THE COLLEGE OF COMMERCIAL ARBITRATORS
PROTOCOLS for EXPEDITIOUS and
COST-EFFECTIVE COMMERCIAL ARBITRATION

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University of Maryland Francis King Carey
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Choice: The basic element...

Ultimately, many business users regard control over the process—the flexibility to make arbitration what you want it to be—as the single most important advantage of binding arbitration and other forms of ADR.

CPR COMMISSION ON THE FUTURE OF ARBITRATION, COMMERCIAL ARBITRATION AT ITS BEST (2001)
Document discovery alone accounts for 50% of litigation costs in the average case, and 90% in active discovery cases.

Of the [electronic discovery] data analyzed, only 10-20 percent of that ends up being relevant while a staggering 80-90 percent is irrelevant and non-responsive to the case.

There is a need for a wide range of critical changes in the landscape of American litigation, including an end to the “‘one size fits all’ approach of the current federal and most state rules.”

“[I]f you simply provide for arbitration under [standard rules] without specifying in more detail . . . how discovery will be handled . . . you will end up with a proceeding similar to litigation.”

James Bender, General Counsel, Williams Companies
“Arbitration is often unsatisfactory because litigators have been given the keys to run the arbitration and they run it exactly like a piece of litigation. It’s the corporate counsel’s fault by simply turning over the keys to a matter.”

Jeffrey W. Carr
Vice President & General Counsel
FMC Technologies, Inc.
“I’m here to tell you that . . . our current experience is that we are getting quicker and more cost-effective results in U.S. courts!”

Corporate counsel for a leading global corporation
The vanishing default arbitration clause?

• E.g., American Institute of Architects Contract Documents (2007 edition)

• E.g., New “Consensus” Construction Contract Documents (2007)
National Summit on the Future of Commercial Arbitration
Washington, Oct. 30, 2009

Sponsored by the
College of Commercial Arbitrators

with support from:
American Arbitration Association
JAMS
International Institute for Conflict Prevention & Resolution (CPR)
ABAJ Section of Dispute Resolution
Chartered Institute of Arbitrators
Straus Institute for Dispute Resolution
National Summit . . .

- National gathering of more than 180 invited in-house counsel, outside counsel, arbitrators and “providers”

- Based on two key insights:
  - Lengthy, costly arbitration results from the interaction of business users; in-house attorneys; institutions providing arbitration and other dispute resolution services; outside counsel; and arbitrators.
  - All of these stakeholders must play a role in achieving desired efficiencies and economies in arbitration.

- “Town hall” meeting with electronic voting
National Summit Response

How often do business users desire arbitration to be speedier, more efficient and more economical than litigation?

![Bar chart showing the percentage of business users who desire arbitration to be speedier, more efficient, and more economical than litigation. The chart indicates a significant majority desire it most of the time.]
In your experience, how often does arbitration fail to meet the desires of business users when they want speed, efficiency and economy?
What are the Barriers to Containing Cost and Time in Arbitration?
National Summit Response

If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive discovery tend to contribute to that result?
National Summit Response

If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent does excessive, inappropriate or mismanaged motion practice tend to contribute to that result?
National Summit Response

If you believe arbitration fails to meet the desires of business users regarding speed, efficiency and economy, to what extent do too-lengthy hearings tend to contribute to that result?
Who Should Be Part of the Solution?
Provider Institutions

• ...are heavily relied upon by drafters to produce effective templates for B2B arbitration; often emphasize a single one-size-fits-all template
• ...put their stamp of approval on arbitrators who are charged with managing the process
• ...have a direct impact on process duration and party satisfaction through administrative functions
Users; In-house Counsel

• ...lay the groundwork for arbitration by crafting/selecting the arbitration provision and procedures
• ...choose the advocates and have a voice in selecting the arbitrators
• ...set the budget
• ...provide overall direction to counsel
• ...participate in the pre-hearing process
Outside Counsel/Advocates

• ...may have input on the arbitration agreement and procedures
• ...may educate the client about how to realize arbitration’s benefits
• ...may be relied on to guide strategy and tactics in arbitration, including arbitrator selection
• ...may, in company with opposing counsel, establish parameters for and “complexion” of arbitration
Arbitrators

• ...may shape or heavily influence the arbitration process
• ...may effectively “mediate” between parties with different objectives
• ...may tailor the process to parties’ needs
• ...may affect the expense and duration of arbitration by their management of discovery, motions, hearings
National Summit Response

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can institutions that provide arbitration rules, panels and administrative services do to help fulfill those expectations?
National Summit Response

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations before disputes arise?
National Summit Response

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can corporate in-house counsel do to help fulfill those expectations once the decision is made to arbitrate a dispute?
National Summit Response

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can outside counsel (advocates in arbitration) do to help fulfill those expectations?
National Summit Response

When arbitration fails to meet the desires of business users regarding speed, efficiency and economy, how much more can arbitrators do to help fulfill those expectations?
CCA Protocols
for Expeditious, Cost-Effective Commercial Arbitration

• 4 sets of guidelines aimed at business users and in-house counsel; outside counsel; arbitrators and provider institutions.
• Product of National Summit and later feedback from participants.
• Published in Summer, 2010 with accompanying commentary and reference to helpful current resources.
Protocol for Arbitration Providers

1. Offer business users clear options to fit their priorities.
2. Promote arbitration in the context of a range of process choices, including stepped dispute resolution processes.
3. Develop and publish rules that provide effective ways of limiting discovery to essential information.
4. Offer rules that set strict presumptive deadlines for completion of arbitration; train arbitrators in the importance of enforcing stipulated deadlines.
5. Publish and promote “fast-track” arbitration rules.
6. Develop procedures that promote restrained, effective motion practice.
Protocol for Arbitration Providers

• 7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.
• 8. Require fact pleadings, early disclosure of documents and witnesses.
• 9. Provide for electronic service of submissions and orders.
• 10. Obtain and make available information on arbitrator effectiveness.
• 11. Provide for expedited appointment of arbitrators.
• 12. Require arbitrators to confirm availability.
• 13. Afford users an effective mechanism for raising and addressing concerns about arbitrator case management.
Protocol for Business Users & In-house Counsel

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.

2. Limit discovery to what is essential; don’t simply replicate court discovery.

3. Set specific time limits on arbitration and make sure they are enforced.

4. Use “fast-track arbitration” in appropriate cases.

5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control.
Protocol for Business Users & In-house Counsel

• 6. Select outside counsel for arbitration expertise and commitment to business goals.
• 7. Select arbitrators with strong case management skills.
• 8. Establish guidelines for early “fleshing out” of issues, claims, defenses, and parameters for arbitration.
• 9. Control motion practice.
• 10. Use a single arbitrator in appropriate circumstances.
• 11. Specify the form of the award. Don’t provide for judicial review for errors of law or fact.
• 12. Conduct a post-process “lessons learned” review and make appropriate adjustments.
Protocol for Outside Counsel

• 1. Be sure you can pursue the client’s goals expeditiously.
• 2. Memorialize early assessment and client understandings.
• 3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.
• 4. Cooperate with opposing counsel on procedural matters.
• 5. Seek to limit discovery in a manner consistent with client goals.
• 6. Periodically discuss settlement opportunities with your client.
• 7. Offer clients alternative billing models.
8. Recognize and exploit the differences between arbitration and litigation.

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

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

11. Work with providers to improve arbitration processes.

12. Encourage better arbitration education and training.
Protocol for Arbitrators

1. Get training in managing commercial arbitrations.
2. Insist on cooperation and professionalism.
3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.
4. Conduct a thorough preliminary conference and issue comprehensive case management orders.
5. Schedule consecutive hearing days.
6. Streamline discovery; supervise pre-hearing activities.
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.
Protocol for Arbitrators

8. Be readily available to counsel.
9. Conduct fair but expeditious hearings.
10. Issue timely and careful awards.
THE CCA PROTOCOLS

- Endorsed by:
  ABA Section of Dispute Resolution
  American Arbitration Association
  JAMS
  Chartered Institute of Arbitrators
  CPR

Download at www.thecca.net