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Inside a Franchise Arbitration

I. INTRODUCTION[1]

Much has been written about how to compel or avoid arbitration of franchise disputes and how to enforce or vacate final arbitration awards. Many franchise lawyers (even some seasoned litigators) would be embarrassed to admit, however, that they have little understanding of what actually happens between the bookends of compelling arbitration and enforcing or attacking the resulting award. They also may be at a loss as to whether a client should make an effort to seek arbitration or avoid it in a particular dispute because they do not know enough about the process. This paper will provide some insight into these issues.

While our focus will be on the structuring, mechanics and progression of a franchise arbitration, it is nevertheless instructive at the outset to take a cursory look at some of the pros and cons of arbitration versus litigation, with the proviso that reasonable minds may differ. Issues to consider include:

- while some believe that arbitration is faster and more efficient than litigation, others report arbitrations that have taken several years and more to conclude;
- filing fees, arbitrator fees, case service/administrative fees and hearing room fees can make arbitration an expensive process;
- the recognition of "class action" arbitration may be on the rise, while many franchisors once thought that they could more easily avoid group or class actions in arbitration;
- arbitrations typically provide for more control over scheduling and less formal hearings than court cases do;
- while arbitrations may reduce the extent of pre-hearing discovery and motion practice, this is not always the case;
- the relaxed rules of evidence in arbitration can be a mixed blessing, depending on what type of evidence a party wants to get in or keep out;
- many franchisors believe that arbitration can avoid the potential for a "runaway jury," but arbitrators have also issued substantial arbitration awards;

[1]The authors thank, for their research, assistance and patience, Wiggin and Dana LLP associate Tahlia Townsend; The Richard L. Rosen Law Firm associate Leonard Salis for all his work and insight in the preparation of this paper.

- arbitration awards do not create the same type of formal legal precedent as court decisions;

- an arbitration award is more likely to remain private than a court decision because awards are less frequently published; and

- the right to appeal an arbitration award is limited.

When all is said and done, there is no across the board consensus among franchisors or franchisees as to whether arbitration or litigation is preferable.

This paper is not intended to be an academic treatise on arbitration, but rather a more practical (and hopefully more useful) effort to demystify the arbitration process by presenting a window into how franchise arbitrations generally work including, among other things:
(i) information you need to know to help you decide whether arbitration is the right choice for your client; (ii) what you need to know before you commence an arbitration; (iii) how arbitrators are chosen (and the kind of arbitrator you should choose); (iv) how much the process is likely to cost; (v) how arbitration pleadings differ from those in litigation; (vi) whether the arbitration process can accommodate different levels of complexity; (vii) the type of discovery that is likely to be allowed; (viii) how arbitration hearings are conducted; (ix) how long it will take to get a final award; and (x) what happens after the award is issued.

II. THINGS TO KNOW BEFORE ARBITRATING A DISPUTE

Arbitration is a creature of contract, and parties cannot be compelled to arbitrate unless they have agreed in writing to do so and the dispute in question is within the scope of that agreement (although nothing prevents parties from agreeing to arbitrate after a dispute arises, or from consensually modifying the terms of an earlier arbitration agreement).[2] So what terms should you look for in an agreement to arbitrate?

The American Arbitration Association (the "AAA") suggests the following standard arbitration clause:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Most careful drafters do not simply insert this pre-fabricated boilerplate as a franchise agreement arbitration provision (the "arbitration agreement"), however. First, careful thought should be given to the entity designated to administer the arbitration, because each body has its own procedural rules and its own fee structure. *See* Section I.C, below. Second, franchise arbitration agreements often contain exceptions, or carve-outs, to the requirement to arbitrate. For example, a franchisor may want to preserve its right to seek immediate injunctive relief in court to protect its intellectual property rights. When drafting an agreement, any desired carve-

[2] *See* 9 U.S.C. §§ 2, 4; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 591 (2002) ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (citation omitted); *accord Paine Webber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990) ("As a matter of contract, no party can be forced to arbitrate unless that party has entered into an agreement to do so").

out should be made explicit in the contract section addressing dispute resolution mechanisms and requirements.

Because the arbitration agreement language generally governs the parties' right and obligation to arbitrate and how the arbitration will be conducted, counsel should think carefully about the following terms when drafting an arbitration agreement:

- the arbitration body designated to administer the dispute;
- choice of law;
- choice of venue;
- allocation of costs and fees
- limitations on damages (particularly punitive damages) or on group or class actions.
- arbitrator characteristics;
- number of arbitrators;
- the scope of arbitrable issues; and
- discovery limitations.

A. Arbitration Administrative Bodies

While nothing prevents parties from agreeing to arbitrate a dispute without third party administration, arbitration provisions commonly specify a particular organization to administer disputes and assist with arbitrator selection. Some well-known administrative bodies include the American Arbitration Association ("AAA") (www.adr.org), JAMS (www.jamsadr.com) and the International Chamber of Commerce International Court of Arbitration (www.iccwbo.org).[3] Other entities, such as CPR International Institute for Dispute Resolution (www.cpradr.org), provide rules and assist with arbitrator selection but do not actually administer arbitrations.

Each of these bodies has its own set of procedural rules for the conduct of the arbitration, including matters such as the form of the demand, the default number of arbitrators, and how a location for the arbitration is selected.[4] The organization's rules will also specify whether interim relief, such as preliminary injunctive relief, is available.[5] The rules are revised

[3]Other organizations include the National Arbitration Forum (www.adrforum.com), United States Arbitration and Mediation (www.usam.com), and Franchise Arbitration and Mediation (www.franarb.com).

[4]*See, e.g.*, AAA Commercial Rules, *available at* www.adr.org/sp.asp?id=22440; ICC Rules *available at* www.iccwbo.org/court/english/arbitration/rules.asp; CPR Non-Administered Arbitration Rules *available at* www.cpradr.org/arb-intro.asp?M=9.2.2; JAMS Comprehensive Rules, *available at* www.jamsadr.com/rules/comprehensive.asp.

[5]*See, e.g.*, AAA Commercial Rules, R-34; ICC Rules, Art. 23; CPR Non-Administered Arbitration Rules, Rule 13; JAMS Comprehensive Rules, Rule 24(e).

periodically and posted on the organization's website; typically the applicable version is the one in force when the demand is filed rather than when the arbitration agreement was executed.[6]

Organizations also often have different rules applicable to different types of disputes, such as commercial, employment or consumer disputes. Supplemental rules may also apply, such as complex, expedited or optional rules. Reviewing the parties' agreement and the applicable rules should clarify the supplemental rules that may apply to a particular dispute, which may depend on the type of dispute or amount in controversy. Some domestic arbitration providers also have special rules or even separate divisions for international disputes.[7]

Different arbitration administrative bodies have different fee structures, which can have a significant effect on the overall cost of an arbitration. *See* Section II.C, below, for further detail. As mentioned above, counsel may also be able to "renegotiate" the body that will administer the arbitration after a dispute arises to save fees or improve other aspects of the arbitration proceedings.

B. Choice of Law

Arbitration agreements are made specifically enforceable in federal court, and immunized against state attempts to require a judicial forum, by the Federal Arbitration Act (the "FAA"), which applies to all arbitration provisions involving "maritime transaction[s]" or interstate commerce.[8] The FAA declares that such arbitration provisions "shall be valid, irrevocable, and enforceable"[9] and preempts any conflicting state law that would otherwise apply.[10] Consequently, state law may invalidate an arbitration agreement only "upon such grounds as exist at law or in equity for the revocation of any contract."[11] Moreover, most states have enacted some form of the Uniform Arbitration Act, which mirrors many of the provisions of the FAA and covers agreements that may not otherwise be covered.[12] Practitioners should be generally familiar with these statutory provisions and consult them as appropriate when a dispute arises.

Because the FAA does not displace generally applicable principles of contract law, parties to an arbitration agreement often seek to control the state law that will apply by including

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[6] *See, e.g.*, AAA Commercial Rules, Important Notice ("These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA"); *see also* JAMS Comprehensive Rules, Rule 3; CPR Non-Administered Arbitration Rules, Rule 1.1; ICC Rules of Arbitration, Art. 6.

[7] *E.g.*, AAA's International Centre for Dispute Resolution and JAMS International Arbitration Rules, *available at* http://www.adr.org/sp.asp?id=28819 *and* http://www.jamsadr.com/rules/international_arbitration_rules.asp.

[8] *See* 9 U.S.C. §§ 1-2.

[9] 9 U.S.C. § 2.

[10] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[11] 9 U.S.C. § 2.

[12] States have also adopted versions of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitrations which may apply to international arbitrations in a particular jurisdiction.

a choice of law provision in their arbitration agreement. Arbitrators usually enforce such choice of law clauses,[13] unless the chosen state has no substantial relationship to the parties or the transaction,[14] or application of the chosen law would restrict the parties' rights under the FAA[15] or would contravene the fundamental policy of another state's otherwise applicable statute.[16] Practitioners should be aware that a choice of law provision will generally be interpreted to encompass any state statutory provisions governing the conduct of arbitration proceedings, unless the agreement states otherwise, which may have consequences for matters such as the availability of a stay of arbitration pending resolution of related litigation.[17] If the parties have not specified the applicable law, or if tort claims are at issue, the arbitrator will look to the conflict of laws principles of the forum state.[18]

C. Choice of Venue

Franchise arbitration agreements frequently specify an exclusive venue for arbitration hearings. These venue selection clauses are generally enforceable.[19] Some states have

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[13]*See, e.g.*, *Gay v. CreditInform,* 511 F.3d 369, 389 (3d Cir. 2007) ("The cardinal principle of the law of arbitration is that . . . [arbitration] 'is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.' . . . That freedom extends to choice-of-law provisions governing agreements, including agreements to arbitrate." (quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also Overstreet v. Contigroup Cos.*, 462 F.3d 409, 411 (5th Cir. 2006) (applying Georgia law pursuant to choice-of-law provision in determining whether to enforce arbitration agreement); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 872 (8th Cir. 2004) (applying Texas law pursuant to choice-of-law provision to determine whether to enforce arbitration agreement).

[14]Restatement (Second) of Conflict of Laws § 187.

[15]Parties may submit themselves to state law rules governing arbitration even if those rules conflict with the terms or policy of the FAA, but must make that election explicit: a general choice of law clause in a contract containing an arbitration clause generally will not suffice to displace the presumption that the FAA applies. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-64 (1995); *see also Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 326-327 (2d Cir. 2004), cert. denied, 125 S. Ct. 90 (2004) (explaining that "a general choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act . . . federal policy favoring arbitration requires a specific reference to the restrictions on the parties' substantive rights or the arbitrator's powers to establish that the parties clearly intended to limit their rights under the FAA." (internal quotation marks omitted)); *Sovak v. Chugai Pharmaceutical Co.,* 280 F.3d 1266, 1270 (9th Cir. 2002); *UHC Management Co., Inc. v. Computer Sciences Corp.,* 148 F.3d 992, 997 (8th Cir. 1998).

[16]*See, e.g., Volvo Const. Equipment North America, Inc. v. CLM Equipment Company, Inc.*, 386 F.3d 581, 607-610 (4th Cir. 2004) (Arkansas Franchise Practices Act embodied a fundamental state policy and could not be waived by choice of law provision, whereas protections of the Louisiana Dealer Act could be waived);*Cromeens, Holloman, Sibert, Inc v. AB Volvo*, 349 F.3d 376, 389 (7th Cir. 2003) (Because Maine has expressed a strong public policy against allowing choice-of-law provisions to prevail over the statute, franchisees could not waive protection under the Maine statute entitled "Franchise Laws for Power Equipment, Machinery and Appliances.").

[17]*Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

[18]*See, e.g.*, *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 302 (6th Cir. 2008) ("In the case at hand, the arbitration agreement does not contain a choice-of-law provision to select the law that governs interpretation of the arbitration agreement. Thus, we apply the Restatement approach."); *St. Paul Fire & Marine Ins. Co. v. Employers Reinsurance Corp.*, 919 F. Supp. 133, 136 (S.D.N.Y. 1996) (performing conflict of law analysis where reinsurance contracts requiring arbitration of disputes contained no choice of law provision).

[19]*See e.g., Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 518-21 (1974) (enforcing provision calling for arbitration before the International Chamber of Commerce which the Court characterized as "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."); *Muzumdar v. Wellness Intern. Network, Ltd*, 438 F.3d 759, 761 (7th Cir. 2006) (enforcing provision of distributorship

enacted statutes purporting to invalidate franchise agreement provisions that require arbitration or litigation in an out-of-state venue, but courts have generally held that such provisions are pre-empted by the FAA.[20] Franchisees have also invoked generally applicable contract defenses such as unconscionability to avoid burdensome venue provisions, but these arguments have not gained much ground except in California, where several courts applying California contract-of-adhesion analysis have recently invalidated provisions requiring franchisees to travel long distances to arbitrate.[21] Whether disputes over the venue should be resolved by the arbitrator or by a court, that is, whether the location of arbitration is considered a "gateway" issue, is unsettled: a number of older circuit court decisions assigned disputes over the proper forum to a court, but at least one circuit court and one district court have concluded that venue is a procedural question to be decided by the arbitrator under the Supreme Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).[22] This conflict is part of a larger uncertainty in the wake of

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agreement mandating arbitration in Dallas, Texas);; *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999) (enforcing venue selection provision in franchise agreement); *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996) (same). Ms. Appleby's law firm represented Doctor's Associates, Inc. in the *Stuart* case.

[20]*See, e.g., KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42, 51-52 (1st Cir. 1999) (FAA preempts Rhode Island statute specifically invalidating venue clauses in franchise agreements); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) ("[T]o the extent that [a New Jersey case interpreting the New Jersey Franchise Practices Act] can be read to invalidate arbitral forum selection clauses in franchise agreements, it is preempted by the FAA."); *Management Recruiters Int'l v. Bloor,* 129 F.3d 851, 856 (6th Cir. 1997) (If the Washington Franchise Investment Protection Act "imposed an absolute requirement of in-state arbitration notwithstanding the parties' agreement to arbitrate [elsewhere], its validity would be in serious doubt as a result of the preemptive effect of the FAA"); *Prude v. McBride Research Labs/, Inc.*, No. 07-13472, 2008 WL 360636 at *5 (E.D. Mich., Feb. 8, 2008) (FAA preempts Michigan Franchise Investment Law provision purporting to void franchise agreement venue clauses requiring arbitration to be conducted outside Michigan); *Flint Warm Air Supply Co., Inc. v. York International Corp.*, 115 F.2d 820 (E.D. Mich. 2000) (same); *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.,* 840 F. Supp. 708 (D. Ariz. 1993) (same); *Newman ex rel. Wallace v. First Atlantic Resources Corp.*, 170 F. Supp. 2d 585, 592-93 (M.D.N.C. 2001) (FAA preempts North Carolina statute voiding any contract provision requiring out of state litigation or arbitration). Ms. Appleby's law firm represented Doctor's Associates, Inc. in the *Hamilton* case.

[21]*Compare, e.g.*, *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d at 980 ("[Franchisees] were aware, based on the language of the arbitration agreement, that they would have to travel to either Florida or Connecticut if an arbitrable dispute arose. . . . Such forum selection clauses are not unconscionable.") *with Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1290 (9th Cir. 2006) (clause in franchise agreement requiring California franchisee to arbitrate disputes in Massachusetts substantively unconscionable under California law because it has "'no justification other than as a means of maximizing an advantage over [franchisees]'" and "'would effectively preclude its franchisees from ever raising claims against [the franchisor], knowing the increased costs and burden on their small businesses would be prohibitive.'" (quoting *Bolter v. Super. Ct.,* 104 Cal. Rptr. 2d 888, 910 (Cal. Ct. App. 2001) (clause in franchise agreement mandating arbitration in Utah substantively unconscionable under California law where franchisor had been headquartered in California at time of original sales to franchisee, and franchisee "never anticipated that [franchisor] would relocate its headquarters to Utah and mandate that all disputes be litigated there.")). However, a recent California decision suggests that the tide in that jurisdiction may be turning against voiding forum selection clauses on unconscionability grounds. *See Smith v. Paul Green Sch. of Rock Music Franchising, LLC.*, No. CV 08-00888 DDP, 2008 WL 2037721, at *6 (C.D. Cal. May 5, 2008) (noting that the "added expense and inconvenience of litigating in Pennsylvania" was "not enough to invalidate the forum selection provision.").

[22]*Compare e.g., Sterling Fin. Inv. Group, Inc. v. Hammer*, 393 F.3d 1223 (11th Cir. 2004) and *Bear, Stearns & Co., Inc. v. Bennett*, 938 F.2d 31 (2d Cir. 1991) (court must decide validity of forum selection provision) *with Richard C. Young & Co., Ltd. v. Leventhal*, 389 F.3d 1 (1st Cir. 2004) (under *Howsam* and *Green Tree* the authority to interpret the forum selection clause lies with the arbitrator) *and Ciago v. Ameriquest Mortg. Co.,* 295 F. Supp. 2d 324 (S.D.N.Y. 2003) (unconscionability challenge to forum selection provision within arbitration clause was not a gateway issue and was for arbitrator to decide).

Howsam and *Green Tree* as to whether a particular challenge is properly seen as casting doubt on the agreement to arbitrate itself, or only the manner in which the arbitration will be conducted.[23] As a general rule, however, if the parties are unable to agree on the location for the arbitration, the tribunal will choose the forum.[24]

D. Allocation of Costs and Fees and Prevailing Party Provisions

The arbitration agreement may specify a particular allocation of arbitration costs and may also contain a provision requiring the non-prevailing party to pay the other party's arbitration costs and attorney's fees. Since these costs and fees may be substantial, it is important to know the parties' respective rights and responsibilities with respect to costs and fees before filing an arbitration demand or upon receiving one. Arbitration awards allocating costs and fees are discussed in more detail in Section VI.D, below.

E. Contractual Damage Caps and Similar Limitations

Franchise agreements frequently contain provisions purporting to prohibit the availability of certain categories of damages, such as consequential or punitive damages, and may further purport to cap available damages to a specified dollar amount. Because arbitration is a matter of contract and arbitration agreements are generally interpreted in the same manner as ordinary contracts, such provisions generally are enforceable.[25] However, such provisions may be void

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[23] *Compare, e.g.*, *Davis v. ECPI College of Technology, L.C*, 227 Fed. Appx. 250, 253-254 (4th Cir. 2007) (whether collective action waiver was unconscionable under South Carolina contract law did not pose question whether a valid agreement to arbitrate exists and was therefore for arbitrator to determine) *and Richard C. Young & Co., Ltd. v. Leventhal*, 389 F.3d 1 (1st Cir. 2004) (authority to interpret arbitral forum selection clause lies with the arbitrator) *and Ciago v. Ameriquest Mortg. Co.,* 295 F. Supp. 2d 324 (S.D.N.Y. 2003) (unconscionability challenge to forum selection provision within arbitration clause was not a gateway issue and was for arbitrator to decide) *with Martin v. TeleTech Holdings, Inc*., 213 Fed. Appx. 581 (9th Cir. 2006) (considering argument that entire arbitration clause was rendered unenforceable by unconscionable fee-sharing provision but concluding that the provision was severable) *and Pro Tech Industries, Inc. v. URS Corp*., (8th Cir. 2004), 377 F.3d 868, 872 (considering, but rejecting, contention that entire arbitration provision was unconscionable because contractor could not afford costs of arbitration) *and Stephens v. Wachovia Corp.*, No. 3:06cv246, 2008 WL 686214 (W.D.N.C. Mar. 7, 2008) (unconscionability of a class action waiver in arbitration agreement was an issue for the court not an arbitrator) *and March v. Tysinger Motor Co., Inc.*, 2007 WL 4358339 (E.D.Va. Dec. 12 2007) (rejecting reasoning of Ciago court and concluding that it was for the court to determine whether provision mandating arbitration before the NAF was unenforceable because it would be prohibitively expensive and would not permit class arbitration) *and Mailbox Center Owners v. Superior Court*, 34 Cal. Rptr. 3d 659, 669 (Cal. Ct. App. 2005) ("Under California law, the question whether grounds exist for the revocation of the arbitration agreement . . . is for the courts to decide, not an arbitrator. . . . This includes the determination of whether arbitration agreements *or portions thereof* are deemed to be unconscionable or contrary to public policy." (internal quotation marks and citations omitted; emphasis added)).

[24] *See, e.g.,* AAA Commercial Rules, R-10 ("If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding."); JAMS Comprehensive Rules, R-19 ("The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing."); ICC Rules of Arbitration, Art. 14 ("The place of arbitration shall be fixed by the Court unless agreed upon by the parties."); CPR Non-Administered Arbitration Rules, R-9.5 ("Unless the parties have agreed upon the place of arbitration, the Tribunal shall fix [it].").

[25] *See, e.g.*, *Stark v. Sandberg*, 381 F.3d 793 (8th Cir. 2004) ("The arbitration clause states any claims will be resolved in accordance with the FAA, which permits a waiver of punitive damages."); *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.,* 298 F.3d 314, 318 n.1 (5th Cir. 2002) ("Provisions in arbitration agreements that prohibit punitive damages are generally enforceable."); *Davis v. Prudential Securities, Inc.,* 59 F.3d 1186, 1193 n.6 (11th Cir. 1995) ("Presumably, . . . parties wishing to avoid the imposition of punitive damages in arbitration may simply expressly exclude punitive damages in the arbitration agreement."); *Baravati v. Josephthal*, 28 F.3d 704, 709 (7th Cir. 1994) ("[P]arties to adjudication [under the Federal Arbitration Act] have considerable power to vary the normal procedures . . . and surely can stipulate that punitive damages will not be awarded."); *Raytheon Co. v.*

as contrary to public policy if they restrict remedies provided by state or federal statute, because the Supreme Court has held that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather that a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).[26] For this reason, arbitration agreements should include a savings clause specifically providing that, if certain remedies cannot be contractually waived under applicable law, a plaintiff retains those remedies under the agreement despite any contractual clauses to the contrary.[27]

F. Contractual Limitation Periods

Franchise agreements often contain contractual limitations periods shorter than the statutes of limitation that may otherwise apply to a claim. As a general rule, statutory limitations periods may be shortened by agreement, so long as the limitations period is not unreasonably short.[28] However, such time limits may be invalidated if they conflict with longer statutory limitation periods enacted to protect consumers rather than businesspeople.[29]

G. Limitations on Consolidated, Group, and Class Arbitrations

In order to reduce transaction costs, franchisees may prefer to arbitrate certain claims either as a group of joined plaintiffs or, if sufficiently numerous, as a class. Franchisors may equally prefer to avoid group or class arbitrations, and frequently include provisions prohibiting such actions in the franchise agreement.

Like any other term in an arbitration agreement, a provision expressly prohibiting group or class action or consolidation is enforceable subject to generally applicable contract defenses, including unconscionability.[30] When an express prohibition on group action is challenged as

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Automated Bus. Sys., Inc., 882 F.2d 6, 12 (1st Cir. 1989) ("Parties that . . . wish arbitration provisions to exclude punitive damages . . . are free to draft agreements that do so.").

[26] *See, e.g.*, *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 824 (8th Cir. 2003) ("When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply."); *Hadnot v. Bay, Ltd.,* 344 F.3d 474, 478 & n. 14 (5th Cir. 2003) (arbitration agreement's ban on punitive damages unenforceable as to Title VII claim); *Alterra Healthcare Crop. v. Estate of Linton*, 953 So.2d 574, 578 (2007) (punitive damages waiver in arbitration agreement void as against public policy because it "defeats the remedial purpose of the [Florida Assisted Living Facilities] Act by eliminating punitive damages and capping noneconomic damages.").

[27] *Kristian v. Comcast, Corp.,* 446 F.3d 25 (1st Cir. 2006) (provision in arbitration agreement prohibiting an award of treble damages impermissibly restricted remedies extended for federal antitrust violations but could be severed through operation of a savings clause such that the arbitration agreement was not rendered unenforceable).

[28] *See, e.g.*, *In re Cotton Yarn Antitrust Litigation***,** 505 F.3d 274, 287 (4th Cir. 2007) (upholding one year limitations period in agreement to arbitrate claims under the Clayton Act); *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 673 n. 16 (6th Cir. 2003) (en banc) (enforcing one-year limitations provision contained in arbitration agreement).

[29] *See Anderson v. Comcast Corp*., 500 F.3d 66, 77 (1st Cir. 2007).

[30] *See, e.g.*, *Jenkins v. First Am. Cash Advance of Georgia, LLC,* 400 F.3d 868, 877 (11th Cir. 2005) (even in consumer context, "arbitration agreements precluding class action relief are valid and enforceable"); *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC,* 379 F.3d 159, 174-75 (5th Cir. 2004) (provision barring both consolidation and class action not unconscionable); *Livingston v. Assocs. Fin., Inc.,* 339 F.3d 553, 559 (7th Cir. 2003) ("The Arbitration Agreement at issue here explicitly precludes [plaintiffs] from . . . pursuing 'class action arbitration,' so we are therefore obliged to enforce the type of arbitration to which these parties agreed, which does not include

unconscionable, the trend has been to treat the question as one of arbitrability for a court to decide, although some courts have held that the enforceability of such a provision does not go to the validity of the agreement to arbitrate but only to the manner in which the arbitration may be conducted, and is therefore a question for the arbitrator rather than the courts under *Howsam* and *Bazzle*.[31]

But what if the arbitration agreement is silent as to group or class actions or consolidation? According to the Supreme Court in *Bazzle*, a silent agreement does not necessarily prohibit group action; whether it does or does not is a matter of interpretation for the arbitrator.[32] Before *Bazzle*, franchisors and many federal courts of appeal assumed that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from . . . requir[ing] consolidated arbitration," or group or class arbitrations.[33] The First Circuit was a notable outlier on this issue, reasoning that, because the FAA does not preempt state laws which are consistent with the federal policy in favor of arbitration, a federal court faced with a silent agreement may apply a state law that authorizes consolidation (or group or class action). According to Justice Stevens' critical fifth-vote concurrence in *Bazzle*, the First Circuit had it right: "The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. . . . There is nothing in the Federal Arbitration Act that precludes either of these determinations."[34]

In response to *Bazzle*, many franchisors have scrambled to include express prohibitions on group or class actions in their franchise agreements, and both the AAA and JAMS have

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arbitration on a class basis.") (internal quotation marks omitted); Revised Uniform Arbitration Act § 10(c) ("The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation."). *But see Fiser v. Dell Computer Corp., Inc.*, No. 30,424 (N.M., June 26, 2007) ("[I]n the context of small consumer claims that would be prohibitively costly to bring on an individual basis, contractual prohibitions on class relief are contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims and are therefore unenforceable in this state.").

[31]*Compare, e.g.*, *Jenkins*, 400 F.3d at 877 ("[T]his claim alleges the Arbitration Agreements specifically are unconscionable because they preclude class action relief. Under section four of the FAA, a federal court may adjudicate this claim because it applies to the Arbitration Agreements themselves, and thus, it places the making of the Arbitration Agreements in issue.") *and Stephens v. Wachovia Corp.*, No. 3:06cv246, 2008 WL 686214 (W.D.N.C. Mar. 7, 2008) (unconscionability of a class action waiver in arbitration agreement was an issue for the court not an arbitrator) *and Mailbox Center Owners v. Superior Court*, 34 Cal. Rptr. 3d 659, 669 (Cal. Ct. App. 2005) ("[T]he franchisees' requests regarding the JAMS agreement's ban on consolidation . . . should properly be considered to be the type of gateway matter[] that ha[s] to do with the validity and binding nature of the given arbitration clauses, under the theory of unconscionability."), *with Davis v. ECPI College of Technology, L.C*, 227 Fed. Appx. 250, 253-254 (4th Cir. 2007) (whether collective action waiver was unconscionable under South Carolina law did not pose question whether a valid agreement to arbitrate exists and was therefore for arbitrator to determine).

[32]*Bazzle,* 539 U.S. at 447 ("Are the contracts in fact silent, or do they forbid class arbitration[?] . . . [I]t is important to resolve that question. But we cannot do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide.").

[33]*Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 274 (7th Cir. 1995); *see also id*. (collecting cases from Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits); *but see New England Energy, Inc. v. Keystone Shipping Co.,* 855 F.2d 1, 5 (1st Cir. 1988) (where the arbitration agreement is silent on the issue, state arbitration law specifically authorizing consolidated arbitration is not preempted by FAA).

[34]Bazzle, 539 U.S. at 54-55 (Stevens, J., concurring).

developed supplemental rules applicable to class arbitrations.[35] These rules provide, *inter alia*, that the arbitrator must first decide whether the applicable agreement permits class arbitration at all and, if so, must ensure that the putative class satisfies the usual requirements for class certification (numerosity, common questions of law or fact, adequate representation, etc).[36] Neither the AAA nor the JAMS rules say anything about joinder, and the AAA rules also do not address consolidation. But JAMS Rule 6(e) expressly vests the arbitrator with the authority to consolidate certain arbitrations, "[u]nless the Parties' agreement or applicable law provides otherwise."

III. COMMENCING ARBITRATION

A. Enforcing the Agreement to Arbitrate

If a dispute falls within the scope of an enforceable arbitration provision and the claimant files a lawsuit or if a respondent refuses to arbitrate, a court will compel arbitration under the FAA[37] or otherwise and, if necessary, may order a stay of the parallel court proceedings pending arbitration.[38] The FAA does not confer federal jurisdiction,[39] and, if no independent grounds for federal jurisdiction -- such as diversity jurisdiction -- exist,[40] a party seeking to compel arbitration may have to go to a state court to do so. If the opposing party files a lawsuit involving claims within the scope of the parties' arbitration agreement and your client would prefer to arbitrate, it is important not to participate in the lawsuit to an extent that would constitute waiver of the right to insist on arbitration. There is no hard and fast rule as to how much participation will constitute a waiver. In the words of the Second Circuit, "[w]hether or not there has been a waiver is decided in the context of the case, with a healthy regard for the policy of promoting arbitration. . . . Of course, the amount of litigation (usually exchanges of pleadings and discovery), the time elapsed from the commencement of litigation to the request for arbitration, and the proof of prejudice are all factors to be considered. The proximity of a trial date when arbitration is sought is also relevant."[41]

B. The Arbitration Demand

Instead of "plaintiffs" and "defendants," arbitration parties are generally referred to as "claimants" and "respondents." Some arbitration purists also eschew the litigation term "vs." and

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[35] *See* AAA Supplementary Rules for Class Arbitrations *at* www.adr.org/sp.asp?id=21936; JAMS Class Action Procedures *at* www.jamsadr.com/rules/class_action.asp.

[36] AAA Supplementary Rules R-4; JAMS Class Action Procedures R-3.

[37] *See* 9 U.S.C. § 4.

[38] *See* 28 U.S.C. § 2283 (district court has authority to "stay proceedings in a State court . . . where necessary . . . to protect or effectuate its judgments").

[39] *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) ("As for jurisdiction over controversies touching arbitration, the [Federal Arbitration] Act does nothing, being "something of an anomaly in the field of federal-court jurisdiction" in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.").

[40] *See* 28 U.S.C. § 1332.

[41] *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995).

replace it with "and," the pleading that begins an arbitration proceeding is a "demand" rather than a "complaint," and the responding pleading is a "response" rather than an "answer."

There are few formal requirements for an operative arbitration demand. Most arbitration administrators will provide a simple form demand that requires the claimant to provide only the most basic information about the claim, such as the parties to the dispute, one or more copies of the arbitration agreement, a short description of the nature of the claim, and the amount in controversy.[42] Nonetheless, except perhaps where the amount in controversy is small, most experienced franchise lawyers will use the form demand as a coversheet only, submitting a more descriptive demand with the coversheet. These detailed demands often resemble court complaints, provide the arbitrator(s) and opposing party with more information and are usually a more effective and persuasive way to commence a case.

JAMS and the AAA allow respondents 14 and 15 days, respectively, to file a response and/or counterclaims.[43] Unlike the general rule in court proceedings, where allegations not denied are deemed admitted, the AAA rules expressly provide that failure to file a response will be construed as a general denial;[44] the JAMS rules do not provide a default rule for interpreting the absence of a response, and JAMS will leave the issue up to the appointed arbitrator(s). The form of the response generally follows the form of the demand. In other words, a short response or simple blanket denial generally responds to a demand set forth on the administrative body's form, and a paragraph-by-paragraph response generally responds to a more formal complaint-like demand. Respondents' counsel may nonetheless prefer a more descriptive response, even if the claimant has filed only a form demand.

C. Fees

Unlike court complaints, which generally require only a modest flat filing fee of a few hundred dollars, filing fees to administrative bodies can be steep and often increase as the amount in controversy increases. For example, under the AAA Commercial Rules, filing a demand for $10,000 or less requires a filing fee of $750 and a case service fee of $200. Demands seeking between $5,000,000 and $10,000,000 require a filing fee of $10,000 and a case service fee of $4,000. Similar fees will apply with respect to the counterclaims filed by the respondent.

The administrative organizations can also be quite strict about when and how much, if any, of these fees are refundable if a matter settles before hearing. If settlement is a likely prospect, clients and practitioners should take the payment and potential non-refundability of these fees into account when considering the timing and advisability of settlement.

In addition to filing fees, hefty hourly rates (discussed in more detail in Section III, below) must also be paid for arbitrators' time, whereas parties in court litigation do not pay for a judge's time.[45] The default rule is that the parties split arbitrator fees, although the parties may agree

[42]Demand forms from AAA and JAMS are included in the Appendix for reference.

[43]*See* JAMS Comprehensives Rules R-9(c); AAA Commercial Rules R-4(b);

[44]*See* AAA Commercial Rules R-4(c).

[45]At least in part because of the high cost of administration, smaller dispute resolution organizations have sprung up, marketing themselves as providing more personalized service at lower rates. There are some downsides to using

upon other methods of cost-sharing, and a deposit sufficient to cover the estimated hearing fees is due before the hearing.[46] If the requisite amount is not delivered by the deadline, the arbitration may be suspended.[47] In order to avoid disruption of the schedule, if only one party has failed to pay, the administrative body typically will give the other party the opportunity to cover the shortfall. Whether to assume the other party's share is a tactical decision that depends on the circumstances, but even a respondent may sometimes prefer to pay the claimant's share than have the proceedings suspended – in order, for example, to head off an unconscionability challenge predicated upon unduly burdensome expense, which could lead to voiding of the arbitration provision and an unwelcome jury trial. By rule in JAMS proceedings, arbitrators may adjust any award to compensate a party that paid more than its fair share of the arbitration costs.[48] As a matter of practice, the AAA generally will not inform the arbitrator which party has not paid, making it impossible for the arbitrator to make such an adjustment, but the AAA itself may adjust the award in such circumstances.

IV. SELECTING THE ARBITRATOR(S)

A. The Number of Arbitrators

The arbitration agreement will typically stipulate whether a single arbitrator or a panel of three arbitrators will be used in any arbitration between the parties. In our experience, franchise agreements frequently provide that a single arbitrator will hear and determine the dispute between the parties. However, if the arbitration agreement does not address this issue, it will be determined in accordance with the rules of the dispute resolution forum.

The JAMS's Comprehensive Arbitration Rules and Procedures assume that the parties intend that a single arbitrator be appointed in the case. Rule 7(a) provides that "The arbitration shall be conducted by one neutral Arbitrator unless all Parties agree otherwise."

Rule 15 of the AAA's Commercial Rules provides that if the arbitration agreement does not specify the number of arbitrators to hear and determine the case, then the "dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed." (The Rule also provides that a party, in its demand or answer, may request that three arbitrators be appointed.) If the arbitration agreement requires that a panel of three arbitrators be appointed, the AAA will enforce that provision and will appoint a panel of three arbitrators.

The AAA has additional rules with respect to this issue when larger and more complex commercial cases are involved. Under the AAA's Procedures for Large, Complex Commercial Disputes (which apply to cases in which the disclosed claim or counterclaim of any party is at least $500,000.00, exclusive of claimed interest, arbitration fees and costs, "unless the parties agree otherwise"), the AAA permits the parties to agree on the appointment of either one or three arbitrators. For example, Procedure L-1(a) states that "Large, Complex Commercial

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these organizations as they often have fewer resources and a more limited roster of neutrals than the more established providers.

[46] *See* AAA Commercial Rules R-52; JAMS Comprehensives Rules R-31(b).

[47] *See* AAA Commercial Rules R-54; JAMS Comprehensives Rules R-6(c), 31(a).

[48] *See* JAMS Comprehensive Rules R-31(c).

cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties." (emphasis added). This subsection goes on to provide that in the event that the parties are unable to agree upon the number of arbitrators, and a claim or counterclaim involves at least $1,000,000.00, then three arbitrators shall hear and determine the case. However, if the parties are unable to agree upon the number of arbitrators and each claim and counterclaim is less than $1,000,000.00, then one arbitrator shall hear and determine the case.[49]

However, in contrast to the approach taken by both the AAA and JAMS, the International Institute for Conflict Prevention & Resolution ("CPR"), in its Non-Administered Arbitration Rules, appears to take a different approach with respect to this issue, and provides for three arbitrators to serve in the event that the parties have not otherwise agreed (either in the arbitration agreement or by other agreement). Rule 5.1 provides that unless the parties have agreed in writing on a tribunal consisting of either a sole arbitrator or three arbitrators who are not appointed by the parties or appointed as provided in Rule 5.4 (which sets forth how arbitrators who are to be designated by the parties shall be selected), the Tribunal shall consist of three arbitrators, one to be appointed by each of the parties, and the third who shall chair the Tribunal and who is to be appointed by the two party-appointed arbitrators.

1. Single Arbitrator v. Multiple Arbitrators

a. What are the advantages or disadvantages of having a single arbitrator or multiple arbitrators conduct the arbitration proceeding?

Many franchisors and franchisees prefer to have a single arbitrator conduct an arbitration proceeding because it is frequently quicker and almost always less expensive for all of the parties involved. Since arbitrators usually charge parties their hourly rates for all time that they spend working on a case (or a per diem rate with respect to hearing dates), a case in which one arbitrator is charging for his or her time will cost the parties significantly less than a case in which they are being charged by three arbitrators. Having one arbitrator conduct an arbitration proceeding also streamlines the administrative process and provides the parties with quicker response time and efficiency in terms of receiving rulings on motions, as well as with respect to scheduling and conducting preliminary conferences (typically telephonic conference calls) and/or in-person hearings.

Some argue that there is a greater likelihood for negative factors such as improper motive, prejudice or bias to affect the outcome of an arbitration proceeding conducted by a single arbitrator rather than a panel of arbitrators (i.e., where an arbitrator has a natural inclination to be more "franchisor friendly" or more "franchisee friendly"). On the other hand, others believe that binding decisions (judicial or arbitral) made by a panel of decision makers may be more likely to be "correct" than decisions that are being made by a single judge or arbitrator. For example, while most state and federal trial level court cases are tried before a single judge, most state and federal appellate courts utilize panels of judges for making decisions. Of course, there are nine justices on the Supreme Court of the United States.

[49]On the other hand, the AAA also has "Expedited Procedures" for arbitration cases where no claim or counterclaim by the parties exceeds the sum of $75,000.00. As part of its "Comprehensive Arbitration Rules & Procedures," JAMS also provides alternative arbitration procedures including a "High-Low" arbitration option and a "Baseball" arbitration option.

b. How are arbitrators selected?

The analysis of how multiple arbitrators are to be chosen begins by reviewing the parties' arbitration agreement. Arbitration agreements often provide for the appointment of a single arbitrator to hear and determine disputes. But where the arbitration agreement provides for multiple arbitrators (usually three), various methods of selection may be provided for. Many arbitration agreements simply provide that the panel of arbitrators is to be appointed in accordance with the rules of the particular dispute resolution forum chosen.

Some arbitration agreements provide that each party shall select one arbitrator and that the two selected arbitrators are then to agree upon and select the third arbitrator. This process is often criticized as unwieldy and inefficient. Some practitioners assume (rightly or wrongly) that the neutral third arbitrator will ultimately decide the case, since those practitioners believe that each party-appointed arbitrator will reflexively favor the party appointing them. As a result, the parties may end up paying thousands of dollars in essentially unnecessary arbitrator fees for the two party-appointed arbitrators, each of whose "vote" cancels the other's out.

There are several variations to this approach, but each is subject to the same criticism that the parties are paying for unnecessary arbitrator fees. For example, the arbitration agreement may provide that each party shall select one arbitrator and that the designated dispute resolution forum selects the third arbitrator from its list of available neutrals. Another alternative is for each party to select one arbitrator and then the parties together agree on the third arbitrator from the forum's list of available neutrals. While this alternative gives the parties more direct input into the choice of the third arbitrator, it is also susceptible to the criticism that the parties are spending thousands of dollars for arbitrator fees for the two party-appointed arbitrators who are likely to cancel out each other's vote.

If the arbitration agreement does not specify how arbitrators (single or multiple) are to be chosen, then the particular rules of the chosen dispute resolution forum shall govern.[50] However, before a dispute resolution forum (whether it be the AAA, JAMS or CPR), will move forward with its particular arbitration selection procedures, the forum will typically contact the parties by conference call in order to attempt to select the arbitrator(s) by agreement (without the use of a formal procedure). For example, the parties may agree to each come up with their own list of potential candidates and to exchange their lists and see if they can agree on one (or more) candidates from the lists. We have frequently found that each of the named dispute resolution fora will encourage informal agreement on the selection of the arbitrator(s) before a more formal process is introduced.

B. Factors to Consider When Choosing an Arbitrator

The factors to be considered when choosing arbitrators in franchise cases include the professional reputation, experience and education, the nature of the case, the arbitrators' hourly rates and fees, as well as other, less tangible factors. For cases involving technical, franchise law issues (including, for example, alleged disclosure and/or other violations of state franchise

[50]For example, CPR's Rule 5, Selection of Arbitrators By the Parties, at subsection 5.1, provides that 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 three arbitrators, where each party appoints an arbitrator (as provided in Rules 3.3 and 3.5), and a third arbitrator who shall chair the Tribunal, who will be appointed by the two party appointed arbitrators, within 30 days of the appointment of the second party arbitrator (*See* Rule 5.2).

laws), it may be important that the arbitrator be an attorney (or retired attorney or retired judge) with significant experience with franchise law and franchise related matters. For other cases which, for example, might primarily involve contract issues, and which only peripherally involve franchise issues, it may be unnecessary to choose a candidate with significant franchise law experience. For these kinds of cases, the lawyers and parties may be able to educate the arbitrator about applicable franchise related issues.

Although there is no general requirement that arbitrators be attorneys, we recommend that parties ask the case manager of the dispute resolution forum to include only attorneys on the proposed list of arbitrators. While some might argue that a "franchise executive" might be as knowledgeable about particular franchise issues (and may charge a lower hourly rate) than some attorneys, franchisee's counsel might be concerned that such a candidate could favor a franchisor, and a franchisor's counsel may be concerned that he or she may not sufficiently understand and correctly apply various complicated legal issues (the parol evidence rule, as just one example). Often, a close review of a particular candidate's biography or description of experience submitted to the parties will reveal that the candidate has only minimal experience with franchise law or franchise related issues. Sometimes the biography/description of a candidate's experience will indicate only that the candidate has served as an arbitrator (or mediator) in a franchise related matter or, perhaps, in a non-franchise matter which involved "some franchise issues." Such an arbitrator may not have the knowledge or experience needed to properly hear and determine a franchise dispute. Insisting on franchise law practice experience, however, can sometimes make it more difficult for the parties to agree on a particular candidate, since many franchise law practitioners specialize in representing either franchisors or franchisees (and not both), raising issues of perceived bias. The parties should closely review the biographies/descriptions of experience that they receive from a particular dispute resolution forum. If a party wishes to obtain clarification of or other additional information with respect to certain information which is included in a candidate's biography or description of experience, the party should refer such questions to the case manager at the dispute resolution forum.

The arbitration agreement may also list particular required arbitrator characteristics, such as having franchise experience or having practiced law or worked in the franchise industry for a particular period of time. If there is no administrative body, the parties will have to locate individuals with the appropriate experience themselves and work together to follow the applicable appointment process. If an administrative body is involved, that body will generally locate potential arbitrators who fit the bill.

The cost of the arbitrator(s) is often an important factor in determining who is selected and who is not. Of course, attorneys who are partners at top tier law firms and who have extensive experience and excellent reputations in their field are likely to charge higher hourly rates than attorneys (or non-attorneys) who do not. Factors such as the quality and amount of their legal experience, the extent of their experience as an arbitrator (and/or mediator), the nature of their practice (i.e., whether they practice law as a sole practitioner or as a partner at a large law firm, or whether they do not actually practice law and only handle cases as a dispute resolution specialist), and even where they are located (i.e., downtown in a large city or in a more rural or suburban location) are all relevant. However, once the party (or his counsel) understands the nature (including the economic aspects) and complexity of the legal issues which are involved in the case (franchise related and otherwise), the party is then in a better position to assess the level of franchise law and other experience that the arbitrator(s) needs to have. This analysis may impact on whether or not the parties are willing to pay "top dollar" for the cost of the arbitrator(s).

Beyond the basic issues of experience and cost, some intangible factors may also come into play when choosing an arbitrator, just as they do when choosing a jury. Counsel for each party should review the biographies/descriptions of experience for each candidate carefully, to try to glean some information, or to make "educated guesses" regarding the suitability of the arbitrator candidate. For example, if you represent a small, single unit franchisee and the arbitrator candidate has been a partner for twenty years at a "white shoe" big city law firm that represents Fortune 500 companies (including large franchisors), you may want to strike this candidate from the list, and not only because he charges $600.00 (or more) per hour. (He may have a natural inclination or bias in favor of large corporate organizations like many franchisors.) Another example is if you are a party's counsel (on either side) and are relatively young and without many years of experience arbitrating cases, you might not want to rank a retired judge (before whom you may not feel entirely comfortable presenting your case and who might react to your perceived inexperience) as one of your higher ranked choices.

Overall, in choosing an arbitrator, be objective and practical in assessing your case and evaluating what qualities you need to have in an arbitrator. Counsel should rely not only on their judgment, but also on their instincts, to help guide them along the way. Counsel may also consider eliciting input from colleagues, clients and others who are knowledgeable, savvy and have good instincts.

C. Provision of List of Names and Biographies

If the parties are unable to use informal methods in agreeing on the selection of an arbitrator (some arbitration agreements provide a time frame within which the parties are unfettered to agree on the selection of the arbitrator(s) by any means), each dispute resolution forum has its own particular selection procedures. Under the AAA's Commercial Rules, arbitrators are chosen from a list of neutrals from its National Roster. Rule 11 provides that the AAA will simultaneously forward to each party an identical list of ten (subject to the AAA's discretion) names and biographies of persons chosen from its National Roster of neutrals and the parties are "encouraged" to agree on the arbitrator(s). However, if the parties are unable to agree on the arbitrator(s), then each party shall have 15 days within which to strike names objected to, (there is no limit on the peremptory strikes), number the remaining names in order of preference and return the list to the AAA. The AAA will select the arbitrator(s) based upon the names that were approved by both parties and "in accordance with the designated order of mutual preference" (see Rule 11(b)). So, if Tom Smith is ranked number "3" and number "2" by the parties, and if Bill Jones is ranked number "4" and number "5", Tom Smith (cumulative "5") will be the "mutual preference" over Bill Jones (cumulative "9"). Rule 11(b) provides that if the parties fail to agree on any of the persons names, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

Like the AAA, JAMS and CPR use a similar "selection from roster approach" when the parties are unable or unwilling to agree on choosing the arbitrators and when the arbitration agreement does not address how the arbitrators are to be selected. Under Rule 15 of its Comprehensive Arbitration Rules and Procedures, if the parties do not agree on the arbitrator(s), JAMS shall send the parties a list of arbitrator candidates and their biographies (five in the case of a sole arbitrator or ten in the case of a three arbitrator panel), and the parties have seven days after receiving the information to strike names (the rule provides for up to two peremptory strikes in the case of a sole arbitrator and three peremptory strikes in the case of a

three arbitrator panel) and to rank the remaining candidates by preference. As with the AAA, the remaining candidate(s) with the highest composite ranking(s) is (are) appointed the arbitrator(s). (Again, Tom Smith would be chosen.) Similarly, under CPR's rules, it will submit to the parties a list of candidates and statement of qualifications from its Panel of Distinguished Neutrals (not less than five in the case of a sole arbitrator or not less than seven in the case of a three arbitration panel), and the parties have ten days after receipt to return the list with the parties' preferences in number order and "noting any objection it may have to any candidate." As with the AAA and JAMS, CPR will select as arbitrators from amongst the nominees willing to serve, for whom the parties have collectively indicated the "highest" preference (Tom Smith, again).

While the basic arbitrator selection procedures utilized by the AAA, JAMS and CPR appear to be very similar, some differences exist. With respect to permitting the parties to make "peremptory strikes" of unwanted candidates, the AAA does not limit the number of strikes that a party can make, while JAMS allows peremptory strikes but limits each party to two strikes, if one arbitrator is being chosen, or to three strikes, if two or more arbitrators are being chosen. However, CPR's rule speaks of "noting any objections" a party may have, which would appear to mean that parties cannot unilaterally strike specific candidates from consideration. Another difference between the AAA and JAMS on the one hand, and CPR on the other, is that neither the AAA nor JAMS seems to contemplate sending or offering a party the other party's ranked arbitrator candidate preferences and objections list. CPR's Rule 6(b), however, provides that CPR shall "on the agreement of the parties, circulate the delivered lists to the parties."

D. Arbitrator Disclosures and Opportunities to Object/Removal of Arbitrators After Selection

In order to comply with due process and fairness issues, all dispute resolution fora utilize provisions relating to required disclosures to the parties by arbitrators who are appointed, which provides an opportunity for the parties to raise objections to an arbitrator's appointment and/or continued service.

Rule 16(a) of the AAA's Commercial Rules calls for the person appointed or to be appointed as an arbitrator to "disclose to the AAA any circumstances likely to give rise to a justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration."[51] Rule 16(b) adds that upon receipt of such information, the AAA shall communicate the information to the parties. Under the AAA's Commercial Rules, the only reference to the parties being able to make objections to the arbitrator is found in Rule 17(b). Subsection (a) of Rule 17 (entitled "Disqualification of Arbitrator") provides that the arbitrator shall be subject to disqualification for: (i) partiality or lack of independence; (ii) inability or refusal to perform his or her duties with diligence and in good faith; and (iii) any grounds for disqualification provided by applicable law. Rule 17(b) provides that "Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive."

[51]The Code of Ethics for Arbitrators in Commercial Disputes, a joint publication of the AAA and the American Bar Association, requires arbitrators to make similar decisions. *See* AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon II (2004), *available at* www.adr.org/sp.asp?id=32124 or www.abanet.org/dispute/commercial_disputes.pdf.

JAMS's Rule 15(h) provides that "Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process." The JAMS Arbitrators Ethics Guidelines similarly require arbitrators to "promptly disclose, or cause to be disclosed all matters required by applicable law."[52] Rule 15(i) provides that a party may challenge the continued service of an Arbitrator "for cause" at any time during the Arbitration process, and that the challenge must be based upon information that was not available to the parties at the time the Arbitrator was selected. This rule also provides that a challenge for cause must be in writing and exchanged with opposing parties who may respond within seven days of service of the challenge. Lastly, this rule provides that "JAMS shall make the final determination as to such challenge" and that such determination shall take into account the materiality of the facts and any prejudice to the parties.

CPR's Rule 7.1 states that "Each arbitrator shall be independent and impartial." Rule 7.3 provides that each arbitrator shall disclose in writing 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." Rule 7.5 confirms that any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt regarding that arbitrator's independence or impartiality, and adds that a party may challenge an arbitrator whom it has appointed only for reasons of which it became aware after the appointment has been made. Rule 7.6 provides that a party may challenge an arbitrator only by notice in writing to CPR (stating the reasons for the challenge with specificity), with a 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. Rule 7.7 provides that the other party may "agree to the challenge" or the arbitrator may voluntarily withdraw. Rule 7.8 provides that "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.

The AAA, JAMS and CPR each have provisions regarding arbitrator disclosures and a party's right to object to or challenge an arbitrator's continued service. However, while the AAA and CPR rules expressly set forth what kinds of things the arbitrator is required to disclose, JAMS's rule is worded more loosely in that it does not indicate the specific circumstances that must be disclosed by the arbitrator. Rather, the rule provides that any disclosures "shall be made as required by law" or within ten calendar days from the date of appointment. (It also states that the obligation to make all required disclosures continues throughout the arbitration process.) On that point, the AAA, JAMS and CPR rules all provide that the arbitrator's obligation to disclose continues throughout the arbitration process. Similarly, AAA, JAMS and CPR clearly reserve to themselves the power and authority to make the "final determination" (JAMS) or the "conclusive decision" (AAA) with respect to party challenges to an arbitrator's appointment and/or continued service. The CPR rules similarly provide that these issues "shall be decided" by the administrative body. There is also a substantial body of state and federal

[52]JAMS Arbitrators Ethics Guidelines, Section V, *available at* www.jamsadr.com/arbitration/ethics.asp. According to JAMS, their arbitrators are also required to comply with the Code of Ethics for Arbitrators in Commercial Disputes referenced above.

law addressing the circumstances under which an arbitrator's failure to disclose potential conflicts will provide grounds for vacating an arbitration award.[53]

As referenced above, the AAA's Commercial Rules (Rule 17(b)) indicate that the "arbitrator shall be subject to disqualification for: (i) partiality or lack of independence; (ii) inability or refusal to perform his or her duties with diligence and in good faith; and (iii) any grounds for disqualification provided by applicable law." Also, as referenced above, JAMS's Rule 15(h) provides that "Any disclosure regarding the selected Arbitrator shall be made as required by law…" While each state will have its own case law interpreting these provisions and interpreting what an arbitrator's disclosure obligation is in a particular case, courts tend to give significant deference to the determination made by the AAA or the other dispute resolution fora as to an arbitrator's qualification to serve. (*See*, *Cohen v. Drexel Burnham Lambert Inc*., 121 Misc. 2d 1009, 469 N.Y.S.2d 885 (Sup. Ct, Nassau County 1983).

On the other hand, New York's Court of Appeals, in order to attempt to reduce the number of post-arbitration cases challenging the impartiality of the arbitrator, has expressed a policy of "maximum prehearing disclosure" in arbitration proceedings and has stated that an arbitrator should "disclose any relationship which raises even a suggestion of possible bias." (*See SOMA Partners, LLC v. Northwest Biotherapeutics, Inc*., 41 A.D.3d 257, 838 N.Y.S.2d 519 (1st Dept., 2007). Indeed, under New York law (and we believe under the law of most other states as well), courts have shown a willingness to vacate arbitration awards when arbitrators have failed to disclose relationships with parties or their affiliates.[54] California was the first state to enact

[53] In relevant part, the FAA provides that an award may be vacated "where there was evident partiality or corruption in the arbitrator[]." 9 U.S.C. § 10(a)(2). This provision was interpreted by the Supreme Court in *Commonwealth Coatings Corp. v. Continental Cas. Co., Puerto Rico*, 393 U.S. 145 (1968). Writing for a plurality, Justice Black would have required arbitrators to "disclose to the parties any dealings that might create an impression of possible bias." *Id*. at 149. However, Justice White's crucial fifth-vote concurrence took a narrower approach, concluding that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." *Id*. at 150. This fractured guidance has led to subtly different interpretations of the evident partiality standard in the federal courts of appeal. However, as the Fifth Circuit has noted, "[w]hile these courts' interpretations of *Commonwealth Coatings* may differ in particulars, they all agree that nondisclosure alone does not require vacatur of an arbitral award for evident partiality. An arbitrator's failure to disclose must involve a significant compromising connection to the parties." *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282-83 (5th Cir. 2007); *cf. Uhl v. Komatsu Forklift Co., Ltd*., 512 F.3d 294, 306 (6th Cir. 2008) (party seeking vacatur based on evident partiality "must show that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration."); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Clemente*, 2008 WL 857756, at *2 (3d Cir. Mar. 6, 2008) (same); *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.***,** 492 F.3d 132 (2d Cir. 2007) (same); *Three S Delaware, Inc. v. DataQuick Information Systems, Inc.*, 492 F.3d 520 (4th Cir. 2007) (same); *JCI Comm., Inc., v. Int'l Broth. Of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (same); *Fidelity Federal Bank, FSB v. Durga Ma Corp.,* 386 F.3d 1306, 1312 (9th Cir. 2004) (evident partiality is present when facts that are not disclosed by an arbitrator create a "reasonable impression of partiality."); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.,* 304 F.3d 1331, 1339 (11th Cir. 2002) ("[A]n arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."); *Al Harbi v. Citibank, N.A.,* 85 F.3d 680, 683 (D.C. Cir. 1996) ("[T]he claimant must establish specific facts that indicate improper motives on the part of an arbitrator."); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 51 F.3d 157, 159 (8th Cir. 1995) (failure to disclose substantial interest in a company which did business with a party to the arbitration created an impression of possible bias sufficient to establish evident partiality); *Health Services Management Corp. v. Hughes,* 975 F.2d 1253, 1264 (7th Cir. 1992) (evident partiality requires demonstration of "more than a mere appearance of bias."); *Ormsbee Dev. Co. v. Grace,* 668 F.2d 1140, 1147, 1150-51 (10th Cir. 1982) (requiring "clear evidence of impropriety" that is "direct, definite and capable of demonstration rather than remote, uncertain, or speculative.").

[54] *See Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir. 1953), which held that under the FAA, while mere personal friendship with one of parties does not disqualify an arbitrator, proof of arbitrator's bias, unfairness or

legislation purporting to override the private provider ethical standards for arbitrations, including those for pre-confirmation disclosure, and violating the standards can cause a court to vacate an arbitration award under California law.[55]

V. PRE-HEARING PROCEDURES

A. Preliminary Conference Call/Scheduling Order

The "roadmap" for the arbitration process and evidentiary hearing, will be established through the preliminary hearing conducted by the arbitrator with the parties. This is in essence a "management meeting" and will be the first time that the parties and the arbitrator have jointly communicated, either in person or by telephone. The meeting itself will be arranged by the administrative body without a request by the parties or their representatives. The purpose of this preliminary hearing is to establish the steps and actions to be taken by the parties to prepare for and attend the hearing, as well as to establish a schedule for the exchange of information. It will be the goal of the arbitrator at this preliminary hearing to address a list of "housekeeping issues," commonly including:

- Statement of claims and issues by the parties;
- Clarification/specification of claims and counterclaims by specific dates;
- Estimated length of the case and number of hearing days required by each side;
- Type of discovery to be agreed upon and schedule of exchange of documents; procedures for addressing discovery disputes;
- Necessity of depositions;
- Use of experts;
- Identification of exhibits and preparation of exhibit books for arbitrator, parties and witnesses;
- Request by either party for a court reporter;[56]
- Stipulation of uncontested facts;
- Procedures for issuance of subpoenas;

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partiality which results in unjust advantage, requires setting aside of award. On the other hand, courts have also found that parties may not "sit idly back and rely exclusively upon the arbitrator's disclosure." For example, if a party goes forward with the arbitration having actual knowledge of the arbitrator's bias, or of facts that reasonably should have prompted further inquiry, it may not later claim bias based upon the failure to disclose such facts. *See J.P. Stevens & Co., v. Rytex Corp*., 34 N.Y.2d 123, 312 N.E.2d 466, 356 N.Y.S.2d 278 (Ct. App. 1974).

[55] *See* Bethany L. Appleby, *Are California's Arbitrator Disclosure Requirements Preempted by the FAA?*, American Bar Association FRANCHISE LAW JOURNAL (Spring 2006). Ms. Appleby is also one of the authors of this paper.

[56] Usually, if both parties agree that the hearing is to be transcribed, the cost is shared. If, however, one party wishes a transcription of the hearing and the other does not, only the party that pays for the transcript (and the arbitrator), are entitled to a copy of the transcript.

- Pre and post-hearing briefs;
- Motions (including any potential dispositive motions);
- Form of award; and
- Preparation of scheduling order.[57]

B. Available Alternative Procedures

During the preliminary conference, the arbitrator should, and generally will, remind the parties of other potential available dispute resolution methods that the particular forum may offer. This may include mediation and other forms of facilitation. Such other procedures may be more advantageous under certain circumstances, such as when there are few, if any, facts in dispute, or if the parties are relatively close in agreement with respect to the amount of damages sought but simply need additional professional assistance to come to a resolution.[58]

C. Discovery

The scope of available discovery is first determined by the arbitration agreement itself. If, as is typical, the arbitration agreement does not address the scope of discovery, the arbitrator will work with the parties to reach mutual agreement, keeping in mind that the intent of the arbitration process is to hold a hearing as soon as possible. This may require the arbitrator to perform a "balancing act" between allowing the parties to undertake discovery they seek, yet insure that a timely hearing is conducted, especially when the agreement states that a hearing must be held within a predetermined time period.[59]

For the most part, discovery in arbitration proceedings concerns only the exchange of documents. It is noted by one commentator, "document production is not only a matter of customary practice by American legal counsel, but it can also be a matter of entitlement — at least in the absence of a provision in the arbitration agreement expressly excluding or limiting discovery.[60] Indeed, at least one federal circuit court has determined that the FAA confers on arbitrators the power to compel parties to exchange documents and to subpoena documents for production at hearing,[61] and state arbitration acts often confer similar powers.

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[57] *See*, for example, L-3 of the *Procedures for Large Complex Disputes*, American Arbitration Association.

[58] For example, Rule 8 of the Commercial Arbitration Rules and Mediation Procedures of the AAA gives the parties the right at any stage of the proceedings to mediate their dispute. As a part of their training, arbitrators are encouraged to advise the parties as to this right during the preliminary conference call, even though the arbitrator cannot then serve as the mediator.

[59] In our experience, most arbitrators are willing to allow the parties to agree to the scope of discovery, however, the arbitrator has the right and discretion to control or limit it as well.

[60] *See*, Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, DISPUTE RESOLUTION JOURNAL (Nov. 2005-Jan. 2006).

[61] *In Re Sec. Life Ins. Co.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

Interestingly, the rules of most dispute resolution bodies do not address the parties' right to conduct depositions. To do so, of course, would transform what is intended to be an expedited resolution format into one that would be more akin to traditional court process. Again, while it is the experience of the authors that arbitrators will generally allow mutually agreed upon discovery, the arbitrator retains discretion to either not permit depositions or limit the number of depositions to be held.[62] For example, rather than undertake five depositions of witnesses to the same event or transaction, the arbitrator may limit it to one or two, on the basis that to the extent the other witnesses are necessary, they can testify at the hearing and be cross examined at that time. On the other hand, with respect to those critical witnesses who cannot appear for legitimate reasons, as well as the deposition of expert witnesses, it is the experience of the authors that such depositions will be permitted. The arbitrator also has the authority to issue document subpoenas to third parties for production pursuant to §7 of the FAA[63] and may have similar powers under state arbitration law as well. Subpoena powers are discussed further in Section E, below.

D. Pleading Format, Pre-Hearing Briefs, Post-Hearing Briefs

1. Format of the Pleadings

Unlike the federal and state court process, there is essentially no required pleading format in arbitration. For example, as discussed in Section I, above, the AAA will generally accept the filing of its arbitration demand form and/or a demand written in the more traditional complaint format. A formalistic writing format may not be viewed as consistent with the philosophy of arbitration as a means to allow parties, who may not be represented by counsel, the opportunity to present their case in the manner they choose.

2. Pre- and Post-Hearing Briefs

The parties and arbitrator(s) should discuss the necessity of pre-hearing and post-hearing briefs during the preliminary hearing. These briefs can be extremely helpful to the arbitrator. Generally, the pre-hearing brief should be short and lay out each party's position to help the arbitrator(s) understand the central issues in the case. Post-hearing briefs can also be critical in helping the arbitrator determine whether the evidence presented during the hearing supports the claims presented in the arbitration demand. The post-hearing brief will more likely be longer than the pre-hearing brief in order to address the evidence presented and the complexity of issues. The arbitrator will generally abide by the joint determination by the parties as to its length, but retains authority to make this final determination. Both the AAA's Commercial Rules and JAMS's rules provide that the filing of post-hearing briefs is a matter of arbitrator discretion. The CPR rules do not explicitly address post-hearing briefing, but CPR Rule 9.2 provides that "Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate." Further, in discussing the evidence to be presented at the hearings, Rule 12.2 states that "Testimony may be presented in written and/or oral form as the Tribunal may determine is appropriate." In light of such wide latitude, there can be little doubt that the arbitrator has the discretion to permit post-hearing briefs.

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[62]Under Rule L-4 of the AAA Large Complex Commercial Cases, the arbitrator has the discretion, on good cause shown and consistent with the expedited nature of arbitration, to order depositions or the propounding of interrogatories to "such persons who may possess information to be determined by the arbitrators to be necessary to determination of the matter."

[63]9 U.S.C.. § 7.

As a practical matter, if a party requests post-hearing briefing, the request is rarely denied. The arbitrator is charged with hearing all of the evidence and conducting the arbitration proceeding in good faith. As a result, arbitrators may have the practical concern that refusing to permit briefing could not only result in the failure to fully understand the factual and legal issues, but might give the appearance of favoritism. A more cynical view is that arbitrators rarely refuse briefing requests because they are generally paid for every hour spent on the case, including time spent reading briefs and doing any additional legal research necessary to render the award.

E. Arbitration Pre-Hearing Powers

The use of subpoenas in arbitration is governed by FAA § 7, which makes Rule 45 of the Federal Rules of Civil Procedure applicable as well. Thus, while the arbitrator has the power to compel third-party witnesses to appear with documents, such power is limited by Fed. R. Civ. P. 45, which requires that:

> a subpoena must be issued from the federal or state court where the deposition is to be held (Rule 45(a)(2)(A); (b) it must be served within the district where the deposition is to be held or if outside the district within 100 miles of the place specified for the hearing or deposition (Rule 45(b)(2)(B), and (c) the court has independent subject matter jurisdiction (Rule 45 (b)(2)(C).

While early cases have held that there was nationwide service of process under FAA § 7, more recent cases have held otherwise.[64] One commentator noted that a potential solution, at least in cases where it would be cost efficient to do so, may be to hold a separate document production hearing in the district where the witness resides, such that if the witness did not appear the party requesting the subpoena could ask the district or state court to enforce it under FAA § 7.[65]

Adjournments and postponements are within the discretion of the arbitrator based on the facts presented by the requesting party. For example, Rule 28 of the AAA's Commercial Rules provides that the "arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative." In addition, if a party advises an arbitrator, either before or at the hearing, that they will choose not to attend and participate, the arbitrator must proceed with the arbitration process. Unlike the traditional court process, the arbitrator cannot issue a "default judgment" for failure of a party to appear. The arbitrator must require the party who is present to submit such evidence as the arbitrator may require for the making of an Award, but cannot issue an Award made solely on the default of a party.[66]

At any time during the process, arbitrators are free to entertain discovery and other motions. These may also include dispositive motions, although rarely granted as the purpose of

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[64] *See Hay Group, Inc. v E.B.S. Acquisition Corp.,* 360 F.3d 404 (3d Cir. 2004); *Dynegy Midstream Services L.P. v Trammochem*, 451 F.3d 89 (2d Cir. 2006).

[65] *See* Leslie Trager, *The Use of Subpoenas in Arbitration*, DISPUTE RESOLUTION JOURNAL (Nov. 2007-Jan. 2008).

[66] *See* Rule 29 of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association.

the hearing is otherwise thwarted. Motions for injunctive relief may also be brought if permitted by the agreement between the parties or the rules of the administrative body.[67] When a dispositive motion or motion for injunctive relief is filed, the arbitrator will request the non-moving party to respond in writing within a time period determined by the arbitrator. Thereafter, the arbitrator will generally ask the parties if they wish to follow up their briefs with a live or telephone argument for any final presentation, although the arbitrator has the discretion to make a determination based only on the briefs. In most cases, the arbitrator's determination should be issued in writing in as short a time period as possible after the argument on the motion. In general, dispositive motions are rarely granted. However, they may be granted where there is essentially no legal issue to be determined (*e.g.*, when Respondent seeks to dismiss Claimant's case because the statute of limitations has expired). Most courts that have addressed this issue have determined that the applicability of a statute of limitation should be decided by the arbitrators, not a court.[68]

An additional issue that may occasionally arise is whether a non-responding party can be sanctioned. In litigation, the trial court judge, of course, has power through applicable court rules to sanction non-compliant parties. In order to determine whether an arbitrator has sanctioning power, one should first look at the scope of the arbitration agreement itself. Rarely, if ever, do arbitration agreements address the right of the arbitrator to impose sanctions on non-compliant parties. If the parties have determined to arbitrate pursuant to the rules of a particular administrative body, then those rules themselves must be the source of reference and authority for sanctioning power. If not, sanctioning authority arguably would not exist, as there would be no agreement between the parties or administrative or legal authority to do so. The problem is that the rules of most administrative bodies simply do not address monetary sanctioning power.[69] Accordingly, in the experience of the authors, it is very unusual for an arbitrator to award sanctions.

VI. CONDUCT OF HEARING

A. The Arbitrator's Expectation of Mutual Cooperation

[67] *See* Optional Rules for Emergency Measures of Protection of the AAA.

[68] *See*, e.g., *Allstate Ins. Co. v. Nodak Mut. Ins. Co.*, 540 N.W.2d 614, 617 (N.D. 1995) (citing *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.*, 25 Conn. Supp. 76 (1963) for the proposition that the legal effect of statutes of limitations . . . should be left to the arbitrators); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 121 (2d Cir. 1991) (any limitations defense -- whether stemming from the arbitration agreement, arbitration association rule, or state statute -- is an issue to be addressed by the arbitrators) (emphasis in original); *Miller v. Prudential Bache Sec., Inc.*, 884 F.2d 128, 129 (4th Cir. 1989) (arbitrators determination that claim was barred by Maryland statute of limitation not subject to review by federal court); *County of Durham v. Richards & Assocs., Inc.*, 742 F.2d 811, 815 (4th Cir. 1984) (any claim of untimeliness, waiver, or laches is for the arbitrator); *O'Neel v. Nat'l Ass'n of Sec. Dealers*, 667 F.2d 804 (9th Cir. 1982) (validity of limitations defenses to enforcement of arbitration agreements should be determined by arbitrator); *Allstate Ins. Co. v. Nodak Mut. Ins Co.*, 540 N.W.2d 614, 617 (N.D. 1995) (the legal effect of statutes of limitations . . . should be left to the arbitrators); *Carpenter v. Pomerantz*, 634 N.E.2d 587, 590 (Mass. Ct. App. 1994) (whether claims are time-barred is not a matter to be decided by the courts . . . [but] is a matter to be determined by an arbitrator).

[69] However, Section A. VIII of the National Association of Security Dealers does provide arbitrators the power to award attorneys fees as a sanction for the failure of party to properly make discovery unless there was substantial justification for the failure. In one particular case where a commercial arbitration panel awarded sanctions as being within the remedial power of the AAA's Commercial Arbitration Rules, an Appellate Court overruled the panel's determination on the basis that the remedial rules did not directly address or mention monetary sanctions and therefore was not a permissible exercise of the arbitrator's powers. *See, Superadio Ltd. P'ship v Walt "Baby" Love Productions, Inc.,* 818 N.E. 2d 589, 591 (Mass. Ct. App. 2004).

Because the right to arbitrate generally emanates from a freely negotiated written agreement, it is often deemed to be a "consensual process." Thus, an arbitrator will expect civility and cooperation from the parties and their counsel. Unlike traditional litigation, the rules of arbitration attempt to avoid application of judicial procedures by addressing "substance over form" to swiftly get to the heart of the matters at issue during the hearing. Still, the hearing process is not totally without structure. For example, before the hearing, the arbitrator will expect counsel for the parties to communicate with one another and to comply with timely completion of the preliminary conference scheduling order, generally without arbitrator involvement. While most arbitrators are flexible and willing to tailor the process to fit the needs of the parties before him or her, the arbitrator will expect the parties to prepare for their presentation of witnesses and evidence with a mutual goal of avoiding the necessity of involving the arbitrator in pre-hearing discovery or hearing-related disputes.[70]

In our experience, presentation of repetitious or duplicative testimony and evidence is unnecessary and will waste valuable hearing time. Thus, in an effort to streamline the process, it is common for arbitrators to request the parties to prepare a book of joint exhibits to be used by both sides. This is useful for the purpose of avoiding duplication of exhibits, since duplication only creates the possibility for confusion. It is helpful if each party prepares separate exhibit books regarding their respective documents that may be offered as evidence. It is our preference that exhibit books be in 3-ring binders, with an index placed in the front of each binder with either tabbed letters or numbers referencing the applicable document. In addition, there should also be a brief description of the document (*i.e.,* Letter to Bob Smith from Betty Jones dated November 12, 1997). It is recommended that one party use numbers and the second party use letters so as not to cause confusion. An additional suggestion is that the letter "C" be placed before any document number with respect to the claimant's exhibits and the letter "R" be placed before any number with respect to respondent's exhibits. It is also highly recommended that all exhibits be Bates-stamped to ensure that during testimony counsel, the witness and the arbitrator are all referring to the same page. This can be determined by the parties without involvement by the arbitrator. In addition to an exhibit book for opposing counsel and the arbitrator, the parties must remember also to prepare exhibit books to be used by the witnesses.

It is important to recognize that a party's success does not depend on the number of exhibits; the bane of any arbitrator's existence is the marking of a massive number of documents that the parties never refer to or that have little, if any, probative value. As an experienced attorney, the arbitrator is not likely to be swayed by the volume of paper versus its substance. Thus, we recommend that only the most relevant documents be submitted as exhibits. In cases involving substantial number of documents, the parties may wish to inquire if the arbitrator desires that they be scanned onto a CD-Rom. This may be useful to later access only those documents admitted as evidence or cited in briefs. If a CD-Rom is submitted, it is crucial to include a detailed, scanned index. During the hearing itself, paper exhibits are still preferred, as hunting for documents on the computer can be time consuming, breaking the flow of testimony and the hearing process. One question that must be decided at the outset is whether all exhibits are deemed admitted (except those to which an objection is raised requiring arbitrator determination), or only those presented through witnesses. If the parties agree as to

[70]If arbitrator involvement is necessary, it cannot be done on an ex-parte basis. See for example, R-18 of the AAA Commercial Rules of Arbitration.

an accepted method, the arbitrator will generally give deference to their preference, but retains the discretion to institute an alternative method.

In addition to proper presentation of exhibit books, it is helpful if the parties stipulate to as many facts as possible. Often, during several days of testimony, the same facts will be rehashed time and again, even though there is essentially no dispute whatsoever regarding the events. The hearing process can be greatly shortened and the attention of the arbitrator maintained if this is avoided.

It is critical to determine a fair method for the division of the hearing time. During the preliminary conference call, the arbitrator or the parties may address the amount of time each side will require to give an opening statement, present witnesses and to generally conduct its case. Generally, the arbitrator will endeavor to insure each side has sufficient time, but this may or may not mean that the time will be equally split.[71] If the parties cannot come to an agreement, the arbitrator will feel compelled to find a solution for them, which may end up with one party having less time than another. Various methods include an equal division of the number of days, or a division of the actual amount of minutes or hours.[72] In the latter event, someone must play timekeeper and report to the arbitrator at the end of each day the actual amount of time used. It is important for the parties to work together during this process; otherwise the arbitrator may feel compelled to cut-off a party's presentation if they go beyond the agreed upon time allotment. If the parties find that they cannot reasonably try their case within the allotted time, they may jointly agree to add hearing days or request additional days by motion.

During the hearing process, the arbitrator will expect the parties to adhere to the scheduling order and presentation of evidence. However, because arbitration is flexible, the arbitrator will generally accept the parties' agreement to change certain aspects of the scheduling order or some other aspect of arbitration. For example, although the parties may not have been provided the right to take depositions, if each party agrees to take the depositions of expert witnesses, the arbitrator will most likely permit them unless there is some reason that causes prejudice to a party or violates the terms of the arbitration clause in the agreement.[73] Another example may be where the parties agree to submit affidavits rather than live testimony. Although live testimony, whether in person or by telephone, is generally preferred, if a party determines to submit evidence via an affidavit only, the arbitrator may grant the request if he believe it will be helpful to determine the issues and there is little or no prejudice to the opposing party.

B. Preliminary Statements

Even if the arbitrator has requested pre-hearing briefs, the parties will generally have the opportunity to present a brief opening statement. The respondent often has the choice of giving its opening statement directly after the claimant's, or reserving its right to do so at the beginning of the presentation of its case. In either event, an arbitrator will find it helpful if the opening

[71] For example, if the Claimant has numerous causes of action and witnesses, and Respondent has a limited counterclaim and fewer witnesses, the time may not be apportioned equally by the arbitrator.

[72] This has been referred to as the "chess clock" method. *See*, Louis L. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, DISPUTE RESOLUTION JOURNAL (May-June 2006).

[73] That could be the case, for example, where the agreement requires a hearing to be held within a designated time period but the depositions would require extension of the hearing date beyond it.

statement clearly states the issues to be determined, while clarifying or adding any additional facts that might not already be noted in the pre-hearing brief. During the opening statement, the parties should also advise the arbitrator as to the amount or type of relief being sought. Although the opening statement can be waived, as with traditional litigation, it can be an effective tool for each side to re-frame or crystallize the issues and guide the arbitrator as to what their evidence will show.

C. Testimony

Generally, testimony during the hearing can be provided by any process including in person, by telephone, affidavit, or even video conferencing if it is available. If any party objects to the method of presenting any witness's testimony, the arbitrator will determine whether the proposed method should be permitted. If possible, the parties should attempt to introduce witnesses in a systematic order to clarify the nature of the controversy and to identify documents and exhibits. In general, live testimony is preferred to enable the arbitrator to consider the demeanor of the witness (*e.g.*, body language, facial expression, tone of voice, etc.) that otherwise may be inaccessible. It is generally unnecessary to bring in out-of-state witnesses or those from long distances when they can testify via telephone. However, counsel must be aware that testimony by telephone can be cumbersome and more difficult when the use or presentation of exhibits is anticipated, inasmuch as certain practical difficulties arise including the quality of transmission, loss of ability to analyze facial expression and body language, increase of occurrence of people speaking at the same time and inability of the arbitrator to know if the witness is reviewing notes or other documents that might be inappropriate. Nevertheless, use of telephone testimony may be an effective way to utilize witnesses who are out-of-state, short in duration and scope, or are simply supporting or corroborating other evidence or testimony.

D. Formal Rules of Evidence Do Not Apply

Unless an arbitration provision provides for the application of specific state or federal rules of evidence,[74] it is generally understood that because of arbitration's inherent relaxed nature, formal rules of evidence do not apply.[75] This fact will generally be stated by the arbitrator at the beginning of the arbitration before the parties' opening statements. Thus, it is not uncommon for hearsay testimony to be presented, or that testimony be given in a "story-like" manner, rather than the "question and answer" format applicable in a court room setting. Nevertheless, necessary objections should not be avoided, especially when they go to the basic fairness of presentation of evidence (for example, when testimony begins to involve matters of multiple hearsay, documents cannot be authenticated, etc.). In addition, upon objection, most arbitrators will generally preclude evidence that is irrelevant or so tangential to the issues at hand that they are not helpful to his or her determination of the case. Still, because arbitrators have the flexibility to hear all evidence material to an issue, evidence is often accepted that

[74]Because arbitration is a creature of the agreement of the parties, the parties are free to have previously agreed in their writing to apply the rules of evidence of a particular state or the federal rules of evidence.

[75]For example, R-31(a) of the Commercial Arbitration Rules and Procedures of the American Arbitration Association provides that the parties may offer "such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary …"

might not otherwise be allowed. This of course does not mean that all evidence is considered equal; rather, through the arbitrator's experience, the "weight of the evidence" should be determined based on its quality and relevance (*e.g.*, direct testimony is usually considered to be more persuasive than hearsay evidence).

E. Informality of Proceedings

The informal nature of the proceedings, as discussed above, benefits the parties by often allowing for the presentation of witness testimony in an "out of order" or "non-sequential" basis that might not otherwise occur in a traditional court proceeding. Because the arbitrator should be flexible and willing to tailor the process to fit the parties needs, most arbitrators will permit the parties to allow witnesses to testify based on their ability to appear during a certain hearing day or time. However, because witnesses may be taken out of order, it is imperative that at a later time, during either closing statements or in a post-hearing brief, the testimony of critical witnesses be summarized for the arbitrator, especially in those cases where the hearing is not transcribed. This can require the arbitrator or other appointed "timekeeper" to record the amount of time for any witness called out of order, especially when a respondent's witness testifies during a claimant's case, or vice versa, or where the arbitration involves multiple parties. It is especially important in a multi-party arbitration that the exhibit books for each party be carefully prepared, that the amount of time for the presentation of each party's case be agreed upon, and that such time be carefully monitored as well during the hearing process to ensure fairness to all parties. In multi-party cases, the arbitrator has the discretion to bifurcate issues by grouping claims by commonality of issues. This may allow for greater efficiency by addressing common claims of multiple parties before addressing individual claims. Similarly, it may be efficient to consider common damage claims separate from those of an individual nature, which is also within the arbitrator's discretion.

VII. THE DECISION PROCESS

A. Closing of Hearing

If post-hearing briefs are filed, the hearings will be declared closed immediately after the post-hearing briefs are submitted. Rule 35 of the AAA's Commercial Rules [entitled "Closing of Hearing"] states, "If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs." Similarly, Subsection (h) of Rule 22 of JAMS's Rules [entitled "The Arbitration Hearing"] states, "The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments." Subsection (h) of JAMS's Rule 22 concludes with the following statement, "If post-hearing briefs are to be submitted, or closing arguments are to be made, the hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments."

B. When is the Arbitrator's Award (Decision) Due?

Arbitrators are charged with: (i) hearing the evidence in the case; (ii) making a determination as to which party is to prevail; and (iii) determining what remedies or what relief, if any, are to be granted to each of the parties. While a court's "determinations" with respect to these issues are typically reflected in its "Decisions," "Orders" or "Judgments" in arbitration proceedings, these determinations are reflected in an "Award" which is rendered by the arbitrator or tribunal.

Some arbitration agreements provide for a specific amount of time within which the arbitrator's award is to be rendered (i.e., 30 days after the close of the hearings). Similarly, the AAA, JAMS and CPR rules essentially provide that the arbitrator's award is to be rendered within 30 days after the hearings have closed. Specifically, AAA Commercial Rule 41 states that, "The Award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing…" Rule 24 of JAMS's Rules states, "The Arbitrator shall render a Final Award (or a Partial Award) within thirty (30) calendar days after the date of the close of the hearings as defined in Rule 22(h) . . . except (i) by the agreement of the Parties; (ii) upon good cause for an extension of time to render the Award; or (iii) as provided in Rule 22(i)" (which relates to re-opening the Hearing for "good cause shown"). Rule 15.7 of CPR's Rules states that the "final award should in most circumstances be rendered within one month" after the dispute is submitted to the Tribunal for decision, and that the parties and the Tribunal "shall use their best efforts to comply with this schedule."

Usually, the arbitrator is able to render his award within 30 days after the hearings are closed (i.e., after he receives the post-hearing briefs). Sometimes, however, this is not possible with respect to large, complicated cases where voluminous hearing binders and transcripts must be reviewed and where post-hearing briefs are long and deal with a myriad of complex issues, or where the arbitrator's schedule will prevent him from rendering an award within that time frame. While the parties may be anxious to receive the award as quickly as possible, as a practical matter (barring abuse by the arbitrator), the parties are not likely to raise an objection with the dispute resolution forum if the arbitrator is late in rendering his award. The arbitrator is, most likely, moving as quickly as he believes is prudent and raising an objection would do nothing positive for either complaining counsel or his client. In fact, raising such an objection could, even on a subconscious level, create negative feelings towards the complaining counsel and/or his client, and could potentially affect the ultimate award.

C. Form of Award (Reasoned v. General)

An arbitrator's award must always be in writing, and must be signed by a majority of the panel of arbitrators if more than one arbitrator is serving. An arbitrator can render one of two types of awards: (i) what is called a "reasoned" award; or (ii) what is typically referred to as a "general" award. (Note: This is different from the issue of the arbitrator being empowered to make an "interim award" or the making of other interim, interlocutory or partial rulings, orders or awards.)

A "reasoned" award is an award where the arbitrator sets forth the findings of fact and reasoning on which the award is based, typically, with an "opinion" section followed by the "award" section. While this may be done in a relatively informal way in an award of several pages, it may also be done in a highly structured and formal document which resembles a judge's decision and in which the arbitrator may discuss and analyze statutory law and case law. On the other hand, a "general" award typically, and simply, states which party has prevailed and what relief is being granted to the prevailing party. A "general" award can be as succinct as "Claimant is awarded the sum of $150,000.00," although the format followed is typically more detailed than this.

In order to determine which form of award the arbitrator will use, one should first review the arbitration agreement. While many arbitration agreements are silent on this issue, others specify which form of award is to be used. Typically, those that do require that the arbitrator's

award contain written findings of fact and conclusions of law. In those instances, the arbitration agreement clearly calls for a "reasoned" award although it may not use or refer to that term.

If the arbitration agreement does not address this issue, one must look to the rules of the particular dispute resolution forum. Rule 42(b) of the AAA's Commercial Rules states that "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate" (emphasis added). However, JAMS and CPR take the opposite approach. JAMS's Rule 24(h) states, "…Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award" (emphasis added). Like JAMS, CPR's Rule 15.2 states "All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise" (emphasis added).

Therefore, if the issue of whether the arbitrator will issue a "reasoned" or "general" award is not addressed (directly or indirectly) in the arbitration agreement, it is an issue to be addressed by the parties. Although AAA Commercial Rule 42(b) provides that the arbitrator need not render a reasoned award unless the parties request such an award in writing "prior to the appointment of the arbitrator" (which would significantly limit the likelihood of obtaining a "reasoned" award), the latter part of the provision loosens the above condition by adding the phrase "or unless the arbitrator determines that a reasoned award is appropriate." Parties often feel that a "general" award will suffice. However, some parties prefer more formality and like to require the arbitrator to issue a "reasoned" award. In either case, best practice is for counsel to discuss this issue (and hopefully agree one way or another), and then to raise the issue at a preliminary hearing (which is typically conducted by telephonic conference call). (*See* Section IV above.)

Other factors that can come into play at this juncture are arbitrator costs and the timing of the award. Unless the scope and length of a "reasoned" award are agreed to prior to the hearings, some parties prefer having the arbitrator issue a "general" award because they have a concern that if given the opportunity to fashion a "reasoned" award the arbitrator (if not bound by the JAMS Rules which call for a "concise written statement of the reasons for the award), may choose to spend many additional hours doing legal research (going beyond what the parties have submitted in their post-hearing briefs) and that therefore, additional arbitrator costs will be incurred and possible time delays (on the arbitrator's part, in rendering his award), may result. Additionally, as will be briefly discussed is Section E(i) below, to the extent that the arbitrator's findings of fact and conclusions of law are set forth in the Award in detail, the more likely it is that the losing party may try to overturn (i.e., vacate) the award on the grounds that it was rendered in "manifest disregard of the law." (*See* Section E (ii) below.)

Lastly, if the parties agree that a "general" award is to be used, it is best practice for counsel to request permission from the arbitrator to submit a proposed award which, if it is accepted by the arbitrator, will grant the submitting party the precise relief that it seeks. This, hopefully, would obviate the problem of having a "general" award containing ambiguities and/or errors which would then have to be corrected promptly (*see* Section E(i) below).

D. The Arbitrator's Ability to Award Legal Fees and Costs

Although there are some state law variants, litigants in the United States generally must follow the so-called "American rule" for attorneys' fees which provides that a party cannot collect attorneys' fees from the losing party unless: (i) a statute or contract provides for the award; (ii) the losing party willfully disobeyed a court order; or (iii) a losing party brought suit in bad faith.

Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240, 247, 257-60 (1975). In determining whether or not the arbitrator can award attorneys' fees and costs, the first step is to review the arbitration agreement. Arbitration agreements may expressly provide that costs and expenses, including reasonable attorney's fees, shall be reimbursed to the prevailing party by the losing party. If this is the case, the arbitrator may award attorneys' fees and costs to the prevailing party. As with litigation, sometimes it is not clear which party, if either of them, should be deemed to be the "prevailing party." Like a judge, an arbitrator has the authority to determine whether one party has satisfied the "prevailing party" threshold and whether or not costs and fees, potentially including attorneys' fees, should be awarded to a particular party.

However, if the arbitration agreement does not contain such a "prevailing party" provision with respect to attorneys' fees and costs, the next step is to review the rules of the particular dispute resolution forum which the parties have selected. Rule 43(d)(ii) of the AAA's Commercial Rules states that an award of the arbitrator may include "an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement" (emphasis added). With respect to "costs," Rule 43(c) states that "The arbitrator may apportion such fees, expenses and compensation among the parties in such amounts as the arbitrator determines is appropriate." (emphasis added).

JAMS's Rule 24(g) states that "The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law. (emphasis added). With respect to "costs," Rule 24(f) states that "The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement" (emphasis added).

CPR's Rule 17.3 states that "Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration[76] 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" (emphasis added).

Therefore, when comparing the AAA's Commercial Rules with the rules of JAMS and CPR with respect to the arbitrator's authority to award attorneys' fees, only the AAA's Commercial Rule provides that the arbitrator's award may include an award of attorneys' fees if "all parties have requested such an award" even if such an award is not authorized under the arbitration agreement or applicable law. In a recent case, the United States District Court for the Southern District of New York affirmed an award of attorneys' fees because the arbitration agreement provided that the parties were to submit any disputes arising under their franchise agreement(s) to binding arbitration in accordance with the AAA's Commercial Rules (which include Rule 43(d) cited above), and because it found that both parties had in fact, sought an award of attorneys' fees in the arbitration. Significantly, the court noted that the fact that the arbitration agreement provided that only the franchisor (and not the franchisees) was entitled to be reimbursed for costs and expenses, including attorneys' fees in the event that the franchisor employs counsel to enforce compliance with the franchise agreement, did not negate the

[76]Under CPR's Rule 17, the "costs of arbitration" include among other things, attorneys' fees incurred by a party (to such an extent as the Tribunal may deem appropriate), as well as the fees and expenses of the Tribunal, the charges and expenses of CPR.

authority of the arbitrator to make an award of attorney's fees to the franchisees pursuant Rule 43(d).[77]

With respect to the costs of the arbitration other than attorney's fees (including, but not limited to the fees charged by the arbitrator and the filing fees and other fees charged by the dispute resolution forum), the arbitrator will typically be entitled to make an allocation of such costs in his award because it is unusual for arbitration agreements to provide that such costs may not be allocated by the arbitrator (and that therefore, are to be borne equally by the parties).

Counsel should also consult applicable state law with respect to the issue of the allocation of costs and fees of the arbitration. As an example, New York's Civil Practice Law and Rules ("CPLR") § 7513 [entitled "Fees and Expenses"], provides, "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorneys' fees, incurred in the conduct of the arbitration, shall be paid as provided in the award (emphasis added). The FAA has no provision relating to the allocation of costs and/or attorneys' fees.

E. Finality and Enforcement

1. Limitations on Ability of Arbitrator to Modify Award after Issuance, even if a Mistake is made.

Typically, arbitration agreements will not address the issue of when an arbitrator may modify an award. The first inquiry then, is to review the rules of the particular dispute resolution forum which has been selected by the parties. However, state law and even federal law, may also play a role in this determination.

Rule 46 of the AAA's Commercial Rules states that "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award." (emphasis added). The Rule then confirms that the arbitrator is not empowered to redetermine the merits of any claim already decided. Interestingly, the Rule does not expressly permit the arbitrator to make such corrections in the Award *sua sponte*.

JAMS's Rule 24(j) states that "Within seven (7) calendar days after issuance of the Award, any party may serve upon the other parties and on JAMS, a request that the Arbitrator correct any computational, typographical or other similar error in an Award…or the Arbitrator may *sua sponte* propose to correct such errors in an Award" (emphasis added).

CPR's Rule 15.5 which is more liberal with respect to making modifications to the award, states "Within 15 days after receipt of the award, either party, with notice to the other party, may request the Tribunal to clarify the award; to correct any clerical, typographical or computation errors, or any errors of a similar nature in the award; to or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award (emphasis

[77] *See Dunhill Franchisees Trust v. Dunhill Staffing Sys., Inc*., 513 F. Supp. 2d 23 (S.D.N.Y. 2007) in which the court granted the franchisees' petition to confirm an arbitration award granting rescission, damages, costs and attorneys' fees. In the interest of full disclosure, one of the author's law firm, The Richard L. Rosen Law Firm, PLLC, was the counsel for the franchisees in the cited *Dunhill* case.

added). As with the JAMS Rule, the CPR Rule permits the Arbitrator/Tribunal to make such "corrections and additional awards on its own initiative as it deems appropriate."

As referenced above, state law and potentially, even federal law, may also come into play with respect to this issue. For example, assume that a particular arbitration case is governed by New York State law. Under Section § 7509 of New York's CPLR [entitled "Modification of Award by Arbitrator"], on written application of a party to the arbitrator within 20 days after delivery of the award, the arbitrator may modify an award upon the grounds stated in subsection (c) of section 7511 (these include: (i) a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; (ii) the arbitrator has awarded upon a matter not submitted to him and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (iii) the award is imperfect in a matter of form, not affecting the merits of the controversy (emphasis added).[78] Additionally, if the arbitrator does not modify the award on the above grounds, then under subsection (c) of CPLR § 7511 [entitled "Vacating or Modifying Award"], if an application is timely made to the court (i.e., within 90 days after delivery of the Award), the court shall modify the award if any of the above grounds are met. The granting of this relief s not discretionary with the court.[79]

Section 11 of the FAA provides that the federal district court in and for the district wherein the award was made, may make an order modifying or correcting the award upon the application of any party to the arbitration based upon the same 3 grounds contained in CPLR § 7509 with respect to when a modification of an award may be made. One difference, however, between the FAA § 11 and CPLR § 7511(c) is that while under said CPLR section the court is required to modify the award (if one of the grounds are met), under FAA § 11, whether the federal court will modify the award (if one of the grounds are met) is within the court's discretion.

Therefore, either state law or federal law (i.e., the FAA), whichever may govern the dispute, may afford the parties additional sources of law with which to obtain a modification of an award, above and beyond what is expressly provided for in the applicable rules of the particular dispute resolution forum chosen by the parties. As the parties' rights to obtain a modification of an award are limited by the time within which the request to the arbitrator may be made, it is best practice for counsel to carefully and promptly review the Award for any mistakes, errors or ambiguities, which may need to be corrected by immediate action.

2. Confirming/Vacating an Award by Court Process

Although the parties to an arbitration proceeding have engaged in a procedure which is binding upon them, an award does not have the legal effect of a court judgment which can be immediately enforced. Rather, in order for a successful party to be able to enforce an award, it must be "confirmed" as part of a legal proceeding brought in either state or federal court. Arbitration agreements usually offer few specifics with respect to these enforcement issues, typically providing only that an arbitrator's award may be enforced (i.e., confirmed) in any court

[78] *See*, for example, *New Paltz Cent. School Dist. v. New Paltz United Teachers*, 99 A.D.2d 907, 472 N.Y.S.2d 511 (3c Dept. 1984), discussing the applicability of CPLR § 7509.

[79] *See Bay Ridge Med. Group v. Health Ins. Plan of Greater New York*, 22 A.D.2d 807 (2 Dept. 1964), discussing the applicability of CPLR § 7511(c).

of competent jurisdiction. From there, counsel must be guided primarily by statutory law, either state of federal (i.e., if the arbitration was subject to the FAA).[80]

Let's assume that a particular arbitration is governed by the FAA which provides for expedited judicial review to confirm, vacate or modify arbitration awards.[81] Section 9 of the FAA states that at any time within one year after the award is made, any party to the arbitration may apply to the federal district court wherein the award was made, for an order confirming the award, and "thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title." In section 10 of the FAA, the court is authorized (but is not required) to make an order vacating (overturning) the award upon the application of any party to the arbitration upon any of the following limited bases:

(i) Where the award was procured by corruption, fraud, or undue means;

(ii) Where there was evident partiality or corruption in the arbitrators, or either of them;

(iii) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; and

(iv) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Pursuant to § 12 of the FAA, a motion to vacate, modify or correct an award must be served within 3 months after the award is filed or delivered.

In 1953, the United States Supreme Court laid the foundation for expandable judicial review of arbitration awards using a "manifest disregard" standard. *See Wilko v. Swan,* 346 U.S. 427 (1953). Several circuits, including the Second Circuit, have recognized "manifest disregard of the law" as an additional ground to warrant a court's decision to vacate an arbitral award beyond those prescribed by FAA § 10(a). *See Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). In recognition of the strong federal policy favoring arbitration as a means of resolving disputes, however, the application of this doctrine "is highly deferential and such relief is appropriately rare." *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 497 F.3d 133, 139 (2d Cir. 2007) Accordingly, the Second Circuit narrowly circumscribes the grounds that justify vacating an award for manifest disregard of the law, placing the burden on the petitioner to demonstrate both that: (i) the arbitrators knew of a governing legal principle, yet refused to apply it or ignored it altogether, and (ii) the law which was ignored was "well-defined, explicit, and clearly applicable to the case." Wallace, 378 F.3d at 189. Further elaborating on this standard, the Second Circuit has held that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is

[80]For a discussion regarding the four different approaches to determining the "amount in controversy" in a confirmation proceeding, see, *Choice Hotels Int'l, Inc. v. Shiv Hospitality, L.L.C.*, 491 F.3d 171 (4th Cir. 2007).

[81]If the arbitration case was not governed by the FAA, counsel would have to review the applicable state civil procedure law to ascertain the proper procedures to either confirm or vacate the award.

convinced he committed serious error does not suffice to overturn his decision." *Pike v. Freeman,* 266 F.3d 78 (2d Cir. 2001), *quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc*., 484 U.S. 29, 38 (1987). However, on March 25, 2008, the Supreme Court of the United States issued a decision in *Hall Street Associates, L.L.C. v. Mattel, Inc*., (128 S.Ct. 1396) in which the Court held that the exclusive grounds for vacating or for modifying or correcting an arbitration award were those explicitly found in §§ 9-11 in the FAA. In so doing, the Court, effectively, rejected the "manifest disregard" review standard created in *Wilko v. Swan*, 346 U.S. 427 (1953).

VIII. CONCLUSION

Will this paper and presentation help you in your first (or next) franchise arbitration? We certainly hope so. But, as with many things in the practice of law, the best way to learn is to actually engage in the perhaps unfamiliar process. What may have seemed mysterious at first will, with experience, become yet another tool of your trade.