevertheless compel arbitration on the ground that the arbitration provisions were incorporated by reference in the retrocessional agreement. Century argued that such incorporation should not be found because (1) the phrasing of the arbitration clause in the reinsurance treaties specified that it applied only to disputes between Century and Argonaut; and (2) the general incorporation provision in the retrocessional agreement was intended only to clarify the parties' obligations under the reinsurance agreements, not to agree to a procedure for resolution of disputes. The Court rejected these arguments based primarily on the breadth of the general incorporation provision in the retrocessional agreement. It found that the arbitration provisions in the reinsurance contracts were incorporated by reference in the retrocessional agreement and that the arbitration of the parties' dispute was proper. The Court found that the parties' dispute also fell within the scope of the arbitration clause, and that Century's asserted grounds for vacatur – that the arbitrators improperly excluded key evidence – failed.

b. Equitable/Alternative Estoppel

***PRM Energy Sys., Inc. v. Primenergy, LLC*, 592 F.3d 830 (8th Cir. 2010).**

Holding: Under the doctrine of "alternative estoppel," a non-signatory can compel a signatory to arbitrate when the signatory's claims are so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement.

Background and Analysis: PRM licensed certain patents to Primenergy, L.L.C. through a network of agreements containing an arbitration clause. After disputes arose between the two parties, PRM sued Kobe Steel, a potential sublicense, for tortious interference with, and

inducement to breach the PRM/Primenergy agreements and with conspiring with Primenergy to convert PRM's intellectual property for their own use. Kobe Steel successfully moved to arbitrate the dispute in the district court and the Eighth Circuit affirmed.

The Eighth Circuit found the "the nature of the alleged misconduct and its connection to the contract demonstrates the requisite relationships between persons, wrongs, and issues necessary to compel arbitration." The court called this form of estoppel "alternative estoppel," relying on a concerted misconduct test from the Eleventh Circuit. The "alternative estoppel" theory adopted by the Eighth Circuit has been labeled "equitable estoppel in other circuits. *See, e.g.*, *Grigson v. Creative Artists Agency*, 210 F.3d 524, 528 (5th Cir. 2000) (holding that equitable estoppel applies "when a signatory to a contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.").

***Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).**

Holding: The Ninth Circuit refused to apply equitable estoppel to compel a signatory to arbitrate with a non-signatory defendant, because the signatory's claim was not intertwined with the contract providing for arbitration and did not arise from the contract.

Background and Analysis: A decedent and his widow obtained a loan, which was memorialized in a document containing an arbitration agreement. They also purchased a life insurance policy from USLIC to cover the amount of the loan. The policy did not contain an arbitration agreement. After the decedent's death, his widow filed a complaint against USLIC for bad faith denial of her insurance claim, and USLIC moved to compel arbitration. USLIC sought to enforce the loan's arbitration agreement, even though it was not a party to that agreement, under equitable estoppel theory.

The Ninth Circuit held that USLIC could not compel arbitration. The Court first held that a dispute with a third party such as USLIC fell outside the scope of the arbitration agreement, which addressed only disputes between the bank and the borrower. Next, the Court held that equitable estoppel did not apply. The Court explained that there are two types of equitable equitable estoppel. In the first, a non-signatory may be held to an agreement containing the arbitration clause despite having never signed the agreement. In the second, a signatory may be required to arbitrate a claim brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations.

The Court declined to apply equitable estoppel because the claim involved was not intertwined with the contract providing for arbitration and did not arise from or relate directly to the agreement.

***Donaldson Co. v. Burroughs Diesel, Inc.*, 581 F.3d 726 (8th Cir. 2009).**

Holding: Equitable estoppel did not bind a signatory to arbitrate with a non-signatory where the signatory did not rely on the agreement to assert its claims against the non-signatory, and there was no coordinated behavior between a signatory and non-signatory.

Background and Analysis: Western Star manufactured trucks that it sold to Burroughs, and the parties signed an agreement containing an arbitration provision. Donaldson supplied parts for the trucks and was not a party to the agreement. When a problem arose with the trucks, Burroughs brought claims against Donaldson and Western Star in state court. Western Star filed suit against Burroughs in district court to compel arbitration between Western Star and Burroughs. Donaldson then moved to compel Burroughs to arbitrate with it, relying on equitable estoppel theories.

The Eighth Circuit applied Mississippi law and held that even if Mississippi recognized equitable estoppel, it did not apply to the instant case. First, the Court determined that Burroughs did not rely on its agreement with Western Star to assert its claims against Donaldson. Second, the Court determined that Burroughs did not allege substantially interdependent and concerted misconduct because it did not suggest that Donaldson and Western Star "knowingly acted in concert" or "worked hand-in-hand."

c. Third Party Beneficiary

***Todd v. Steamship Mut. Underwriting Ass'n*, 601 F.3d 329 (5th Cir. 2010).**

Holding: A direct action plaintiff may be required to arbitrate as a third party beneficiary to an arbitration contract, even though it is a non-signatory to the arbitration agreement.

Background and Analysis: Louisiana's direct action statute allows injured individuals to proceed directly against tortfeasors' insurers in certain circumstances. In two prior cases, *Zimmerman* and *Big Foot*, the Fifth Circuit had held that direct action plaintiffs' suits could not be stayed pending arbitration because the direct action plaintiffs were not parties to arbitration agreements. *See Zimmerman v. Int'l Co. & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997); *In re Talbott Big Foot, Inc.*, 887 F.2d 611(5th Cir. 1989). Relying on *Zimmerman* and *Big Foot*, the district court in *Todd* refused to compel a direct action plaintiff to arbitrate.

The Fifth Circuit reversed, in light of the Supreme Court's recent opinion in *Arthur Andersen LLP v. Carlisle*, __ U.S. __, 129 S. Ct. 1896 (2009). The Fifth Circuit held that *Carlisle* effectively overruled *Zimmerman* and *Big Foot* by holding that non-signatories to arbitration agreements (such as direct action plaintiffs) sometimes can be compelled to arbitrate. The Court remanded so that the district court could determine whether the direct action plaintiff could be required to arbitrate as a third party beneficiary.

3. Defenses to Enforcement

a. Unconscionability

***Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom, AT&T Mobility LLC v. Conception*, 78 U.S.L.W. 3454, 78 U.S.L.W. 3677, 78 U.S.L.W. 3687 (U.S. May 24, 2010) (No. 09-893).**

Holdings:

- An arbitration agreement containing a class action waiver was unconscionable and unenforceable under California law, and was not saved by a provision authorizing the payment of a $7500 premium to a customer if the customer obtained an arbitration award greater than the company's last written settlement offer.

- The FAA did not expressly or impliedly preempt California law governing unconscionability. (The Supreme Court has granted AT&T's petition for writ of certiorari on this question).

Background and Analysis. Customers brought a putative class action against AT&T, claiming that the company's offer of a free phone for signing up for telephone service was fraudulent because the company imposed a sales tax based on the retail value of the new phones. AT&T moved to compel arbitration based on an arbitration clause in the service agreement, which (1) prohibited class arbitration; and (2) required AT&T to pay a $7500 premium to any customer that obtained an arbitration award greater than AT&T's last written settlement offer before the arbitration. The district court denied the motion to compel and the Ninth Circuit affirmed.

Relying on a three-part test set out by a previous panel, the Ninth Circuit found that the class action waiver provision in the arbitration clause was unconscionable under California law because (1) the agreement at issue was a contract of adhesion; (2) the dispute involved predictably small amounts of damages; and (3) it was alleged that the party with superior bargaining power (AT&T) carried out a scheme deliberately to cheat large numbers of consumers out of individually small amounts of money. The premium provision included in the arbitration clause did not change the analysis of the second factor because AT&T easily could take the premium off the table by offering the customer the face value of its claim (usually $30.22), eliminating any incentive to bring a claim.

The Ninth Circuit also found that the FAA did not expressly or impliedly preempt California law, reasoning that the unconscionability "rule" it applied was not an arbitration-specific rule, but rather applied generally to all contracts under California law. Accordingly, the rule fell within the scope of 9 U.S.C. § 2 (arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

Petition for Writ of Certiorari: AT&T's petition raised the following question: "Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures–here, class-wide arbitration–when those procedures are not necessary to ensure that the parties to the arbitration agreements are able to vindicate their claims." The petition points out that hundreds of millions of arbitration agreements require that arbitration proceed on an individual basis and that unlike California, most states have upheld the enforceability of such agreements, as long as they do not impose substantial costs on the non-drafting party nor limit that party's remedies. AT&T challenges the Ninth Circuit's finding that these unconscionability rules apply to all contracts generally under California law, and argues that these arbitration-specific requirements (requiring class arbitration when the three-part test set out above is satisfied) are preempted by the FAA.

***Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010) (6-4 en banc decision).**

Holdings:

- A challenge to the enforceability of an explicit class action waiver provision within an arbitration agreement is a challenge to the validity of the parties' agreement to arbitrate, and is thus a question for the court to decide.

- Under the terms of a severability clause in the arbitration agreement, the district court had to address the contention that the class action waiver was unconscionable before considering whether the waiver could be severed.

- The parties did not contract around the general rule that questions regarding the validity of an arbitration agreement were for the court to resolve.

Background and Analysis: The Puleos brought a putative class action challenging retroactive interest-rate increases on the account balances of their credit cards, despite the fact that their credit card agreement contained an arbitration clause with a class action waiver provision. After Chase moved to compel arbitration, the Puleos urged the district court to order the parties to arbitrate the class claims, contending that the question of whether the class waiver was unconscionable was for the arbitrator, not the court, to decide. The district court held that it first must decide the enforceability of the class action waiver, found the waiver enforceable, and compelled the Puleos to arbitrate their claims on an individual basis. The Third Circuit, sitting en banc, affirmed.

The Third Circuit held that when a party challenges the validity of the arbitration clause itself, the question is presumptively for the court to decide, not the arbitrator. The Third Circuit rejected the Puleos' arguments that this general rule was inapplicable because of (1) their willingness to arbitrate, albeit not under the terms of the class waiver provision, (2) the presence of a severability clause in the arbitration agreement, or (3) the parties intended to reserve questions of arbitrability for the arbitrator. On the latter point, the Puleos did not demonstrate that the parties "clearly and unmistakably" agreed to submit questions regarding the validity of the arbitration agreement to the arbitrator. The dissent argued that because both parties agreed

that their dispute was arbitrable, the issue of arbitrability was not on the table and the enforceability of the class waiver provision was for the arbitrator to decide.

***Omstead v. Dell, Inc.*, 594 F.3d 1081 (9th Cir. 2010).**

Holdings:

- A class action waiver of arbitration was unconscionable under California law.
- Application of a choice-of-law provision designating Texas law would violate a fundamental policy of California and the provision would not be enforced.
- A class action waiver provision is not severable from the remainder of the contract.

Background and Analysis: Customers brought a putative class action against Dell alleging various state law claims arising out of their purchase of notebook computers. The purchase agreement contained an arbitration clause, a class action waiver provision, and a choice-of-law provision designating Texas law as controlling. The district court granted Dell's motion to compel arbitration. The Ninth Circuit reversed.

The Ninth Circuit held that the choice-of-law provision was unenforceable as violative of the fundamental public policy of California. The Court found that under California law, the class action waiver was unconscionable because the sales agreement was a contract of adhesion, the amount in controversy was small enough to prevent customers from bringing individual claims, and the plaintiff alleged a deliberate practice of depriving customers of money. Further, the class action provision was not severable because it was "central" to the arbitration provision.

***Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010).**

In a putative class action brought by a wireless customer against a wireless service provider, the Eleventh Circuit certified the following questions to the Florida Supreme Court in order to determine whether the district court's order compelling arbitration should be reversed or affirmed: "(1) Must Florida courts evaluate both procedural and substantive unconscionability simultaneously in a balancing or sliding scale approach, or may courts consider either procedural or substantive unconscionability independently and conclude their analysis if either one is lacking?; (2) Is the class action waiver provision in Plaintiff's contract with Sprint procedurally unconscionable under Florida law?; (3) Is the class action waiver provision in Plaintiff's contract with Sprint substantively unconscionable under Florida law? (4) Is the class action waiver provision in Plaintiff's contract with Sprint void under Florida law for any other reason?" The case is currently pending in the Florida Supreme Court.

***Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010).**

Holding: An alternative dispute resolution clause requiring a party to engage in an "informal and formal conciliation" process prior to arbitration was both procedurally and substantively unconscionable under the facts of this case.

Background and Analysis. Quixtar markets a variety of products and services that it sells to consumers through a network of individual distributors that it refers to as "Independent Business Owners ("IBOs"). Certain senior IBOs also produce and market "business and support materials to junior IBOS. A group of junior IBOs brought suit against Quixtar and certain senior IBOS, alleging that they operate an illegal pyramid scheme in violation of the RICO statute. The defendants moved to dismiss the suit, or in the alternative, to compel plaintiffs to resolve their claims through a mandatory ADR process outlined in the IBO agreements. That process required a plaintiff to go through a three-step procedure: (1) an "Informal Conciliation" with Quixtar, likened to a mediation; (2) a "Formal Conciliation," which involved a non-binding hearing before a board of senior IBOs, which then would issue a recommendation that could be accepted, reversed or modified by Quixtar; and (3) binding arbitration, limited by certain "Rules of Conduct." The district court denied the motion to dismiss, holding that the ADR process was unconscionable. The Ninth Circuit affirmed.

Under California law, an arbitration agreement is unenforceable if it is both procedurally and substantively conscionable. The Ninth Circuit found that the ADR procedures were procedurally unconscionable, because (1) Quixtar occupied a superior bargaining position, (2) the agreements were presented to the plaintiffs on a take-it-or-leave-it basis, with no opportunity for meaningful negotiation, and (3) Quixtar failed to attach a copy of the Rules of Conduct, which contained the full description of the non-binding conciliation and binding arbitration processes, and which was subject to unilateral amendment by Quixtar at any time. The Ninth Circuit found the conciliation procedures to be substantively unconscionable, because among other reasons, the lack of mutuality of the requirement, the shortened statute of limitations created by the Rules of Conduct, Quixtar's unilateral and unchecked right to reverse or modify the IBO hearing panel's recommendation (while getting a "free peek" at its opponents' case), and the inability of an IBO to effectively challenge the Rules of Conduct through the conciliation process. Finally, the Ninth Circuit found the third-stage binding arbitration process to be substantively unconscionable as well, based on the lack of mutuality in the requirement that IBOs engage in binding arbitration, the reduced statute of limitations imposed by the Rules of Conduct, the unilateral confidentiality requirement imposed on IBOs, the inclusion of an arbitration selection process that unfairly favored Quixtar, and the inclusion of a fee-shifting provision that requires the losing party to bear the costs of the arbitration, including the prevailing party's attorneys' fees.

***Harrington v. Atl. Sounding Co., Inc.*, 602 F.3d 113 (2d Cir. 2010).**

Holding: The Second Circuit held that an arbitration agreement was not substantively unconscionable under New Jersey law, reversing the contrary holding of the district court.

Background and Analysis: The plaintiff was injured while working as a seaman for the defendants. Unable to work, the plaintiff asked the defendants for financial support to cover his injury and upcoming surgery. In response, the plaintiff and the defendants signed a Claim Arbitration Agreement, in which the defendants agreed to pay the plaintiff 60% of his wages, the plaintiff agreed that these payments would be an advance against any settlement, and the plaintiff agreed all claims would be arbitrated. The plaintiff later filed suit against the defendants in

district court, and the defendants moved to compel arbitration. The district court ruled that the agreement was both procedurally and substantively unconscionable, reasoning that the plaintiff was heavily medicated when he signed the agreement, and the agreement created a false impression that the defendants were not subject to any liability by stating that the defendants were not "currently responsible or liable."

The Second Circuit reversed, reasoning that under New Jersey law, procedural unconscionability (which includes "various inadequacies like age, literacy, and lack of sophistication") is not enough not make an arbitration agreement unenforceable. Rather, substantive unconscionability must also be present. To be substantively unconscionable, an agreement must include "an exchange of obligations so one-sided as to shock the court's conscience." The Second Circuit held that the Claim Arbitration Agreement "had no such effect." To hold that an advance of funds in exchange for an agreement to arbitrate shocked the conscience "would contravene the 'liberal federal policy favoring arbitration agreements.'" Therefore, the Court remanded so that the district court could consider the plaintiff's other defenses to arbitration.

***Ragone v. Atl. Video at the Manhattan Ctr.*, 595 F.3d 115 (2d Cir. 2010).**

Holding: An agreement to arbitrate could be enforced where the parties seeking to compel arbitration agreed to waive provisions that otherwise might have been found to be unconscionable.

Background and Analysis: The plaintiff brought a Title VII employment discrimination action against AVI and ESPN. AVI moved to compel arbitration pursuant to an arbitration agreement with the plaintiff. The plaintiff resisted arbitration, arguing that several of the provisions in the arbitration agreement were unconscionable. In particular, the plaintiff complained that the arbitration agreement impermissibly shortened the statute of limitations to 90 days and required that attorney's fees be awarded to the prevailing party. The defendants waived enforcement of these two provisions, and the district court accordingly ruled that the agreement was not unconscionable.

The Second Circuit affirmed, holding that the district court could enforce an agreement that modifies a provision that otherwise might have been unconscionable. The Court was careful to note, however, that had the provisions not been waived, they might have impermissibly diminished rights under Title VII.

In a separate issue, the Court held that under the doctrine of equitable estoppel, ESPN could invoke the arbitration clause and be a party to the arbitration, even though it was a non-signatory to the arbitration agreement. The Court determined there was no question that the subject matter of the dispute between the plaintiff and AVI was factually intertwined with the dispute between the plaintiff and ESPN, because it was, "in fact, the same dispute." The Court also found it relevant that the plaintiff knew from the beginning of her employment with AVI that she would regularly work with and be supervised by ESPN personnel. The Court held that this relationship allowed ESPN to avail itself of the arbitration agreement.

***Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009).**

Holding: An arbitration clause in a credit card agreement, which included a class action waiver and various fee and cost-sharing provisions, was neither procedurally nor substantively unconscionable under Missouri law, reversing the contrary holding of the district court.

Background and Analysis: Under Missouri law, a party challenging the enforceability of an arbitration provision must show that it is both procedurally and substantively unconscionable. The Eighth Circuit found that the arbitration clause in the credit card agreement between Chase and the plaintiff was neither. With respect to the procedural unconscionability inquiry, the Court noted that (1) the arbitration clause was not in a smaller font size than the remainder of the document, (2) the arbitration agreement and class-action waiver were introduced by a boldfaced heading and a paragraph in all-uppercase font, (3) the class action waiver always had been a part of the credit card agreement, (4) the plaintiff had ample time to opt out of the amendments to the agreement imposing various cost- and fee-sharing provisions before they took effect, and (5) there was no evidence that Chase engaged in high-pressure sales tactics to coerce the plaintiff into entering into the agreement.

The Eighth Circuit likewise rejected the district court's finding that the agreement was substantively unconscionable, which requires a showing that the agreement is one which "no man in his senses and not under delusion would make, on one hand, and one that no honest and fair man would accept." The district court had concluded that class action waiver was unconscionable because there was no effective remedy for cardmembers that had suffered small actual damages. The Eighth Circuit rejected this argument, largely based on an exception in the arbitration clause that allowed a cardmember to file a claim individually in small claims court. The Court also did not find unconscionable a provision that contemplated a sharing or shifting of costs and fees, at the arbitrator's discretion, after the second day of any arbitration hearing (Chase agreed to pay the initial filing fee and arbitrator fees for the first two hearing days).

***G.R. Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009).**

Holdings:

- FAA did not preempt the consideration of the unconscionability of a class arbitration waiver provision.
- The class arbitration waiver provision in the credit card agreement was unconscionable.

Background and Analysis: A cardholder brought a putative class action against a credit card company and an issuing bank. The cardholder agreement had an arbitration clause, a class arbitration waiver provision, and a choice-of-law provision requiring application of Utah law (which expressly allows class arbitration waivers in consumer credit agreements). The district court granted AMEX's motion to compel arbitration, and the Third Circuit reversed.

The Third Circuit first determined that the unconscionability defense urged by the cardholder was a general contract defense that applies to waivers of all class-wide actions,

whether in arbitration or in court. Therefore, the FAA did not preempt the state law unconscionability analysis. *See* 9 U.S.C. § 2. Next, the Court determined that the Utah choice-of-law provision would violate New Jersey public policy, and therefore refused to enforce it. Finally, the Court found that the class arbitration provision was unconscionable under New Jersey law because the cardmember agreement was a contract of adhesion, presented on a take-it-or-leave-it basis in standardized print form, without the opportunity to negotiate, and because the low monetary value of the claims effectively precluded a plaintiff from bringing claims on an individual basis.

***Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009).**

Holdings:

- Arbitration clause was not procedurally unconscionable under Oregon law.
- A class action waiver provision was substantively unconscionable under Oregon law.
- The waiver provision was not severable, and thus, the entire arbitration clause was unenforceable.

Background and Analysis: Customers brought a putative class action against T-Mobile arising out of their purchase of wireless cards. The purchase agreement contained an arbitration clause, a class action waiver provision, and a severability provision forbidding severance of the class action waiver provision. The district court granted T-Mobile's motion to compel arbitration. The Ninth Circuit reversed.

The Ninth Circuit held that the take-it-or-leave-it nature of the agreement was insufficient to render the arbitration provision procedurally unconscionable under Oregon law, particularly where the arbitration clause and class action waiver are featured in boldface and uppercase text. However, a finding of substantive unconscionability is enough to render a contract provision invalid under Oregon law. Because of the disparity in bargaining power, the one-sided nature of the class action waiver provision, and the inability of consumers to vindicate their rights on an individual basis, the Ninth Circuit found the waiver provision to be substantively unconscionable. Further, in light of the contractual provision prohibiting severance of the class action waiver, the Court found the entire arbitration agreement to be unenforceable.

b. Compliance with a Condition Precedent

***Dealer Computer Servs., Inc. v. Old Colony Motors*, 588 F.3d 884 (5th Cir. 2009).**

Holding: Payment of arbitration-related fees is a procedural condition precedent to arbitration that the arbitrator should review, not the court.

Background and Analysis: Dealer Services filed an arbitration demand against Old Colony, and Old Colony filed counterclaims. Old Colony was unable to pay its proportional share of deposits for the arbitrator's fees and expenses, so Dealer Services filed suit under 9

U.S.C. § 4 to compel Old Colony to pay its share. The trial court granted the motion to compel and ordered Old Colony to pay the deposit.

The Fifth Circuit reversed, holding that payment of fees is a procedural condition precedent to arbitration and is within the purview of the arbitrators, not the courts. Under the AAA Rules, arbitrators have the discretion to order either party to pay the fees upon the failure of payment in full. If the party that fails to pay the fees prevails in the proceeding, the fees may be subtracted from its recovery. If the party that fails to pay the fees loses, the arbitrators may add the fees to the final award. The Fifth Circuit remanded the case to the district court with instructions to dismiss Dealer Services' motion to compel.

c. Waiver

***Hill v. Ricoh Americas Corp.*, 603 F.3d 766 (10th Cir. 2010).**

Holding: Defendant did not waive its right to arbitrate by waiting five months after the lawsuit was filed to move to compel arbitration.

Background and Analysis: The Tenth Circuit held that Defendant did not waive its right to arbitrate, even though it waited five months after suit was filed to move to compel arbitration. Very little activity had taken place in the case before Defendant's demand for arbitration. The trial was not set for another eleven months, discovery could continue for another five-and-a-half months, and the deadline for completing ADR was more than two months away.

***Nicholas v. KBR, Inc.*, 565 F.3d 904 (5th Cir. 2009).**

Holding: The filing of a lawsuit is generally a substantial invocation of the judicial process, sufficient to establish waiver of the right to arbitrate as long as the party resisting arbitration can show prejudice.

Background and Analysis: Without any mention of an arbitration agreement, Plaintiff filed a lawsuit, filed a motion to remand, amended her complaint, responded to discovery, and sat for her deposition. Ten months after filing suit, and after an unfavorable legal ruling, Plaintiff moved to compel arbitration. The district court ruled that Plaintiff waived the right to arbitrate.

The Fifth Circuit affirmed. The Court held that "the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies." Concluding that Plaintiff had substantially invoked the judicial process, the Court went on to find that the defendant was prejudiced because it had conducted the bulk of activity necessary to defend against Plaintiff's claims.

***Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476 (5th Cir. 2009).**

Holding: Defendant waived its right to arbitrate by waiting to seek arbitration until after the trial court indicated that it would rule against Defendant.

Background and Analysis: Before seeking to compel arbitration, Defendant removed the case to federal court, filed counterclaims, and participated in discovery and numerous discovery meetings. One year after the plaintiff filed suit, the trial court indicated in a status conference that it would rule against Defendant. It was only then that Defendant moved to compel arbitration. The Fifth Circuit held that Defendant waived its right to arbitrate by waiting to move to compel arbitration until after the district court's unfavorable pronouncements. This, the Court found, substantially invoked the judicial process and prejudiced the plaintiff.

***Hooper v. Advance Am. Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917 (8th Cir. 2009).**

Holding: A party filing an "extensive and exhaustive" motion to dismiss under Rule 12(b) waives the right to later seek arbitration of the dispute, even if the motion purports to "reserve the right" to enforce the arbitration clause if the motion is denied.

Background and Analysis: Advance America, a payday lender, moved to dismiss a putative class action brought against it under Rule 12(b)(1) and 12(b)(6) (for lack of subject matter jurisdiction and failure to state a claim, respectively), while "reserving its right" to enforce an arbitration clause in the loan agreements if its motion were denied. After portions of the plaintiff's lawsuit survived the "extensive" motion to dismiss, Advance America moved to stay litigation and compel arbitration. The district court denied the motion on the grounds of waiver and the Eighth Circuit affirmed.

Applying a three-part test, the Eighth Circuit found that a right to arbitration is waived when (1) a party was aware of its right to arbitration, (2) acted inconsistently with that right, and (3) did so to the detriment of the opposing party. The Court emphasized that Advance America "substantially invokes the litigation machinery" by filing an "extensive and exhaustive" motion to dismiss that required the district court to analyze many issues of first impression. However, the Court took pains to say that "[n]ot every motion to dismiss is inconsistent with the right to arbitration," particularly motions that did not touch on the merits of a dispute or sought only the dismissal of frivolous claims.

***Southeastern Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963 (8th Cir. 2009).**

Holding: Defendant waived its right to arbitrate, even though its delay in moving to compel arbitration was based on its mistaken belief that it could not arbitrate under state law.

Background and Analysis: Defendant believed that it could not arbitrate under Arkansas law, which required mutuality of obligation within the arbitration agreement. Relying on this law, Defendant participated in discovery and filed a motion for judgment on the pleadings without raising the issue of arbitration. Over one year later, Defendant asserted for the first time that it had a right to arbitrate under a new unpublished federal district court case, which held that the Arkansas law requiring mutuality was preempted by the FAA.

The Eighth Circuit nevertheless held that Defendant waived its right to arbitrate. The Court reasoned that long before the new district court opinion allowing arbitration, United States Supreme Court precedent held that the FAA preempts state laws that withdraw the power to enforce arbitration agreements. The Eighth Circuit therefore concluded that, despite Arkansas case law to the contrary, "it should have been clear to [Defendant] that the arbitration agreement was at least arguably enforceable because Arkansas could not have imposed additional requirements that applied only to arbitration agreements." Finding no valid excuse for Defendant's delay, the Court held that Defendant acted inconsistently with its existing right to arbitrate by waiting thirteen months before asserting that right.

B. Cases Relating to the Scope of Arbitration Clauses.

***Chelsea Family Pharm., PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1196 (10th Cir. 2009).**

Holdings:

- Two factually distinct injuries pleaded in the same causes of action in a complaint constitute distinct "controversies or claims" whose arbitrability must be separately evaluated.

- In the face of a narrow arbitration clause, which authorized arbitration of "any controversy or claim arising out of or relating to payments to [plaintiff] by [defendant]," the court determined that one set of the plaintiff's factual claims was subject to arbitration, while another was not.

- Because the two claims were distinct and unrelated, the district court did not need to stay the non-arbitrable claims pending resolution of the arbitrable claims.

Background and Analysis: Chelsea Family Pharmacy, a local pharmacy servicing retail customers, entered into an agreement with Medco Health, a third party prescription drug program administrator, to fill Chelsea's prescriptions and facilitate insurance reimbursements. The agreement contained a clause requiring arbitration of disputes "arising out of or relating to payments to [Chelsea] by Medco." Chelsea brought suit against Medco claiming two distinct factual injuries, despite commingling the factual allegations in setting forth its causes of action: (1) Medco unlawfully reimbursed Chelsea at lower than the prevailing rate; and (2) Medco operated its mail order program in a manner that unlawfully harmed Chelsea's competitiveness.

The Tenth Circuit noted that in determining whether a clause is broad or narrow, the court must consider whether the parties clearly manifested a desire to limit arbitration to specific disputes. While arbitration is heavily favored, a narrow arbitration clause will only cover an issue that, on its face, falls within the boundaries of the clause, and matters that are merely collateral to those falling within the scope of an arbitration clause are not covered. Here, looking at the factual underpinnings of the claim rather than the legal labels used by the plaintiff, the Court found that Chelsea's claims regarding the low reimbursements fell within the scope of the narrow arbitration clause, but that its competitiveness claims did not. Because resolution of the

reimbursement claims were distinct from, and would have no preclusive effect on, the competitiveness claims, the Court held that there was no need to stay the competitiveness claims pending the outcome of the arbitration of the reimbursement claims.

***Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).**

Holding: Plaintiff's claims arising from an alleged sexual assault fell outside a broad arbitration provision that called for arbitration of all claims "related to" employment.

Background and Analysis: Plaintiff worked for Halliburton/KBR in Baghdad. Plaintiff alleged that one night, she was drugged, beaten, and sexually assaulted by several Halliburton/KBR employees while she was off duty in her barracks bedroom. Plaintiff filed suit against Halliburton/KBR, and Halliburton/KBR sought to compel arbitration under Plaintiff's employment contract, which stated that she agreed to arbitrate "any and all claims . . . related to [her] employment."

The Fifth Circuit held that Plaintiff's claims arising from the sexual assault (for assault and battery, intentional infliction of emotional distress, negligent hiring, retention and supervision, and false imprisonment) were not within the scope of the arbitration agreement. The Court conceded that the analysis was fact-specific and was careful not to hold that sexual assault allegations could never relate to employment. But the Court held that under the facts of the case—where the assault occurred after hours in Plaintiff's bedroom while she was off duty—the arbitration provision's scope stopped at the Plaintiff's bedroom door.

drafting checklist—an excerpt from

DRAFTING DISPUTE MANAGEMENT CLAUSES: A PRACTICAL GUIDE FOR THE TRANSACTIONAL LAWYER

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by the
Dispute Resolution Committee
of the
ABA Business Law Section

DRAFTING DISPUTE MANAGEMENT CLAUSES: A PRACTICAL GUIDE FOR THE TRANSACTIONAL LAWYER

by the
Dispute Resolution Committee[1]
of the
ABA Business Law Section
Lawrence D.W. Graves, Chair

[1] The Committee acknowledges the primary assistance of Terry L. Trantina and F. Peter Phillips in creating the text of this *Guide*, and of Joan Grafstein and Mr. Phillips in editing.

Appendix: The Checklist

What follows is an exhaustive checklist for the conscientious drafter containing the points to consider in order to manage conflicts that may arise in a client's deal:

Specify the Type and Combinations of ADR

1. What Number and Types of ADR?
    a. Mandatory prelitigation negotiation only?
    b. Mandatory prelitigation mediation only?
    c. Arbitration only?
    d. Negotiation leading to arbitration?
    e. Mediation leading to arbitration?
    f. Negotiation leading to mediation, leading to arbitration?
    g. Other ADR types (*e.g.*, med/arb, neutral fact-finding, early neutral evaluation, mock trial, shared neutral expert)?

2. Good faith, face-to-face negotiation
    a. Designate negotiators?
    b. Later escalate to more senior negotiators?
    c. Require person with authority to bind?
    d. May slow process down—desirable?

3. Mediation by Neutral Third Party
    a. Successful a majority of the time.
    b. If unsuccessful, may slow process down—desirable?

4. Arbitration: binding or advisory?

5. Other processes (*e.g.*, minitrial, mediation/arbitration)?

6. How each step is initiated? Must prior step be exhausted for next step to commence?

7. May related counterclaim(s) be raised for the first time at a subsequent step or must they go through entire process?

Specify the Number and Skill-Set of Your ADR Neutrals

1. Mediator
   a. Naming specific mediator in advance?
   b. Allow mediator expert help?
   c. Provide for co-mediators in multiparty disputes?

2. Arbitrator?
   a. Single arbitrator means quicker process, less expense
   b. Three-arbitrator panel for big dollar cases or complex matters? Party appointed? Neutral or non-neutral?
   c. Decisions by majority, more consensus decision making?
   d. Broader experience base applied to decisions?
   e. Slower process, more expensive

3. Specify neutral's required skill set and background?
   a. Attorney?
   b. Former judge?
   c. Professional skills (*e.g.*, accountant, architect, engineer)?
   d. Knowledge of law or industry practice of specific area?
   e. Educational background or licenses?
   f. ADR training and experience?

4. Specify specific neutral(s), neutral list (*e.g.*, former federal judges) or special ADR Provider panel?

Specify the Location of the ADR Proceedings

1. Specify geographic location (*e.g.*, city, county, state, judicial district)?

2. Specify site (*e.g.*, party, ADR Provider, or neutral's office)?

3. Specify site selection process, criteria, or defaults?

4. Let neutral select site?

Specify the Scope of Issues and Parties Subject to ADR

1. Include all disputes (use court approved "magic" words, i.e., "all disputes arising out of or relating to…")?

2. Include all except those expressly "carved-out" (*e.g.*, subject matter carve-outs like patent disputes, claim value carve-outs such as matters within small claims court jurisdiction, or matters determined by arbitrator to be above a specified dollar amount)?

3. Only specific issues subject to ADR?

4. Which parties can/must adjudicate disputes in arbitration proceeding?

5. Permit/require additional third-party beneficiaries (*e.g.*, subsidiaries or parent) to adjudicate disputes in arbitration?

6. Expressly prohibit or require joinder of disputes or parties from other contracts? Are related contracts consistent on this point?

7. Include claims arising under prior or related contracts?
   a. Make all disputes subject to ADR even if arising from prior contract?
   b. Only disputes arising out of or related to new contract?

Specify the Applicable Substantive Law

1. Specify that FAA governs and enforces the ADR obligation and that state law, excluding the state's choice of law and ADR law provisions, governs all other substantive matters?

2. Specify state ADR law and state substantive law?

3. Specify limitations periods that apply to disputes?
   a. Provide for application of state law statutes of limitation?
   b. Provide for tolling of state statutes of limitations on notice of dispute?

c. Allow parties to file law suit to preserve limitations on claims?
d. Provide special contract limitations periods for adjudicating disputes and specify that longer state limitation statutes do not apply?

4. Provide that arbitrator must follow state recognized and applicable privileges (*e.g.*, attorney client and work-product privilege)?

Specify the Applicable ADR Procedural Rules

1. Specify all applicable procedures in agreement?

2. Specify that neutral panel will determine all procedures?

3. Incorporate ADR Provider procedural rules?
   a. Non-administered (*e.g.*, CPR Commercial Arbitration Rules).
   b. Administered (*e.g.*, JAMS or AAA Commercial Arbitration Rules).
   c. Special sector rules of an ADR Provider (*e.g.*, construction, employment, consumer, complex commercial, etc.)?
   d. Allow neutral panel to provide for any other required procedures?
   e. Provide that ADR contract provisions supplement and override conflicting ADR Provider rules?

4. Provide for application of all or selected federal or state procedure rules?

5. Provide for application of all or some federal or state rules of evidence?

6. Specify permitted type of proceeding:
   a. Require face to face?
   b. Permit telephone or electronic proceedings (or portions of proceedings)?
   c. Permit resolution of dispute by arbitrator based on written submissions and documents?
   d. Permit range of options and who selects?

7. Provide specific time limits for each ADR step and for the issuance of an arbitration decision and award?

8. Provide arbitrator power to conduct summary proceedings or proceedings in a party's absence and render award when party refuses to participate or cooperate?

9. Dispositive motions, such as motions for summary judgment, allowed?

Specify the Arbitrator's Obligations and Scope of Powers

1. Specify limits of arbitrator discretion?

2. Specify that arbitrator must follow dictates and limits of agreement?

3. Specify that arbitrator must apply applicable substantive law to dispute?

4. Specify that award shall not be vacated for mistakes of law?

5. Specify that arbitrator may simply do justice and is not required to follow the law to resolve the dispute?

6. Require arbitrator actions within specified time frames (*e.g.*, rendering award within specified number of days following close of hearing)?

Specify Permitted Scope of Review of ADR Award

1. Permit only that provided by applicable federal or state ADR statute?

2. Create private review panel (*e.g.*, one- or three-person panel to review decision and award, and specify scope of review)?
   a. De novo review of facts and law?
   b. Only errors of law (specify standard, *e.g.*, clearly erroneous)?
   c. Available only if award exceeds certain dollar amount or provides certain type of relief (*e.g.*, specific performance, punitive damages)?

Specify the Extent of Confidentiality

1. Specify whether existence and nature of the dispute and proceedings will be confidential?

2. Specify whether information provided or statements made in prior ADR steps may be used in subsequent steps?

3. Specify whether a record will be made of the proceedings and specify the purposes for which it may be used?

4. Specify whether the award will be confidential, except for limited disclosures to necessary third parties (*e.g.*, accountants) and for purposes of confirmation or vacatur?

5. Specify whether disclosures, statements, decision, or award may be disclosed in the course of other proceedings between same parties?

6. Agree to exclude all but neutrals, parties, and witnesses from hearing room?

Specify the Permitted Scope of Discovery

1. Adopt ADR Provider rules concerning discovery?

2. Adopt ADR Provider rules concerning discovery modified by specific additions or overriding exceptions?

3. Adopt state or federal civil discovery rules with or without specific additions or exceptions?

4. Exclude civil discovery rules with exceptions (*e.g.*, provisions for serving extraterritorial subpoenas)?

5. Provide that arbitrator shall determine all issues regarding the scope and types of permitted discovery (*e.g.*, depositions, written interrogatories)?

6. Specifically provide or limit scope and type of discovery that will be permitted, with administration by the arbitrator (*e.g.*, no depositions, no interrogatories, no party-issued subpoenas)?

7. Provide procedures for third-party subpoenas (*e.g.*, incorporate state or federal long-arm statutes or court rules)?

8. Require mandatory prehearing meetings for sharing of documents and lists of witnesses?

Specify the Jurisdiction to Confirm or Vacate the Arbitration Award

1. Rely on ADR Provider procedural rules?

2. Require written reasoned decision and award?

3. Require award containing findings of fact and conclusions of law?

4. Require or permit only bare award?

5. Specifically permit arbitrator to resolve issues by summary judgment?

6. Grant arbitrator specific authority to limit introduction of evidence?

7. Provide for specific jurisdiction for confirmation or vacation of award to prevent forum shopping?

8. Provide whether the decision and award may be given res judicata effect in subsequent proceedings between the same parties?

Specify the Relief Available from Arbitrator and Court

1. Be silent on the issue of scope of available relief?

2. Rely on incorporated ADR Provider rules?

3. Specify that arbitrator may provide for any relief available under applicable statute or equity and not otherwise lawfully restricted by the parties' agreement?

4. Provide for specific limits on the scope of relief the arbitrator may award (*e.g.*, no punitive damages, no consequential damages, no specific performance, and only monetary relief)?

5. Permit arbitrator to award interim relief?

6. Expressly make taking dispute to court rather than submitting it to the required ADR process a breach of contract for which arbitrator must grant relief (including waiver of remedy for dispute) and attorney fees?

7. Provide for party assumption of own attorney fees, costs, and ADR fees, unless award required by applicable statute?

8. Provide for award of attorney fees and costs to prevailing party?

9. Provide for sharing of mediator and arbitrator fees and ADR Provider fees?

10. Provide for arbitrator allocation of all or some of the ADR fees?

11. Allow parties to seek injunctive relief in court solely to preserve status quo, to preserve assets, or to toll statutes of limitations?

Miscellaneous Considerations

1. Specify the precise process for and timing of initiation of each step of ADR:
   a. Method of commencement (*e.g.*, written demand or notice)?
   b. Set time limits for each step?

2. Specify scope of disputes subject to particular ADR proceeding:
   a. Only those disputes specifically set forth in the demand and those in other party's response to that particular demand?
   b. require joinder of all known outstanding disputes and waiver of disputes not expressly joined or set forth in written demand?
   c. specify that each separate dispute (if not waived) must go through all ADR steps (no skipping steps, no surprise disputes)?

3. Specify what happens if one party fails to honor agreement to arbitrate disputes and goes instead to court to remedy a dispute subject to arbitration?
   a. Specify that going to court is a separate breach of the agreement for which damages, including attorney fees, are recoverable?
   b. Provide that failure to withdraw suit on demand shall result in waiver of the right to relief for the dispute taken to court?

4. Specify what happens when one party fails to pay fees of administering ADR entity or neutral:
   a. Allow other party to pay to permit ADR to continue?
   b. Provide that failure to pay required fees constitutes a binding waiver of the dispute(s) subject to process?
   c. Require arbitrator to proceed to award without regard to nonpayment of fees by one party?

Choice of Law; Venue.

A. Any dispute based upon this Agreement or any other aspect of the commercial relationship between the parties, whether sounding in tort, contract, or any other legal theory, shall be resolved by binding arbitration, and judgment upon the award(s) rendered by the arbitrators may be entered in any court having jurisdiction thereof. The arbitral tribunal shall consist of one arbitrator, selected by agreement between the parties; failing such agreement, the arbitrators shall be named by the Internationa Chamber of Commerce ("ICC"). Arbitration proceedings will be held in New York, NY, under the Rules of Commercial Arbitration and under the institutional supervision of the ICC, and the parties irrevocably submit to the jurisdiction of the Federal and State courts sitting in New York, NY incident to any such arbitral proceeding.

B. The procedural law governing the arbitration shall be the law of New York; the substantive law shall be the law of New York, including applicable federal law. In no event shall the arbitrator have the discretion to apply the "choice of law" rules of any jurisdiction, including the situs, whether those rules are deemed to be procedural or substantive, to vary the applicable procedural and substantive law chosen by the parties; nor shall the arbitrator have the power to decide contrary to applicable law, *ex aequo et bono*, or otherwise depart in scope or means from that to which a judgment of a court of competent jurisdiction could extend. The prevailing party shall be entitled to an award of its attorneys' fees and costs. Arbitral proceedings relating to this Agreement may be consolidated with any other arbitral proceedings between or among X, Y, and any other person, arising out of the common commercial relationships among those persons.

C. The foregoing provisions shall not limit the right of either party to commence any action or proceeding to compel arbitration, or to obtain execution of any award rendered in any such action or proceeding, in any other appropriate jurisdiction or in any other manner. A final arbitral award against either party in any proceeding arising out of or relating to this Agreement shall be conclusive.

The Cutting Edge of Arbitration: *Arbitration Consultants*

by Deborah Rothman*

Trial strategy consultants' skill sets do not necessarily transfer well to arbitration.

- Dynamics of arbitration
- Insight into the decision-making process of attorneys and retired judges.
- Not yet widely-known and utilized.

Flexible functions and tasks, depending on client's needs.

- Sophisticated feedback and advice ~ Second set of neurons.
- Role tends to be fluid, flowing from collaboration.
- Enable counsel to take advantage of flexibility of arbitration proceeding.

When is an arbitration consultant most likely to be used?

- "Bet the farm" cases, particularly where the case has some acknowledged problems.
- But can also be used to manage and streamline the case, defensively, where the other party is expected to pursue scorched earth discovery and motion practice.

Examples of functions of consultant:

- Help draft a unique, transaction-specific arbitration agreement.
- Help select arbitrator.
- Help shape arbitration process.
- Review critical pleadings, briefs.
- "Interpret" rulings, orders.
- Conduct mock arbitration
    - Effectiveness of evidence.
    - Strength of claims, defenses, legal theories, arguments.
    - How damage calculations would be received.
    - How key witnesses come across.

Mock arbitration models:

Can be configured a number of different ways--

Sole arbitrator

2 or 3 "sole" arbitrators

Panel(s) of 3 arbitrators

Deliberation models

Feedback session, in-depth de-briefing and questioning by counsel, client.

Cross-fertilization among arbitration consultants.

* Deborah Rothman, a magna cum laude graduate of Yale College, with graduate degrees from Princeton's Woodrow Wilson School and NYU Law School, is a nationally-known mediator, arbitrator and arbitration consultant. She has been named a Southern California Super Lawyer ('06 – '10) and a Best Lawyer in America ('06 -'10). In 2009 she was named one of the top arbitrators in California by Who's Who Legal.

June 16, 2010 Draft

The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration

Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions

Thomas J. Stipanowich, Editor-in-Chief

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Protocols for Expeditious, Cost-Effective Arbitration

General Principles

These Protocols are premised on our conclusion that the pace and costs of commercial arbitrations are driven by dependent variables: specific steps taken, or not taken, by each of the four constituencies of the arbitration process (i.e., the parties, the advocates, the arbitrators and the arbitration providers). The Protocols are, accordingly, structured to provide specific steps that each constituency can take to alter the current trajectory of increasing costs and extended proceedings in arbitration. For example, if the arbitration provider whose rules control a case provides no option for limited discovery and if the parties and their counsel are battling every issue, the arbitrator's ability to contain discovery costs is seriously constricted. These Protocols therefore also contemplate that, in adopting specific steps, the constituencies will strive to cooperate and coordinate their actions, yielding maximum impact. Common to the Protocols for each constituency are these overarching principles:

Early case management, involving agreements by the parties and their counsel on such matters as the timeline of the case, the scope of discovery, and the availability of substantive motions followed by a scheduling order and ongoing supervision by the arbitrator, is an essential first step in every case.

Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and the arbitrator should exercise the full range of his or her power to implement a discovery plan. The Protocols do <u>not</u> assume that the parties in every case will favor truncated discovery; some disputes require deeper discovery to allow for more efficient hearings. The pivotal point is that, by having options to consider and then by electing an appropriate option for the particular dispute, the overall costs of arbitration can still be contained, if only because disputes over the scope of discovery can be averted by agreements and a scheduling order at the outset.

Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Some see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that would be disposed of by a court are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. Recognizing whether in a particular case a substantive motion would advance the goal of lower cost and greater efficiency is among the most challenging tasks these Protocols present to the constituencies; they aim to promote cooperation and close consideration of the role a motion might play.

While there are certain categories of cases that are alike except for the identity of the parties and other participants, most commercial arbitrations with a substantial amount at stake are distinct in at least some way, be it the twist of circumstance that sparked a dispute or the array of legal issues presented. These Protocols offer steps that might apply to the broad range of cases, and yet embedded in them is a recognition that a well-run arbitration is custom-tailored for the particular case. The parties and their counsel are encouraged to engage with the arbitrator to manage the case in the best way possible for that particular case.

At its core, arbitration is a *consensual process*, rooted most often in an arbitration agreement made when the parties were in a constructive, business enhancing mode. When a dispute arises, the reaction will vary. Some parties, looking to do business again in the future or accepting of the occurrence of a dispute, will be able to cooperate effortlessly towards a common goal of cost containment. Other parties, by the point of a dispute, are entrenched in their respective perspectives of what occurred and why the other side is to blame; parties in this mind-set face a daunting challenge to look beyond grievances in order to find cost savings that might benefit each side. These Protocols aim to meet the diverse settings in which cases arise, recognizing that Protocols ultimately cannot be imposed but can only be encouraged, in a context where the constituencies work together to formulate the best plan for the particular case.

A Protocol for Business Users and In-House Counsel

While not all business users seek economy and efficiency in arbitration, these are priorities for most businesses much or most of the time. The high cost and/or length of commercial arbitration appear to be the greatest sources of dissatisfaction with the process. There are, however, a number of choices available to business users—in preparing to sign a contract, after disputes arise, and throughout the arbitration process—that will promote cost- and time-saving in dispute resolution. The following Actions are recommended as options for business users and in-house counsel in making choices regarding arbitration. They may be embraced wholly or selectively in light of business priorities in particular relationships and kinds of disputes.

1. ***Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between "one-size-fits-all" arbitration procedures with lots of "wiggle room" and more streamlined or bounded procedures.***

Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning. Reflexively "plugging in" a standard form arbitration provision forfeits the single best opportunity business users have for tailoring procedures to limit the scope of discovery, establish timetables and create other boundaries for arbitration. Traditional "one-size-fits-all" provisions afford considerable leeway for arbitrator discretion but also create opportunities for counsel to expand, often excessively, the dimensions and density of the arbitration. The potential benefits of this flexibility must be balanced against significant downsides—the possibility of strategic or tactical manipulation by counsel, and the tendency to convert arbitration into a replica of litigation.

In most cases an arbitration clause should be part of a comprehensive dispute resolution process that might include executive negotiation, mediation and, finally, arbitration. An effective dispute resolution provision incorporating appropriate procedures of a well-established "provider institution" is usually of mutual beneficial to the parties. (See *Protocol for Arbitration Providers.*)

2. ***Limit discovery to what is essential; do not simply replicate court discovery.***

Since the most critical factor in the cost and length of litigation or arbitration is nearly always the scope of discovery, parties seeking efficiency and economy in arbitration must make it clear that discovery in arbitration is not for the litigator who will leave no stone unturned.[1] The first and by far the best opportunity for business users to place meaningful limits on discovery is in the arbitration

[1] From Commentary to the CPR Rules: "[a]rbitration 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." [1] INT'L INST. FOR CONFLICT PREVENTION & RESOL. RULES FOR NON-ADMINISTERED ARBITRATION (20__), [hereinafter CPR RULES] Commentary to CPR Rule 11, *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary.

agreement or incorporated arbitration procedures. There are a number of ways in which arbitration provider institutions' procedures may limit discovery. (See *Protocol for Arbitration Providers,* Action 3.) A predispute agreement, while not always achievable, is more likely to produce favorable results since post-dispute it is much more difficult to achieve consensus.

A second opportunity occurs when a dispute arises and outside counsel is retained. At this point, in-house counsel may promote discovery limits by acknowledging that, while scaling back on discovery carries some risk that some significant evidence may not be found, the client is prepared to accept that risk in order to secure the greater benefit of a process that is substantially faster and less expensive than litigation. Inside and outside counsel should thoroughly discuss the cost versus benefit of various courses of discovery that might be pursued in the arbitration and memorialize in writing the client's decision concerning the nature and extent of discovery it wishes to initiate. (See *Protocol for Outside Counsel*, Actions 2, 5.)

If business users have failed or been unable to avail themselves of either of the first two opportunities, it may still be possible to convince the arbitrator(s) to limit the scope of discovery. (See *Protocol for Outside Counsel*, Action 3; *Protocol for Arbitrators*, Action 6.)

3. <u>Set specific time limits on arbitration and make sure they are enforced.</u>

Business users should consider agreeing to binding limits on the length of the arbitration in the arbitration agreement. This could be accomplished by simply setting a deadline (e.g., one year) for completion of the arbitration or by incorporating provider rules that establish a timetable for each phase of the arbitration. A predispute arbitration agreement might establish different deadlines or timetables corresponding to different total amounts in controversy. (See *Protocol for Arbitration Providers*, Action 4.) Arbitrators could be afforded authority to establish procedures and timelines for achieving the contractual limits as well as discretion to vary the limits in truly exceptional circumstances.

Some experienced in-house counsel favor prescribing overall time limits in large, complex disputes as well as smaller cases. If binding time limits are not desired in all cases, however, business users should at least consider their application in disputes involving amounts below a certain dollar figure.

Contractual time limits, like other stipulated boundaries, are only effective if they are recognized and enforced. Thus, it is critical for outside counsel to advocate such enforcement and for arbitrators to respond accordingly. (See *Protocol for Outside Counsel,* Action 3; *Protocol for Arbitrators*, Action 3.)

If businesses are unwilling or unable to establish predispute timetables for arbitration but still hope to set an acceptable deadline, it will be necessary to seek a post-dispute agreement with the other party (if consensus is realistically achievable) or an appropriate arbitral order.

4. ***Use "fast-track arbitration" in appropriate cases.***

Businesses should use, in appropriate cases, fast-track (expedited or streamlined) arbitration. Businesses wishing to employ fast-track procedures in a predispute arbitration agreement must either specify those procedures and the circumstances under which they will be used or incorporate an arbitration provider's rules that detail such procedures and the circumstances of their application.

Some businesses may be willing to utilize, in cases of certain types or certain dollar amounts, a highly truncated approach in which discovery and motions are not permitted; the parties' arbitration demand and response are accompanied by detailed statements of their claims and/or defenses as well as all facts to be proven, supplemented by citation to all legal authorities relied upon, copies of exhibits, and summaries of the testimony of all lay and expert witnesses, after which the case proceeds to an immediate hearing. (See *Protocol for Arbitration Providers*, Action 5.)

5. ***Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.***

Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business's important interests, the prospects for a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective. If outside counsel is not involved in early case assessment, in-house counsel should convey the internal assessment to outside counsel and request their independent analysis. (See *Protocol for Outside Counsel*, Action 2.) As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

6. ***Select outside counsel for arbitration expertise and commitment to business goals.***

In-house counsel should select outside arbitration counsel for their expertise in arbitration, not litigation, their likely effectiveness as an advocate in the arbitration process, taking account of the key players (opposing party and counsel, the arbitration provider institution, and prospective or appointed arbitrators), and their ability to meet client's objectives regarding speed and economy (including the client's decision regarding the extent of resources to be devoted to the matter). In-house counsel should explore the possibility of billing arrangements other than pure hourly billing such as fixed fees, contingency fees, and other arrangements that incentivize counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible. (See *Protocol for Outside Counsel, Action 7.*)

7. *Select arbitrators with strong case management skills.*

In-house counsel should be actively involved, alongside outside counsel, in selecting arbitrators who are able and willing to promote effective cost- and time-saving procedures. Information from provider institutions may be supplemented by intra-firm communications and discrete queries to listservs and social networking programs. Counsel might agree to pre-screen prospective arbitrators by means of a questionnaire or joint or separate interviews; counsel should be forthright in asking prospective arbitrators about their philosophy and style of case management. (See *Protocol for Outside Counsel,* Action 3.)

Counsel should be aware that (1) the requirement that its arbitrators continually upgrade their process management skills and (2) the quality and scope of information regarding prospective arbitrators, may offer key points of comparison among arbitration provider institutions. (See *Protocol for Arbitration Providers*, Points 7, 10.)

8. Establish guidelines for early "fleshing out" of issues, claims, defenses, and parameters for arbitration.

Businesses should consider agreeing that before the preliminary conference, parties will provide preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts. (See *Protocol for Arbitration Providers*, Action 8.) They should also consider requesting that, following the first, or at the latest, the second case management conference, the arbitrators issue comprehensive case management orders that incorporate limitations on discovery and motion practice, and set time frames and hearing dates that will not be varied except for good cause shown. (See *Protocol for Arbitrators*, Actions 3, 4.)

9. Control motion practice.

Businesses should also consider agreeing to procedures for limiting "reflexive" motion practice and expediting the presentation and hearing of motions that have the potential to promote cost- and time-saving in arbitration. (See *Protocol for Arbitration Providers*, Action 6.)

10. Use a single arbitrator in appropriate circumstances.

Businesses should consider using a single arbitrator when appropriate. Some in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator. Others believe that collegial decision-making usually produces better decisions by decreasing the chance that important points will be overlooked or misunderstood, and that the additional cost of having three arbitrators, which is typically a fairly small part of total arbitration costs, is well worth the expenditure in important cases. Before providing for a three-member tribunal, counsel should always consider whether the complexity of the issues, the stakes involved, or other factors warrant the use of three arbitrators. A strong argument can often be made for sole arbitrators in cases with low or moderate damages exposure. (Depending on the parameters set for the use of a single arbitrator, parties may need to modify the arbitration procedures incorporated in the arbitration agreement to address this issue.)

In cases with three-member panels, businesses should consent to having the chair decide discovery disputes and other procedural matters unless all parties request the involvement of the full tribunal.

11. Specify the form of the award. Do not provide for judicial review for errors of law or fact.

Business users should specify in the arbitration agreement the form of award desired (e.g., bare, reasoned, findings of fact and conclusions of law, etc.) and, where appropriate, a limit on the length of the award, bearing in mind that the more detailed the award, the more costs increase.

Business users should not include in their arbitration clauses an agreement that attempts to authorize courts to review arbitration awards for errors of fact or law. Besides raising issues of enforceability under arbitration law, such provisions may entail significant additional process costs and delays without commensurate benefits. If a business is not content to accept judicial review that is limited to the few grounds for vacatur set forth in the Federal Arbitration Act or comparable state statutes, a course that best achieves the finality which is among the major benefits of arbitration for most business users, it should incorporate in its arbitration clause a well-designed appellate arbitration procedure such as those sponsored by some provider institutions.

12. Conduct a post-process "lessons learned" review and make appropriate adjustments.

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

A Protocol for Arbitration Providers

Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions should be undertaken by providers for the purpose of achieving these goals.

1. Offer business users clear options to fit their priorities.

Instead of promoting a single "one-size-fits-all" set of procedures, institutions that provide dispute resolution services for business disputes should publish a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. In addition to any specialized rules (e.g., employment, construction, franchise, etc.) for which there is market demand, all providers of commercial arbitration services should develop and publish at least four different sets of generalized arbitration rules: (1) Fast Track Arbitration Rules that allow no discovery or motions and follow a timeline that requires completion of the arbitration within three months of commencement; (2) Streamlined Arbitration Rules that allow minimal discovery and motions and follow a timeline that requires completion of the arbitration in six months; (3) Standard Arbitration Rules that allow somewhat more discovery and follow a time line that requires completion of the arbitration in six to nine months; and (4) Customized Arbitration Rules that empower arbitrators, in exceptionally complex cases, to establish, after consulting with counsel, individualized procedures and timelines that require completion of the arbitration within nine to twelve months. A provider's website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

2. Promote arbitration in the context of a range of process choices, including "stepped" dispute resolution processes.

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also "set the table" for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

3. Develop and publish rules that provide effective ways of limiting discovery to essential information.

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant "wiggle room" often result in litigation-like discovery, provider institutions should develop and publish procedures that give

business users the ability to effectively limit the scope of discovery in arbitration through their predispute agreement. As a general matter, discovery should be restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- **prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;**
- **prohibiting form interrogatories and limiting the number of interrogatories;**
- **setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;**
- **limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;**
- **directing parties to cooperate on voluntary information exchange/discovery;**
- **directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);**
- **authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.**

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the description of custodians from whom electronic discovery can be collected should be narrowly tailored to include only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

4. Offer rules that set strict presumptive deadlines for completion of arbitration; train arbitrators in the importance of enforcing stipulated deadlines.

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a strict presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that their training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances

clearly beyond the contemplation of the parties when the time limits were established. (See *Protocol for Arbitrators*, Action 3.)

5. Publish and promote "fast-track" arbitration rules.

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals. (See *Protocol for Business Users and In-House Counsel,* Action 4.) A "fast-track" approach may feature some or all of the following:

- **relatively short presumptive deadlines;**
- **limits on the number of arbitrators;**
- **expedited arbitrator appointment procedure;**
- **early disclosure of information;**
- **heavily curtailed discovery and motion practice;**
- **limits on the length and form of the award.**

If fast-track procedures are published separately from a provider's standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Providers should consider the possibility of providing, as one option, a highly truncated process that eliminates discovery and motions and allows the parties to proceed to a hearing immediately after serving pre-hearing memoranda that include detailed statements of all claims and/or defenses as well as all facts to be proven, all legal authorities relied upon, copies of all exhibits, and summaries of all lay and expert witness testimony.

6. Develop procedures that promote restrained, effective motion practice.

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case, and (b) the reflexive use of motion practice in arbitration by some litigation attorneys. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion. (See *Protocol for Business Users*, Action 9; *Protocol for Arbitrators*, Action 7.)

7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators

to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness. (See *Protocol for Arbitrators*, Action 1.)

8. Offer Users a Rule Option that requires fact pleadings and early disclosure of documents and witnesses.

Providers' should afford users the option of adopting rules that require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings all documents supporting each claim or defense, as well as a list of witnesses they expect to call. Such rules should require that parties supplement their documents and witness lists periodically prior to the hearing. (See *Protocol for Business Users*, Action 8.)

9. Provide for electronic service of submissions and orders.

Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

10. Obtain and make available information on arbitrator effectiveness.

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should be made available in summary form (and without attribution) to parties and counsel selecting arbitrators. Providers should remove from their rosters those arbitrators who prove themselves incapable of efficiently managing business arbitrations. (See *Protocol for Business Users*, Action 7.)

11. Provide for expedited appointment of arbitrators.

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, 30 days) from the filing of the arbitration demand, the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

12. Require arbitrators to confirm availability.

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

13. *Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.*

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

14. Offer process orientation for inexperienced users.

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

A Protocol for Outside Counsel

Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client's goals and expectations for resolving disputes, and should approach arbitration in a manner that reflects these expectations and also exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.

1. ***Be sure you can pursue the client's goals expeditiously.***

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client's goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

2. ***Memorialize early assessment and client understandings.***

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client's instructions. (See *Protocol for Business Users and In-house Counsel*, Actions 5, 6.)

3. ***Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.***

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client's business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators under consideration and should, consistent with the Canons of Ethics for Commercial Arbitrators, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in

writing at the beginning of the arbitration process and, even if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings. (See *Protocol for Arbitrators*, Action 3.)

4. Cooperate with opposing counsel on procedural matters.

If saving time and money is an important client goal in the arbitration,, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client's consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter. (See *Protocol for Arbitrators*, Actions 2, 3, 4.)

5. Seek to limit discovery in a manner consistent with client goals.

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client. (See *Protocol for Arbitrators*, Action 6.)

6. Periodically discuss settlement opportunities with your client.

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, for example, when all or certain discovery has been completed and before substantial sums are spent on preparing for and conducting the hearing.

7. Offer clients alternative billing models.

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution. (See *Protocol for Business Users*, Action 6.)

8. Recognize and exploit the differences between arbitration and litigation.

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in

terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility. (See *Protocol for Arbitrators*, Actions 6, 7, 9.)

9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the prehearing phase that one or more significant prehearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreeing to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights. (See *Protocol for Business Users*, Action 10; *Protocol for Arbitrators*, Action 8.)

10. Help your client make appropriate changes based on lessons learned.

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies. (See *Protocol for Business Users*, Action 12.)

11. Work with providers to improve arbitration processes.

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

12. Encourage better arbitration education and training.

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

A Protocol for Arbitrators

Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.

1. ***Get training in managing commercial arbitrations.***

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules. (See *Protocol for Arbitration Providers*, Action 7.)

2. ***Insist on cooperation and professionalism.***

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with opposing counsel and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like. (See *Protocol for Outside Counsel*, Actions 4, 5, 8.)

3. ***Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.***

Arbitrators should recognize that commercial parties are generally looking for "muscular" arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to displease the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established. (See *Protocol for Business Users*, Action 3.) They should also encourage parties to "tee up" particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration. (See *Protocol for Arbitration Providers*, Action 6; Protocol *for Outside Counsel*, Action 8.)

4. ***Conduct a thorough preliminary conference and issue comprehensive case management orders.***

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.* Arbitrators should emphasize the importance of participation by senior client representative of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive "case management order" setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown. (See *Protocol for Outside Counsel*, Actions 3, 4, 5.)

5. ***Schedule consecutive hearing days.***

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing that originally projected.

6. ***Streamline discovery; supervise pre-hearing activities.***

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreement and each side's position with regard to the dispute, rather than formal written submissions). (See *Protocol for Outside Counsel*, Action 5.)

7. ***Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act affirmatively on those.***

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrate, either in

a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing dispositive motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

8. Be readily available to counsel.

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than 2 or 3 business days) to hold a conference call with the parties in order to resolve such matters.

9. Conduct fair but expeditious hearings.

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

10. Issue timely and careful awards.

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration.*

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***Draft* Protocols provided in conjunction with August, 2010 ABA Annual Meeting -- Business and Corporate Litigation Committee program, *"The Cutting Edge of Arbitration: What You Need to Know."* The final version of the Protocols, along with Commentary and resources, will be finalized within the next month, and are available upon request by sending an e-mail to: Deborah.Rothman@aya.yale.edu**