

A Guide to Commercial Mediation and Arbitration for Business People



AMERICAN ARBITRATION ASSOCIATION®

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A Guide to Commercial Mediation and Arbitration for Business People



Introduction

In the normal course of day-to-day business affairs, disputes are often inevitable. Parties might disagree as to their individual rights and obligations no matter how carefully a contract is written. This can lead to delayed shipments, complaints about the quality of merchandise, claims of nonperformance, and similar misunderstandings. The resolution of such disputes, however, need not be costly and acrimonious. Alternative means of dispute resolution can save time and money, and can help to put the dispute behind you while preserving valuable business relationships.

The American Arbitration Association® (AAA®) administers a broad range of dispute resolution services, which address the needs of businesses mired in conflict. These services include:

Mediation

Mediation is a meeting among disputants, their representatives, and a mediator to discuss settlement. The mediator's role is to help the disputants explore issues, needs, and settlement options. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but resolution of the dispute rests with the disputants themselves. A mediation conference can be scheduled very quickly and requires a relatively small amount of preparation time. The conference usually begins with a joint discussion of the case, followed by the mediator working with the disputants both together and separately, if appropriate, to resolve the case. Many cases are resolved within a few hours. Perhaps most importantly, mediation works!

Arbitration

Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. Private and confidential, it is designed for quick, practical, and economical dispute resolution. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, through the modification of certain aspects of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information used; evidence, locale, number of arbitrators; and issues subject to arbitration, for example. The parties may also provide for expedited arbitration procedures, including the time limit for rendering an award, if they anticipate a need for hearings to be scheduled on short notice. All such mutual agreements will be binding on the American Arbitration Association as well as the arbitrator. The AAA has also developed special Procedures for Large, Complex Disputes.

Prior to the initial hearing in a case, the AAA may schedule either an administrative conference with the parties or a preliminary hearing with the arbitrator(s) and the parties to arrange for such matters as the production of relevant documents and the identification of witnesses, and for discussion of and agreement by the parties to any desired rule modifications. AAA administration is guided by those decisions that the parties make as to how to handle such sensitive issues as privacy of proceedings, confidentiality, trade secrets, evidence, proprietary information, and injunctive relief.

The National Roster of Neutrals

To serve the community with mediators and arbitrators representing all fields of specialization, the AAA maintains a national roster of trained experts throughout the United States and the rest of the world.

The AAA requires that applicants have a minimum of 10 years of senior level business or professional expertise or legal practice prior to being considered for the roster.

Selected qualities in arbitrators and mediators for which the AAA looks are:

- > commitment to impartiality and objectivity;
- > dispute management skills;
- > judicious temperament; patience, and courtesy;

- > respect of bar or business community, and
- > strong academic background and professional or business credentials.

The American Arbitration Association is committed to maintaining an ongoing review of the quality of its roster of neutrals. Current panelists and new applicants are evaluated to guarantee neutrals' possession of superior management skills, commitment, ethics, training, and suitability to the caseload. The Association monitors the integrity of the process, the quality of roster composition, and balance in terms of gender, racial, and ethnic diversity. The bottom line is a roster of neutrals crafted to meet the needs of the parties.

An AAA Glossary of Dispute Resolution Terms

Some of the commonly used terms follow.

Arbitration is submission of a dispute to one or more impartial persons for a final and binding decision.

Awards are the decisions of arbitrators. Awards are made in writing and are enforceable in court under state and federal statutes. Enforcement actions, when necessary, are brought by the parties to the arbitration.

Case managers are the AAA staff persons assigned to administer cases. The case manager is responsible for the general management of a particular case, including panel selection, scheduling and exchange of information among the parties, and all of the other administrative details.

Caucuses are meetings in which a mediator talks with the parties individually to discuss the issues.

Claimants are filing parties, also known as plaintiffs.

Counterclaims are counter demands made by a respondent in his or her favor against a claimant. They are not mere answers or denials of the claimant's allegations.

Demands for Arbitration are unilateral filings of claims in arbitration, based on a contractual or statutory right; also, the forms used.

Fact finding is a process by which parties present the arguments and evidence to a neutral person who then issues a nonbinding report on the findings, usually recommending a basis for settlement.

Hearing is a proceeding in which evidence is taken for the purpose of determining the facts of a dispute and reaching a decision based on evidence.

Mediation is a process in which a neutral assists the parties in reaching their own settlement but does not have the authority to make a binding decision.

Mini-trial is a confidential, nonbinding exchange of information, intended to facilitate settlement. The goal of mini-trial is to encourage prompt, cost-effective resolution of complex litigation. Mini-trial seeks to narrow the areas of controversy, dispose of collateral issues, and encourage a fair and equitable settlement.

Negotiation is a process in which disputants communicate their differences to one another and with this knowledge try to resolve them.

Parties are the disputants.

Respondents are responding parties, also known as defendants.

Submission is the filing of a dispute by all parties to a dispute resolution process after it arises.

A Guide to Commercial Mediation for Business People

How Does Mediation Differ From Arbitration?

Arbitration is less formal than litigation, and mediation is even less formal than arbitration. Unlike an arbitrator, a mediator does not have the power to render a binding decision. A mediator does not hold evidentiary hearings as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, on which they render a final and binding decision known as an award.

In joint sessions or caucuses with each side, a mediator tries to obtain a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to:

- > reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
- > open discussions into areas not previously considered or inadequately developed;
- > communicate positions or proposals in understandable or more palatable terms;
- > probe and uncover additional facts and the real interests of parties;
- > help each party to better understand the other party's view and evaluation of a particular issue, without violating confidences;
- > narrow the issues and each party's positions, and deflate extreme demands;
- > gauge the receptiveness for a proposal or suggestion;
- > explore alternatives and search for solutions;
- > identify what is important and what is expendable;
- > prevent regression or raising of surprise issues; and
- > structure a settlement to resolve current problems and parties' future needs.

Types of Disputes Resolved by Mediation

Any type of civil dispute can be resolved by mediation. The kinds of conflicts brought to AAA mediations have been as varied as the types of industries and business specialties using the process. Just about any type of dispute that parties want resolved quickly and inexpensively can be submitted to mediation.

The Benefits of Mediation

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are that:

- > parties are directly engaged in the negotiation of the settlement;
- > the mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own;
- > as mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation;
- > parties generally save money through reduced legal costs and less staff time;
- > parties enhance the likelihood of continuing their business relationship; and
- > creative solutions or accommodations to special needs of the parties can become a part of the settlement.

In the interest of swift and low-cost dispute resolution, arbitrations pending under the rules of the American Arbitration Association can be submitted to mediation under the applicable mediation rules at no additional administrative fee. The parties are responsible for compensating the mediator at his or her published hourly rate.

Occurrence of Mediation

Mediations can originate in different ways. First, mediation can occur when a dispute initially arises and before a lawsuit is ever filed. Second, mediation can occur as an adjunct procedure to pending litigation. That is, as soon as the parties file a lawsuit, they can use mediation in an effort to resolve the dispute at the inception of litigation or at any time thereafter, but prior to a trial being held. Third, mediation can occur during or immediately after a trial but before a decision is announced by a judge or jury. Fourth, mediation can occur after a judgment has been rendered in litigation. There might be a disagreement over the meaning or manner of carrying out a judgment, or concern about the possibility of lengthy court appeals. The parties can seek the assistance of a mediator to help them resolve these problems.

The Mediators

AAA mediators are carefully selected attorneys, retired judges, and experts in various professional and business fields. Each candidate has been trained in mediation skills. Only highly respected and experienced individuals are selected by the AAA to be mediators.

Scheduling a Mediation

Once parties have agreed, a mediation can be conducted on the first mutually available date. Of course, the parties may agree to have their mediation set for an earlier or later date depending on the circumstances of their case.

Stages of a Mediation

I. The Agreement to Mediate

As mediation is a voluntary process, the parties must agree that their dispute will be conducted under the applicable mediation rules of the AAA. This may be accomplished in a number of ways.

Request for Mediation

The parties can provide for the resolution of future disputes by including a mediation clause in their contract. A typical mediation clause reads as follows:

If a dispute arises out of or relates to this contract or the breach thereof and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

The clause may also provide for the qualifications of the mediator, the method of payment, the locale of meetings, and any other item of concern to the parties. When a party files a Request for Mediation, the requesting party must forward a copy of the mediation clause contained in the contract under which the dispute arose. A Request for Mediation form can be found on the Association's website at **www.adr.org**.

Submission to Mediation

Where the parties did not provide in advance for mediation, they may submit an existing dispute to mediation by the filing of a submission form that has been duly executed by the parties or their authorized representatives. A Submission to Dispute Resolution form can be found on the Association's website at **www.adr.org**.

II. Selection of the Mediator

Upon receipt of the Request for Mediation or the Submission to Dispute Resolution, the AAA will appoint a qualified mediator to serve on the case. The parties will be provided with a biographical sketch of the mediator. The parties

are instructed to review the sketch closely and advise the Association of any objections they may have to the appointment. Since it is essential that the parties have complete confidence in the mediator's ability to be fair and impartial, the Association will replace any mediator not acceptable to the parties.

III. Preparation for the Mediation Session

To prepare for mediation:

1. Define and analyze the issues involved in the dispute.
2. Recognize the parameters of the given situation (what you can realistically expect, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.).
3. Identify your needs and interests in settling the dispute.
4. Prioritize the issues in light of your needs.
5. Determine courses of action, positions, and tradeoffs and explore a variety of possible solutions.
6. Seek to make your proposals reasonable and legitimate and be willing to accommodate needs of the other party.
7. Ascertain the strengths and weaknesses of your case.
8. Ready facts, documents, and sound reasoning to support your claims.
9. Anticipate the other party's needs, demands, strengths and weaknesses, positions, and version of facts.
10. Focus on the interests, not the position, of each party.
11. Develop your strategies and tactics through discussion of issues, presentation of proposals and testing of the other party's positions.

IV. The Mediation Conference

The parties should come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases. Parties are, of course, entitled to representation by counsel.

At the outset, mediators describe the procedures and ground rules covering each party's opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of proceedings.

After these preliminaries, each party describes respective views of the dispute. The initiating party discusses its understanding of the issues, the facts surrounding

the dispute, what it wants, and why. The other party then responds and makes similar presentations to the mediator. In this initial session, the mediator gathers as many facts as possible and clarifies discrepancies. The mediator tries to understand the perceptions of each party, their interests, and their positions on the issues.

When joint discussions have reached a stage where no further progress is being made, the mediator often meets with each party in caucuses. While holding separate sessions with each party, the mediator may shuttle back and forth between parties and bring them back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party's version of the facts, priorities, and positions, loosen rigid stances, explore alternative solutions, and seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party's positions. The mediator serves not as an advocate but as an "agent of reality." The mediator must make each party think through demands, priorities, and views, and deal with the other party's arguments.

An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator increases the parties' perceptions of their cases in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator creates in the minds of the parties the idea that there are alternatives to seek. The parties articulate these possibilities by moving toward tradeoffs and acceptable accommodations.

During the final caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator makes suggestions about a final settlement, stresses the consequences of failure to reach agreement, emphasizes the progress which has been made, and formalizes offers to gain an agreement.

The mediator acts as a facilitator to keep discussions focused and avoid new outbreaks of disagreement. The mediator will often have the parties negotiate the final terms of a settlement in a joint session. The mediator will then verify the specifics of an agreement and make sure that the terms are comprehensive, specific, and clear in the final session.

V. The Settlement

When the parties reach an agreement, they should reduce the terms to writing and exchange releases. They may also request that the agreement be put in the form of a consent award, for which the AAA will make the arrangements.

If the mediation fails to reach a settlement of any or all of the issues, the parties may submit to binding arbitration. Such arbitration would be administered under the appropriate arbitration rules. In accordance with the AAA's Commercial Mediation Procedures, the information offered in mediation may not be used in arbitration (or in subsequent litigation).

Cost of the Mediation

The cost of mediation is based on the mediator's published hourly rate, which covers both mediator compensation and an allocated portion for the AAA's services.

All expenses are generally borne equally by the parties. The parties may adjust this arrangement by agreement.

Before the commencement of the mediation, the AAA shall estimate anticipated total expenses. Each party shall pay its portion of that amount as per the agreed upon arrangement. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

A Guide to Commercial Arbitration for Business People

Stages of an Arbitration

I. The Agreement to Arbitrate

The most important step in initiating arbitration is the agreement to arbitrate. This agreement can be of one of two kinds: it can take the form of a future-dispute arbitration clause in a contract or, where the parties did not provide in advance for arbitration, it can take the form of a submission of an existing dispute to arbitration.

The parties can provide for the arbitration of future disputes by inserting the following clause into their contracts.

Standard Arbitration Clause

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.

Arbitration of existing disputes may be accomplished by the use of the following:

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.

Regardless of how the agreement to arbitrate was reached, filing of a claim with the AAA along with the appropriate filing fee, and serving the defending party are all that is required to set the machinery for arbitration into motion. Upon receiving the initiating papers together with the filing fee, the AAA assigns the case to one of its staff who, from that point onward, is at the disposal of the parties, expediting administration and assisting both sides in all procedural matters until the award is rendered.

Pursuant to the rules, the parties and the AAA may use electronic communication to give the notices required by the rules.

*The American Arbitration Association will supply the form, on request, but arbitration may also be initiated through ordinary correspondence, provided that all of the essential information is included. These forms can also be obtained through the Association's website located at **www.adr.org**.*

Special attention is sometimes required to determine in which state and city hearings are to take place. If the place of arbitration has not been designated in the contract or if the parties have not otherwise notified the AAA of their agreement on locale, the AAA will designate the city in accordance with its rules. Among the factors considered are:

- > locations of the parties;
- > locations of witnesses and documents;
- > the location of sites or the place of materials;
- > relative costs to the parties;
- > the place of performance of the contract;
- > laws applicable to the contract;
- > places of previous court actions, if any;
- > the location of the most appropriate panel of arbitrators; and
- > any other reasonable arguments that might affect the locale determination.

Hearings may be held in any geographical area, not just where the AAA maintains regional offices.

Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs. Those procedures provide for notice of arbitrator appointment and notice of hearing by telephone and for the award of the arbitrator to be rendered no later than 14 days from the date of closing of the hearing.

An Important Note Concerning Consumer-Related Disputes

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

For additional information on the AAA and consumer-related disputes, please review the Consumer Due Process Protocol, the Supplementary Procedures for Consumer-Related Disputes, and other material found on our website at **www.adr.org**.

A Checklist for Initiating Arbitration

	BY DEMAND FOR ARBITRATION	BY SUBMISSION TO ARBITRATION
Original Document	Mail to the respondent.	File one copy with the AAA.
Copies Needed by the AAA	One.	One.
Copies Retained by the Parties	The demanding party retains one.	Each party retains one.
Signatures Required	An authorized person for the demanding party signs and lists his or her title.	Authorized persons for both parties sign, listing their titles.
Identification of Parties	The respondent should be clearly identified by official name and address.	Official names and addresses of both parties should appear, with signatures and titles.
Contract Clauses	Arbitration clauses should be quoted in full (may be attached separately if more convenient). Include date of the document.	Not applicable.
Filing Fee	A nonrefundable filing fee must be advanced by the demanding party. The arbitrator later apportions the fee.	The fee may be shared equally. The arbitrator later apportions the fee.
Statement of the Dispute	It should be brief but clear and include the amount claimed, if any, and the relief sought.	Claims and answers should be brief but clear and include the amount claimed, if any, and the relief sought.
Answering Statements	The respondent may mail the answering statement to the claimant and file a copy with the AAA. If a counterclaim is asserted, a filing fee must be paid.	See the preceding.
Composition of the Arbitration Panel	The AAA will determine the number of arbitrators unless composition is stated in the arbitration clause.	The number of arbitrators desired may be stated at the time of filing. If not stated, the AAA will determine the composition of the panel.
Locale of Arbitration	If not provided for in the arbitration clause, the demanding party should indicate its preference.	Locale should be indicated, if possible.

II. Selection of the Arbitrator

To serve the business community with arbitrators representing all fields of specialization, the American Arbitration Association maintains a Roster of Neutrals throughout the United States and the rest of the world. Usually nominated by leading figures in their industries, trades, or professions, arbitrators are added to the panel after careful checking of qualifications and reputations.

Arbitrators generally charge a rate consistent with his or her stated rate of compensation, beginning with the first preliminary hearing. When appointed by the AAA, neutrals serve under its *Commercial Arbitration Rules* and their conduct is guided by the *Code of Ethics for Arbitrators in Commercial Disputes*. Arbitrators deserve the same respect and courtesy given to all who dedicate themselves to the public good.

Parties can serve their own best interests by presenting their cases in an expeditious and orderly way, thereby facilitating the task of the arbitrator.

Unless the parties have indicated another method, the AAA uses the following simple and effective system for selecting the arbitrator:

1. After the filing of the submission or the answering statement, or upon the expiration of the time within which the answering statement is to be filed, the AAA sends each party a copy of the same specially prepared list of proposed arbitrators to resolve the controversy. In drafting the list, the AAA is guided by the nature of the dispute. Biographical information on each arbitrator accompanies the list.
2. Parties study the list, strike names to which they object, and number the remaining names in order of preference. *Additional information about the proposed arbitrators is available through the case manager. While the AAA makes every effort to keep its information current, each party is encouraged to do further research on the persons suggested.*
3. When these lists are returned to the AAA, the case manager compares indicated preferences and makes note of the mutual choices. Where parties are unable to find a mutual choice on a list, additional lists may be submitted at the request of both parties.
4. If the parties cannot agree on an arbitrator, the AAA will make an administrative appointment, but in no case will an arbitrator whose name was crossed out by either party be appointed.

Panels with Party-Appointed Arbitrators

Under some arbitration clauses in use, each party to a dispute appoints one arbitrator (who might or might not be a member of the AAA's National Roster of Neutrals) and the two select a third arbitrator from the AAA's panels in accordance

with procedures just described in steps 2-4. Unless the parties specifically agree in writing that the party-appointed arbitrators are to be non-neutral, arbitrators appointed by the parties in this manner must meet the impartiality and independence standards set forth within the rules.

In cases in which the party-appointed arbitrators are serving as non-neutrals, to avoid the danger that a compromise award might have to be rendered for the sake of a majority, the parties sometimes provide, and the AAA recommends, that the third arbitrator be permitted to render the award alone when a unanimous award is not possible. This may be done by the parties in their agreement to arbitrate or in a later stipulation.

It is also recommended in cases involving non-neutral party-appointed arbitrators that the neutral arbitrator ascertain from the party-appointed arbitrators the nature and extent of any relationship between the arbitrators and the parties that appointed the arbitrators and whether there will be any direct communication between such arbitrators and the parties that appointed them.

Finally, even in cases in which party-appointed arbitrators are serving as non-neutrals, the AAA recommends that parties agree to not communicate ex parte with their party-appointed arbitrator after the appointment procedures in the rules have been completed.

III. Preparation for the Hearing

The case manager consults all parties and arbitrators to determine a mutually convenient day and time for the hearing. If the parties cannot agree, the arbitrator is empowered to set dates.

Note that, in this as in all other administrative matters, the AAA staff manages details and arrangements. This has a two-fold advantage: it relieves the arbitrator of the burden and eliminates the necessity of direct communication between the parties and the arbitrator except at the hearing. By specifically forbidding communication with the arbitrator, except in the presence of both parties, AAA rules avoid the danger that one side will offer arguments or evidence that the other has no opportunity to rebut. Parties may participate in the Direct Exchange Program allowing the parties and arbitrators to exchange documents directly, copying the AAA, if the case meets specific program requirements.

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the proceedings. There is no additional administrative fee for this service.

In most cases, a preliminary hearing with the parties and/or their representatives and the arbitrator will be scheduled by the arbitrator to specify the issues to be resolved, to stipulate uncontested facts, and to consider other matters that will expedite the arbitration proceedings.

Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and a schedule for the production of relevant documents and other information, (ii) the identification of all witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. For purposes of arbitrator compensation, the preliminary hearing will be considered the first day of service.

Occasionally, a party needs to postpone a scheduled hearing. When this is necessary, the party seeking postponement should first contact the other party to obtain its consent, as well as alternate hearing dates, before contacting the AAA. If the other party does not consent to the postponement, the AAA should be so advised. The case manager will, in turn, coordinate having the arbitrator decide whether the hearing should be postponed, as the rules provide. In no event should the parties contact the arbitrator directly.

Since the arbitrator will make the award on the basis of the facts and exhibits presented at the hearing, it is essential that the parties or their representatives prepare for arbitration carefully.

1. Assemble all documents and papers that you will need at the hearing. Always make photocopies for the arbitrator and the other party. If documents that are needed are in the possession of the other party, ask that they be brought to the arbitration. Under some state arbitration laws, the arbitrator or another person has authority to subpoena documents and witnesses. A checklist of documents and exhibits will be helpful toward your orderly presentation.
2. If it will be necessary for the arbitrator to visit a building site or warehouse for an on-the-spot investigation, make plans in advance. The arbitrator must be accompanied by representatives of both parties, unless they specifically authorize that the investigation be conducted without their presence or unless one party fails to attend after being notified.
3. Interview all of your witnesses. Make certain that each one understands the whole case and particularly the importance of his or her own testimony within it.

4. If there is a possibility that others, not on your regular list of witnesses, might have to appear, alert them to be available on call without delay.
5. Make a written summary of what each witness will prove. This will be useful as a checklist at the hearing and will help you make sure that nothing is overlooked.
6. Study the case from the other side's point of view. Be prepared to answer the opposition's evidence.
7. If a transcript of the hearing is needed, the parties are responsible for making the arrangements and notifying the other parties of such arrangements in advance of the hearing.

The right to representation in arbitration by counsel or another authorized person is guaranteed by the rules of the American Arbitration Association. A party who desires to be represented should notify the other side and file a copy of the notice with the AAA at least seven days before the hearing. When arbitration is initiated by a representative or when the respondent replies through a representative, however, such notice is deemed to have been given.

IV. Presentation of the Case

Arbitration hearings are conducted somewhat like court trials, except that arbitrations are less formal. Arbitrators are not required to follow strict rules of evidence. They must hear all of the evidence material to an issue but they may determine for themselves what is relevant. Arbitrators are therefore inclined to accept evidence that might not be allowed by judges.

This does not mean, however, that all evidence will be considered to be of equal weight.

Direct testimony of witnesses is usually more persuasive than hearsay evidence, and facts will be better established by documents and exhibits than by argument only.

It is customary for the claimant to proceed first with its case, followed by the respondent. This order may be varied, however, when the arbitrator thinks it necessary. It is equally the responsibility of the claimant and the respondent to present their cases to the arbitrator in an orderly and logical manner.

This includes:

1. An opening statement that clearly but briefly describes the controversy and indicates what is to be proved. Such a statement lays the groundwork and helps the arbitrator understand the relevance of testimony to be presented.

2. A discussion of the remedy sought. This is important because the arbitrator's power is conferred by the agreement of the parties. Each party should try to show that the relief that it requests is within the arbitrator's authority to grant.
3. Introduction of witnesses in a systematic order to clarify the nature of the controversy and to identify documents and exhibits. Cross-examination of witnesses is important, but each party should plan to establish its case by its own witnesses.
4. A closing statement that should include a summary of the evidence and arguments and a refutation of points made by the opposition.

After both sides have had an equal opportunity to present all of their evidence, the arbitrator declares the hearing closed.

The Award

The award is the decision of the arbitrator on the matters submitted to him or her under the arbitration agreement. If the arbitration panel consists of more than one arbitrator, the majority decision, under AAA rules, is binding. The purpose of the award is to dispose of the controversy finally and conclusively. It is made within the limits of the arbitration agreement and it rules on each claim submitted. Arbitrators are not required to write opinions explaining the reasons for their decisions. As a general rule, AAA commercial awards consist of a brief direction to the parties. In some cases, both parties will request an opinion or the arbitration agreement provides for one.

The power of the arbitrator ends with the making of the award. An award may not be changed by the arbitrator, once it is made, unless the parties agree to restore the power of the arbitrator or unless the law provides otherwise.

When the parties agree to request a clarification or interpretation of a disputed ruling, the agreement must be in writing. Such an agreement is filed with the AAA, which then proceeds to make the necessary arrangements with the arbitrator. In some jurisdictions, the law permits arbitrators to clarify or modify the award upon the request of a party.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Procedure for Oral Hearings

	WHO DECIDES	WHO MAKES ARRANGEMENTS	NOTICE
Time	The arbitrator, at the convenience of the parties.	The case manager, who consults the parties and the arbitrator.	At least 10 days, given by the case manager unless parties agree otherwise.
Representation by Counsel	The individual party.	The individual party.	Seven days notice to other party unless arbitration was initiated by counsel, in which case notice is deemed to have been given.
Stenographic Records and Interpreters	The requesting party.	The requesting party.	The requesting party notifies the other party in advance of the hearing and may inquire of the other side as to whether it would like to share the cost and get a copy of the record.
Attendance at Hearing	Parties attend and bring witnesses. Arbitrators decide which other interested persons may attend and may require exclusion of witnesses during the testimony of others.	Parties arrange for attendance of witnesses.	Parties notify their own interested persons.
Written Statements (e.g. Affidavits and Documents)	The arbitrator decides whether to receive such evidence when it is presented.	Each party arranges to submit its own documents. If they are in the possession of the other party, documents may be requested directly.	Arbitrator will set a deadline for exchange of documents.
Subpoenas of Witnesses and Documents	The arbitrator issues subpoenas on showing of need by a party. In some states, attorneys of record may also issue subpoenas.	The case manager obtains signature of arbitrator for subpoena supplied by party and returns subpoena to party for service	Subpoenas are served by parties directly on the witness or the custodian of documents.
Inspection or Investigation	The arbitrator may decide on his or her own initiative or at the request of a party, if the arbitrator deems it necessary.	The case manager.	Parties are notified of time and place of inspection so that they can be present.
Closing of Oral Hearings	The arbitrator closes the hearing after both sides complete proofs and witnesses. If briefs, investigations, or more data are required, the hearings are kept open.	The case manager arranges for receipt of post-hearing matters and makes a record of the closing of hearings on instructions from the arbitrator.	The case manager notifies parties of all official closing dates.

Procedures for Large, Complex Disputes

Recognizing that large, complex arbitrations often present unique procedural problems, the AAA, working with attorneys, arbitrators, and industry advisory groups, has developed Procedures for Large, Complex Disputes. The overall purpose of these procedures is to provide for efficient, economical, and speedy resolution of larger disputes. Cases are administered by senior AAA staff. The procedures provide for an early administrative conference with the AAA and a preliminary hearing with the arbitrators, both conducted via telephone conference call. Documentary exchanges and other essential exchanges of information are facilitated, as is preparation of a statement of reasons accompanying the award. They are meant to complement the applicable rules that the parties have agreed to use and may be modified by the parties.

Emergency Measures of Protection

If emergency interim relief is required before the panel has been constituted, parties have needed to resort to the courts rather than seek the requisite relief from the arbitrator. To bridge this deficiency and to more fully implement the parties' intent to arbitrate any future disputes, the AAA has made available Emergency Measures of Protection.

A party seeking such relief prior to the constitution of the panel must notify the AAA and all other parties in writing of the nature of the relief sought, the reasons why such relief is required, and why the party is entitled to such relief on an emergency basis. Within one business day of receipt of the notice, the AAA will appoint a single emergency arbitrator to rule on emergency applications from a special AAA panel of emergency arbitrators designated for that purpose. Of course, the appointment of the emergency arbitrator will be subject to a disclosure and challenge procedure similar to that in the standard commercial rules.

The rules provide an expedited time within which the arbitrator shall establish a schedule for consideration of the application for relief, and shall accordingly review the request. If the arbitrator determines that the party is entitled to the relief, he or she may enter an interim award granting the relief and stating the reasons therefore. Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until such time as the panel is constituted. The emergency arbitrator shall have no further power to act after the panel is constituted, unless

the parties agree that the emergency arbitrator is named as a member of the panel. The procedures contain a provision on modification of the interim award and apportionment of costs.

International Cases

In order to best serve the parties in any international dispute resolution proceeding, the AAA has created a separate division: the International Centre for Dispute Resolution® (ICDR®). The ICDR handles all international matters, including the administration of international mediation and arbitration cases. This international administrative system is set apart from the AAA's domestic administrative services. The key distinction is to provide the international business and legal community confidence in having an award that will be internationally recognized and enforceable.

An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States, or having an arbitration agreement between parties from different countries. ICDR administration is designed for parties that have differing languages, legal systems and cultural backgrounds. The ICDR maintains specialized administrative facilities supervised by multilingual attorneys in New York and a worldwide panel of arbitrators and mediators.

Administrative Fees

As a not-for-profit organization, the AAA prescribes an initial filing fee and case service fees to compensate for the cost of providing administrative services. The initial filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Case service fees will be incurred as cases proceed. Administrative fees are based on the amount of the claim or counterclaim.

In an effort to make arbitration costs reasonable to consumers, the AAA has a separate fee schedule for disputes arising from arbitration clauses in agreements between individual consumers and businesses, where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. Please refer to the *Procedures for Consumer-Related Disputes* when filing a consumer-related claim.

Arbitrator compensation is not included in the administrative fee schedule. The parties are responsible for compensating the arbitrator at his or her published rate (hourly or per diem).

As an additional service, the AAA provides hearing rooms, which are available for rental by the parties. Check with the AAA for rates and availability.

For more information concerning the AAA's administrative fee schedule and refund schedule, please visit our website at **www.adr.org**.

