DEVELOPING ISSUES IN COMMERCIAL ARBITRATION: THE "MANAGERIAL" ARBITRATOR MODEL

By Richard Chernick[1]

Although arbitration has been around in some form for centuries, it was not until the adoption of the United States Arbitration Act in 1925 that it became a permissible alternate to the courts. And it was not until the 1990s that it really came into its own. This growth is principally attributable to the Supreme Court's broad embrace of the commercial arbitration process and its rejection of legal doctrines that try to limit the scope and relative importance of arbitration.

Arbitration was transformed in the 1980s and 1990s by a series of United States Supreme Court decisions[2] which have made it more accessible and its enforcement more predictable. This in turn has encouraged businesses to consider arbitration for their disputes and has encouraged individual neutrals and providers to promote arbitration.

The importance of the courts in creating a hospitable environment for the growth of arbitration cannot be overemphasized. The key principles of these U.S. Supreme Court cases are (1) that arbitration is a preferred dispute resolution choice and that courts must therefore err on the side of enforcing rather than limiting agreements to arbitrate; and (2) that arbitration, being a contractual process, encourages parties to create their own unique processes which courts will respect and enforce.

In this context, parties and counsel have come to appreciate the value of fashioning their own process to suit the individual case and expect that a court will enforce those process choices (or, more usually, defer to the arbitrator and the parties in determining what the parties' agreement was and how it should be effectuated). The benefits to the parties are obvious, and the value in high-dollar cases where much is at stake and where the issues are complex is inestimable in the hands of skillful lawyers and neutrals.

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[2] Chernick, Law Attempts to Put Arbitration Agreements on Equal Footing, *Los Angeles Daily Journal* (April 9, 2003). *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Wilco v. Swan*, 346 U.S. 427 (1953); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985);*Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) *Rodriguez de Quias v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991);*Allied Bruce-Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *see also Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992); *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362 (1994); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951 (1997); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

As counsel become more sophisticated at fashioning a process that suits their particular case, the complexity of managing and conducting arbitrations increases and the agreed or negotiated process may tend to resemble a court trial in a complex case. This means that legal issues and constructs are more common (pleadings, discovery, requests for provisional relief, dispositive motions, motions *in limine*, application of rules of evidence, enhanced review of awards, etc.), and ancillary and final review of arbitration orders and awards becomes more common. *See* Revised Uniform Arbitration Act.[3]

The skilled arbitrator is an essential part of this scheme. It does not work if the arbitrator is not qualified to manage a complex and difficult dispute. Parties know this and regard their opportunity to choose the arbitrator as their most important process choice. I refer to this approach to arbitration as "managerial," meaning that the parties have the desire to use the tools of the arbitral process to fashion a unique and tailored process for that case. A managerial arbitrator is one who is willing to collaborate with the parties in this effort and to assume the primary responsibility for managing the process chosen in order to achieve the parties' goal of an effective and efficient proceeding.

There are several pivotal issues in the arbitral process which provide the opportunity to achieve the process objectives of the parties.

Arbitrability:

Courts determine the existence of an agreement to arbitrate (9 U.S.C. § 2). Issues such as the enforceability of an agreement to arbitrate and the interpretation of the agreement to arbitrate as to who and what are subject to arbitration are all for the court. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967) (severability of arbitration clause from agreement in which it is contained). There is extensive case law addressing the nuances of these issues. *See, e.g., Sandvik AB v. Advent International, Plc*, 220 F3d 99 (3d Cir. 2000) (existence of authorization of agent to sign agreement to arbitrate for the court to determine); *Teledyne v. Kone Corp.*, 892 F.2d 1404 (9th Cir 1990); *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003) (issue of allegedly forged signature on agreement to arbitrate is for the court).

The parties may give the arbitrator power to determine issues of arbitrability in their agreement to arbitrate, if they do so "clearly and unmistakably." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Alternately, if the clause only designates applicable rules of an institutional provider but the rules give the arbitrator that power, that may be enough. *See* JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(c); American Arbitration Association Commercial Arbitration Rules, Rule R-8(a); *Shaw Group Inc. v. Triplefine Int'l. Corp.*, 322 F.3d 115, 121-122 (2d Cir. 2003) (applying New York law); *Hoeft v. MVI Group Inc.*, 343 F.3d 57 (2d Cir. 2003). A party can also be estopped to challenge an arbitrator's determination as to arbitrability if it

[3] www.upenn.edu/bll/ulc/uarba.

sought such rulings in the arbitration. *PowerAgent Inc. v. Electronic Data Systems Corp.*, 2004 WL 345741 (9th Cir. 2004).

The United States Supreme Court has recently clarified its view of what disputes are subject to determination by arbitrators rather than the courts. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) ("gateway issue" of applicability of six year ineligibility rule contained in NASD Code of Arbitration Procedure is a "procedural" question for the arbitrator, not an issue of "substantive arbitrability"); *see also PacifiCare Health Systems, Inc. v. Book,* 538 U.S. 401 (2003) (whether contractual punitive damage waiver affected power of arbitrator to award treble damages under RICO); *Green Tree Financial Corp. v. Bazzle,* 123 S.Ct. 2402 (2003) (whether parties had waived the right to a class wide arbitration). *See also* Revised Uniform Arbitration Act § 6(c), Comment 2.). The intricacies of these "threshold" issues are addressed at length in J. Lehrman, *On the Threshold of Arbitration*, Los Angeles Lawyer 20 (Dec. 2003).

Arbitrators are also in control of the determination whether conditions precedent to arbitration have occurred. *See generally* Revised Uniform Arbitration Act ("RUAA") §§ 6(b), (c); *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (court refused to compel arbitration until condition precedent is met); *Kemiron Atlantic, Inc. v. Aguachem International, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (*accord*). Under *Howsam v. Dean Witter Reynolds, Inc., supra,* 537 U.S. 79, this issue is one that an arbitrator should decide. *See Int'l Ass'n of Bridge Structural Ornamental & Reinforcing Ironworkers, Shopman's Local 493 v. Efco Corp. & Construction Products, Inc.*, 2004 WL 369036 (8th Cir. 2004).

There is also a parallel trend to read broadly the parties' own definition of the scope of the arbitration – how one interprets the portion of the arbitration clause that defines disputes subject to arbitration. For example, the phase "all disputes arising under this agreement," once read narrowly, is now commonly interpreted to imply a broad form arbitration agreement, *i.e.*, encompassing not just contractual disputes arising in the relationship but also related statutory and tort-based claims as well. *See ACE Capital Re Overseas Ltd. v. Central United Life Insurance Co.*, 307 F.3d 24 (2d Cir. 2002); *Simula, Inc. v. Autoliv, Inc.*, 175 F3d 716 (9th Cir. 1999); *Tate v. Saratoga Savings and Loan Ass'n.*, 216 Cal. App. 3d 843 (1989).

All of this suggests that increasingly the arbitrator is empowered to define the scope of the arbitration and the parties' entitlement to arbitrate. This role is an essential aspect of the management of the arbitration process, and sophisticated parties usually prefer to have all such issues determined in the arbitration rather than by a court. Generally speaking, the more control the arbitrator has in defining the scope of the arbitration the better the administration of large and complex cases. The "managerial" arbitrator has a stake in determining the parties' intent and in effectuating that intent. The arbitrator is also more likely to be practical in making determinations which accord with sensible structuring of the arbitration process and to tend to err on the side of avoiding inefficient or multiple proceedings.

Institutional v. Non-Administered Arbitration:

The institution designated to administer the arbitration controls the content of rules and the arbitrator selection process to the extent the clause does not specify to the contrary. If no institution is designated, all disputes about arbitrator selection and disqualification must go to court. Institutions also supply administrative procedures for certain decisions (arbitrator qualification, selection and disqualification; venue, etc.). As noted above, most institutional rules also grant power to the arbitrator to determine his or her own jurisdiction.

Non-administered arbitrations are more flexible because of the absence of any procedure for determining any of these issues unless specified in the clause, but that creates risks where the parties may not be cooperating fully. Lack of agreement on key issues usually means that the parties must seek a court determination as to those issues.

Where the parties have not chosen an arbitral institution to administer the arbitration, the sole arbitrator or the chair of the panel becomes the administrator. This task is burdensome, but it also assures that the arbitrator will have control not only over the process generally but also over the day to day management of the case.

Arbitrator Selection:

Parties usually decide on a format for the arbitration that is appropriate to their dispute: sole arbitrator, three neutral arbitrators, or party appointed (non-neutral) arbitrators in a tripartite panel. This is not just a cost issue; the benefits of three neutral highly qualified arbitrators cannot be overemphasized where the stakes are high and there will be no review for correctness of the award.

Parties strive to select arbitrators who are qualified and appropriate to their case. Information may be obtained about arbitrator-candidates directly from the provider and from counsel who have appeared before the nominee in similar cases. In major cases, counsel may decide to interview arbitrator-candidates (jointly and not *ex parte*). The interview permits counsel to assess the experience, value system, work ethic, and hearing skills of each candidate. Part of this inquiry should be directed to the candidate's knowledge and experience as to the substantive and technical and legal issues presented. But the crucial qualities of a managerial arbitrator should also be assessed in determining the candidate's suitability to be sole arbitrator or chair of a tripartite panel.

It is reasonably easy to obtain references from the arbitrator or the provider to counsel in prior "larger" cases. And while prior counsel's views about the arbitrator might be colored by the outcome, usually a discussion about management skills and diligence in conducting the proceeding will elicit reasonably balanced views. This information is crucial to the selection process of a sole arbitrator and the chair of a tripartite panel, and less important for side arbitrators (be they neutral or non-neutral).

Locale:

Where the arbitration is conducted usually will influence the list of arbitrators an institution will propose to the parties. Parties often look elsewhere, but absent agreement of the parties, the institutional provider will determine who is proposed for selection.

The physical location of the arbitration hearing is also relevant to issues of neutrality, adequacy of facilities, convenience to counsel and witnesses, etc. The longer the hearing, the more important this is. Obviously, venue can be controlled through the clause drafting process, but parties may also agree on location of the hearing after the fact once counsel and the arbitrators are selected.

Large arbitrations require large quarters – a hearing room that will accommodate 20 or so people, a set up that is conducive to a court reporter and "real time" technology, a screen to display exhibits electronically, video and teleconference facilities for depositions and witness testimony, innumerable outlets for laptop computers and internet connections and war rooms for counsel to gather during breaks and to store exhibits and other materials for the duration of the proceeding. These "trappings" may seem to be merely a comfort issue, but they prove essential for long proceedings where effective presentation of evidence depends to some extent upon the attributes of the physical space.

Pleadings:

Demands, Answering Statements and Counterclaims should be prepared with the nature of the process in mind. Virtually no pleadings are "required" in arbitration, but this is often the only statement of the case the arbitrator will see until hearing briefs are submitted shortly in advance of the evidentiary hearing. Detailed and tedious "pleading" style submissions are usually not helpful in gaining an understanding of the case.

The arbitrator needs to know what the case is about prior to the preliminary hearing (discussed below), either by reading the pleadings or a preliminary hearing statement. The pleadings are likely to go into a notebook or file that the arbitrator will have ready access to in ruling on later motions and discovery disputes. A concise and non-mechanistic statement of the case is therefore helpful to the understanding of a party's positions in many different contexts.

Preliminary Hearing:

The preliminary hearing is the crucial step in structuring the arbitration process; the arbitrator will use the preliminary hearing to determine the parties' goals in the arbitration and to ascertain what process elements will help to achieve those goals. The essential principle that drives this process is that the arbitrator wants to help the parties achieve the "perfect" process for their case. Most of the issues to be addressed will not be covered by the clause and most will not be covered by the applicable procedural rules. The arbitrator will encourage the parties to agree on these process points but retains the authority to make decisions as to process where agreement is not achieved. This power,

used wisely, can encourage agreement on most important issues. *See, e.g.*, RUAA §§ 6, 8(b), 15(a), (b), (c); Cal. Code Civ. Proc. § 1282.2(c); AAA Commercial Arbitration Rules R-7(a), 30(b), 31(b); JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(a), 22(a)

The listing of issues that follows is intended to highlight the range of process issues which the parties ought to be interested in and which the arbitrator will want determined so that the matter can proceed efficiently and effectively. Some of the more important issues are briefly elaborated on below. All determinations made at the preliminary hearing(s) will be documented in a carefully drafted procedural order(s) which the arbitrator will prepare.[4]

- Arbitrability (*see* above)
- Status of party appointed arbitrators (neutral/non-neutral) (Appendix A, ¶ 3)
- Completion of disclosure process and confirmation of arbitrator's appointment
- Applicable law (Appendix A, ¶ 6)
- Applicable rules of procedure: *Id.*
- Structural issues:
  Consolidation: *Shaw's Supermarkets, Inc. v. United Foods & Commercial Workers Union*, 321 F.3d 251 (1st Cir. 2003) (arbitrator may consolidate related claims into one proceeding); *but see* RUAA § 10 (court may consolidate arbitrations, implying arbitrators do not have this authority), Cal. Code Civ. Proc. § 1281.3 (same); bifurcation (liability and damages; attorneys' fees and costs; punitive damages; remedial phases (*e.g.* partnership dissolution); *see, e.g.*, RUAA § 15; Cal. Code Civ. Proc. § 1282.2(c); (*see* Appendix A, ¶ 8(b))
- Initial exchange of information (exhibits, known witnesses) (*see* discussion below)
- Discovery between parties (*see* discussion below)
- Third party discovery (*see* discussion below)
- Scheduling of motions (provisional relief, dispositive motions) (*see* discussion below)
- Final exchange of witness identification for the hearing (*see* discussion below)
- Expert witness procedure (*see* discussion below)
- Exchange of documents intended to be offered at the hearing (*see* discussion below)
- Preparation of exhibit binders and objections to introduction of documentary evidence prior to commencement of hearing (Appendix A, ¶ 8(d))
- Scheduling the hearing(s) (*see* discussion below)
- Use of demonstrative evidence in opening statement

[4] *See* Appendix A for a form of Procedural Order used by the author.

- Briefs and motions in limine; post hearing briefs (*see* discussion below)
- Scheduling argument
- Need for court reporter and payment arrangements (Appendix A, ¶ 8(f))
- Remedies anticipated to be sought and need to bifurcate hearing to aid determination of remedial issues
- Rules of evidence; exclusion of evidence
- Form of award (*see* discussion below)
- Agreed appeal procedure (such as JAMS Optional Arbitration Appeal Procedure)

Discovery:

Nothing that drives the cost of litigation more than discovery. The most valuable role an arbitrator can play is to persuade the parties that discovery proportional to the complexity of the dispute will give counsel what they need without burdening parties with unnecessary expense or delay. Full and timely disclosure of documents and witnesses is the starting point. Close supervision of this process by the arbitrator will also send the message that gamesmanship will not be tolerated (and will hurt the credibility of the party which crosses that line). The power of the arbitrator to supervise discovery is expressly stated in most arbitration rules (RUAA §§ 17 (c), (d); AAA Rule R-21; JAMS Rule 17(c)). That power may also include the power to sanction, although the ultimate sanction for discovery abuse or refusal is the right of the arbitrator to apply evidentiary inferences for the incomplete production of evidence. In tripartite arbitrations parties usually agree to submit all discovery disputes to the presiding arbitrator alone to insure efficient and timely resolution. *See* Appendix A, ¶ 7(b).

Third-party discovery is more constrained and may not be permitted at all under the United States Arbitration Act ("FAA"), 9 U.S.C. § 7. *Compare In re Security Life Insurance Co. of America*, 228 F.3d 865, 870-871 (8th Cir. 2000) *with COMSAT Corp. v. National Science Foundation*, 190 F.3d 269. 275-276 (4th Cir. 1999). There are ways around this, including the taking of depositions to preserve the testimony of witnesses who are unavailable to attend the hearing (*e.g.*, Cal. Code Civ. Proc. § 1283) and the issuance of "hearing subpoenas" to third parties for the production of documents at a hearing especially set for that purpose in advance of the commencement of the evidentiary hearing proper. *See* Appendix, ¶ 7(c).

Part of the expense and delay of discovery is the result of formalistic and detailed requirements for motion practice. Arbitrators can cut through this morass by being willing to accept conference calls on short notice to address narrow issues which do not require briefing or to deal with objections to key questions at depositions that will enable the process to be completed efficiently.

Arbitrators have considerable power in making discovery determinations and orders, and discovery rulings that may be incorrect are not a ground to vacate an award. *Prestige Ford v. Ford Dealers Computer Services, Inc.* 324 F.3d 391, 395 (5th Cir.

2003); *Nationwide Mutual Insurance Co. v. Home Insurance Co.* 278 F.3d 621, 625 (6th Cir. 2002).

Motion Practice:

Parties usually prefer to go to court to address the need for provisional relief, but in some cases the arbitration is a better forum to resolve such issues if timing is not urgent. The need for such relief should be addressed during the preliminary hearing.

Dispositive motions (RUAA § 15(b)) and motions *in limine* should be used sparingly and almost never where there is not extensive discovery. *See Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (1995), *Reed v. Mutual Service Corp.*, 106 Cal. App. 4th 1359, 1364-1370 (2003) (NASD six-year limitations period applied to dismiss claim at preliminary conference). Institutionally, the use of dispositive motions is limited because of the rule that a refusal on the part of the arbitrator to hear relevant evidence is a ground for *vacatur* of the award. RUAA § 23(a)(3); FAA § 10(a)(3).

Scheduling the Hearing:

Efficiency goes out the window when the hearing is not continuous. Particularly where there is a tripartite panel, calendar conflicts may on occasion necessitate delays of months in finding the few extra days needed to complete a hearing. The cost of demobilizing and repreparing for a hearing is considerable. The largest expense of civil litigation is the cost occasioned by continuances of trials after all preparation is completed.

A continuous hearing is not only more efficient for counsel, it more conducive to a decision-making process that is based on actual recollection of testimony and argument. Hours may be varied to suit the parties. Some counsel prefer 8:00 a.m. to 1:00 p.m. or 12:00 Noon to 6:00 p.m. without a meal break in order to preserve one-half day in the office or for preparation. Others prefer a more traditional 9:00 or 9:30 a.m. to 5:00 or 5:30 p.m. schedule with a lunch hour. Whatever schedule works for the parties is likely to be acceptable to the arbitrator. *See* Appendix A, ¶ 8(a).

The arbitrator has significant control over scheduling issues – setting, continuing, or refusing to postpone hearings. Cal. Code Civ. Proc. § 1282.2(a)(1); *Prestige Ford v. Ford Dealers Computer Services, Inc.* 324 F.3d 391, 395 (5th Cir. 2003); JAMS Rule 19(a). Ideally this power is used to urge the parties to agree on a time and duration for the hearing, but failing agreement the arbitrator may order it.

Exhibits:

The arbitrator should order early exchange not just of documents for discovery but also later exchange or designation of documents intended to be offered in the hearing. *See* Appendix A, ¶ 7(d). This later exchange enables counsel to put together a single,

non-duplicative, organized set of exhibits properly marked and in notebooks or other convenient organization which makes them accessible to the arbitrator. Id., ¶ 8(d). (In larger cases it may be preferable to assign blocks of exhibit numbers and to allow separate Claimant and Respondent sets of exhibits to be prepared, rather than to require a joint exhibit list.)

Objections should be identified on the joint exhibit list, or in a separate writing required to be served a few days prior to the hearing, and exhibits as to which there is no foundational objection should be admitted without the need of any stipulation or authenticating testimony at the hearing. Relevance issues are usually addressed in argument. *See* Appendix A, ¶ 8(d).

This allows counsel to refer to exhibits or to attach them (selectively) to the prehearing brief and identify them on demonstrative exhibits (*see* below). Documents in evidence need not be referred to specifically by witnesses if their significance is clear and they are otherwise called to the arbitrator's attention.

Witnesses:

Witness exchanges similarly should be required in order to enable proper preparation for cross-examination. Be sure that witnesses who will testify other than in person are identified as to their mode of testimony. *See* Appendix A, ¶ 7(e). This enables early objections, for example, to telephonic testimony of an important witness or make arrangements for the witness to have access to certain documents at the time of his or her testimony. The arbitrator may also order appropriate procedures for the cross examination of witnesses by telephone, including procedures for having documents placed in front of the witness that are not disclosed prior to the examination.

Expert Testimony:

The procedural order is likely to require the exchange of expert reports (if they are intended to be offered during the hearing) in advance of the hearing. If expert testimony is crucial, the arbitrator might propose stipulating to a disclosure and discovery process similar to that in the Federal or State discovery rules so that the parties have the opportunity to control access to expert testimony and to be fully prepared to address all expert issues.

The arbitrator has the power to appoint a neutral expert or to establish other procedures for the taking of expert testimony. For example, competing experts can be ordered to meet and confer prior to their testimony and to create a list of agreed and disputed issues if that will aid in the assessment of their testimony.

Demonstrative Exhibits:

Anything that will help the arbitrator sort and understand the early testimony, before he or she is familiar with all the facts, is crucial. A timeline or chronology and

organization chart of a corporate party is often helpful. On specific issues during the hearing, demonstratives can be employed to assist important witnesses in organizing or summarizing complex facts and in depicting important relationships between events. In discussing damages, demonstrative exhibits can be used to summarize and clarify damage theories and proof. Exhibit references should be included on all demonstratives to tie the assertions to the record so that the demonstrative exhibit is useful to the arbitrator in writing the Award. Demonstrative exhibits intended to be used during the opening statement should be ordered exchanged prior to opening statement.

Remedies:

If remedies other than or in addition to compensatory damages are possible, it may be a good idea to bifurcate liability and damages in order to permit full exploration of available remedies after the initial liability determination has been made. This is particularly true in joint venture, partnership dissolution and other proceedings where non-monetary remedies are important. *See Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362 (1994) (arbitrator may grant a remedy consistent with the parties'' agreement which a court could not have); *Ajida Technologies, Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534 (2001) (arbitrators' power to fashion remedy consistent with parties' agreement). The AAA and JAMS rules are consistent wit this grant of authority. AAA Rule R-43(a); JAMS Rule 24(c).

Fees and Costs:

Many agreements provide for the shifting of fees and costs in favor of the prevailing party. This determination is often bifurcated from the main hearing and determined after the issuance of an Interim Award. *See* Appendix A,¶ 8(b). This procedure assures that a final award will not issue omitting consideration of the fee and cost issue inadvertently. There is extensive law on the issue of arbitrators' power to award fees and costs (*see* W. Knight, C. Fannin, R. Chernick & S. Haldeman, *California Practice Guide – Alternative Dispute Resolution* ¶ 5:430 *et seq.* (The Rutter Group 2002).

Briefing and Argument:

Prehearing briefs are commonly filed and will usually have more influence on the decision making process than post hearing submissions. Post-hearing briefs are sometimes necessary in addition to final argument, particularly after lengthy hearings and where there is a transcript counsel wish to use to present evidentiary support for legal positions. But post hearing briefing always delays the prompt submission of the matter to the arbitrator for decision; it is sometimes preferable to have the matter submitted immediately after argument so that the deliberation may occur and the award can be prepared while the testimony is fresh in the arbitrator's mind. The arbitrator is the best judge of which process will be most conducive to effective decision making. The columns below suggest alternate sequencing of hearing, briefing and argument; other choices are also possible. Whatever approaching is taken, it ought to be agreed on early

in the process so counsel will be able to adjust their presentation of evidence to suit the agreed format:

Alt. 1	Alt. 2	Alt. 3	Alt. 4
Prehearing brief	Prehearing brief	Prehearing brief	Hearing
Hearing	Hearing	Hearing	Post hearing brief
Argument	Post Hearing Brief	Tent. Award	Argument
Decision	Argument	Argument	Decision
	Decision	Decision	

Alternate 3 proposes issuance of a tentative award by the arbitrator prior to argument. Where the arbitrator is reasonably clear where the decision-making process is likely to lead, this is an effective way to focus counsel on the issues the arbitrator regards as important.

Award Formats.

Where issues are bifurcated, the arbitrator may issue an interim award reflecting the determination of the issues heard in Phase I and then schedule a hearing on the bifurcated issue, such as the amount of attorneys' fees and costs or punitive damages. The interim award in such circumstances is not subject to confirmation or *vacatur*. The arbitrator also has the authority in certain cases to hear and determine part of the case and issue a partial final award intending that award to be reviewed by a court and that the parties would return to arbitration thereafter for further proceedings. *See Hightower v. Superior Court (O'Dowd),* 86 Cal. App. 4th 1415 (2001); *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 282-283 (2d Cir. 1986). The sequencing of the case is in the arbitrator's control and is an essential tool where complex remedial relief is required. *See* Appendix A, ¶¶ 8(b), (g).

The arbitrator might also propose use of alternative formats for the award, such as high-low or baseball (parties each submit a proposed resolution; arbitrator must select one or the other). Such a choice should be embodied in an order so that the reviewing court will understand the arbitrator's authority. In appropriate cases the parties might also consider med-arb or arb-med formats (arbitrator acts as mediator before or after the arbitration hearing; in the latter case the award is sealed and only opened if the mediation is not successful).

Review of Awards.

Arbitration awards are reviewed by courts on a limited basis under the FAA and the CAA. Cal. Code Civ. Proc. § 1286; 9 U.S.C. § 9 – 11. *See, e.g., Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992). Enhanced judicial review clauses in arbitration agreements typically require the arbitrator to render a reasoned award (with or without findings of fact and conclusions of law) and impose on the reviewing court the obligation to confirm the award only if it meets the parties' defined standard. Because such a provision alters

the statutory review process and expands the court's duties, there is a split of authority whether a court is obligated to follow the parties' agreement.

Federal circuits are split whether enhanced review is permissible under the Federal Arbitration Act. *See Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) (no enhanced review by agreement; reviewing other circuit cases to the contrary). California courts do not permit enhanced review. *Crowell v. Downey Community Hospital,* 95 Cal. App. 4th 730 (2002); *Oakland-Alameda County Coliseum Authority v. CC Partners,* 101 Cal. App. 4th 635 (2002).

Federal courts are also split as to whether parties may by agreement *limit* judicial review of an arbitration award. *See Hoeft v. MVI Group Inc.* (2nd Cir. 2003) 343 F.3d 57 (agreement unenforceable).

As an alternative review process one might consider tripartite panels and internal review processes such as the JAMS Optional Appeal Procedure. They present no legal issues and may be more reliable than a clause that a court will need to interpret and apply, perhaps over objection of the winning side.

Conclusion:

Where parties and arbitrators approach the design and effectuation of the arbitration proceeding as a partnership, and where all participants have an interest in achieving a process that is best suited to the particular case, and where the arbitrator is a skilled manager of the arbitration, even the most complex arbitration can present the opportunity for an effective exercise in quality decision-making.

In the end . . .

You get the process you deserve . . .

You get the outcome you deserve.

APPENDIX A

J A M S ARBITRATION No. 12200XXXXX

_____,

Claimant,

and

_____,

Respondent.

_____

REPORT OF PRELIMINARY HEARING
AND SCHEDULING ORDER NO. 1

A preliminary hearing was conducted in this matter on _____, pursuant to written notice, and the following order is made respecting the conduct of this arbitration:

1. Parties and Counsel. The parties to this arbitration are identified in the caption and are represented as follows:

Name
Firm
Address
City
Telephone
Fax
Email
Counsel for Claimant

Name
Firm
Address
City
Telephone
Fax
Email
Counsel for Respondent

2. Arbitrators:

Richard Chernick
JAMS
350 South Figueroa Street, Suite 990
Los Angeles, CA 90071
213/620-1133 213/620-0100 (fax)
Chairman

_____
address
Los Angeles, CA 900xx
213/xxx-xxxx 213/xxx-xxxx (fax)
Appointed by Claimant

_____
address
Los Angeles, CA 900xx
213/xxx-xxxx 213/xxx-xxxx (fax)
Appointed by Respondent

3. Case Manager:

_____
JAMS
350 South Figueroa Street, Suite 990
Los Angeles, CA 90071
213/253-XXXX 213/620-0100 (fax)

_____ and _____ are party-appointed non-neutral arbitrators as that term is used in the Revised Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA 2004) ("Code of Ethics"). They are free to engage in ex parte communications until the commencement of the arbitration hearing (¶ 8(a), *infra*), subject to Code of Ethics, Canon X(C)(4)(a), and not thereafter.

4. Agreement to Arbitrate. Arbitration clauses are contained in the _____ Agreement ("Agreement") dated _____, at ¶ X. Arbitration was ordered pursuant to Order dated _____ in L.A.S.C. Case No. BC_____ ("Order").

5. Pleadings and Arbitrability. The claims are stated in the Demand for Arbitration dated _____. The claims are arbitrable. The Response is dated _____. [Ref. Counterclaim if applicable]

6. Applicable Law and Rules. The substantive law of California and the California Arbitration Act together with the JAMS Comprehensive Rules ("Rules") shall apply in this proceeding.

7. Discovery and Exchange of Information.

(a) The Order prescribes certain discovery. The parties shall work out a discovery plan cooperatively. The arbitrators shall determine permissible discovery if the parties are unable to agree and shall supervise all discovery to the extent necessary and in accordance with the California Discovery Act.

(b) The parties shall meet and confer on all discovery disputes. Such disputes shall be resolved by the Chairman, provided that the moving party may require at the time the discovery motion is filed or the responding party may require at the time opposition is filed that such dispute be resolved by the full panel.

(c) The parties may serve subpoenas for production of documents from third parties, which shall be returnable on _____, at 9:00 a.m. at the Los Angeles office of JAMS. That hearing shall be limited to the production of documents and the examination of custodians of such documents to determine compliance with the subpoenas and any objections thereto.

(d) The parties shall exchange all documentary evidence they intend to offer at the hearing (excepting only documents to be offered solely for impeachment), including reports of any experts intended to be offered during the Hearing, not later than _____. Supplemental documents may be designated and exchanged by _____. Documents not so exchanged shall not be admitted.

(e) Counsel shall identify all non-rebuttal percipient and expert witnesses expected to testify at the Hearing and indicate the manner in which each witness is expected to testify (in-person, telephonically or by affidavit or declaration), not later than _____ and may supplementally designate witnesses by _____. Witnesses not so identified shall not be permitted to testify at the hearing.

8. Hearing Procedure.

(a) The Phase I Hearing shall be conducted on _____, commencing at 9:30 a.m. in the JAMS _____ office. The hearing hours generally shall be 9:30 a.m. to 5:00 p.m. but may be varied as necessary to accommodate counsel or witnesses.

(b) Bifurcation. The issues of the amount of punitive damages as well as the amount of costs and attorneys' fees to which any party may be entitled shall be bifurcated and determined subsequent to the Phase I Hearing. The entitlement to an award of punitive damages and fees and costs shall be determined as part of the Phase I hearing.

(c) Prehearing briefs and motions *in limine*, if any, may be filed not later than _____.

(d) Trial exhibits shall be pre-marked with consecutive Arabic numerals (without any indication of the party offering same) and a joint exhibit list shall be prepared not later than _____. The parties shall indicate any objection to the introduction of any exhibit. The joint exhibit list and objections shall be furnished to the arbitrators at the commencement of the hearing. Exhibits not objected to shall be deemed admitted at the commencement of the hearing. One set of exhibits shall be prepared for the arbitrators and one for the witnesses in addition to copies for counsel. All exhibits will be discarded 30 days after the issuance of the final award unless a party requests, in writing, that the exhibits be retained or returned.

(e) The parties are encouraged to execute a stipulation of undisputed facts and to submit that document to the arbitrator at the hearing. A disk formatted to Word shall accompany any such stipulation.

(f) If any party intends to utilize the services of a court reporter, notice thereof shall be given to the other side by _____. The parties are encouraged to agree on any division of cost with respect to the reporter they desire, and to agree as to whether such costs shall or shall not be an allocable cost of this proceeding.

(g) The award shall state the reasons on which the decision of the arbitrators is based. The award may be served by regular mail unless any party requests, in writing, service by certified mail in accordance with Cal. Code of Civil Procedure § 1283.6.

9. Miscellaneous.

(a) Documents shall be served on JAMS through the Case Manager, with a copy sent directly to each arbitrator, except the trial exhibits shall be submitted only to the arbitrators on the day of the hearing.

(b) All deadlines herein shall be strictly enforced. This Order shall continue in effect unless and until amended by subsequent order of the arbitrator.

DATED: _____

_____
Arbitrator

_____
Arbitrator

_____
Arbitrator