Drafting the Arbitration Clause to Avoid Common Complaints

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Many participants in the construction industry have expressed a theoretical interest in arbitration as a dispute resolution technique, for all the reasons generally attributed to that process—privacy, informality, and so forth—but nonetheless refuse to agree to arbitrate their disputes because of dissatisfaction with various aspects of the process that they have experienced in past proceedings, or have heard about from others. Some of these objections may be to some immutable feature of arbitration, such as the unavailability of a jury trial or of any meaningful right to appeal, and if those features are critical, then obviously arbitration is not the solution for these people. But not all objections are fundamental.

A basic problem with modern American arbitration is that most of its potential users have heard at least one horror story, if they haven’t lived through one, that seems to impeach the claim that arbitration is the quicker, cheaper, more sensible alternative to litigation. They have a fresh anecdote to hand in the recent case involving a dispute between the business of “the painter of light” and some of his dealers,1 seemingly a typical business dispute arbitrated under the AAA Commercial Arbitration Rules which became, as the Court of Appeals declared, an arbitration which was “the model of how not to conduct one.” This case involved the following:

- A dispute which arose in time for arbitration to be commenced in 2002
- “Nearly 50” days of hearings, closed and followed by closing arguments in December 2006
- A 2007 disclosure by the panel of new business arrangements involving one of the arbitrators’ law firms with a party

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1 Thomas Kinkade Co. v. White, 711 F.3d 719 (6th Cir. 2013), affirming Thomas Kinkade Co. v. Lighthouse Galleries, LLC, 2010 WL 436604 (E.D. Mich. 2010), judgment aff’ed, 711 F.3d 719 (6th Cir. 2013). All the details about the course of arbitration and litigation are taken from the reports of these two decisions.
and that party’s appointed arbitrator, objections to this situation, and refusal by the panel or the AAA to take any action

- Reopening of the record, over objection of one of the parties, to permit the other to supply proof previously omitted, including several thousand pages of financial records “wrongfully withheld” in discovery
- Sanctions imposed on one of the parties for discovery abuse and hearing misconduct
- An interim award issued in May 2008, granting some relief and declaring other claims denied, followed by a final award in February 2009, seemingly awarding damages previously denied; by which time according to their affidavits the parties had incurred about $5.5 million in attorney’s fees
- A 2009 petition to vacate the award, granted by the trial court in January, 2010, and appellate affirmance of that ruling in April 2013

Following vacation of the award, the court left it up to the parties to decide where to proceed with their 11-year-old, unresolved dispute. It is unknown what the parties decided to do.

Lawyers take much of the blame for the type of disaster illustrated by this history, although obviously the advocates cannot be blamed for all the problems that plagued this arbitration. It has been said that of the developments bringing about increasing criticism of the arbitration process, a principal one is that “it appears that as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial.” Many of the complaints often heard about arbitration, and cited as reasons

2 Some construction industry members, jaded by personal experiences, have loudly concluded that the arbitration process has been co-opted by the legal profession, with lawyers firmly entrenched in all levels of the rule-making, administration and operation of arbitration, changing the arbitration process so that it more closely resembles the courtroom trial...

Friedlander, Arbitrator-Directed Arbitration: ADR with a Samurai Arbitrator, 6:1 ACCL J. 127, 128 (Winter 2012). The author, arguing in favor of a remedy different from any proposed here, makes note of many reflections of dissatisfaction with current construction arbitration—AIA’s abandonment of automatic selection of arbitration in its form documents, insurance carriers’ recommendation that insureds refuse to agree to arbitrate, the belief by knowledgeable construction lawyers that arbitration is at least in part failing its users.

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not to agree to it even by those expressing a fondness for the concept, are largely avoidable, and it is the construction lawyers who can best take the lead in assisting their clients to avoid them. Transactional lawyers should help their clients at the outset of a relationship by informing them of the full range of their options in specifying the use of arbitration, so that those who might be inclined to favor its use, if the procedure were somewhat different, will understand that they have the complete power to make the procedure different, and more acceptable, by negotiating for appropriate language in their contracts.

For purposes of this presentation, consider a substantial construction contract whose dispute resolution provision reads as follows:

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 Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.4

What some signing a contract containing this clause (or one like it) may not realize, or realize only too late, is that they have just surrendered a large measure of control over their dispute to others.

In the first place, adopting the standard arbitration rules of the American Arbitration Association or of another institutional administrative provider inherently vests that organization, and the arbitrator or panel selected by it to hear a dispute, with considerable power and discretion to determine the parties’ procedural fate. Even AAA spokespersons don’t advocate “[t]houghtlessly inserting a boilerplate arbitration clause into your contract,” but suggest tailoring the process to fit the needs of the contract parties.5 In addition, when arbitration ensues, a new set of lawyers, frequently trained as litigators, will often enter the picture, and their handling of the dispute may not conform to what the parties to the contract thought they wanted (and one or both of the contract parties may have later decided they didn’t want the simple and informal and cheap proceeding they formerly wanted, but an expensive bloodbath).

4Standard clause suggested by the American Arbitration Association ("AAA") in its Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes), effective October 1, 2009 (hereafter the “AAA Construction Rules”). The clause suggested in the AAA Commercial Arbitration Rules is essentially identical.

The issues that arbitrating parties will face, the resolution of which may contribute mightily to their satisfaction or dissatisfaction with the process, include these: Where will the arbitration be heard? What parties and claims will be involved? How many and what type of people will hear the matter? Will pre-hearing motions be considered? What discovery, if any, will occur before the hearing? How much time will be consumed by pre-hearing activities and by the hearing? What relief will the parties be able to get from the arbitrator or panel? The handling of all these issues will contribute to the duration and expense of the process, or at least to the parties’ satisfaction with it, but, typically, those parties which express concern about time and expense of arbitration will have left the issues for someone else to control.

The time to avoid some of the unhappiness and resentment which tend to follow unsuccessful arbitration proceedings is at the time of the contract, when the parties can dictate how every one of these issues (and others) will be resolved. Arbitration is controlled by agreement and, with limited exceptions, parties are free to agree to a completely customized way of handling arbitration of their disputes. Although their rules otherwise govern a number of these procedural issues, the major dispute resolution providers have largely agreed that parties may contract for other procedures, which will be honored.

Parties negotiating the hypothetical construction contract

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6 Two thorny issues, beyond the scope of this article, which have involved considerable recent dispute and litigation, are the extent to which parties may effectively control availability of class arbitration and whether they may alter the rights to judicial review of arbitration awards that would otherwise be available by statute. The developing jurisprudence on the former issue was discussed in Leiby, Class Arbitrations Under Attack—But Survive, 7:1 ACCL Journal 311 (Winter 2013). Here, we are considering negotiated, business-to-business arbitration clauses, where it is unlikely that either party would seek to allow class arbitration, and assuming that judicial review will exist to the extent allowed by applicable statute. The complaint, sometimes heard, that arbitration does not involve the strict application of the rules of evidence will not be addressed since it is a complaint that cannot be mollified. If a party insists on application of the rules of evidence then it will not likely be satisfied with arbitration and should elect litigation.

7 See AAA Commercial Arbitration Rules, R-1(a) (“The parties, by written agreement, may vary the procedures set forth in these rules.”); JAMS The Resolution Experts, JAMS Comprehensive Arbitration Rules and Procedures effective October 1, 2010 (hereafter the “JAMS Rules”), Rule 2 (“The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies . . . . The Party-agreed procedures shall be enforceable as if contained in these Rules.”); The International Institute for Conflict Prevention and Resolution (“CPR”) 2007 CPR Rules for Non-Administered Arbitration (hereafter the “CPR Rules”), Rule
mentioned above should give some thought to their preferences about, and seek to negotiate and then document agreements on, each of the following issues (and possibly others). In an Appendix I have provided some sample language which may be of use to contract drafters, or may suggest modified language which would be preferable. Readers are no doubt capable of devising alternative language as contracts are negotiated.

A. Preliminary Issues

1. The Locale of the Arbitration

Frequently negotiators working on commercial contracts will give considerable thought to the issue of venue for litigation; the courts have often had to resolve disputes over the enforceability of such provisions. Less thought is probably given in the usual instance to the venue where an arbitration hearing will occur. If no provision is made for a choice of locale, typically the decision will be made for the parties by the arbitration provider. Parties should realize the impact of this seemingly minor decision on the budget. It may be that neither party is located in or conveniently near the project’s location; often at least one is not. The lawyers and witnesses necessary for the hearing must be brought to and lodged in the hearing locale; frequently one or more of the arbitrators will also be attending from a remote location at the parties’ expense in both travel cost and time. If the parties can agree on a location, some of the likely financial consequences will be known before a dispute ripens into active arbitration, and the location will be known before the selection of a tribunal whose travel cost

1.1 (The Rules where referred to in a contract are deemed to have been made part of the parties’ arbitration agreement “except to the extent that they have agreed in writing, or on the record during the course of the arbitral proceeding, to modify these Rules.”). For some reason, the AAA Construction Rules lack such a provision. See Rule R-1.

8 See AAA Construction Rules, Rule R-12: “The parties may mutually agree to the locale where the arbitration is to be held . . . . When the parties’ arbitration agreement is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the project in dispute, as determined by the AAA, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.” For the remainder of this paper I am going to rely heavily upon the AAA Construction Rules, since they are the most commonly adopted in construction contracts (including, until recently, for default procedures under the ubiquitous American Institute of Architects standard form agreements for construction and design).

9 Patricia O’Prey & Gilda R. Turitz, Preventing the Runaway Arbitration: Strategies for Drafting an Arbitration Clause, presentation at the ABA Section of Litigation 2012 Annual Conference at 3 (April 18-20, 2012).
may become an issue (and will also be known to potential arbitrators whose availability or willingness to serve might be affected by the location). Solving this problem in advance is a simple matter.

2. Parties to the Arbitration

One thing that many arbitration consumers would like to be able to predict more confidently is who will likely be involved in any arbitration that they may later face. In the typical construction project, a number of relationships exist among various players all of whom may play a role in later disputes—not only the owner and its general contractor or construction manager, but a number of subcontractors or trade contractors, a design professional such as the project architect and potentially several subconsultants to the design professional, and occasionally equipment or material suppliers who have significant input into the project such as design-build responsibility for what they supply. Often a major dispute over a complete project failure will implicate quite a number of these parties. If claims and counterclaims and third-party claims among them are inevitable, will they all be heard and resolved in the same forum?

First, none of these parties will be involved in arbitration unless they have agreed to arbitrate (unless they can be forced to arbitrate as non-signatories, which is unpredictable\textsuperscript{10}). Second, they will not be part of a single arbitration unless they have all agreed to the same procedure; if owner and contractor have an AAA arbitration clause in their contract but the subcontracts all require arbitration before JAMS, complete efficiency will be impossible. Even if all project parties have agreed to arbitrate, and to do so under the auspices of the same arbitral organization, however, the issue whether they will do so in joint or separate fashion remains cloudy unless they have provided the answer in their contract(s).

There are two preliminary issues: First, may arbitrating parties join additional parties to their proceeding? Second, may two or more separate proceedings be consolidated? The arbitral rules allow joinder and consolidation, but provide no guarantees to the parties whether either will be allowed, unless they reach agreement after a dispute has resulted in an arbitration demand. JAMS provides that unless the law or parties’ agreements provide otherwise, it may consolidate new arbitration proceedings with existing proceedings, taking into account “all circumstances,” and

\textsuperscript{10}See Ingwalson, Mow and Elysian Kurnik, Arbitration and Nonsignatories: Bound or Not Bound?, 6:1 ACCL J. 73 (Winter 2012).
the Arbitrator may allow a party to join, or require a party to be joined, in a pending arbitration, “taking into account all circumstances the Arbitrator deems relevant and applicable.” Where AAA is administering a proceeding, absent agreement on joinder or consolidation, a special arbitrator will be appointed to rule on the issue. This “R-7 arbitrator” will be an arbitrator not involved otherwise in the dispute.

Consolidating multiple proceedings, or joining additional parties to a pending proceeding, raises further procedural issues that may as well be dealt with in the parties’ agreement. For example, if there are numerous parties, how are arbitrators selected? If each of these parties has agreed to a three-member panel, with party arbitrators selecting the third, and there are more than two parties, who selects the party arbitrators? AAA has anticipated such problems, and provides as follows:

If the R-7 arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, the arbitrator may also establish a process for selecting arbitrators for any ongoing or newly constituted case and, unless agreed otherwise by the parties, the allocation of responsibility for arbitrator compensation among the parties, subject to reapportionment by the arbitrator(s) appointed to the newly constituted case in the final arbitration award.

JAMS simplifies this process, at least in the case of consolidation, by providing that parties to a consolidated case “will be deemed to have waived their right to designate an arbitrator as well as any contractual provision with respect to the site of the Arbitration.” If one does not want to waive its selection rights or defer entirely to AAA as the price of consolidation or joinder, a better approach can be prescribed by contract. Such prescription is particularly essential when “party arbitrators” are to be appointed, and agree on a third to form a panel of three arbitrators, so that all parties have somehow to be aligned (or ignored) in such a way that there are two selectors of the initial arbitrators. Even when a sole arbitrator, or all arbitrators, will be selected by the “striking/ranking” method from a provider’s list, some agreement might be useful in determining whether parties in natural alignment act separately or collaboratively in that process.

11 JAMS Rules 6(e), 6(f).
12 AAA Construction Rules, Rule 7.
13 AAA Construction Rules, Rule R-7(c).
14 JAMS Rules, Rule 6(e). Since CPR Rules apply only to non-administered arbitration, they do not allow the organization to make decisions about consolidation and joinder.
Although the organizations have attempted to provide reasonably for handling of issues involving multiple parties and multiple claims, they may not have done so to the satisfaction of contracting parties. For many years, for example, the American Institute of Architects took the institutional position that arbitrations involving architects should not be combined with arbitration involving other parties (no matter what the AAA rules might provide). For example in its flagship owner-contractor General Conditions document, AIA provided that no arbitration under the construction contract could include the architect by consolidation or joinder without the written consent of the architect and all other parties sought to be joined; moreover, no parties other than owner and contractors and other parties “substantially involved in a common question of fact or law or whose presence is required if complete relief is to be accorded” could be included in an arbitration by consolidation or joinder.\(^\text{15}\) This prohibition has been considerably modified in the current edition of the document\(^\text{16}\) (after substantial criticism of AIA’s rigidity on the subject), but still does not, of course, bind any other party to go along with attempted joinder or consolidation.

That will require drafting decisions to be carefully made and carried out. Not only must the contract between owner and contractor and that between owner and architect require arbitration under the same procedure,\(^\text{17}\) but the contractor must be persuaded or required to “flow down” similar provisions to its subcontractors and the architect to “flow down” similar provisions to its subconsultants. Each of these agreements should also state the parties’ intended provisions about consolidation and joinder as well. If one or more of the parties wishes to avoid consolidation or joinder, for example a small subcontractor wishing to avoid the expense of participation in a major war among the big players, that should be stated and not left up to the decision of JAMS or a special AAA arbitrator.

### 3. The Composition of the Tribunal

Typically an arbitration “tribunal” consists of one or three
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arbitrators. One issue parties may want to control is the number of arbitrators who will hear their disputes. Otherwise, in an arbitration subject to organizational rules, the number of arbitrators will be dictated either by the rules or by the arbitral association. For example, in normal construction cases before the AAA, one arbitrator will hear a case unless the Association, in its discretion, decides that there will be three.\(^\text{18}\) As mentioned below, such a difference substantially increases the expense of the proceeding, in this situation potentially against the wishes of every party. JAMS rules provide for a single arbitrator absent agreement by all parties to use more.\(^\text{19}\) The CPR rules, on the contrary, provide that absent agreement in writing for a single arbitrator, or a neutral panel, the tribunal will consist of two party-appointed arbitrators with a third selected by those two.\(^\text{20}\) If contracting parties desire to have party-appointed arbitrators under either of the other sets of rules, they must so agree in advance.

The size of a panel can make a considerable difference. Scheduling a hearing when three arbitrators' schedules, rather than only one's, must be accommodated is frequently troublesome; hearings which do not run continuously to conclusion may be one result of having the larger panel. When a reasoned award is requested, and must be circulated among three arbitrators for agreement, obvious delay may be the result. Perhaps more significantly, however, the expense of a three-arbitrator panel is obviously far greater than that of a single arbitrator; math tells us that the fees charged by the arbitrators will be trebled at least; some would argue that the entire expense of the arbitration is likely to triple where three arbitrators are used.\(^\text{21}\)

The benefits of having a larger panel should be considered. Some would suggest a runaway, “aberrant” award is likely to be moderated by having the larger panel, and certainly if a mix of qualifications is desired, such as combined legal, architectural and construction management experience, it is far easier to obtain with multiple arbitrators. Other, less worthy, reasons to prefer

\(^{18}\)See AAA Construction Rules, Rule R-18(a). The default mode of hearing the large, complex construction case, in the absence of an agreement otherwise, requires a panel of three arbitrators. Id., Rule L-3(a).

\(^{19}\)See JAMS Rules Rule 7(a) (2010).

\(^{20}\)See CPR Rules Rule 5.1 (2007). This process is almost required by the structure of CPR arbitrations.

\(^{21}\)Based on comments posted on a popular arbitration/mediation forum in which numerous arbitrators participate.
multiple arbitrators may also come into play.\textsuperscript{22} Whatever the parties think will be best for them, there is no reason to leave the size of the panel up to the discretion of someone else, when they can instead make their preference clear by contract.

One of the complaints often heard by opponents of arbitration is that the panels from which they are to select arbitrators do not provide them with properly qualified choices.\textsuperscript{23} Whether this is a fair criticism or not, the choices can be improved by agreement. If the parties can agree, for example, that they want a single arbitrator or panel chair who has 20 years of experience as a lawyer in arbitrating disputes between owners and architects, the provider should offer them a list of people with such qualifications to select from (although the more precise the requirements, the less likely it is that a sizeable roster can be found in the near locality of the dispute).

Contracting parties are well advised to avoid the “sin of overspecificity” in describing their dream tribunal.\textsuperscript{24} Parties may wish to have a technical member of a three-arbitrator panel—a mechanical engineer, for example, or a scheduling expert. Their wishes should be honored. Should one party decide after arbitration has been demanded that it would really like a mechanical engineer for an arbitrator, by which time the other party would really like not to have a mechanical engineer on the panel, the chances of having one are much reduced. Again, some advance thought given to the types of people who would best resolve a dispute likely to arise under the particular contract, and an agreement to use that type of person as an arbitrator, can resolve many complaints about the choices parties are expected to make in selecting a panel.

\textsuperscript{22}Posters on the same e-forum have mentioned the possibility that having multiple arbitrators provides “cover” for an arbitrator who wishes to rule without annoying parties who might retaliate by depriving the arbitrator of future business.

\textsuperscript{23}Although this is difficult to harmonize with the conclusion that a jury of 12 random citizens should be preferred.

\textsuperscript{24}See Townsend, Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins, 58:1 Disp. Res. J. 1, 3 (February—April 2003) (Giving the example “The Arbitration shall be conducted by three arbitrators, each of whom shall be fluent in Hungarian and shall have twenty or more years of experience in the design of buggy whips, and one of whom, who shall act as chairman, shall be an expert on the law of the Habsburg Empire,” which seems comical unless one substitutes “computer chips” for “buggy whips” and similarly updates the language and law reference, in which case it becomes “chillingly” familiar.).
B. Pre-Hearing Procedure

1. The Availability of Discovery

Probably the biggest complaint business interests express about arbitration of their disputes has to do with the expansion of discovery in arbitration, to the point that some refer to the conversion of arbitration into litigation and denounce it as having become even slower and more expensive than traditional litigation. There is some evidence in support of this trend, but no reason it has to be the case.

There is nothing in the arbitration rules that provides for unlimited or abusive discovery. For example, the AAA Construction Arbitration Rules provide, on the general topic, only as follows:

**R-24. Exchange of Information**

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

i. the production of documents and other information, and

ii. the identification of any witnesses to be called.

(b) At least 7 calendar days prior to the hearing, or by the date established by the arbitrator, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(d) There shall be no other discovery, except as indicated herein, unless so ordered by the arbitrator in exceptional cases.

Neither do the other familiar rules allow uninhibited discovery practice, although they are somewhat more liberal. Yet, most readers have heard of the big arbitration battle where lawyers are flying around the country deposing one another’s clients and experts, issuing subpoenas for non-party depositions and document production, and otherwise carrying on every bit the way they have become used to in court. How can this be?

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25 A minority of arbitration opponents criticize it for allowing too little discovery, or at least an unpredictable amount.

26 CPR Rule 11 permits such discovery as the tribunal determines to be appropriate in the circumstances, taking into account the parties’ needs and the desirability of making discovery expeditious and cost-effective. JAMS calls for voluntary exchange of documents and the names of witnesses, and allows each party to take one deposition of an opposing party or its witnesses; the necessity of any additional depositions is determined by arbitrator. JAMS Rule 17(a), (b).
A number of factors contribute. Lawyers, or litigators at least, are accustomed to exploring every possible source of information. Parties, even those which decry expensive discovery in the abstract, may discover new affection for it when they become involved in big-money disputes. And arbitrators have difficulty (some try a lot harder than others) restraining parties’ and lawyers’ desires for expensive proceedings. Arbitrators often ask, in effect, “what do I do when the lawyers come to me jointly and say ‘We agree that twenty depositions need to be taken, and you don’t know the case the way we do so you really can’t knowledgeably rule on what ought to be needed’”? Arbitrators don’t want their decisions to be vacated, and they like to be well-regarded as arbitrators, and the easiest way to get along is to let the lawyers at least do whatever they agree needs to be done.27

If the cost of discovery, and the effect it may have on the schedule of arbitration, is a concern to the parties, then perhaps they will try to agree in advance on what discovery will be permitted, and not leave it up to an arbitrator to whose discretion the applicable rules defer, or, worse, to an arbitrator unwilling to enforce the rules’ limitations on discovery. It may not be easy to do, since one can hardly anticipate the size and complexity of any dispute that will arise later, but it is certainly feasible to try to agree on what discovery (absent later agreement to the contrary) will be allowed.

It is pointless to provide, as some clauses (occasionally imposed by powerful owners) do, that discovery in arbitration will be in accordance with the Federal Rules of Civil Procedure. This type of clause reflects what has been called the “sin of litigation envy.”28 The Federal Rules of Civil Procedure can be utilized, without paying a District Judge and a Magistrate Judge by the hour, in federal courts,29 if their provisions are desirable the parties probably want to forego arbitration.

Otherwise, they are free to agree, and if they clearly agree the arbitrator should be bound to direct, that depositions will not be allowed, or a certain number will be, limited to certain durations,

27See the College of Commercial Arbitrators’ Protocols for Expeditious Cost-Effective Commercial Arbitration (hereafter “Protocols”) at 7 (2010) attributing arbitrators’ frequent failures to limit discovery practices, or to adhere to schedule, especially where the parties have agreed otherwise, to an unwillingness to second-guess agreements between counsel, a concern about an arbitration award being challenged by motion to vacate, and possibly a reluctance to avoid offending anyone in the hope of securing future appointments.

28See Townsend, supra note 24, at 4.

29And similar rules are available in the court systems of most states.
or that the number of depositions will vary with the size of the dispute. They can deal in advance with the increasingly expensive subject of electronic discovery. They can, if they wish for some reason, agree to serve and respond to interrogatories and requests for admission (thus approaching the importation of court rules), and they certainly can provide for the automatic exchange of project documents and the form in which that will be done. A commonly seen provision requires each party to allow at least the deposition of its corporate representative and the deposition of any testifying expert, for a certain reasonably limited time.

Since it is difficult to predict competently what discovery will be needed in a dispute that may not arise for several years, contract drafters are advised to consider including a “safety valve” so that agreed discovery limitations can be modified by stipulation, or to give the arbitrator appropriate flexibility to ensure fairness.30 Of course, any flexibility entrusted to the arbitrator may result in unwanted discovery, so should be carefully calibrated.

Although the tendency to convert arbitration into a replica of litigation is often charged to the lawyer advocates involved, who are accustomed to litigation under court rules, their clients are not blameless.

Business clients—especially those with significant interests or assets at stake—are often disinclined to challenge this effort [by the lawyers] to mine information. They may agree with or rely on the advocate’s preliminary counsel that the mining operation will yield productive results; indeed, they may have strategic reasons for using discovery to increase their opponent’s costs, and/or delay the final resolution of the dispute.31

This doesn’t deter them as a group, however, from responding to surveys by saying that excessive discovery contributes highly to their disappointment and the arbitration process.32 If business users genuinely feel this way, they should ask their lawyers to try to negotiate provisions for discovery that will make arbitrating more palatable to them.

In summary,

drafters of arbitration clauses often forget that arbitration is a matter of agreement between the parties. This means that the parties can tailor all aspects of the arbitration, including the discovery

30 O’Prey & Turitz, supra note 9, at 4.
31 Protocols at 7.
32 Id. at 6.
process, to fit their anticipated needs and budgets. The parties can agree to lots of discovery, no discovery or limited discovery. \(^{33}\)

2. Availability of Motion Practice

While experienced trial lawyers in federal and state courts are accustomed to filing pretrial motions to exclude evidence, and particularly pretrial motions to exclude the opinions of experts which may not meet the requirements of the *Daubert* rule,\(^ {34}\) such motions are probably not a productive use of a party's time in arbitration. There is nothing in the history of the *Daubert* cases that suggests that their rule applies in arbitration (particularly since the rules of evidence themselves generally don't apply to arbitrations\(^ {35}\)), nor are parties even assured that their arbitrators will have any knowledge of the rules of evidence.

Experienced litigators are also accustomed to using summary judgment motions to obtain pretrial rulings on certain claims or defenses, and some of them consider the unreliability of getting such motions heard by arbitrators to be one of the serious drawbacks to arbitration.\(^ {36}\) On the other hand, some advocates for improved arbitration procedures focus on motion practice as an *undesirable* feature of modern arbitration, reasoning as follows:

Potential motions must be scrutinized, as they are time-consuming.

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\(^{35}\) See, e.g., AAA Construction Rules, Rule R-33(a) ("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."); JAMS Rules, Rule 22(d) ("Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product."); CPR Rules, Rule 12.2 (essentially the same as JAMS Rules).

and may not have any practical significance. Companies and their counsel should consider whether any potential motion truly “advances the ball.” Motions designed to restrict evidence at the hearings (so-called motions in limine) may be inappropriate because the formal rules of evidence do not apply in arbitration, and the arbitrator should rightfully consider evidence designed to further his or her understanding of the case. Similarly, arbitrators may be reluctant to grant dispositive (summary judgment) motions absent a stipulation by the parties because one of the few grounds for vacating an award under the Federal Arbitration Act is a refusal to hear material evidence.37

A recent survey conducted at a national summit on business-to-business arbitration explored the attitudes of in-house counsel and others frequently exposed to arbitration, and one of the key sources of cost and delay in commercial arbitration was identified by responders as “excessive, inappropriate or mismanaged motion practice.”38

These points related to a question somewhat off the topic of the article—whether normal motions are a good idea in arbitration—but also to a germane question: if motion practice in arbitration is a time-waster, should it be restricted or precluded by advance agreement? Perhaps the best explanation of the difficult choice drafters have about motions is described as follows:

The use of dispositive motions in arbitration—now contemplated even by some expedited rules—is, practically speaking, a double-edged sword. This import from the court system, prudently employed, is a potentially critical tool for narrowing arbitral issues prior to hearings and full-blown discovery, thus avoiding unnecessary preparation and hearing time. The problem is that a, as in court, motion practice often contributes significantly to arbitration costs and cycle time without clear benefits. Filing of motions often leads to the establishment of schedules for briefing and arguments entailing considerable effort by advocates, only to have arbitrators postpone decisions on the motions until the close of hearings . . .. If dispositive action is foreseen as a useful element in arbitration, an appropriate provision should be included in the arbitration procedure.39

The arbitral organizations seem to have mixed attitudes toward the wisdom of motion practice. While JAMS specifically mentions the arbitrator’s authority to consider a motion for sum-


38 See Protocols at 8.

mary disposition of a particular claim or issue,\textsuperscript{40} AAA has no provision for such motions (unless it is meant to be implied in the authorization for arbitrators to enter “interim awards,” which appear to be meant primarily to be in the nature of preliminary relief).\textsuperscript{41} The CPR Rules vaguely permit arbitrators to “make pre-hearing orders” in order to define the issues to be heard and determined.\textsuperscript{42}

It may be difficult to anticipate what type of preliminary motions will be helpful in a remote arbitration, or if all such motions will be considered anathematic. Those parties which have a fixed view on the subject, however, may take it out of the hands of the arbitrator, and out of the influence of standard arbitral rules, by contracting for exactly the type of motion practice—including none—they find acceptable.

C. The Time Allowed for the Arbitration

Critics of arbitration often complain that the process is no longer the quicker, cheaper alternative to litigation, and in part this complaint relates to the time disputes take to reach a hearing, and then to reach a closed record and an award. The cause of drawn-out hearings is probably multiple, starting with attorneys intent on “zealous advocacy,” and facilitated by arbitrators who are unable or unwilling to restrict the parties to a limited schedule, “perhaps because of lack of skill or native discomfort with proactive management, or because they may be uncomfortably aware of scheduling issues of their own that may need to be accommodated during the course of trying a complex case.”\textsuperscript{43}

The basic arbitral rules of all the major domestic organization do not provide the schedule for preparing and then hearing the arbitration; the rules anticipate that early on, the parties and the arbitrator(s) will confer and agree on a schedule for further proceedings. What may occur, however, is a disagreement between a claimant which believes the matter can be resolved in three months, with little or no discovery, and a respondent which argues that a year’s depositions and document review will be required before the next conference, at which the parties can discuss a hearing date. The arbitrator, new to the dispute and little prepared to debate its needs, may be unprepared to forcefully take a side in such a disagreement. Often the party claim-

\textsuperscript{40}JAMS Rules, Rule 18.
\textsuperscript{41}AAA Construction Rules, Rule R-36.
\textsuperscript{42}CPR Rules, Rule 9.4.
\textsuperscript{43}See Protocols at 10.
All of the major arbitration rules provide for expedited procedures, which by their terms primarily relate to small disputes. For example, the Fast Track procedures under the AAA Construction Rules apply where no party’s claim or counterclaim exceeds $75,000; however, there is nothing to stop parties from adopting these rules, or procedures similar to them, for any size dispute. Under these rules there is meant to be no discovery and there are limits on the time to hearing and the time from hearing to award. Similar expedited procedures may be applied in arbitration under the JAMS Rules if they are referenced in the parties’ agreement or later agreed to by all; they similarly restrict (although not as much as AAA) the right to discovery and provide limits on the time to hearing.

Contracting parties can independently impose a schedule on their disputes by agreeing to one in their contract, though it is unquestionably a risky idea. The temptation to save time and money by agreeing to an extra-speedy proceeding will be considered a good idea later when the $35,000 change order dispute breaks out; if instead there is a $20 million project failure involving dozens of witnesses and thousands of documents, the advocates will wish such an idea had never occurred to their clients. Litigators would say that the record supporting the ability to design agreed-upon dispute resolution procedures is “mixed” in part because, with respect to larger commercial disputes, “the discovery and time needed to develop each side’s respective case can be much more difficult [than in a consumer or employment dispute] to anticipate where the eventual dispute is unknown at the time of contracting.”

Moreover, as pointed out by one of the nation’s leading scholars in the area of arbitration, agreeing to time limits by itself is obviously insufficient; “drafters must incorporate specific process elements facilitating a shorter arbitration. These elements include arbitrator selection procedures, early sharing of detailed information, tightly bounded discovery, and (possibly) limitations on the final award.”

It is also possible, in theory, to agree on the maximum dura-

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44 AAA Construction Rules, Rule F-1.
45 JAMS Rules, Rules 16.1, 16.2.
46 Antwell & Clayton, supra note 36.
47 Stipanowich, supra note 39, at 427.
tion of a hearing, but this involves even more risky predicting, and at this point also involves imposing time limits on not only the parties but also a hypothetical arbitrator or panel whose style may legitimately not fit a limited hearing. Of course, any agreement on the maximum duration of a hearing must limit the amount of time each party can have to present direct testimony and to cross-examine witnesses. 48 Some would argue that such limits are not only difficult to set in advance, but rife with potential for abuse; for example, if cross-examination time is charged to the party calling the witness, it may be very protracted if the opposing counsel means to run out the clock on the time allowed to the witness’s sponsor.

While thoughtful contract negotiators may be able to help prevent complaints about delays in the process by agreeing in advance to time limits for resolving an arbitrated dispute, contracting parties and their attorneys should be aware that too tight a timeframe for an arbitration can cripple the process before it gets started. The risk is, as usual, collateral litigation. American courts have been less rigid than their European counterparts in finding that a failure to meet a deadline in an arbitration agreement deprives an arbitrator of jurisdiction to proceed with the arbitration. However, drafters should not invite a challenge on that basis by imposing unrealistic deadlines on the parties, the case administrator, or the arbitrator. 49

As a result of these uncertainties and risks, in-house counsel are advised to consider “including a caveat that any specified timeframes may be modified by the parties’ stipulation or in the arbitrator’s discretion on a showing of good cause.” 50

D. Matters Involving Relief Available and Form of Award

A complaint often heard when speakers compare arbitration with litigation is that the outcomes in the former are unacceptably unpredictable. We know when we go to court whether a judge may enjoin a party, and under what circumstances, what the outcome—verdict or judgment—will look like, what damages ought to be available by law, and whether, under the applicable

49 Townsend, supra note 24, at 4 (footnote omitted).
50 See O’Prey & Turitz, supra note 9, at 3.
law, costs and attorney’s fees may be shifted from loser to winner. On the other hand, many of these issues are not so predictable in arbitration, where the law and rules are somewhat vague and almost everything involves a certain degree of (unappealable) discretion exercised by a person or persons who are, at the time of making the deal, complete strangers to the parties. These issues of relief and remedies involve a number of significant questions.

1. **Interim Relief and Injunctive Relief**

Parties may wonder whether, in the event of arbitration, they are subject to being hastily brought before an arbitrator for a hearing on something like a preliminary injunction or an attachment of assets, or for that matter whether the ultimate award may involve an injunction. The arbitral organizations grant arbitrators a good deal of leeway in these areas. JAMS allows the arbitrator to grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. AAA and CPR Rules provide nearly identical powers. On the subject of injunctive relief, JAMS provides “The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties’ agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy,” and AAA and CPR rules are similarly flexible.

If contracting parties don’t want to subject themselves to a hypothetical arbitrator’s later views of what might be “deemed necessary,” or would like to have a better idea of what standards might be used to measure that necessity, they are at liberty to provide their own rules for interim and injunctive relief in their contract.

2. **Consequential or Punitive Damages**

Parties to construction contracts have increasingly agreed that they will mutually waive “consequential damages” in claims

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51 It seems unnecessary to discuss here the desirability, in every contract, of providing the source of the applicable substantive law, not because it isn’t recommended, but because transactional counsel are already inserting such provisions in their contracts routinely.

52 JAMS Rules, Rule 24(e).


54 JAMS Rules, Rule 24(c), AAA Construction Rules, Rule R-45(a), CPR Rules, Rule 10.3.
against one another. Yet, it is not entirely clear to everybody just what “consequential damages” may be. Their definition or clarification is a matter of some value in any contract, whether arbitration is selected as the dispute resolution procedure or not. And the parties should decide, independently of the printed form, whether they wish to waive all consequential damages, or waive some but not all, or limit their exposure to consequential damages beyond a certain value, or otherwise manage their risks, all at the time of contracting. If they do not, they are exposed to some uncertainty under the rules of arbitration.

“It is not entirely clear whether punitive damages can or cannot be awarded where the dispute resolution clause makes no mention of such damages. Thus, if the parties wish to preclude the arbitrator(s) from awarding punitive damages they should include specific language to that effect in the dispute resolution clause.” Punitive damages are one of the greatest sources of unpredictability in litigation and, should they be available in arbitration, where there are no clear standards for their recovery, and more importantly no real opportunity for appeal, they would have potential to significantly affect risk analysis and budgeting in construction. They can be foregone by contract or, conceivably, parties could preserve their availability but restrict the amount of any award, limit their award to situations involving specific egregious causes, or otherwise tailor their availability.

3. Attorneys’ Fees and Cost Shifting

We all know that one of the major concerns to business people considering claims and disputes is the transactional cost of resolving them. Parties to construction contracts believe they are better able to anticipate, and possibly control, their risks of excess construction expense, delayed completion, and other business problems than the charges to expect from their lawyers, arbitrators, and arbitrators.

56 The excellent discussion of this issue in Axelroth, Mutual Waiver of Consequential Damages—The Owner’s Perspective, 18:1 The Constr. Law. 11-12 (Jan. 1998), clearly illustrates the definitional problem.
57 JAMS Clause Workbook at 5 (citation omitted). It appears to be undisputed law, in some states, that arbitrators have the power to award punitive damages, at least under an arbitration clause permitting an award of “any remedy or relief that an arbitrator deems just and equitable within the scope of the Agreement . . . .” See, e.g., Kitchens v. Turquoise Properties Gulf, Inc., 70 So. 3d 377 (Ala. Civ. App. 2010), cert. denied, (Apr. 8, 2011). This language is essentially identical to the AAA Standard. See AAA Construction Rules, Rule R-45(a).
tors, arbitration providers, and experts if a dispute cannot be avoided. Some speakers on the subject also opine that disputes can be avoided or made less frequent by managing fees and expenses in the contract. In most jurisdictions, the “American Rule” applies and leaves each party to a dispute responsible for paying its own expenses of pursuing the dispute, but nothing prevents the parties from making other arrangements and, if they do, the arbitrator or panel by rule should honor their agreement.

AAA provides that its arbitrators must, in their final awards, assess fees, expenses and compensation and “may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.” The award may also include an award of attorneys’ fees “if all parties have requested such an award or it is authorized by law or their arbitration agreement.” JAMS arbitrators’ awards may allocate arbitration fees and arbitrator compensation and expenses unless prohibited by the parties’ agreement (and even the agreement may not restrict certain allocations under the rules); the award may allocate attorneys’ fees and expenses, and interest on the basis the arbitrator deems appropriate, if provided by the parties’ agreement or allowed by applicable law. Under the CPR rules, an arbitrator may fix, and apportion between the parties in such manner as is deemed reasonable, the fees and expenses of arbitrator(s), CPR charges, miscellaneous expenses of the arbitration including witness expenses, and “costs for legal representation and assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate.”

Contracting parties which need to assess their risk of dispute resolution expense somewhat reliably may wish to avoid finding out after the dispute is over what the arbitrator thought was an appropriate way to share the expense, and provide instead by their contract whether any or all of the expense of paying the arbitral institution, the arbitrators, and the parties’ lawyers and witnesses may be shifted by the arbitrator and on what basis such reallocation will be considered.

4. The Form of Award

Some parties involved in arbitration would prefer to receive an award that reads like a jury verdict: “Claimant is to recover of

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58 AAA Construction Rules, Rule R-45(c).
59 Id., Rule R-45(d)(ii).
60 JAMS Rules, Rule 24(f), (g).
61 CPR Rules, Rule 17.2 (emphasis supplied).
Respondent the sum of $——-.” Perhaps they expect that any dispute over money will be simple enough so that all will understand how the result was reached. Arbitrators often express a preference for the simple award, which requires less time to compose than a more complex award and which, since it reveals little of the arbitrator’s reasoning, is also more difficult to challenge on a motion to vacate or in opposition to a motion to enforce. Many parties, however, want a better idea of what the panel’s reasoning was, especially if they may have fought for years over a number of complicated issues; they may also want assurance that the result wasn’t reached casually, or arbitrarily as by mathematically splitting the difference between the parties’ demands. If they anticipate an interest in the reasoning behind the award, they are at liberty to require the arbitrator(s) to give them information about how an award was reached.

The AAA rules in general express a preference for the simple award. Under its Commercial Rules, the default format for an award, absent party agreement on something different, is not a “reasoned award.”63 In construction cases, the rules require an award that includes a “concise written financial breakdown” but no reasoned opinion or more unless the parties have early on agreed to require one.63 CPR and JAMS basic award formats promise a little more: CPR awards “shall state the reasoning on which the award rests unless the parties agree otherwise”;64 JAMS awards, absent contrary agreement, require “a concise written statement of the reasons for the Award.”65

Parties tempted to require more from their arbitrators, such as written findings of fact and conclusions of law, should consider a number of factors: First, even if they may hope to enhance the appealability of an award by making it more explicit, appeals are still a very long shot.66 Second, some of the people they might like to select to arbitrate their disputes may be unwilling to serve if such judicial provisions are required, thus limiting their access to

62 AAA Commercial Arbitration Rules, Rule R-44.
63 See AAA Construction Rules, Rule R-44.
64 CPR Rules, Rule 15.2.
65 JAMS Rules, Rule 24(h).
66 See the decision in B.L. Harbert Intern., LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006), warning/threatening parties which attempt to “appeal” arbitration losses in the following language: “Courts cannot prevent parties from trying to convert arbitration losses into court victories, but it may be that we can and should insist that if a party on the short end of an arbitration award attacks that award in court without any real legal basis for doing so, that party should pay sanctions.” Id. at 913.
good arbitrators. And finally, the cost of the arbitration will inevitably rise with any requirement for additional work on the part of the tribunal; especially where a three-member panel is involved, and must circulate the award for agreement, negotiation, revision and possibly even preparation of minority opinions, the time required to secure an award and especially the fees charged for arbitrator time will surely soar.

If parties truly wish a complete explanation of the arbitrator’s opinion, they must agree to such early in the process. Since, at the point where disputes have arisen, agreeing on such details may have become much less likely, the more promising time to try to agree is at the point they are happily negotiating their construction contract.

E. Conclusion

Construction lawyers bear a good deal of responsibility for the way in which their clients’ disputes are resolved, and endure a substantial amount of criticism (deservedly or not) for the developments in construction arbitration that have led to increasing dissatisfaction. The construction bar can assist the industry, and individual clients, to experience more satisfactory process, if not necessarily results, by encouraging and assisting them to protect themselves—at the time contracts are being negotiated—from many of the most objectionable aspects of modern arbitration.

Appendix—Sample Clauses

I. Locale Of The Arbitration

- The hearing before the arbitrator shall be held in Atlanta, Georgia, unless the parties mutually agree, in writing, to select another forum.
- The locale of the hearing of the arbitration shall be as mutually agreed upon by the parties to the arbitration or, if the parties are unable to agree, then the arbitration shall be held in Atlanta, Georgia.

II. Parties To The Arbitration

- The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding

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67 In addition to the other sources referred to in the text from which alternative arbitration clause language has been obtained, I am indebted to India Johnson, President of AAA, for sharing with me alternative language collected by AAA in anticipation of developing a clause builder system. A number of these clauses were composed for use in specific contract drafting or in some cases, specifically for purposes of illustrating the points made in this article.
companies and other parties concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).  

- Any person or entity that could appropriately be named in a court proceeding (“Joined Party”) is entitled to participate in the arbitration so long as that person or entity agrees to be bound by the arbitration award (“Joinder”). A “Joined Party” does not participate in the selection of the arbitrators.

III. Composition Of The Tribunal

- If the principal amount in dispute involves less than $1,000,000, then the arbitration shall be conducted and finally settled by a sole arbitrator. If the principal amount in dispute involves $1,000,000 or more, if the amount in dispute is unknown, or if relief other than damages is sought, then the arbitration shall be conducted and finally settled by a panel of three arbitrators.

- The sole arbitrator selected shall be (a retired judge from a particular court) (a lawyer with ten years of active practice in a specified area, such as construction) (an accountant) (a licensed engineer trained in the specialty of engineering).

- The panel of arbitrators shall be composed as follows: (The Chair shall be an attorney with at least twenty years of active litigation experience, or shall be a retired judge from a particular court) (One of the wing arbitra-

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68 The AAA Guide To Drafting Alternative Dispute Resolution Clauses For Construction Contracts (hereafter the “AAA Guide”) at 13-14 (2007).

69 Adapted from Arbitration Agreement of Lakeview Hospital Pain Management Center.
Drafting the Arbitration Clause

tors shall be an expert in an area such as construction) (The Chair must previously have served as Chair or sole arbitrator in at least ——— arbitrations where an award was entered following a hearing on the merits)70

• The arbitrator shall be (a civil engineer) (a practicing attorney specializing in construction law).71

• In the event any claim exceeds ———, exclusive of interest and costs, the dispute shall be heard and determined by three arbitrators consisting of persons qualified in (civil engineering) (construction management) (construction law) (mechanical engineering, etc.) or (one contractor, one design professional and one construction attorney).72

• In the event that arbitration is necessary, ——— (name of specific arbitrator) shall act as the arbitrator.73

IV. The Availability Of Discovery

Provisions for discovery are infinitely variable. The point is to agree on limits and type of discovery and require that no further discovery be allowed without mutual agreement.

JAMS has suggested a number of provisions with respect to document requests, interrogatories, requests for admission, and E-Discovery, found in its Clause Workbook, to which the reader is referred. The clause on depositions found there is quoted because depositions are the main source of expense in many disputes and the source of a great deal of resentment from parties dissatisfied with arbitration:

• In any arbitration arising out of or related to this Agreement, each side may take ——— discovery depositions. Each side’s depositions are to consume no more than a total of ——— hours. There are to be no speaking objections at the depositions except to preserve privilege. The

70 The foregoing two clauses were adapted from the JAMS Clause Workbook (2011), available on the JAMS website.
71 AAA Guide at 11.
72 AAA Guide at 12.
73 This type of clause should be used very carefully, on short-term projects, if at all, and should name an arbitrator who can be counted on to survive and serve, or the arbitration clause may be defective and unenforceable for want of a valid arbitrator selection.
total period for the taking of depositions shall not exceed ______ weeks.74

- The discovery process shall be limited by the following:
  1. Where the dispute is less than $500,000, there shall be no discovery other than exchange of documents. 2. Where the dispute is over $500,000 but less than $1,000,000, discovery shall consist of no more than ______ depositions of ______ hours or less. 3. In disputes in excess of $1,000,000, discovery shall be limited to the number and length of depositions as determined by the arbitrator(s).75

- After the arbitrators are selected, the parties shall confer jointly with the arbitrators at the earliest convenient date to determine the discovery that shall take place. Each party shall have the right to take no more than ______ depositions of potential witnesses not to exceed an aggregate total of ______ hours of deposition time for a party, and shall have the right to serve no more than ______ subsequent interrogatories, none of which shall include more than _____ interrogatories. Additional discovery shall be in the discretion of the arbitrator. All discovery shall be completed within ______ months after the selection of the arbitrators, unless this period of time is extended by good cause.76

- The Parties shall submit true copies of all documents considered relevant with their respective statement of Claim or defense, and any counterclaim or reply. Neither Party may compel the other to produce additional documents. However, the arbitrator(s) may require the submission of additional documents limited to specific, narrow and well-defined classes of documents that the arbitrator(s) considers necessary for resolution of the Dispute. The maximum number of witnesses each Party may call to give evidence on its behalf, including by oral testimony, declaration or witness statement, is three witnesses of fact and one expert witness.

V. Availability Of Motion Practice

- The parties agree that no pre-hearing motion seeking a ruling on the merits of their dispute, or on the admis-
Drafting the Arbitration Clause

sibility at any hearing of proposed evidence, shall be heard by the Arbitrator.

- In any arbitration arising out of or related to this Agreement:
  1. Any party wishing to make a dispositive motion shall first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side shall have a brief period within which to respond.
  2. Based on the letters, the arbitrator will decide whether to proceed with more comprehensive briefing and argument of the proposed motion.
  3. If the arbitrator decides to go forward with the motion, he/she will place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
  4. Under ordinary circumstances, the pendency of such a motion will not serve to stay any aspect of the arbitration or adjourn any pending deadlines.77

- The parties agree that in any arbitration hereunder, neither party shall file, and the arbitrator will not consider, a “dispositive motion” such as one for summary disposition or summary award, on any ground related to the quality or extent of evidence or proof; the only such motions which may be filed and considered must be based on existence of allegedly complete, preliminary legal or contractual defenses not requiring evidence, such as expiration of an applicable statute of limitations, unambiguous written release, or failure to satisfy a written condition precedent.

VI. Time Allowed For The Arbitration

- In any arbitration arising out of or related to this Agreement:
  a. Discovery is to be completed within ___ days of the service of the arbitration demand.
  b. The evidentiary hearing on the merits (“Hearing”) is to commence within ___ days of the service of the arbitration demand.
  c. At the Hearing, each side is to be allotted ___

77 JAMS Clause Workbook at 8.
days for presentation of direct evidence and for cross examination.

d. A brief, reasoned award is to be rendered within ____ days of the close of the hearing or within ____ days of service of post-hearing briefs if the arbitrator(s) direct the service of such briefs.

The arbitrator(s) must agree to the foregoing deadlines before accepting appointment.

Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.78

- Time is of the essence in dispute resolution. Arbitration hearings shall take place within 90 days of filing and awards issued within 120 days. Arbitrator(s) shall agree to these limits prior to accepting appointment.79

VII. Type Of Relief Available

A. Interim Relief and Injunctive Relief

- Notwithstanding any provision to the contrary in the Rules referred to herein, the Arbitrator shall have no power to afford interim relief of any sort, or to enjoin or require any action other than in the final award resolving all claims in arbitration.

- Any award shall be limited to monetary damages and shall include no injunction, order for specific performance or direction to any party other than the direction to pay a monetary amount.80

B. Consequential or Punitive Damages

- In any arbitration arising out of or related to this Agreement, the arbitrator(s) are not empowered to award punitive or exemplary damages, except where permitted by statute, and the parties waive any right to recover any such damages.81

- In any arbitration arising out of or related to this Agreement, the arbitrator(s) may not award any

78 JAMS Drafting Guide at 8.
76 AAA Guide at 16.
80 AAA Guide at 16.
81 JAMS Clause Workbook.
incidental, indirect or consequential damages, including damages for lost profits.\textsuperscript{82}

- The arbitrator(s) shall have no authority to award punitive or other damages not measured by the prevailing party’s actual damages, except as may be required by statute.\textsuperscript{83}
- In no event shall an award exceed the amount of the claim by either party.\textsuperscript{84}

C. Attorneys’ Fees and Cost Shifting
- In any arbitration arising out of or related to this Agreement, the arbitrator(s) shall award to the prevailing party, if any, the costs and attorneys’ fees reasonably incurred by the prevailing party in connection with the arbitration. If the arbitrator(s) determine a party to be the prevailing party under circumstances where the prevailing party won on some but not all of the claims and counter-claims, the arbitrator(s) may award the prevailing party an appropriate percentage of the costs and attorneys’ fees reasonably incurred by the prevailing party in connection with the arbitration.\textsuperscript{85}
- The arbitrator(s) may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorneys’ fees.\textsuperscript{86}
- Each party shall bear its own costs and expenses and an equal share of the arbitrator(s) and administrative fees of arbitration.\textsuperscript{87}

D. Form of Award
- The award of the arbitrator(s) shall (be accompanied by a reasoned opinion) (include a breakdown as to specific claims).\textsuperscript{88}
- The award of the arbitrator(s) shall be in writing and signed by (the arbitrator) (a majority of the arbitrators).\textsuperscript{89}

\textsuperscript{82}Id.\textsuperscript{83}AAA Guide at 16.\textsuperscript{84}Id.\textsuperscript{85}Id.\textsuperscript{86}AAA Guide at 17.\textsuperscript{87}Id.\textsuperscript{88}Id.\textsuperscript{89}AAA Guide at 18.
arbitrators). In the award, the arbitrator(s) shall find the facts specially and state the conclusions of law separately.