

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	15
1-5 CONTRACTUAL ARBITRATION.....	16
1-5:1 The Principal Authorizing Statutes	17
1-5:1.1 Federal Arbitration Act	17
1-5:1.2 New Jersey Arbitration Acts	19
1-5:1.3 Choice of Law Issues; Alternative Law Designations	22
1-5:1.3a Choice of Law	22
1-5:1.3b Alternative Designations.....	24
1-5:1.3c A Word of Caution.....	25
1-5:2 Contracts in Which Arbitration is Permitted	26
1-5:3 Contract Formation Elements	32
1-5:3.1 Generally	32
1-5:3.2 Means of Indicating Assent	41
1-5:3.2a Capacity; Authority; Infancy/ Minors	46
1-5:3.3 Failures in Indicating Assent.....	47
1-5:4 Terms To Be Included in Arbitration Provisions	48
1-5:4.1 Location of Clause	49
1-5:4.1a Notice	50
1-5:4.1b Multiple Locations or Documents	52
1-5:4.1c Adoption by Reference	53

Table of Contents

	1-5:4.1d	Internet Issues; Click-Wrap Agreements	54
	1-5:4.1e	Carve-Outs	56
	1-5:4.1f	Boilerplate	57
1-5:4.2	Scope and Delegation		59
	1-5:4.2a	Generally	59
	1-5:4.2b	Scope	60
	1-5:4.2c	Statutory Claims; Post-Termination; Relationship.....	64
	1-5:4.2d	Delegation	65
1-5:4.3	Administered and Non-Administered Arbitration.....		68
	1-5:4.3a	Administered	68
	1-5:4.3b	Non-Administered	72
	1-5:4.3c	No Selection of Provider or Arbitrator: <i>Flanzman</i>	73
1-5:4.4	Choice of Law and Rules		75
	1-5:4.4a	Applicable Law	75
	1-5:4.4b	Forum Rules	77
1-5:4.5	Parties To Be Bound		79
1-5:4.6	Pre-Arbitration Mediation; Non-Binding Arbitration.....		82
1-5:4.7	Arbitrator Number, Selection, and Qualifications.....		83
1-5:4.8	Confidentiality, Timing, Discovery, Hearings, Class Actions, Remedies, Notice and Location		84
	1-5:4.8a	Confidentiality	85
	1-5:4.8b	Discovery	86
	1-5:4.8c	Hearings; Motions; Witnesses... ..	86
	1-5:4.8d	Relief Permitted; Limitations... ..	87
	1-5:4.8e	Notice; Service	88
	1-5:4.8f	Location or Site/Seat of the Arbitration Hearings	89
	1-5:4.8g	Class Actions	90
1-5:4.9	Allocation/Shifting of Fees and Costs.....		90
	1-5:4.9a	Administrative and Arbitrator's Fees and Costs.....	90
	1-5:4.9b	Attorneys' Fees and Costs.....	91
1-5:4.10	Award (<i>e.g.</i> , Form and Remedies; Interest)		92

Table of Contents

	1-5:4.11 Appeals.....	93
1-6	ARBITRATE, BUT FOSTER SETTLEMENTS	93
Chapter 2: Commencing the Arbitration.....		95
2-1	INTRODUCTION: JOINT SUBMISSION; DEMAND; OR MOTION TO COMPEL/STAY.....	95
2-1:1	The Demand for Arbitration	95
2-1:1.1	Generally	95
2-1:1.2	Notice/Service; Statute of Limitations	97
2-1:2	Motion to Compel Arbitration and/or Stay/Dismiss Litigation or Arbitration	98
2-1:2.1	Generally	98
2-1:2.1a	Severance: Claims, Parties, or Terms.....	102
2-1:2.2	State Court Procedure.....	103
2-1:2.3	Federal Court Procedure.....	105
2-1:3	Motion to Stay/Enjoin Arbitration/Arbitrator.....	107
2-1:4	Appeals/Mandamus.....	108
2-1:4.1	State Court Appeal	108
2-1:4.2	Federal Appeal/Mandamus.....	109
2-2	WHO MAY REPRESENT A PARTY?.....	110
2-2:1	Generally: Pro Se Representation.....	110
2-2:2	Unauthorized Practice of Law; Entities.....	111
2-2:3	Disqualification: Conflicts of Interest	113
2-3	CONSIDERATIONS REGARDING THE ARBITRATOR	114
2-3:1	Qualifications and Experience; Diversity	114
2-3:2	The Number of Arbitrators.....	116
2-3:3	The Arbitrator Is Usually a “Neutral”; Immunity; Practice of Law	117
2-3:4	Disclosure.....	118
2-3:5	Non-Neutral (Canon X) Arbitrators	120
2-3:6	Continuing Duty To Disclose	121
2-4	WHO DECIDES WHAT?.....	123
2-4:1	Severability	123
2-4:1a	FAA Section 1 Exemption	129
2-4:2	Delegation	130
2-4:2.1	Generally	130
2-4:2.2	Specific Language and Clause Structure.....	131
2-4:2.3	Rules-Based Delegation	134
2-4:2.4	Delegation in Non-Administered Cases...	137

Table of Contents

2-4:3 Conditions Precedent..... 137

2-4:4 Strategic Considerations 139

2-5 ISSUES REGARDING JURISDICTION/
ARBITRABILITY/AMBIGUITY 144

2-5:1 The Authority to Arbitrate 144

 2-5:1a Consideration 145

 2-5:1b Notice and Mutual Assent; Authority;
 Signatures 146

2-5:2 Required Additions to Contracts Affecting Some
Statutory or Constitutional Rights in New Jersey..... 148

2-5:3 Unconscionability..... 155

2-5:4 Waiver; Late Applications After or During
Litigation; Estoppel; Superseding Agreements..... 157

2-5:5 Non-Signatories; Estoppel; Bifurcation 163

2-6 GOVERNING LAW AND PREEMPTION;
CLASS ACTIONS 169

2-6:1 Governing Law 169

2-6:2 Class-Action Waivers, Adoption, and Preemption.... 173

 2-6:2.1 The Law..... 173

 2-6:2.2 The AAA Rules 181

 2-6:2.2a Class Actions 181

 2-6:2.2b Supplementary Rules for
 Multiple Filings 182

2-7 CONSOLIDATED ARBITRATIONS..... 183

Chapter 3: Before the Hearing 185

3-1 PRE-HEARING CONSIDERATIONS 185

 3-1:1 Emergent/Injunctive Relief 185

 3-1:1.1 Generally 185

 3-1:1.2 Court Enforcement 187

 3-1:2 Answer and Counterclaims/Cross-Claims/
 Third-Party Claims; Amendments 188

 3-1:3 Pre-Hearing Conferences 189

 3-1:3.1 Checklist for a Case Management &
 Scheduling Order 194

 3-1:4 Pre-Hearing Motion Practice..... 199

 3-1:5 Discovery..... 202

 3-1:5.1 In General..... 202

 3-1:5.2 Document Exchanges 207

 3-1:5.2a In General..... 207

 3-1:5.2b Documents from Non-Parties... 207

Table of Contents

	3-1:5.3 Litigation Holds	209
	3-1:5.4 E-Discovery	210
	3-1:5.5 Privilege Claims	212
	3-1:5.6 Depositions.....	213
	3-1:5.7 Experts: Reports, Depositions, and Testimony	215
	3-1:5.8 Non-Party Summons/Subpoenas.....	218
	3-1:5.8a Subpoenas to Non-Party Witnesses	218
	3-1:5.8b New York Model Summons Annotated Study.....	221
	3-1:5.8c Costs of Non-Party Subpoenas	226
3-2	ADJOURNMENTS.....	227
3-3	OPEN OR CLOSED PROCEEDINGS— CONFIDENTIALITY.....	230
3-4	MOTIONS <i>IN LIMINE</i>	232
3-5	DISPOSITIVE MOTIONS	234
3-6	INTERIM RELIEF AND AWARDS	235
3-7	APPLICATION TO ENJOIN SUCCESSIVE ARBITRATION OR LITIGATION	236
3-8	BANKRUPTCY	237
3-9	FINAL PRE-HEARING CONFERENCE	237
 Chapter 4: Evidence Law Considerations		241
4-1	INTRODUCTION TO EVIDENCE LAW IN ARBITRATION.....	241
	4-1:1 The Arbitrator’s Mindset Concerning Evidence Law.....	241
	4-1:2 Preliminary Findings	242
	4-1:3 Decision-Making.....	243
4-2	THE NEW JERSEY OR FEDERAL ANNOTATED RULES OF EVIDENCE.....	244
4-3	SOURCES OF EVIDENCE LAW	244
4-4	WHAT IS “EVIDENCE”?	245
	4-4:1 Traditional “Evidence”	245
	4-4:2 Other “Evidence”.....	245
 Chapter 5: Selected Evidence Provisions		247
5-1	NOTICE OF LAW AND FACTS	247
5-2	PRESUMPTIONS	248
5-3	RELEVANT EVIDENCE AND ITS EXCLUSION.....	249

Table of Contents

5-4	CHARACTER EVIDENCE.....	250
5-5	HABIT, ROUTINE PRACTICE, AND CUSTOM	251
5-6	REMEDIAL MEASURES, SETTLEMENT OFFERS, PLEAS, AND INSURANCE	252
5-7	PRIVILEGES	253
5-7:1	Self-Critical Analysis Privilege.....	253
5-7:2	Attorney Work Product Privilege.....	254
5-7:3	Attorney-Client Privilege	254
5-7:4	Settlement/Mediation	255
5-7:5	Other Privileges	256
5-7:5a	Litigation Privilege	257
5-7:6	How to Treat Stricken Evidence That Already Has Been Heard.....	257
5-8	COMPETENCY OF WITNESSES TO TESTIFY—OATHS AND INTERPRETERS	258
5-9	ENHANCEMENTS OF OR ATTACKS ON CREDIBILITY	259
5-10	REFRESHING RECOLLECTION	261
5-11	PRIOR STATEMENT OF A WITNESS.....	262
5-12	SEQUESTRATION OF WITNESSES	262
5-13	OPINION AND EXPERT TESTIMONY.....	264
5-13:1	Lay Opinion.....	264
5-13:2	Expert Opinion Testimony.....	264
5-13:3	Independent Experts.....	268
5-14	HEARSAY AND ITS EXCEPTIONS	269
5-14:1	In General.....	269
5-14:2	Federal vs. New Jersey Classifications.....	269
5-14:2.1	Prior Inconsistent Statement of a Witness	269
5-14:2.2	Admission of a Party.....	270
5-14:3	Exceptions Where the Witness Is Available	270
5-14:3.1	Present Sense Impression	270
5-14:3.2	Excited Utterances.....	271
5-14:3.3	State of Mind	271
5-14:3.4	Statement for Purposes of Medical Diagnosis or Treatment.....	272
5-14:3.5	Recorded Recollection	272
5-14:3.6	Business and Official Records	273
5-14:3.7	Learned Treatises	274
5-14:3.8	Statement Against Interest.....	275
5-14:3.9	Other Exceptions When Witness Is Available	275

Table of Contents

5-14:4	Exceptions When the Witness is Unavailable	276
5-14:4.1	What Is “Unavailable?”	276
5-14:4.2	Prior Testimony of a Witness.....	277
5-14:4.3	Dying Declaration	277
5-14:4.4	Statement Against Interest.....	278
5-14:4.5	Trustworthy Statements by Deceased Declarants	278
5-14:4.6	Other Miscellaneous Exceptions	278
5-14:5	Use and Scope of Admissible Hearsay.....	279
5-14:5.1	Included Hearsay.....	279
5-14:5.2	Included Expert Opinion	279
5-14:5.3	Attack on Declarant’s Credibility	280
5-15	AUTHENTICATION AND IDENTIFICATION	280
5-16	CONTENTS OF WRITINGS AND PHOTOGRAPHS	281
5-17	RULE OF COMPLETENESS	282
5-18	RELAXATION OF EVIDENCE RULES.....	282
 Chapter 6: The Hearing		283
6-1	THE ARBITRATOR AND COUNSEL ARE PARTS OF A SEARCH FOR THE TRUTH.....	283
6-1:1	The Arbitrator’s Role in the Case.....	283
6-1:2	The Arbitrator’s Direct Participation.....	286
6-1:2.1	Questioning of Witnesses.....	286
6-1:2.2	Witnesses Called by the Arbitrator	289
6-1:2.2a	Expert Witnesses.....	289
6-1:2.2b	Fact Witnesses	292
6-1:2.2c	The Arbitrator’s Research of Facts and Law.....	292
6-2	THE ARBITRATOR’S CONTROL OF AN ADVERSARY HEARING	293
6-2:1	General Control by the Arbitrator.....	293
6-2:2	Analysis of the Elements of Testimony.....	297
6-2:3	Cross-Examination—Its Purpose and Scope.....	300
6-2:4	Objections to Evidence	301
6-2:4.1	Leading Questions—Discouraged But Permitted	301
6-2:4.1a	Definition of “Leading”.....	301
6-2:4.1b	Leading on Cross-Examination	302
6-2:4.1c	Permissive Leading on Direct Examination	303
6-2:4.1d	Sanctions for Violations.....	304

Table of Contents

	6-2:4.2	Questions Calling for Narrative Answers (General Questions).....	305
	6-2:4.3	Question Assuming a Fact Not in Evidence	305
	6-2:4.4	Compound Question	306
	6-2:4.5	Ambiguous/Unintelligible Questions	306
	6-2:4.6	Asked and Answered Questions (Badgering a Witness).....	306
	6-2:4.7	Intimidating or Abusing the Witness	307
	6-2:4.8	Argumentative Questions.....	307
	6-2:4.9	Speculative Questions (Those That Call for the Witness to Speculate)	308
	6-2:4.10	Unresponsive Answers.....	308
	6-2:5	Handling Coaching (Speaking) Objections	308
	6-2:6	Replacing the Arbitrator; Removal.....	309
6-3		OTHER HEARING ROOM PROBLEMS.....	310
	6-3:1	Extraneous Influences; Threats.....	310
	6-3:2	Sleeping, Talkative, or Inattentive Attendees	311
	6-3:3	The Tired Arbitrator or Counsel.....	311
	6-3:4	Demeanor of Witnesses; Other Credibility Indicia ...	311
	6-3:5	Disruptive Behavior	312
	6-3:6	Sidebar or Arbitrators' Conferences	312
	6-3:7	Control of Dress.....	313
6-4		ADDITIONAL INFORMATION AND ADVICE.....	314
	6-4:1	How to “Disregard” Stricken Material	314
	6-4:2	Burden of Proof	315
	6-4:3	The Record	315
	6-4:3.1	Transcripts.....	315
	6-4:3.2	The Arbitrator’s Personal Notes	317
	6-4:4	The Arbitrator’s Legal and Factual Rulings.....	318
	6-4:5	Adjournments and Extensions.....	319
	6-4:6	Defaults	320
	6-4:7	Sanctions, Fees, and Costs—Proportionate Relief	321
	6-4:7.1	Costs and Remedies for Nonpayment	323
	6-4:7.1a	Costs.....	323
	6-4:7.1b	Failure to Pre-Pay Arbitration Fees.....	323
	6-4:7.2	Attorneys’ Fees.....	325
	6-4:7.3	Punitive and Multiple Damages	329
	6-4:7.4	Interest.....	330
	6-4:8	Courtesy to All	331
	6-4:9	An Arbitrator Is Appointed, Not Anointed.....	332

Table of Contents

6-4:9.1	Prepare for Each Session and Keep an Open Mind	332
6-4:9.2	Do Not Forget Common Sense.....	333
6-4:9.3	Do Not Be Afraid To Bend and To Be “Human”	333
6-5	PHONE OR VIDEO HEARINGS	333
6-6	COUNSEL’S PREPARATION IS PARAMOUNT	334
6-7	PERMIT THE PARTIES TO PRESENT THE CASE IN FULL; REBUTTAL; CONCLUDING THE TESTIMONY/EVIDENCE AND HEARING.....	334
 Chapter 7: The Award.....		 339
7-1	TIME	339
7-2	FORM/STRUCTURE/NOMENCLATURE.....	340
7-2:1	Form.....	340
7-2:2	Structure/Style	342
7-2:3	Nomenclature	344
7-2:3.1	Generally	344
7-2:3.2	Bifurcation.....	346
7-2:3.3	Attorneys’ Fees and Costs/Expenses; Interest.....	347
7-3	SCOPE; REMEDIES	348
7-4	SIGNING AND FILING/NOTICE	352
7-5	“APPEALS” OF ARBITRAL AWARDS.....	353
7-5:1	AAA/ICDR Appellate Arbitration	354
7-5:2	Appeals in CPR, JAMS, and Other Matters	356
7-6	CONSENT AWARDS.....	358
 Chapter 8: After the Award.....		 359
8-1	INTRODUCTION.....	359
8-2	POST-AWARD MOTIONS IN THE ARBITRATION AND <i>FUNCTUS OFFICIO</i>	359
8-2:1	Modification, Correction, or Clarification	359
8-2:2	Timing and Procedure	364
8-3	MOTIONS IN COURT TO MODIFY, VACATE, OR CONFIRM AN AWARD	364
8-3:1	Introduction	364
8-3:2	Timing and Procedure	365
8-3:2.1	Federal Procedure.....	365
8-3:2.1a	Jurisdiction	365
8-3:2.1b	Papers Required.....	367
8-3:2.1c	Confirm	367

Table of Contents

	8-3:2.1d	Modify, Vacate, or Correct.....	368
	8-3:2.1e	Sanctions	369
	8-3:2.2	New Jersey State Procedure	369
	8-3:2.2a	Confirm	370
	8-3:2.2b	Modify, Vacate or Correct; Evidence; Discovery.....	371
8-3:3		Remand/Rehearing	372
8-3:4		Attorneys’ Fees on Motions; Post-Award Interest.....	374
8-3:5		Appeals.....	375
8-3:6		Enforcing the Judgment on a Confirmed Award; Effect	376
8-3:7		Legal Standards Generally.....	377
8-3:8		Review of an Arbitrator’s Application of the Law	382
8-3:9		Manifest Disregard in the Federal Circuits	388
8-3:10		Other Statutory Standards.....	390
8-3:11		New Jersey Expanded Review.....	390
8-4		REPRESENTATION OF A PARTY AFTER ARBITRATION	391
8-5		PRESERVING CONFIDENCES	392
8-6		DISPOSITION OF FILES AND RECORDS	392
		Chapter 9: Other Arbitration Regimes	393
9-1		NON-BINDING ARBITRATION.....	393
9-2		STATE COURT-ANNEXED ARBITRATION PROGRAM	394
9-3		FEDERAL COURT-ANNEXED ARBITRATION PROGRAM	398
9-4		FAMILY LAW ARBITRATION	399
9-5		PROBATE, FORECLOSURE, PARTITION VS. SUBDIVISION, VARIANCE OR OTHER SPECIALIZED ARBITRATION	402
9-6		MEDIATION-ARBITRATION (MED-ARB) OR ARBITRATION-MEDIATION (ARB-MED)	402
9-7		HIGH-LOW ARBITRATION.....	406
9-8		“BASEBALL” ARBITRATION	408
9-9		DELAWARE RAPID ARBITRATION	408
9-10		NEW JERSEY INTERNATIONAL ARBITRATION, MEDIATION, AND CONCILIATION ACT	409
		Appendix 1: American Arbitration Association Commercial Arbitration Rules and Mediation Procedures.....	411

Table of Contents

**Appendix 2: American Arbitration Association Supplementary
Rules for Class Arbitrations..... 459**

Appendix 3: AAA/ICDR Arbitration Rules 468

**Appendix 4: AAA Code for Ethics for Arbitrators
in Commercial Disputes..... 509**

Appendix 5: Federal Arbitration Act, 9 U.S.C. §§ 1-16 527

**Appendix 6: Revised New Jersey Arbitration Act,
N.J.S.A. 2A:23B-1 to 36..... 535**

**Appendix 7: Summaries of New Jersey Arbitration
Cases 2006-2021 557**

Appendix 8: Recent Case Law Index 2017-2021 792

Table of Cases..... 841

Table of Statutes and Rules 909

Index 919

