

CONTENTS

Preface: The Ever-Expanding Artistic Role of the Effective Advocate xxix

Acknowledgments xxxiii

Chapter One: General Description of Arbitration in the ADR Context..... 1

- 1.1 Overview of the Processes..... 1
- 1.2 Important Differences Between Arbitration and Mediation..... 3
- 1.3 Advantages and Disadvantages of Arbitration, Mediation, and Court Adjudication 4
 - 1.3.1 Advantages of the Processes 4
 - 1.3.2 Disadvantages of the Processes 5
- 1.4 Court-Annexed Arbitration and Mediation 8
- 1.5 Initiating the Processes 9
 - 1.5.1 Choosing Between Mediation and Arbitration 9
 - 1.5.2 Persuading Opposing Counsel to Participate 11
 - 1.5.3 Selecting the Appropriate Type of Neutral Services 11

Chapter Two: Preliminary Pre-Arbitration Considerations 13

- 2.1 Stages of the Arbitration Process..... 14
 - 2.1.1 Initiation..... 14
 - 2.1.1.1 Submission 14
 - 2.1.1.2 Demand or Notice 15
 - 2.1.1.3 Motion to Compel Arbitration Granted 15
 - 2.1.1.4 Court Rule or Court Order 16
 - 2.1.2 Preparation 16
 - 2.1.3 Prehearing 16
 - 2.1.4 Hearing 16
 - 2.1.5 Decision-Making..... 17
 - 2.1.6 Award 18

Contents

2.2	Application of Arbitration to Various Types of Disputes.....	18
2.2.1	Business Disputes	18
2.2.2	Construction Disputes.....	18
2.2.3	Insurance Disputes	18
2.2.4	Healthcare Disputes	19
2.2.5	Securities Disputes.....	19
2.2.6	Customer Disputes	19
2.2.7	Employment Disputes	20
2.2.8	Labor Union Disputes	20
2.2.9	Real Estate Disputes	20
2.2.10	Family Disputes.....	21
2.2.11	International Disputes	21
2.3	Drafting the Arbitration Agreement	22
2.3.1	Intent to Arbitrate.....	23
2.3.2	Arbitrable Disputes.....	23
2.3.3	Joinder of Claims or Parties.....	24
2.3.4	Designation of Dispute Resolution Organization	24
2.3.5	Location of Arbitration.....	24
2.3.6	Virtual, Live, or Hybrid Hearing.....	25
2.3.7	Procedure to Initiate Arbitration.....	25
2.3.8	Pre-Arbitration ADR.....	26
2.3.9	Time Limits.....	26
2.3.10	Arbitrator Selection Procedures	26
2.3.11	Scope of Arbitrator’s Authority and Jurisdiction	26
2.3.12	Pleadings and Discovery	27
2.3.13	Confidentiality	27
2.3.14	Evidence	28
2.3.15	Court Reporter and Recording.....	28
2.3.16	Interpreters and Accommodations.....	29
2.3.17	Nature, Effect, and Enforceability of Award.....	29
2.3.18	Appeal Procedures	30
2.3.19	Designation of Law to Govern the Arbitration Agreement	30

2.3.20 Court to Have Jurisdiction to Enforce Agreement and Award 30

2.3.21 Payment of Arbitration Fees and Expenses..... 30

2.3.22 Checklist: Advantages to Using a Dispute Resolution
 Organization 31

2.4 Selecting Cases for Arbitration 32

 2.4.1 Favorable Indications for Arbitration 32

 2.4.2 Unfavorable Indications for Arbitration 33

2.5 Indicator Guide for Selecting Cases for Arbitration 33

 2.5.1 Favorable Indicators Chart..... 33

 2.5.2 Unfavorable Indicators Chart 34

2.6 Choosing the Appropriate Arbitration Forum and Panel 35

 2.6.1 Choosing the Appropriate Arbitration Forum..... 35

 2.6.1.1 Court-Annexed Arbitration Programs 35

 2.6.1.2 Bar Association Arbitration Programs 36

 2.6.1.3 Nonprofit ADR Organizations..... 36

 2.6.1.4 For-Profit Organizations..... 36

 2.6.2 Deciding on the Number of Arbitrators..... 37

 2.6.2.1 Single Arbitrator Panel 37

 2.6.2.2 Multiple Arbitrator Panels 38

 2.6.3 Choosing Individuals to Serve as Arbitrators 39

2.7 Attorney Ethics..... 41

 2.7.1 Duties to Client 41

 2.7.1.1 Competence and Allocation of Authority Between Client
 and Lawyer..... 41

 2.7.1.2 Diligence and Communication 42

 2.7.1.3 Confidentiality of Information 42

 2.7.1.4 Conflicts of Interest..... 42

 2.7.1.5 Organization as Client 43

 2.7.1.6 Client with Diminished Capacity..... 43

 2.7.1.7 Declining or Terminating Representation 44

 2.7.1.8 Lawyer as Advisor..... 44

 2.7.2 Duties to Tribunal 44

Contents

2.7.2.1	Meritorious Claims and Contentions	44
2.7.2.2	Expediting Litigation	44
2.7.2.3	Candor Toward the Tribunal.....	44
2.7.2.4	Impartiality and Decorum of the Tribunal.....	45
2.7.2.5	Unauthorized Practice of Law	45
2.7.2.6	Misconduct	45
2.7.3	Duties to Opposing Parties and Counsel and Third Persons.....	45
2.7.3.1	Fairness to Opposing Party and Counsel.....	46
2.7.3.2	Truthfulness in Statements to Others.....	46
2.7.3.3	Communication with Person Represented by Counsel.....	46
2.7.3.4	Dealing with Unrepresented Persons and Prospective Clients.....	47
2.7.3.5	Respect for Rights of Third Parties.....	48
2.8	Considering Procedural Alternatives.....	48
2.8.1	Recorded or Telephone Testimony.....	49
2.8.2	Bifurcation	49
2.8.3	Consolidating Claims.....	49
2.8.4	Phasing the Arbitration.....	50
2.8.5	Class-Action Procedure.....	50
2.9	Considering Site Inspection and Audiovisual Aids.....	51
2.10	Selecting Expert Witnesses	52
2.11	Considering Whether to Mediate First	53
2.12	Arbitrator Ethics.....	53
2.13	Lawyer Serving as Third-Party Neutral.....	54
2.14	Civility Guidelines.....	55
Chapter Three: Prehearing Advocacy.....		57
3.1	Drafting the Arbitration Demand	58
3.2	Drafting the Response to the Demand	59
3.2.1	Drafting the Answer.....	59
3.2.2	Drafting Counterclaims.....	61
3.2.3	Strategies for Answering a Demand.....	61

3.3 Drafting Motions and Responses..... 62

3.4 Drafting Position Statements 62

3.5 The Preliminary Hearing 63

 3.5.1 Normally Discussed Topics 64

 3.5.1.1 Expectation of Civility and Professionalism 64

 3.5.1.2 Discovery 64

 3.5.1.3 Witness Lists 65

 3.5.1.4 Hearing Exhibits 66

 3.5.1.5 Fact Stipulations..... 66

 3.5.1.6 Sequestering Witnesses 66

 3.5.1.7 Burden and Standard of Proof..... 67

 3.5.1.8 Designating the Place of Hearing; Arranging the Hearing Room 67

 3.5.1.9 Estimate of Hearing Length 67

 3.5.1.10 Subpoenas 68

 3.5.1.11 Prohibition Against Ex Parte Communications with Arbitrators 68

 3.5.1.12 Audiovisual Aids 68

 3.5.1.13 Final Oral Arguments; Post-Hearing Proposed Findings of Fact and Conclusions of Law 69

 3.5.1.14 Nature and Form of Award 69

 3.5.2 Other Topics..... 69

 3.5.2.1 Applicable Rules and Law Governing the Procedure in the Particular Arbitration and the Parties’ Claims..... 69

 3.5.2.2 Arbitrability of All Issues..... 70

 3.5.2.3 Amended Pleadings 71

 3.5.2.4 Addition or Joinder of Parties 71

 3.5.2.5 Observers and Other Attendees 71

 3.5.2.6 Order of Evidence..... 72

 3.5.2.7 Position Statements or Prehearing Briefs 72

 3.5.2.8 Stenographer or Recording..... 72

 3.5.2.9 Interpreter 73

 3.5.2.10 Necessary Accommodations..... 73

Contents

3.5.2.11	Site Inspections.....	73
3.5.2.12	Experts	73
3.5.2.13	Appeal Procedures.....	74
3.5.2.14	Pre-Arbitration Mediation.....	74
3.5.2.15	Additional Preliminary Hearings	74
3.6	Prehearing Discovery.....	75
Chapter Four: Preparing for the Arbitration Hearing		77
4.1	Designing the Persuasive Trial Story.....	77
4.2	Preparing the Client	80
4.2.1	Explain the Arbitration Process	80
4.2.2	Make Your Client Feel at Ease	80
4.2.3	Explain How to Testify.....	81
4.2.4	Ask Your Client Questions as You Would on Direct Examination.....	81
4.2.5	Subject Your Client to Cross-Examination	81
4.2.6	Encourage Your Client to Divulge to You Both Good and Bad Information Relating to the Case	82
4.2.7	Avoid Judging or Criticizing Your Client’s Role in the Events Giving Rise to the Dispute	82
4.2.8	Warn Your Client to Avoid Inappropriate Body Language When Not Testifying.....	83
4.3	Preparing the Witness.....	83
4.3.1	Conducting a Hearing Simulation.....	83
4.3.2	Both You and the Witness Should be Fully Aware of the Witness’s Prior Testimony.....	84
4.3.3	Put the Witness Through a Direct Examination.....	84
4.3.4	Put the Witness Through a Cross-Examination	85
4.3.5	Preparing Expert Witnesses	85
4.3.6	Remind Witnesses of the Danger of Nonverbal Communication	85
4.3.7	Advise Witnesses as to Proper Attire.....	85
4.3.8	Inform Witnesses of the Order of Testimony.....	86

4.3.9	Warn Nonclient Witnesses Regarding Possible Inquiry into Witness Preparation.....	86
4.4	Preparing the Exhibits	86
4.4.1	Preparing Demonstrative Exhibits	86
4.4.2	Preparing Photographs and Visual Recordings	87
4.4.3	Securing Physical Objects.....	87
4.4.4	Anticipating Opponent’s Exhibits.....	87
4.4.5	Ensure Witnesses Have Identical Perceptions of Exhibits	87
Chapter Five: Advocacy During the Arbitration Hearing.....		89
5.1	Procedural Rules.....	91
5.1.1	Application of the Federal Rules of Civil Procedure.....	91
5.1.2	Testimony Not Required to Be Under Oath.....	91
5.1.3	Evidence by Affidavit	92
5.1.4	Authorized Representative	92
5.1.5	Decision and Award.....	92
5.2	Opening Statement.....	93
5.2.1	Basic Differences Between Arbitration and Trial Opening Statements	93
5.2.1.1	Stipulations May Be Read Aloud.....	94
5.2.1.2	Written Opening Statements.....	94
5.2.1.3	Claimant May Request to Make Opening Statement After Respondent.....	94
5.2.1.4	Statements May Be Deemed to Constitute Admissions	95
5.2.1.5	Omissions May Constitute Waiver of Claim or Defense	95
5.2.1.6	Arbitrator May Permit a Reply and Surreply.....	96
5.2.2	Rule Against Argument	96
5.2.3	Introduction and Summary	97
5.2.4	Presenting the Facts.....	98
5.2.4.1	Be Brief and Keep it Interesting.....	98
5.2.4.2	Apply the Principle of Primacy.....	98
5.2.4.3	Tie the Evidence to Legal Issues	98
5.2.4.4	Put the Puzzle Together.....	98

Contents

5.2.4.5	Focus on Operative Facts	99
5.2.4.6	Emphasize Undisputed Evidence.....	99
5.2.4.7	Discard Tangential Facts	99
5.2.4.8	Deal Minimally with Bad Facts.....	99
5.2.5	Brief Statement of Law	99
5.2.6	Comments on Opposition’s Case.....	100
5.2.6.1	Anticipating the Respondent’s Opening	100
5.2.6.2	Avoid Being Personally Derisive	100
5.2.6.3	Avoid Addressing Respondent’s Case in Detail.....	101
5.2.6.4	Commenting on the Claimant’s Opening	101
5.2.7	Summary and Request for Relief.....	102
5.2.8	Objections and Responses.....	102
5.2.8.1	Improper Argument	103
5.2.8.2	Personal Knowledge of Facts	103
5.2.8.3	Raising Issues or Matters Outside the Pleadings.....	103
5.2.8.4	Discussing Excluded Evidence.....	103
5.2.8.5	Opponent’s Comments Demeaning Your Client or Witnesses.....	103
5.2.8.6	Exceeding Limits on the Opening Statement	104
5.3	Direct Examination	104
5.3.1	Goals of Direct Examination	104
5.3.1.1	Introduce Undisputed Facts	104
5.3.1.2	Enhance the Likelihood of Disputed Facts.....	104
5.3.1.3	Lay Foundations for the Introduction of Exhibits	105
5.3.1.4	Reflect Upon the Credibility of Witnesses.....	105
5.3.1.5	Hold the Attention of the Arbitrator	105
5.3.2	Basic Rules Governing Direct Examination.....	106
5.3.2.1	Competence of Witnesses.....	106
5.3.2.2	Nonleading Questions.....	106
5.3.2.3	Narrative Testimony.....	106
5.3.2.4	The Nonopinion Rule.....	107
5.3.2.5	Refreshing Recollection.....	107

- 5.3.3 Planning the Direct Examination 107
 - 5.3.3.1 Content 107
 - 5.3.3.2 Organization 110
- 5.3.4 Questioning Technique 112
 - 5.3.4.1 Use Short, Open Questions 112
 - 5.3.4.2 Use Directive and Transitional Questions 113
 - 5.3.4.3 Reinitiate Primacy 113
- 5.3.5 Dealing with Adverse and Hostile Witnesses 113
 - 5.3.5.1 Adverse Witnesses 113
 - 5.3.5.2 Hostile Witnesses 114
- 5.3.6 Redirect Examination and Rehabilitation 114
 - 5.3.6.1 Purpose of Redirect 114
 - 5.3.6.2 Basic Rules of Redirect 114
 - 5.3.6.3 Conduct of Redirect 115
- 5.3.7 Ethics of Direct Examination 116
 - 5.3.7.1 Preparing Witnesses 116
 - 5.3.7.2 Offering Inadmissible Evidence 116
 - 5.3.7.3 Perjury 117
- 5.4 Cross-Examination 117
 - 5.4.1 The Role of Cross-Examination 117
 - 5.4.2 Basic Rules of Cross-Examination 118
 - 5.4.2.1 Leading Questions Permitted 118
 - 5.4.2.2 Limitations on Scope 118
 - 5.4.2.3 Other Restrictions 119
 - 5.4.3 Content of Cross-Examination 120
 - 5.4.3.1 Consider the Purposes of Cross-examination 120
 - 5.4.3.2 Arrive at the “Usable Universe” of Cross-examination 121
 - 5.4.3.3 Use a Risk-Averse Approach to Preparation 122
 - 5.4.4 Organizing the Cross-Examination 123
 - 5.4.4.1 Additional Organizing Principles 123
 - 5.4.4.2 Guidelines for Organization 124
 - 5.4.4.3 A Classic Format for Cross-Examination 125

Contents

5.4.5	Questioning Technique	126
5.4.5.1	Plan for Control	126
5.4.5.2	Use Questions That Achieve Control.....	129
5.4.5.3	Avoid Questions That Lose Control.....	130
5.4.5.4	Reasserting Control.....	132
5.4.6	Ethics of Cross-Examination	134
5.4.6.1	Factual and Legal Basis for Questioning	134
5.4.6.2	Assertions of Personal Knowledge	134
5.4.6.3	Derogatory Questions	135
5.4.6.4	Discrediting a Truthful Witness.....	135
5.4.6.5	Misusing Evidence.....	135
5.5	Impeachment.....	135
5.5.1	Tactical Considerations	136
5.5.1.1	Impeach the Witness Only on Significant Matters	136
5.5.1.2	Impeach the Witness Only on True Inconsistencies	136
5.5.1.3	Impeach a Witness Only When Success Is Likely.....	136
5.5.1.4	Do Not Impeach on Favorable Information	136
5.5.1.5	Consider the “Rule of Completeness”	137
5.5.1.6	Consider Refreshing the Witness’s Recollection	137
5.5.1.7	Evidentiary Considerations.....	137
5.5.2	Prior Inconsistent Statements.....	137
5.5.2.1	Recommit the Witness	138
5.5.2.2	Validate the Prior Statement.....	139
5.5.2.3	Confront the Witness with the Prior Statement.....	139
5.5.2.4	Ethical Concerns.....	141
5.5.3	Other Prior Inconsistencies.....	141
5.5.3.1	Impeachment by Omission or Silence.....	141
5.5.3.2	Prior Inconsistent Actions.....	142
5.5.4	Character and “Characteristic” Impeachment.....	142
5.5.4.1	Conviction of a Crime.....	142
5.5.4.2	Past Untruthfulness and Other Bad Acts.....	143
5.5.4.3	Impaired Perception or Recollection.....	143

- 5.5.5 “Case Data” Impeachment..... 143
 - 5.5.5.1 Personal Interest 143
 - 5.5.5.2 Motive..... 143
 - 5.5.5.3 Bias or Prejudice..... 144
- 5.6 Shaping the Process Toward a Favorable Decision 144
 - 5.6.1 Introducing All Pertinent Evidence..... 144
 - 5.6.2 Proper Handling and Use of Exhibits 145
 - 5.6.2.1 The Role of Exhibits 145
 - 5.6.2.2 Types of Exhibits..... 146
 - 5.6.2.3 Prehearing Procedures for the Admission of Exhibits 146
 - 5.6.2.4 Offering Exhibits During the Hearing 147
- 5.7 Final Argument 150
 - 5.7.1 The Role and Function of the Final Argument 150
 - 5.7.1.1 The Whole Story 150
 - 5.7.1.2 Use of Theory and Theme..... 150
 - 5.7.1.3 What Makes It Argument 151
 - 5.7.1.4 Analogies, Allusions, and Stories 153
 - 5.7.2 Format..... 153
 - 5.7.2.1 Claimant’s Argument in Chief 154
 - 5.7.2.2 Respondent’s Argument in Chief..... 154
 - 5.7.2.3 Claimant’s Rebuttal..... 155
 - 5.7.2.4 Variations 156
 - 5.7.3 Structure..... 156
 - 5.7.3.1 Topical Organization..... 156
 - 5.7.3.2 Alternative Structures..... 157
 - 5.7.3.3 Other Organizing Tools 157
 - 5.7.4 Content 159
 - 5.7.4.1 Tell a Persuasive Story 159
 - 5.7.4.2 Tie Up Cross-Examinations 160
 - 5.7.4.3 Comment on Promises 160
 - 5.7.4.4 Resolve Problems and Weaknesses..... 161
 - 5.7.4.5 Discuss Damages..... 161

Contents

5.7.4.6	Thanks	162
5.7.5	Ethics and Objections.....	162
5.7.5.1	Impermissible Argument	162
5.7.5.2	The Protocol of Objections	163
5.8	Persuasive Techniques.....	163
5.8.1	Opening Statement and Final Argument.....	164
5.8.1.1	Do Not Read.....	164
5.8.1.2	Use Simple, Straightforward Language	164
5.8.1.3	Verbal Pacing.....	165
5.8.1.4	Movement for Emphasis and Transition	165
5.8.1.5	Visuals and Exhibits	165
5.8.1.6	Using Emotion in Final Argument	166
5.8.2	Persuasive Use of Exhibits.....	166
5.8.2.1	Persuasive Foundations	166
5.8.2.2	Creative Exhibits	167
5.9	Summary of the Elements of Persuasion	169
5.9.1	The Five Objectives of Persuasive Messages	169
5.9.2	The Three Artistic Means of Persuasion	170
Chapter Six: Advocacy During a More Formal Arbitration Hearing		171
6.1	Evidentiary Rules.....	171
6.2	Foundations for Evidence	173
6.2.1	Components of Foundation.....	173
6.2.2	Foundations for Testimonial Evidence.....	174
6.2.2.1	Personal Knowledge	174
6.2.2.2	Special Foundations for Certain Testimonial Evidence	174
6.2.2.3	Establishing Foundations	175
6.2.2.4	Foundations for Hearsay Statements	176
6.3	Foundations for Documents	179
6.3.1	Authentication	179
6.3.2	Foundations for Hearsay Exceptions.....	180
6.4	Foundations for Real and Demonstrative Evidence	183

6.4.1	Real Evidence/Tangible Objects	183
6.4.2	Photography and Other Recording Devices.....	184
6.4.3	Demonstrative Evidence	185
6.5	Making and Responding to Objections	185
6.5.1	Form of Question Objections	185
6.5.2	Substantive Objections	187
6.5.3	Ethics and Objections.....	192
6.6	Making and Responding to Offers of Proof.....	193
6.7	Standards for Expert Testimony	194
6.7.1	Areas of Expertise	194
6.7.2	Scope of Opinion.....	194
6.7.3	Basis for Opinion.....	194
6.7.4	The Expert’s Overview.....	195
6.7.5	Offering Expert Testimony.....	195
6.7.5.1	Introduction and Foreshadowing	195
6.7.5.2	Qualification	196
6.7.5.3	Opinion and Theory.....	197
6.7.5.4	Explanation and Support.....	198
6.7.5.5	Theory Differentiation.....	198
6.7.6	Persuasive Expert Examination Techniques.....	199
6.7.6.1	Humanize the Expert Witness.....	199
6.7.6.2	Keep the Testimony Accessible.....	199
6.7.6.3	Use Leading Questions When Called For	200
6.7.6.4	Encourage Powerful Language	200
6.7.6.5	Use Enumeration.....	201
6.7.6.6	Consider Inoculation.....	201
6.7.6.7	Do Not Stretch the Witness’s Expertise.....	201
6.7.7	Cross-Examining Expert Witnesses	201
6.7.7.1	Challenge the Witness’s Credentials	202
6.7.7.2	Obtain Favorable Information.....	203
6.7.7.3	Use Learned Treatises.....	203
6.7.7.4	Challenge the Witness’s Impartiality	204

Contents

6.7.7.5	Point Out Omissions.....	205
6.7.7.6	Substitute Information	205
6.7.7.7	Challenge Technique or Theory.....	205
6.7.8	Ethics of Expert Examination.....	206
6.8	Ensure Completeness and Accuracy of Transcripts	207
6.8.1	Ensure Completeness of Transcripts	207
6.8.2	Ensure Accuracy of Transcripts	208
Chapter Seven: Post-Hearing Advocacy		209
7.1	Drafting Post-Hearing Briefs	210
7.2	Requisites of an Award	211
7.3	Motion to Reopen Hearing or to Modify or Correct Award.....	212
7.4	Enforcing the Award.....	213
7.5	Challenging the Award.....	214
7.6	Appeal	217
Chapter Eight: Hybrid Processes.....		219
8.1	High-Low Arbitration	219
8.2	Baseball Arbitration	220
8.3	Factfinding	221
8.4	Co-Med-Arb.....	222
8.5	Summary Jury Trial.....	223
8.6	Mini-Trial.....	225
8.7	Simulated Juries.....	227
8.8	Special Masters	227
8.9	Early Neutral Evaluation	228
8.10	Expert Panels.....	230
8.11	Co-Mediation.....	231
8.12	Arb-Med.....	232
8.13	Binding Mediation	232
8.14	Hybrid ADR Process Selection	233

Chapter Nine: Online Arbitration and Dispute Resolution 239

- 9.1 Types of Online Alternative Dispute Resolution Services—
 - Generally 240
 - 9.1.1 Examples of Primary ODR Services 240
 - 9.1.1.1 Online Arbitration 240
 - 9.1.1.2 Online Mediation..... 241
 - 9.1.1.3 Online Negotiation 242
- 9.2 Cost or Financing of Service..... 242
- 9.3 Cyberspace Netiquette..... 243
 - 9.3.1 Communicate Only With Permission..... 243
 - 9.3.2 Be Conscious of Time Zones 244
 - 9.3.3 Respect People’s Space 244
 - 9.3.4 Request and Provide Confirmations 244
 - 9.3.5 Check and Answer Email Regularly 244
 - 9.3.6 Give Notice of Extended Absences 245
 - 9.3.7 Forward Emails with an Explanation 245
 - 9.3.8 Attach Only Necessary Documents 245
 - 9.3.9 Police Hostile or Hurtful Language..... 245
 - 9.3.10 Keep Communications Crisp, Pithy, and Relevant 245
 - 9.3.11 Mind Your Grammar, Spelling, and Punctuation..... 246
 - 9.3.12 Pick Up the Telephone..... 246
 - 9.3.13 Save Your Email Correspondence 246

Chapter Ten: Effective Advocacy in Online Arbitration 247

- 10.1 Comparison of Live Face-to-Face, Videoconference, Telephone, and Written Communication in Arbitration..... 248
 - 10.1.1 Face-to-Face Communication in Arbitration 248
 - 10.1.2 Telephonic Communication in Arbitration..... 249
 - 10.1.3 Written Communication in Arbitration..... 249
- 10.2 Benefits and Limitations of Online Arbitration251
 - 10.2.1 Benefits.....252
 - 10.2.1.1 Availability252

Contents

10.2.1.2	Cost.....	252
10.2.1.3	Speed.....	252
10.2.1.4	Arbitrator Expertise.....	252
10.2.1.5	Less Confrontational.....	253
10.2.1.6	Cyberspace Ensures a Neutral Forum.....	253
10.2.2	Limitations	253
10.2.2.1	Enforcement of Arbitral Awards.....	253
10.2.2.2	Uncertainty Regarding Confidentiality, Privacy, Anonymity, and Authenticity	253
10.2.2.3	Absence of Human Factors.....	253
10.2.2.4	Computer Accessibility and Literacy	254
10.2.2.5	Unsuitability of Disputes for Online Arbitration.....	254
10.2.3	Confidentiality	255
10.3	Ethics of Advocacy in Online Arbitration.....	256
10.3.1	Carefully Manage the Power of the “CC”.....	257
10.3.2	Take Security Precautions Vis-à-Vis Other Web Users.....	257
10.3.3	Maintain Appropriate Confidentiality Within Your Groups.....	257
10.4	Online Arbitration Protocols	257
10.5	Considerations in Selecting an Online Arbitration Service and Arbitrator.....	258
10.5.1	The Online Arbitration Process	258
10.5.2	Selecting an Online Arbitration Service.....	259
10.5.2.1	Initial Considerations.....	259
10.5.2.2	ODR Service Providers and Principal Services Offered	260
10.5.3	Selecting an Online arbitrator.....	260
Chapter 11: Online Arbitration Walk-Through.....		261
11.1	Online Arbitration Walk-Through Scenario.....	261
11.1.1	Online Arbitration Participants and Their Locations.....	262
11.1.2	General Information Concerning Construction Dispute	263
11.1.3	Confidential Information for Best, the General Contractor.....	263
11.1.4	Confidential Information for PerfecTemp, the Installer	264

11.1.5	Confidential Information for Imagineering, Project Engineer	265
11.2	Designing the Online Arbitration Procedures Through the Vehicle of the Preliminary Hearing	266
11.2.1	Claims Matrix	266
11.2.2	Stages of the Arbitration Process and Communication Formats and Technology	268
11.2.2.1	All Counsel	268
11.2.2.2	Communication Modes.....	268
11.2.3	Civility and Professionalism	271
11.2.4	Applicable Rules and Law Governing the Procedure in the Arbitration; Law Applicable to Claims.....	271
11.2.4.1	As Counsel for Best	271
11.2.4.2	As Counsel for Aircon	271
11.2.4.3	As Counsel for Imagineering.....	272
11.2.4.4	As Counsel for PerfecTemp.....	272
11.2.4.5	Arbitrator Fairman	272
11.2.5	Ability to Arbitrate All Issues.....	272
11.2.6	Discovery.....	273
11.2.6.1	All Counsel	273
11.2.6.2	As Counsel for Best	273
11.2.6.3	As Counsel for Aircon	273
11.2.6.4	As Counsel for Imagineering.....	274
11.2.6.5	As Counsel for PerfecTemp.....	274
11.2.6.6	Arbitrator Fairman	274
11.2.7	Prehearing Motions, Pleading Amendments, and Briefing Schedules.....	276
11.2.8	Addition or Joinder of Parties	276
11.2.9	Witness Lists; Experts; Expert Reports; Subpoenas	276
11.2.9.1	All Counsel	276
11.2.9.2	As Counsel for Best	276
11.2.9.3	As Counsel for Aircon	277
11.2.9.4	As Counsel for PerfecTemp.....	277

Contents

11.2.9.5	As Counsel for Imagineering.....	277
11.2.9.6	Arbitrator Fairman	277
11.2.10	Observers and Other Attendees	278
11.2.11	Hearing Exhibits and Fact Stipulations	278
11.2.12	Order of Presenting Evidence	278
11.2.13	Sequestration of Witnesses.....	278
11.2.14	Burden and Standard of Proof.....	278
11.2.15	Position Statements or Prehearing Briefs.....	279
11.2.16	Stenographer and Interpreter	279
11.2.17	Interpreters and Accommodations	279
11.2.18	Scheduling of Hearing; Length of Proceedings.....	279
11.2.19	Final Oral Arguments; Post-Hearing Proposed Findings and Conclusions	279
11.2.20	Nature and Form of Award.....	280
11.2.20.1	As Counsel for Best	280
11.2.20.2	As Counsel for Aircon	280
11.2.20.3	As Counsel for Imagineering.....	280
11.2.20.4	As Counsel for PerfecTemp.....	280
11.2.20.5	Arbitrator Fairman	280
11.2.21	Appeal Procedures and Enforcement of the Award	280
11.2.22	Pre-Arbitration Mediation	280
11.2.23	Additional Preliminary Hearings.....	280
11.2.24	Prohibition Against Ex Parte Communication with Arbitrator....	281
Epilogue		283
Appendices		285
A.	Arbitration Forum and Panel Selection Checklist.....	289
B.	Drafting the Pleading; Preliminary Hearing Checklist.....	293
C.	Case Evaluation Matrix	297
D.	Client, Witness, and Exhibit Preparation Checklist.....	299
E.	Arbitration Hearing Checklist	303
F.	Exhibit Log.....	317

G.	Post-Hearing Advocacy Checklist.....	319
H.	Organizations Offering ADR Services.....	321
I.	Organizations Offering Online Dispute Resolution Services	323
J.	Arguments to Support Rulings on Various Motions and Objections During Arbitration Proceedings	329
Index	369