

**MODEL OF ARBITRATOR COMPETENCE — A SKILLS
ANALYSIS**

(a) Case Management Skills

General Definition: The ability to organize and prepare for the arbitration in an efficient and effective manner.

- **Ability to design and maintain office systems**
 - maintains a recording system
 - sets up a correspondence system
 - regularly reviews and controls diary entries
 - maintains a case file monitoring system
 - maintains full and up to date costing files
 - maintains full and up to date accounting files

- **Ability to allocate time, effort and other resources effectively**
 - reviews documents received from parties
 - develops an overall perspective of the case
 - draws up a timetable for preparation and conduct of the arbitration

- **Ability to work according to systems or rules governing the handling of cases**
 - records details of the appointment (e.g., terms, conditions and fee)
 - confirms the appointment in writing with both parties

- ensures all correspondence is provided to both parties
- ensures all correspondence received has been provided to the other party
- draws up a timetable

- Ability to bring the file to completion
 - quickly drafts award
 - if on a panel, works co-operatively to draft the decision
 - promptly notifies the parties on completion of the award

(b) Procedural Skills

General Definition: The ability to conduct matters that are referred to arbitration using fair, flexible and effective procedures.

- Ability to determine if appointment is legitimate (jurisdiction)
 - checks contract between the parties and in particular the arbitration clause
 - checks to ensure agreement is effective or in existence
 - ensures that issues in dispute are covered by the terms of the arbitration clause
 - ensures there is no reason for parties to challenge the appointment (e.g., independence and impartiality)
 - ensures appointment is not inconsistent with local laws or institutional rules

- Ability to deal with preliminary matters

- calls preliminary meeting if requested or required, in consultation with the parties
 - gives directions to parties on pleadings and disclosure of evidence
 - requests that parties disclose all relevant information at the earliest opportunity (to arbitrator and parties)
 - encourages parties to come to an agreement on as many facts as possible prior to the arbitration
 - ensures all procedural steps have been exhausted as required
- **Ability to supervise preliminary meetings or pre-trials**
 - supervises conduct of the meeting
 - explains in advance the procedure of the meeting or pre-trial and particularly that which might cause surprise
 - intervenes when necessary
 - persuades parties to come to agreement on as many procedural aspects of the case as possible
- **Ability to handle interlocutory matters**
 - hears the parties' arguments on the matter
 - characterizes and decides the points at issue
 - defines and supervises a fair interlocutory procedure
- **Ability to conduct a fair hearing**

(c) Introductory

- clearly explains the role of the arbitrator
- clearly defines ground rules and procedure
- clearly explains procedure to parties
- invites parties to estimate time necessary for the hearing

(d) Hearing

- affords each party full and proper opportunity to present its case
- allows each party the opportunity to examine the other party's witnesses
- allows parties to make and respond fully to objections
- allows parties adequate time to respond to surprises
- decides quickly on procedural objections
- keeps interruptions to a minimum
- narrows issues (by clarification without unnecessarily adding or interjecting)
- maintains order
- Ability to handle witnesses
 - explains procedure to witnesses where necessary
 - for expert witnesses, considers legitimacy of expertise
 - encourages expert witnesses to make use of lay language

- **Ability to keep a record of the evidence**
 - ensures a proper record is kept of submissions and evidence
 - subjects record to review and organization frequently
 - analyzes record periodically during the hearing
 - limits evidence to relevant topics
- **Weighs the evidence, and if necessary, decides upon admissibility**

(e) Decision Making Skills

General Definition: The ability to reach a principled decision determining the rights and liabilities of the parties in the dispute and to expound that conclusion in the form of a reasoned award.

- **Ability to understand the factual issues**
 - separates the parties' claims and issues
 - identifies the real issues between the parties
 - reconstructs the issues in terms which will facilitate a solution
 - evaluates the strengths of arguments and counter-arguments
 - evaluates the submissions and the relevant evidence
 - acknowledges those issues that are of no or little relevance
- **Ability to define the legal issues and apply them to the facts**
 - determines the relevant principles of law
 - applies the relevant law to the specific facts of the case
 - distinguishes between different sources of law (i.e., the contract between the parties, the local law, or the law of an institution)
 - uses deduction to determine the application of relevant principles of law
- **Ability to come to a decision**
 - reaches an independent and impartial decision after careful analysis of all the relevant data

- **Ability to articulate the decision**
 - articulates succinctly the reasons and the terms of the award as well as the evidence considered and the weight given to the evidence
 - uses terminology appropriate to the audience to which it is directed

(f) Award Writing Skills

General Definition: The ability to effectively convey a decision in writing.

- **Ability to address formalities**
 - cites parties' names, dates, etc.
 - knows requirements of formalities
- **Ability to summarize briefly facts and issues**
 - briefly describes the nature of the dispute and how it arose
 - summarizes evidence and submissions
 - identifies undisputed facts and law agreed upon
 - distinguishes parties' claims and issues
 - reconstructs issues in terms which facilitate a solution
 - separates relevant and irrelevant facts
- **Ability to reference the law relied on**
- **Ability to substantiate the decision**
 - correlates findings with relevant evidence
 - explains chosen weighting of evidence
 - shows inconsistencies in the evidence
- **Ability to convey the decision clearly to the parties**
 - writes clearly and concisely
 - logically proceeds with thoughts (e.g., connected paragraphs)
 - uses appropriate language for the audience
 - presents decisions in an impartial manner
 - articulates succinctly the reasons for reaching the decision

(g) Interpersonal Skills

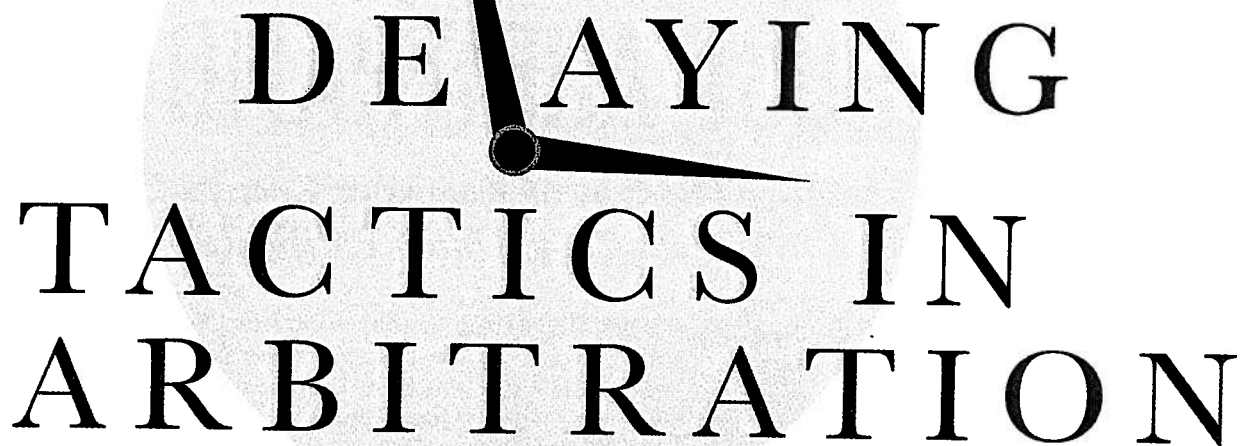
General Definition: The ability to control the arbitration process in a manner which engenders mutual respect between all those involved in an arbitration, to communicate effectively and facilitate others in doing so and to demonstrate commitment to resolving satisfactorily the dispute entrusted.

- **Ability to maintain a good relationship with the parties**
 - acts with courtesy, respect and patience
 - indicates interest in the issues and the parties
 - does not pre-judge the parties or the issues
 - is modest in attitudes held towards others and in self regard
 - devotes such care and attention to the case as the parties might reasonably require

- **Ability to remain impartial and independent**
 - does not send unilateral correspondence
 - discloses all facts which may give rise to doubts about potential impartiality
 - allows equal opportunities to both parties to correspond with arbitrator
 - remains detached but not unfriendly
 - avoids relationships which might expose pressure or coercion
 - controls emotion
 - never discusses the merits of the case with one party in the absence of the other
 - ensures each party has all documents

- **Ability to maintain legitimacy**
 - personal appearance commands respect
 - is punctual
 - has a quietly assured manner
 - maintains consistent behaviour
 - if uses own expertise, gives parties a chance to comment
 - is discreet and diligent
 - keeps all information confidential
 - acts with self confidence and authority

- **demands respect for the office of arbitrator**
- **Ability to listen actively**
 - **remains visibly alert at all times**
 - **does not interrupt**
 - **intervenes selectively**
- **Ability to speak effectively**
 - **uses clear diction**
 - **clarifies or paraphrases where necessary**
 - **asks succinct questions if necessary**
 - **is direct but not intimidating**
 - **adopts a moderate volume and pace of speaking**
 - **uses an unemotional detached tone of voice**
 - **uses simple language**
 - **uses terminology of the parties' profession**
- **Ability to maintain a civil atmosphere at the hearing**
 - **uses civil language**
 - **uses some humour**
 - **displays understanding of evidence and submission**
 - **puts parties and witnesses at ease**
 - **does not use distracting body movements**
 - **discourages an excessively adversarial climate**



DELAYING TACTICS IN ARBITRATION

BY ALAIN FRÉCON

Let's face it. Anyone involved with arbitration has either engaged in or seen another party use delaying tactics to stall the regular flow of arbitration. Such tactics are almost universally frowned upon by arbitrators and attorneys, except that there is no rule prohibiting their use when it would serve the interest of a party who can afford to delay. This article analyzes the most common delaying tactics, their timing and efficient management tools arbitrators can use to minimize their impact on the process.

No one likes it when a party uses delaying tactics to stall the normal course of an arbitration, whether it is an *ad hoc* (i.e., self-administered) or an administered proceeding.¹ It is generally assumed that the respondent is the most likely party to seek to delay the arbitration, arguably because it would benefit from a postponement of the outcome. However, experience teaches that this is not the exclusive privilege of respondents. Claimants have reasons of their own to instigate delay.

Since arbitration is a voluntary process created by the parties for their own benefit, there is little doubt that one or both parties can exert enough control over the process to slow it down. A party may have a variety of reasons for doing so.

Fortunately, delaying tactics are rarely abused to the point of totally defeating the arbitration process. There are several reasons for this. First, parties generally do not want to increase the costs of arbitration. Second, their attorneys know that lengthy delays may cause confusion and prevent the arbitrator from focusing on the crucial issues and facts of the case. Third, arbitrators have the power to minimize delay through effective management.² Well-trained, experienced arbitrators are more likely to have the skills necessary to curb a party's inclination to delay the process.

This article examines purposeful delaying tactics and when they are used. Then it addresses what arbitrators can do to minimize or eliminate these delays.

What is a Delaying Tactic?

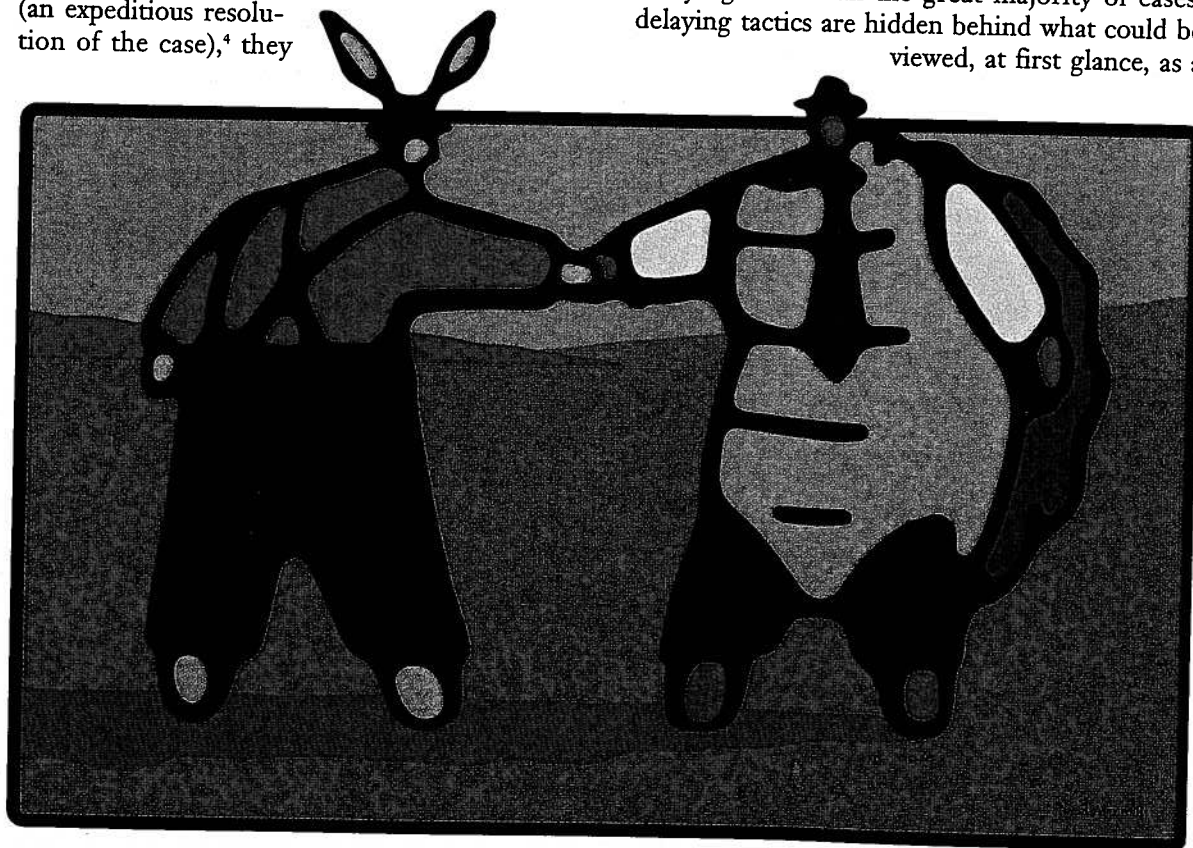
A delaying tactic³ is any reason or excuse given to intentionally delay an arbitration from proceeding. The usual purpose of delaying tactics is to postpone the discussion of a particular topic or the resolution of a particular issue or to confuse the arbitrator about the merits of the case. Because delaying tactics are contrary to one of the goals of arbitration (an expeditious resolution of the case),⁴ they

tend to be perceived negatively. By lengthening the process, they increase costs and expenses and often antagonize the adversary. When delaying tactics are used, there is usually little doubt of their happening. Most of the time, a party who seeks a delay will file an unnecessary motion raising one or more legal or procedural issues, or fail to comply with a deadline. Either the arbitrator or a court, as the case may be, must rule on the motion or address the noncompliance before the process can continue.

Often, delaying tactics are triggered after a sudden event, such as an abruptly cancelled meeting, or the unexpected raising of a legal or procedural issue. For purposes of this article, the discussion of delaying tactics is divided into three broad categories: jurisdictional challenges, discovery-related motions, and other procedural challenges.

1. Jurisdictional Challenges

Jurisdictional challenges usually focus on one or more of the following: (1) the substantive law applicable to the dispute, (2) the law governing the arbitration procedure, (3) the arbitration rules of the administering organization,⁵ (4) whether the arbitration clause covers this dispute, or (5) whether the contract containing the arbitration clause is valid. In all cases, it is important to distinguish legitimate legal challenges from delaying tactics. In the great majority of cases, delaying tactics are hidden behind what could be viewed, at first glance, as a



legitimate challenge. A party who seeks a delay will usually see an ambiguity where there is none, file unnecessary motions, and generally be obstructive to the normal development of the arbitration. A legitimate jurisdictional challenge, such as to a truly ambiguous or pathological arbitration clause, will trigger a lengthy delay, but that is not the purpose of the challenge.

Under the Commercial Arbitration Rules of the American Arbitration Association,⁶ as well as those of other well-established ADR institutions, arbitrators have the authority to deal with these issues. If they decide these challenges promptly, all the while maintaining control over the arbitration process, delay can be minimized. However, a procedural challenge filed in court before the arbitrator is selected will probably cause a lengthy delay because of the time it takes to conduct court proceedings and because the challenger, if unsuccessful, could file an appeal with a higher court.

2. Discovery Challenges

Delaying tactics during discovery are quite common. Parties frequently claim that they are unable to schedule a site visit, or have a problem complying with the other side's discovery requests. For example, parties often fail to produce requested documents, or claim that the documents sought are missing or unavailable. They also may claim that certain witnesses are unavailable for extended periods of time.

Discovery is one area in which arbitrators clearly have the authority and the duty to manage the arbitration so as to achieve efficiency.⁷ In all instances, it is important for the arbitrator to pro-actively monitor the parties' progress in advancing the discovery process. Failing to do so often leads to last minute surprises. There are several management tools arbitrators can use to curb the inclination to delay discovery. For example, they can require the parties to demonstrate "good cause" for a postponement or a change in a response date. They can encourage the attorneys to bring all matters that could cause delay to the arbitrator's attention. Perhaps the most onerous action an arbitrator can take when a party persistently fails to comply with a discovery request is to draw a negative inference from that conduct. Thus, if a party failed to produce a document that would have contradicted the respondent's position that performance was due by July 1, the arbitrator could infer, in reaching a decision on the merits, that the parties had

agreed to a July 1 performance date. Typically, it suffices for an arbitrator to warn the parties of the consequences of dilatory tactics.

To encourage compliance, arbitrators can tactfully emphasize the importance of a particular discovery request and encourage the parties to voluntarily cooperate. Under most circumstances, this will bring about greater cooperation, at least for a time.

Under the AAA commercial rules, arbitrators are given express authority to deny the admission of cumulative or repetitive evidence, and to bifurcate proceedings, if appropriate for efficient management.⁸ However, the goal of efficiency can collide with due process.⁹ Arbitrators need not accord the same level of due process as is available in court. Had the parties wanted the full protection of judicial due process, they should not have agreed to arbitration. Due process in the context of arbitration arguably has a lower standard of protection—one that is satisfied by a fair procedure, equal treatment of the parties, and the opportunity for the parties to present their case.¹⁰

When a party fails to comply with an allegedly abusive discovery request, the arbitrator must carefully balance the need for efficiency against the requesting party's need to obtain relevant information. Requests that are broadly worded "fishing expeditions"¹¹ probably can be denied without raising due process issues. A prudent approach that should satisfy the requirements of due process would have the arbitrator probe the relevance of each request by asking such questions as, "Why do you need these documents?" or "What is the relevance of that evidence?" This could help narrow the scope of the requests.

To deter a party from claiming that it was not afforded a full opportunity to present its case, arbitrators should explain all of their rulings to the parties. A party will rarely challenge an adverse ruling if the panel's reasons are clearly stated and not in total disregard of the law.

Some discovery requests are extremely burdensome, particularly those seeking numerous electronic files. The reason is that responding to such requests is a time consuming, costly and technologically complex project.¹² For this reason, arbitrators should not hesitate to question the relevance of such requests, taking into consideration the facts at issue and the size of each request.

For example, in a recent arbitration, the claimant asked the respondent (a Fortune 100 com-

When both parties agree to delay, there is little the arbitrator can do.

pany with over 200 distributors worldwide) to produce "all internal e-mails and electronic data" pertaining to the product distributed under the contract. The claimant argued that the respondent had long planned to terminate the contract because it was restructuring its distribution network and wanted to grant that particular contract to another (presumably larger) distributor in a different country. The respondent claimed the production request was onerous and expensive. After a telephone conference with the arbitrator, the parties were able to agree to a more reasonable and focused discovery request at the claimant's expense.

Parties sometimes file mundane discovery motions, for example, asking for information or documents already known to them or even in their possession, solely to slow the arbitration. The parties' ingenuity in this respect is endless and arbitrators can be hard pressed to deny such motions outright. Each motion must be carefully evaluated. To prevent this type of motion practice from getting out of hand, the arbitrator can set time limits for filing motions, limit motion length, and set a short time frame for issuing a ruling.¹³ To expedite rulings when there is a three-person panel, the arbitrators should first agree, and then obtain the parties' agreement, to having the chairperson decide all procedural and discovery motions without the input of the other two arbitrators.¹⁴ However, a disgruntled party could later claim that the process was flawed because not all arbitrators were consulted on an "important" issue. Thus, the person serving as chair of the panel should be sensitive to each situation and decide which motions are important enough to be heard by the entire panel in order to avoid problems later on. If a party later complains about a decision by the chair alone, the party should be reminded of his or her agreement to that procedure.

Most institutional arbitration rules grant arbi-

trators fairly broad authority to decide what evidence is relevant to the case and, if relevant, whether the evidence is cumulative or repetitive, and thus should not be admitted.¹⁵ They also give the arbitrators broad discretion as to how to conduct the proceedings. This discretion far exceeds what inexperienced arbitrators understand their authority to be and what experienced attorneys for the parties may lead them to believe. Most established arbitration rules authorize arbitrators to conduct an efficient arbitration. For example, the AAA commercial rules empower arbitrators to conduct the proceedings "with a view to expediting the resolution of the dispute" and give them discretion to "direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."¹⁶ Arbitrators should not hesitate to use the authority granted by such rules, since that is what they are retained to do.

It cannot be stressed enough that arbitrators must exercise their good judgment and not base their decisions on the fear of being reversed by a court. Many arbitrators make the mistake of liberally granting motions that an experienced arbitrator would deny with a reasoned explanation. Some arbitrators also fail to cut short unduly long examinations of witnesses whose testimony is largely repetitive, for fear that this could lead to the award being vacated. Instead, they could simply suggest that the party's counsel shorten the examination to avoid repetitive testimony.

When both parties engage in delaying behavior during the discovery phase, such as by postponing schedules and preparing extensive discovery requests, arbitrators can be rendered powerless to expedite the process. Institutional arbitration rules recognize the fact that the process belongs to the parties and suggest that the arbitrator should concur with the parties' requests for postponements in such circumstances.¹⁷ Tactful pressures on both parties are the only recourse to minimize delays.

3. Other Delaying Tactics

Perceived procedural irregularities arising in connection with selection of the arbitrator often are the basis for delaying tactics in arbitration. For example, a party may challenge an arbitrator for failing to disclose something that could raise questions about the arbitrator's impartiality. When these challenges are unsuccessful, as they usually are, the decisions are frequently appealed, giving rise to a steady flow of court decisions. Thus, arbitrators

Author Alain Frécon has more than 30 years of experience with commercial and corporate transactions and international litigation. A member of the Minnesota State Bar and a qualified neutral under Rule 114, Minnesota General Rules of Practice, he has been serving as an arbitrator since 1976. He serves on the American Arbitration Association training faculty and is a mediator and arbitrator on the AAA panel for commercial, international and large, complex cases. He also serves on the panel of CPR and the ICC. He can be reached at Alain@freconlaw.com and at 612-338-6868.

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should take these challenges very seriously.¹⁸

Any challenge to the independence of an arbitrator needs to be dealt with swiftly. In *ad hoc* arbitration, the responsibility for hearing the claim falls to the very arbitrator whose independence is being challenged. In administered arbitration, the organization administering the proceeding typically will determine whether the challenge has validity.

Arbitrators are not judges and they must subrogate their personal views and perceptions to the greater integrity of the arbitration process. They must resign whenever a challenge to their impartiality or independence establishes cause at the level stated by the applicable rules.

Parties sometimes want their counsel to claim unfair treatment, bias or partiality in order to intimidate the arbitrator.¹⁹ An arbitrator must promptly dispel unfounded complaints of unfairness, such as the claim that one side's requests are always denied while the other side's requests are always granted. One approach is to inform the parties that intimidation by accusations of partiality will not work, and urge the parties to focus on the orderly presentation of their case.

From time to time, a party might refuse to make timely payments of the arbitrator's compensation or the arbitral organization's fee as a way of delaying the process. When an administered arbitration case is not "fully funded" (that is, one or more parties have defaulted in paying a required fee), the arbitral rules usually leave it to the discretion of the arbitrators to continue the proceedings or to put the case in "abeyance."²⁰ This unfairly fulfills the goal of the party seeking the delay. In *ad hoc* arbitration, putting a case in abeyance for nonpayment of the arbitrator's compensation creates a delicate ethical issue, since the arbitrator knows the identity of the defaulting party. In administered arbitration, arbitrators are admonished never to discuss compensation issues directly with the parties; the administering institution performs that role, thereby preserving the arbitrator's neutrality. But in *ad hoc* arbitration, there is no one to discuss compensation with the parties in place of the arbitrator. That said, I believe that arbitrators should not hesitate to put a case in abeyance if there is good reason to believe that they will not be compensated for their services. However, if

the case is small and does not involve a lot of time, I suggest that an arbitrator consider serving *pro bono* before putting a case in abeyance.

Delays can be achieved by asking the arbitrator to retain an expert or requesting a site inspection.

Such requests may not be intended to create delay but they do slow down the process, and increase the parties' costs and expenses.

In complex commercial or construction cases, experts can serve a useful function, clarifying or explaining certain aspects of the case. While commercial arbitration rules are usually silent on the subject, international arbitration rules typically grant arbitrators the right to appoint an expert for the sole purpose of advising them. Thus, arbitrators should use their best judgment when

assessing a request for an expert. The arbitrator must consider the complexity of the case and whether having an expert would help narrow the issues and thus help expedite resolution. In most cases, appointing an expert for the sole purpose of advising the arbitrator is wasteful and inefficient. It probably would be more helpful to the arbitrator to have the parties' retain their own experts and then have these experts testify in each other's presence. This would give the arbitrator an opportunity to clarify issues or facts, or challenge particular aspects of the experts' testimony. In domestic arbitration, only in very rare instances would an arbitrator retain an expert.

If a party requests a site visit, the arbitrator must determine whether such a visit is likely to reveal relevant evidence. Many arbitrators believe that a site visit is extremely helpful. They do not think that photographs or videos make good substitutes.²¹ However, if the site is far away or hard to access, the time and costs of transporting everyone there should be considered. Inconvenience to the arbitrator or panel, however, is not enough to deny a legitimate request for a site visit.

If the arbitrator orders a site visit, but one party refuses to participate, the arbitrator may proceed with the inspection in the absence of that party. But first, the arbitrator must advise all parties and then make sure that a detailed written report is given to them so that the absent party has an opportunity to comment. Failure to do so could constitute a sufficient ground to vacate the award.

Sometimes a party will request a change of counsel. This is rarely done just to cause delay but

Most of the time, a party who seeks a delay will file an unnecessary motion that raises one or more legal or procedural issues, or fail to comply with a deadline.

it could be used for that purpose. Besides disrupting the existing schedule, the appointment of new counsel means that the arbitrator will have to give the new attorney adequate time to learn the file. Unfortunately, arbitrators are powerless in this circumstance to keep the proceeding on track.

Role of the Parties' Attorneys in Causing Delay

The actions of the parties' lawyers, rather than that of the parties themselves, are probably the most frequent perceived cause of delays in arbitration. The attorneys are doing what they believe is necessary to protect their clients' strategic interest or desires. In general, a lawyer will not slow the progress of arbitration unless he or she has determined that it is in the client's best interest or received instructions from the client to do so. This is consistent with the lawyer's duty of zealous representation.

But when arbitration is the chosen process for resolving a dispute, lawyers also have an ethical duty to provide their clients with a process that is more expeditious and less expensive than litigation. This means avoiding unnecessary delays.

There is little doubt that the increased role of lawyers as counsel in arbitration (along with the fact that arbitrators are frequently lawyers or former judges) has complicated and, in general, lengthened the process. Arbitrators, commentators and scholars have expressed valid concerns about the increasing legalization (dare we say

"lawyer control"?) of arbitration.²²

However, it should be admitted that some legalization of the process has been rendered necessary as a result of the increased complexity of commercial transactions and the claims they generate. Moreover, when parties spend time and money to assert their contractual rights in arbitration, they can expect to be represented by counsel of their choosing. In addition, the influence of lawyers on the arbitration process has not been altogether bad because they have brought sophistication, clarity and focus to arbitration. No doubt the deliberation process that arbitrators must undertake has been greatly facilitated by the skills of lawyers in presenting facts and arguments. Thus, it would be shortsighted to view lawyers as having only a negative impact on the process. Given their positive contribution, delaying tactics by attorneys could be viewed as an incidental consequence of a process that arbitrators can learn to manage.

Motivation for Delays

Sometimes, a party seeks to delay arbitration in order to make it difficult for an adversary with less economic power or access to evidence to continue the process. When one party enjoys significantly larger financial resources, or controls most of the documentary evidence in the case, it can be tempting to extend or complicate the process as much as possible, in the hope that the other side will be forced to abandon the proceedings or agree to a settlement. More often, however, there are legal or business reasons for seeking to delay arbitration. A party may wish to delay the effect that an adverse award would have on its financial records, or desire to buy more time to allow another transaction to take place. Arbitrators are unlikely to know the real reasons for a party's delaying tactics. But that does not change their mission, which is to manage a process in an efficient way, without regard to a party's hidden motives or strategic need for delay.

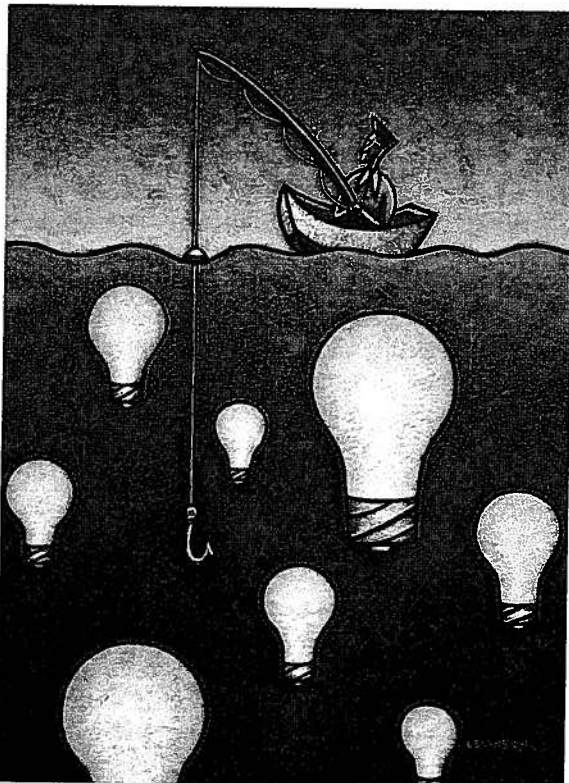
Timing of Delays

One or both parties can use delaying tactics at any time—even before the demand is made. No particular phase of the arbitration process is more or less prone to delays. Each of the four phases of arbitration can be targeted for delaying tactics.

Since parties usually want to contain their legal costs, they are more likely to choose a delaying tactic that produces a delay they can control.

1. The Demand Phase

Arbitrators have no ability to control delays that are triggered before they are selected. Most



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early delays are not that significant. The exception is a challenge to a poorly drafted or "pathological" arbitration clause.²³ Delays result because such clauses raise legal issues pertaining to the validity or interpretation of the arbitration clause or the enforceability of an award. That's when the entire process gets off to a bad start. Take the case of an arbitration

clause that fails to state with precision the place where the arbitration will take place. In that situation, a party could seize the opportunity to challenge the place where the other party brings the arbitration. If the clause provides that "the arbitration shall take place at a location mutually agreed to by the parties," the parties, who are already at odds, may not be able to perform the simple task of selecting a locale for the arbitration.

Another cause of early delay is when a party chooses not to respond to a notice from the administering organization stating that an arbitration demand has been filed. If no answer is filed, the rules generally presume that the respondent denies all claims.²⁴ This avoids further delay. But if the respondent never responds or communicates with the arbitral institution, the rules allow the arbitration to proceed without the respondent's participation, but only after notice to the non-responding party. Under some arbitration rules, after 14 days²⁵ a respondent can ask the institution for an extension of time to answer. Usually, arbitral organizations will grant an extension not exceeding 30 days. Following a late answer, a respondent can ask for further time to "amend" its answer before the appointment of the arbitrator. This avoids the need to obtain the arbitrator's consent to the amendment and eliminates further delay.

Before the arbitrator or panel is selected, a party can ask the case administrator to hold one or more "administrative conferences" to discuss a broad range of issues, including arbitrator selection. Naturally, the scheduling of a conference (which can be held via telephone) is dependent on the availability of counsel and the parties. The combination of busy schedules and unforeseeable events can delay the conference by several weeks. It is important for the arbitrator to learn of delays before his or her selection since these delays

***Unless they are vigilant,
arbitrators can be
manipulated by the parties
and their attorneys into
postponing the hearing or
delaying its conclusion.
Any delay invariably has
a domino effect....***

can be a sign of future delaying behavior.

In *ad hoc* arbitration, if the arbitration clause is silent as to what happens when the respondent fails to answer, the demanding party will have to seek relief in a court having jurisdiction to compel arbitration. State arbitration laws must be consulted before submitting the controversy to the determination of a state court.²⁶

This, combined with a possible appeal of the court's decision, may generate lengthy delays.

Other delaying tactics include filing a complaint in a court in a different jurisdiction (or filing a new arbitration demand with an arbitration organization different from the one selected for the initial case²⁷), and submitting an issue unrelated to the current arbitration. A party can also intentionally file a demand for arbitration with the wrong institution. Such tactics are rarely successful from a legal perspective but they can trigger several weeks or months of delays.

The process of selecting the arbitrator can also generate delays. Since there is no *voir dire* procedure in arbitration in which the attorneys can question the potential arbitrators, the selection process can seem to be an uncomfortable guessing game. As a result, an attorney may legitimately delay selecting the arbitrator while trying to seek reliable information about the candidates.

Another possible reason for delay early in the process may be a party's decision to challenge an arbitrator based on his or her disclosure statement (for example if it reveals a conflict of interest, bias, lack of independence, or inadequate qualifications or experience). Such legitimate challenges can take weeks, months, or longer.

For example, in a recent arbitration administered by the AAA under the International Arbitration Rules of the United Nations Commission on International Trade Law, one party challenged a party-appointed arbitrator under Article 10, questioning his impartiality and independence, since he had chaired a panel in a different arbitration between the same parties. The AAA concurred with the challenging party and a new arbitrator was appointed. Several months later, the same party questioned the impartiality and independence of the second arbitrator due to his membership in the same law firm as the first arbitrator. Months later, after numerous ex-

changes of letters and requests for additional disclosure, the challenging party moved to remove the second arbitrator. With the parties' approval, the AAA appointed three independent, experienced arbitrators to a "special commission" for the sole purpose of considering this challenge. By the time the commission decided the issue (it took three months to reach a decision), it was almost the one-year anniversary date of the filing of the arbitration. This demonstrates how lengthy and expensive a challenge to an arbitrator can be.

In administered cases, arbitrators have no say in the outcome of a challenge to their appointment for it is the arbitral institution that will make the decision. A party could challenge the arbitrator's appointment in court, even though

By taking control at the preliminary hearing, the arbitrator can set the tone for the process to come. Of course, the arbitrator should be courteous.³¹ Professional courtesy encourages cooperation and discourages erratic behavior. Being courteous, however, should not be interpreted as being weak. Indeed, the arbitrator should, when necessary, set the boundaries of acceptable behavior. This is critical to establishing credibility and authority in the eyes of the parties' attorneys. If a party can get away with delaying tactics early on, such uncooperative behavior is likely to continue. Delaying tactics are, in a way, a signal that the arbitrator has lost some control over the process.³²

Taking charge of the agenda at the preliminary hearing, and deciding when and how issues

It is not always necessary for the arbitrator to hear a witness testify to his or her educational and professional background when that information is readily available in deposition transcripts.

the court would probably rule that it has no authority to hear the case prior to issuance of the award.²⁸

2. The Preliminary Hearing Phase

Once the arbitrator has been appointed, it is time to have the preliminary hearing (that is, a conference with the parties' attorneys). At this stage, the parties' ability to seek relief in court is greatly curtailed.²⁹

The preliminary hearing is a critical part of the pre-hearing process. Scholars generally agree that arbitrators should demonstrate at the first preliminary hearing their case management skills and knowledge of the applicable arbitration rules.³⁰ The parties entrust the arbitrators with the responsibility for deciding the merits of the case and managing the process. Accordingly, they must deliver on that trust, making sure that the arbitration moves forward in an efficient manner, even while the parties' attorneys test the arbitrator's mettle by trying to control the process themselves. Just because the lawyers are more knowledgeable about the case at that particular time, there is no reason to relinquish control over the proceeding to them. Thus, arbitrators should establish their authority at the first preliminary hearing, using as much diplomacy as possible. At the same time, they should ask for the cooperation of the attorneys in adhering to the schedule established by mutual agreement.

like the scope and timing of discovery will be addressed, signals to the parties that they are dealing with an experienced arbitrator. When the parties have chosen a three-person panel, the chairperson will be the individual in charge. But first, all of the arbitrators should agree on the process for deciding procedural motions. It is vital for the panel to give the appearance of cohesiveness. Nothing is more harmful to the arbitration process than having a divisive panel whose members are openly at odds with each other.

Deadlines are frequently set at the preliminary conference. Although some deadlines may need to be extended, in order to keep the arbitration on track, at least from a psychological point of view, the arbitrator should insist on their being timely met. This way the parties and their attorneys will consider the deadlines to be firm and seek postponements only for legitimate reasons.

3. The Hearing Phase

It is at the hearing on the merits that the arbitrator's management skills, professional experience and knowledge of the case converge. So it is important for the arbitrator to maintain control over the proceeding and encourage the parties to stick to the schedule. If, instead, the arbitrator takes a *laissez faire* attitude toward any aspect of the arbitration, a party will have no qualms about asking for a postponement, or conducting unnecessarily long examinations of unimportant wit-

nesses, or seeking cumulative or repetitive testimony from a series of witnesses.

To avoid delays based on the unavailability of witnesses or evidence, seasoned arbitrators often ask the parties for a list of witnesses, together with the order in which they will testify on direct and cross examination and the amount of time each examination will take. They may also ask for assurances from counsel that these witnesses will be available to testify at the hearing. In the event a witness is sick or called to an emergency meeting out of town, the arbitrator should consider whether the witness is crucial to the case. If so, perhaps the examination of this witness can be rescheduled at a later date. If not, perhaps the witness can submit a written statement or be questioned in a telephone or video conference. If the witness was deposed, it may not be necessary for the witness to testify on direct. Relevant portions of the deposition could be read into evidence as direct testimony. It is not always necessary for the arbitrator to hear a witness testify to his or her educational and professional background when that information is readily available in a deposition transcript. Arbitrators can be creative in finding ways for evidence to be admitted that need not comply with judicial standards of evidence.

An arbitrator should not hesitate to limit witnesses to those who are essential to the case. The parties' attorneys can be questioned as to the need for a particular witness, the scope of the proposed examination and its purpose. If the parties have agreed to use witness statements for less important witnesses, or if deposition testimony has been admitted, counsel should be allowed to cross-examine the witness only on the subject matter of the witness statement or deposition testimony. Of course, the arbitrator must obtain the parties' agreement to these ground rules earlier in the process at one of the preliminary hearings.

In addition to a postponement request, a party may file a garden-variety motion to interrupt the direct or cross-examination of a witness. Such motions are distracting to the arbitrator and obviously cause delay. Accordingly, before deciding whether to reject or entertain such a motion, the arbitrator should question the need for it and hear the comments of opposing counsel. If the arbitrator decides to hear the motion, opposing counsel should be asked to respond as quickly as practicable. Then the arbitrator can immediately rule on the motion or postpone the decision if warranted.

Unless they are vigilant, arbitrators can be manipulated by the parties and their attorneys into postponing the hearing or delaying its con-

clusion. Any delay invariably has a domino effect, leading to further delays because of the problem of re-scheduling new dates for the continued hearing. Accordingly, arbitrators should avoid granting postponements and limit tactics that cause delay but they must be prudent in exercising their managerial authority. If a party has shown sufficient cause for a postponement, the request should not be denied.

4. *The Award Phase*

After an arbitrator has heard all the evidence, the delicate phase of deliberations and drafting the award follows. Both can be subject to delays, but less so to delaying tactics by the parties or their attorneys.

Reaching a decision in an arbitration case is time-consuming, especially in a complex case involving a panel of arbitrators. Deliberations can be delayed by an uncooperative arbitrator. For example, non-neutral, party-appointed arbitrators may not cooperate in order to cater to the interest of the party that appointed them.³³ Unfortunately, little can be done to motivate an uncooperative arbitrator. One can complain to the administering organization, if any. But the only option is for the other two arbitrators to prepare a majority decision. This prevents having to delay the release of the award.

Arbitrators have different styles of deliberating. Most need a few days to review their notes and think about the entire case before reaching a decision, or, if there is a panel, agreeing to deliberate with other members of the panel. Usually, the arbitrators are willing to spend a few hours together immediately after the hearing to share common perceptions, exchange views and questions, and share responsibilities for the decision-making process. This is probably the most efficient approach, as it allows the arbitrators to promptly discuss the case after having just heard all the evidence.

Once a case has been decided, the award must be written. Arbitrators have an obligation to provide an award within the time stated by the applicable arbitration rules.

Traditionally, domestic arbitration awards were alarmingly brief—only a sentence or two to identify the winner and state how much the winner would get.³⁴ This made it easy for arbitrators to comply with the time requirements for issuing the award. However, not all parties were happy with this type of award. Anecdotal information indicates that parties in domestic arbitration, influenced by the common use of reasoned awards in international arbitration,³⁵ are now more often requesting a written explanation of

the award. The reason is probably that parties simply want to know the factual and legal basis for the decision.

However, drafting a reasoned award can take more time than these rules allow for.³⁶ When all members of the panel are lawyers, egos, linguistic styles, standing in the community, age and professional celebrity can complicate the writing process. As a result, it may take longer than anticipated to generate a draft award. However, arbitrators have an obligation to provide a prompt award, which explains why some arbitral rules, such as those of the AAA, set a time limit for issuance of the award.

If a panel has been asked to write a reasoned award, the arbitrators must determine who will write it. Each arbitrator is usually given an opportunity to write part of the award and then review the sections written by the other arbitrators.³⁷ This process takes time, particularly if the arbitrators are working in different time zones and have busy schedules. There is little that can be done if an arbitrator fails to hold up his or her end in drafting or reviewing the award. There is also little to prevent an arbitrator from making significant editorial changes during the review process, although the chair of the panel can try to discourage this. When there are non-neutral, party-appointed arbitrators on a panel, drafting the award can become a last ditch effort to renegotiate fine points that were either overlooked or temporarily set aside during the arbitration.

Delays in preparing and finalizing the award can irritate other arbitrators on the panel, since they postpone the ultimate release of the award. The administering institution may provide some help in moving the award-writing process along.

Delays in Implementing the Award

Once the award has been issued, the parties can delay its implementation by requesting a modification or clarification of the award,³⁸ or by seeking to overturn the award. Such delays do not constitute delaying tactics *per se*, but they are worthy of mention.

Enforcement can be delayed when the losing party refuses to pay the amount awarded or continues to engage in an activity prohibited by the award. In these instances, the party seeking enforcement will have to obtain judicial assistance before it will be able to execute the award.

The losing party can seek to vacate the award in state or federal court.³⁹ But this is not an easy task. Vacating an award requires the moving party to establish significant failures in the arbitration process.⁴⁰ Moreover, there is a strong policy in favor of arbitration and the finality of awards. In other words, courts will hesitate to interfere with the decision of an arbitrator.

Ethics and Efficiency

Arbitrators undertake to be fair and impartial and conduct an efficient arbitration proceeding. However, efficiency cannot substitute for fairness. Thus, arbitrators may not set a "break-neck" schedule if doing so could affect any party's ability to prepare and present its case. Arbitration should not be a race towards resolution. So, while efficiency must remain a priority of the arbitrator, it should not become an obsession. Some arbitration proceedings will take more time than others, whether or not the parties engage in delaying tactics.

Unless a party complains to the arbitrator that the process is too slow, or that the adversary is taking an inordinate amount of time to reply or execute certain tasks, the process is probably going at a fair pace.

On the other hand, if a party complains about delays, the arbitrator should immediately determine the true nature of the delay and whether it is justified and reasonable. Arbitrators must draw on their own personal experience and judgment in reaching a conclusion, as no arbitration rule will be of assistance.

When one party complains about the adversary's conduct, the arbitrator may have to question (as diplomatically as possible) the party whose conduct is the subject of the com-

plaint. This can put the arbitrator in a somewhat confrontational position. Some arbitrators feel uncomfortable in this role and will not step in when the process slows down. Whether this is due to inexperience, a dislike of confrontation, or a fear of giving offense, arbitrators must put aside their personal preferences and fears in order to provide the parties with an efficient, fair process.

Conflict of Interest

Since arbitrators are usually paid on an hourly or daily basis, they stand to make more money the more protracted the discovery, the more

A motivated and well-funded party may cause significant delays and even derail the arbitration process if the other party cannot afford the added expenses.

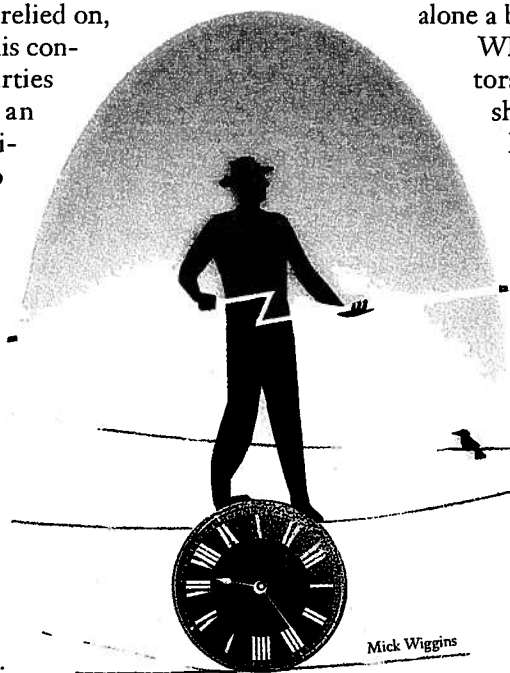
issues raised, the more cases relied on, and the longer the briefs. This conflict of interest with the parties seems to give arbitrators an incentive not to be too efficient. Were this conflict to guide the behavior of arbitrators, it could destabilize the integrity of the arbitration process.

However, I think it can be fairly said that most arbitrators are ethical and put their financial interests aside when they accept an appointment to a case. While arbitrators are not rewarded monetarily for their efficiency, they are rewarded with a reputation for efficiency. This makes them attractive candidates for appointment in other cases. Most arbitrators know this.

Of course, not all arbitrators are angels. One unethical arbitrator can taint the process. This is why it is so important for arbitral organizations to closely monitor arbitrators' billing practices and be outspoken about eliminating abuses. (The ICC has eliminated the problem by providing that arbitrators will receive compensation that is proportional to the size of the amount in dispute.⁴¹) Arbitrators also should be self-policing on the issue of compensation and oppose clear cases of abuse. Most arbitrators are willing to discuss these matters openly with their colleagues and make sure that they avoid even a shadow of impropriety.

The parties also need to recognize how their conduct reflects in the arbitrator's bill. If the parties cite extensive case law and other authorities in lengthy briefs, it will be partly their fault that the arbitrator's bill is high. Arbitrators should question the necessity for extensive citation of cases and reach an agreement with the parties about this at a preliminary hearing, well before the briefs are submitted.

Now that arbitration is so well accepted, we have "celebrity" arbitrators who have very busy professional calendars. It is no secret that some parties seek high profile arbitrators, especially parties interested in delaying the ultimate resolution of the dispute. Even when the arbitrators are not celebrities, it is still difficult for arbitrators and the parties to find the time when everyone will be able to attend a single conference, let



alone a block of hearing days.

When accepting cases, arbitrators, no matter how renowned, should never forget that they have an obligation to be available to serve.⁴² The fact that arbitration is informal does not mean that it has to be out of control. I submit that an arbitrator who accepts a case should be reasonably confident that other professional commitments will not significantly interfere with the case just accepted.

True, some schedule conflicts are unavoidable. But when the chairperson of an arbitral panel regularly experiences calendar conflicts, the other arbitrators should question the chair's ability to serve in that capacity and seek the assistance of the administering organization, in coordination with counsel.

Conclusion

A motivated and well-funded party may cause significant delays and even derail the arbitration process if the other party cannot afford the added expense. Because parties have the ability to fashion an arbitration clause best suited to their circumstances, it is advisable that they consider all these issues and adopt an ADR policy before they start negotiating their arbitration clause. Every effort they make toward simplifying the discovery process and establishing deadlines for the completion of the various phases of the arbitration process, including provisions regarding challenges to the award and its later enforcement, will go a long way towards impeding the use of delaying tactics. To preserve the integrity and efficiency of the arbitration process, delaying tactics must be identified, carefully evaluated, limited and eliminated whenever possible.

Thus, arbitrators need to question the legitimacy of requests that would delay arbitration (without questioning the requester's good faith) and they should not hesitate to ask probing questions. Their task is to find a workable alternative that would avoid or limit the potential delay. Arbitrators need to learn how to be "diplomatically forceful" when necessary. ■

(Endnotes are on the next page)

ENDNOTES

¹ In administered arbitration, an ADR provider acts as an intermediary between the parties and the arbitrator. The administering organization usually has promulgated arbitration rules under which the arbitration takes place.

² For a thoughtful article on management of the international case, see John Fellas, "A Fair and Efficient International Arbitration Process," 59 (1) *Disp. Resol. J.* 78 (Feb.-April 2004).

³ The term "tactic" is used to mean the knowledge or science of maneuvering. I do not mean to imply any pejorative connotation (such as connivance or artifice), even if the user of a delaying tactic was motivated by a desire to deceive.

⁴ Tactics to delay the proceedings are not specifically addressed in arbitration rules, statutes and treaties, and they are rarely discussed in the arbitration literature. Commercial arbitration rules focus on procedures and efficient management of the process.

⁵ In *ad hoc* arbitration, the arbitrator takes care of administrative matters. In administered arbitration, the institution chosen by the parties handles such matters.

⁶ See AAA commercial rules, R-8.

⁷ See *id.*, R-32 (b). See also CPR Rule 9.2.

⁸ AAA commercial rules, R-30(b), R-31(b), (c).

⁹ The essential elements of "due process of law" are the right to notice and an opportunity to be heard and to defend oneself in orderly proceedings adapted to the nature of the case. The guarantee of due process requires that every person has a "day in court" and the benefit of "general law." See *Black's Law Dictionary* (revised 4th ed., 1968) (quoting *Dimke v. Finke*, 295 N.W. 75,79 (Minn. 1940).

¹⁰ Thus, a blunt refusal to hear, or denial of a request to discover, relevant documents could be enough to have the award set aside later on. See *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002), and *Zubulake v. USB Warburg, LLC*, No. 02 Civ. 1243, 2003 WL 21087884 (S.D.N.Y. May 13, 2003), and WL 21714957 (S.D.N.Y. July 24, 2003), for a list of questions used by courts to determine if due process was hindered during the discovery process.

¹¹ Most judges despise so-called "fishing expeditions," which refer to broad and over-reaching discovery requests that may not seek the discovery of relevant information. Litigators use this tactic in the hope that "in the flow of documents produced" they will be able to find the "smoking gun," i.e., the decisive document proving their case. Fishing expeditions are expensive, time-consuming and often inefficient. Therefore, they should be avoided in the

context of arbitration.

¹² For an interesting article on the subject, see Sharon D. Nelson & John W. Simek, "Electronic Discovery," 21 (4) *GP Solo* 35 (ABA June 2004).

¹³ See CPR Rule 9.2

¹⁴ See ICDR (AAA) International Arbitration Rules, art. 26.2; CPR Rule 9.1.

¹⁵ See AAA Rules, R-32 (b); CPR Rule 9-3 (a).

¹⁶ See AAA commercial rules, R-32; CPR Rule 9.2, 9.3(a), 12.1 & 12.4; UNCITRAL Rules, arts. 24 & 25.

¹⁷ E.g., AAA commercial rules, R-30.

¹⁸ See recent case law cited in "Arbitrator Update," 41-48 (AAA Department of Curriculum Development, 2004).

¹⁹ Arbitrators should promptly respond to such accusations and demonstrate for the record that they are unfounded (assuming they are).

²⁰ See AAA commercial rules, R-54; CPR Rule 16.5.

²¹ Michael J. Altshuler, "Seeing is Believing: The Importance of Site Visits in Arbitrating Construction Disputes," 58 (3) *Disp. Resol. J.* 36 (Aug.-Oct. 2003).

²² See Thomas J. Stipanowich & Peter H. Haskell, "Commercial Arbitration at Its Best," CPR and the ABA Section of Business Law, Section of Dispute Resolution, 2001, quoting Louis Craco as follows: "Arbitration has become a legalistic method of adjudication." See also Gerald F. Phillips, "Is Creeping Legalism Infecting Arbitration?," 58 (1) *Disp. Resol. J.* 37 (Feb.-April 2003).

²³ The term was coined by Frederick Eisemann, a former Secretary General of the International Court of Arbitration of the ICC. A good example of a pathological clause states as follows: "In case of dispute, the parties agree to submit to arbitration, but in case of litigation, the Tribunal de la Seine shall have exclusive jurisdiction." This clause was cited in John Fellas, *supra* n. 2. For a concise, up-to-date review of recent decisions on the subject see John Fellas, "The Scope of Judicial Review of Arbitration Awards," 230 (92) *N.Y. Law J.*

²⁴ See AAA commercial rules, R-4 (b), (c); CPR Rule 3.4.π

²⁵ In compliance with the 15 days required by AAA commercial rules, R-4 (b), (c).

²⁶ For example, see Minn. Stat. Ann. §§ 572.08-572.09.

²⁷ This is often referred to as "piecemeal" arbitration (or litigation) and its only purpose is to delay matters, increase costs and expenses, and confuse the issues. Unjustified court actions can be sanctioned (though such sanctions are extremely rare) if determined to be frivolous. No arbitration rule provides for sanctions for this type of behavior.

²⁸ *Gulf Guaranty Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (held that a district court has no authority under the FAA to remove an arbitrator prior to issuance of the award).

²⁹ Except in the event of gross misconduct by the arbitrator or fraud, courts typically will refuse to interfere with the arbitration process.

³⁰ See James J. Myers, "Techniques for Managing Arbitration Hearings," 51 (1) *Disp. Resol. J.* (Jan.-March 1996).

³¹ Canon IV of the "Revised Code of Ethics for Arbitrators in Commercial Disputes" guides arbitrators to be "patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants."

³² Regular training of arbitrators cannot be overemphasized. At training sessions, arbitrators also learn about the most recent techniques and arbitration-related court cases.

³³ Clearly a violation of the arbitrator's ethical duties (See Canon I, B of the Revised Code of Ethics, *supra* n. 31).

³⁴ For example: "We found for Respondent and award..."

³⁵ Canadian and most Western European arbitrators traditionally render full-fledged decisions containing a detailed description of the case, facts, legal issues, evidence presented, claims of the parties and reasoning.

³⁶ The award-rendering process is not considered "good cause" for an extension of time (See AAA Commercial Rules, R-40) although parties do agree to such extension of time in most cases.

³⁷ See the Revised Code of Ethics, *supra* n. 31, which states in Canon IV.G, that "co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings."

³⁸ Usually within 20-30 days from receipt of the award. See AAA Commercial Rules, R-48; CPR Rule 14.5.

³⁹ See § 10 of the Federal Arbitration Act.

⁴⁰ Each state has its own law governing arbitration, which contains specific time limits during which an award can be challenged. In Minnesota, an application to vacate an award must be made within 90 days after delivery of a copy of the award (see § 572.19 subd. 2). The only exception to that time limit is the application predicated upon fraud, corruption or other undue means, which can be filed 90 days after such grounds are known or should have been known.

⁴¹ See ICC article 30.2 & app. III, art. 4.

⁴² Canon X of the Revised Code of Ethics, *supra* n. 31.

This Act is Current to April 7, 2010

COMMERCIAL ARBITRATION ACT

[RSBC 1996] CHAPTER 55

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Definitions

1 In this Act:

"arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

- (a) corrupt or fraudulent conduct;
- (b) bias;
- (c) exceeding the arbitrator's powers;
- (d) failure to observe the rules of natural justice;

"arbitration" means a reference before an arbitrator to resolve a dispute under this Act or an arbitration agreement;

"arbitrator" means a person who, under this Act or an arbitration agreement, resolves a dispute that has been referred to the person, and includes an umpire;

"arbitration agreement" means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the *International Commercial Arbitration Act* applies;

"award" means the decision of an arbitrator on the dispute that was submitted to the arbitrator and includes

- (a) an interim award,
- (b) the reasons for the decision, and
- (c) any amendments made to the award under this Act;

"commercial agreement" means an agreement arising out of a commercial relationship and includes, but is not limited to, agreements respecting the following kinds of transactions:

- (a) a trade transaction for the supply or exchange of goods or services;
- (b) a distribution agreement;
- (c) a commercial representation or agency;
- (d) factoring;
- (e) leasing;
- (f) construction of works;
- (g) consulting;
- (h) engineering;
- (i) licensing;
- (j) financing;
- (k) banking;
- (l) insurance;

- (m) an exploitation agreement or concession;
- (n) joint venture and other related forms of industrial or business cooperation;
- (o) carriage of goods or passengers by air, sea, rail or road;
- (p) investing;

"court" means the Supreme Court.

Application of Act

2 (1) Subject to subsection (4), this Act applies to the following:

- (a) an arbitration agreement in a commercial agreement;
- (b) an arbitration under an enactment that refers to this Act, except insofar as this Act is inconsistent with the enactment regulating the arbitration, or with any rules or procedure authorized or recognized by that enactment;
- (c) any other arbitration agreement.

(2) A provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* (Canada) or the *Family Relations Act* has no effect.

(3) If an arbitration agreement contains a reference to the *Arbitration Act*, that reference is deemed to be a reference to this Act.

(4) This Act does not apply to the Trade, Investment and Labour Mobility Agreement entered into between the governments of British Columbia and Alberta on April 28, 2006, or to amendments to that Agreement, except as provided in Article 31 of that Agreement.

Death of a party

- 3** (1) If a party to an arbitration agreement dies, the personal representatives of the deceased party are bound by, and are not by the death precluded from enforcing, the terms of the arbitration agreement.
- (2) The authority of an arbitrator to hear and decide on the arbitration is not revoked by the death of the party who appointed the arbitrator.
- (3) Subsections (1) and (2) are subject to an agreement by the parties to an arbitration agreement.
- (4) This section does not affect a rule of law or an enactment under which the death of a person extinguishes a right of action.

Appointment of arbitrators

- 4** (1) If an arbitration agreement does not provide for the appointment of an arbitrator, an arbitration under that agreement is before a single arbitrator.
- (2) If an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an additional person to act as an umpire.
- (3) If arbitrators who have appointed an umpire cannot reach a majority decision on any matter before them, the umpire must decide the matter, and the umpire's decision is for all purposes the decision of the arbitrators.

Advance production of documents

- 5** (1) Before an arbitration hearing commences, the arbitrator may, on the application of a party, order another party to produce any documents that the arbitrator considers are relevant to the arbitration.
- (2) A party who has been ordered to produce documents under subsection (1) must permit the party in whose favour

the order was made to inspect those documents and take copies of them.

Examination and production of records and evidence

6 (1) All parties to an arbitration and any person claiming through them must

(a) submit to being examined by the arbitrator under oath, when ordered by the arbitrator, and

(b) produce all records that the arbitrator may require.

(2) In an arbitration, the arbitrator

(a) must admit all evidence that would be admissible in a court,

(b) may admit in addition other evidence that the arbitrator considers relevant to the issues in dispute, and

(c) may determine, subject to the rules of natural justice, how evidence is to be admitted.

Subpoena to witness

7 (1) A party to an arbitration or to a reference from the court may issue a subpoena to a witness.

(2) No subpoena may be issued under subsection (1) for a document unless the witness could be compelled to produce the document in an action.

(3) The court may order that a subpoena be issued to compel a witness to attend an arbitration.

Oath

8 (1) An arbitrator may order that a witness at an arbitration testify under oath.

(2) If an arbitrator requires the testimony of a witness or a party to an arbitration to be given under oath, the arbitrator may administer the oath.

Interim award

9 During an arbitration, an arbitrator may make an interim award respecting any matter on which the arbitrator may make a final award.

Specific performance

10 An arbitrator has the same power as the court to make an order for specific performance of an agreement between the parties for the sale of goods.

Costs

11 (1) The costs of an arbitration are in the discretion of the arbitrator who, in making an order for costs, may specify any or all of the following:

- (a) the persons entitled to costs;
- (b) the persons who must pay the costs;
- (c) the amount of the costs or how that amount is to be determined;
- (d) how all or part of the costs must be paid.

(2) In specifying the amount of costs under subsection (1) (c), the arbitrator may specify that the costs include

- (a) actual reasonable legal fees, and
- (b) disbursements, including the arbitrator's fees, expert witness fees and the expenses incurred for holding the hearing.

(3) In specifying how costs are to be determined, the arbitrator may refer the matter to a registrar of the Supreme Court for assessment.

(4) The registrar is not to assess the costs referred under subsection (3) as though they were costs in a proceeding in the Supreme Court but must assess them in the manner specified by the arbitrator.

(5) If in an award the arbitrator makes no order as to costs, a party may apply to the arbitrator, within 30 days of being notified of the award, for an order respecting costs.

(6) If no application is made under subsection (5) or if, following an application under subsection (5), the arbitrator makes no order as to costs, the parties to the arbitration bear their own costs, and the fees and expenses referred to in section 26 (1) are to be borne equally among each of the parties to the arbitration.

Majority decision

12 (1) If there are more than 2 arbitrators in an arbitration, the award may be made by a majority of arbitrators.

(2) If there is no majority decision on any matter to be decided in an arbitration, the decision of the chair is the decision on that matter.

Time for arbitrator's decision

13 (1) If the parties have agreed to a time limit for the making of an award, the arbitrator or the court may extend the time limit, whether or not the time has expired and despite the agreement.

(2) Subsection (1) does not affect the power of the court to make an order under section 18 (1) (b).

Award binding

- 14** The award of the arbitrator is final and binding on all parties to the award.

Stay of proceedings

- 15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
- (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.
- (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

Revocation of arbitrator's authority

- 16** (1) Subject to an agreement referred to in section 3 (3), the parties may not revoke the authority of an arbitrator, except by leave of the court under subsection (2).
- (2) A party to an arbitration may apply to the court for an order revoking the authority of an arbitrator.
- (3) In considering whether to revoke the authority of an arbitrator, the court must consider the factors referred to in section 15 (3) (a) to (c), (i) and (j).

(4) If, after a dispute arises under an arbitration agreement that names a person as an arbitrator, a party to that agreement applies to the court

(a) for an order revoking the authority of the arbitrator, or

(b) for an order in any other proceeding whether the party seeks on grounds of apprehended bias, to revoke the arbitrator's authority or restrain the arbitration from proceeding,

the court must not refuse the order on the ground that the applicant knew or ought to have known that the arbitrator may not be capable of acting impartially because of the arbitrator's relationship to

(c) another party to the arbitration agreement, or

(d) the subject matter of the dispute.

Appointment of arbitrator by court

17 (1) If an arbitration agreement provides for

(a) the appointment of a single arbitrator, and the parties, after a dispute has arisen, cannot concur in the appointment of the arbitrator, or

(b) an arbitrator or another person to appoint an arbitrator, and the arbitrator or that person neglects or refuses to make the appointment,

a party may serve written notice on the other party, the arbitrator or the other person, as the case may be, to concur in the appointment of a single arbitrator or to appoint an arbitrator.

(2) If the appointment is not made within 7 days after the notice is served under subsection (1), the court must appoint an arbitrator, on application of the party who served the notice.

(3) On the application of any party the court may appoint an arbitrator if

(a) an arbitrator refuses to act, is incapable of acting or dies, and

(b) the arbitration agreement

(i) does not provide a means of filling the vacancy that has occurred, or

(ii) provides a means of filling the vacancy, but a qualified person has not filled the vacancy within the time provided for in the agreement, or if no time has been provided for, within a reasonable time.

(4) An arbitrator appointed by the court under this section has the same powers and duties as though the arbitrator were appointed under the arbitration agreement.

Removal of arbitrator

18 (1) On the application of a party to an arbitration, the court may remove an arbitrator who

(a) commits an arbitral error, or

(b) unduly delays in proceeding with the arbitration or in making an award.

(2) The court may order that an arbitrator who is removed under subsection (1) on the grounds of corrupt or fraudulent conduct or undue delay in proceeding with the arbitration or in making an award

(a) receive no remuneration for the arbitrator's services, and

(b) pay all or part of the costs, as determined by the court, that the parties to the arbitration have incurred up to the date that the order removing the arbitrator was made.

(3) Subject to subsection (5), if the court removes an arbitrator under subsection (1), it may appoint another arbitrator to replace the one who was removed, unless the parties have agreed in the appointment of a replacement.

(4) An arbitrator appointed under subsection (3) has the same powers and duties as though the arbitrator were appointed under the arbitration agreement.

(5) An arbitration proceeding is stayed if

(a) the arbitration agreement includes a provision that names the arbitrator,

(b) that arbitrator is removed under subsection (1), and

(c) the parties to the arbitration agreement do not agree, within 30 days after the removal, on another arbitrator to replace the arbitrator.

(6) If an arbitration proceeding is stayed under subsection (5), the parties may take any other proceedings to resolve the dispute that they could have taken but for the arbitration agreement.

Scott vs. Avery clauses

19 (1) A term of an agreement providing that

(a) an action may not be commenced, or

(b) a defence to an action may not be raised or pleaded

until the matter that is the subject of the cause of action or defence has been adjudicated by arbitration under that, or some other, agreement has no effect except as provided in subsection (2).

(2) A term of an agreement referred to in subsection (1) (a) or b) is deemed to be an arbitration agreement.

Extension of time limit

20 If the terms of an arbitration agreement provide that a claim to which the agreement applies is barred unless

- (a) notice to appoint an arbitrator is given,
- (b) an arbitrator is appointed, or
- (c) some other step to commence the arbitration proceedings is taken,

within the time limited by the arbitration agreement, the court may, if it considers that undue hardship would otherwise result, extend the time on terms, if any, as the justice of the case requires.

Consolidation of arbitrations

21 Disputes that have arisen under 2 or more arbitration agreements may be heard in one arbitration if

- (a) the disputes are similar, and
- (b) all parties to those agreements agree on the appointment of the arbitrator and the steps to be taken to consolidate the disputes into the one arbitration.

International Commercial Arbitration Centre rules

22 (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

(2) If the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.

(3) If the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails.

Legal principles apply unless excluded

23 An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

Arbitrator may call own witness

24 (1) An arbitrator may call a witness on the arbitrator's own motion.

(2) A witness called by the arbitrator under subsection (1) may be cross-examined by all parties to the arbitration, and all parties may call evidence in rebuttal.

Arbitrator's decision

25 An award must be in writing and must be signed by the arbitrator.

Arbitrator's fees

26 (1) The fees and expenses of an arbitrator or of a clerk, secretary or reporter assisting in the arbitration must not exceed the fair value of the services performed together with necessary and reasonable expenses incurred.

(2) If an arbitrator has delivered the arbitrator's account for fees and expenses, any party to the arbitration or the arbitrator may apply to the district registrar or other reviewing officer of the court for an appointment to review the account.

(3) The applicant for the review must deliver a copy of the appointment to the arbitrator or the parties, as the case may be.

(4) A party may review an arbitrator's account even though the account has been paid.

(5) Section 70 of the *Legal Profession Act* applies to the procedure at a review under subsection (2).

(6) A term of an arbitration agreement prohibiting the review of an arbitrator's fees and expenses has no effect.

(7) A party to a review under subsection (2) may appeal the review to the court within

(a) 14 days of after the date of the reviewing officer's certificate,

(b) a period allowed by the court, or

(c) a period specified by the reviewing officer in the certificate.

(8) The court may make any order it considers just in the appeal, including an order that the reviewing officer amend the certificate.

(9) If an account has been reviewed under subsection (2), the certificate of the reviewing officer or district registrar may be filed in the registry of the court and, on the expiry of the time specified in subsection (7), the certificate may be enforced as though it were a judgment of the court.

Amendments to the award

27 (1) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct

(a) a clerical or typographical error,

(b) an accidental error, slip, omission or other similar mistake, or

(c) an arithmetical error made in a computation.

(2) An application by a party under subsection (1) must be made within 15 days after the party is notified of the award.

(3) An amendment under subsection (1) must not, without the consent of all parties, be made more than 30 days after all parties have been notified of the award.

(4) Within 15 days after being notified of the award, a party may apply to the arbitrator for clarification of the award.

(5) On an application under subsection (4), the arbitrator may amend the award if the arbitrator considers that the amendment will clarify it.

(6) Within 30 days after receiving the award, a party may apply to the arbitrator to make an additional award with respect to claims presented in the proceedings but omitted from the award, unless otherwise agreed by the parties.

Interest

28 For the purposes of the *Court Order Interest Act* and the *Interest Act (Canada)*, a sum directed to be paid by an award is a pecuniary judgment of the court.

Enforcement of an award

29 With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

Court may set aside award

30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may

(a) set aside the award, or

(b) remit the award to the arbitrator for reconsideration.

(2) The court may refuse to set aside an award on the grounds of arbitral error if

(a) the error consists of a defect in form or a technical irregularity, and

(b) the refusal would not constitute a substantial wrong or miscarriage of justice.

(3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

Appeal to the court

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Extent of judicial intervention

32 Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

Application for reasoned award

33 (1) A party to an arbitration may apply to the court for an order that the arbitrator give more detailed reasons for an award.

(2) On an application under subsection (1), the court may order that the arbitrator state the reasons for the award in detail that is sufficient to consider any question of law that arises out of the award, were an appeal to be brought under section 31.

(3) The court must not make an order under this section unless written notice is given to the arbitrator before the award is made that a reasoned award would be required or a good reason is shown why no such written notice was given.

Application to court to determine question of law

34 (1) On the application of a party, the court may determine any question of law that arises during the course of an arbitration if that party obtains the consent of either the arbitrator or of the other parties to the arbitration.

(2) The court must not make a determination on the question submitted unless it is satisfied that substantial savings in costs of the arbitration would result.

(3) A determination made under this section may be appealed to the Court of Appeal.

Exclusion agreements

35 If, after an arbitration has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 31, 33 and 34, the court has no jurisdiction to make an order under those sections except in accordance with the agreement, but otherwise an agreement to exclude the jurisdiction of the court under those sections has no effect.

Reference by court order

36 The court may order at any time that the whole matter, or a question of fact arising in a proceeding, other than a criminal proceeding, be tried before an arbitrator agreed on by the parties if

(a) all parties interested, and not under disability, consent,

(b) the proceeding requires a prolonged examination of documents, or a scientific or local investigation that cannot, in the opinion of the court, conveniently be made before a jury or conducted by the court through its other ordinary officers, or

(c) the question in dispute consists wholly or partly of matters of account.

Powers on reference

37 (1) In a reference by the court to an arbitrator, the arbitrator is an officer of the court and has the authority and must conduct the reference in the manner prescribed by rules of court and as the court may direct.

(2) Unless set aside by the court, the report or award of an arbitrator on a reference is equivalent to the verdict of a jury.

Remuneration

38 The court may determine the remuneration to be paid to an arbitrator on a reference by the court.

Court powers

39 The court and the Court of Appeal have, for references, the powers that are conferred on the court in references out of court.

Attendance of prisoner

40 The court may order the attendance of a prisoner for examination before an arbitrator.

Costs

41 An order under this Act may be made on terms, as to costs or otherwise, that the authority making the order thinks just.

Applications to the court

42 (1) Applications to the court under this Act must be made by originating application under the rules of court.

(2) An application under section 30 or 31 must be made within 60 days after the parties have been notified of the award and its terms.

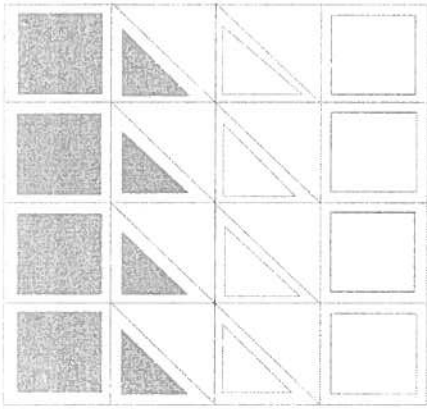
Extension of time limit

43 The court may extend any time limit provided for in this Act even if the application for the extension or the order granting the extension is made after time has expired.

Application of provisions

44 Sections 4 to 6, 8 to 12, 14, 25 and 26 (1) apply to every arbitration agreement except in so far as the parties have agreed otherwise.

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DOMESTIC COMMERCIAL ARBITRATION

Rules of Procedure

(As amended June 1, 1998)

as printed August 1998

THE BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE

Suite 500-1311 HOWE STREET
VANCOUVER, BC V6Z 2P3

PHONE: (604) 684-2821
FAX: (604) 736-9233
EMAIL: cases@bcica.com

www.bcicac.com

Model Arbitration Clause

Parties who agree to arbitrate under the Centre's Rules, and to have the Centre act as appointing authority and to provide administrative services, may use the following clause in their agreement:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated therewith or derived there from, shall be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre pursuant to its Rules.

The place of arbitration shall be Vancouver, British Columbia, Canada.

Applicability of Rules

Parties should examine the Centre's Rules to ensure that all the provisions are suitable and appropriate in the circumstances. Parties may agree to modify the Rules. Any necessary modifications of the Rules should be added to the model arbitration clause described above.

The Commercial Arbitration Act of British Columbia

S. 22 of the *Commercial Arbitration Act* reads:

International Commercial Arbitration Centre Rules

22. (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.
- (2) Where the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.
- (3) Where the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails.

**BRITISH COLUMBIA INTERNATIONAL
COMMERCIAL ARBITRATION CENTRE**

FEE SCHEDULE
(as amended November 1, 1997)

**FOR
DOMESTIC COMMERCIAL ARBITRATIONS**

Commencement Fee (non-refundable):

For claims or counterclaims up to \$50,000	\$500	(plus GST)
For claims or counterclaims over \$50,000 or where no specific amount is claimed	\$1,500	(plus GST)

If a commencement fee of \$500 was paid and the arbitration tribunal awards an amount in excess of \$50,000, the Centre will adjust the commencement fee to \$1500.

Where a commencement fee of \$500 is paid, the parties are encouraged to adopt the Centre's Shorter Rules for Domestic Commercial Arbitration.

Administration Fee **\$150 per party** (plus GST)

The administration fee is due six months after the arbitration commences and every 90 days thereafter until the case is withdrawn, settled, or the hearings are closed or the arbitration terminated.

Disbursements and fees of the arbitration tribunal are in addition to the above noted amounts.

Hourly rates are set by individual arbitrators.

BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE

DOMESTIC COMMERCIAL ARBITRATION

Rules of Procedure

(As amended June 1, 1998)

as printed August 1998

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GENERAL

1. Interpretation

- (1) "Rules" means these Domestic Commercial Arbitration Rules of Procedure of the Centre as amended from time to time.
- (2) In these Rules,
 - (a) terms and phrases have the same meanings as defined in or contemplated by the *Commercial Arbitration Act*, R.S.B.C., 1996, c.55;
 - (b) except as otherwise defined or contemplated in the *Commercial Arbitration Act*, terms and phrases have the same meanings as defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238;
 - (c) "Centre" means the British Columbia International Commercial Arbitration Centre in Vancouver, British Columbia ;
 - (d) "Act" means the *Commercial Arbitration Act*, R.S.B.C., 1996, c.55;
 - (e) words signifying a male person include a female person; and
 - (f) words in the singular include the plural and words in the plural include the singular.

2. Application

- (1) The Centre shall administer an arbitration if:
 - (a) the parties agree to arbitrate under the Rules of the Centre; or
 - (b) these Rules are deemed to apply by virtue of the provisions of the *Commercial Arbitration Act*.
- (2) These Rules do not apply to an international arbitration as defined in the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

3. Time

- (1) In these Rules, where the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.
- (2) In these Rules, in the calculation of time, the first day shall be excluded and the last day included.
- (3) The Centre may, at any time, extend or abridge a period of time required in these Rules, other than a period of time fixed or determined by an arbitration tribunal.

4. Fees

- (1) The commencement fees and administration fees for arbitrations conducted under these Rules are set out in the Centre's *Fee Schedule for Domestic Commercial Arbitration* as amended from time to time.
- (2) The full amount of the commencement fee as set out in the *Fee Schedule for Domestic Commercial Arbitration* shall be paid to the Centre by the party presenting the claim or counter-claim.

- (3) An administration fee shall be paid to the Centre by each party as set out in the *Fee Schedule for Domestic Commercial Arbitration*.
- (4) In addition to the commencement and administration fees, the Centre shall be reimbursed for any expenses that it incurs on behalf of the parties.
- (5) Fees are non-refundable and subject to adjustment by the Centre. The allocation of fees between the parties shall be determined ultimately under Rule 38.
- (6) Where a party does not pay an administration fee or any other outstanding amount, any other party may pay that amount to ensure that the arbitration proceeds.
- (7) Outstanding fees and disbursements shall be paid prior to the release of the arbitration award.

5. Modification of Rules

The parties shall notify the Centre of any agreement to modify the Rules upon commencement of the arbitration or as soon as any such agreement is made thereafter.

6. Waiver of Rules

A party which knows of a failure to comply with these Rules and which proceeds with the arbitration without promptly stating its objection in writing shall be deemed to have waived the objection. The arbitration tribunal shall determine whether a party has waived an objection.

7. Communications

- (1) Parties to an arbitration under these Rules may deliver any written communications required or permitted under these Rules personally, by mail, by facsimile or by other means of telecommunication which provide a record of delivery. Communications shall be considered received when delivered to a party's address for delivery.
- (2) The address for delivery shall be the party's address as stated in the Arbitration Notice or Submission to Arbitrate. A party may change its address for delivery by giving written notice to the other parties, the Centre, and the arbitration tribunal.
- (3) A copy of all written communications between a party and the arbitration tribunal must be delivered to the other party at the same time.
- (4) Information in regard to the substance of the dispute (i.e., matters other than administrative details) should only be communicated to the arbitration tribunal by a party while in the presence of the other party, or by way of documents where previously agreed to by the parties or as set out in these Rules.

COMMENCEMENT OF ARBITRATION

8. Arbitration by Agreement

- (1) Where a dispute falls under an arbitration clause or agreement, a party, as claimant, may submit that dispute to arbitration by giving a written Arbitration Notice to the respondent and to the Centre. The Arbitration Notice shall contain:
 - (a) the names of the parties to the dispute and counsel, if represented, together with their addresses for delivery;
 - (b) a brief statement of the matter in dispute, and a request that it be referred to arbitration;
 - (c) the remedy sought including, where possible, a precise estimate of the amount claimed;
 - (d) the number and names of arbitrators proposed or agreed upon, if any;
 - (e) the required qualifications of the arbitrators as agreed to by the parties, if any; and
 - (f) any modification of these Rules which has been agreed to by the parties.
- (2) The required commencement fee as set out in the *Fee Schedule for Domestic Commercial Arbitration* must accompany the copy of the Arbitration Notice sent to the Centre.
- (3) A copy of the arbitration clause or agreement relied upon and a copy of the applicable contract(s), if any, must be appended to the Arbitration Notice.

9. Arbitration by Submission

- (1) Parties to a dispute may submit a dispute to arbitration by filing a Joint Submission to Arbitrate with the Centre. The Joint Submission to Arbitrate shall contain:
 - (a) the names of the parties to the dispute and counsel, if represented, together with their addresses for delivery;
 - (b) a statement of the matter to be arbitrated;
 - (c) the remedy sought and, where possible, a precise estimate of the amounts claimed and counter-claimed;
 - (d) the number and names of arbitrators proposed or agreed upon, if any;
 - (e) the required qualifications of the arbitrators as agreed to by the parties, if any; and
 - (f) any modification of these Rules which has been agreed to by the parties.
- (2) The required commencement fee as set out in the *Fee Schedule for Domestic Commercial Arbitration* must accompany the arbitration notice.
- (3) The Joint Submission to Arbitrate must be signed by the parties to the dispute. and a copy of the applicable contract(s), if any, must be appended.

10. Commencement Date

The arbitration is deemed to have commenced when the Arbitration Notice or Joint Submission has been filed with the Centre and the commencement fee paid. The Centre shall notify the parties when an arbitration has commenced.

APPOINTMENT OF ARBITRATION TRIBUNAL

11. Number

Unless the parties have agreed on the number of arbitrators before or within 15 days after the arbitration has commenced, the arbitration shall be before a single arbitrator.

12. Appointment of Arbitrator(s)

- (1) Where a single arbitrator is to be appointed, and the parties have not yet agreed upon an arbitrator 21 days after the arbitration has commenced, a party may request the Centre to appoint the single arbitrator.
- (2) Where three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators so appointed shall choose a third arbitrator within 14 days of the date on which the second arbitrator was appointed. The third arbitrator will act as the presiding arbitrator of the tribunal.
- (3) Unless the parties have otherwise agreed, where three arbitrators are to be appointed and one party fails to appoint within the time specified in the agreement or, where no time is specified, within 14 days of receiving notice of appointment of the first arbitrator, the party which appoints the first arbitrator may establish the tribunal in accordance with either Rule 12(4) or 12(5) below.
- (4)
 - (a) The Centre may appoint the second arbitrator upon request of either party.
 - (b) The two appointed arbitrators shall choose a third arbitrator within 14 days of the date on which the second arbitrator was appointed. The third arbitrator shall act as the presiding arbitrator of the tribunal.
 - (c) Where the appointed arbitrators have not agreed upon a presiding arbitrator within 14 days, either party may request the Centre to appoint the presiding arbitrator.
- (5) The party which appointed the first arbitrator may give the party in default of appointment written notice that, if the second arbitrator is not appointed within 14 days of receiving the notice, the first arbitrator shall be the sole arbitrator whose award shall be binding on both parties as if originally appointed sole arbitrator by agreement of the parties.
- (6) Anyone who appoints an arbitrator shall immediately notify the Centre, in writing, of the appointment.
- (7) The parties may agree to request that the Centre appoint an arbitrator at any time.

13. Independence and Impartiality

- (1) An arbitrator shall be and remain at all times wholly independent and impartial.
- (2) Every person must, upon accepting an appointment as arbitrator, sign a statement declaring that he or she knows of no circumstance likely to give rise to justifiable doubts as to his or her independence or impartiality and that he or she will disclose any such circumstance to the parties should such arise after that time and before the arbitration is concluded. A copy of the statement shall be filed with the Centre and a copy provided to all parties.

14. Method of Appointment

- (1) A party requesting the Centre to appoint an arbitrator shall provide the Centre with names previously considered by the parties to the arbitration.
- (2) Where the Centre is asked to appoint a sole or presiding arbitrator, it shall use the following procedure unless it determines the procedure to be inappropriate.
 - (a) The Centre shall communicate to each party an identical list of at least 4 names of proposed arbitrators, together with a brief description of each.
 - (b) Within 10 days of the listing each party shall advise the Centre as to its order of preference of the proposed names and delete any name to which it objects.
 - (c) Taking into consideration the responses of the parties, the Centre may appoint an arbitrator from among the names on the list, or communicate to each party a second list of at least 4 other names.
 - (d) In the event the Centre communicates a second list of names to the parties, each party shall respond with its preferences and objections within 10 days.
 - (e) The Centre will appoint an arbitrator within 14 days of communicating the second list.
- (3) A party seeking more information about a proposed arbitrator shall not communicate directly with the proposed arbitrator. On request, the Centre will endeavor to provide more information about a proposed arbitrator
- (4) When appointing an arbitrator, the Centre shall observe the qualifications agreed to by the parties and have regard to:
 - (a) the objections and preferences expressed by the parties in the appointment procedure, as well as any additional qualifications requested by a party;
 - (b) the nature of the contract;
 - (c) the nature and circumstances of the dispute; and
 - (d) any other consideration likely to secure the appointment of a qualified, independent and impartial arbitrator.

15. Challenges

- (1) A party may challenge any arbitrator where circumstances exist that give rise to a justifiable doubt as to his or her independence or impartiality, or whether he or she possesses the qualifications specifically agreed to by the parties.
- (2) A party who intends to challenge an arbitrator shall, no later than 14 days after the appointment of that arbitrator or 14 days after the circumstances giving rise to the challenge became known to that party, send a written statement of challenge to the arbitration tribunal and to the Centre. The statement of challenge shall set out detailed reasons for the challenge.
- (3) If the challenged arbitrator agrees to withdraw or all other parties to the arbitration agree to the challenge, the challenged arbitrator shall withdraw from the arbitration. In neither case shall the validity of the grounds for challenge be implied.
- (4) Where the challenged arbitrator does not withdraw pursuant to 15 (3):
 - (a) where there is a single arbitrator, that arbitrator shall decide on the challenge;

- (b) in the case of a three person panel where the presiding arbitrator is not challenged, the presiding arbitrator shall decide the challenge;
 - (c) where the presiding arbitrator is the challenged arbitrator, all of the arbitrators shall decide the challenge.
- (5) A party may appeal an arbitration tribunal's decision under 15 (4) to the Centre within 7 days.
- (6) The Centre shall decide the appeal from the tribunal's decision under 15(4) as soon as is reasonably possible after receiving the request and according to such procedures as the Centre considers appropriate. The decision of the Centre on this appeal shall be final and conclusive.

16. Substitution

- (1) The Centre may declare the office of arbitrator to be vacant if, on the basis of evidence thought satisfactory by the Centre, it concludes that an arbitrator is unable to perform the duties of the office. A substitute arbitrator shall be appointed by the Centre.
- (2) Where a member of an arbitration tribunal is replaced, any hearings previously held may be repeated at the discretion of the tribunal. Where a single arbitrator is replaced, any hearing previously held shall be repeated.

CONDUCT OF THE PROCEEDING

17. Place of Arbitration

- (1) The place of arbitration shall be Vancouver, British Columbia, unless otherwise agreed by the parties.
- (2) The arbitration tribunal may meet at any other place it considers necessary for any purpose, including deliberation, to hear witnesses, experts or the parties, or for the inspection of documents, premises, goods or other property.

18. Pre-hearing Meeting

- (1) The arbitration tribunal shall convene a pre-hearing meeting within 21 days of appointment.
- (2) The pre-hearing meeting agenda may include:
 - (a) identification of the issues in dispute,
 - (b) procedure to be followed,
 - (c) fees, costs and deposits,
 - (d) time periods for steps to deal with any other matters that will assist the parties to settle their differences or to assist the arbitration to proceed in an efficient and expeditious manner.
- (3) The pre-hearing meeting may take place by conference telephone call.

- (4) The arbitration tribunal shall record any agreements or orders made at the pre-hearing meeting and shall, within 7 days of that meeting send a copy of that document to each of the parties and the Centre.

19. Conduct of the Arbitration

- (1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner it considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case.
- (2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits.

20. Jurisdiction

- (1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement
- (2) A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause unless specifically found to be so by the arbitration tribunal.
- (3) Any objection to the jurisdiction of the arbitration tribunal to consider a claim or counter-claim shall be raised in the statement of defense or statement of defense to counter-claim. The tribunal may consider a late objection if it regards the delay justified.
- (4) A party is not precluded from raising a jurisdictional plea by the fact that it has appointed or participated in the appointment of an arbitrator.

21. Exchange of Statements

- (1) Within 21 days of the commencement of the arbitration, the claimant shall deliver a written statement to the respondent, the Centre, and the arbitration tribunal, if appointed. The statement should include:
 - (a) a description of all matters and amounts being claimed;
 - (b) the facts supporting the claim(s) made;
 - (c) the issues to be determined;
 - (d) the relief or remedy sought.
- (2) Within 15 days of receipt of the claimant's statement, the respondent shall deliver a written statement of defense.
- (3) At the time a respondent submits its statement of defense, it may make counterclaims or assert a set-off.
- (4) The claimant has 15 days from receipt of the respondent's counterclaim to deliver a written reply.
- (5) Subject to the direction of the arbitration tribunal, each party shall deliver the documents upon which it intends to rely with each of the above statements.

22. Amendment of or Supplement to Claim

The arbitration tribunal may allow a party to amend or supplement its claim or counterclaim or defense during the course of the arbitration, unless the arbitration tribunal considers the delay in amending or supplementing the claim to be prejudicial to another party or considers that the amendment or supplement goes beyond the terms of the arbitration agreement .

23. Production of Documents

The arbitration tribunal may order a party to produce any particular document or class of documents it considers relevant within a time it specifies. Where such an order is made the other party may inspect those documents and take copies of them.

24. Agreed Statement of Facts

The parties shall, within a period of time specified by the arbitration tribunal, identify those facts which are not in dispute and submit to the tribunal an agreed statement of facts.

25. Confidentiality

Unless otherwise agreed by the parties or required by law, all hearings, meetings, and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.

26. Hearings and Evidence

- (1) The arbitration tribunal shall, in consultation with the parties, set the dates for the hearings.
- (2) Each party shall prove the facts on which it relies.
- (3) In deciding issues of relevance and materiality of evidence, the arbitration tribunal shall not be required to apply the rules of evidence.
- (4) The arbitration tribunal may direct the order of proceeding, divide the proceedings into stages, exclude repetitive or irrelevant testimony, limit or refuse to receive the evidence of a witness of fact or opinion, or direct the parties to address specific issues the determination of which may dispose of some or all of the dispute.
- (5) Subject to the direction of the arbitration tribunal,
 - (a) the evidence of every witness shall be presented in written form;
 - (b) the written statement of each witness shall be signed by the witness and, if the tribunal so directs, duly sworn or declared;
 - (c) the parties shall exchange statements of witnesses no less than 5 days before the hearing, if any;
 - (d) a witness shall attend the hearing for oral examination if requested to do so no less than 2 days before the hearing;

- (e) if a witness is requested but fails to attend the hearing, the tribunal may refuse to receive the written statement as evidence or place such weight on the evidence as it considers appropriate; and
 - (f) subject to sub-rules 4 and 5 (e), each statement shall be received as the direct examination of the witness.
- (6) The arbitration tribunal, on such terms as are necessary to prevent prejudice, may allow a party to introduce into evidence a document not disclosed under Rule 21 (5), or introduce oral evidence of a witness not disclosed under this Rule.

27. Experts

- (1) An expert's report shall include a statement of the expert's opinion, the facts upon which the opinion is based, and a description of the qualifications of the expert.
- (2) Subject to the direction of the arbitration tribunal:
 - (a) A party intending to rely on the opinion of an expert shall deliver a copy of the expert's report to each party and the tribunal no less than 14 days before the hearing.
 - (b) A party which objects to the admissibility of all or any part of a report shall notify the party relying on the report no less than 7 days before the hearing.
 - (c) An expert whose report has been delivered under sub-rule 1 shall attend the hearing for oral examination, if requested no less than 7 days before the hearing.
- (3) The arbitration tribunal may direct the parties' experts to meet and to prepare a joint report identifying those matters which are not in dispute and those which are in dispute.
- (4) The arbitration tribunal may appoint one or more experts to report on specific issues and may direct a party to give an expert any relevant information or to provide access to any relevant documents, goods or property in its control or possession for inspection, subject to the following:
 - (a) The tribunal shall first notify the parties of its intention, and invite the parties' submissions in respect of the proposed terms of reference and identity of the expert.
 - (b) The tribunal shall deliver a copy of the expert's report to each party and give each party the opportunity to challenge all or any part of the report in a manner determined by the tribunal.
 - (c) At the request of a party, the expert shall make available for examination all documents, working papers, goods or other property in the expert's possession which the expert used in the preparation of the report.

28. Default of a Party

- (1) If the claimant is properly notified but fails to attend the hearing, the arbitration tribunal may proceed to render a final award with or without a hearing.
- (2) If the respondent fails to deliver its statement of defense or is properly notified but fails to attend the hearing, the arbitration tribunal may proceed with the hearing. The final award shall be made on the basis of the evidence received.

- (3) If the claimant fails to comply with a requirement under these Rules or fails to comply with an order of the arbitration tribunal, the tribunal may issue an order for the termination of the arbitration. The tribunal must provide the claimant with not less than 14 days notice of its intention to terminate the arbitration and determine that the claimant has not provided sufficient cause for being in breach of the Rules or the order of the tribunal.

29. General Powers of the Arbitration Tribunal

- (1) Without limiting the generality of Rule 19 or any other Rule which confers jurisdiction or powers on the arbitration tribunal, and unless the parties at any time agree otherwise, the tribunal may:
 - (a) order an adjournment of the proceedings from time to time;
 - (b) make a partial award;
 - (c) make an interim order or award on any matter with respect to which it may make a final award, including an order for costs, or any order for the protection or preservation of property that is the subject matter of the dispute;
 - (d) order inspection of documents, exhibits or other property, including a view or physical inspection of property;
 - (e) order the recording of any oral hearing;
 - (f) at any time extend or abridge a period of time fixed or determined by it, or any period of time required in these Rules;
 - (g) empower one member of the arbitration tribunal to make interim and other orders, including settling of matters at the pre-hearing meeting, that do not deal with the issues in dispute;
 - (h) order any party to provide security for the legal or other costs of any other party by way of a deposit or bank guarantee or in any other manner the arbitration tribunal thinks fit;
 - (i) order any party to provide security for all or part of any amount in dispute in the arbitration;
 - (j) order that any party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation;
 - (k) make an award ordering specific performance, rectification, injunctions and other equitable remedies.

30. Settlement Offers

- (1) A party making a formal, written offer to settle shall deliver a copy to the Centre.
- (2) If the offer is not accepted, and subject to its terms, the Centre shall hold the offer without disclosing its terms to the arbitration tribunal until after the tribunal has decided the substantive issues in dispute.
- (3) The Centre shall provide the arbitration tribunal with a copy of the offer before the tribunal decides issues of cost.

31. Deposits Against Costs

- (1) The arbitration tribunal may, from time to time, require each party to deposit with the Centre in trust an equal amount as an advance for the anticipated costs of the arbitration including the tribunal's fees.
- (2) If the required deposits are not made within 15 days after receipt of the request from the arbitration tribunal, the tribunal and/or the Centre shall inform the parties in order that another party may make the required payment.
- (3) If the required deposits are not made, the arbitration tribunal may order the suspension or termination of the proceeding.

32. Payment out of Deposits

- (1) The Centre may, from time to time, pay to the arbitration tribunal from any deposit it holds under Rule 31, a reasonable and appropriate amount for fees earned or expenses incurred.
- (2) After the final award has been made, the claim withdrawn, a settlement reached or the arbitration abandoned, the Centre shall apply any deposits it holds to the costs of the arbitration, including any arbitration tribunal fees and disbursements, as well as administrative fees and expenses. The Centre will render an accounting to the parties and return any unexpended balance.

MAKING THE AWARD AND TERMINATING THE PROCEEDINGS

33. Legal Principles Apply

An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

34. Closure of Hearings and Termination of the Proceedings

- (1) Having received the evidence and the final submissions of the parties, the arbitration tribunal shall close the hearing.
- (2) After the hearings have been closed, the arbitration tribunal may, in exceptional circumstances, re-open the hearings at any time before the final award.
- (3) The arbitration tribunal may order the termination of the arbitration where it finds that the proceedings have become unnecessary or impossible.

35. Settlement

- (1) The arbitration tribunal may encourage settlement of the dispute and, with the written agreement of the parties, may conduct mediation, conciliation, facilitation or other appropriate procedure(s).

- (2) If the parties settle the dispute during the arbitration proceedings, the arbitration tribunal shall terminate the proceedings and, if requested by the parties and acceptable to the tribunal, record the settlement in the form of an arbitration award.

36. Arbitral Award

- (1) Pursuant to Section 12 of the Act, where the arbitration tribunal consists of three or more arbitrators, an award shall be made by a majority of the tribunal. Where there is no majority decision, the decision of the chair of the arbitration tribunal shall be the award.
- (2) The arbitration tribunal may make a partial award.
- (3) The arbitration tribunal may make an interim order that shall be merged or addressed in the award when all issues, including costs, have been determined.
- (4) The arbitration tribunal shall make its final award within 60 days after the hearings have been closed.
- (5) An award shall be in writing and include the reasons. The arbitration tribunal shall file a copy of each award with the Centre.
- (6) The Centre may withhold publication of an award to the parties on the basis of outstanding fees.

37. Interest

On the basis of evidence presented, the arbitration tribunal may order simple or compound interest to be paid in an award.

38. Costs

- (1) The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.
- (2) In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 19(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.
- (3) In the event the arbitration tribunal awards costs, it shall specify the amounts of the fees and expenses so awarded or the method for the determination of those amounts.
- (4) Costs include:
 - (a) the fees of the arbitration tribunal which shall be separately determined and stated for each member of the tribunal, together with reasonable travel and other expenses incurred by the tribunal;
 - (b) the fees of any expert appointed by the arbitration tribunal, including travel and other reasonable expenses incurred;
 - (c) the legal and other expenses reasonably incurred in relation to the arbitration by a party determined by the arbitration tribunal to be entitled to recover such costs; and
 - (d) the commencement fee, administration fees, and the expenses incurred by the Centre.

- (5) The liability of parties for the tribunal's fees and expenses is joint and several between the arbitration tribunal and the parties.

39. Amendments and Corrections to the Award

- (1) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct
- (a) a clerical or typographical error,
 - (b) an accidental error, slip, omission or other similar mistake, or
 - (c) an arithmetical error made in a computation.
- (2) An application by a party under 39 (1) must be made within 15 days after the party is notified of the award.
- (3) An amendment under 39 (1) must not, without the consent of all parties, be made more than 30 days after all parties have been notified of the award.
- (4) Within 15 days after being notified of the award, a party may apply to the arbitrator for clarification of the award.
- (5) On an application under 39 (4), the arbitrator may amend the award if the arbitrator considers that the amendment will clarify it.
- (6) Within 30 days after receiving the award, a party may apply to the arbitrator to make an additional award with respect to claims presented in the proceedings but omitted from the award, unless otherwise agreed by the parties.