



104: Understanding & Preparing for Arbitrations of Commercial Disputes

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Faculty Biographies

Zela G. Claiborne

Zela G. Claiborne is a full time mediator and arbitrator who specializes in the resolution of complex commercial, real estate, and construction matters. Much of her practice is devoted to mediation and she has successfully mediated hundreds of disputes, including multi-party disputes ranging in value up to several millions of dollars. Also, she has successfully resolved several international matters through mediation/conciliation. In addition, she has served as an arbitrator on many international and domestic cases. Ms. Claiborne has been a panelist with the American Arbitration Association since 1991 and currently serves on both the National and International Rosters of the AAA. She also is on the panel of the CPR Institute for Dispute Resolution.

Before starting her full time ADR practice, she was a general partner at a large San Francisco law firm, where she tried cases and specialized in complex litigation and ADR. She frequently speaks and writes on ADR topics and has taught in training programs for both mediators and arbitrators. Ms. Claiborne's professional activities include the Association of Business Trial Lawyers, the College of Commercial Arbitrators, the Governing Committee of the ABA's Forum on the Construction Industry, the American College of Construction Lawyers, the International Arbitration Club, and the Mediation Society.

She graduated with a JD from the University of California at Berkeley (Boalt Hall) with a JD.

Adam R. Eaton

Adam R. Eaton is a senior attorney for Comcast Cable Communications, Inc. in Englewood, Colorado. He is responsible for commercial litigation matters and pre-dispute advice and counsel. Typical matters include subscriber class actions, false and deceptive advertising claims, all types of commercial contract disputes including those involving programming, vendor, and franchise agreements, antitrust and securities fraud cases, and arbitration matters.

Prior to joining Comcast's predecessor AT&T Broadband, Mr. Eaton was a litigation partner at Holme Roberts & Owen LLP in Denver.

Mr. Eaton received a BS from the University of Arizona and is a graduate of the UCLA School of Law.

Thomas S. O'Neill

Thomas S. O'Neill is associate general counsel of Exelon Corporation located in Warrenville, Illinois. He is lead counsel to Exelon's nuclear generation group, which operates the largest fleet of nuclear power plants in the United States. Mr. O'Neill provides legal support directly to Exelon nuclear senior management in all areas of law impacting the business including regulatory, environmental, commercial, employment, litigation, and certain tax matters.

Prior to joining Exelon, Mr. O'Neill was in private practice with Jenner Block in Chicago, where he handled all aspects of federal and state civil and criminal litigation, including pleading, discovery, deposition, trial, class action, and internal investigations for a wide range of corporate and individual clients, with emphasis in complex commercial civil litigation.

Mr. O'Neill received his BA from the University of Illinois with honors with high distinction and is a *cum laude* graduate of Notre Dame Law School.

Layn R. Phillips

Layn R. Phillips is a partner with the Los Angeles law firm of Irell & Manella and is founder of the Irell and Manella Alternative Dispute Resolution Center.

He was nominated by the President, in 1986, to serve as a United States District Judge for the Western District of Oklahoma. He presided over more than 140 federal civil and criminal trials in the Tenth Circuit. In 1990, Judge Phillips was designated by the Chief Justice of the United States Supreme Court to preside over cases in the Fifth Circuit in the Northern District of Texas. While serving as a federal judge, he also gained extensive experience in the realm of settlement negotiations and mediation, presiding over dozens of settlement conferences in complex business disputes and class actions. Judge Phillips also sat by designation on the United States Court of Appeals for the Tenth Circuit in Denver, Colorado. Prior to these appointments, he joined the United States Attorney's office in Los Angeles as an assistant United States attorney, serving as a federal prosecutor in the Central District of California. During the Reagan Administration, he was appointed by the President to serve as the United States attorney in Tulsa, Oklahoma. He began his career at the Federal Trade Commission.

As a result of his trial work, he has been elected into, and now serves, as a fellow in the American College of Trial Lawyers and in the International Academy of Mediators. In addition, he has mediated hundreds of disputes referred by private parties and courts and has been appointed a Special Master by various federal courts in complex civil proceedings. He served as the president of the Federal Bar Association in Orange County, California and served on the Orange County Bar Association board of directors and judiciary committee. Judge Phillips also served as the president of two American Inns of Court, and maintains the status of Master Emeritus in three separate Inns. He is currently serving as the cochair of the Central District of California Lawyer Representatives to the Ninth Circuit Judicial Conference.

He attended undergraduate school and law school at the University of Tulsa in Tulsa, Oklahoma and Georgetown University Law Center.

**104 UNDERSTANDING AND PREPARING FOR ARBITRATIONS OF
COMMERCIAL DISPUTES**

**ACCA 2003 Annual Meeting
Wednesday October 8, 2003**

Presentation Outline And Materials**1. Why Arbitrate?**

- Pros and Cons of Commercial Arbitration, Including Costs, Timing, and the Nature and Appealability of Arbitration Awards.
- Should The Parties Mediate First?

2. How To Select An Arbitrator.

- Single Arbitrator vs. Three-Person Panel.
- Should Party Appointed Arbitrators Act As Neutrals?
- Is It Better To Have a Technical Expert Arbitrate a Technical Dispute?

3. What To Expect In The Preliminary Hearing Before The Arbitrator.**4. Common Discovery And Pre-Hearing Issues.**

- Discovery Practices
- Limitations on Discovery
- Resolving Discovery Disputes
- Motion Practice/Dispositive Motions

5. The Arbitration Hearing.

- Procedural Guidelines
- Evidentiary Rules

6. Arbitration Awards.

- Types of Awards
- Potential Challenges To Awards

Attachments/Written Materials

1. **Sample Arbitration Provisions**
2. **Commercial Arbitration: Pro and Con**
3. **Comparison of the Procedural Rules of Prominent Arbitration Organizations**

Useful Websites

American Arbitration Association, www.adr.org
Judicial Arbitration and Mediation Services, Inc., www.jamsadr.com
CPR Institute for Dispute Resolution, www.cpradr.org
International Chamber of Commerce, International Court of Arbitration, www.iccwbo.org
London Court of International Arbitration, www.lcia-arbitration.com
National Arbitration Forum, www.arb-forum.com
U.N. Commission on International Trade Law, www.uncitral.org
National Association of Securities Dealers, www.nasdaq.com
Stockholm Chamber of Commerce, www.chamber.se

SAMPLE ARBITRATION PROVISIONS

STANDARD AAA ARBITRATION PROVISION:¹

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

AAA's Guide suggests the following agreement providing for the arbitration of existing disputes (in the absence of a prior agreement to arbitrate):

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

MORE COMPLEX ARBITRATION PROVISIONS:

(1) DISPUTE RESOLUTION

Any claim, controversy or dispute arising out of or relating to this Agreement shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association. To the extent that the Commercial Rules conflict with this provision, this Agreement shall control. The validity of this agreement to arbitrate, the arbitrability of any dispute and confirmation of any award shall be governed by the Federal Arbitration Act, 9 USC Sections 1-16. This arbitration provision shall not limit the right of the parties prior to or during any such dispute to seek judicial relief for the purpose of maintaining the status quo until such time as the arbitration award is rendered or the dispute is otherwise resolved. The arbitration shall be conducted in [] County, [state]. A demand for arbitration shall be served according to the Notice provisions of this Agreement. Within ten (10) days of service of a demand for arbitration, the parties shall appoint a sole arbitrator. If the parties are unable to agree upon a sole arbitrator within the ten (10) day period, then either party may request from the [arbitration administrator, e.g. AAA, JAMS, JAG] a list of three (3) arbiters. Within twenty (20) days of service of the demand for arbitration, first [Claimant], and then [Respondent], shall eliminate one Arbiter from the list of three (3) and the remaining Arbiter shall be appointed by the parties as the sole arbitrator. Unless otherwise agreed by the parties, discovery shall be limited to ten (10) requests for production/inspection per party and thirty-five (35) hours of deposition testimony per

¹ From American Arbitration Association's publication "A Guide to Mediation and Arbitration for Business People," amended and effective January 2003 (available at www.adr.org).

party (with a limit of seven (7) hours per witness). The arbitration hearing shall commence within 120 days of appointment of the arbitrator and the arbitrator's decision shall be rendered in writing within thirty (30) days after the conclusion of the hearing. Each party may file one dispositive motion no later than thirty (30) days before the commencement of the arbitration hearing. The arbitrator shall grant or deny all dispositive motions before commencement of the hearing. The arbitrator shall have the authority only to award equitable relief and compensatory damages, as limited by this Agreement, and shall not have the authority to award punitive damages or other non-compensatory damages. The fees, expenses and costs of the arbitrator shall be borne equally by the parties. The decision of the arbitrator shall be final and binding and may not be appealed or modified, except as provided in the Federal Arbitration Act. Any party may apply to any court having jurisdiction to enforce the decision of the arbitrator and to obtain a judgment thereon. The demand for arbitration, the arbitration proceedings and the arbitrator's award shall be considered Confidential Information under this Agreement. Notwithstanding the foregoing, the parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

(2) DISPUTE RESOLUTION (ALTERNATE):

Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. [This arbitration provision shall not limit the right of [ABC Corp.] prior to or during any such dispute to seek, use, and employ ancillary, or preliminary rights and/or remedies, judicial or otherwise, for the purposes of realizing upon, preserving, protecting, or otherwise procuring access to equipment or other materials located on the [Property]]. The arbitration shall be conducted within the county where the Property is located. Within ten (10) calendar days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by [ABC Corp.] and one shall be selected by [XYZ, Inc.]. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) calendar days, then either party may apply to any judge in any court sitting in [State] for appointment of the third arbitrator. There shall be no discovery during the arbitration other than the exchange of information that is provided to the arbitrator(s) by the parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within ninety (90) calendar days after the date of the selection of the arbitrator(s) or within such period as the parties may otherwise agree. Each party shall be responsible for the fees, expenses and costs

incurred by the arbitrator appointed by each party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Commercial Arbitration: PRO and CON

Issue	Pro	Con
<p>Cost – Arbitration is widely viewed as being less expensive than traditional court proceedings, but that may not always be the case. Arbitration should be less costly, assuming discovery and motion practice are limited, which along with appeals, are the primary drivers of high cost of litigation. Having multiple arbitrators also increases the costs. With proper drafting, an arbitration provision can be cost effective.</p>	X	
<p>Timing – Typically, arbitrations proceed more swiftly to conclusion than a typical court case. Most business executives prefer speedier resolution of commercial disputes. The ability to control the timing to resolution is a factor in favor of arbitration.</p>	X	
<p>Discovery Limitations – Discovery is expensive. Plaintiffs like to go on fishing expeditions to make the defendant spend money. The text of the arbitration clause can limit the amount and scope of discovery.</p>	X	
<p>Motion Practice – Unlimited motion practice usually increases the cost of litigation. The typical arbitration clause does not address motion practice and the arbitrator is therefore free to consider motions or not in his/her discretion. While judges are often motivated to “clear” their docket by making dispositive rulings, arbitrators often prefer to “hear all of the facts” and may not be incented to resolve matters early.</p>	?	?
<p>Split-The-Baby Awards – There is a perception that arbitrators tend to “split-the-baby” in their awards. While this may be acceptable in many business disputes, it can make it more difficult to obtain a “clean kill,” even when the facts and law are in your favor.</p>		X
<p>No Appeal – Arbitrators are not bound to follow the law and there is usually no right to appeal in arbitration. Eliminating appeal saves costs and allows for quicker resolution; however, there is risk that an arbitrator may make an award that is not supported by law. In such instances, neither party usually has the right to appeal.</p>		X
<p>Confidentiality – Unlike court proceedings, an arbitration provision may provide for confidential resolution of disputes.</p>	X	

Comparison of the Procedural Rules of Prominent Arbitration Organizations

	Number of Arbitrators	Party Appointment?	Dispositive Motions	Rules of Evidence	Discovery Practices
American Arbitration Association (AAA) Commercial Rules	1 if claim is < \$1M; 3 if claims is > \$1M; unless parties agree otherwise	If triparte arb. in agreement, each appoints 1 & AAA or appointees select Chair	Permitted.	Rules of evidence unnecessary. Arbs. decide admissibility, relevance & materiality.	Exchange of witness lists/copies of all exhibits to be submitted at hearing. More expansive discovery in disputes over \$500K
Judicial Arbitration and Mediation Services, Inc. (JAMS)	1 unless parties agree to 3	Parties strike and then rank names on list provided by JAMS Case Manager	Arbitrator decides motions for Summary Disposition of particular claims or issues	Rules of evidence unnecessary. Arbs .decide admissibility and can use Federal rules as guide	Must exchange copies of all docs, witness lists, & expert reports. Each party allowed 1 deposition
Center for Public Resources (CPR)	3 unless parties request 1	Each party appoints one, and the 2 party appointees select the Neutral	Not permitted.	Tribunal determines manner of presentation, rules of evidence, privileges	Determined by tribunal w/ regard for confidentiality/ proprietary information.
International Chamber of Commerce (ICC)	1 unless parties request more. Rules same for multiple appointments.	Parties agree on arbitrator. If they cannot agree, ICC makes the appointment.	N/A	Determined by parties	Determined by parties
London Court of International Arbitration (LCIA)	1 unless parties request 3 or LCIA finds 3-member tribunal is appropriate.	LCIA appoints all arbitrators & chairpersons	Not permitted.	LCIA has latitude to decide whether or not to apply any strict rules of evidence.	Court determines precisely what must be exchanged or furnished in discovery.
National Arbitration Forum (NAF)	1 if claim is < \$1M; 3 if claims is > \$1M unless parties agree otherwise	Parties agree on 1 or each selects 1 and appointees name 3 rd or NAF chooses	Parties may file motions for dismissal. Dismissal with or w/ out prejudice. No SJ	Arbitrator determines admissibility of evidence; not bound by rules of evidence.	Exchange of docs/ info, use of depositions or interrogatories and may request addt'l discovery.
U.N. Commission on International Trade Law (UNCITRAL)	3 unless parties agree to 1	E ach selects 1 and they name 3 rd , If 1 arbitrator, parties select appointing authority	Not permitted.	Rules set by tribunal; tribunal states what parties must produce. Witnesses, written statements, docs etc.	Determined by tribunal as it sees fit. Written statements by parties, experts where needed etc, or live witness testimony
National Association of Securities Dealers (NASD)	1 if claim is < \$50,000 3 if claims is > \$50,000	Director makes lists, parties strike/rank; Dir. appoints & the parties name the chair.	Dismissal either by motion or by decision of arbitrators. Can be with prejudice. No S.J.	Arbitrators determine materiality/ relevance; not bound by rules re: admissibility	Document/information exchange, pre-hearing conferences, subpoenas, and depositions.
Stockholm Chamber of Commerce (SCC)	Parties decide number. If they do not agree, the default is 3 unless SCC decides 1 is preferable.	Multiple arb.: parties select equal number & SCC names chair. Single arbitrator: SCC appoints	Not permitted.	Tribunal uses law specified by parties or that it determines best applies. No formal rules of evidence.	Initial written statements of claim/ defense list evidence. Tribunal can req. addt'l docs.