

# 2000 CPR Non-Administered Arbitration Rules

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## REVISION HISTORY

- 1989 CPR published Rules and Commentary for Non-Traditional Arbitration for Business Disputes.
- 1993 Significant CPR revision of selected provisions of the Rules.
- 1994 New Title: Non-Administered Arbitration Rules & Commentary.
- 1995 Changes made to Rules 5.1, 6.4(b) and Commentary on Rule 5 regarding use of CPR Panels of Distinguished Neutrals.
- 1998 Bibliography updated.
- 2000 Significant CPR revision to Rules and Commentary. Bibliography updated.

## INTRODUCTION

The CPR Institute for Dispute Resolution brings a distinct viewpoint to the field of domestic and international dispute resolution. Its tenets

1. Most disputes are best resolved privately and by agreement.
2. Principals should play a key role in dispute resolution and should approach a dispute as a problem to be solved, not a contest to be won.
3. A skilled and respected neutral third party can play a critical role in bringing about agreement.
4. Efforts should first be made to reach agreement by unaided negotiation.
5. If such efforts are unsuccessful, resolution by a non-adjudicative procedure, such as mediation, should next be pursued. These procedures remain available even while litigation or arbitration is pending.
6. If adjudication by a neutral third party is required, a well-conducted arbitration proceeding usually is preferable to litigation.
7. During an arbitration proceeding the door to settlement should remain open. Arbitrators may suggest that the parties explore settlement, employing a mediator if appropriate.
8. Arbitration proceedings often can be conducted efficiently by the Arbitral Tribunal without administration by a neutral organization, or limiting the role of such an organization to assistance in arbitrator selection or ruling on challenges to arbitrators, if necessary.

The CPR Rules for Non-Administered Arbitration reflect these tenets.

## STANDARD CONTRACTUAL PROVISIONS

The CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration are intended in particular for use in complex commercial arbitrations and are designed to assure the expeditious and economical conduct of proceedings. The Rules may be adopted by parties wishing to do so by using one of the following standard provisions:

### A. Pre-Dispute Clause

"Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration by (a sole arbitrator) (three arbitrators, of whom each party shall appoint one) (three arbitrators, of whom each party shall designate one in accordance with the "screened" appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be appointed by either party). The arbitration shall be governed by the Federal

Arbitration Act, 9 U.S.C. §§ 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of the arbitration shall be (city, state)."

## **B. Existing Dispute Submission Agreement**

*"We, the undersigned parties, hereby agree to submit to arbitration in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration (the "Rules") the following dispute:*

[Describe briefly]

*We further agree that the above dispute shall be submitted to (a sole arbitrator) (three arbitrators, of whom each party shall appoint one) (three arbitrators, of whom each party shall designate one in accordance with the "screened" appointment procedure provided in Rule 5.4) (three arbitrators, none of whom shall be appointed by either party). We further agree that we shall faithfully observe this agreement and the Rules and that we shall abide by and perform any award rendered by the arbitrator(s). The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and judgment upon the award may be entered by any court having jurisdiction thereof. The place of arbitration shall be (city, state)."*

## **A. GENERAL AND INTRODUCTORY RULES**

### **Rule 1: Scope Of Application**

1.1 Where the parties to a contract have provided for arbitration under the CPR Institute for Dispute Resolution ("CPR") Rules for Non-Administered Arbitration (the "Rules"), or have provided for CPR arbitration without further specification, they shall be deemed to have made these Rules a part of their arbitration agreement, except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Rules. Unless the parties otherwise agree, these Rules, and any amendment thereof adopted by CPR, shall apply in the form in effect at the time the arbitration is commenced.

1.2 These Rules shall govern the arbitration except that where any of these Rules is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail.

### **Rule 2: Notices**

2.1 Notices or other communications required under these Rules shall be in writing and delivered to the address specified in writing by the recipient or, if no address has been specified, to the last known business or residence address of the recipient. Notices and communications may be given by registered mail, courier, telex, facsimile transmission, or any other means of telecommunication that provides a record thereof. Notices and communications shall be deemed to be effective as of the date of receipt. Proof of transmission shall be deemed *prima facie* proof of receipt of any notice or communication given under these Rules.

2.2 Time periods specified by these Rules or established by the Arbitral Tribunal (the "Tribunal") shall start to run on the day following the day when a notice or communication is received, unless the Tribunal shall specifically provide otherwise. If the last day of such period is an official holiday or a nonbusiness day at the place where the notice or communication is received, the period is extended until the first business day which follows. Official holidays and non-business days occurring during the running of the period of time are included in calculating the period.

### **Rule 3: Commencement Of Arbitration**

3.1 The party commencing arbitration (the "Claimant") shall address to the other party (the "Respondent") a notice of arbitration.

3.2 The arbitration shall be deemed commenced as to any Respondent on the date on which the notice of arbitration is received by the Respondent.

3.3 The notice of arbitration shall include in the text or in attachments thereto:

- a. The full names, descriptions and addresses of the parties;
- b. A demand that the dispute be referred to arbitration pursuant to the Rules;
- c. The text of the arbitration clause or the separate arbitration agreement that is involved;
- d. A statement of the general nature of the Claimant's claim;
- e. The relief or remedy sought; and
- f. The name and address of the arbitrator appointed by the Claimant, unless the parties have agreed that neither shall appoint an arbitrator or that the party-appointed arbitrators shall be appointed as provided in Rule 5.4.

3.4 Within 20 days after receipt of the notice of arbitration, the Respondent shall deliver to the Claimant a notice of defense. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the demand shall be deemed denied. Failure to deliver a notice of defense shall not excuse the Respondent from notifying the Claimant in writing, within 20 days after receipt of the notice of arbitration, of the arbitrator appointed by the Respondent, unless the parties have agreed that neither shall appoint an arbitrator or that the party-appointed arbitrators shall be appointed as provided in Rule 5.4.

3.5 The notice of defense shall include:

- a. Any comment on items (a), (b), and (c) of the notice of arbitration that the Respondent may deem appropriate;
- b. A statement of the general nature of the Respondent's defense; and
- c. The name and address of the arbitrator appointed by the Respondent, unless the parties have agreed that neither shall appoint an arbitrator or that the party-appointed arbitrators shall be appointed as provided in Rule 5.4.

3.6 The Respondent may include in its notice of defense any counterclaim within the scope of the arbitration clause. If it does so, the counterclaim in the notice of defense shall include items (a), (b), (c), (d) and (e) of Rule 3.3.

3.7 If a counterclaim is asserted, within 20 days after receipt of the notice of defense, the Claimant shall deliver to the Respondent a reply to counterclaim which shall have the same elements as provided in Rule 3.5 for the notice of defense. Failure to deliver a reply to counterclaim shall not delay the arbitration; in the event of such failure, all counterclaims set forth in the notice of defense shall be deemed denied.

3.8 Claims or counterclaims within the scope of the arbitration clause may be freely added or amended prior to the establishment of the Tribunal and thereafter with the consent of the Tribunal. Notices of defense or replies to amended claims or counterclaims shall be delivered within 20 days after the addition or amendment.

3.9 If a dispute is submitted to arbitration pursuant to a submission agreement, this Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement.

#### **Rule 4: Representation**

4.1 The parties may be represented or assisted by persons of their choice.

4.2 Each party shall communicate the name, address and function of such persons in writing to the other party and to the Tribunal

### **B. RULES WITH RESPECT TO THE TRIBUNAL**

#### **Rule 5: Selection Of Arbitrators By The Parties**

5.1 Unless the parties have agreed in writing on a Tribunal consisting of a sole arbitrator or of three arbitrators not appointed by parties or appointed as provided in Rule 5.4, the Tribunal shall consist of two arbitrators, one appointed by each of the parties as provided in Rules 3.3 and 3.5, and a third arbitrator who shall chair the Tribunal, selected as provided in Rule 5.2. Unless otherwise agreed, any arbitrator not appointed by a party shall be a member of the CPR Panels of Distinguished Neutrals ("CPR Panels").

5.2 Within 30 days of the appointment of the second arbitrator, the two party-appointed arbitrators shall appoint a third arbitrator, who shall chair the Tribunal. In the event the party-appointed arbitrators are unable to agree on the third arbitrator, the third arbitrator shall be selected as provided in Rule 6.

5.3 If the parties have agreed on a Tribunal consisting of a sole arbitrator or of three arbitrators none of whom shall be appointed by either party, the parties shall attempt jointly to select such arbitrator(s) within 30 days after the notice of defense provided for in Rule 3.4 is due. The parties may extend their selection process until one or both of them have concluded that a deadlock has been reached. In this event, the arbitrator(s) shall be selected as provided in Rule 6.

5.4 If the parties have agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them, as provided in this Rule 5.4, either party, following the expiration of the time period for the notice of defense, may request CPR in writing, with a copy to the other party, to conduct a "screened" selection of party-designated arbitrators as follows:

a. CPR will provide each party with a copy of its CPR Panels list. Within 15 days thereafter, each party shall designate three candidates, in order of preference, from the CPR Panels as candidates for its party-designated arbitrator, and so notify CPR and the other party in writing.

b. CPR will ask the first candidate so designated by each party to confirm his or her availability to serve as arbitrator and to disclose in writing any circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality, as provided in Rule 7. CPR will circulate to the parties each candidate's completed disclosure form. A party may object to the appointment of any candidate on independent and impartial grounds by written and reasoned notice to CPR, with copy to the other party, within 10 days after receipt of that candidate's disclosure form. CPR shall decide the objection after providing the non-objecting party with an opportunity to comment on the objection. If there is no objection to the candidate, or if the objection is overruled by CPR, CPR shall appoint the candidate as arbitrator, and any subsequent challenges of that arbitrator, based on circumstances subsequently learned, shall be made and decided in accordance with the procedures set forth in Rules 7.6 - 7.8.

c. If the first candidate designated by a party is unavailable, or if his or her independence or impartiality is successfully challenged, CPR will repeat the process provided in Rule 5.4(b) as to the subsequent candidates designated by that party, in order of the party's indicated preference. A party may designate additional candidates if the three candidates designated by that party are unavailable or do not meet the requirements of Rule 7.

d. Neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or arbitrator as to which party selected either of the party-designated arbitrators. No party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator or arbitrator candidate designated or appointed pursuant to this Rule 5.4.

e. The chair of the Tribunal will be appointed by CPR in accordance with the procedure set forth in Rule 6.4, which shall proceed concurrently with the procedure for appointing the party-designated arbitrators provided in subsections (a) - (d) above.

f. The compensation of all members of the Tribunal appointed pursuant to Rule 5.4 shall be administered by the chair of the Tribunal in accordance with Rule 16.

5.5 Where the arbitration agreement entitles each party to appoint an arbitrator but there is more than one Claimant or Respondent to the dispute, and either the multiple Claimants or the multiple Respondents do not jointly appoint an arbitrator, CPR shall appoint all of the arbitrators as provided in Rule 6.4.

#### **Rule 6: Selection Of Arbitrator(s) By CPR**

6.1 Whenever (i) a party has failed to appoint the arbitrator to be appointed by it; (ii) the parties have failed to appoint the arbitrator(s) to be appointed by them acting jointly; (iii) the party-appointed arbitrators have failed to appoint the third arbitrator; (iv) the parties have provided that one or more arbitrators shall be appointed by CPR; or (v) the multi-party nature of the dispute calls for CPR to appoint all members of a three-member Tribunal pursuant to Rule 5.5, the arbitrator(s) required to complete the Tribunal shall be selected as provided in this Rule 6, and either party may request CPR in writing, with copy to the other party, to proceed pursuant to this Rule 6.

6.2 The written request may be made as follows:

a. If a party has failed to appoint the arbitrator to be appointed by it, or the parties have failed to appoint the arbitrator(s) to be appointed by them through agreement, at any time after such failure has occurred.

b. If the party-appointed arbitrators have failed to appoint the third arbitrator, as soon as the procedure contemplated by Rule 5.2 has been completed.

c. If the arbitrator(s) are to be appointed by CPR, as soon as the notice of defense is due.

6.3 The written request shall include complete copies of the notice of arbitration and the notice of defense or, if the dispute is submitted under a submission agreement, a copy of the agreement supplemented by the notice of arbitration and notice of defense if they are not part of the agreement.

6.4 Except where a party has failed to appoint the arbitrator to be appointed by it, CPR shall proceed as follows:

a. Promptly following receipt by it of the request provided for in Rule 6.3, CPR shall convene the parties in person or by telephone to attempt to select the arbitrator(s) by agreement of the parties.

b. If the procedure provided for in (a) does not result in the selection of the required number of arbitrators, CPR shall submit to the parties a list, from the CPR Panels, of not less than five candidates if one arbitrator remains to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR and to the other party. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall designate as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate. If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

6.5 Where a party has failed to appoint the arbitrator to be appointed by it, CPR shall appoint a person whom it deems qualified to serve as such arbitrator

### **Rule 7: Qualifications, Challenges And Replacement Of Arbitrator(s)**

7.1 Each arbitrator shall be independent and impartial.

7.2 By accepting appointment, each arbitrator shall be deemed to be bound by these Rules and any modification agreed to by the parties, and to have represented that he or she has the time available to devote to the expeditious process contemplated by these Rules.

7.3 Each arbitrator shall disclose in writing to the Tribunal and the parties at the time of his or her appointment and promptly upon their arising during the course of the arbitration any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.

7.4 No party or anyone acting on its behalf shall have any *ex parte* communications concerning any matter of substance relating to the proceeding with any arbitrator or arbitrator candidate, except that a party may advise a candidate for appointment as its party-appointed arbitrator of the general nature of the case and discuss the candidate's qualifications, availability, and independence and impartiality with respect to the parties, and a party may confer with its party-appointed arbitrator regarding the selection of the chair of the Tribunal. As provided in Rule 5.4(d), no party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator or arbitrator candidate designated or appointed pursuant to Rule 5.4.

7.5 Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, provided that a party may challenge an arbitrator whom it has appointed only for reasons of which it becomes aware after the appointment has been made.

7.6 A party may challenge an arbitrator only by a notice in writing to CPR, with copy to the Tribunal and the other party, given no later than 15 days after the challenging party (i) receives notification of the appointment of that arbitrator, or (ii) becomes aware of the circumstances specified in Rule 7.5, whichever shall last occur. The notice shall state the reasons for the challenge with specificity. The notice shall not be sent to the Tribunal when the challenged arbitrator is a party-designated arbitrator selected as provided in Rule 5.4; in that event, CPR may provide each member of the Tribunal with an opportunity to comment on the substance of the challenge without disclosing the identity of the challenging party.

7.7 When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. Neither of these actions implies acceptance of the validity of the challenge.

7.8 If neither agreed disqualification nor voluntary withdrawal occurs, the challenge shall be decided by CPR, after providing the non-challenging party and each member of the Tribunal with an opportunity to comment on the challenge.

7.9 In the event of death, resignation or successful challenge of an arbitrator not appointed by a party, a substitute arbitrator shall be selected pursuant to the procedure by which the arbitrator being replaced was selected. In the event of the death, resignation or successful challenge of an arbitrator appointed by a party, that party may appoint a substitute arbitrator; provided, however, that should that party fail to notify the Tribunal (or CPR, if the Tribunal has been constituted as provided in Rule 5.4) and the other party of the substitute appointment within 20 days from the date on which it becomes aware that the opening arose, that party's right of appointment shall lapse and the Tribunal shall promptly request CPR to appoint a substitute arbitrator forthwith.

7.10 In the event that an arbitrator fails to act or is *de jure* or *de facto* prevented from duly performing the functions of an arbitrator, the procedures provided in Rule 7.9 shall apply to the selection of a replacement. If the parties do not agree on whether the arbitrator has failed to act or is prevented from performing the functions of an arbitrator, either party may request CPR to make that determination forthwith.

7.11 If the sole arbitrator or the chair of the Tribunal is replaced, the successor shall decide the extent to which any hearings held previously shall be repeated. If any other arbitrator is replaced, the Tribunal in its discretion may require that some or all prior hearings be repeated.

#### **Rule 8: Challenges To The Jurisdiction Of The Tribunal**

8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

8.2 The Tribunal shall have the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made not later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended such a challenge may be made not later than the response to such claim or counterclaim.

### **C. RULES WITH RESPECT TO THE CONDUCT OF THE ARBITRAL PROCEEDINGS**

#### **Rule 9: General Provisions**

9.1 Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate. The chair shall be responsible for the organization of arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal.

9.2 The proceedings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each phase of the proceeding, including without limitation the time allotted to each party for presentation of its case and for rebuttal. In setting time limits, the Tribunal should bear in mind its obligation to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible.

9.3 The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. Such conference shall be held promptly after the constitution of the Tribunal, unless the Tribunal is of the view that further submissions from the parties are appropriate prior to such conference. The objective of this conference shall be to discuss all elements of the arbitration with a view to planning for its future conduct. Matters to be considered in the initial pre-hearing conference may include, *inter alia*, the following:

- a. Procedural matters (such as setting specific time limits for, and manner of, any required discovery; the desirability of bifurcation or other separation of the issues in the arbitration; the desirability and practicability of consolidating the arbitration with any other proceeding; the scheduling of conferences and hearings; the scheduling of pre-hearing memoranda; the need for and type of record of conferences and hearings, including the need for transcripts; the amount of time allotted to each party for presentation of its case and for rebuttal; the mode, manner and order for presenting proof; the need for expert witnesses and how expert testimony should be presented; and the necessity for any on-site inspection by the Tribunal);
- b. The early identification and narrowing of the issues in the arbitration;
- c. The possibility of stipulations of fact and admissions by the parties solely for purposes of the arbitration, as well as simplification of document authentication;
- d. The possibility of appointment of a neutral expert by the Tribunal; and
- e. The possibility of the parties engaging in settlement negotiations, with or without the assistance of a mediator. After the initial conference, further pre-hearing or other conferences may be held as the Tribunal deems appropriate.

9.4 In order to define the issues to be heard and determined, the Tribunal may, *inter alia*, make pre-hearing orders and instruct the parties to file more detailed statements of claim and of defense, and pre-hearing memoranda. 9.5 Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix the place of arbitration based upon the contentions of the parties and the circumstances of the arbitration. The award shall be deemed made at such place. The Tribunal may schedule meetings and hold hearings wherever it deems appropriate

#### **Rule 10: Applicable Law(s) And Remedies**

10.1 The Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

10.2 Subject to Rule 10.1, in arbitrations involving the application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

10.3 The Tribunal may grant any remedy or relief, including but not limited to specific performance of a contract, which is within the scope of the agreement of the parties and permissible under the law(s) or rules of law applicable to the dispute.

10.4 The Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law

#### **Rule 11: Discovery**

The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed in discovery.

## **Rule 12: Evidence And Hearings**

12.1 The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal or agreed by the parties, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements:

- a. A statement of facts;
- b. A statement of each claim being asserted;
- c. A statement of the applicable law and authorities upon which the party relies;
- d. A statement of the relief requested, including the basis for any damages claimed; and
- e. A statement of the nature and manner of presentation of the evidence, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for each witness's direct testimony.

12.2 If either party so requests or the Tribunal so directs, a hearing shall be held for the presentation of evidence and oral argument. Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate. The Tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.

12.3 The Tribunal, in its discretion, may require the parties to produce evidence in addition to that initially offered. It may also appoint neutral experts whose testimony shall be subject to cross-examination and rebuttal.

12.4 The Tribunal shall determine the manner in which witnesses are to be examined. The Tribunal shall have the right to exclude witnesses from hearings during the testimony of other witnesses.

## **Rule 13: Interim Measures Of Protection**

13.1 At the request of a party, the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.

13.2 A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

## **Rule 14: The Award**

14.1 The Tribunal may make final, interim, interlocutory and partial awards. With respect to any interim, interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

14.2 All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise. The award shall be deemed to be made at the seat of arbitration and shall contain the date on which the award was made. When there are three arbitrators, the award shall be made and signed by at least a majority of the arbitrators.

14.3 A member of the Tribunal who does not join in an award may file a dissenting opinion. Such opinion shall not constitute part of the award.

14.4 Executed copies of awards and of any dissenting opinion shall be delivered by the Tribunal to the parties.

14.5 Within 15 days after receipt of the award, either party, with notice to the other party, may request the Tribunal to interpret the award; to correct any clerical, typographical or computation errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any interpretation, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests an interpretation, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All interpretations, corrections, and additional awards shall be in writing, and the provisions of this Rule 14 shall apply to them.

14.6 The award shall be final and binding on the parties, and the parties will undertake to carry out the award without delay. If an interpretation, correction or additional award is requested by a party, or a correction or additional award is made by the Tribunal on its own initiative as provided in Rule 14.5, the award shall be final and binding on the parties when such interpretation, correction or additional award is made by the Tribunal or upon the expiration of the time periods provided in Rule 14.5 for such interpretation, correction or additional award to be made, whichever is earlier.

14.7 The dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference required by Rule 9.3. The final award should in most circumstances be rendered within one month thereafter. The parties and the Tribunal shall use their best efforts to comply with this schedule.

## **D. MISCELLANEOUS RULES**

### **Rule 15: Failure To Comply With Rules**

Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules, in a manner deemed material by the Tribunal, the Tribunal shall fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

### **Rule 16: Costs**

16.1 Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator and shall be reimbursed for any reasonable travel and other expenses.

16.2 The Tribunal shall fix the costs of arbitration in its award. The costs of arbitration include:

- a. The fees and expenses of members of the Tribunal;
- b. The costs of expert advice and other assistance engaged by the Tribunal;
- c. The travel and other expenses of witnesses to such extent as the Tribunal may deem appropriate;
- d. The costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate;
- e. The charges and expenses of CPR with respect to the arbitration;
- f. The costs of a transcript; and
- g. The costs of meeting and hearing facilities.

16.3 Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration.

16.4 The Tribunal may request each party to deposit an appropriate amount as an advance for the costs referred to in Rule 16.2, except those specified in subparagraph (d), and, during the course of the proceeding, it may request supplementary deposits from the parties. Any such funds shall be held and disbursed in such a manner as the Tribunal may deem appropriate.

16.5 If the requested deposits are not paid in full within 20 days after receipt of the request, the Tribunal shall so inform the parties in order that jointly or severally they may make the requested payment. If such payment is not made, the Tribunal may suspend or terminate the proceeding.

16.6 After the proceeding has been concluded, the Tribunal shall return any unexpended balance from deposits made to the parties as may be appropriate.

#### **Rule 17: Confidentiality**

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.

#### **Rule 18: Settlement And Mediation**

18.1 Either party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.

18.2 With the consent of the parties, the Tribunal at any stage of the proceeding may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties. The mediator shall be a person other than a member of the Tribunal. Unless the parties agree otherwise, any such mediation shall be conducted under the CPR Mediation Procedure.

18.3 The Tribunal will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent.

**Rule 19: Actions Against CPR Or Arbitrator(s)**

Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

**Rule 20: Waiver**

A party knowing of a failure to comply with any provision of these Rules, or any requirement of the arbitration agreement or any direction of the Tribunal, and neglecting to state its objections promptly, waives any objection thereto.

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

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

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

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

The CPR Institute for Dispute Resolution ("CPR") Rules for Non-Administered Arbitration (the "Rules") (Rev. 2000) were developed by CPR to provide procedures to facilitate the conduct of arbitration fairly, expeditiously and economically. The Rules are designed to be easily comprehended. The Rules are intended in particular for the complex case, but are suitable regardless of the complexity of the case or the amount in dispute.

Every disputant wants to have a reasonable opportunity to develop and present its case. Parties that choose arbitration over litigation do so in large part out of a need or desire for a proceeding that is speedy and economical – factors which tend to go hand in hand. The Rules were designed with each of these objectives in mind.

The complexity of cases will vary greatly. In rules of general application, it is not appropriate to fix hard and fast deadlines. Rule 14.7 commits the parties and the arbitrator(s) to use their best efforts to assure that the dispute will be submitted to the Tribunal for decision within six months after the initial pre-hearing conference, and that the final award will be rendered within one month thereafter. Rule 9.2 empowers the arbitrator(s) to establish time limits for each

phase of the proceeding, including specifically the time allotted to each party for presentation of its case and for rebuttal.

Counsel are expected to cooperate fully with the Tribunal and with each other to assure that the proceeding will be conducted with civility in an efficient, expeditious and economical manner. Rule 16.3 empowers the arbitrators in apportioning costs to take into account, *inter alia*, "the circumstances of the case" and "the conduct of the parties during the proceeding." This broad power is intended to permit the arbitrators to apportion a greater share of costs than they otherwise might to a party that has employed tactics the arbitrators consider dilatory, or in other ways has failed to cooperate in assuring the efficient conduct of the proceeding.

### **Types Of Disputes**

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

CPR has published additional arbitration rules, the CPR Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes and the CPR Rules for Non-Administered Arbitration of International Disputes (the "International Rules") (Rev. 2000). The CPR International Rules are designed for disputes involving persons or business enterprises of different nationalities or located in different countries. Parties to international transactions may specifically provide for application of the International Rules by including the suggested standard pre-dispute clause for the International Rules in their contracts, or by agreeing to application of the International Rules after a dispute arises. Unless the parties specifically provide for or agree to application of the International Rules, these Rules shall apply (Rule 1.1).

While most arbitrations involve two parties, the Rules are also suitable for proceedings among three or more parties. References to "Claimant," "Respondent" and "other party" should be construed to encompass multiple Claimants, Respondents or other parties in such multi-party proceedings. Where necessary, the Rules specifically address particular issues raised in the multiparty context. For example, Rule 3.2 provides that the arbitration shall be deemed commenced "as to any Respondent" when that Respondent receives the notice of arbitration. Rule 5.5 deals with the constitution of the Tribunal where the arbitration agreement entitles each party to appoint an arbitrator but there is more than one Claimant or Respondent to the dispute.

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

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

- provide a set of rules which the parties can adopt in a pre-dispute agreement or for an existing dispute;
- provide administrative staff to render services required for case handling and to insulate arbitrators from parties;
- provide lists of persons from which arbitrators may be chosen;
- appoint the arbitrator(s) if necessary;
- decide arbitrator conflict of interest challenges if necessary;

- determine arbitrator fees and bill the parties for such fees;
- schedule hearings and send notices of hearings;
- provide hearing rooms;
- distribute documents;
- review awards for procedural comments.

The charges of administering organizations typically are related to the amount in dispute, but rates vary.

Many arbitration practitioners and arbitrators see a need for administered arbitration, but others favor non-administered or "ad hoc" arbitration, particularly for large or complex cases. They believe that the arbitrator(s) and the parties' advocates are capable of performing many of the functions generally performed by the administering organization, and that the arbitrator(s) and advocates often may be better able to control the conduct of the proceeding than such an organization. The fees charged by an administering organization may also be a factor. The assistance of a neutral third party may be needed in selecting the Tribunal or deciding a conflict of interest challenge to an arbitrator. Under the Rules, upon party request CPR is available to perform these functions. CPR's fee schedule for performing these functions is listed on CPR's website at [www.cpradr.org](http://www.cpradr.org).

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

### **Salient Features Of The Rules**

The Rules differ in numerous respects from arbitration rules promulgated by other organizations. Features that CPR considers particularly significant are:

1. The Rules call for non-administered arbitration, in which CPR only becomes involved when necessary to break an impasse in the proceedings. Specifically, CPR's role in the arbitral proceeding is limited to assisting the parties by administering the arbitrator selection process where the parties have selected the "screened" selection procedure of Rule 5.4; appointing arbitrators where the parties are unable to agree on such arbitrators (Rule 6); and ruling on challenges to arbitrators (Rule 7).
2. The Rules require the expeditious conduct of the proceeding, empowering the arbitrator(s) to establish time limits for each phase of the proceeding (Rule 9.2), and to penalize a party engaging in dilatory tactics (see Rule 16.3).
3. All arbitrators, including those appointed by either party, are required to be independent and impartial (Rule 7.1). Such a requirement enhances the integrity of the arbitration process, even if it represents a departure from existing U.S. practice. Rule 5.4 offers parties, as an option, a "screened" procedure for selecting party-appointed arbitrators without the arbitrators knowing which party appointed them, thereby even further enhancing the integrity of the process.
4. The parties are given ample opportunity to select a sole arbitrator or a panel of three arbitrators without intervention of CPR. If they fail, either party may request CPR's assistance (Rule 6.1). CPR will first convene the

parties to attempt to select the arbitrator(s) by agreement of the parties. Only if that attempt fails will CPR submit a list of candidates to the parties for ranking (Rule 6.4).

5. The Tribunal may decide challenges to its jurisdiction (Rule 8). This should allow arbitrators to decide all issues, including arbitrability questions, without the necessity for court intervention.

6. The chair of the Tribunal is assigned responsibility for the organization of conferences and hearings and arrangements with respect to the functioning of the Tribunal (Rule 9.1).

7. The Tribunal is required to hold at least one pre-hearing conference to plan and schedule the proceeding (Rule 9.3). Such conference should result in the smooth scheduling of the case, and may aid possible settlement.

8. The Tribunal is required to apply the substantive law chosen by the parties to govern the merits of their dispute (Rule 10.1). The Tribunal is also specifically empowered to grant any remedy, including specific performance and injunctive relief, within the scope of the parties' agreement and permissible under applicable law (Rule 10.3).

9. The Tribunal is given great leeway in matters of procedure. The Tribunal is specifically empowered, for instance, to:

- establish time limits for each phase of the proceeding (Rule 9.2);
- limit the time allotted to each party for presentation of its case (Rule 9.2);
- make pre-hearing orders (Rule 9.4);
- require such discovery as it deems appropriate (Rule 11);
- require the submission of pre-hearing memoranda (Rules 9.4 and 12.1);
- require evidence to be presented in written or oral form (Rule 12.2).

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

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

12. The Tribunal is required to state the reasoning on which its award rests unless the parties agree otherwise (Rule 14.2). CPR believes the parties are entitled to know how the decision was reached. The requirement that the award be reasoned also discourages any tendency for arbitrators to "split-the-baby" without a principled basis for doing so.

13. Each arbitrator is to be fully compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator (Rule 16.1).

14. The Tribunal is empowered to apportion costs, including attorneys' fees and other costs incurred by the parties, between the parties, taking into account the circumstances of the case, the conduct of the parties during the proceeding and the result (Rule 16.3).

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

16. The Tribunal may suggest at any time that the parties explore settlement (Rule 18.1).

17. The Tribunal may arrange for mediation of the dispute at any time with the consent of the parties (Rule 18.2).

18. The Rules are intended primarily for disputes between responsible parties who will not attempt to obstruct the process. However, the Rules do permit the process to go forward even if a Respondent fails to deliver a notice of defense, fails to participate in selection of the Tribunal, or ultimately fails to appear at a hearing. (See Rules 3, 6 and 15).

## COMMENTARY ON STANDARD CONTRACTUAL PROVISIONS

CPR recommends that in most instances, business agreements include a multistep ADR scheme with three sequential stages of dispute resolution: (i) a Negotiation Phase between executives with decision making authority who are at a higher level than the personnel involved in the dispute; (ii) a Mediation Phase to facilitate settlement by employing a skilled neutral, not to impose a solution, but to assist the parties in reaching agreement; and (iii) a Final Binding Arbitration Phase in case the non-binding phases produce no settlement, or, Litigation if the non-binding phases produce no settlement and private binding arbitration is not selected.

The suggested standard pre-dispute clause and submission agreement which precede the Rules may be modified or supplemented. It is desirable that the parties specify the number of arbitrators, the place of arbitration and the governing law. If a governing law is specified, it may be advisable to state whether or not the conflict of laws rules of that law are included. The pre-dispute clause and the submission agreement call for an election as to whether the Tribunal will be composed of:

- three arbitrators, of whom each party appoints one, and the two party-appointed arbitrators in turn attempt to select the third,
- three arbitrators, of whom each party shall designate one in accordance with the "screened" appointment procedure provided in Rule 5.4 and CPR selects the third (discussed in greater detail in the Commentary to Rule 5),
- three arbitrators, none of whom are appointed by the parties, or
- a sole arbitrator.

Such an election made in a pre-dispute clause may be changed by further agreement once a specific dispute has arisen. If the parties fail to make an election, the party-appointed model where each party appoints an arbitrator and they in turn select the third applies in accordance with Rule 5.1. (Rules 5 and 6 govern the selection of arbitrators.)

Pursuant to *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248 (1989), CPR has inserted language in the standard pre-dispute clause and submission agreement to the effect that the arbitration shall be governed by the Federal Arbitration Act. If parties chose to use a different law, or if the federal law does not apply (where, for example, the underlying transaction is not "in commerce"), another law should be specified.

It is essential for the parties to stipulate that judgment may be entered upon the award, in order to comply with the requirement of the Federal Arbitration Act, 9 U.S.C. § 9.

**Punitive Damages** – The U.S. Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 512 U.S. 52, 115 S. Ct. 1212 (1995), held that, unless the parties expressly agree otherwise, arbitrators are authorized to award punitive damages. If the parties wish to preclude the arbitrators from awarding punitive damages, it would be advisable to include a provision to that effect in the predispute clause or the submission agreement. A suggested provision to that effect is:

*"The arbitrator(s) are not empowered to award damages in excess of compensatory damages [and each party expressly waives and foregoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.]"*

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

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

## **COMMENTARY ON INDIVIDUAL RULES**

### **A. General And Introductory Rules**

#### **Rule 3. Commencement Of Arbitration**

Rule 3 sets forth the procedure to be followed when a proceeding is commenced pursuant to a pre-dispute arbitration clause. Under Rule 3.4, the arbitration will proceed even if the Respondent should fail to file a timely notice of defense. If the pre-dispute clause required each party to appoint an arbitrator, and either party fails to do so, the other party may request CPR to step in pursuant to Rule 6. Rule 3.8 governs the addition or amendment of claims after the notice of arbitration is filed; defenses, too, may ordinarily be freely added or amended, unless the Tribunal determines otherwise. A submission agreement entered into after a dispute has arisen may include all or some of the material called for by Rules 3.3 and 3.5 and may eliminate the need for a notice of arbitration and a notice of defense. Rule 3.9 provides that "Rule 3 shall apply to the extent that it is not inconsistent with the submission agreement." If the parties so desire, the submission agreement can provide that Rule 3 notices will not be required or will be modified.

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

It is assumed that parties normally would be represented by a law firm or an individual attorney; however, the Rules permit parties to be represented or assisted by any persons of their choice. Under the laws of certain jurisdictions, representation of a party in an arbitration proceeding may constitute the practice of law, in which case representation by an attorney would be required. If the parties are represented by legal counsel, such counsel need not be a member of the local bar at the seat of the arbitration unless local law or regulation at the seat of the arbitration so requires.

### **B. Rules With Respect To The Tribunal**

#### **Rule 5. Selection Of The Arbitrators By The Parties**

Most practitioners, when confronted with a large or complex dispute, have greater confidence in a panel of three arbitrators than in a single arbitrator. Moreover, they usually prefer to permit each party to appoint an arbitrator. Rule 5.1 provides, therefore, that the Tribunal shall consist of two arbitrators appointed by the parties and a third arbitrator who shall chair the Tribunal, unless the parties have agreed on a Tribunal consisting of a sole arbitrator or three arbitrators not appointed by the parties.

Rule 5.4, added to the Rules in 2000, presents a novel "screened" procedure for constituting a three-member Tribunal, two of whom are designated by the parties without knowing which party designated each of them. The procedure is intended to offer the benefits, while avoiding some of the drawbacks, of having party-appointed arbitrators. On the one hand, parties are able to designate arbitrators whom they consider to be well-qualified to sit on the Tribunal. On the other hand, any tendency (subtle or otherwise) of party-appointed arbitrators to favor or advocate the position of the parties who appointed them is avoided because those arbitrators are approached and appointed by CPR rather than the parties and are not told which party designated each of them. The Rules governing *ex parte* communications (Rule 7.4), challenges (Rule 7.6), and resignations (Rule 7.9) contain specific provisions designed to preserve the "screen" for the party-designated arbitrators under Rule 5.4 throughout the arbitration. The parties may choose the "screened" selection procedure in their pre-dispute arbitration clause (see standard pre-dispute clause), or agree to the screened procedure once a dispute arises.

CPR recognizes that, as a practical matter, some party-designated arbitrators selected pursuant to Rule 5.4 may deduce or learn which parties designated them – i.e., the "screen" may not, in all instances, be perfect. CPR nevertheless believes that the screened procedure is worthy of consideration by parties as a means to enhance the integrity of arbitrations involving party-appointed arbitrators. Any party-designated arbitrator who does, in fact, learn which party appointed him or her should disclose that fact to each of the parties and the other members of the Tribunal in order to ensure a level playing field. In the event an arbitrator discovers who appointed him or her, such knowledge would not be a basis for disqualification or challenge *per se*, and the arbitration can continue uninterrupted on a non-"screened" basis.

For many parties, the ability to select a Tribunal well qualified to hear and decide their dispute is a primary motivation to opt for arbitration. The selection of highly qualified, experienced arbitrators is critical. CPR believes that at least the chair of the Tribunal usually should be a respected attorney experienced in arbitration. The arbitrators should be persons able and willing to control the course of the proceeding and to make definitive rulings on substantive and procedural matters.

Sophisticated counsel representing the parties are likely to know of individuals, especially of attorneys, who are well qualified and who meet the "independent and impartial" standard of Rule 7.1. CPR has established panels of leading members of the bar, including former judges, who are highly qualified to serve as arbitrators, in its CPR Panels of Distinguished Neutrals ("CPR Panels"). CPR's lists of panelists are available on the CPR website ([www.cpradr.org](http://www.cpradr.org)) or upon request from CPR, and panel members may be contacted directly. Unless parties otherwise agree, Rule 5.1 requires that any arbitrator, not appointed by a party, shall be a member of the CPR Panels. It should be noted that scheduling hearings on dates on which all three arbitrators are available frequently presents considerable difficulties and may well result in delays. Moreover, the need to have two or three arbitrators agree on the text of an award may also cause delay and additional expense. Consequently, a proceeding conducted by a sole arbitrator may be more expeditious and less expensive. Tribunals of two arbitrators have been used on occasion, typically in complex technological disputes in which the objective was to structure a *modus vivendi* rather than only to arrive at conclusions as to liability and damages. The Rules may be modified to provide for a two-arbitrator Tribunal.

Rule 5.5 deals with the constitution of three member Tribunals in the multi-party context. It provides that, if there is more than one Claimant or one Respondent, and the parties' arbitration clause contemplates each party appointing an arbitrator, then the multiple Claimants or multiple Respondents can jointly appoint an arbitrator. If they are unable or unwilling to do so, CPR shall appoint all of the arbitrators following the procedures of Rule 6.4.

## **Rule 6. Selection Of The Arbitrator(s) By CPR**

Selection of arbitrators by the parties is the preferred course, and the parties are given ample opportunity to select a Tribunal without CPR's assistance. However, if they fail, either party may request CPR's assistance at the time and in the manner specified in Rule 6. For CPR's fee schedule for providing such assistance, see CPR's website at [www.cpradr.org](http://www.cpradr.org).

In accordance with Rule 6.4(a), CPR then will convene the parties and will propose candidates in an attempt to complete the Tribunal in this informal and speedy manner. If this procedure is not wholly successful, CPR will submit a list of candidates to the parties in writing. The parties are required to rank the nominees in order of preference. The nominee(s) willing to serve for whom the parties collectively have indicated the highest preference will be selected. Where a party has failed to appoint its party appointed arbitrator, CPR shall appoint a person whom it deems qualified (Rule 6.5).

The parties will be encouraged to inform CPR of the qualifications they seek in an arbitrator. Individuals nominated by CPR will be members of CPR's Panels, absent a special reason to go beyond the CPR Panels compelled by the particular circumstances of the arbitration.

## **Rule 7. Qualifications, Challenges And Replacement Of Arbitrators**

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

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

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

Rules 7.3 and 7.5 - 7.8 set forth a formal procedure for disclosure of "circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality," and for a challenge for "justifiable doubt," after the Tribunal has been constituted. It is anticipated that normally an individual's possible conflicts of interest would be disclosed and resolved informally before selection, and that it would rarely become necessary to invoke the formal procedure. Specifically, CPR's Model Agreement for Parties and Arbitrators requires that:

- B.1. The Arbitrator has made a reasonable effort to learn and has disclosed to the parties in writing (a) all business or professional relationships the Arbitrator and/or the Arbitrator's firm have had with the parties or their law firms within the past five years, including all instances in which the Arbitrator or the Arbitrator's firm served as an attorney for any party or adverse to any party or in which the Arbitrator served as an arbitrator or mediator in a matter involving any party; (b) any financial interest the Arbitrator has in any party; (c) any significant social, business or professional relationship the Arbitrator has had with an officer or employee of a party or with an individual representing a party in the Proceeding; and (d) any other circumstances that may give rise to justifiable doubt regarding the Arbitrator's independence or impartiality in the Proceeding.
- B.2. Each party and its law firm has made a reasonable effort to learn and has disclosed to every other party and the Arbitrator in writing any relationships of a nature described in paragraph B.1. above not previously identified and disclosed by the Arbitrator.

- B.3. The parties and the Arbitrator are satisfied that any relationships disclosed pursuant to paragraphs B.1. and B.2. above will not affect the Arbitrator's independence or impartiality. Notwithstanding such relationships or others the Arbitrator and the parties did not discover despite good faith efforts, the parties wish the Arbitrator to serve in the Proceeding, waiving any claim based on said relationships and the Arbitrator agrees to so serve.
- B.4. The disclosure obligations in paragraph B.1. and B.2. above are continuing until the Proceeding is concluded. The ability of the Arbitrator to continue serving in this capacity shall be explored with each such disclosure.”

In general, CPR believes all arbitrators should be held to high ethical standards and urge arbitrators to consult appropriate codes and guidelines, including the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, Proposed Model Rules of Professional Conduct for the Lawyer as Third Party Neutral (CPR website, [www.cpradr.org](http://www.cpradr.org)) and the Code of Ethics for Arbitrators in Commercial Disputes (1977) (under revision).

If an arbitrator is formally challenged by a party, Rule 7.8 provides that CPR (for a fixed administrative fee) will decide the challenge after providing the challenged arbitrator, the other members of the Tribunal and the non-challenging party with an opportunity to comment on the challenge. In providing an opportunity to comment and deciding the challenge, CPR will follow the procedures set forth in its CPR Challenge Protocol (distributed to the parties and the Tribunal upon notification of a challenge and/or upon request). The CPR Challenge Protocol provides that challenges are decided by a designated Challenge Officer within CPR or, where appropriate in light of the difficulty, complexity or other relevant factors, by a Challenge Review Committee consisting of three members drawn from a CPR Challenge Review Board of CPR Panelists. Decisions on challenges will be made and communicated to the parties and Tribunal expeditiously. The basis and reasons underlying the decision, however, are not communicated to the parties or the Tribunal, consistent with the confidential and administrative nature of the decision and the desire to avoid or minimize interlocutory proceedings in the courts. For CPR's fee schedule, see CPR's website at [www.cpradr.org](http://www.cpradr.org).

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

### **Rule 8. Challenges To The Jurisdiction Of The Tribunal**

This Rule expresses the generally accepted principle that arbitrator(s) have the competence initially to determine their own jurisdiction. Accordingly, any objections to the existence, scope or validity of the arbitration agreement, or the arbitrability of the subject matter of the dispute, are decided, at least in the first instance, by the Tribunal consistent with the U.S. Supreme Court's decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995). The arbitrator(s) will decide whether the arbitration proceeds in the face of a jurisdictional challenge.

## **C. Rules With Respect To The Conduct Of The Arbitral Proceedings**

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

Under Rule 9.1 the chair is "responsible for the organization of the arbitral conferences and hearings and arrangements with respect to the functioning of the Tribunal." The efficiency of the proceeding will depend in large part on the chair's

taking the lead in asserting the Tribunal's control over critical aspects of the procedure, including the setting of time limits as authorized by Rule 9.2.

The Rules give the Tribunal wide latitude as to the manner in which the proceeding will be conducted. It is expected that the procedure will be determined in large part during the pre-hearing conference(s) held pursuant to Rule 9.3 and that following the conference(s) the Tribunal will issue a procedural timetable and/or one or more orders on procedural matters. The pre-hearing conference prescribed by Rule 9.3 should ordinarily be held in person in order to maximize the benefits of the conference, but may also be held by telephone or other form of electronic or teleconference where considerations of efficiency so dictate.

Narrowing issues to those central to the controversy, fact stipulations and admissions should be strongly encouraged by the Tribunal in the interest of focusing on core issues and simplifying the proceeding.

Some controversies hinge on one or two key issues of law which in litigation may be decided early by motion for partial summary judgment. At the pre-hearing conference, the desirability of the Tribunal's ruling on such issues before the hearings commence can be considered.

Other controversies hinge on a key issue of a technical nature on which a neutral expert can be helpful in bringing about a resolution. The appointment by the Tribunal of such an expert is authorized by Rule 12.3 and also can be discussed at the pre-hearing conference.

The Tribunal may bifurcate the proceeding. If the proceeding is bifurcated to first decide the issue of liability, the parties then may well be able to agree on the remedy. Often parties have options not available to a judge or to arbitrators.

A pre-hearing conference may well give the arbitrators an opportunity to suggest settlement discussions or mediation, as contemplated by Rule 18. Simply bringing the attorneys together for purposes of a conference may lead to such discussions.

## **Rule 10. Applicable Law(s) And Remedies**

Under Rule 10, unless the parties shall have agreed in their contract or otherwise as to which law shall govern, the Tribunal is free to apply the law(s) or rules of law as it determines to be appropriate to govern the dispute. Rule 10.3 makes clear that the Tribunal can grant any remedy or relief available under the contract and applicable law, including equitable relief such as specific performance and injunctive relief. Indeed, arbitrators have been held to have even greater latitude than courts in fashioning appropriate equitable relief. Arbitrators may not simply do as they please, however; any remedy or relief granted must be permissible under the contract and applicable law and Rule 14.2 requires arbitrators to explain the reasoning on which their awards rest.

**Punitive Damages** – The U.S. Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 512 U.S. 52, 115 S. Ct. 1212 (1995), held that, unless the parties expressly agree otherwise, arbitrators are authorized to award punitive damages. If the parties wish to preclude the arbitrators from awarding punitive damages, it would be advisable to include a provision to that effect in the pre-dispute clause or the submission agreement. A suggested provision to that effect is:

*"The arbitrator(s) are not empowered to award damages in excess of compensatory damages [and each party expressly waives and foregoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.]"*

## **Rule 11. Discovery**

Under Rule 11, the Tribunal

*"may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."*

Arbitration is not for the litigator who will "leave no stone unturned." Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items which a party has a substantial, demonstrable need. Rule 12.2 provides for the application of the attorney-client privilege and the work product immunity. That protection is intended to apply to discovery as well as to hearings.

It is desirable for the parties' counsel to agree, preferably before the initial pre-hearing conference, on a discovery plan and schedule and to submit the same to the Tribunal for its approval.

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

### **Rule 12. Evidence And Hearings**

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

Self-authentication of documentary exhibits, the authenticity of which are not disputed, is a widely used practice which reduces hearing time. In cases in which voluminous testimony is expected, the hearings will be expedited considerably if the Tribunal requires the direct testimony of all or most witnesses to be submitted in written form before the witness is to appear. This procedure also enables opposing counsel to better prepare for cross-examination. Affidavits would be admissible in evidence unless the Tribunal rules otherwise.

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

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

Rule 12.3 empowers the Tribunal to appoint neutral experts. CPR expects this power to be exercised sparingly, and only following consultation with the parties as to the need for a neutral expert, the scope of the assignment, and identification of well-qualified candidates. It is not intended that the expert give advice to the Tribunal *ex parte*; indeed, the Rule entitles the parties to cross-examine and to rebut the expert. The conflicting views of partisan experts can lead to confusion rather than enlightenment of arbitrators. In appropriate cases the arbitrators might encourage the parties early on, e.g., at the pre-hearing conference, to agree on the joint appointment of a neutral expert.

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

The Tribunal's powers with respect to subpoenas are determined by applicable law and are not dealt with specifically in the Rules.

#### **Rule 14. The Award**

Rule 14.2 provides: "All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise." Most parties engaging in arbitration want to know the basis on which the arbitrator(s) reached their decision. CPR, moreover, considers it good discipline for arbitrators to require them to spell out their reasoning. Sometimes this process gives rise to second thoughts as to the soundness of the result. The Rule 14.2 mandate gives the arbitrator(s) greater leeway than would a requirement to state "conclusions of law and findings of fact." Some parties hesitate to arbitrate out of a concern that arbitrators are prone to "split the baby", *i.e.*, to make compromise awards. Any tendency on the part of arbitrators to reach compromise awards should be restrained by the requirement of a reasoned award.

Certain administering organizations and practitioners favor "bare" awards without explanation of any sort, in the belief that such awards are the least likely to be challenged and overturned by a court. In CPR's view, the risk that a reasoned award will be successfully challenged normally is small and outweighed by the other considerations mentioned above.

Where there are three arbitrators, a majority of the arbitrators must sign the award. Occasionally, a Tribunal of three arbitrators experiences great difficulty in developing a position to which a majority can subscribe. Certain other arbitration rules empower the chair of the Tribunal to make an award singly under such circumstances, notwithstanding the (usually slight) risk of a rogue chair ruling unreasonably. The parties are free to modify the Rules to grant such authority to the chair.

Unless the parties have agreed in their business agreement or otherwise which law shall govern, the Tribunal is free to determine the law which is to govern the award.

Rule 14.7 requires the parties and the arbitrators to use their best efforts to submit the dispute to the Tribunal for decision within six months of the initial pre-hearing conference, and to render the final award within one month following such submission.

The Rules do not deal expressly with confirmation of an award, as the matter is covered by the Federal Arbitration Act, 9 U.S.C. § 9 and its state counterparts. For most users of arbitration, the finality of the arbitration award is a significant advantage of arbitration over court litigation. But parties to major cases are occasionally concerned about the possibility of an aberrant award and would like the option of a private appeal to a tribunal of outstanding appellate arbitrators. In response to that concern, CPR has promulgated the CPR Arbitration Appeal Procedure, which is available on the CPR website ([www.cpradr.org](http://www.cpradr.org)) or upon request from CPR.

#### **D. Miscellaneous Rules**

##### **Rule 15. Failure To Comply With Rules**

Rule 15 empowers the Tribunal to impose a remedy it deems just whenever a party materially fails to comply with the Rules. The power to make an award on default is specifically provided. Pursuant to Rule 16.3, the Tribunal also may take a party's conduct during the proceeding into account in assessing costs.

## **Rule 16. Costs**

CPR believes that highly qualified arbitrators are entitled to be fully compensated for their service as arbitrators. If an arbitrator is a member of a law firm, he or she is likely to expect compensation at approximately the hourly rates normally charged for his or her services. The rates payable to party-appointed arbitrators should be agreed to between the appointee and the appointing party (except where the screened procedure of Rule 5.4 is being used to designate party-appointed arbitrators, in which case the rates will be agreed to between the appointees and CPR). The rates of other arbitrators should be established by agreement with both parties. The members of a three-member Tribunal are likely to be compensated at different rates, but gross variations may present problems. In any event, the agreed upon compensation rate for each of the arbitrators should ordinarily be fully disclosed to all Tribunal members and parties.

Normally, the parties are expected to make advances for costs to a fund pursuant to Rule 16.4, and the arbitrators' fees, as well as other expenses, would be paid from such fund.

The "costs of arbitration" enumerated in Rule 16.2 include the costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate.

In accordance with Rule 16.3, unless the parties otherwise agreed, the Tribunal may apportion the costs of arbitration between the parties "in such manner as it deems reasonable taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration." The arbitrator(s) may take into account tactics by either party that unreasonably interfered with the expeditious conduct of the proceeding.

## **Rule 18. Settlement And Mediation**

A high percentage of civil lawsuits and business arbitration proceedings are disposed of before a trial or hearing takes place, most by settlement. Yet often each party is reluctant to propose settlement negotiations, if only out of concern that the proposal will be seen as a sign of weakness. A suggestion to explore settlement by the Tribunal at one or more appropriate junctures in the proceeding should launch such negotiations without either party's bearing the onus of being the proposer.

A skilled mediator can play a critical role in bringing about agreement between adversaries, even where unaided negotiations did not result in agreement. If the Tribunal believes that mediation may result in a settlement, the Tribunal may suggest that the parties engage in such a process and, if the parties agree, assist in arranging the same. The parties should consider suspending the arbitration proceedings while mediation is in progress, at least for a limited time.

It may well be desirable for senior executives to play an active role in a mediation proceeding. Often the parties have settlement options that are business-oriented and more creative than the payment of money. Business executives are likely to be best able to explore such options. As a general rule, members of the Tribunal should not serve as mediator. The parties may hesitate to confide in an arbitrator serving as mediator and an arbitrator would be inhibited in making settlement proposals or giving advice to the parties. Moreover, an arbitrator serving as mediator may no longer be able to serve as an impartial arbitrator if the mediation fails to resolve the dispute. The Tribunal can nevertheless be helpful by proposing well qualified candidates to serve as a mediator.

If a settlement does not come about, the terms of any settlement offers should not be admitted into evidence at the hearings or otherwise disclosed to the Tribunal. If the parties enter into a settlement agreement, they may wish to request the Tribunal to issue an award incorporating the settlement terms.

For information on how to file a matter with CPR, see <https://www.cpradr.org/dispute-resolution-services/file-a-case>.