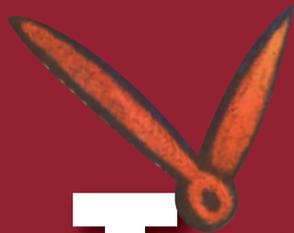




The ideas from the protocols condensed in a convenient, easy-to-use format that you can carry around with you.



Time & Cost

SOLUTIONS

**for Commercial Arbitration:
Highlights from the College of Commercial
Arbitrators' Four Protocols for Parties, Counsel,
Arbitrators and Arbitral Institutions**

BY EDNA SUSSMAN AND CHRISTI UNDERWOOD.

Edna Sussman is a full-time independent arbitrator and mediator specializing in international and domestic business disputes. She is the principal of SussmanADR LLC and the Distinguished ADR Practitioner in Residence at Fordham University of Law School. She serves on the arbitration and mediation panels of the American Arbitration Association and on its Board of Directors. For further information, see her web site at www.sussmanADR.com.

Christi L. Underwood, a member of the American Arbitration Association's Board of Directors, serves on the AAA's national panel of arbitrators for commercial and construction disputes, and the International Centre for Dispute Resolution panel. She is a Fellow of two professional associations: the College of Commercial Arbitrators and the American College of Construction Lawyers. In her home state of Florida, she is a Florida Bar Board Certified Construction Attorney. For additional information see her web site at www.clu@clu-law.com.

“Cost is a fundamental concern of businesses. As cost concerns are often not addressed with vigor in arbitration, it is not surprising that many business users have chosen to use courts instead,” said Michael McIlwrath, senior counsel for litigation with GE Oil & Gas. Cost and delay are key issues facing arbitration providers and arbitrators in the 21st Century.

Users of commercial arbitration are frustrated because their expectations for an efficient, low cost process are often not being realized. The issue has been tackled to some degree by some international arbitration providers, including the International Centre for Dispute Resolution (ICDR), the American Arbitration’s (AAA) international division,¹ and by the International Chamber of Commerce (ICC). More recently, William K. Slate, president and CEO of the AAA gave a talk on this problem at the 2010 AAA Neutrals Conference in Florida, emphasizing that the alternative dispute resolution (ADR) industry must solve the problem through action. Fortunately, the College of Commercial Arbitrators (CCA), a group of some of the most experienced and respected commercial arbitrators in this country, has already identified solutions. The CCA has developed real practical steps that every stakeholder in the arbitration process can take to reduce the cost of the process and accelerate the proceeding. These steps are incorporated into four protocols, one for users and their in-house counsel, one for outside counsel, one for arbitrators and one for arbitration institutions.

Each protocol has value, not only for the stakeholder to whom it is addressed, but also to the other stakeholders. For example, the Protocol for Arbitrators may help the parties decide what they should seek in an arbitrator or help them prepare for an interview with prospective arbitrators.

This article highlights the CCA’s recommendations in each of the four protocols.

The Basis for the Protocols

The protocols are based on information and data obtained during a CCA conference in the fall of 2009, co-sponsored by the AAA, JAMS, the International Institute for Conflict Prevention and Resolution (CPR), the Chartered Institute of Arbitrators, and Pepperdine University’s Straus Institute for Dispute Resolution, on the subject of business-to-business (B2B) arbi-

tration. At the conference, which was attended by about 200 individuals (including corporate counsel, outside counsel, arbitrators and representatives of arbitration organizations and service providers), the CCA discussed the issues and challenges facing B2B arbitration, including the issues of cost and delay. Using an electronic polling process, the CCA gathered data on possible solutions to these problems and in August 2010, released a 95-page report entitled “Protocols for Expedient, Cost-Effective Commercial Arbitration,” authored by three CCA Fellows, Academic Director of Pepperdine’s Straus Institute for Dispute Resolution, Thomas Stipanowich, and co-editors Curtis von Kann, a JAMS arbitrator, and Deborah Rothman, an AAA arbitrator.

The CCA’s protocols represent the conclusions drawn by business users, in-house attorneys, provider institutions, outside counsel and arbitrators in response to concerns about arbitration becoming too much like litigation over the past few years.

Having an economic and efficient arbitration is a choice. Business users can make better choices to “promote cost-and time-saving” solutions and the protocols tell them how. As noted in the introduction to the protocol for users and in-house counsel, users have more than one opportunity to make these choices. The first is at the contract planning and negotiation stage, the second is after a dispute arises and the third is during all phases of the arbitration.

“Living Documents”

The CCA protocols can have a positive impact on the efficiency of B2B arbitration only if widely disseminated and widely used by all stakeholders. Thus, the next step is publicity and education. Our intention is to serve both purposes. In service of this idea, we have summarized the highlights of each protocol on pages 22-26. To make these summaries portable and convenient to use and distribute, we formatted three of them on a

single page and one on a two sides of a page.

Can we expect these protocols to remedy the cost and delay concerns about B2B arbitration? The answer is, it depends. First, CCA must educate the four different categories of stakeholders, about the protocols. The sponsoring provider organizations are already aware of the protocols. But business users, outside counsel and commercial arbitrators who are not affiliated with the CCA may not be. The CCA is making presentations, publishing articles, giving speeches and distributing the protocols to numerous business industry groups in order to communicate its message to stakeholders.

How, when, and to what extent the concepts set forth in the protocols are adopted will determine their ultimate influence upon improving B2B arbitration. What is clear is that, once in receipt of the protocols, stakeholders will have to make great behavioral changes in order to return commercial arbitration to its roots. Passive arbitrators will have to become pro-active managers. Litigators will have to restrain themselves from “littering the record with objections” and using litigation discovery practices in arbitration. Steve Smith, vice president and general counsel at Lockheed Martin Space Systems, reflected on the premise of change when he said, “The arbitral institutions, arbitrators themselves, outside counsel, and the user community, chiefly through inside counsel, all have key roles to play. In my mind, when my colleagues in-house participate as full team members with their outside arbitration counsel, and temper the desire of some such counsel to conduct arbitration like court litigation, significant improvements will result.”

However, for far reaching solutions, change must take place even earlier, in the drafting of better arbitration clauses. Additional arbitration process provisions that fit the needs of the parties’ particular transaction should be incorporated into the contract. This means that the protocol must get into the hands of business lawyers,

not just the litigators.

McIlwrath predicted that if the protocols are implemented, “arbitration will become more attractive to the stakeholder who ultimately matters most: the parties who decide whether to have their commercial disputes submitted to arbitration.”

The protocol summaries that articulate solutions today may need to be further refined tomorrow. This concept is best presented by Stanley Sklar, president of the CCA, who said “[t]he Protocols should be considered a ‘living’ document which will change as new ideas and procedures are developed to create a realistic alternative to the court system for business disputes.”

The actual effect of the protocols on the cost and time of arbitration will have to be measured at some future time. The CCA anticipates holding another business summit in the future at which time feedback will be solicited and lessons learned will be shared with the commercial arbitration industry. Until then those involved in B2B arbitration should avail themselves of the myriad of tools offered in the protocols, stay mindful of the choices available, and try to conduct themselves in a manner that accomplishes two of the arbitration’s central goals—efficiency and low cost. ■

Endnotes

¹ In May 13, 2008, the ICDR issued Guidelines for Information Exchanges in International Arbitration, A .PDF file can be accessed from www.adr.org.

² In 2007, the ICC issued a report called Techniques for Controlling Time and Cost in Arbitration, ICC Publication 843. A .PDF file can be accessed from www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

³ See the President’s column on page 1 of the Nov. 2010-Jan. 2011 *Dispute Resolution Journal*, which is based on AAA president and CEO William K. Slate II’s presentation at the Neutrals Conference.

⁴ CCA called this conference a “national summit.”

⁵ Available on the CCA Web site at www.thecca.net/CCA_Protocols.pdf.



TURN THE PAGE TO SEE THE HIGHLIGHTS FROM THE FOUR PROTOCOLS

Highlights from the Protocol for Users and In-House Counsel

The recommendations in this protocol address dissatisfaction with the high cost and time of commercial arbitration.

They can be adopted in whole or in part depending on the circumstances.

1 Don't mindlessly choose "one-size fits-all" arbitration provisions. Consider whether it is desirable to tailor the procedures to limit discovery and establish other boundaries. Do incorporate a requirement for an institutional provider, such as the American Arbitration Association. It is possible to choose a more streamlined process.

2 Don't replicate litigation-style discovery in the arbitration process. Instead limit discovery to what is essential. There are opportunities to limit discovery in a pre-dispute arbitration agreement or during the pre-hearing phase of arbitration by agreement of counsel or the arbitrator's order.

3 Do set a limit on the phases of arbitration and the overall length of the proceeding. The arbitration agreement might provide a deadline of one year for large controversies and less for smaller ones.

4 Do choose fast track or an other form of expedited arbitration when suitable for the controversy. Either define the circumstances when it will be employed or incorporate a service provider's rules that detail such procedures.

5 Do stay involved throughout the dispute resolution process to ensure that the client's objectives are being met. Attend the preliminary conference. Conduct a case assessment, set a realistic budget, and require counsel to abide by it unless express approval to deviate is granted.

6 Don't select outside counsel based on litigation experience. Instead, base the selection decision on counsel's arbitration experience and willingness to honor the business goals. In-house counsel should also be willing to consider alternative fee arrangements, such as incentives for achieving an efficient and expeditious process. The comments to this protocol contain a list of questions to ask prospective outside counsel.

7 Select arbitrators who are strong managers and have demonstrated an ability to supervise an efficient and economical process. A pre-screening questionnaire or interview of prospective arbitrators may be appropriate, as more fully discussed in the comments to this protocol.

8 Be willing to enter into stipulations with opposing counsel and come to the preliminary conference with submissions that identify key issues, claims, defenses, damages, and indicate whether experts are needed.

9 Agree to controls on motion practice. While dispositive motions can be a valuable, cost efficient tool, they should be employed only pursuant to a procedure. Dispositive motions may be beneficial in certain circumstances, such as when damages are limited by contract, or a statutory remedy or statute of limitations is involved.

10 Consider using a single arbitrator in lieu of a panel when appropriate. Obviously, three arbitrators cost more than one. When three arbitrators are used, agree to delegate certain pre-hearing decisions to the chair to make the process more efficient.

11 Specify the form of the award and do not include a provision for judicial review of the award. Determine whether the award shall be bare, reasoned, or contain findings of fact and conclusions of law. Also, consider putting a limit on the length of the award. Do not attempt to give courts the authority to determine an appeal of the arbitration award. The comments summarize the risks and legal uncertainties in the area of expanded judicial review. Those who desire appellate rights should consider a private appellate process.

12 Conduct a post-mortem after the arbitration to identify "lessons learned." with regard to achieving efficiency and economy. Then revise internal company procedures accordingly ■

Highlights from the Protocol for Outside Counsel

This protocol offers “guidance” for lawyers retained by the parties to B2B arbitration to help them approach the

arbitration process with the “goals and expectations” of the client in mind.

1 Outside counsel should only agree to represent a business client in B2B arbitration when they are familiar with the applicable arbitration rules and the service provider, and they have the experience and knowledge to efficiently meet the client’s goals and expectations.

2 Outside counsel should provide the client with an early case assessment and then reach “an understanding” with the client (and memorialize the understanding) on the approach to arbitration, discovery, possible settlement discussions, length of resolution process, arbitration, and the client’s budget. These understandings should be revisited periodically to determine whether the client has new instructions.

3 Outside counsel should undertake due diligence into the background and qualifications of the arbitrator candidates in order to select an arbitrator with the right philosophy, case management ability, and a willingness to meet the client’s expectations as to the cost and length of arbitration.

4 Having a cordial professional relationship with opposing counsel saves more time and money than fighting. Thus, outside counsel should obtain the client’s consent to cooperate with opposing counsel in order to agree on pre-hearing procedural and process issues.

5 Consistent with the client’s goals, outside counsel should advise clients that limited discovery is the norm in arbitration, and seek ways to streamline discovery by cooperating with the arbitrator and opposing counsel.

6 Outside counsel should periodically discuss with clients the advantages of negotiating a settlement, pointing out when opportunities to settle arise, and the benefits of mediating before large expenditures are incurred.

7 Outside counsel should offer client alternatives to hourly billing, such as incentives for reducing the estimated time or costs of arbitration.

8 Outside counsel should “exploit” the differences between arbitration and litigation by behaving appropriately in the hearing, curbing the inclination to grandstand. They should avoid making repetitive objections to form and hearsay. Attorneys who object at every turn waste everyone’s time.

9 Outside counsel should keep the arbitrator informed of developments in the case and seek the arbitrator’s assistance (or the assistance of the chair of the panel) if a pre-hearing issue arises that the parties cannot resolve themselves. Arbitrators do not want to postpone hearing dates and savvy outside counsel will take the initiative to notify the arbitrator when a potential delay causing event arises.

10 Outside counsel should engage in a post-arbitration evaluation with the client to determine the lessons learned for the client and the lawyers involved in the arbitration. A lesson learned could warrant a change in the client’s standard dispute resolution clause, arbitration training, or some other matter.

11 Outside counsel should share their insights about the process with arbitration providers so that improvements can be made in the dispute resolution clauses, arbitration rules and choices offered to arbitration users.

12 Outside counsel are often in a position to effect positive change in ADR processes by their affiliation with law schools, professional organizations and civil groups. Thus, they should help identify ways to improve arbitration education, training and ADR laws. ■

Highlights from the Protocol for Arbitrators

Ultimate responsibility for the efficient management of arbitration proceedings falls to the arbitrator. The recommendations in this protocol are corollaries of recommendations in the preceding protocols for users, outside counsel and providers.

Because the protocol for arbitrators may be of considerable help to users and their in-house and outside counsel, to avoid confusion we have chosen to avoid the first person “you” and refer to arbitrators in the third person.

1 Commercial arbitrators should have ongoing training in commercial arbitration, including training in how to manage a case efficiently without sacrificing fairness to the parties. Being an effective consumer or labor arbitrator does not ensure effectiveness as a commercial arbitrator.

2 Arbitrators should mandate that everyone behave in a professional manner, cooperate in all phases of the arbitration to shape the procedures, and comply with deadlines. Arbitrators can “lead by example,” for instance, by establishing a professionally cordial atmosphere, being on time and meeting their own deadlines.

3 Arbitrators should actively manage the proceeding and enforce timetables and deadlines, except when there are compelling, unforeseen circumstances. They should use their reasonable discretion to fashion an appropriate, fair and expeditious proceeding. This goal should be facilitated by the natural reluctance of parties and counsel to displease the decision maker in their case.

4 Arbitrators should conduct a thorough preliminary conference following CCA best practices as described in the CCA Guide to Best Practices in Commercial Arbitration, and then memorialize all schedules, procedures and deadlines in a comprehensive case management order. The preliminary conference is the single best tool to focus on creating a cost efficient and fair process. This protocol provides details.

5 Arbitrators should insist that the hearing be conducted on consecutive days whenever possible, because they are less expensive. To prepare a realistic schedule, it may be necessary to add a few days at the outset because of the tendency of counsel to underestimate how many days they will need to put on their cases.

6 Arbitrators should take an active role in limiting and streamlining discovery, consistent with the applicable arbitration rules and the circumstances. Arbitrators should monitor compliance with the pre-hearing schedule and resolve promptly any issue that could disrupt the hearing dates.

7 Arbitrators should identify a procedure for parties to file motions in order to discourage inappropriate and “unproductive” motions. Dispositive motions should be permitted if the subject matter can streamline or shorten the proceeding (for example, a motion to dismiss based on the statute of limitations).

8 Arbitrators should be reasonably available to counsel to resolve disputes that could delay the timely end of the case. To achieve “speed and efficiency,” arbitrators “must encourage counsel to consult them quickly when obstacles to schedule compliance arise” Thus, arbitrators should be willing to convene a telephone conference on short notice and “be able to rule at the end of the call or very shortly thereafter.”

9 Arbitrators should conduct a fair hearing in an efficient manner. The need for efficiency during the hearing is especially great because each hearing day involves a great deal of expense. Arbitrators are directed to Chapter 9 of the CCA Guide to Best Practices in Commercial Arbitration for 45 pages of guidance on efficient hearing management.

10 Because arbitrators must set an example and adhere to deadlines for the process, they must issue the award within the time required. The award should be in the appropriate form and be drafted with careful attention to detail in order to avoid grounds to vacate the award. ■

Highlights from the Protocol for Arbitration Providers

Neutral arbitration providers offer a valuable service to businesses that want to resolve B2B disputes in an efficient and timely manner. For example, the American Arbitration Association has a variety of arbitration rules that commercial parties can use, such as commercial, construction, international, and patent arbitration rules and it maintains a panel of experienced independent arbitrators in a wide variety of fields. The AAA helps many

parties with arbitrator selection by providing them with a list of qualified arbitrators from the panel. In addition, a case manager is assigned to help the parties' counsel and the arbitrator schedule and organize the proceeding.

Arbitration providers can help parties make better process choices to achieve economy and efficiency, and identify arbitrators with "the proper case management skills and philosophy."

1 Providers should offer business users a clear variety of options because business dispute resolution needs vary. For example, a small sales transaction contract is different from a multimillion dollar construction or commercial contract. Thus, business users need to be able to have a choice of procedures (i.e., fast track, expedited, streamlined, large complex case clauses, etc.) as well as a choice of dispute resolution clauses. In addition, providers should publish "guidance on their Web sites about the benefits and costs of each process." Furthermore, provider Web sites should be organized in such a way that the different procedural options and clauses can be easily located and user feedback can be obtained.

2 Providers should promote stepped dispute resolution clauses, which usually begin with negotiation, followed by mediation, followed by binding arbitration if the dispute is not completely resolved in one of the earlier steps. If successful, non-binding dispute resolution processes can save the parties time and money, give them more control over the outcome, and preserve their business relationship. Mediation has the additional advantage of providing confidentiality protections for private communications between a party and the mediator.

3 Too much "wiggle room" in provider arbitration rules tends to invite parties to use litigation-like discovery practices. Thus, provider rules should be drafted so that discovery is limited to only essential information. Providers should establish guidelines that limit electronic discovery, interrogatories and depositions; that require arbitrators to rule quickly on discovery disputes; and, that authorize

arbitrators to shift costs for discovery abuses. In addition, providers should incorporate these limits on discovery into an arbitration clause that offer detailed discovery procedures that users can adopt in their pre-dispute agreement.

4 Providers should offer rules and train arbitrators in adherence to "presumptive" deadlines for each phase of the process. Providers and arbitrators should enforce stipulated deadlines absent clear unforeseen circumstances.

5 Providers should offer well defined, fast track arbitration programs, guidance on when to elect to use them, and promote the rules to users. As referenced in point 1, fast track rules provide the most economical and quickest final resolution.

6 Providers should develop and promote procedures for the appropriate use of dispositive or other motions in arbitration. These procedures could save time and money by requiring parties to obtain advance approval from the arbitrator instead of parties' counsel unilaterally filing such motions.

7 Providers should train arbitrators in process management and improving skills to reduce cost and time, particularly during the preliminary conference and up to the final hearing.

8 Related to Point 1 providers should offer users a rule that requires early detailed fact pleading, early disclosure of documents supporting each claim and defense, legal authority relied on, and anticipated witnesses.

9 Provider rules should require all pleadings, motions, orders and other documents to be exchanged by electronic service upon the parties, counsel and the arbitrator, unless special circumstances justify another procedure.

10 Providers should offer as a “core service” the opportunity to evaluate arbitrators based on their effectiveness as efficient case managers. This information should be acquired in a “post-arbitration telephone interview” and periodically communicated to the arbitrators. Inefficient arbitrators should be removed from the provider’s panel.

11 Providers should expedite the appointment of arbitrators with rules that impose strict deadlines on appointments and take the appointment decision away from parties who fail to meet the appointment deadline.

12 Before offering an appointment to an arbitrator, providers should confirm the arbitrator’s availability to hear and decide the case within the relevant time frame.

13 Providers should develop an ADR mechanism (for example, an ombudsperson) for the express purpose of hearing users’ complaints about inefficient arbitrators or the arbitration process itself. The hearer of these complaints should have authority to generate solutions.

14 Providers should offer an orientation program for business users who are new to the commercial arbitration process. The format should identify the differences between arbitration and litigation and how to use the arbitration process to further the business user’s goals. This type of program could be online or in person. ■

Religious Requirement for Arbitrators *(Continued from page 19)*

proceedings fairly in accordance with the rules of natural justice.” But what was not needed, it said, was “any particular ethos.” Therefore, it ruled that membership of the Ismaili community was “clearly not necessary for the discharge of the arbitrators’ functions.” Because the religious requirement was “an integral part of the agreement to arbitrate,” the court held that the entire arbitration clause was unenforceable.

Implications

The Court of Appeal recognized that its decision “has a far wider significance than the present case” due to the fact that the term “employment” is defined identically, or nearly identically, in all English legislation forbidding discrimination, including Section 9(1)(b) of the Equality Act 2010, which prohibits discrimination based on “nationality and national origins.”

Many arbitration clauses in international commercial agreements contain nationality requirements and those that do not routinely incorporate institutional arbitration rules with nationality considerations or

requirements. For example, Article 6(4) of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR, the international division of the American Arbitration Association) permits the ICDR, in selecting “suitable arbitrators,” to “appoint nationals of a country other than that of any of the parties.” At least this rule is permissive. By contrast, Article 9(1) of the ICC Rules of Arbitration is mandatory: “In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator’s nationality....” Article 6 of the LCIA Arbitration Rules, is prescriptive: “Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise.”

Does the decision by the English Court of Appeals, if upheld, put at risk all arbitration clauses that specify nationality or that incorporate rules that specify nationality? There has been considerable disagreement in the English and European arbitration

literature as to whether the implications would be wide or narrow, but there seems to be agreement that the implications of the UK Supreme Court decision are uncertain.

The ICC and the LCIA have both intervened as *amici curiae*, to express the arbitration community’s concerns. Some major English law firms are advising clients that incorporate institutional arbitration rules in their arbitration agreements to exclude the application of any provisions relating to the nationality of an arbitrator.² Others are advising clients to “consider amending their arbitration agreements to delete any expressly discriminatory provisions and to disapply any relevant [institutional] rules.”³

The UK Supreme Court’s decision could be announced by the end of 2011. Until then, the concern and uncertainty about nationality requirements continue. ■

Endnotes

¹ [2010] EWCA Civ 712.

² See, e.g., “UK—Jivraj v Hashwani: Amendments needed to arbitration clauses,” Linklaters’ Technology, Media & Technology News, 13 October 2010.

³ See A. Welsh and A. Pullen (Allen & Overy), “Jivraj v. Hashwani: is the sky falling in?” in Practical Law Company, October 2010.