

A TALE OF TWO LAWYERS: HOW ARBITRATORS AND ADVOCATES CAN AVOID THE DANGEROUS CONVERGENCE OF ARBITRATION AND LITIGATION

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I. INTRODUCTION

When modern arbitration became popular in the United States in the 18th and 19th centuries, courts viewed it as a threat to their exclusive powers. Over time, that mindset has changed dramatically. The passage of the Federal Arbitration Act (“FAA”) in 1926 embraced a federal policy strongly favoring arbitration as a method of relieving court congestion and providing parties with a speedier, less costly means of resolving disputes. Thereafter, agreements to arbitrate found their way into many standard form agreements and business contracts as arbitration became accepted as a *bona fide* alternative to litigating in court. Today, as litigators can attest, judges in our overcrowded courts routinely suggest, cajole and persuade counsel to submit various types of disputes to binding arbitration. Some state courts now require the parties, as a condition precedent to trial, to submit disputes to a court-appointed arbitrator.

Clearly, arbitration is here to stay. But there is a growing sense among those in the Alternative Dispute Resolution (“ADR”) community that, over the past decade or so, the arbitral process has been under attack. The concern is that arbitration is becoming emasculated, procedurally reshaped to the point where a growing number of disputes are now prepared, presented and defended in the same way as court cases. The result is that many of

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the key benefits arbitration offers—including saving time and money, and avoiding extensive and expensive pre-trial discovery—are severely compromised. In short, many commentators fear that arbitration is becoming a mirror image of litigation.¹

Frequently, the desire to litigate in arbitration (sometimes facetiously referred to as “arbitaging”) stems from (1) trial attorneys who are either ignorant about the arbitral process, or (2) attorneys who employ “Rambo-like” tactics because they believe it is in their client’s best interests to transform the arbitration into an expensive, lengthy legal proceeding. In response, those in the arbitration industry have made a series of concerted efforts to educate, remind and counsel those who use arbitration to do so in such a way that the benefits it affords are not compromised.²

The hallmarks of arbitration are its voluntary nature, its flexibility, its efficiency, its finality, and the expertise of the arbitrators. The growing transformation of arbitration into arbitaging has given rise to valid criticisms over the resulting loss of efficiency and economy that is attributable to the shift toward litigation-style tactics and the lack of effective case management by arbitrators.³ Arbitrators and parties who appreciate and abide by the applicable rules

¹ Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8 (2010); see also, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forego access to judicial remedies.”); Elena V. Helmer, *International Commercial Arbitration: Americanized, “Civilized,” or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 35-36 (2003); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 434-35 (2000); Nicolas C. Ulmer, *A Comment on “The ‘Americanization’ of International Arbitration?”*, 16 MEALEY’S INT’L ARB. REP. 24 (June 2001).

² Thomas J. Stipanowich, *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, THE COLLEGE OF COMMERCIAL ARBITRATORS (CCA) (2010), http://www.thecca.net/CCA_Protocols.pdf; ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (Nov. 11, 2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002579; JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES, JAMS (Jan. 6, 2010), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf; Neal M. Eiseman, Robert S. Peckar & Charles Juliana, *Discovery in Construction Arbitration: When Is Enough, Enough?*, AAA Construction Conference (June 1, 2012); John Bulman & Neal M. Eiseman, *Optimizing the Hearing in Arbitration for Your Client*, AMERICAN ARBITRATION ASSOCIATION CONSTRUCTION CONFERENCE (Nov. 13, 2009).

³ Michael Tarullo, *If a Frog Had Wings: Expectations and Realities of Construction Dispute Resolution*, JAMS GLOBAL CONSTRUCTIONS SOLUTION (Winter 2012), available at <http://www.jamsadr.com/files/Uploads/Documents/GEC-Newsletter/JAMS-GEC-News-2012-Winter.pdf>; Albert Bates, *Controlling Time and Cost in Arbitration: Actively Managing the Process and “Right-Sizing” Discovery*, 67 DISP. RESOL. J. 54, 54 (Aug.-Oct. 2012).

can reap the benefit of a streamlined arbitral process.⁴ The starting point for being able to ensure a just, speedy and economical arbitration process is to understand the similarities and dissimilarities of arbitration and litigation during both the pre-hearing and hearing phases.

This Article provides (1) a brief overview of some of the historical differences between arbitration and litigation as they relate to the preparation for and the conducting of hearings, and (2) a description of how litigation-style procedures and practices are finding their way into arbitration and how best to eradicate them. With satirical vignettes to illustrate our points, we discuss the techniques and practices that should be adopted by arbitrators and parties to ensure that arbitration remains an alternative to litigation in resolving disputes—a process that, if utilized properly, is more economical and efficient than trying a case in court.

II. THE UNIQUE—AND CHANGING—NATURE OF ARBITRATION

Despite the growing influence of litigation-style practices, arbitration remains fundamentally different from litigation. “Foremost, arbitration is a private and contractual means of dispute resolution.”⁵ As a matter of contract, each arbitration proceeding must be limited and bound by the specific terms of its parties’ arbitral agreement.⁶ Thus, in practice, the parties are free contractually to choose their own “judges, forum, and rules.”⁷ These attributes make arbitration a system that is “broader . . . than litigation” because an arbitrator is likely to evaluate the ongoing rela-

⁴ See, e.g., Wolf Von Kumberg, *International Commercial Arbitration from a User’s Perspective: Are the Benefits More Theoretical than Real?*, 66 DISP. RESOL. J. 76 (Nov. 2011-Jan. 2012).

⁵ Randy D. Gordon, *Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration*, 18 FLA. J. INT’L L. 549, 559 (2006); see also MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* 1 (1984); *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9d Cir. 2000) (“[A]n agreement to arbitrate is a matter of contract.”); *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2001) (enforcing agreement to foreclose judicial review of an arbitration award beyond the district court level).

⁶ Gordon, *supra* note 5, at 559; FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 321 (3d ed. 1973).

⁷ Gordon, *supra* note 5, at 559. As Gordon notes, the parties may contractually “select their own judges, who do not, incidentally, need to be judges or even lawyers.” *Id.* at n.38; see also, John Arrastia Jr. & Christi L. Underwood, *Arbitration v. Litigation: You Control the Process v. The Process Controls You*, 64 DISP. RESOL. J. 31 (Nov. 2009–Jan. 2010) (discussing the ability of parties in arbitration to select their own “judge”).

tionship between the parties, as opposed to the specific dispute at hand.⁸ At the same time, arbitration can be “narrower” than litigation because its scope is controlled by the agreement.”⁹

An arbitrator’s concern for “a ‘suitable’ rather than a legally correct decision” means that he or she is not bound by ordinary substantive or procedural law in reaching a decision.¹⁰ Accordingly, many have analogized the arbitration process to a classic suit in equity, in which the Chancellor was more concerned with justice than with a slavish adherence to legal formalities.¹¹

Furthermore, it is well-known that the strict rules of evidence and civil procedure that are critical to due process considerations in a trial need not be (and frequently are not) followed at arbitral hearings: “Arbitrators are not bound by the rules of evidence and indeed may draw on their personal knowledge in making awards. Witnesses need not be required to testify under oath. If a written record of a proceeding exists, it need not be as complete as in litigation.”¹²

Traditionally, arbitration included minimal pre-hearing discovery. While the existing arbitration rules promulgated by the American Arbitration Association (“AAA”) and the International Chamber of Commerce (“ICC”) support the proposition that discovery is disfavored in arbitration,¹³ other rule-making organizations have increasingly made way for litigation-style discovery—including depositions—in their rules.¹⁴ Simply put, across-the-

⁸ Gordon, *supra* note 5, at 559.

⁹ *Id.*

¹⁰ *Id.* at 559-60; *see also, e.g.*, *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Mulholland Constr. Co. v. Lee Pare & Ass’n*, 576 A.2d 1236, 1238 (R.I. 1990).

¹¹ Gordon, *supra* note 5, at 560.

¹² Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 36 (1988).

¹³ The AAA’s Commercial Arbitration Rules, for example, explicitly direct that “[t]he arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. . . .” AAA COM. ARB. RULES & MED. PROCS., RULE R-30(b) (2009). Even AAA’s special rules for large and complex cases, which authorize some discovery, make it subject to the arbitrator’s discretion and impose other restrictions. *See id.*, Rule L-4(b) (“Parties shall cooperate in the exchange of documents, exhibits and information within such party’s control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.” *See also* ICC ARB. & ADR RULES, arts. 22 & 25 (2011).

¹⁴ *See, e.g.*, *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS, Rules 16.2, 17, 21 (2010), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf (authorizing document requests, requests for production of electronically stored information, depositions, issuance of subpoenas for witnesses and documents); *IBA Rules on the Taking of Evidence in International Arbitration*, IBA COUNCIL, Arts. 3 & 4 (2010).

board discovery is an anathema to an economic arbitration procedure. Just as discovery has traditionally accounted for the bulk of litigation-related costs,¹⁵ it increasingly threatens to become the biggest expense in arbitration proceedings. While arbitration rules often empower arbitrators to restrict unbridled discovery,¹⁶ traditional litigation-schooled practitioners often agree on extensive discovery programs before an arbitrator is appointed, sometimes even incorporating by reference civil procedure rules.¹⁷ Reflecting this trend, the Revised Uniform Arbitration Act (“RUAA”) of 2000¹⁸ includes many new elements that effectively give the parties the option of treating an arbitration proceeding more like a court case. For example, the RUAA authorizes the arbitrator, in addition to a court, to issue orders for provisional remedies to protect the effectiveness of the arbitration proceeding “to the same extent and under the same conditions as if the controversy were the subject of a civil action.”¹⁹ It explicitly authorizes arbitrators to “decide a request for summary disposition” before the hearing and to set the “time and place” for it.²⁰ The RUAA further empowers the arbitrator to issue nationwide subpoenas for the attendance of witnesses, order depositions, and “permit such discovery as the arbitrator decides is appropriate in the circumstances.”²¹ Under the RUAA, an arbitrator may also award a wide range of final remedies, including punitive and exemplary damages and attorney’s fees.²²

Similarly, courts have recognized that arbitrators, like judges, can make determinations regarding their own jurisdiction.²³ Current federal arbitration law requires courts to enforce the parties’ agreement, if sufficiently “clear,” to submit such front-end ques-

¹⁵ Stipanowich, *supra* note 1, at 12; *see also, e.g.*, Allen L. Overcash & Erin L. Gerdes, *Five Steps to Fast-Track the Large, Complex Construction Case*, 64 DISP. RESOL. J. 35, 38 (May–Jul. 2009) (“Discovery is usually the greatest single cause of delay in large, complex construction cases.”).

¹⁶ *See, e.g.*, AAA COM. ARB. RULES, *supra* note 13, at Rule L-4.

¹⁷ Stipanowich, *supra*, note 1, at 12.

¹⁸ The RUAA has been adopted in Alaska, Arizona, Arkansas, Colorado, the District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. *See Nat’l Conference of Commissioners on Uniform State Laws, Uniform Arbitration Act-2000*, 3 PEPP. DISP. RESOL. L. J. 323 (2003), Prefatory Note.

¹⁹ *Id.*; *See also* 7 U.L.A. 33–34.

²⁰ *Id.* at § 15; *See also* 7 U.L.A. 56–57.

²¹ *Id.* at § 17; *See also* 7 U.L.A. 60–61.

²² *Id.* at § 21; *See also* 7 U.L.A. 72–73.

²³ *See* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

tions as the scope of arbitrability to the arbitrator.²⁴ A number of courts have also upheld the power of arbitrators to render summary judgment²⁵ or to sanction parties for failing to comply with arbitral orders.²⁶ Under the FAA,²⁷ it is unsettled whether an arbitrator can subpoena third-party witnesses who are not bound by the arbitration agreement.²⁸ However, in response to such uncertainties, the drafters of the RUAA specifically authorized arbitrators to issue deposition subpoenas.²⁹

There is broad support for the proposition that arbitration is a better alternative to litigation for industries such as construction, where it is beneficial to have the expertise of engineers, architects and construction attorneys on panels. Indeed, the AAA has a set of arbitration rules specifically designed for the construction industry.³⁰ The same holds true for any industry where it is preferable that the individual(s) deciding the dispute has expertise in the subject matter of the dispute.

With all of this background in mind, it becomes clear that the rationales underlying the parties' selection of arbitration are confounded when the process begins to resemble traditional civil litigation. Consider the following:

²⁴ See, e.g., *Kaplan*, 514 U.S. at 947.

²⁵ See *Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (1995); *Stilfer v. Seymour Weiner*, 488 A.2d 192 (Md. App. 1985); *Pegasus Constr. Corp. v. Turner Constr. Co.*, 929 P.2d 1200 (Wash. App. 1997); but see *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996).

²⁶ See, e.g., *Superadio Ltd. v. Winstar Radio Prods., LLC*, 844 N.E.2d 246, 252–54 (Mass. 2006).

²⁷ 9 U.S.C. §7, (2012).

²⁸ Compare *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078 (N.D. Ill. 2008) (holding that the FAA does not afford the arbitrator with the power to subpoena third parties), with *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865 (8d Cir. 2000) (holding that the power expressly granted to arbitrators under the FAA to require non-parties to appear and produce documents at a hearing included the implied, lesser power to require production of such documents prior to a hearing). For a detailed discussion of the conflict among the various United States circuit courts on this aspect of the FAA, see Hans Smit, *Obtaining Evidence from Non-Parties in International Arbitration in the United States*, 20 AM. REV. INT'L ARB. 421 (2009).

²⁹ See UNIF. ARB. ACT § 17(b) (2000), 7 U.L.A. 61 (2009).

³⁰ See generally AAA CONSTRUCTION ARB. RULES & MED. PROCS. (2009).

III. VIGNETTE #1: A TALE OF TWO LAWYERS: HOW *NOT*
TO ACT AT THE PRE-HEARING
MANAGEMENT CONFERENCE

Lee T. Gates is not your typical trial attorney. He regularly employs (and enjoys) Rambo-like tactics and revels in his carefully crafted reputation for exploiting the legal process to wear down his opponents. For several consecutive years, he was first in his state for taking the most depositions. By his own account, he routinely serves interminable and onerous interrogatories in all of his cases and files more motions for protective orders than anyone he knows. Over the years, Lee has specially-designed time schedules for his cases. As if on automatic pilot—and of course after execution of stringent confidentiality and non-compete agreements—Lee tasks his ever-rotating group of junior attorneys with the implementation of his strategy. For most matters, besides the initial client meeting, Lee doesn't bother himself much in the minutia until the emergence of what he calls “the perfect storm”—the time after the third round of discovery when, according to the schedule, is also when supplemental responses are due to the first two sets, along with the motion to compel, or in the alternative sanctions for failure to present an adequately prepared Rule 30(b)(6) corporate designee. In Lee's own mind, he is simply the best at using civil procedure to wear out opponents, psychologically and financially. His clients' interests are sometimes secondary to these ends.

Surprisingly, though, he has never arbitrated a case before. When a construction client recently retained him to defend it in a dispute where the parties' contract contained a broad agreement to arbitrate,³¹ he relished the opportunity to expand his reputation and common practices into the ADR arena. He examined the arbitration clause and saw that it mandated that hearings be held before the AAA pursuant to its Construction Industry Rules.³² From Lee's point of view, arbitration was just going to be litigation with a private judge. As is his wont, he never bothered to read the Construction Rules beyond the introduction; he fully intended to

³¹ The contract provides: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”

³² AAA CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES (including Procedures for Large, Complex Construction Disputes), Rules Amended and Effective Oct. 1, 2009 (“Construction Rules”) available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004219&revision=latestreleased (last visited Mar. 1, 2013).

play by his own set of rules.³³ Lee even giggled to himself when he saw the sentence in the Rules' first paragraph stating that "[a]rbitration has proven to be an effective way to resolve these disputes privately, promptly and economically."

Lee took out a pamphlet on commercial arbitration that he held on to from a continuing legal education course he was required to take a few years back. It underscored that arbitration is not the same as, but is an alternative to, litigation because in arbitration the emphasis is on speed, efficiency, cost-savings and finality rather than just due process of law.³⁴ The pamphlet also noted that, as a result, many of the pre-trial discovery devices used in litigation are not part of an arbitration proceeding.³⁵ "We'll see about that!" he chuckled to himself as he crumpled up the pamphlet and tossed it, from three-point range, directly into the trash bin. Lee rolled up his sleeves and said to himself: "Let's have some fun."

The next day, his army of associates serves upon the claimant's counsel, Arby Traite, Esq., the first round measures: (1) four notices to take the depositions of the CEO, CFO, a Department Head, and a Corporate Deposition on fifty-four separate topics; (2) 100 interrogatories excluding sub-parts; (3) a blunderbuss document demand covering every possible written and electronic communication issued by any employee of the claimant for the past three years; (4) copies of five non-party *duces tecum* and *ad testifi-*

³³ Lee T. Gates apparently overlooked (or conveniently chose to ignore) the language in the Construction Rules at R-1(a): "The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules or whenever they have provided for arbitration of a construction dispute without designating particular AAA Rules." *Id.*

³⁴ See *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 159 U.S. 662 (2010) (Parties to an arbitration "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (acknowledging "a substantive law of arbitrability"); see also *COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999) ("Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes.") (citing *Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980)).

³⁵ See *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993) (acknowledging that "the benefits of pretrial discovery [are] often unavailable in an arbitral forum"); see also *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980) ("An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties that are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery.").

candum subpoenas that are in the process of being served upon various non-party witnesses; and (5) a motion to be presented to the arbitrator seeking to dismiss the demand for failing to state a cause of action. In the transmittal e-mail to Arby Traite attaching all of the foregoing, he proudly notes “I LEAVE NO STONE UNTURNED. MORE TO FOLLOW.”³⁶

After receiving Lee’s e-mail and its myriad of attachments, Arby resists the temptation to respond in kind. He knows that a seasoned, properly-trained arbitrator will be turned-off by what Lee is attempting to do, so he focuses his efforts on doing everything possible to select an arbitrator with proven management ability who is sensitive to the need for a speedy and efficient process. He also knows that the underlying facts and issues in the case are not overly complicated, so the Construction Rules, when followed by the arbitrator, will not allow Lee to run roughshod. Accordingly, Arby sends Lee a frank, non-argumentative e-mail (1) suggesting that Lee focus on selecting an arbitrator, (2) objecting to his discovery demands as improper and (3) suggesting that if Lee is serious about turning the arbitration into a time-consuming, expensive litigation-type proceeding, he will first need—over Arby’s strenuous objection—to obtain the permission of the arbitrator.³⁷ After he receives Arby’s e-mail, Lee smiles and gives the “all clear” to his team to immediately rifle off “phase two”—a twenty-page Request for Admissions containing 285 separate requests and appending 50 documents.

Subsequently, after the selection of the arbitrator,³⁸ Arby gears up for the pre-hearing conference mandated by AAA Rule R-23. Not only does it afford the parties the opportunity to clarify the issues and claims, to schedule the evidentiary hearings and deal with any preliminary matters,³⁹ it also represents the first opportu-

³⁶ See COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich et al., eds., 2010), citing International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information, available at www.adr.org/si.asp?id=5288 (last visited Mar. 1, 2013).

³⁷ Unlike Lee, who couldn’t be bothered to read the Construction Rules, Arby knew that under Rule R-23, it is the arbitrator who directs whether and to what extent discovery may be required and that even in the Large Complex case context (Rule L-4 (c)), the “extent to which discovery shall be conducted” is a topic for consideration by the arbitrator. See *supra*, note 32 at Rule 23.

³⁸ Arbitrator Ima Notsoloman, an experienced commercial arbitration and trial attorney from a prominent New York law firm, was appointed by the AAA.

³⁹ See CCA PROTOCOLS, *supra* note 36, at Rules R-23 and L-4.

nity to discuss the case before the arbitrator.⁴⁰ Arby understands the importance of making a good first impression and wants to set the proper tone for the remainder of the proceeding. He is well aware that Rule 24, titled “Exchange of Information,” recognizes the “expedited nature of arbitration” and authorizes only document exchange, the identification of witnesses to be called at the hearings and the exchange of exhibit books prior to the hearings. In fact, subparagraph (d) affirmatively states that “[t]here shall be no other discovery . . . unless so ordered by the arbitrator in exceptional cases.”

Arby also prepares himself for Lee’s inevitable assertion that this is a large, complex matter that should be administered under the AAA’s Large Complex Construction Disputes Rules.⁴¹ If Lee is able to convince the arbitrator that those rules must be followed, Arby understands that the arbitrator may be inclined to permit some additional discovery.⁴² Nonetheless, there is no automatic right to much beyond document discovery and expert disclosure, so Arby is eager to point out that it is incumbent upon Lee to substantiate a bona fide need for motion practice or interrogatories or depositions. Arby is ready to remind the arbitrator that if Lee’s client wanted to avail itself of traditional pre-trial discovery, it never should have agreed in its contract to arbitration. Arby also prepares a list of several examples to illustrate why any information that would be conveyed through interrogatories or depositions can just as easily be obtained through particularizations of claims and cross-examination of the testifying witnesses.

Lee manages to delay the pre-hearing conference for several weeks, pleading sickness and a variety of other transparent excuses. Finally, however, the telephone conference takes place.⁴³ The arbitrator, Ms. Notsoloman, spends some time allowing Lee and Arby to describe the nature of the case and the core issues. Notsoloman, through sheer dint of persuasion, gets an agreement

⁴⁰ By this time, the arbitrator has received Arby’s arbitration demand setting forth a relatively clear and concise description of the claim as required by Rule R-4. In contrast, the arbitrator has not received a similar description from Lee T. Gates because Lee is seeking a dismissal.

⁴¹ The Large Complex Rules apply if either the claimant’s claim or the respondent’s counter-claim total \$1 million or more. See *CCA PROTOCOLS*, *supra* note 36, at Rule L-1.

⁴² Rule L-4 provides the arbitrator(s) in a Large Complex Case shall determine “the extent to which discovery shall be conducted.” *CCA PROTOCOLS*, *supra* note 36, at Rule L-4.

⁴³ Stipanowich, *supra* note 36, at 70 (“If possible, the conference should be conducted in-person, which is more conducive to cooperation and mutual brainstorming than a conference call. Unless the amount at stake is quite modest, the increased productivity of an in-person conference is almost always worth the added expense.”).

regarding hearing dates from Lee and Arby⁴⁴ and works her way backward to establish the overall case schedule. Lee, as one might expect, becomes frustrated at the common sense and practical approach. At one point during the pre-hearing conference, the following exchange takes place:

MR. GATES: I want to talk about my discovery. Mr. Traite refuses to comply with my limited and reasonable discovery.

MR. TRAITTE: I'm sorry, I'm not sure I heard that. Did you actually say "limited and reasonable discovery?"

MR. GATES: Yep.

MR. TRAITTE: Wow.

ARBITRATOR NOTSOLOMAN: Have you agreed on any discovery plan?

MR. TRAITTE: No, we haven't except for my objection to his supposed "limited and reasonable discovery."

ARBITRATOR NOTSOLOMAN: Have you had any discussions at all?

MR. TRAITTE: I tried.

MR. GATES: What's to discuss? I sent my demands to him weeks ago and he has no excuse. His silence is deafening.

ARBITRATOR NOTSOLOMAN: Mr. Gates, I did briefly review your discovery requests. You do recognize, don't you, that you don't ordinarily get discovery as a matter of right in arbitration?

MR. GATES: With all due respect,⁴⁵ Ms. Notsoloman, of course I get to have discovery! We're not back in

⁴⁴ Securing the hearing dates required, in the end, the arbitrator's request that Lee put his clients on the phone for the remainder of the preliminary conference. Thinking better of his most recently stated position on hearing dates, Lee acquiesced.

⁴⁵ The authors note that rarely, if ever, is this phrase followed by language complimentary to the arbitrator.

the 18th Century! What kind of due process would there be without it?

ARBITRATOR NOTSOLOMAN: Exactly what due process concern are you raising?

MR. GATES: C'mon judge, I've been litigating for twenty-five years. I've never had a case where I couldn't do interrogatories, requests to admit and all my depositions! These are basic fundamental rights!

ARBITRATOR NOTSOLOMAN: I understand your point. My obligation, Mr. Gates, is to manage this arbitration to honor the parties' contract calling for arbitration. If there is a genuine due process concern, tell me now. Otherwise, we need to look to the applicable AAA Rules. Absent the agreement of the parties, we need to discuss and I need to approve all discovery beyond the exchange of documents and witness and exhibit lists.⁴⁶ So tell me why you need to conduct this expansive discovery?

MR. GATES: Wow, kind of a silly question! How can I prepare for depositions without interrogatories? How can I prepare for trial—I mean arbitration—without depositions? How can I beat up experts without my interrogatories? I'll have you know I've been perfecting these interrogatories for my whole career! As my Daddy used to say, "Lee, my boy, leave no tern un-stoned." Something like that anyway.

ARBITRATOR NOTSOLOMAN: Mr. Gates, my father always told me to keep my options open which, in this case, I fully intend to do. Mr. Traite, any thoughts?

MR. TRAITTE: I really think that Lee's proposed discovery goes way beyond what this case needs, what the

⁴⁶ Arbitrator Notsoloman is, of course, wrong in one regard. Even if the parties agree on a discovery plan, the arbitrator should review and approve it after confirming it is consistent with the nature of the case and the overall case schedule.

Rules contemplate, and what these parties anticipated. My lord, Ms. Notsoloman, he even wants to know what summer camp my client's children go to! The issues are fairly straightforward and the amount in controversy is not gargantuan. It seems to me that Mr. Gates has to show good cause for conducting discovery beyond the exchange of documents. I object to his overreaching, make-work discovery that is not going to contribute one whit to this case!

MR. GATES: Well tough noogies Arby, I'm gonna get my discovery! You wait!

MR. TRAITÉ: Over my dead body. There is no way . . .

ARBITRATOR NOTSOLOMAN: Gentlemen, gentlemen, hold on. You might find it more productive to address the issues with me. Mr. Gates, as I understand it, your due process concern boils down to the assertion that you have always conducted extensive discovery in litigation and you feel it is necessary for your proper presentation of the case at arbitration. Is that a fair summary?

MR. GATES: I guess so.

ARBITRATOR NOTSOLOMAN: Well, that's not really a due process issue. That's more the nature of the arbitration process your client agreed on. You will have full opportunity to examine and cross-examine witnesses to make sure I get the full picture. Now, for example, if you needed to secure the testimony from an out-of-state witness, I am sure that Mr. Traite would not object to a deposition under those circumstances, and I would be inclined to allow it. But otherwise, we need to look to the rules, and these rules are not the same as trial court rules.

MR. GATES: You have to let me do expert witness depositions, at least. Please?

ARBITRATOR NOTSOLOMAN: Mr. Traite?

MR. TRAITÉ: It probably makes sense to have a limited deposition of the two main experts since it will probably expedite the hearings.

*ARBITRATOR NOTSOLOMAN: Expert disclosures are due under our schedule by the end of April. Why don't we have expert depositions by the end of May, limited to eight hours each, absent good cause. Okay?*⁴⁷

MR. TRAITÉ: Sounds fine.

*MR. GATES: You must be joking! The shortest expert deposition I have done in the last ten years was six full days and that's only because the witness's ulcer began to bleed.*⁴⁸ *This is absurd!*

ARBITRATOR NOTSOLOMAN: Not absurd, Mr. Gates, but arbitration. For now, I will not permit discovery beyond the exchange of documents, the expert disclosures and the expert depositions. If either party feels that there is good cause to conduct other, limited discovery, please send an e-mail request to me, which includes your reasons for the discovery along with the precise discovery requests. Let's move on.

Lee, smarting from what he perceives as manifest mistreatment by the arbitrator and apparently the world in general, seeks to make

⁴⁷ Arbitrator Notsoloman made a judgment call here probably to appease Mr. Gates, also recognizing that parties, even seasoned participants in arbitration, tend to "hide the ball" as much as possible with expert disclosures. Expert disclosures should comport with Federal Rules of Civil Procedure Rule 26(a)(2)(B), which requires a written report that contains a complete statement of all opinions the witness will express and the reasons behind them. The rule also requires a recitation of the facts and data reviewed in forming the opinions, exhibits that will be used to summarize/support the facts, witness qualifications and publications, a listing of previous cases in which the witness testified, and a statement of compensation the expert is receiving. FED. R. CIV. P. 26(a)(2)(B)(ii)-(vi). In this context, and assuming the parties comply, the need for a deposition to understand the opinions and factual underpinnings of said opinions is unnecessary. See John Burritt McArthur, *Do Arbitrators Know Something that Judges Don't?*, 94 JUDICATURE 107, 115 ("With the detailed expert reports not required under Rule 26, the expert deposition often should be unnecessary.")

⁴⁸ Lee must focus his practice in state court without the one day of seven-hour limit placed on depositions under the federal rules. FED. R. CIV. P. 30(d)(1). If depositions are allowed in arbitration, an arbitrator should impose a similar limitation on time as designed by the federal rules.

some hay by pressing his Motion to Dismiss. The following exchange ensues:

MR. GATES: What about my Motion to Dismiss? I demand that it be heard! Now that IS a matter of due process or I'm an idiot!

MR. TRAITE: I'm not sure I should comment.

ARBITRATOR NOTSOLOMAN: Please don't.

MR. TRAITE: But I would point out that it's awfully premature to entertain a motion to dismiss. You haven't even heard a single witness and we haven't even exchanged documents.

ARBITRATOR NOTSOLOMAN: Mr. Gates, I don't read your motion as raising any clear issue demanding dismissal, such as a release or a statute of limitation, assuming statutes of limitation are binding in arbitration. Short of that kind of situation, Mr. Gates, I think we should stay focused on preparing this matter for hearing.

MR. GATES: You can't do that to me! How can I justify this to my client?

ARBITRATOR NOTSOLOMAN: Mr. Gates, you are obviously a talented trial lawyer. The arbitration process is a little different, as I am sure you will come to find. To further make clear the difference, I also order the following: First, any party wishing to file a motion related to discovery must attach a certification that the party has conferred with the opposing party in good faith to seek a resolution to the issue, without success, and that resolution by me is necessary. I expect to see particular facts in the certification regarding the attempts such as dates, lengths of calls, and positions taken.

MR. GATES: Jeez Louise—what if I need to go to the bathroom?

ARBITRATOR NOTSOLOMAN: Second, counsel must obtain my permission before filing any other substantive motions down the road. Is that clear?

MR. TRAITE: Very.

MR. GATES: Say again?

ARBITRATOR NOTSOLOMAN: Second, counsel must obtain my permission before filing any other substantive motions down the road. Is that clear?

MR. GATES: You're telling me that I need your permission to file a motion? I'll get you reversed in a heartbeat! I am sorry, Ms. Notsoloman, I simply cannot believe this is right! And you, Arby, are you going to be such a wimp in this case as to allow this?

ARBITRATOR NOTSOLOMAN: That's enough, Mr. Gates. We are all professionals and I expect you and Mr. Traite to act appropriately. Let's stay focused on the issues at hand. I point out that it is a small burden for you to send a letter indicating what motion you wish to file and why. Let's move on.

MR. GATES: [unintelligible mutter]

MR. TRAITE: [vigorous nodding]

At this point, Lee T. Gates, nearly apoplectic, is popping Tums and mumbling to himself that he will actually read the Construction Arbitration Rules. Thereafter, as to the conduct at the hearings themselves, Arby suggests:

- All exhibits should be presumptively admitted without elaborate foundation unless genuine, substantive objections can be articulated.
- There must be assurances that the right witness is being called for the right testimony.
- Offers of proof should be encouraged to preempt unnecessary, time-consuming testimony.

- There will be tandem experts where both parties' experts attend the hearings to encourage a meaningful dialogue between them for the benefit of the arbitrator.

Predictably, Lee immediately objects to these suggestions, noting that he made his money and his reputation on the hyper-technical use of the rules of evidence to keep documents out of court. Perhaps fatigued by the entire preliminary conference process, Lee fails to respond when both Arby and Ms. Notsoloman noted that, under Rule R-33(a), conformity to the rules of evidence is not necessary in arbitration proceedings. Lee again promises himself an immediate review of the Construction Rules.

At the end of the pre-hearing conference, Arby places the phone gently down upon the receiver and smiles. Lee slams down the receiver, crumbles up his notes and heaves an air ball far to the right of the trash bin. He is not smiling.

Ms. Notsoloman carefully prepares a memorandum to her arbitration file setting forth an overview of the case, substantive and procedural topics discussed, evaluation of counsel, and other preliminary observations. She also instructs the Case Manager to issue the Preliminary Hearing Conference Order that clearly delineates the hearing schedule, deadlines and requirements leading up to the hearing, the procedure requiring leave to file motions, and direct exchange with the arbitrator. Reflecting on the abrupt, boorish comments made by counsel and forecasting the difficulty likely to flow from such conduct should it continue, for the first time, she concluded her Order with the following statement:

By contract, the Parties agreed to settle their dispute through arbitration. In adopting the AAA Rules, they recognized the value in choosing this method of dispute resolution. As the selected Arbitrator, I recognize the authority and responsibility the Parties have entrusted upon me. At all times, I will respect the role I have been given and will collaboratively work with the Parties to ensure we achieve a prompt, economical, fair, and final resolution of this matter. This will best be achieved through the exercise of professionalism, cooperation, courtesy, and resolute follow-through on above-recited commitments made by all parties. Accordingly, it is so ORDERED. Non-compliance with this Order will be remedied by me, through an allocation of costs or other appropriate mechanisms, consistent with the Parties' agreement and the AAA Rules.⁴⁹

⁴⁹ Such a statement would be rare, but with counsel such as Lee T. Gates, it might be appropriate.

IV. REQUIRING COOPERATION AND IMPOSING ACCOUNTABILITY AT THE PRE-HEARING CONFERENCE

As demonstrated in our parody, the pivotal time to address any potential disruptions in the arbitral process is at the initial pre-hearing conference.⁵⁰ This is typically the first occasion the arbitrator and the parties, usually through their counsel, communicate with one another about the specifics of the dispute and what information needs to be exchanged to adequately prepare for the evidentiary hearings.⁵¹ It is important for the arbitrator to set the correct tone of cooperation, assert leadership, and communicate the intent to keep the parties accountable to their commitments.⁵²

The exchange of information is a delicate dance in arbitration. When in doubt, the rule of thumb is to actively avoid expansive discovery.⁵³ Given the lack of rules, such as those that exist in the court system, the *flexibility* of the information exchange process is actually one of the more beneficial aspects of the arbitral process.

⁵⁰ See Stipanowich, *supra* note 2, at 70 (“The single greatest tool for achieving a fair and efficient commercial arbitration is a well-conducted preliminary conference. It is the best opportunity for all participants to focus their attention and creativity on how to make the arbitration run smoothly and economically. It is also the ideal time for client representatives to appreciate how costly and protracted a ‘scorched earth’ campaign will be and how much time and money can be saved by scaling back on discovery, motions and hearing time. That is why arbitrators should insist that senior client representatives (business executives or in-house counsel) attend the conference.”).

⁵¹ *Id.* (“A productive preliminary conference requires thorough preparation by all participants. Arbitrators should provide counsel with an agenda of matters to be taken up at the conference and should invite counsel to add to the list. Arbitrators should require counsel to discuss the agenda items in an effort to reach agreement on as many items as possible and provide to the arbitrators, prior to the conference, a joint email setting forth the agreements they have reached and their respective points of disagreement.”).

⁵² *Id.* at 68-69 (“Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with each other and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectation of cooperation and reasonableness and affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as rulings on motions, issuing orders and the like.”).

⁵³ *Id.* at 69 (“Arbitrators should recognize that commercial parties are generally looking for ‘muscular’ arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously.”). Some rules even appear to permit arbitrators to trump parties’ agreements, for example, AAA RULE L-4(c) authorizes the arbitrator to “place such limitations on the conduct of such [agreed] discovery as the arbitrator(s) shall deem appropriate.”

A. Pre-Hearing Conference

1. The Importance of the Pre-Hearing Conference

The perceived benefits of arbitration, including flexibility, speed, and relative affordability, should be safeguarded at the pre-hearing conference, and this requires significant preparation by the arbitrator and advocates.⁵⁴ This is the critical event in the arbitration that sets the tone for the pre-hearing discovery to be permitted and the procedures to be followed once the hearing phase begins. Accordingly, those who do not prepare adequately for the conference do so at their own risk. Proper preparation requires a case assessment; consultation with the client about witnesses, documents, and information exchange; budgetary evaluation; strategic analysis regarding legal theories and presentation of evidence; and reflections on the interplay among opposing counsel, the arbitrator, and the respective business interests in play.⁵⁵ It is more than merely a conference to set dates or to explore information exchange in a generalized sense. Rather, it requires the arbitrator to communicate unambiguous expectations regarding the arbitration process and to set forth a schedule that instills among counsel a motivation to cooperate and a common commitment to ensure the parties gain the advantages of their choice of dispute resolution.⁵⁶ If either the neutral or advocates appear unprepared to participate in such a productive discussion, it is wise to consider rescheduling the conference after this necessary work has been performed.

⁵⁴ See Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS & COMM. L.J. 383, 428 (2009) (noting that the "pre-hearing conference assumes special significance as a tool for process planning and guidance" for expedited arbitrations); Kent B. Scott & Adam T. Mow, *Creating an Economical and Efficient Arbitration Process is Everyone's Business*, 67 DISP. RESOL. J. 41 (Aug.-Oct. 2012).

⁵⁵ See Stipanowich, *supra* note 36, at 29 ("Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business's important interests, the prospect of a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective . . . as they do with other large expenditures, businesses should set an appropriate and realistic budget for the arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference. . . .")

⁵⁶ Reference back to the "choice" the parties made to select arbitration is very helpful in guiding the discussion and obtaining consensus during the early stages of an arbitration process. See Stipanowich, *supra* note 1, at 51 ("Choice is what sets arbitration apart from litigation. If parties truly desire an expedited procedure in which speed and economy are the preeminent goals, it is possible to structure and implement a 'lean program' to achieve those ends at the cost of various procedural bells and whistles.").

Parties do not want to be in arbitration where their opponent acts in a way that improperly lengthens the time and expense to get the dispute resolved. They also do not want to be before an arbitrator who lacks the desire, confidence or ability to control the events leading up to the hearings. A frustrating scenario for an experienced arbitration advocate is when he or she shies away from presenting creative ideas to expedite a matter (or from challenging the counter-productive conduct of opposing counsel) simply because the arbitrator will not entertain it. The hesitancy usually emanates from the arbitrator's unwarranted fear that issuing an adverse ruling will constitute grounds for vacating an award.⁵⁷ Therefore, it is critical that the organization the parties select to administer the arbitration be fully cognizant of the need to avoid abuse and delay and that it has on its roster experienced arbitrators who are willing and able to take appropriate actions to deter such behavior.⁵⁸

The arbitrator should also consider scheduling compliance conferences to confirm the parties have met all of the previously ordered deadlines for exchanging information. This serves as a reminder of the importance of deadlines and also acts as a deterrent to any party who might otherwise be less than vigilant as to the dates set forth in the arbitrator's scheduling order. This also tends to prevent the all-too-frequent scenario where one or more parties applies to the arbitrator at the last minute to adjourn hearing dates.

2. The Purpose and Scope of the Pre-Hearing Conference

A preliminary conference in a commercial arbitration case is not unlike a Rule 16 scheduling conference under the Federal Rules of Civil Procedure. Its purpose is to generate a road map for

⁵⁷ Stipanowich, *supra* note 54, at 433 (“[S]ince arbitrators are subject to vacatur for refusal to admit relevant and material evidence some may draw the inference—not established by law—the failure to grant court-like discovery is an inherent ground of vacatur”) (citing 9 U.S.C. § 10(a) (2000)).

⁵⁸ See Stipanowich, *supra* note 36, at 56 (“Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider’s roster and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness.”). To ensure the organization makes decisions appropriately, counsel should respond freely and openly to post-arbitration inquiries regarding the qualities of the arbitrator. Most service providers send counsel questionnaires to complete regarding the performance of the arbitrators. In addition, many attorneys and law firms maintain a database regarding the qualifications of arbitrators for a particular matters.

the resolution of the case through settlement or disposition at the evidentiary hearings. Yet sometimes the informality of the arbitration process inappropriately causes a lack of preparation. The exaggerated example of Lee T. Gates in Vignette #1 is meant to illustrate this point. Rather than reading the applicable AAA Rules or critically thinking about the dispute resolution process, Mr. Gates seemingly ran through his litigation checklist immediately before the preliminary conference and mistakenly expected his adversary and decision-maker would do no more. Clearly, he was unprepared. Arbitrator Notsoloman had the authority to reconvene the preliminary hearing so that it was both in-person (rather than telephonic) and with a senior client representative present.⁵⁹

Rule 23 of the AAA Construction Industry Rules lets the parties know that the preliminary management conference is the time to make scheduling and other decisions that will control the time and cost of the arbitration. It points out that the matters to be discussed at the preliminary management hearing may include (1) the issues to be arbitrated, (2) specifications of all claims and (3) identifying ways to offer testimony and exhibits efficiently and cost-effectively at the hearings.⁶⁰ More specifically, Rule 23 provides that the issues to be raised may include deadlines for amending claims, the scope and timing of the exchange of information, a review of possible cost-savings steps, testimony by affidavit, telephone or the Internet, plus the procedures for exhibit management and the identity and testimony of witnesses.⁶¹ The topics to be covered during an effective preliminary conference include:

⁵⁹ There is an interesting flux between the attorney-client relationship in arbitration versus litigation. Because of the flexibility of arbitration and the fact that it is inherently a product of the client's *choice* to waive litigation, the client's role and involvement is often heightened. A party's attorney needs to reflect on this dynamic and defer decisions, on at least a preliminary basis, concerning procedural and/or strategic considerations to the client. Scott & Mow, *supra* note 54, at 40 (citing the CCA Protocols and recommending "continuing involvement of company representatives"); *see also* Stipanowich, *supra* note 54, at 53 (advising that "principals, and not agents, must act as principals [and] ideally this includes not only choice making at the time of contracting, but a strategic approach to conflict management in which arbitration is considered among a variety of tools and approaches." The CCA Protocols state that "[i]n-house counsel are a vital part of the effort to distinguish the tone of an arbitration process from that of litigation."

⁶⁰ AAA Rule, *supra* note 32 at Rule 23.

⁶¹ *Id.*

a. Identification of Agreed-Upon and Disputed Issues
of Fact and Law

To benefit from (and even to improve upon) the efficiency of arbitration, it is necessary to identify all of the disputed issues.⁶² Ordinarily, the claimant and respondent need only scratch the surface at specifying the general nature of their claims. In practice, the description of the dispute and the dollar amount accomplish little more than triggering the attributes sought in the selection of an arbitrator(s) and the amount of the administrative fees.⁶³ The time period between the appointment of an arbitrator and the preliminary conference provides fertile ground for more detailed specification of claims. While the formality of “admit, deny, or unable to admit or deny” used in court practice from general perspective should not be followed, the practice of simply saying “undisputed” or “disputed” (along with a specific factual explanation) is preferred.⁶⁴

⁶² See JAMS STREAMLINED ARBITRATION RULES & PROCEDURES R. 7 (2009) (requiring claimants to file a “Submission of Claim . . . including a detailed statement of . . . claim including all material facts to be proved, the legal authority relied upon . . . copies of all documents that Claimant intends to rely upon in the arbitration and names of all witnesses and experts Claimant intends to present at the Hearing.”). The CCA Protocols refer to the early exchange of claims and defenses as being of “critical importance” and “a dramatic departure from the current norm in arbitration practice and [which will] demand significant adjustment in the expectations of advocates.” See Stipanowich, *supra* note 36, at Rule 8 commentary, 34-35. This call for heightened, early specification of claims also exists in the litigation arena—a recent task force concluded that the “failure to effectively identify issues early-on ‘often leads to a lack of focus in discovery.’” Institute for the Advancement of the American Legal System, *Final Report On The Joint Project Of The American Collect Of Trial Lawyers Task Force On Discovery And The Institute For The Advancement Of The American Legal System*, AMERICAN COLLEGE OF TRIAL LAWYERS (2009), <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (calling for notice pleading “to be replaced by fact-based pleading . . . that ‘set[s] forth with particularity all the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses.”).

⁶³ AAA Rule R-5 requires the claim submission to contain

- (a) The names and addresses for each party;
- (b) A statement setting forth the nature of the relief sought, the amount involved and the claims and counterclaims asserted by the parties. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party;
- (c) The hearing locale, if agreed upon by the parties;
- (d) The appropriate filing fee for each claim or counterclaim.

Rule R-5 concludes by encouraging parties “to provide descriptions of their claims in sufficient detail to make the circumstances of their dispute clear to the arbitrator.” The Arbitrator should compel this in an order prior to the preliminary conference. See *supra* note 32 at Rule 5.

⁶⁴ This is analogous to the separate statement of undisputed facts required by many state and federal courts for motions for summary judgment. See CAL. CODE CIV. P. § 437c(b)(1); MASS. SUPER. CT. R. 9A(b)(5). The key to this framework is limiting the answer to singular word choices—undisputed or disputed. If disputed, the respondent must provide some factual basis as

After pleasantries are exchanged during the preliminary conference, unlike the more common practice of asking each party to present their description of the case, an arbitrator may consider framing, based upon a review of the filings, the factual issues in chronological order followed by the relevant issues of law (followed, of course, by a statement, “Did I get that right?”). If the issues are too numerous or complex, an “issue-by-issue” scorecard tends to increase the likelihood of an efficient preliminary conference.⁶⁵ Such an approach accomplishes, overtly and subtly, several objectives.

First, it establishes the arbitrator’s control over the case. It demonstrates that there already has been a serious commitment of time devoted to the matter by the arbitrator who understands the facts and legal issues. The derivative benefits of such a perception should be less overreaching on discovery issues and unmeritorious legal positions by attorneys.⁶⁶ An advocate who knows the arbitrator “gets it” will be more likely to propose innovative solutions and strategies to effectively dispose of the matter and move with alacrity to notify the arbitrator of deviations from the schedule and/or new issues presented by his adversary.⁶⁷

to the reason why it is disputed. An arbitrator should insist upon a greater statement than simply, “Respondent leaves Claimant to its proof.”

⁶⁵ See Allen L. Overcash & Erin L. Gerdes, *Five Steps to Fast-Track The Large, Complex, Construction Case*, 64 DISP. RESOL. J. 34-41 (May-July 2009) (proposing a model to identify the specific disputed claims and generation of a “scorecard” which identifies in a single chart the disputed claims with reference to the supporting evidence). The steps proposed by Overcash and Gerdes, implemented after appointment of the arbitrator(s), are:

Step 1: The Parties’ Narrative Statements of Claims and Defenses (intended to be comprehensive and binding on the parties);

Step 2: Proposed Reasoned Awards (designed to hone in on the ultimate relief requested);

Step 3: Limit Discovery (to issues where there is contradictory evidence);

Step 4: The Joint Scorecard (summary of disputed issue, party positions, and evidence);

Step 5: The Detailed Hearing Schedule.

⁶⁶ Determining materiality and relevance are the guideposts to every other decision in the case including discovery and motion practice. FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the *fact is of consequence* in determining the action.”) (emphasis added). It is the arbitrator’s duty to assist the parties in determining the “facts of consequence” in the arbitration so that the boundaries of discovery and motion practice can be best customized.

⁶⁷ Stipanowich, *supra* note 2, at 66 (“Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the pre-hearing phase that one or more significant pre-hearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs.”)

Second, setting out the facts and legal issues creates “book ends” which will guide the scope of information exchange, motion practice, and potential settlement. Essentially, the arbitrator should only extend discovery and motion practice as far as is helpful to prosecute or defend the material items *in dispute*. An arbitrator should avoid turning the process into one where a party’s whole work file is examined without clear justification in the hope that it will uncover the proverbial “smoking gun.”⁶⁸ While it is true that facts and law should be established by virtue of the specific filings (the arbitration demand and claim, and then answering statement and counterclaim), an experienced arbitrator will naturally frame the issues in a manner that better facilitates discussion and resolution between the parties (by removing the usual rhetoric, if nothing else).⁶⁹ From that perspective, the arbitrator sets forth a course of dealing from virtually the beginning of the case that enables the parties to communicate “apples to apples,” as opposed to arbitrating different avenues of the case, as routinely occurs between fierce advocates.⁷⁰

b. Setting Pre-Hearing and Hearing Dates

Arbitrator Notsoloman set the arbitration hearing dates first and then worked backwards to fix the other deadlines. That is a good sound practice that necessarily requires an accurate estimation of the number of days for the arbitration hearing. Identifying and discussing the issues of fact and law will allow for a more pro-

⁶⁸ Document discovery alone accounts for fifty percent of litigation costs in an average case and ninety percent in active discovery cases. Stipanowich, *supra* note 1, at 12, citing *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls*, THIRD BRANCH (Admin. Office of the U.S. Courts), (Oct. 1999), <http://www.uscourts.gov/ttb/oct99ttb/october1999.html>. In addition, fifty-one percent of a polled arbitration group found excessive discovery to contribute to their belief that arbitration fails to meet the desires of business users regarding speed, efficiency, and economy. Stipanowich, *supra* note 2, at 6–8 (“[D]iscovery under standard arbitration procedures has tended to become much like its civil court counterpart. . . . All too often . . . this expensive ‘overblown’ process results in little to no useful information, let alone the proverbial ‘smoking gun.’”).

⁶⁹ The process of determining the appropriate scope of discovery has been referred to as “right sizing” discovery. Bates *supra* note 3, at 58–59 (Aug.–Oct. 2012).

⁷⁰ Stipanowich, *supra* note 2, at 63–64 (“Psychologists tell us that, when people have a dispute, there is a natural tendency (“reactive devaluation”) to view with suspicion anything proposed by the other side. This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one’s opponent, frequently impels counsel in arbitration and litigation to fight with their opposite number on every substantive and procedural aspect of the case. . . . Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements.”).

ductive discussion regarding the days required for hearings. As in state and federal court, the remaining deadlines include motion practice, fact discovery, expert discovery, exchange of exhibits, any stipulations of fact, and pre-hearing memoranda. The necessity for these specific deadlines and their timing will shift for each arbitration. No matter what dates are set, productivity is achieved by making certain that the dates are firm and will *not* be modified, absent authorization by the arbitrator, even in the event of an agreement to extend by the parties.⁷¹

There appears to be a growing preference for speed in the arbitration process.⁷² This is not surprising, as the speedy resolution of disputes is one of the core promises of arbitration.⁷³ While the consensus is still generally that arbitration is faster than litigation, the service providers are offering expedited arbitration procedures and rules that the parties can expressly agree to at the time they form their contract or when the dispute is presented.⁷⁴

c. The Mechanics of Conducting the Hearing

Most arbitration organization's rules provide a great degree of flexibility and discretion for the logistics of the hearings. Both the advocates and neutrals should continuously strive to "think outside

⁷¹ McArthur, *supra* note 47, at 116 ("The [case monitoring] techniques discussed here should be just as productive in the hands of judges as of arbitrators. Stricter use of discovery deadlines, shorter deadlines, firm trial dates in the initial scheduling order, careful electronic searching and document sampling, skepticism about broad or open-ended interrogatories, corporate-representative depositions, and requests for admission, narrowed expert discovery, and simple privilege lists can help keep dockets under control in either system."). *See also* Stipanowich, *supra* note 2, at 69 ("Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established.").

⁷² *See* 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 14-15, available at <http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf> (reporting that over fifty percent had no experience with fast-track arbitration over the past five years but almost two-thirds are willing to consider fast-track clauses for future contracts). *See also* Stipanowich, *supra* note 2, at 28 ("The best way to impose time limits on arbitration is to include those limits in the arbitration clause or incorporate provider rules that contain such limits. All expedited or streamlined rules are distinguished by fixed or presumptive time limits, although these vary considerably in detail.").

⁷³ Thus vindicating the age-old adage: "Time is money."

⁷⁴ AAA Expedited Procedures, aimed at claims under \$75,000, contemplate resolution around 60 days. AAA Rules, *supra* note 30, at Section E. The CPR Rules bookmark the expedited arbitration process at a 100-day process beginning at the pre-hearing conference. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, EXPEDITED ARBITRATION OF CONSTRUCTION DISPUTES R. 1.3 (2006). JAMS' models also include shortened procedural stages. JAMS Streamlined Arbitration Rules & Procedures, *supra* note 62.

the box” when it comes to evidentiary hearings. Such ideas may include:

- Dispositive motions on legal issues (e.g. release, waiver, statutes of limitation);
- Bifurcation of issues (e.g., liability before damages);
- Direct examination by affidavit or written statement;
- Examination by conference of two or more witnesses; or
- Dual examination of adverse expert witnesses at the same time.

In any event, the basics must be covered and agreement reached upon:

- **The Locale of the Evidentiary Hearings.** Unlike the court system, there is no automatic forum for arbitration proceedings. Assuming the agreement is silent (other than perhaps the name of a city), the arbitrator should rely upon the parties to make a choice as long as there is adequate space for the evidentiary hearing and a breakout room for each party to confer with clients and witnesses.
- **Pre-Marking Exhibits.** Although it may be perceived as bordering on obsessive-compulsive, setting up an exhibit numbering protocol for pre-marked exhibits tends to avoid unnecessary frustration, anxiety, and waste in the final stages before the evidentiary hearings. In all too many cases, both sides pre-mark exhibits with the same number, mark the same (or worse yet, virtually the same) exhibits for identification, and/or have to redo everything at the last minute because the process is unworkable for the arbitrator. For two-party arbitrations, numbers and letters may be assigned as traditionally is the case. For multi-party matters, blocks of numbers per party tends to work (Exhibits 1-999 for the Claimant, 1000-1999 for Respondent #1, 2000-2999 for Respondent #2).
- **The Stenographer.** Make a decision as to whether there will be a stenographer and how the cost will be allocated. Our recommendation is that the arbitrator try to remain neutral on this point. While a *verbatim* record will surely help an arbitrator at the time the award is prepared, the cost of the stenographer *and* the added cost of reading and making citation to the transcripts (a painstaking task for all those who

have had the pleasure to do it) will ultimately be borne by the parties.⁷⁵

- **Out-of-State Witnesses or Documents.** If parties anticipate the need for testimony or documents from non-parties to prove or defend their case, that topic should be examined early in the process to coordinate the issuance of subpoenas.⁷⁶
- **The Special Expertise of the Arbitrator.** Arbitrators are often selected for their specialized knowledge, industry experience, and education. They are vetted by the service provider organizations who regularly monitor performance.⁷⁷ Yet, there are often cases where even a little more help and understanding is appropriate. In those situations, the parties are well-served to agree upon a treatise, publication, or

⁷⁵ AAA, *supra* note 13, at Rule R-26 covers the “stenographic record.” It permits parties to retain a stenographer provided a party gives at least three days notice. The transcript only has to be provided to the arbitrator(s) and opposing parties if the arbitrator determines it to be the “official record of the proceeding.” The arbitrator may issue orders regarding the allocation of the stenographer costs. Rule R-28 *prohibits* any other means of recording (e.g. digital recorder) absent agreement of the parties or direction of the arbitrator.

⁷⁶ The courts are split as to whether Section 7 of the Federal Arbitration Act permits parties in an arbitration to subpoena (pre-hearing) documents from a non-party. The following are cases from jurisdictions that permit the issuance of subpoenas: *In re Arbitration Between Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000); *accord* *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804 F.Supp.2d 808, 810 (N.D. Ill. Aug. 9, 2011); *Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F.Supp. 1241 (S.D. Fla. 1988); *Festus & Helen Stacy Found, Inc. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F.Supp.2d 1375, 1378 (N.D. Ga. 2006); *In re Meridian Bulk Carriers*, 2003 WL 23181011, 1-2 (E.D. La. 2003). Cases from jurisdictions that do *not* extend arbitrators such authority include: *See* *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008); *Hay Group v E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *accord* *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269, 275 (4th Cir. 1999) (denying authority in general but suggesting they may have the power to issue pre-hearing subpoenas when “special need or hardship is shown”); *Kennedy v Am. Express Travel Related Servs. Co.*, 646 F.Supp.2d 1342 (S.D. Fla. 2009); *Empire Fin Group v Penson Fin Servs*, 2010 WL 742579, 3 (N.D. Tex. 2010); *Matria Healthcare v Duthie*, 584 F.Supp.2d 1078, 1083 (N.D. Ill. 2008).

⁷⁷ To be placed on the AAA National Roster of Arbitrators, applicants must have a minimum of 10 years of senior-level business or professional experience or legal practice as well as all appropriate education and professional association leadership and involvement. An applicant must submit at least three (3) letters of recommendation from independent sources such as a current AAA Panel member, state judge, opposing counsel, or former client/employer. A personal letter and resume is required with the submission. *See* Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878.

conferring expert to provide the arbitrator with the additional education that will result in an informed award.

- **The Form of the Award.** Unless the rules otherwise limit the choice, the parties must indicate the preferred form of award they want the arbitrator to issue.⁷⁸ The default award under most provider rules is a “standard” award that simply disposes of each specific claim on a line-item basis, with no articulation of the arbitrator’s reasoning.⁷⁹ Some parties opt for an award that requires the arbitrator to give a reasoned basis the decision(s).⁸⁰

3. Encouraging Open Communication and Cooperation in the Case Management Order

There is a direct correlation between efficiency and communication among counsel, the arbitrator, and service provider organizations.⁸¹ An unambiguous case management order following the preliminary conference cements the groundwork achieved during the conference itself. Beyond the issuance of the order, the parties, neutrals, and organizations should do everything within their power to facilitate free-flowing dialogue. If the rules allow it, consider agreeing to direct e-mail exchanges between the parties and the arbitrators (obviously not *ex parte* communications).⁸² Set periodic conference calls to confirm the parties are on track. If necessary, the arbitrator should remind counsel that arbitration was chosen by the parties and attempt to encourage their cooperation even when acting as zealous advocates. Repeated commands for cooperation and professionalism, including ordering the parties to “meet and confer” regarding discovery disputes and presentation

⁷⁸ The options suggested by the AAA Rules, include a “reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law.” AAA Rule, *supra* note 13, at R-44(c).

⁷⁹ *Id.* at R-44(b), describes the default award, if no other is selected. It provides that the “arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.”

⁸⁰ *Id.* at R-44(c) provides that “[t]he parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing.” Under the same rule, if the parties cannot agree on the form of award, the “arbitrator shall determine the form of award.” *Id.*

⁸¹ CCA PROTOCOLS, *supra* note 36, at 74 (Noting that, unlike judges in litigation, arbitrators are readily available to counsel).

⁸² AAA refers to a standard accelerated exchange agreement that permits this improved communication. *Supra* note 13, at R-44(c).

of evidence, will assist the arbitrator in keeping the parties in-line.⁸³

a. The Information Exchange

Each of the different ADR provider organizations promulgates rules to enable their arbitrators to maintain efficiency and cost-control.⁸⁴ The desire to curtail needlessly expensive and time-consuming pre-hearing discovery is embedded in both the philosophy of arbitration and the rules of the providers. For example, “The Code of Ethics for Arbitrators in Commercial Disputes” provides:

An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for a decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.⁸⁵

It is the arbitrator’s duty to make it clear that, absent consent of both parties, there is no automatic right to any additional discovery beyond the exchange of particularizations of claims, reasonable document discovery and certain written expert and witness disclosure. This means that many of the discovery devices associated with litigation will not be permitted unless it is clear (1) they are appropriate given the particular underlying facts and (2) they will reduce the time spent at the hearings without creating a disproportionate increase in time and expenses beforehand. Clearly, a party who asks the arbitrator to order something as time-consuming and expensive as depositions, interrogatories or requests for admissions

⁸³ CCA PROTOCOLS, *supra* note 36, at 72-73 (“[I]t is equally essential for arbitrators to monitor the parties’ progress with discovery and other pre-hearing activities and to quickly step in if unexpected developments threaten to disrupt the schedule. Some arbitrators like to schedule periodic conference calls to check the status of pre-hearing activities. Others fear this may encourage counsel to pile up problems for the periodic calls rather than work them out themselves and thus instruct counsel to request a conference call promptly after serious, good faith efforts at resolution failed. Whichever approach is taken, arbitrators need to ‘stay on top of the case’ from preliminary conference to hearing to make sure that the parties’ expectations about the length of the arbitration are met.”).

⁸⁴ See AAA RULES, *supra* note 13, at R-44(c).

⁸⁵ See Canon 1F of “The Code of Ethics for Arbitrators in Commercial Disputes” which was originally prepared in 1977 by committees of the American Arbitration Association and the American Bar Association and revised in 2003.

must be able to demonstrate that what is being requested will promote (and not compromise) speed and efficiency.⁸⁶

The degree of permissible pre-hearing discovery is determinable, in large part, by the size and complexity of the claim(s) involved.⁸⁷ In an AAA “Fast Track” case (where the total of the individual claims of the two parties is not to exceed \$75,000),⁸⁸ the process is streamlined: At least five days before the hearing, the parties exchange copies of all exhibits, affidavits and other information they intend to submit at the hearing and identify all witnesses.⁸⁹ There is no right to discovery, except in “exceptional cases” ordered by the arbitrator.⁹⁰

Under the AAA’s Regular Track Procedures (claims exceeding \$75,000), the exchange of information is broader and it usually includes document production, witness identification and the exchange of exhibits at least seven days in advance of the hearings. There is no other discovery, unless ordered by the arbitrator because “exceptional” circumstances exist.⁹¹

In “Large, Complex Construction Disputes” (disputes of at least \$1 million), the AAA rules permits more in-depth discovery if the arbitrators deem it appropriate.⁹² For example, depositions and interrogatories may be permitted “upon good cause shown and

⁸⁶ See Stipanowich, *supra* note 54, at 433-40 (discussing the balanced approach to discovery in arbitration); Stipanowich, *supra* note 36, at 22 (“Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan. . . . The pivotal point is that, by having options to consider and then by electing an appropriate option for the particular dispute, the overall costs of arbitration can still be contained, if only because disputes over the scope of discovery can be averted by agreement and a scheduling order at the outset.”).

⁸⁷ The International Institute for Conflict Prevention & Resolution arrived at different “modes” of discovery in its *CPR Protocol for Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, CPR, available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/614/CPR-Protocol-on-Disclosure-of-Documents-and-Presentation-of-Witnesses-in-Commercial-Arbitration.aspx> (last visited Feb. 26, 2013) (“CPR Protocols”). The four modes (Mode A through Mode D) start from the most restrictive (Mode A) which has no document exchange except for arbitration exhibits to the most expansive (Mode D) which matches the federal standard of discovery (exchange of information relevant to any parties’ claims or defenses).

⁸⁸ AAA RULES, *supra* 13, at F-1.

⁸⁹ *Construction Arbitration Rules & Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, Rule F-8 (2009).

⁹⁰ *Id.* at Rule F-9.

⁹¹ *Id.* at Rule R-24(d).

⁹² *Id.* at Rule L-5.

consistent with the expedited nature of arbitration.”⁹³ Stipulations of uncontested facts and the procedure for the issuance of subpoenas may also be ordered.⁹⁴

Other AAA rules promote the speed, cost and efficiency of the arbitration during the hearing phase. Regular Track Construction Rule 32 permits the arbitrator to “conduct the proceedings with a view toward expediting a resolution of the dispute” and gives the arbitrator discretion to “direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues . . . which could dispose of all or part of the case.”⁹⁵

When considering the degree to which pre-hearing discovery may be necessary, counsel should bear in mind that at the hearings they may offer “such evidence as is relevant and material to the dispute.”⁹⁶ Contrary to what attorneys have grown accustomed to in court, in arbitration, “conformity to the Federal Rules of Evidence shall not be necessary.”⁹⁷ This supports the notion that an experienced arbitrator does not necessarily need to review testimony that complies with the strict rules of evidence to be able to decide a case fairly.

No discussion of discovery in arbitration would be complete without reference to electronically stored information (“ESI”). The fear of sanctions, whether monetary or non-monetary, has given birth to an enormous cottage industry of services assisting customers with electronic data. This is a new cost of “doing business” that, based upon the relative economic stagnation, eats into many companies profits.⁹⁸ The flexibility and customization of the arbitration process can curtail these issues.⁹⁹ Whereas Lee T.

⁹³ *Id.* at Rule L-5(d). This is in stark contrast to the scope of permissible information exchange under the Regular Track Construction Rules which only permit “production of documents and other information” with an instruction that “[t]here shall be no other discovery, except as indicated herein, unless so ordered by the arbitrator in exceptional cases.” *Id.* at Rule 44(a), 44(d).

⁹⁴ *Id.* at Rule L-4. .

⁹⁵ *Id.* at Rule R-32.

⁹⁶ *Id.* at Rule 33(a).

⁹⁷ *Id.*

⁹⁸ See Stipanowich, *supra* note 36, at 438 (“As one leading participant in the development of guidelines for the management and discovery of electronic information explains, ‘If the law of e-discovery were allowed to develop on an ad hoc basis, one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in real world.’”) (citing THE SEDONA CONFERENCE, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (The Sedona Conference Working Group Series, Sept. 2005)).

⁹⁹ See Stipanowich, *supra* note 54, at 439, citing Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoilation of Evidence*, 61 DISP. RESOL. J. 9, 10 (2006-07); see

Gates would revel in requiring Arby Traite’s client to produce and reformat backup tapes or risk sanctions in his ordinary court practice, Gates’ efforts could be summarily quashed if his client agreed in the arbitration agreement to limit the scope of e-discovery—or if the arbitrator imposed reasonable limitations on the scope of requests, such as limited number of custodians,¹⁰⁰ targeted search terms, predictive coding,¹⁰¹ or an e-discovery consultant.¹⁰²

V. VIGNETTE #2: A TALE OF TWO LAWYERS: HOW *NOT* TO CONDUCT YOURSELF AT THE EVIDENTIARY HEARING

Matters have not proceeded as well as Lee T. Gates hoped, and no one ever told him that “hope is a bad plan.” As the hearings have progressed, Gates’ frequently successful litigation style and obfuscating techniques have been met with crisp and practical responses by Arbitrator Notsoloman. Lee T. Gates is particularly stunned by the arbitrator’s decision to “hot tub” the expert witnesses.¹⁰³ His temperature rises during the following exchange:

MR. GATES: Wait, wait, wait! You’re serious? You want my expert to testify simultaneously with Traite’s expert? That’s completely insane.

also John E. Bulman & R. Thomas Dunn, *Managing Exchanges of Electronically Stored Information (ESI) in Construction Arbitration*, 67 DISP. RESOL. J., 68, 68-76 (Aug-Oct 2012) (advocating for call for cooperation amongst ESI exchange in construction arbitration).

¹⁰⁰ As used here, the term “custodian” refers to the end-user of the electronic records. For example, in a construction project, the parties to an arbitration could agree to production of records from three custodians: the construction company’s project executive, project manager, and superintendent.

¹⁰¹ The phrase predictive coding refers to a form of computer-assisted review. In general, the most experienced, knowledgeable counsel “code” a random batch set of documents with a software program. The codes indicate degrees of responsiveness as well as some relevant issues. The software program uses that coding against the entire population of electronic records to “predict” the responsive group of records. The process works best when there is transparency between opposing counsel regarding the “coding” and batch sets. It has obtained recent judicial approval. See *Moore v. Publicis Groupe & MSL Group*, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

¹⁰² SEDONA CONFERENCE, *RFP + E-Discovery Vendor Panel*, available at <http://thesedonaconference.org/node/981>. There are approximately 40 vendors listed on the website.

¹⁰³ Also known as “dueling experts,” this technique is gaining currency and is being used more often, particularly on the international front. See, e.g., *Concurrent Evidence: New Method With Experts*, JUDICIAL COMMISSION OF NEW SOUTH WALES, available at www.judcom.nsw.gov.au/publications/education-dvds/copy_of_education-dvd (last visited March 1, 2013).

MR. TRAITÉ: Lee, you of all people should be perfectly comfortable with that concept!

ARBITRATOR NOTSOLOMAN: Gentlemen, let's stay focused on the matter at hand. Mr. Gates, based on my review of the experts' reports and the testimony I have heard thus far, it appears to me that the experts have more in common than not.

MR. GATES: Really? I doubt that. No self-respecting expert of mine would agree with that devil-spawned whelp that Arby has trotted out.

MR. TRAITÉ: Wow.

ARBITRATOR NOTSOLOMAN: Mr. Gates, you will have a chance to demonstrate the expert's family history during cross examination, but right now, I would like to understand what specific objections you have to a hearing session with both experts.

MR. GATES: Well, I have never seen it done.

MR. TRAITÉ: That's certainly a principled objection.

ARBITRATOR NOTSOLOMAN: That's quite enough Mr. Traité.

MR. TRAITÉ: I apologize.

ARBITRATOR NOTSOLOMAN: Mr. Gates, I will of course lay down some ground rules, but I think that this will be productive. You are a competent attorney and you know your case. You should have no problem adapting to this process.

MR. GATES: But this can get out of control! What's to stop my expert from agreeing with all the dribble that Arby's expert spouts?

ARBITRATOR NOTSOLOMAN: It is conceivable your expert might well agree with a number of points made by Mr. Traité's expert and his expert might agree to some extent with yours.

*MR. GATES: C'mon judge, I've been working over, I mean **with**, experts for my entire career and this is the first time this bizarre experimental process has been suggested. Can't we just do this the old fashioned way?*

ARBITRATOR NOTSOLOMAN: I understand your concerns. Let me address your first point—this is not an experimental process. The first protocols in the United States for “dueling experts” were developed by a respected Chicago attorney nearly twenty years ago.

MR. GATES: Oh great, Chicago voting is like my recording of billable hours—early and often.

ARBITRATOR NOTSOLOMAN: Fortunately, I did not hear that. This process has proved to be efficient in this context and is now used quite often in the international arena. I am satisfied that this will be a productive process that will advance the hearings. Any concerns can be addressed by the ground rules I set out. And, of course, you have the right to raise objections and questions at the time. Let's stop the debate and move on.

Despite Lee T. Gates' strident efforts to derail the arbitration, the Claimant presented its direct case and experts are examined. Now, as Mr. Gates presents a third day of testimony in the Respondent's case-in-chief, the patience of Mr. Traite and the arbitrator grow thin:

MR. GATES: Mr. Project Executive, on Thursday, November 15 in the year of our Lord 2012, just after you had arrived at work and had your first cup of black coffee, no sugar, at 7:16 a.m. with your project superintendents in the company project trailer at the northeast corner of the Behemoth Apartment Complex, Phase 2A project site off of Washburn Avenue in Boston, Massachusetts, what, if anything, did you do next with respect to the project's fourth monthly update to the project critical path method schedule required by the Di-

vision 1 Specifications, as amended, prepared by the project architect and dated June 1, 2011?

WITNESS: Huh?

MR. TRAITÉ: Ms. Notsoloman, hold on a second please. I have quietly sat here listening to Mr. Gates reconstruct the complete history of the world in painful detail. He has not yet passed the middle ages, much less the 20th century. Can we pick up the pace? This seems to be well-plowed ground—we have heard from three witnesses already on the fourth schedule update.

MR. GATES: I'm just getting' started. Buckle-up me-boy!

ARBITRATOR NOTSOLOMAN: Mr. Gates, Mr. Traite does have a point. I have already heard substantial testimony about this update. I am concerned that this may be redundant and cumulative. Can you make an offer of proof as to what new information this witness can provide?

MR. GATES: Look, I don't have to tip my hand and put this on a silver platter for Arby.

ARBITRATOR NOTSOLOMAN: Mr. Gates, I am asking you to summarize the expected testimony that you expect from this witness. Mr. Traite has, in essence, objected to this line of questioning. You, in turn, need to explain to me why I should hear it.

MR. GATES: You have to hear it! Otherwise, you are preventing me from putting on my case. It's black letter law¹⁰⁴ that your refusal to hear competent evidence is grounds for vacating any award!

MR. TRAITÉ: Wow.

¹⁰⁴ David A. Sentera & Andrew L. Chapin, *Statutory Grounds for Challenging Arbitration Awards*, 19 CONSTRUCTION LAWYER 4, 5-8 (1999) (describing §12(4) of the Uniform Arbitration Act (UAA) on refusing to hear evidence). *See also* Intercarbon Bermuda Ltd. v. Caltex Trading & Transport Corp., 146 F.R.D. 64 (S.D.N.Y. 1993).

ARBITRATOR NOTSOLOMAN: Mr. Gates, let's be clear on one point. Applicable case law and the rules under which we are currently operating make it perfectly clear that I determine the admissibility, relevance and materiality of the evidence offered. The old concept to which you refer is outdated and not determinative. The rules provide that I can reject evidence that is cumulative or of slight value.¹⁰⁵ In this particular instance, the evidence you appear to be offering is cumulative, redundant and therefore of slight value. But, I have asked you to provide an offer of proof in case I have missed something.

MR. TRAITE: You haven't missed a thing.

MR. GATES: This is totally unfair!

In the end, Lee's offer of proof did establish one narrow area of inquiry that Arbitrator Notsoloman allowed, but the bulk of the proffered testimony was considered cumulative, redundant and of little value.

VI. THE ARBITRATOR'S RULINGS DURING THE EVIDENTIARY HEARINGS

At all times throughout the pre-hearing process, the arbitrator should remain mindful of the cost of discovery *vis-a-vis* the size of the claim(s). The arbitrator, unlike most judges, often possesses years of expertise in the subject matter of the parties' dispute.¹⁰⁶ As such, the arbitrator is in a unique position to suggest and facilitate ways to reduce the time and expense involved in resolving the dispute. The arbitrator who does is not being overly proactive; he is merely doing his job. In its "Protocols for Expedious, Cost-Effective Commercial Arbitrators," the College of Commercial

¹⁰⁵ See e.g., *Construction Arbitration Rules & Mediation Procedures*, *supra* note 89, at R-33.

¹⁰⁶ The AAA requires ten years of construction experience. *Qualification Criteria and Responsibilities for Members of the AAA Panel of Construction Arbitrators*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003872 (last visited Feb. 20, 2013). The time period for the complex construction panel is fifteen years. *Qualification Criteria and Responsibilities for Members of the AAA Large, Complex Construction Case Panel of Arbitrators*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003874 (last visited Feb. 20, 2013).

Arbitrators identifies the following “[m]ajor steps toward an efficient arbitration hearing”¹⁰⁷:

- Make clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained. Urge counsel to focus on the probativeness of evidence, not its admissibility.
- Determine what order of proof is most appropriate for the particular case, including sequencing of the hearing in progressive phases, taking both sides’ witnesses issue by issue, or ruling on threshold issues before receiving evidence on other issues.
- Encourage the parties to submit a joint collection of core exhibits in chronological order with key portions highlighted.
- Establish an expedited procedure for the receipt of other exhibits. For example, require all parties to submit their tabbed, indexed exhibits in advance of the hearing and tell counsel that such exhibits will be received *en masse* except for any that are privileged or genuinely challenged as to authenticity.
- Require that parties show demonstrative exhibits, including PowerPoint slides, to each other a reasonable time before they are used in the hearing so that time is not wasted in assessing and possibly challenging their accuracy.
- Discuss with counsel the possible use of written direct testimony for some or all witnesses.
- Establish procedures to narrow and highlight the matters on which opposing experts disagree. For example, require experts to confer before hearing and provide the arbitrators with a list of points on which they agree, the points on which they disagree, and a summary statement of their respective opinions on the latter.
- Limit the presentation of duplicative or cumulative testimony.
- Make appropriate arrangements for receiving by audio or video conference call testimony from witnesses in remote locations.
- Consider receiving affidavits or pre-recorded testimony regarding less critical matters.
- Sequester witnesses until they testify unless all parties request otherwise.
- Establish and maintain a realistic daily schedule for the hearing. Start hearings on time and do not allow excessive recesses and lunch breaks.

¹⁰⁷ CCA PROTOCOLS, *supra* note 36, at 75-76.

- Encourage the parties to employ a “chess clock” that limits the total number of hours available to counsel for examination and argumentation.
- At the close of each hearing day (*not* the beginning), discuss with counsel any administrative matters that need attention and monitor their progress against the projected hearing schedule. If needed to meet the scheduled completion date, consider starting hearings earlier, ending them later, or having one or more night or weekend sessions.
- Do not hesitate to tell counsel when a point has been understood so they may move on, or, conversely, when a point was not understood and requires clarification.
- Make certain, well prior to the hearing, that counsel have worked out all logistical arrangements concerning transcripts, shared use of PowerPoint, and other equipment.
- Freely take witnesses out-of-turn, when necessary, to accommodate scheduling conflicts.
- Prohibit parties from running out of witnesses on any given day. “Call your next witness” is a powerful tool for keeping a hearing moving.

Whether it is (1) motion practice prior to or during the hearings, (2) the presentation of fact and expert witnesses or (3) a desire to place a reasonable limit on the time the parties have to present their witnesses, if handled appropriately, neither the parties’ right to a fair hearing nor the goals of arbitration will be compromised.

A. Motion Practice

Motion practice may or may not be appropriate in arbitration, but counsel should never assume they have the automatic right to engage in it. While the AAA’s Regular Track Rules grant the arbitrator discretion to entertain motions that might dispose of all or part of a claim,¹⁰⁸ unsolicited dispositive motions can be the source of significant delays and costs. Unless it appears that the granting of a requested motion has a reasonable chance of narrowing the disputed issues and/or the parties’ claims, permission to make the

¹⁰⁸ *Construction Arbitration Rules & Mediation Procedures*, *supra* note 89, at Rule 32(c); *see also* RUAA, § 15(b) (permitting an arbitrator to decide “a request for summary disposition of a claim or particular issue” if both parties agree or at the request of the movant as long as proper notice and an opportunity to respond are given to the other party).

motion should be denied.¹⁰⁹ At the preliminary conference, therefore, the arbitrator should order that no party has the unilateral right to make a motion (including Lee T. Gates' favorite: motions *in limine*) unless the arbitrator authorizes it in advance.¹¹⁰ Generally, unless the motion involves a clear-cut legal issue (such as a statute of limitation or a contractual waiver) or a time/cost savings suggestion (such as bifurcation of issues or phased factual determinations), prudence dictates that a request to file a motion be denied until sufficient evidence has been offered during the evidentiary hearings.¹¹¹

B. *Fact and Expert Evidence*

Although it may come as a surprise to attorneys whose practice consists solely of litigating in trial courts, due process in arbitration does not require strict adherence to the rules of civil procedure and evidence.¹¹² Rather, the emphasis is on speed, efficiency, cost savings and finality. Additionally, to streamline matters, the arbitrator may request offers of proof and reject evidence

¹⁰⁹ CCA PROTOCOLS, *supra* note 36, at 9 (“The problem is that, as in court, motion practice often contributes significantly to arbitration cost and cycle time without clear benefits. The filing of motions leads to the establishment of schedules for briefing and argument entailing considerable effort by advocates, only to have arbitrators postpone a decision until the close of the hearings because of the existence of unresolved factual disputes raised by the motion papers.”).

¹¹⁰ *Id.* at 73 (“Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrates, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.”).

¹¹¹ *Id.* at 73 (“After discovery, motions are probably the leading cause of excessive cost and delay in commercial arbitrations. Veteran litigations, acting largely out of habit, frequently file motions for summary disposition and other relief, which impose substantial burdens of briefing and argument on all counsel and intensive factual and legal review by arbitrators. While arbitrators certainly have the authority to grant such motions, the absence of appellate review typically and properly makes them quite cautious about doing so, especially when the other side has had little or no discovery. On the other hand, there are purely legal issues, such as statute of limitations, interpretation of a contract, or identifying the required elements of a cause of action, which arbitrators can and should undertake to decide early in a case, particularly when a decision in favor of the movants could substantially reduce transaction time and cost for both sides. Arbitrators need to educate counsel on which sorts of motions are likely to be productive in arbitration and which are not and then establish procedures for processing the former quickly and efficiently.); *See also* Stipanowich, *supra* note 54, at 430-31 (discussing the effective use of dispositive motions in arbitration).

¹¹² Darrick M. Mix, *ADR In The Construction Industry: Continuing The Development Of A More Efficient Dispute Resolution Mechanism*, 12 OHIO ST. J. ON DISP. RESOL. 463, 468 (1997).

which is “cumulative, unreliable, unnecessary, or of slight value.”¹¹³ This underscores why it is counter-productive for an arbitrator to automatically entertain any and all evidence that is submitted by simply noting, “I’ll take it for what it’s worth.” Well-trained arbitrators should not hesitate to eliminate redundant or irrelevant documents and testimony.

1. Examination by Affidavit

Admission of witness testimony through written statements is well-entrenched in international arbitration practice.¹¹⁴ The witness statements are under oath in affidavit or narrative format (i.e., separately numbered paragraphs).¹¹⁵ Referenced exhibits are attached to the witness statement in the same order that they would have been introduced during oral examination. The witness statement then is introduced in lieu of direct examination.¹¹⁶ The assumption is that the arbitrator will have reviewed and analyzed the witness statement well before the hearings, thereby resulting in significant time savings. The adage that one cannot cross-examine a piece of paper is true. That is why affidavits are generally inadmissible in court as hearsay and why arbitrators should cautiously

¹¹³ *Construction Arbitration Rules & Mediation Procedures*, *supra* note 89, at Rule 33(b).

¹¹⁴ WHITE & CASE, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, 24, <http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf> (87% of the survey respondents stated that fact evidence was introduced in part by written witness statement and 13% was solely by oral examination); *see also* *IBA Rules on the Taking of Evidence in International Arbitration*, *supra* note 14, at Arts. 3 & 4. Art. 4(4) (noting that the panel may order each party to submit written witness statements).

¹¹⁵ Patricia D. Galloway, *Takin’ Care of Business: Arbitration is Voluntary and a Creature of Contract and Party Appointed Arbitrators*, ABA FORUM ON THE CONSTRUCTION INDUSTRY (Jan. 20, 2011), 12-13, *available at* http://www.pegasus-global.com/newsletters/201104/Takin_care_of_business_Patricia_D_Galloway_ABA_Construction_Industry_Forum.pdf (last visited Mar. 1, 2013), quoting Peter Ashford’s *Handbook on International Commercial Arbitration* as suggesting witness statements should follow the following guidelines:

- The statement should be drafted in the first person singular.
- Documents should be referred to where they support evidence being given. Usually the documents should be attached or in a supporting volume, but included with the statement. These documents should also be page numbered so the witness can easily refer to them during the hearing.
- The statement should prove those facts that have been pleaded in the written pleadings.
- The statement should generally be in chronological order but if there are various issues, it can effectively deal with each issue and in turn, within each section, to deal with matters chronologically.

¹¹⁶ Rather than have a witness start off “cold” with cross-examination, a preferred practice is to permit a general introduction and overview of the witness’ testimony. This permits the witness to introduce the central points of the proffered testimony in his or her own words before having to defend a position through cross-examination.

evaluate them if the witness is not subject to live cross-examination.¹¹⁷

2. Simultaneous Examination of Fact Witnesses

Unlike parliamentary proceedings, witness examination in court is traditionally presented one witness at a time. In some situations, however, there can be some benefit to having multiple witnesses simultaneously in the “hot chair.” This is not generally the practice in the United States, but it does occur by default during an arbitrator’s examination of witnesses. Given the natural tendency to respond to the decision-maker’s questions, it is not uncommon for multiple witnesses to start talking (proffering testimony) in response to the same question. In court, this approach has been attempted in the context of Rule 30(b)(6) depositions of corporate parties.¹¹⁸ It works well when individuals are used to working with one another and where business responsibilities naturally overlap (e.g., “President and VP of Sales”). It could theoretically be used for direct and cross-examination in an arbitration. While it is difficult to manage and coordinate multiple witnesses, especially on cross, there is the added benefit that the testimony is locked in with less chance of a later witness coming to rehabilitate the testimony of someone with less authority.

3. Group Examination of Adverse Expert Witnesses

Arbitrator Notsoloman insisted upon the dual examination of the parties’ expert witnesses. Sometimes referred to as tandem experts or “hot-tubbing,” this technique has been a frequently discussed tactic, but less frequently used procedure, to narrow and

¹¹⁷ AAA GUIDELINES TO COMMERCIAL ARBITRATORS, *A Guide for Construction Industry Arbitrators*, available at http://www.ilr.cornell.edu/alliance/resources/Guide/guide_for_construction_arbs.html (last visited Mar. 2, 2013) (“Business people generally prefer arbitration because of its convenience. When witnesses are in a distant city and it would be costly to bring them to the hearing, parties may ask you to accept testimony in the form of affidavits. You may agree if convinced that there is good reason for the request. If there is an objection, you should hear arguments from both sides before making a decision. In evaluating affidavits, you should take into account the fact that witnesses were not subject to cross examination, as they would have been had they appeared in person.”).

¹¹⁸ Jerold S. Solovy & Robert Byman, *Deposition By Committee*, THE NATIONAL LAW JOURNAL (May 17, 2004) (discussing a case example of a Rule 30(b)(6) deposition by committee). The authors have been involved in multi-person deponent corporate designations through the insistence of opposing counsel. Although cumbersome for the stenographer, there were some benefits to the process where there was a natural tendency to divert responsibility.

better harmonize the expert witness opinions.¹¹⁹ The underlying hypothesis is that professional experts, when push comes to shove, will ultimately square with each other in a more meaningful way if they simultaneously have to address the fact finder's inquiries.¹²⁰ There will be less "maneuvering" or "evasion" (e.g., "I must not have heard or read that testimony") in a situation where a peer is challenging the professional.¹²¹ Having such a discussion may even lead to compromised positions that the experts and/or their attorneys did not foresee before the hot-tubbing session arose.

C. *Time Management*

One potential risk (and benefit) of arbitration over litigation is the flexibility of more time. Most arbitrators, unlike judges in overcrowded and under-funded courts, can make themselves available for wider blocks of time for hearings. While financial motivation might exist for an arbitrator to allow extended proceedings, fortunately most arbitrators do not appear to be overly influenced by such financial motivations. The availability of longer blocks of time, if managed properly, can have the salutary effect of compressing the overall hearing time by avoiding the "start/stop" problems of sporadic meetings.¹²²

Once a time-frame is set for the hearings, whether two days or twenty days,¹²³ the arbitrator has the responsibility to maintain the

¹¹⁹ Stipanowich, *supra* note 54, at n.142 (identifying joint examination of expert witnesses as one way for arbitrators to achieve greater economy and efficiency in arbitration), citing Terry F. Peppard, *New International Evidence Rules Advance Arbitration Process*, 73 WIS. LAWYER 18, 21 (2000) ("[joint examination] allows the arbitrators to make instant comparisons of contending views [and] encourages the witness to explain themselves to their collegial peers and to make concessions of uncontested matters, thus . . . sharpen[ing] the issues to be decided."). See also Patricia Galloway, *supra* note 115, at 22-24

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² CCA PROTOCOLS, *supra* note 36, at 27 ("Northcote Parkinson's famous 'law' that work expands to fill the time available for its completion encapsulates the fundamental truth that human beings find it nearly impossible to terminate working on an important matter when there is still time left to do more. This is especially true in commercial arbitration where the stakes are often high, those doing the work are typically conscientious "Type A" lawyers, and all actors—both counsel and arbitrators—are being paid by the hour.").

¹²³ AAA RULES, *supra* note 13, at L-4(h) ("Generally hearings will be scheduled on consecutive days or in blocks of consecutive days *in* order to maximize efficiency and minimize costs."); CCA PROTOCOLS, *supra* note 36, at 72 ("Arbitrators should attempt to schedule consecutive hearing days whenever possible. Arbitrators should also be sure that a realistic number of days are reserved for the hearing. Counsel frequently underestimate, sometimes drastically, the

schedule and not permit it to elongate in perpetuity.¹²⁴ The difficult part is how to fairly enforce such time constraints on the parties.¹²⁵ The old-fashioned chess clock is a *bona fide* option. With a chess clock system, a specific time is allotted to each side and the arbitrator communicates that they can use their time as they deem appropriate—but that they will not be permitted to introduce additional testimony once their time has expired. The arbitrator or stenographer keeps the official clock and, at the end of each day, communicates the remaining time for each side. In well-guided and controlled time clock arbitrations, experience shows that the parties present their case in less than the allotted time.¹²⁶

VII. CONCLUSION

Unless there is a consensus and all of the parties desire to retain some or all of the pre-trial discovery devices and procedural safeguards available in traditional civil litigation, one party's attempts to inject those devices and safeguards can sabotage an arbitration. If that occurs, the benefits that arbitration has historically afforded—a quicker, economical, flexible, and less expensive way to resolve disputes—will slowly evaporate. Therefore, a party who expects to receive what arbitration offers must be vigilant and affirmatively resist an adversary's attempt to use tactics that reduce or destroy its benefits. The time to do so is in front of the arbitrator at the first pre-hearing conference, when the ground rules are being established. Unless the arbitrator takes the initiative, a party who fails to act proactively to persuade the arbitrator to stop the other party from litigating instead of arbitrating will undoubtedly discover—way too late—that the process it signed up for no longer exists.

amount of time they will take for examinations and arguments at the hearing. It is better to schedule an ample number of days and cancel those not needed than to schedule too few days and then have to find, on the calendar of busy lawyers and arbitrators additional, mutually available time for completing the hearing.”).

¹²⁴ CCA PROTOCOLS, *supra* note 36, at 27 (“There is no reason why time limits cannot be placed on completing a commercial arbitration, and many thoughtful observers believe that such limits are the single most effective device available for reining in arbitration cost and delay.”).

¹²⁵ Galloway, *supra* note 115, at 22-24 (advocating the common practice for the arbitrator to give each party equal amount of time to present its evidence).

¹²⁶ *Id.* at 23.

