

A Guide to Commercial Dispute Resolution for Businesses and Entrepreneurs



AMERICAN ARBITRATION ASSOCIATION®

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Introduction

In the normal course of day-to-day business affairs, disputes are inevitable. Parties might disagree as to their individual rights and obligations no matter how carefully a contract is written. Disputes can lead to delayed shipments, complaints about the quality of merchandise, dissatisfaction of services provided, and similar misunderstandings. Resolving such disputes, however, need not be as costly and bitter as court litigation can be. Instead, you can save time and money by using alternative means of resolving a dispute, helping to put the dispute behind you while preserving valuable business relationships.

The American Arbitration Association® (AAA®) administers a broad range of dispute resolution services which address the needs of businesses stuck in conflict. These services include:

Mediation

Mediation is a meeting among parties to a dispute, their representatives, and a neutral mediator to discuss settlement. The mediator's role is to help the parties explore issues, needs, and settlement options. The mediator may offer suggestions and point out issues the parties may have overlooked, but resolution of the dispute rests with the parties themselves. A mediation conference can be scheduled quickly. The mediator may start the mediation session with a joint discussion of the case, after which the mediator will work with the parties both together and separately, as appropriate, to resolve the case. Many cases can be resolved within a few hours.

Arbitration

Arbitration is an alternative to court litigation. It is a process where one or more impartial persons – the arbitrators – will make a final and binding decision regarding the dispute. Private and often confidential, it is designed for quick, practical, and

economical dispute resolution. Parties can exercise additional control over the arbitration process, both before and after the dispute arises. By adding specific provisions to their arbitration clauses, parties can modify the process and tailor it to meet their needs. The parties may agree on issues such as the confidentiality of proprietary information disclosed; how to present their evidence; locale of the arbitration; the number of arbitrators; and the scope of issues subject to arbitration. The parties may also select expedited procedures or specify a time limit for rendering an award if they anticipate a need for a quick resolution of the dispute. Such mutual agreements will be binding on the AAA as well as the arbitrator.

After the case is initiated, the AAA may schedule an administrative conference with the parties. The conference will center on administrative, non-substantive matters such as mediation, arbitrator selection, and locale of the proceedings.

After the arbitrator is appointed, depending on the complexity of the case, the arbitrator may set a preliminary hearing where the arbitrator and parties will set a case schedule and discuss document exchange, identification of witnesses, and the method of hearing, among other items.

Early Neutral Evaluation: Getting an Expert's Opinion

Early Neutral Evaluation (ENE) encourages direct communication between adversarial parties about possible claims and supporting evidence—particularly important in situations where the disputants are far apart in their views on how the law applies to the case in question or what the case is worth. ENE proceedings are considered confidential.

When working with the AAA, parties engaging in the ENE process receive access to the AAA's diverse panel of neutrals—experts in their industries or businesses who are able to effectively evaluate the issues at hand. At the conclusion of the review, the neutral evaluator's non-binding report, which consists of an unbiased opinion of the issues presented, can serve as a catalyst for settlement negotiations, can enhance communication between the parties and can be employed to dispose of specific issues prior to proceeding with other dispute resolution options.

The National Roster of Neutrals

The AAA maintains a national roster of experts who are trained mediators, neutral evaluators and arbitrators, throughout the United States and in numerous other countries across the world.

The AAA requires that roster applicants have a minimum of 15 years of senior level business or professional expertise or legal practice before they apply for the roster.

The AAA looks for certain qualities, such as:

- > commitment to impartiality and objectivity;
- > dispute management skills;
- > judicious temperament, patience, and courtesy;
- > respect of bar or business community, and
- > strong academic background and professional or business credentials.

The AAA is committed to an ongoing review of its roster. Current panelists and new applicants are regularly evaluated as to their performance, case management skills, neutrality, ethics, training, and suitability for current and future caseloads. The AAA actively monitors the quality and composition of its roster and is committed to providing parties with diverse panelists. This provides a roster of experienced neutrals able to meet the parties' needs.

An AAA Glossary of Dispute Resolution Terms

Some commonly used dispute resolution terms are:

Arbitration is the submission of a dispute to one or more neutral and impartial persons, called arbitrators, for a final and binding decision.

Awards are the decisions of arbitrators. Awards are made in writing, and the winning party may confirm and then enforce an award in court pursuant to state and federal laws.

Case managers/case administrators are the AAA employees assigned to administer cases. The case manager is responsible for the general management and administration of a particular case and works with the parties on arbitrator or mediator selection, scheduling status conferences and other hearings, and the exchange of communications among the parties and the arbitrator or mediator. The case manager/administrator also manages the financial aspects of the case.

Caucuses are meetings in which a mediator talks with the parties separately to discuss the issues.

Claimant(s) is the party(ies) who files the demand or submission for arbitration.

Consent Awards are settlement agreements entered into by the parties, signed by arbitrators and issued as Awards.

Counterclaims are counter demands made by a respondent seeking affirmative relief against a claimant. They are not mere answers or denials of the claimant's allegations.

Demands for Arbitration are unilateral filings of claims in arbitration, based on a contractual or statutory right. Demands also refers to the forms used, for example, the Demand for Arbitration form used to initiate an arbitration.

Early Neutral Evaluation (ENE) is a confidential process in the early stage of a dispute in which parties work with a neutral evaluator who possesses the required expertise to assess the dispute. ENE seeks to determine best and worst case alternatives that can point the way to a negotiated agreement. The neutral evaluator does not make a binding decision unless all parties request that.

Emergency Arbitrator is the arbitrator appointed before the merits arbitrator is selected, to decide requests for emergency relief.

Ex Parte refers to communication that takes place without the presence or participation of all the other parties involved.

Hearing is a proceeding in which the arbitrator hears or receives evidence for the purpose of determining the facts of a dispute and reaching a decision based on evidence.

Mass Arbitration refers to a group of cases filed by or against a common party and all parties' representation is consistent or coordinated across the cases.

Mediation is a process in which a neutral person, the mediator, assists the parties in reaching their own settlement but does not have the authority to make a binding decision.

Merits Arbitrator is the arbitrator appointed to resolve the substantive issues in the arbitration.

Negotiation is a process in which parties in a dispute communicate their differences to one another and try to resolve them.

Parties are those individuals or entities with a dispute.

Process Arbitrator is the arbitrator appointed to manage the procedural aspects of the arbitration. The process arbitrator does not decide the merits of the case.

Respondents are the responding parties.

Submission to arbitration or mediation is a filing agreed to by all parties to a dispute, when parties do not have a pre-existing agreement to resolve their disputes using arbitration or mediation.

How Does Mediation Differ From Arbitration?

Arbitration is a process – less formal than court litigation - in which an impartial third party, the arbitrator, makes a binding decision regarding the parties' claims and defenses.

Mediation is a process in which an impartial third party, the mediator, assists the parties in reaching their own settlement. Mediation is less formal than arbitration, and the mediator does not have the authority to make a binding decision as to the parties' dispute.

While an arbitrator usually holds an evidentiary hearing, a mediator does not hold hearings but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and the parties' respective positions. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, and they render an award, a final and binding decision.

In both joint sessions and caucuses with each side, a mediator works to facilitate a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to:

- > reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
- > open discussions into areas not previously considered or inadequately developed;
- > communicate positions or proposals in understandable or more palatable terms;
- > probe and uncover additional facts and the real interests of parties;
- > help each party to better understand the other party's view and evaluation of a particular issue, without violating confidences;

- > narrow the issues and each party's positions, and deflate extreme demands;
- > gauge the receptiveness for a proposal or suggestion;
- > explore alternatives and search for solutions;
- > identify what is important and what is expendable;
- > prevent regression or raising of surprise issues; and
- > structure an agreed settlement to resolve current problems and parties' future needs.

Types of Disputes Resolved by Mediation

Mediations can resolve any type of civil dispute. Almost any type of business dispute that parties want resolved quickly and inexpensively can be submitted to mediation.

The Benefits of Mediation

The benefits of successfully mediating a dispute to settlement vary, depending on the parties' needs and interests. The most common advantages are:

- > parties are directly engaged in the negotiation of the settlement;
- > the mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives they might not have considered on their own;
- > a mediation can be scheduled at an early stage in the dispute, and a settlement can be reached much more quickly than in litigation;
- > parties generally save money through reduced legal costs;
- > parties enhance the likelihood of continuing their business relationship; and
- > the settlement agreement can include creative solutions or accommodations tailored to the parties' needs.

In the interest of swift and low-cost dispute resolution, parties with arbitrations the AAA is administering can submit their disputes to mediation under the applicable AAA mediation procedures.

Mediation Can Take Place Any Time

Parties can turn to mediation at various times during the life of their dispute. First, parties can mediate when a dispute initially arises and before any party even files a lawsuit or arbitration. Second, mediation can take place while litigation or arbitration is pending. That is, as soon as the parties file a lawsuit or arbitration,

they can use mediation to resolve the dispute at any time between the start of litigation or arbitration and the court decision or arbitrator award. Third, mediation can take place during or immediately after a trial or hearing but before a decision is rendered.

The Mediators

AAA mediators are carefully selected attorneys, retired judges, and subject matter experts who have completed mediation training. AAA selects only highly respected and experienced individuals to be on its roster of mediators.

Scheduling a Mediation

Once parties have agreed on a mediator, a mediation can be conducted on the first mutually available date and can take place via videoconference, phone, or in person over one or more sessions. Of course, the parties may agree to have their mediation take place at any time depending on the circumstances of their case.

Stages of a Mediation

I. The Agreement to Mediate

As mediation is a voluntary process, the parties must agree to mediate their dispute under the applicable AAA mediation procedures. This may be accomplished by filing a Request for Mediation or Submission to Mediation.

Request for Mediation

The parties can provide for the mediation of future disputes by including a mediation clause in their contract. A typical mediation clause reads as follows:

If a dispute arises out of or relates to this contract or the breach thereof and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

The clause also may specify the qualifications of the mediator, the locale of the mediation session, the submission of mediation statements, and any other item of concern to the parties. When a party files a Request for Mediation, the requesting party must include with their Request a copy of the mediation clause contained in the contract under which the dispute arose. A Request for Mediation form can be found on the AAA's website at **www.adr.org**.

Submission to Mediation

If the parties did not include a mediation clause in their contract, they may submit an existing dispute to mediation by filing a submission form signed by all parties or their authorized representatives. A Submission to Dispute Resolution form can be found on at **www.adr.org**.

II. Selection of the Mediator

Upon receipt of the Request for Mediation or the Submission to Mediation, the AAA either will appoint a qualified mediator or will send the parties a list of qualified mediators, along with their resumes. AAA encourages the parties to agree on a mediator from the list. However, if the parties do not agree, each party may strike

names from the list and rank the remaining mediators. The AAA appoints the highest-ranked mutually agreeable mediator.

Once a mediator is appointed, the AAA will ask the mediator to disclose any potential conflicts with the parties and/or their counsel. The AAA will request that the parties review the disclosures closely and advise the AAA if there are any objections to the mediator's appointment. As it is essential the parties have complete confidence in the mediator's ability to be fair and impartial, the AAA will replace any mediator not acceptable to all parties.

III. Preparation for the Mediation Session

To prepare for mediation, the parties may want to:

1. Identify and analyze the issues involved in the dispute.
2. Identify and prioritize the needs and interests in settling the dispute and consider realistic expectations, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.
3. Determine courses of action, positions, and tradeoffs and explore a variety of possible solutions. Ready facts, documents and sound reasoning to support your claims.
4. Recognize the strengths and weaknesses of your case and anticipate the other party's needs, demands, strengths and weaknesses, positions, and version of facts.

IV. The Mediation Conference

The parties should come to the mediation conference prepared with the evidence and documentation they feel will be necessary to discuss their respective cases. Parties are entitled, of course, to representation by counsel at the mediation.

At the outset, mediators normally describe the procedures and ground rules covering each party's opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of the proceedings.

After these preliminaries, the mediator may ask each party to describe its respective views of the dispute. The initiating party discusses its understanding of the issues, the facts surrounding the dispute, what it wants, and why. The other party then responds and makes a similar presentation. In this initial session, the mediator may seek to gather as many facts as possible and to clarify discrepancies. The mediator will work to understand the perceptions of each party, their interests, and their positions on the issues.

When the mediator believes that joint discussions have reached a stage where no further progress will be made, the mediator often meets with the parties in caucuses. Holding separate sessions with each party, the mediator may shuttle back and forth between parties. The mediator may also bring the parties back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party's version of the facts, priorities, and positions, to loosen rigid stances, to explore alternative solutions, and to seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party's positions. The mediator does not serve as an advocate but as an "agent of reality." The mediator encourages each party to think through its demands, priorities, and views, and to understand the other party's arguments.

An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator broadens the parties' perceptions of their cases in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator helps the parties consider different alternatives and moves the discussion toward tradeoffs and acceptable accommodations.

During the final caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator may make suggestions about a final settlement, stress the consequences of failure to reach agreement, emphasize the progress that has been made, and formalize offers to gain an agreement.

The mediator acts as a facilitator to keep discussions focused and to avoid new issues to dispute. The mediator often will have the parties negotiate the final terms of a settlement in a joint session. In the final session, the mediator will verify the specifics of an agreement to make sure the terms are comprehensive, specific, and clear.

V. The Settlement

When the parties reach an agreement, they should reduce the terms of the settlement to writing. If the mediation relates to an arbitration already pending with the AAA, the parties may request the settlement include a consent award for the arbitrator to issue in the arbitration case.

If the parties fail to resolve any or all of their disputes in the mediation, the parties may submit the dispute to binding arbitration to be administered under the appropriate arbitration rules. In accordance with the AAA's Commercial Mediation Procedures, the mediation is confidential, and the information offered in mediation may not be used in arbitration (or in subsequent litigation).

Cost of the Mediation

The mediation costs generally are borne equally by the parties. The parties may adjust this arrangement by agreement. Before the mediation session begins, the mediator will provide the AAA with an estimate of their anticipated total compensation and any expenses, and the AAA will request deposits from the parties based on that estimate. Each party will pay its portion of the requested deposit. When the mediation concludes, the AAA will render a financial accounting and will return to the parties any unused mediator compensation/expense deposits.

Fixed-Rate Mediation

The Fixed-Rate Mediation Program is designed to provide parties with a cost-effective approach to resolving two-party disputes where the claim amount is \$100,000 or less by submitting a dispute to a mediator. Parties that mediate under this program are charged a fixed rate inclusive of AAA fees and mediator compensation. Mediations under this program include a one-day mediation conference, a pre-mediation conference call with the parties and mediator if requested, and the mediator's review of pre-mediation statements.

For the current AAA administrative fee schedule, visit **www.adr.org/rules**.

Stages of an Arbitration

I. The Agreement to Arbitrate

To initiate arbitration, the parties must have an agreement to arbitrate or a Court Order requiring arbitration. As with mediation, the agreement to arbitrate can be of one of two kinds: a pre-dispute arbitration clause in a contract or, where the parties did not provide in advance for arbitration, a submission of an existing dispute to arbitration.

The parties can provide for the arbitration of future disputes by inserting the following clause into their contracts .

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.

If the parties do not have an arbitration clause in their contracts, but have unanimous agreement to submit a dispute to arbitration, that can be accomplished through the following language:

The parties hereby submit the following dispute to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.

When drafting an arbitration clause for future disputes or post-dispute submission, parties may consider including the number of arbitrators, qualifications of the arbitrator(s), locale of hearings, allocation of payment, etc. The AAA has free tools to help the parties draft arbitration clauses. ClauseBuilder and ClauseBuilder AI will guide the parties to the essential elements of a clause, concluding with language that can be included in any contract. For more information visit **www.clausebuilder.org** or **www.clausebuilder.ai**.

Filing Requirements

Once there is an agreement to arbitrate, a party can initiate an arbitration easily by filing a Demand for Arbitration with the AAA (the demand forms are available at www.adr.org). The Demand for Arbitration form is strongly recommended but not required, as long as all the necessary information is included elsewhere with the filing. The filing party also must provide a copy of the arbitration agreement and pay the appropriate filing fee. The filing party must serve the respondent party with the demand and arbitration agreement. After the AAA receives the required documents and the filing fee, it will assign the case to a case manager/case administrator who, from that point forward, is responsible for expediting administration of the case and assisting both sides in all procedural matters until the case is closed.

Pursuant to the AAA rules, the parties and the AAA may use electronic communication such as email to give the required notices.

For most cases, it will be important to determine where – city and state - the arbitration hearing will take place. If the place of arbitration (the locale) has not been designated in the contract, and if the parties have not otherwise notified the AAA of their agreement on locale, the AAA will designate the hearing locale in accordance with its rules. Among the factors AAA considers are:

- > locations of the parties (note that location of the parties' counsel is generally less relevant);
- > locations of witnesses and documents;
- > the location of sites or place or materials;
- > relative costs to the parties;
- > the place of performance of the contract;
- > laws applicable to the contract;
- > places of previous court actions, if any;
- > the location of the most appropriate arbitrators; and
- > any other reasonable arguments that might affect the locale determination.

Arbitration hearings can take place in any city; they are not limited to where the AAA maintains an office. Hearings may be in-person, or held via videoconference, teleconference, or some hybrid format.

An Important Note Concerning Consumer-Related Disputes

The AAA applies the *Consumer Arbitration Rules* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA has the discretion to apply, or not to apply, the *Consumer Arbitration Rules* in any specific case, and the parties may bring to the arbitrator's attention any disagreement concerning the rules to be applied. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of the court's jurisdiction, even in consumer arbitration cases filed by the business.

For additional information on the AAA and consumer-related disputes, please review the *Consumer Due Process Protocol*, the *Consumer Arbitration Rules*, and other material found on our website at **www.adr.org**.

Mass Arbitration

The AAA defines mass arbitration as a group of arbitration demands filed by or against a common party, where the parties' representation is consistent or coordinated across the cases. The threshold for a consumer or employment/workplace mass arbitration is 25 cases. For other types of disputes, including business-to-business and construction, the threshold is 100 cases.

In mass arbitration, each case proceeds to an individual award on the merits. This differs from other forms of group actions such as class or collective actions, where a single award is rendered for the entire group.

The AAA's *Mass Arbitration Supplementary Rules* govern mass arbitrations administered by the AAA and contain a number of efficiencies for administering these caseloads, namely, a Process Arbitrator appointed near the outset of the caseload to decide any disputed non-merits issues. Parties also are required to mediate the disputes unless either side opts out.

If mediation is unsuccessful, then after the Process Arbitrator phase is complete, the cases move to individual merits arbitration for hearing and final adjudication.

The AAA *Mass Arbitration Supplementary Rules* are focused on eliminating deadlock on important issues and getting parties to resolution more efficiently.

To learn more about mass arbitration, please visit www.adr.org/mass-arbitration.

Emergency Measures of Protection

If the arbitration clause does not exclude emergency or temporary interim relief from arbitration or if all parties agree, and a party believes emergency relief is required before an arbitrator has been appointed, the AAA's Commercial Arbitration Rules provide for Emergency Measures of Protection.

A party seeking emergency relief before the merits arbitrator has been appointed must notify the AAA and all other parties in writing of the nature of the relief sought, the reasons why such relief is required, and why the party is entitled to such relief on an emergency basis. Within one business day of the AAA's initiating the request for emergency relief, the AAA will administratively appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated for that purpose. The emergency arbitrator will make disclosures, if any, and the parties will have one business day to object to the emergency arbitrator's appointment on the basis of the disclosure.

The rules provide an expedited timeframe for the emergency arbitrator to set a schedule for deciding the request for emergency relief. If the arbitrator determines the requesting party is entitled to relief, the arbitrator may enter an interim order or award granting the relief and stating the reasons for the order or award. Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the non-emergency ("merits") arbitrator is appointed. The emergency arbitrator has no further power to act after the merits arbitrator is appointed unless the parties agree that the emergency arbitrator is named as the merits arbitrator or as a member of the panel. The Emergency Measures rule contains a provision on the apportionment of costs. When apportioning costs, the emergency arbitrator may take into consideration whether the request for emergency relief was made in good faith.

Due to the time-sensitive nature of Expedited Procedures, requests for emergency relief are not permitted under the Expedited Procedures (cases under \$100,000 at issue).

II. Selection of the Arbitrator

The AAA maintains a national and international Roster of Arbitrators from various fields of experience and specialization to serve the business community.

When appointed by the AAA, arbitrators serve under the AAA Commercial Arbitration Rules and their conduct is guided by the *The Code of Ethics for Arbitrators in Commercial Disputes*. The AAA's Commercial Rules require that parties and their representatives conduct themselves in accordance with the AAA's *Standards of Conduct for Parties and Representatives* in their AAA cases.

Unless the parties have agreed on another method for arbitrator appointment, the AAA uses the following process for selecting the arbitrator:

1. Parties are encouraged to agree on an arbitrator(s). If the parties cannot agree, the AAA sends each party a copy of the same list of proposed arbitrators to resolve the controversy. In preparing the list for any specific arbitration case, the AAA case manager is guided by the nature of the dispute, locale, and parties' preferences (if any). The AAA case manager will include each listed arbitrator's resume, which contains biographical information and rate of compensation.
2. Parties are encouraged to agree on an arbitrator(s) from the provided list. If they cannot agree, each side will strike the arbitrators to whom they object and number the remaining arbitrators' names in order of preference. While the AAA encourages its arbitrators to keep their biographical information current, each party is encouraged to research the listed arbitrators.
3. After the parties return their lists to the AAA, the AAA compares indicated preferences and appoints the highest-ranked, mutually agreeable arbitrator.
4. If there are no mutually agreeable arbitrators from a list, the AAA either may provide an additional list of proposed arbitrators or it may administratively appoint the arbitrator. If AAA administratively appoints the arbitrator, it will not choose an arbitrator whose name was crossed out on a list by either party.
5. Once appointed, the arbitrator conducts a conflicts check and makes any disclosures on the parties, counsel and any identified potential witnesses, and AAA sends the arbitrator's disclosures to the parties with the arbitrator's appointment notices. The parties then have an opportunity to object to the arbitrator's appointment on the basis of the disclosures.

Panels with Party-Appointed Arbitrators

Some arbitration clauses specify that each party to a dispute appoints one arbitrator. Those two arbitrators then select a third arbitrator to chair the panel (from the AAA's Roster), usually following the procedures described in steps 2-4

above. The party-appointed arbitrators are neutral and must meet the impartiality and independence standards set forth within the rules unless the parties specifically agree in writing that the party-appointed arbitrators are to be non-neutral.

In cases involving non-neutral party-appointed arbitrators, the AAA still obtains and shares disclosures, as described in step 5 above, but it also recommends that the neutral chair ascertain from the party-appointed arbitrators the nature and extent of any relationship between them and the parties that appointed them as well as whether there will be any direct communication between such arbitrators and the parties throughout the arbitration.

Even in cases in which party-appointed arbitrators are non-neutral, the AAA recommends that parties agree not to communicate *ex parte* with their party-appointed arbitrator after the appointment process has been completed.

III. Preparation for the Hearing

After the arbitrator is appointed, depending on the complexity of the case, the arbitrator may set a preliminary hearing. The purposes of the preliminary hearing are to specify the issues in dispute, to discuss any uncontested facts, and to consider other matters that may expedite the arbitration proceedings.

Consistent with the expedited nature of arbitration, the arbitrator usually will establish at the preliminary hearing a schedule for (i) the production of relevant documents and other information, if the arbitrator allows for any information exchange, (ii) the identification of witnesses to testify at the hearing, and (iii) further hearings to resolve the dispute.

The arbitrator, in consultation with the AAA case administrator and the parties and/or their representatives, will determine a mutually convenient date and time for the evidentiary hearing. If the parties cannot agree, the arbitrator has the discretion to set the hearing date.

Occasionally, a party needs to postpone a scheduled hearing. If this occurs, before contacting the AAA, the party seeking postponement should contact the other party to obtain its consent to the postponement as well as alternate hearing dates. If the other party does not consent to the postponement, the AAA should be so advised. The case administrator then will coordinate with the arbitrator, who will decide the postponement request. In no event should the parties contact the arbitrator directly unless the parties and the arbitrator have agreed to utilize the

AAA's Direct Exchange Program, which allows the parties to communicate directly with the arbitrator as long as all parties and the AAA are copied at the same time.

The arbitrator will base the award on the facts, exhibits, witness testimony and arguments the parties present at the hearing and in any pre- or post-hearing briefing. Accordingly, it is essential that the parties or their representatives carefully prepare for the hearing. The parties may want to:

1. Assemble all documents and information they will need at the hearing. The parties will make arrangements with the arbitrator on how to exchange documents and exhibits, including using the AAA's Hearing Exhibits space on AAA WebFile®. If a party needs documents that are in the possession of the other party, the party should ask that the documents be brought to the arbitration. Under some state arbitration laws, the arbitrator or another person has the authority to subpoena third-party documents and witnesses. A checklist of documents and exhibits will be helpful toward your orderly presentation.
2. If it will be necessary for the arbitrator to visit a building site or other location for an on-the-spot investigation, make plans in advance. The arbitrator must be accompanied by representatives of both parties, unless they specifically authorize that the investigation be conducted without their presence or unless one party fails to attend after being notified.
3. If there is a possibility that others, not on your regular list of witnesses, might have to appear, alert them to be available on call without delay.
4. If a transcript of the hearing is needed, the parties are responsible for making the arrangements and notifying the other parties of such arrangements in advance of the hearing. The parties may contact the case administrator for recommendations of third-party transcription service vendor.

Parties can serve their own best interests by presenting their cases in an expeditious and orderly way, thereby facilitating the arbitrator's tasks and reducing the costs involved.

Representation

The AAA's rules provide that a party may be represented in an arbitration by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be represented should notify the AAA and the other side at least seven days before the hearing. When arbitration is initiated by a representative or when the respondent replies through a representative, such notice is deemed to have been given.

IV. Presentation of the Case

Arbitration hearings are similar to court trials, except that arbitrations are less formal and more flexible. Additionally, arbitrators are not required to follow strict rules of evidence, so they may be inclined to accept evidence that judges might not allow. The arbitrator will decide the admissibility, relevance, and materiality of the evidence a party offers, and the arbitrator may exclude evidence they deem to be cumulative or irrelevant.

It is customary for the claimant to proceed first with its case, followed by the respondent. The arbitrator may vary this order when the arbitrator thinks it is necessary or efficient. Both the claimant and the respondent have the responsibility to present their cases to the arbitrator in an orderly and logical manner. This includes:

1. An opening statement, if allowed, that clearly but briefly describes the controversy and indicates what is to be proved. Such a statement lays the groundwork and helps the arbitrator understand the relevance of the testimony to be presented.
2. A discussion of the remedy sought. Because the arbitrator's power is conferred by the parties' arbitration agreement, each party should try to show that the relief that it requests is within the arbitrator's authority to grant.
3. Introduction of witnesses in a systematic order to clarify the nature of the controversy and to identify documents and exhibits. Cross-examination of witnesses is important, but each party should plan to establish its case by its own witnesses.
4. A closing statement, if any, that summarizes the party's evidence and arguments and refutes the opposing party's points.

After both sides have had a fair opportunity to present all of their evidence, the arbitrator declares the hearing closed. While the above outlines the typical arbitration process, an arbitrator may alter it to fit the needs of the case.

The Award

The award is the arbitrator's decision on the matters submitted under the arbitration agreement. Under the AAA rules, if the arbitration panel consists of more than one arbitrator, the majority decision is binding. The purpose of the award is to dispose of the controversy finally and conclusively. The award should be made within the limits of the arbitration agreement, and it should decide each claim submitted. Arbitrators generally are not required to write opinions stating the reasons for their decisions (a "reasoned award"). As a general rule, AAA commercial awards

consist of a brief explanation to the parties. In some cases, however, both parties will request the arbitrator issue a reasoned award, or the arbitration agreement may provide for one.

The arbitrator's jurisdiction ends with the issuance of the award. Other than limited modification pursuant to the AAA rules, the arbitrator may not change an award, once issued, unless the parties agree to restore the power of the arbitrator or unless the law provides otherwise.

If a party requests modification of an award in accordance with the AAA rules, such request must be in writing and submitted within the time limit provided by the AAA rules, and the opposing party may provide a response. The AAA will forward the request and response to the arbitrator for decision. Under the rules, however, the arbitrator cannot re-determine the merits of any claim already decided.

The AAA's case administration services generally conclude with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary. However the AAA is not involved or included in that process.

Procedures for Large, Complex Disputes

Recognizing that large, complex arbitrations often present unique procedural problems, the AAA, working with attorneys, arbitrators, and industry advisory groups, developed *Procedures for Large, Complex Disputes*. The overall purpose of these procedures is to provide for efficient, economical, and speedy resolution of larger disputes. The procedures provide for an early administrative conference with the AAA and a preliminary hearing with the arbitrator(s), both conducted via telephone or videoconference. The procedures provide for additional possible exchange of documents and other essential information that regular track cases do not permit.

Expedited Arbitration Procedures

The AAA will apply its Expedited Procedures in any commercial case where no disclosed claim or counterclaim exceeds \$100,000, exclusive of interest and arbitration costs. Those procedures provide for a streamlined administrative process and for the arbitrator to render an award no later than 14 days from the date the hearing closes.

International Cases

In order to best serve the parties in any international dispute resolution proceeding, the International Centre for Dispute Resolution® (ICDR®), AAA's international division, handles all international matters, including the administration of international mediation and arbitration cases. This international administrative system is set apart from the AAA's domestic administrative services. The key distinction is to provide the international business and legal community confidence in having an award that will be internationally recognized and enforceable.

An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States or having an arbitration agreement between parties from different countries. ICDR administration is designed for parties that have differing languages, legal systems, and cultural backgrounds. The ICDR maintains specialized administrators and multilingual attorneys in offices throughout the US and abroad and a worldwide panel of arbitrators and mediators.

Administrative Fees

As a not-for-profit organization, the AAA prescribes an initial filing fee and a final fee to compensate for the cost of providing administrative services. The initial filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. The final fee is billed when the hearing is scheduled. These administrative fees are based on the amount of the claim or counterclaim.

In an effort to make arbitration costs reasonable to consumers, the AAA has a separate fee schedule for disputes arising from agreements between individual consumers and businesses, where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. Please refer to the *Consumer Arbitration Rules* and applicable Costs of Arbitration fee schedule when filing a consumer-related claim.

Arbitrator compensation is not included in the administrative fees parties pay to AAA. The parties are responsible for compensating the arbitrator at their published rate (hourly or daily) for regular track and large complex commercial cases. Arbitrators in expedited matters receive a fixed rate determined by the

AAA. The AAA does not retain any portion of the arbitrator's compensation. Any unused portion of the arbitrator's compensation will be refunded at the conclusion of the arbitration.

For more information and complete listing of all AAA fees schedule and refund schedule, please visit our website at **www.adr.org/Rules**.

As an additional service, certain AAA offices have hearing rooms available for rental by the parties. Check with the local AAA office for rates and availability.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

