

Table of Contents

Chapter 1: Overview of Arbitration in the Dispute Resolution Process	1
1-1 HISTORY	1
1-2 ARBITRATION AND ARBITRATOR DEFINED	3
1-3 BENEFITS OF ARBITRATION	7
1-4 STATUTORY AND COURT-RULES BASED ARBITRATION; LIMITATIONS.....	12
1-4:1 Statutory Mandates	12
1-4:2 Limitations	13
1-4:3 Bankruptcy	14
1-4:4 Court Rules Mandates	14
1-5 CONTRACTUAL ARBITRATION.....	15
1-5:1 The Principal Authorizing Statutes	16
1-5:1.1 Federal Arbitration Act	16
1-5:1.2 New Jersey Arbitration Acts	18
1-5:1.3 Alternative Law Designations; Choice of Law Issues	21
1-5:2 Contracts in Which Arbitration is Permitted	23
1-5:3 Contract Formation Elements	29
1-5:3.1 Generally	29
1-5:3.2 Means of Indicating Assent	37
1-5:3.3 Failures in Indicating Assent.....	40
1-5:4 Terms That May Be Included in Arbitration Provisions	41
1-5:4.1 Location of Clause	42
1-5:4.1a Notice	42
1-5:4.1b Multiple Locations or Documents	43
1-5:4.1c Adoption by Reference	44
1-5:4.1d Internet Issues; Click-Wrap Agreements.....	45
1-5:4.1e Carve-Outs	47
1-5:4.1f Boilerplate	48
1-5:4.2 Scope and Delegation	49

Table of Contents

	1-5:4.2a	Generally	49
	1-5:4.2b	Delegation	53
1-5:4.3	Administered and Non-Administered Arbitration.....		56
1-5:4.4	Choice of Law and Rules		62
	1-5:4.4a	Applicable Law	62
	1-5:4.4b	Forum Rules	64
1-5:4.5	Parties To Be Bound		65
1-5:4.6	Pre-Arbitration Mediation; Non-Binding Arbitration.....		68
1-5:4.7	Arbitrator Number, Selection, and Qualifications.....		69
1-5:4.8	Confidentiality, Timing, Discovery, Hearings, Class Actions, Remedies, Notice and Location		70
	1-5:4.8a	Confidentiality	70
	1-5:4.8b	Discovery.....	71
	1-5:4.8c	Hearings; Motions; Witnesses....	72
	1-5:4.8d	Relief Permitted; Limitations....	72
	1-5:4.8e	Notice; Service	73
	1-5:4.8f	Location or Site/Seat of the Arbitration Hearings	73
	1-5:4.8g	Class Actions	74
1-5:4.9	Allocation/Shifting of Fees and Costs.....		75
	1-5:4.9a	Administrative and Arbitrator's Fees and Costs.....	75
	1-5:4.9b	Attorneys' Fees and Costs.....	76
	1-5:4.10	Award (<i>e.g.</i> , Form and Remedies)	77
	1-5:4.11	Appeals.....	78
1-6	ARBITRATE, BUT FOSTER SETTLEMENTS		78
Chapter 2: Commencing the Arbitration.....			79
2-1	INTRODUCTION: JOINT SUBMISSION; DEMAND; OR MOTION TO COMPEL/STAY		79
2-1:1	The Demand for Arbitration		79
	2-1:1.1	Generally	79
	2-1:1.2	Notice/Service; Statute of Limitations	81
2-1:2	Motion to Compel Arbitration and/or Stay/Dismiss Litigation.....		81
	2-1:2.1	Generally	81
	2-1:2.2	State Court Procedure.....	85
	2-1:2.3	Federal Court Procedure.....	87

Table of Contents

2-1:3	Motion to Stay/Enjoin Arbitration	88
2-1:4	Appeals/Mandamus	89
	2-1:4.1 State Court Appeal	89
	2-1:4.2 Federal Appeal/Mandamus.....	90
2-2	WHO MAY REPRESENT A PARTY?.....	91
	2-2:1 Generally: Pro Se Representation.....	91
	2-2:2 Unauthorized Practice of Law	91
	2-2:3 Disqualification: Conflicts of Interest	93
2-3	CONSIDERATIONS REGARDING THE ARBITRATOR	94
	2-3:1 Qualifications and Experience.....	94
	2-3:2 The Number of Arbitrators	96
	2-3:3 The Arbitrator Is Usually a “Neutral”; Immunity; Practice of Law	96
	2-3:4 Disclosure	97
	2-3:5 Non-Neutral (Canon X) Arbitrators	99
	2-3:6 Continuing Duty To Disclose	100
2-4	WHO DECIDES WHAT?.....	102
	2-4:1 Severability	102
	2-4:1a FAA Section One Exemption	108
	2-4:2 Delegation	108
	2-4:2.1 Generally	108
	2-4:2.2 Rules-Based Delegation	112
	2-4:2.3 Delegation in Non-Administered Cases ...	114
	2-4:3 Conditions Precedent.....	115
	2-4:4 Strategic Considerations	117
2-5	ISSUES REGARDING JURISDICTION/ ARBITRABILITY/AMBIGUITY	121
	2-5:1 The Authority to Arbitrate	121
	2-5:2 Required Additions to Contracts Affecting Some Statutory or Constitutional Rights in New Jersey	125
	2-5:3 Unconscionability	132
	2-5:4 Waiver; Late Applications After or During Litigation; Estoppel; Superseding Agreements.....	134
	2-5:5 Non-Signatories; Estoppel; Bifurcation	139
2-6	GOVERNING LAW AND PREEMPTION; CLASS ACTIONS	145
	2-6:1 Governing Law	145
	2-6:2 Class-Action Waivers, Adoption, and Preemption....	149
	2-6:2.1 The Law.....	149
	2-6:2.2 The AAA Rules	157

Table of Contents

2-7	CONSOLIDATED ARBITRATIONS.....	158
Chapter 3: Before the Hearing 161		
3-1	PRE-HEARING CONSIDERATIONS	161
3-1:1	Emergent/Injunctive Relief	161
3-1:1.1	Generally	161
3-1:1.2	Court Enforcement	163
3-1:2	Answer and Counterclaims/Cross-Claims/ Third-Party Claims; Amendments	164
3-1:3	Pre-Hearing Conferences	165
3-1:3.1	Checklist for a Case Management and Scheduling Order	170
3-1:4	Pre-Hearing Motion Practice.....	175
3-1:5	Discovery.....	177
3-1:5.1	In General.....	177
3-1:5.2	Document Exchanges	182
3-1:5.2a	In General.....	182
3-1:5.2b	Documents From Non-Parties	182
3-1:5.3	Litigation Holds	184
3-1:5.4	E-Discovery	185
3-1:5.5	Privilege Claims	187
3-1:5.6	Depositions.....	188
3-1:5.7	Expert Reports, Depositions and Testimony	190
3-1:5.8	Third-Party Summons/Subpoenas	193
3-1:5.8a	Subpoenas to Third-Party Witnesses	193
3-1:5.8b	New York Model Summons Annotated Study.....	196
3-1:5.8c	Costs of Third-Party Subpoenas	201
3-2	ADJOURNMENTS.....	202
3-3	OPEN OR CLOSED PROCEEDINGS— CONFIDENTIALITY.....	204
3-4	MOTIONS <i>IN LIMINE</i>	207
3-5	DISPOSITIVE MOTIONS	208
3-6	INTERIM RELIEF AND AWARDS	209
3-7	APPLICATION TO ENJOIN SUCCESSIVE ARBITRATION OR LITIGATION	210
3-8	BANKRUPTCY	211

Table of Contents

Chapter 4: Evidence Law Considerations 213

4-1 INTRODUCTION TO EVIDENCE LAW
IN ARBITRATION 213

4-1:1 The Arbitrator’s Mindset Concerning
Evidence Law 213

4-1:2 Preliminary Findings 214

4-1:3 Decision-Making 215

4-2 THE NEW JERSEY OR FEDERAL ANNOTATED
RULES OF EVIDENCE 216

4-3 SOURCES OF EVIDENCE LAW 216

4-4 WHAT IS “EVIDENCE”? 217

4-4:1 Traditional “Evidence” 217

4-4:2 Other “Evidence” 217

Chapter 5: Selected Evidence Provisions 219

5-1 NOTICE OF LAW AND FACTS 219

5-2 PRESUMPTIONS 220

5-3 RELEVANT EVIDENCE AND ITS EXCLUSION 221

5-4 CHARACTER EVIDENCE 222

5-5 HABIT, ROUTINE PRACTICE, CUSTOM 223

5-6 REMEDIAL MEASURES, SETTLEMENT
OFFERS, PLEAS, AND INSURANCE 224

5-7 PRIVILEGES 225

5-7:1 Self-Critical Analysis Privilege 225

5-7:2 Attorney Work Product Privilege 226

5-7:3 Attorney-Client Privilege 226

5-7:4 Settlement/Mediation 227

5-7:5 Other Privileges 228

5-7:6 How to Treat Stricken Evidence That Already
Has Been Heard 229

5-8 COMPETENCY OF WITNESSES TO
TESTIFY—OATHS AND INTERPRETERS 229

5-9 ENHANCEMENTS OF OR ATTACKS
ON CREDIBILITY 231

5-10 REFRESHING RECOLLECTION 233

5-11 PRIOR STATEMENT OF A WITNESS 233

5-12 SEQUESTRATION OF WITNESSES 234

5-13 OPINION AND EXPERT TESTIMONY 235

5-13:1 Lay Opinion 235

5-13:2 Expert Opinion Testimony 236

5-13:3 Independent Experts 240

5-14 HEARSAY AND ITS EXCEPTIONS 240

Table of Contents

5-14:1	In General.....	240
5-14:2	Federal vs. New Jersey Classifications.....	241
5-14:2.1	Prior Inconsistent Statement of a Witness	241
5-14:2.2	Admission of a Party.....	241
5-14:3	Exceptions Where the Witness Is Available	242
5-14:3.1	Present Sense Impression	242
5-14:3.2	Excited Utterances.....	243
5-14:3.3	State of Mind	243
5-14:3.4	Statement for Purposes of Medical Diagnosis or Treatment.....	243
5-14:3.5	Recorded Recollection	244
5-14:3.6	Business and Official Records	244
5-14:3.7	Learned Treatises.....	246
5-14:3.8	Statement Against Interest.....	246
5-14:3.9	Other Exceptions When Witness Is Available	247
5-14:4	Exceptions When the Witness is Unavailable	248
5-14:4.1	What Is “Unavailable?”.....	248
5-14:4.2	Prior Testimony of a Witness.....	248
5-14:4.3	Dying Declaration	249
5-14:4.4	Statement Against Interest.....	249
5-14:4.5	Trustworthy Statements by Deceased Declarants	249
5-14:4.6	Other Miscellaneous Exceptions.....	250
5-14:5	Use and Scope of Admissible Hearsay.....	251
5-14:5.1	Included Hearsay.....	251
5-14:5.2	Included Expert Opinion	251
5-14:5.3	Attack on Declarant’s Credibility	252
5-15	AUTHENTICATION AND IDENTIFICATION	252
5-16	CONTENTS OF WRITINGS AND PHOTOGRAPHS	253
5-17	RULE OF COMPLETENESS	253
5-18	RELAXATION OF EVIDENCE RULES.....	254
Chapter 6: The Hearing.....		255
6-1	THE ARBITRATOR AND COUNSEL ARE PARTS OF A SEARCH FOR THE TRUTH.....	255
6-1:1	The Arbitrator’s Role in the Case.....	255
6-1:2	The Arbitrator’s Direct Participation.....	258
6-1:2.1	Questioning of Witnesses.....	258
6-1:2.2	Witnesses Called by the Arbitrator	261
6-1:2.2a	Expert Witnesses.....	261

Table of Contents

	6-1:2.2b	Fact Witnesses	264	
	6-1:2.2c	The Arbitrator’s Research of Facts and Law	264	
6-2	THE ARBITRATOR’S CONTROL OF AN ADVERSARY HEARING		265	
6-2:1	General Control by the Arbitrator		265	
6-2:2	Analysis of the Elements of Testimony.....		269	
6-2:3	Cross-Examination—Its Purpose and Scope.....		272	
6-2:4	Objections to Evidence		273	
	6-2:4.1	Leading Questions—Discouraged But Permitted	273	
		6-2:4.1a	Definition of “Leading”..... 273	
		6-2:4.1b	Leading on Cross-Examination	274
		6-2:4.1c	Permissive Leading on Direct Examination	275
		6-2:4.1d	Sanctions for Violations.....	276
	6-2:4.2	Questions Calling for Narrative Answers (General Questions).....	277	
	6-2:4.3	Question Assuming a Fact Not in Evidence	277	
	6-2:4.4	Compound Question	278	
	6-2:4.5	Ambiguous/Unintelligible Questions	278	
	6-2:4.6	Asked and Answered Questions (Badgering the Witness).....	278	
	6-2:4.7	Intimidating or Abusing the Witness	279	
	6-2:4.8	Argumentative Questions.....	279	
	6-2:4.9	Speculative Questions (Those That Call for the Witness to Speculate)	280	
	6-2:4.10	Unresponsive Answers	280	
6-2:5	Techniques for Handling Coaching (Speaking) Objections.....		280	
6-2:6	Replacing the Arbitrator.....		281	
6-2:7	Permit the Parties to Present the Case in Full; Rebuttal; Closing the Hearing		282	
	Chapter 7: Additional Considerations at the Hearing		287	
7-1	OTHER HEARING ROOM PROBLEMS		287	
	7-1:1	Extraneous Influences; Threats	287	
	7-1:2	Sleeping, Talkative, or Inattentive Attendees	287	
	7-1:3	The Tired Arbitrator or Counsel.....	288	

Table of Contents

7-1:4	Demeanor of Witnesses and Other Credibility Indicators	288
7-1:5	Disruptive Behavior	289
7-1:6	Sidebar or Arbitrators' Conferences	289
7-1:7	Control of Dress	290
7-2	USEFUL INFORMATION AND ADVICE	291
7-2:1	How to "Disregard" Stricken Material	291
7-2:2	Burden of Proof	291
7-2:3	The Record	292
	7-2:3.1 Transcripts.....	292
	7-2:3.2 The Arbitrator's Personal Notes	293
7-2:4	The Arbitrator's Legal and Factual Rulings.....	295
7-2:5	Adjournments and Extensions.....	296
7-2:6	Defaults	296
7-2:7	Sanctions, Fees, and Costs—Proportionate Relief	298
	7-2:7.1 Costs and Remedies for Nonpayment	299
	7-2:7.1a Costs.....	299
	7-2:7.1b Failure to Pre-Pay Arbitration Fees.....	300
	7-2:7.2 Attorneys' Fees	301
	7-2:7.3 Punitive and Multiple Damages.....	306
	7-2:7.4 Interest.....	306
7-2:8	Courtesy to All	307
7-2:9	An Arbitrator Is Appointed, Not Anointed.....	309
	7-2:9.1 Prepare for Each Session and Keep an Open Mind	309
	7-2:9.2 Do Not Forget Common Sense.....	309
	7-2:9.3 Do Not Be Afraid To Bend and To Be "Human"	309
7-3	PHONE OR VIDEO HEARINGS	310
	Chapter 8: After the Arbitration Hearing	311
8-1	DRAFTING THE AWARD	311
8-1:1	Time	311
8-1:2	Form/Nomenclature	312
	8-1:2.1 Form.....	312
	8-1:2.2 Nomenclature	314
	8-1:2.2a Generally	314
	8-1:2.2b Bifurcation.....	316
	8-1:2.2c Attorneys' Fees and Expenses or Interest.....	317
8-1:3	Scope	318

Table of Contents

8-1:4	Signing and Filing/Notice	322
8-1:5	Consent Awards.....	323
8-2	POST-AWARD MOTIONS IN THE ARBITRATION AND <i>FUNCTUS OFFICIO</i>	323
8-2:1	Modification, Correction, or Clarification	323
8-2:2	Timing and Procedure	328
8-3	MOTIONS IN COURT TO MODIFY, VACATE, OR CONFIRM AN AWARD	328
8-3:1	Introduction	328
8-3:2	Timing and Procedure	329
8-3:2.1	Federal Procedure.....	329
8-3:2.1a	Jurisdiction	329
8-3:2.1b	Papers Required.....	331
8-3:2.1c	Confirm	331
8-3:2.1d	Modify, Vacate, or Correct.....	332
8-3:2.1e	Sanctions	333
8-3:2.2	New Jersey State Procedure	333
8-3:2.2a	Confirm	334
8-3:2.2b	Modify, Vacate or Correct; Evidence; Discovery.....	335
8-3:3	Remand/Rehearing	336
8-3:4	Attorneys' Fees on Motions; Post-Award Interest.....	338
8-3:5	Appeals.....	339
8-3:6	Enforcing the Judgment on a Confirmed Award; Effect.....	340
8-3:7	Legal Standards Generally.....	341
8-3:8	Review of an Arbitrator's Application of the Law	345
8-3:9	Manifest Disregard in the Federal Circuits	351
8-3:10	Other Statutory Standards.....	354
8-4	"APPEALS" OF ARBITRAL AWARDS	354
8-4:1	AAA Appellate Arbitration	354
8-4:2	Appeals in CPR, JAMS, and Other Matters	357
8-4:3	New Jersey Expanded Review	358
8-5	REPRESENTATION OF A PARTY AFTER ARBITRATION	359
8-6	PRESERVING CONFIDENCES	359
8-7	DISPOSITION OF FILES AND RECORDS	360
	Chapter 9: Other Arbitration Regimes	361
9-1	NON-BINDING ARBITRATION	361

Table of Contents

9-2	STATE COURT-ANNEXED ARBITRATION PROGRAM	362
9-3	FEDERAL COURT-ANNEXED ARBITRATION PROGRAM	366
9-4	FAMILY LAW ARBITRATION	367
9-5	PROBATE, FORECLOSURE, PARTITION VS. SUBDIVISION, VARIANCE OR OTHER SPECIALIZED ARBITRATION.....	370
9-6	MEDIATION-ARBITRATION (MED-ARB) OR ARBITRATION-MEDIATION (ARB-MED)	370
9-7	HIGH-LOW ARBITRATION.....	374
9-8	“BASEBALL” ARBITRATION	376
9-9	DELAWARE RAPID ARBITRATION	377
9-10	NEW JERSEY INTERNATIONAL ARBITRATION, MEDIATION, AND CONCILIATION ACT	377
Appendix 1: American Arbitration Association Commercial Arbitration Rules and Mediation Procedures		379
Appendix 2: American Arbitration Association Supplementary Rules for Class Arbitrations.....		427
Appendix 3: AAA/ICDR Arbitration Rules		436
Appendix 4: AAA Code for Ethics for Arbitrators in Commercial Disputes.....		481
Appendix 5: Federal Arbitration Act, 9 U.S.C. §§ 1-16		499
Appendix 6: Revised New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 36.....		507
Appendix 7: Summaries of New Jersey Arbitration Cases 2006-2020		529
Appendix 8: Recent Case Law Index 2016-2020		783
Table of Cases.....		831
Table of Statutes and Rules		889
Index		899