

The College of Commercial Arbitrators

# Protocols

for

Expeditious, Cost-Effective  
Commercial Arbitration

*Key Action Steps for  
Business Users, Counsel, Arbitrators  
& Arbitration Provider Institutions*

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## **Acknowledgments**

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***The concept of a National Summit sprang from two key insights: (1) that lengthy, costly arbitration results from the interaction of business users, in-house attorneys, the institutions that provide arbitration and other dispute resolution services, outside counsel and arbitrators; and (2) that all of these “stakeholders” must play a role in achieving desired efficiencies and economies in arbitration.***

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## **A Protocol for Business Users and In-house Counsel**

*While not all business users seek economy and efficiency in arbitration, these are priorities for most businesses much or most of the time. The high cost and/or length of commercial arbitration appear to be the greatest sources of dissatisfaction with the process. There are, however, a number of choices available to business users—in preparing to sign a contract, after disputes arise, and throughout the arbitration process—that will promote cost- and time-saving in dispute resolution. The following Actions are recommended as options for business users and in-house counsel in making choices regarding arbitration. They may be embraced wholly or selectively in light of business priorities in particular relationships and kinds of disputes.*

### **Critical Actions**

1. **Use arbitration in a way that best serves economy, efficiency and other business priorities. Be deliberate about choosing between “one-size-fits-all” arbitration procedures with lots of “wiggle room” and more streamlined or bounded procedures.**

Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning. Reflexively “plugging in” a standard form arbitration provision may forfeit the single best opportunity business users have to tailor procedures to limit the scope of discovery, establish timetables and create other boundaries for arbitration. Traditional “one-size-fits-all” provisions leave considerable leeway for arbitrator discretion but also leave considerable “wiggle room” for the interaction of counsel. The potential benefits of this flexibility must be balanced against significant downsides—the possibility of strategic or tactical manipulation by counsel, and the tendency to convert arbitration into a replica of litigation.

In most cases an arbitration clause should be part of a comprehensive dispute resolution process that might include executive negotiation, mediation and, finally, arbitration. An effective dispute resolution provision incorporating appropriate procedures of a well-established “provider institution” can and should be presented as mutually beneficial to the parties. (See *Protocol for Arbitration Providers*.)

2. **Limit discovery to what is essential; don’t simply replicate court discovery.**

Since the most critical factor in the cost and length of adjudication is nearly always the scope of discovery, parties seeking efficiency and economy in arbitration must make it clear that discovery in arbitration is “not for the litigator who will leave no stone unturned.” The first and by far the best opportunity for business users to place meaningful limits on discovery is in the arbitration agreement or incorporated arbitration procedures. There are a number of ways in which arbitration provider institutions’ procedures may limit discovery. (See *Protocol for Arbitration Providers*, Action 3.) A predispute agreement, while not always achievable, is

more likely to produce tangible results than post-dispute efforts since, once a specific dispute has arisen, at least one party will often perceive discovery limits to be disadvantageous, if only because they are proposed by their adversary.

A second opportunity occurs when a dispute arises and outside counsel is retained. At this point, in-house counsel may promote discovery limits by acknowledging that, while scaling back on discovery carries some risk that some significant evidence may not be found, the client is prepared to accept that risk in order to secure the greater benefit of a process that is substantially faster and less expensive than litigation. Inside and outside counsel should thoroughly discuss the cost versus benefit of various courses of discovery that might be pursued in the arbitration and memorialize in writing the client's decision concerning the nature and extent of discovery it wishes to initiate. (See *Protocol for Outside Counsel*, Actions 2, 5.)

If business users have failed or been unable to avail themselves of either of the first two opportunities, it may still be possible to convince the arbitrator(s) to limit the scope of discovery by reasonable argument. (See *Protocol for Outside Counsel*, Action 3; *Protocol for Arbitrators*, Action 6.)

### **3. Set specific time limits on arbitration and make sure they are enforced.**

Business users should consider agreeing to binding limits on the length of the arbitration in the arbitration agreement. This could be accomplished by simply setting a deadline (e.g., one year) for completion of the arbitration or by incorporating provider rules that establish a timetable for each phase of the arbitration. A predispute arbitration agreement might establish different deadlines or timetables corresponding to different total amounts in controversy. (See *Protocol for Arbitration Providers*, Action 4.) Arbitrators could be afforded authority to establish procedures and timelines for achieving the contractual limits as well as discretion to vary the limits in truly exceptional circumstances.

Some experienced in-house counsel favor prescribing overall time limits in large, complex disputes as well as smaller cases. If binding time limits are not desired in all cases, however, business users should at least consider their application in disputes involving amounts below a certain dollar figure.

Contractual time limits, like other stipulated boundaries, are only effective if they are recognized and enforced. Thus, it is critical for outside counsel to advocate such enforcement and for arbitrators to respond accordingly. (See *Protocol for Outside Counsel*, Action 3; *Protocol for Arbitrators*, Action 3.)

If businesses are unwilling or unable to establish predispute timetables for arbitration but still hope to set an acceptable deadline, it will be necessary to seek a post-dispute agreement with the other party (if consensus is realistically achievable) or an appropriate arbitral order.

**4. Use “fast-track arbitration” in appropriate cases.**

Businesses should use, in appropriate cases, fast-track (expedited or streamlined) arbitration. Businesses wishing to employ fast-track procedures in a predispute arbitration agreement must either specify those procedures and the circumstances under which they will be used or incorporate an arbitration provider’s rules that detail such procedures and the circumstances of their application.

Some businesses may go so far as to stipulate to a highly truncated approach in which discovery and motions are not permitted; the parties’ arbitration demand and response are accompanied by detailed statements of their claims and/or defenses as well as all facts to be proven, supplemented by citation to all legal authorities relied upon, copies of exhibits, and summaries of the testimony of all lay and expert witnesses, after which the case proceeds to an immediate hearing. (See *Protocol for Arbitration Providers*, Action 5.)

**5. Stay actively involved throughout the dispute resolution process to pursue speed and cost-control as well as other client objectives.**

Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process. They should conduct an early case assessment to determine how much of an effect the dispute may have on the business’s important interests, the prospects for a successful outcome, how much time and money the business is prepared to devote to the resolution of the dispute, and what resolution approach is likely to be most effective. If outside counsel is not involved in early case assessment, in-house counsel should convey the internal assessment to outside counsel and request their independent analysis. (See *Protocol for Outside Counsel*, Action 2.) As they do with other large expenditures, businesses should set an appropriate and realistic budget for arbitration and should forbid outside counsel from exceeding that budget without express approval. In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should actively partner in the management of the arbitration rather than relinquishing such control to outside counsel.

**6. Select outside counsel for arbitration expertise and commitment to business goals.**

In-house counsel should select outside arbitration counsel for their expertise in arbitration, not litigation, their likely effectiveness as an advocate in the arbitration process, taking account of the key players (opposing party and counsel, the arbitration provider institution, and prospective or appointed arbitrators), and their ability to meet client’s objectives regarding speed and economy (including the client’s decision regarding the extent of resources to be devoted to the matter). In-house counsel should explore the possibility of billing arrangements other than pure hourly billing such as fixed fees, contingency fees, and

other arrangements that incentivize counsel to conduct the arbitration and resolve conflict as efficiently and expeditiously as possible. (See *Protocol for Outside Counsel, Action 7.*)

**7. Select arbitrators with strong case management skills.**

In-house counsel should be actively involved, alongside outside counsel, in selecting arbitrators who are able and willing to promote effective cost- and time-saving procedures. Information from provider institutions may be supplemented by intra-firm communications and discrete queries to listservs and social networking programs. Counsel might agree to pre-screen prospective arbitrators by means of a questionnaire or joint or separate interviews; counsel should be forthright in asking prospective arbitrators about their philosophy and style of case management. (See *Protocol for Outside Counsel, Action 3.*)

Counsel should be aware that the (1) requirement that its roster continually upgrade their process management skills of prospective arbitrators, as well as (2) the quality and scope of information regarding prospective arbitrators, may offer key points of comparison among arbitration provider institutions. (See *Protocol for Arbitration Providers, Points 7, 10.*)

**Other Important Actions**

**8. Establish guidelines for early “fleshing out” of issues, claims, defenses, and parameters for arbitration.**

Businesses should consider agreeing that before the preliminary conference, parties will provide preliminary statements of legal and factual issues, key facts to be proven, estimated damages broken down by category, and likely witnesses and types of experts. (See *Protocol for Arbitration Providers, Action 8.*) They should also consider requesting that, following the first, or at the latest, the second case management conference, the arbitrators issue comprehensive case management orders that incorporate limitations on discovery and motion practice, and set time frames and hearing dates that will not be varied except for good cause shown. (See *Protocol for Arbitrators, Actions 3, 4.*)

**9. Control motion practice.**

Businesses should also consider agreeing to procedures for limiting “reflexive” motion practice and expediting the presentation and hearing of motions that have the potential to promote cost- and time-saving in arbitration. (See *Protocol for Arbitration Providers, Action 6.*)

**10. Use a single arbitrator in appropriate circumstances.**

Businesses should consider using a single arbitrator when appropriate. Some in-house counsel believe the costs and practical problems associated with three-member tribunals often outweigh the benefits, and are willing to submit all but the most complex cases to a single arbitrator. Others believe that collegial decision-making usually produces better decisions by decreasing the chance that important points will be overlooked or misunderstood, and that the additional cost of having three arbitrators, which is typically a fairly small part of total arbitration costs, is well worth the expenditure in important cases. Before providing for a three-member tribunal, counsel should always consider whether the complexity of the issues, the stakes involved, or other factors warrant the use of three arbitrators. A strong argument can often be made for sole arbitrators in cases with low or moderate damages exposure. (Depending on the parameters set for the use of a single arbitrator, parties may need to modify the arbitration procedures incorporated in the arbitration agreement to address this issue.)

In cases with three-member panels, businesses should consent to having the chair decide discovery disputes and other procedural matters unless all parties request the involvement of the full tribunal.

**11. Specify the form of the award. Don't provide for judicial review for errors of law or fact.**

Business users should specify in the arbitration agreement the form of award desired (e.g., bare, reasoned, findings of fact and conclusions of law, etc.) and, where appropriate, a limit on the length of the award, bearing in mind that the more detailed the award, the more costs increase.

Business users should not include in their arbitration clauses an agreement that attempts to authorize courts to review arbitration awards for errors of fact or law. Besides raising issues of enforceability under arbitration law, such provisions may entail significant additional process costs and delays without commensurate benefits. If a business is not content to accept judicial review that is limited to the few grounds for vacatur set forth in the Federal Arbitration Act, a course that best achieves the finality which is among the major benefits of arbitration for most business users, it should incorporate in its arbitration clause a well-designed appellate arbitration procedure such as those sponsored by some provider institutions.

**12. Conduct a post-process "lessons learned" review and make appropriate adjustments.**

At the conclusion of the arbitration, in-house counsel should conduct a thorough analysis of lessons learned and should make appropriate adjustments in arbitration policies, agreements, rules and management to address concerns regarding efficiency and economy.

## **A Protocol for Arbitration Providers**

*Business users rely heavily on arbitration providers for arbitration procedures, arbitrator selection and administrative services. In order to effectively promote economy and efficiency, providers need to offer users clear-cut process choices and develop and share information on their relative value and effectiveness. They also need to take measures to ensure that parties can find arbitrators with the proper case management skills and philosophy. The following specific Actions may be undertaken by providers for the purpose of achieving these goals.*

### **Critical Actions**

**1. Offer business users clear options to fit their priorities.**

Instead of promoting a single “one-size-fits-all” set of procedures, institutions that provide dispute resolution services for business disputes should publish a variety of templates, including arbitration clauses and procedures to give users real choices that fit their priorities, including time and cost savings. (See, e.g., Action 5 below regarding “fast track” procedures.) A provider’s website should be organized in a manner that facilitates clear and easy access to different process choices, and should offer straightforward guidance (including, if possible, specific user feedback) about the benefits and costs to users of each process choice.

**2. Promote arbitration in the context of a range of process choices, including stepped dispute resolution processes.**

Resolving conflict through negotiation or mediation usually affords parties a superior opportunity to avoid significant cost or delay, and offers several other potential benefits, including greater control over outcome, enhanced privacy and confidentiality, preservation or improvement of business relationships, and better communications. Even if it fails to produce settlement, moreover, mediation may also “set the table” for arbitration. Therefore, provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped dispute resolution provisions that begin with executive negotiation and mediation.

**3. Develop and publish rules that provide effective ways of limiting discovery to essential information.**

Because discovery is usually the chief determinant of arbitration cost and duration, and because arbitration procedures that leave parties and arbitrators significant “wobble room” often result in litigation-like discovery, provider institutions should develop and publish procedures that give business users the ability to effectively limit the scope of discovery in arbitration through their predispute agreement. As a general matter, discovery should be

restricted to information that is material and not merely relevant. Among the possible approaches to limiting discovery:

- prohibiting requests for admission, and instead encouraging party representatives to confer regarding stipulation of facts;
- prohibiting form interrogatories and limiting the number of interrogatories;
- setting limits on the number and length of depositions, and limiting arbitrator discretion to authorize additional depositions to situations where there is a demonstrated need for the requested information, there are no other reasonable means of obtaining the information, and the request is not unduly burdensome to other parties;
- limiting document production to documents or categories of documents for which there is a specific, demonstrable need; requiring parties to describe requested documents with specificity, explain their materiality, assure the tribunal they do not have the documents, and make clear why they believe the other party has possession or control of the documents;
- directing parties to cooperate on voluntary information exchange/discovery;
- directing arbitrators to manage discovery disputes as expeditiously as possible (e.g., by offering to resolve issues through prompt conference calls before resorting to extensive briefing and written argument);
- authorizing arbitrators to consider, when awarding fees and costs, the failure of parties to cooperate in discovery and/or to comply with arbitrator orders, thereby causing delays to the proceeding or additional costs to other parties.

Special attention should be given to detailed procedures for managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts. At a minimum, the number of custodians from whom electronic discovery can be collected should be narrowly tailored to apply to only those individuals whose electronic data may reasonably be expected to contain evidence that is material to the dispute and cannot be obtained from other sources. In addition to filtering data based on the custodian, the data should be filtered based on file type, date ranges, sender, receiver, search term or other similar parameters. Normally, disclosure should be limited to reasonably accessible active data from primary storage facilities; information from back-up tapes or back-up servers, cell phones, PDAs, voicemails and the like should only be subject to disclosure if a particularized showing of exceptional need is made.

**4. Offer rules that set strict presumptive deadlines for completion of arbitration; train arbitrators in the importance of enforcing stipulated deadlines.**

In the interest of economy and efficiency, providers should ensure that parties have the opportunity to adopt arbitration procedures that include a strict presumptive deadline for completion of arbitration. The procedures should facilitate compliance with the final

deadline through the inclusion of presumptive time limits for each phase of the arbitration, and by giving arbitrators explicit authority to employ procedures and set deadlines appropriate to the goal of meeting the overall deadline. Providers should also ensure that its training programs offer arbitrators instruction in the importance of adhering to stipulated timetables or deadlines for arbitration except in circumstances clearly beyond the contemplation of the parties when the time limits were established. (See *Protocols for Arbitrators*, Action 3.)

**5. Publish and promote “fast-track” arbitration rules.**

Providers should offer a variety of procedural choices with varying degrees of emphasis on expedition and economy, including at least one set of procedures that place heavy emphasis on those goals. (See *Protocol for Business Users and In-house Counsel*, Action 4.) A “fast-track” approach may feature some or all of the following:

- relatively short presumptive deadlines;
- limits on the number of arbitrators;
- expedited arbitrator appointment procedure;
- early disclosure of information;
- heavily curtailed discovery and motion practice;
- limits on the length and form of the award.

If fast-track procedures are published separately from a provider’s standard procedures, the provider should take measures to ensure that users are equally aware of the fast-track option and are provided with user-friendly guidance on how and when to employ the fast track procedures.

Providers should consider the possibility of providing, as an “extreme” option, a highly truncated process that eliminates discovery and motions and allows the parties to proceed to a hearing immediately after serving pre-hearing memoranda that include detailed statements of all claims and/or defenses as well as all facts to be proven, all legal authorities relied upon, copies of all exhibits, and summaries of all lay and expert witness testimony.

**6. Develop procedures that promote restrained, effective motion practice.**

Properly employed, motions to narrow or dispose of claims or defenses can promote efficiency and economy in arbitration. Presently, however, there are two major concerns about motion practice in arbitration: (a) the reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case, and (b) the reflexive use of motion practice in arbitration by some litigation attorneys. Providers should attempt to address these concerns by publishing guidelines for effective and efficient resolution of motions, particularly dispositive motions. This might involve a simple method for screening

motions at the outset, including factors to be considered by arbitrators in deciding whether to entertain a motion. In the interest of time- and cost-saving, would-be movants might be required to set up a conference call with the arbitrator(s) and opposing counsel to discuss the issue before filing any motion. (See *Protocol for Business Users*, Action 9; *Protocol for Arbitrators*, Action 7.)

**7. Require arbitrators to have training in process management skills and commitment to cost- and time-saving.**

Provider institutions should conduct training in managing hearings fairly but expeditiously, with particular emphasis on ways of reducing cost and promoting efficiency, and should require arbitrators to complete such training before being included on the provider's roster, and to update their knowledge and skills annually. Providers should also consider requiring arbitrators to make a pledge to actively seek ways to promote cost- and time-saving in a manner consistent with the agreement of the parties and fundamental fairness. (See *Protocol for Arbitrators*, Action 1.)

**Other Important Actions**

**8. Require fact pleadings, early disclosure of documents and witnesses.**

Providers' arbitration procedures should require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings all documents supporting each claim or defense, as well as a list of witnesses they expect to call. The rules should require that parties supplement their documents and witness lists periodically prior to the hearing. (See *Protocol for Business Users*, Action 8.)

**9. Provide for electronic service of submissions and orders.**

Arbitration procedures should require that all pleadings, motions, orders and other documents filed in the arbitration be served electronically on each arbitrator and each parties' counsel except where that method of service is impractical (as with documents of too great a length to be conveyed electronically) or where other special considerations require another method.

**10. Obtain and make available information on arbitrator effectiveness.**

Providers should conduct a post-arbitration telephone interview with arbitrating parties and counsel to obtain information on arbitrator effectiveness in managing arbitration fairly and expeditiously. Such information should periodically be furnished to arbitrators in a way that precludes their identifying the sources of the comments. Such information should be made available in summary form (and without attribution) to parties and counsel selecting

arbitrators. Providers should remove from their rosters those arbitrators who prove themselves incapable of efficiently managing business arbitrations. (See *Protocol for Business Users*, Action 7.)

**11. Provide for expedited appointment of arbitrators.**

Provider rules should expedite the selection of the tribunal by providing that, if all arbitrators have not been appointed within a specific time (say, 30 days) from the filing of the arbitration demand, the provider will appoint the arbitrators. The rules should also impose stringent time limits for all communications by parties and by prospective arbitrators that are required as a part of the appointment process.

**12. Require arbitrators to confirm availability.**

Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed.

**13. Afford business users an effective mechanism for raising and addressing concerns about arbitrator case management.**

Providers that offer administrative services, including arbitrator appointment services, should offer users a meaningful mechanism (such as a designated ombud) for addressing party concerns and complaints regarding the arbitrators or the arbitration process. Among other things, the individual/office would be authorized to explore opportunities for addressing concerns about process speed and cost.

**14. Offer process orientation for first-time users.**

Providers should make available to business parties and to counsel online or in-person orientation programs that summarize and illustrate (a) the principal differences between arbitration and litigation and (b) how to use arbitration to accomplish the parties' goals of fair, economical and efficient resolution of disputes.

## **A Protocol for Outside Counsel**

*Business users depend on outside counsel to promote their business interests, which often include economy and efficiency, in arbitration. Outside counsel should be careful to clarify their client's goals and expectations for resolving disputes at the outset, and approach arbitration in a manner that reflects these expectations and also exploits the differences between arbitration and litigation. The following Actions are offered as specific guidance to Outside Counsel for this purpose.*

### **Critical Actions**

**1. Be sure you can pursue the client's goals expeditiously.**

Outside counsel should only accept an advocacy role in arbitration when they have determined what the client's goals are in the particular case and are sure they have the knowledge, experience, and availability to pursue those goals effectively, efficiently and expeditiously. They should be familiar with the arbitration rules and provider involved in the particular case and should have in-depth knowledge of ways to save time and money in arbitration without compromising either the fairness of the process or the soundness of the result. They should also be certain that they or a partner have the negotiation and mediation skills that may be required at various stages of the arbitration.

**2. Memorialize early assessment and client understandings.**

Outside counsel should provide the client at the outset with a careful early assessment of the case, including a realistic estimate of the time and cost involved in arbitrating the matter at various levels of depth and detail. Counsel should reach an understanding with the client concerning the approach to be followed, the extent and nature of any discovery to be initiated, the possibility and desirability of a negotiated settlement, the desired overall timetable for arbitration, and the resources the client is prepared to devote to the matter. Counsel should memorialize those understandings in writing and should adhere to the client's expectations and budget. Counsel should periodically review these understandings with the client and should memorialize any significant changes in the client's instructions. (See *Protocol for Business Users and In-house Counsel*, Actions 5, 6.)

**3. Select arbitrators with proven management ability. Be forthright with the arbitrators regarding your expectations of a speedy and efficient proceeding.**

Outside counsel should help their client select arbitrators with the experience, knowledge and capabilities that are likely to further the client's business goals, including expectations as to cost and time. Counsel should do a thorough "due diligence" of all potential arbitrators

under consideration and should, consistent with the Canons of Ethics for Commercial Arbitrators, interview them concerning their experience, case management practices, availability and amenability to compensation arrangements that would incentivize them to conduct the arbitration efficiently and expeditiously.

Parties desiring speed and economy in the arbitration process should be forthright in conveying their expectations to the arbitrators regarding the duration of the proceedings, beginning at the time candidates for appointment as arbitrator are identified. These expectations can be set down in writing at the beginning of the arbitration process and, even if unilateral and non-binding, may have an impact on scheduling and management decisions made by the arbitrators during the proceedings. (See *Protocol for Arbitrators*, Action 3.)

**4. Cooperate with opposing counsel on procedural matters.**

If saving time and money is an important client goal in the arbitration,, counsel should make clear to the client that the fullest benefits of time- and cost-saving (i.e., those concerning procedures for preparing for and conducting the hearing) can ordinarily only be achieved when opposing counsel cooperate fully and freely with each other and with the arbitrator to achieve those benefits. Counsel should obtain the client's consent to such cooperation and should pursue that approach regarding all procedural and process issues in the arbitration. Counsel should meet and confer early with opposing counsel in order to foster a cordial and professional working relationship and to reach as many agreements as possible concerning matters that will be taken up at the Preliminary Conference and should continue to meet and confer regularly thereafter. (See *Protocol for Arbitrators*, Actions 2, 3, 4.)

**5. Seek to limit discovery in a manner consistent with client goals.**

Make clients aware that ordinarily discovery in arbitration will be much more limited than in litigation, even in the absence of clear rules and guidelines, and cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery in a manner consistent with the stated goals of the client. (See *Protocol for Arbitrators*, Action 6.)

**Other Important Actions**

**6. Periodically discuss settlement opportunities with your client.**

During the arbitration, counsel should periodically discuss with their client the possible advantages of settlement and opportunities that may arise for pursuing settlement. Unless the case has been thoroughly mediated already, counsel should ask the client to consider the possibility of mediating with an experienced mediator (who is not one of the arbitrators) at an appropriate stage in the arbitration, for example, when all or certain discovery has been

completed and before substantial sums are spent on preparing for and conducting the hearing.

**7. Offer clients alternative billing models.**

Counsel should offer clients professional service models other than an hourly fee basis, including models that provide incentives for reducing cycle time or the net costs of dispute resolution. (See *Protocol for Business Users*, Action 6.)

**8. Recognize and exploit the differences between arbitration and litigation.**

Counsel should recognize the many differences between litigation and arbitration, including the absence of a jury on whom rhetorical displays and showboating may have some effect. Arbitrators are generally experienced and sophisticated professionals with whom posturing and grandstanding are almost always inappropriate, counter-productive, and wasteful of the client's time, money and credibility with the arbitrators. Counsel should keep in mind that dispositive motions are rarely granted in arbitration, and should employ such motions only where there will be a clear net benefit in terms of time and cost savings. Counsel should be aware that arbitrators tend to employ more relaxed evidentiary standards, and should therefore avoid littering the record with repeated objections to form and hearsay. An advocate who objects at every turn is likely to try the patience of a tribunal and undermine his or her own credibility. (See *Protocol for Arbitrators*, Actions 6, 7, 9.)

**9. Keep the arbitrators informed and enlist their help promptly; rely on the chair as much as possible.**

Counsel should work with opposing counsel to keep the arbitrators informed of developments in the interval between the preliminary conference and the hearing so that the arbitrators may assist in resolving potential problems and avoid inefficiencies and unnecessary expenditures of time at the hearing. If it becomes apparent during the prehearing phase that one or more significant prehearing issues cannot be resolved by agreement of the parties, counsel should not delay in putting the arbitrators to work. Failure to do so could result in the need to postpone the hearing, thus generating avoidable delay and unnecessary costs. Agreeing to have the chair of a three-arbitrator tribunal resolve discovery, scheduling, and other procedural orders will generally produce significant savings of time and money without impairing any party's substantive rights. (See *Protocol for Business Users*, Action 10; *Protocol for Arbitrators*, Action 8.)

**10. Help your client make appropriate changes based on lessons learned.**

Once arbitration is completed, counsel should conduct an evaluation of the entire process with the client and attorneys involved in the representation. Counsel should memorialize

lessons learned and make appropriate changes to dispute resolution provisions, firm arbitration training, and firm procedures and policies. (See *Protocol for Business Users*, Action 12.)

**11. Work with providers to improve arbitration processes.**

Outside counsel should work with arbitration providers to create more effective choices for business arbitration through the development of new alternative process techniques, rules and clauses.

**12. Encourage better arbitration education and training.**

Outside counsel should help improve laws governing dispute resolution, including arbitration, and should encourage more effective legal, business and judicial education regarding arbitration and other forms of dispute resolution.

## **A Protocol for Arbitrators**

*Whether or not business users have tailored arbitration procedures to most effectively promote economy and efficiency, they commonly rely on arbitrators to conduct arbitration proceedings economically and efficiently. Arbitrator training, experience and philosophy may all play a part in their ability to accomplish these goals through thoughtful case management; adherence to contractual limits on discovery, timetables, etc.; and effectively distinguishing, and appropriately acting upon, dispositive motions that might conclude or streamline a dispute. The following Actions are offered as detailed guidance for arbitrators in addressing these concerns.*

### **Critical Actions**

**1. Get training in managing commercial arbitrations.**

It is axiomatic that all arbitrators should have the knowledge, temperament, experience and availability required by the appointment, as well as a working knowledge of arbitration law, practice and procedures of administrative organizations, and the various opportunities for realizing economies and efficiencies throughout the arbitration process. Those who wish to arbitrate large and complex commercial cases should secure special training in how to manage such arbitrations with expedition and efficiency without sacrificing essential fairness, should identify that training in their biographical materials, and should pledge to conduct the arbitration so as to adhere to any time limits in the arbitration agreement or governing rules. (See *Protocol for Arbitration Providers*, Action 7.)

**2. Insist on cooperation and professionalism.**

Arbitrators should communicate clearly and unequivocally from the outset their expectation that counsel can and will cooperate fully and willingly with opposing counsel and with the arbitrator in all procedural aspects of the arbitration. Arbitrators should establish a professionally cordial atmosphere, one that reinforces expectations of cooperation and reasonableness and affords counsel the fullest opportunity to contribute to shaping the arbitration process. Arbitrators should lead by example by being prepared and punctual for all arbitration proceedings and by fixing and meeting deadlines for their own actions, such as ruling on motions, issuing orders and the like. (See *Protocol for Outside Counsel*, Actions 4, 5, 8.)

**3. Actively manage and shape the arbitration process; enforce contractual deadlines and timetables.**

Arbitrators should recognize that commercial parties are generally looking for “muscular” arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators should utilize their considerable discretion and the natural reluctance of counsel and parties to displease the ultimate decision-maker so as to fashion, with the input and cooperation of the parties and their counsel, an arbitration process that is appropriate for the case at hand and as expeditious as possible while still affording all parties a full and fair hearing.

Arbitrators should routinely enforce contractual deadlines or timetables for arbitration except in circumstances that were clearly beyond the contemplation of the parties when the time limits were established. (See *Protocol for Business Users*, Action 3.) They should also encourage parties to “tee up” particular issues for early resolution when the resolution of such issues is likely to promote fruitful settlement discussions or expedite the arbitration. (See *Protocol for Arbitration Providers*, Action 6; *Protocol for Outside Counsel*, Action 8.)

**4. Conduct a thorough preliminary conference and issue comprehensive case management orders.**

As early in the case as possible, arbitrators should conduct a thorough Preliminary Conference in the manner prescribed in Chapter 6 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*. Arbitrators should emphasize the importance of participation by senior client representative of each party, in person or by phone, in this critical opportunity to develop a sensible and economical plan for the arbitration. Whenever feasible, the first conference should be conducted in-person, since that setting is more conducive than conference calls to fostering cordial and cooperative relations among parties and counsel. After the conference, arbitrators should issue a comprehensive “case management order” setting forth the procedures and schedule that will govern the arbitration. Arbitrators should only permit departures from those procedures and schedule for good cause shown. (See *Protocol for Outside Counsel*, Actions 3, 4, 5.)

**5. Schedule consecutive hearing days.**

In order to avoid the delay and excess costs caused by having multiple hearing sessions, arbitrators should schedule the hearing on consecutive days whenever possible. Arbitrators should encourage the parties to make a realistic estimate of the number of hearing days they will need and should reserve a sufficient number of days for completing the hearing in the time allotted, even if unexpected developments, or unduly optimistic estimates, lead to a somewhat longer hearing than originally projected.

**6. Streamline discovery; supervise pre-hearing activities.**

Arbitrators should make clear at the preliminary conference that discovery is ordinarily much more limited in arbitration than in litigation and should work with counsel in finding ways to limit or streamline discovery in a manner appropriate to the circumstances. Arbitrators should actively supervise the pre-hearing process. They should keep a close eye on the progress of discovery and other preparations for the hearing and should promptly resolve any problems that might disrupt the case schedule (usually through a conference call preceded by a jointly-prepared email outlining the nature of the parties' disagreement and each side's position with regard to the dispute, rather than formal written submissions). (See *Protocol for Outside Counsel*, Action 5.)

**Other Important Actions**

**7. Discourage the filing of unproductive motions; limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but act affirmatively on those.**

Arbitrators should establish procedures to avoid the filing of unproductive and inappropriate motions. They should generally require that, before filing any motion, the moving party demonstrate, either in a short letter or a telephone conference, that the motion is likely to be granted and is likely to produce a net savings in arbitration time and/or costs.

Arbitrators should explain to parties that dispositive motions involving issues of fact are granted less frequently in arbitration than in litigation because there is no appellate court to reinstate the case if they erred in dismissing it. However, there are matters for which a dispositive motion, especially a motion for partial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process—as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether a contract permits claims for certain kinds of damages, or construe a key contract provision. Thus, arbitrators should encourage parties to be judicious in filing dispositive motions but should be willing to entertain and rule on them in situations where the motion presents a realistic possibility of shortening, streamlining or focusing the arbitration process.

**8. Be readily available to counsel.**

Arbitrators should recognize that their acceptance of an arbitral appointment carries with it an obligation to be reasonably available to the parties to resolve procedural, process or scheduling disputes that could delay the timely resolution of the case. Thus, they should be willing on fairly short notice (generally not more than 2 or 3 business days) to hold a conference call with the parties in order to resolve such matters.

**9. Conduct fair but expeditious hearings.**

Arbitrators should conduct hearings in a manner that is both fair and expeditious as described in detail in Chapter 9 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*.

**10. Issue timely and careful awards.**

Arbitrators should issue carefully crafted awards that meet the parties' needs in terms of format, level of detail, and timing, and that are unlikely to lead to additional cost and delay due to vacatur and further proceedings. See Chapter 11 of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*.