

Table of Contents

Chapter 1: Overview of Arbitration in the Dispute Resolution Process	1
1-1 HISTORY	1
1-2 ARBITRATION AND ARBITRATOR DEFINED	4
1-2:1 Arbitration	4
1-2:2 Arbitrator	6
1-3 BENEFITS OF ARBITRATION	8
1-4 STATUTORY AND COURT RULES-BASED ARBITRATION; BANKRUPTCY; LIMITATIONS	14
1-4:1 Statutory Mandates	14
1-4:2 Court Rules Mandates	16
1-4:3 Bankruptcy	17
1-4:4 Limitations	18
1-5 CONTRACTUAL ARBITRATION	19
1-5a “A Written Provision...or an Agreement in Writing”	19
1-5b “In a Record”	21
1-5c Other Issues	23
1-5:1 The Principal Authorizing Statutes	24
1-5:1.1 Federal Arbitration Act	24
1-5:1.2 New Jersey Arbitration Acts	28
1-5:1.3 Choice of Law Issues; Alternative Law Designations	30
1-5:1.3a Choice of Law	30
1-5:1.3b Alternative Designations	34
1-5:1.3c A Word of Caution	35
1-5:2 Contracts in Which Arbitration is Permitted	36
1-5:3 Contract Formation Elements	46
1-5:3.1 Generally	46
1-5:3.2 Means of Indicating Assent	56
1-5:3.2a Capacity; Authority; Infancy/ Minors	61
1-5:3.3 Failures in Indicating Assent	63
1-5:4 Terms To Be Included in Arbitration Provisions	65

Table of Contents

1-5:4.1	Location of Clause	66
1-5:4.1a	Notice	67
1-5:4.1b	Multiple Locations or Documents/Termination	69
1-5:4.1c	Adoption by Reference	71
1-5:4.1d	Internet Issues; Click-Wrap Agreements	72
1-5:4.1e	Carve-Outs	74
1-5:4.1f	Boilerplate	76
1-5:4.2	Scope and Delegation	78
1-5:4.2a	Generally	78
1-5:4.2b	Scope	79
1-5:4.2c	Statutory Claims; Post-Termination; Relationship.....	83
1-5:4.2d	Delegation	84
1-5:4.3	Administered and Non-Administered Arbitration.....	89
1-5:4.3a	Administered	89
1-5:4.3b	Non-Administered	93
1-5:4.3c	No Selection of Provider or Arbitrator: <i>Flanzman</i>	94
1-5:4.4	Choice of Law and Rules	97
1-5:4.4a	Applicable Law	97
1-5:4.4b	Forum Rules	99
1-5:4.5	Parties To Be Bound	101
1-5:4.6	Pre-Arbitration Mediation; Non-Binding Arbitration.....	104
1-5:4.7	Arbitrator Number, Selection, and Qualifications.....	105
1-5:4.8	Confidentiality, Timing, Discovery, Hearings, Class/Mass Actions, Remedies, Notice and Location	106
1-5:4.8a	Confidentiality	107
1-5:4.8b	Discovery	108
1-5:4.8c	Hearings; Motions; Witnesses ...	109
1-5:4.8d	Relief Permitted; Legal Errors; Limitations	110
1-5:4.8e	Notice; Service	111
1-5:4.8f	Location or Site/Seat of the Arbitration/Hearings	112
1-5:4.8g	Class/Mass Actions.....	113

	1-5:4.9 Allocation/Shifting of Fees and Costs.....	114
	1-5:4.9a Administrative and Arbitrator’s Fees and Costs.....	114
	1-5:4.9b Attorneys’ Fees and Costs.....	115
	1-5:4.10 Award (<i>e.g.</i> , Form and Remedies; Interest)	116
	1-5:4.11 Appeals.....	117
1-6	GENERATIVE AI.....	117
1-7	ARBITRATE, BUT FOSTER SETTLEMENTS	117

Chapter 2: Commencing the Arbitration..... 119

2-1	INTRODUCTION: JOINT SUBMISSION; DEMAND; MOTION TO COMPEL OR STAY	119
	2-1:1 The Demand for Arbitration	119
	2-1:1.1 Generally	119
	2-1:1.2 Notice/Service; Statute of Limitations	122
	2-1:2 Motion to Compel Arbitration and/or Stay/Dismiss Litigation or Arbitration	123
	2-1:2.1 Generally	123
	2-1:2.1a Severance: Claims, Parties, or Terms.....	128
	2-1:2.2 State Court Procedure.....	129
	2-1:2.3 Federal Court Procedure.....	132
	2-1:3 Motion to Stay/Enjoin Arbitration/Arbitrator.....	135
	2-1:4 Appeals/Mandamus.....	136
	2-1:4.1 State Court Appeal	136
	2-1:4.2 Federal Court Appeal/Mandamus	137
2-2	WHO MAY REPRESENT A PARTY?.....	139
	2-2:1 Generally: Pro Se Representation.....	139
	2-2:2 Unauthorized Practice of Law; Entities.....	139
	2-2:3 Disqualification: Conflicts of Interest	141
2-3	CONSIDERATIONS REGARDING THE ARBITRATOR	142
	2-3:1 Qualifications; Experience; Diversity; Availability	142
	2-3:1a Qualifications; Experience	143
	2-3:1b Diversity	143
	2-3:1c Availability.....	143
	2-3:1d Replacement; Other	144
	2-3:2 The Number of Arbitrators.....	145
	2-3:3 The Arbitrator Is Usually a “Neutral”; Immunity; Practice of Law	146
	2-3:4 Disclosure: Duties of Arbitrators and Parties	147

Table of Contents

2-3:5	Non-Neutral (Canon X) Arbitrators	150
2-3:6	Continuing Duty To Disclose	151
2-3:7	Removal.....	153
2-3:8	Arbitrator Billing.....	153
2-4	WHO DECIDES WHAT?.....	154
2-4:1	Severability	154
2-4:1a	FAA Section 1 Exemption	161
2-4:2	Delegation	162
2-4:2.1	Generally	162
2-4:2.2	Specific Language and Clause Structure.....	163
2-4:2.3	Rules-Based Delegation	166
2-4:2.4	Delegation in Non-Administered Cases....	169
2-4:2.5	Multiple Documents	170
2-4:3	Conditions Precedent.....	172
2-4:4	Strategic Considerations	174
2-5	ISSUES REGARDING JURISDICTION/ ARBITRABILITY/AMBIGUITY	179
2-5:1	The Authority to Arbitrate	179
2-5:1a	Consideration	180
2-5:1b	Notice and Mutual Assent; Authority; Signatures	181
2-5:2	Required Additions to Contracts Affecting Some Statutory or Constitutional Rights in New Jersey	184
2-5:3	Unconscionability	191
2-5:4	Waiver; Late Applications After or During Litigation; Superseding Agreements	194
2-5:4a	Federal Waiver Standard: <i>Morgan</i>	194
2-5:4b	State Waiver Standard: <i>Cole</i>	196
2-5:4c	Examples of Waiver Conduct	196
2-5:4d	Arbitration as Waiver or Estoppel	198
2-5:4e	Failing to Pay Fees; Superseding Agreement; Other	199
2-5:4f	Who Decides?	200
2-5:5	Non-Signatories; Estoppel; Bifurcation	201
2-6	GOVERNING LAW AND PREEMPTION; CLASS ACTIONS	207
2-6:1	Governing Law	207
2-6:2	Class-Action Waivers, Adoption, and Preemption....	212
2-6:2.1	The Case Law	212
2-6:2.1a	Generally	212

Table of Contents

	2-6:2.1b	Designating Class-Action Arbitration.....	217
	2-6:2.1c	Class-Action Waivers Not in Arbitration	220
	2-6:2.2	The AAA Rules: Class Actions and Mass Arbitration	221
	2-6:2.2a	Class Actions	221
	2-6:2.2b	Supplementary Rules for Mass Arbitration	222
2-7		CONSOLIDATED ARBITRATIONS; JOINDER	222
		Chapter 3: Before the Hearing	225
3-1		PRE-HEARING CONSIDERATIONS	225
	3-1:1	Emergent/Injunctive Relief; Jurisdiction and Arbitrability.....	225
	3-1:1.1	Generally	225
	3-1:1.2	Court Enforcement	228
	3-1:1.3	Jurisdiction and Arbitrability Orders	230
	3-1:2	Answer and Counterclaims/Cross-Claims/ Third-Party Claims; Amendments	230
	3-1:3	Pre-Hearing Conferences	231
	3-1:3.1	Checklist for a Case Management & Scheduling Order	237
	3-1:4	Pre-Hearing Motion Practice.....	243
	3-1:5	Discovery.....	246
	3-1:5.1	In General.....	246
	3-1:5.2	Document Exchanges	251
	3-1:5.2a	In General.....	251
	3-1:5.2b	Documents from Non-Parties....	251
	3-1:5.3	Litigation Holds	254
	3-1:5.4	E-Discovery	254
	3-1:5.5	Privilege Claims	256
	3-1:5.6	Depositions.....	258
	3-1:5.7	Experts: Reports, Depositions, and Testimony	260
	3-1:5.8	Non-Party Summons/Subpoenas	262
	3-1:5.8a	Subpoenas to Non-Party Witnesses	263
	3-1:5.8a1	Federal (FAA)	263
	3-1:5.8a2	New Jersey (NJRUA)	265

Table of Contents

	3-1:5.8a3	Generally; Privilege; Immunity	265
	3-1:5.8b	New York Model Summons Annotated Study.....	266
	3-1:5.8c	Costs of Non-Party Subpoenas	271
3-2	ADJOURNMENTS.....		272
3-3	OPEN OR CLOSED PROCEEDINGS— CONFIDENTIALITY.....		275
3-4	MOTIONS <i>IN LIMINE</i>		277
3-5	DISPOSITIVE MOTIONS		279
3-6	INTERIM RELIEF AND AWARDS		280
3-7	APPLICATION TO ENJOIN SUCCESSIVE ARBITRATION OR LITIGATION		281
3-8	BANKRUPTCY		282
3-9	FINAL PRE-HEARING CONFERENCE		283
Chapter 4: Evidence Law Considerations			285
4-1	INTRODUCTION TO EVIDENCE LAW IN ARBITRATION		285
	4-1:1	The Arbitrator’s Mindset Concerning Evidence Law.....	285
	4-1:2	Preliminary Findings	286
	4-1:3	Decision-Making.....	287
4-2	THE NEW JERSEY OR FEDERAL ANNOTATED RULES OF EVIDENCE.....		288
4-3	SOURCES OF EVIDENCE LAW		288
4-4	WHAT IS “EVIDENCE”?		289
	4-4:1	Traditional “Evidence”	289
	4-4:2	Other “Evidence”	289
Chapter 5: Selected Evidence Provisions			291
5-1	NOTICE OF LAW AND FACTS		291
5-2	PRESUMPTIONS		292
5-3	RELEVANT EVIDENCE AND ITS EXCLUSION.....		293
5-4	CHARACTER EVIDENCE.....		294
5-5	HABIT, ROUTINE PRACTICE, AND CUSTOM		295
5-6	REMEDIAL MEASURES, SETTLEMENT OFFERS, PLEAS, AND INSURANCE		296
5-7	PRIVILEGES		297
	5-7:1	Self-Critical Analysis Privilege.....	297

Table of Contents

5-7:2	Attorney Work Product Privilege.....	298
5-7:3	Attorney-Client Privilege.....	299
5-7:4	Settlement/Mediation; Conflict-of-Laws.....	300
5-7:5	Other Privileges.....	300
	5-7:5a Litigation Privilege.....	301
5-7:6	How to Treat Stricken Evidence That Has Already Been Heard.....	301
5-8	COMPETENCY OF WITNESSES TO TESTIFY—OATHS AND INTERPRETERS.....	302
5-9	ENHANCEMENTS OF OR ATTACKS ON CREDIBILITY.....	304
5-10	REFRESHING RECOLLECTION.....	306
5-11	PRIOR STATEMENT OF A WITNESS.....	306
5-12	SEQUESTRATION OF WITNESSES.....	307
5-13	OPINION AND EXPERT TESTIMONY.....	308
	5-13:1 Lay Opinion.....	308
	5-13:2 Expert Opinion Testimony.....	309
	5-13:3 Independent Experts.....	313
5-14	HEARSAY AND ITS EXCEPTIONS.....	313
	5-14:1 In General.....	313
	5-14:2 Federal vs. New Jersey Classifications.....	314
	5-14:2.1 Prior Inconsistent Statement of a Witness.....	314
	5-14:2.2 Admission of a Party.....	314
	5-14:3 Exceptions Where the Witness Is Available.....	315
	5-14:3.1 Present Sense Impression.....	315
	5-14:3.2 Excited Utterances.....	316
	5-14:3.3 State of Mind.....	316
	5-14:3.4 Statement for Purposes of Medical Diagnosis or Treatment.....	316
	5-14:3.5 Recorded Recollection.....	317
	5-14:3.6 Business and Official Records.....	317
	5-14:3.7 Learned Treatises.....	319
	5-14:3.8 Statement Against Interest.....	319
	5-14:3.9 Other Exceptions When Witness Is Available.....	320
	5-14:4 Exceptions When the Witness is Unavailable.....	321
	5-14:4.1 What Is “Unavailable?”.....	321
	5-14:4.2 Prior Testimony of a Witness.....	321
	5-14:4.3 Dying Declaration.....	322
	5-14:4.4 Statement Against Interest.....	322

Table of Contents

5-14:4.5	Trustworthy Statements by Deceased Declarants	322
5-14:4.6	Other Miscellaneous Exceptions	323
5-14:5	Use and Scope of Admissible Hearsay	324
5-14:5.1	Included Hearsay	324
5-14:5.2	Included Expert Opinion	324
5-14:5.3	Attack on Declarant’s Credibility	324
5-15	AUTHENTICATION AND IDENTIFICATION	325
5-16	CONTENTS OF WRITINGS AND PHOTOGRAPHS	326
5-17	RULE OF COMPLETENESS	326
5-18	RELAXATION OF EVIDENCE RULES	327

Chapter 6: The Hearing 329

6-1	THE ARBITRATOR AND COUNSEL ARE PARTS OF A SEARCH FOR THE TRUTH	329
6-1:1	The Arbitrator’s Role in the Case	329
6-1:2	The Arbitrator’s Direct Participation	332
6-1:2.1	Questioning of Witnesses	332
6-1:2.2	Witnesses Called by the Arbitrator	335
6-1:2.2a	Expert Witnesses	336
6-1:2.2b	Fact Witnesses	338
6-1:2.2c	The Arbitrator’s Research of Facts and Law	339
6-2	THE ARBITRATOR’S CONTROL OF AN ADVERSARY HEARING	340
6-2:1	General Control by the Arbitrator	340
6-2:2	Analysis of the Elements of Testimony	343
6-2:3	Cross-Examination—Its Purpose and Scope	346
6-2:4	Objections to Evidence	347
6-2:4.1	Leading Questions—Discouraged But Permitted	347
6-2:4.1a	Definition of “Leading”	347
6-2:4.1b	Leading on Cross-Examination	349
6-2:4.1c	Permissive Leading on Direct Examination	349
6-2:4.1d	Sanctions for Violations	350
6-2:4.2	Questions Calling for Narrative Answers (General Questions)	351
6-2:4.3	Question Assuming a Fact Not in Evidence	352
6-2:4.4	Compound Question	352

Table of Contents

	6-2:4.5	Ambiguous/Unintelligible Questions	352
	6-2:4.6	Asked and Answered Questions (Badgering a Witness).....	353
	6-2:4.7	Intimidating or Abusing the Witness	353
	6-2:4.8	Argumentative Questions.....	354
	6-2:4.9	Speculative Questions (Those That Call for the Witness to Speculate)	354
	6-2:4.10	Unresponsive Answers.....	354
	6-2:5	Handling Coaching (Speaking) Objections	355
	6-2:6	Replacing the Arbitrator; Removal	355
6-3		OTHER HEARING ROOM PROBLEMS	357
	6-3:1	Extraneous Influences; Threats	357
	6-3:2	Sleeping, Talkative, or Inattentive Attendees	357
	6-3:3	The Tired Arbitrator or Counsel; Objections.....	358
	6-3:4	Demeanor of Witnesses; Other Credibility Indicia ...	358
	6-3:5	Disruptive Behavior	359
	6-3:6	Sidebar or Arbitrators' Conferences	359
	6-3:7	Control of Dress.....	360
6-4		ADDITIONAL INFORMATION AND ADVICE	361
	6-4:1	How to “Disregard” Stricken Material	361
	6-4:2	Burden of Proof	362
	6-4:3	The Record	362
	6-4:3.1	Transcripts.....	362
	6-4:3.2	The Arbitrator’s Personal Notes	364
	6-4:4	The Arbitrator’s Legal and Factual Rulings.....	365
	6-4:5	Adjournments and Extensions; Dismissal.....	367
	6-4:6	Defaults	367
	6-4:7	Sanctions, Fees, and Costs—Proportionate Relief ...	369
	6-4:7.1	Costs and Remedies for Nonpayment	370
	6-4:7.1a	Costs.....	370
	6-4:7.1b	Failure to Pre-Pay Arbitration Fees.....	371
	6-4:7.2	Attorneys’ Fees.....	373
	6-4:7.3	Punitive and Multiple Damages	377
	6-4:7.4	Interest	378
	6-4:8	Courtesy to All	379
	6-4:9	An Arbitrator Is Appointed, Not Anointed.....	380
	6-4:9.1	Prepare for Each Session and Keep an Open Mind	380
	6-4:9.2	Do Not Forget Common Sense.....	381
	6-4:9.3	Do Not Be Afraid To Bend and To Be “Human”	381

Table of Contents

6-5	PHONE OR VIDEO HEARINGS	381
6-6	COUNSEL'S PREPARATION IS PARAMOUNT	382
6-7	PERMIT THE PARTIES TO PRESENT THE CASE IN FULL; REBUTTAL; CONCLUDING THE TESTIMONY/EVIDENCE AND HEARING.....	382
6-8	RE-OPENING THE HEARING	386
Chapter 7: The Award.....		387
7-1	TIME	387
7-2	FORM; STRUCTURE; NOMENCLATURE.....	388
7-2:1	Form.....	388
7-2:2	Structure; Style	390
7-2:3	Nomenclature	392
7-2:3.1	Generally	392
7-2:3.2	Bifurcation.....	395
7-2:3.3	Attorneys' Fees and Costs/Expenses; Interest.....	395
7-3	SCOPE; REMEDIES	397
7-4	SIGNING AND FILING/NOTICE	401
7-5	"APPEALS" OF ARBITRAL AWARDS.....	402
7-5:1	AAA/ICDR Appellate Arbitration	403
7-5:2	Appeals in CPR, JAMS, and Other Matters	405
7-6	CONSENT AWARDS.....	407
Chapter 8: After the Award.....		409
8-1	INTRODUCTION.....	409
8-2	POST-AWARD MOTIONS IN THE ARBITRATION AND <i>FUNCTUS OFFICIO</i>	409
8-2:1	Modification, Correction, or Clarification	409
8-2:2	Timing and Procedure	414
8-3	MOTIONS IN COURT TO MODIFY, VACATE, OR CONFIRM AN AWARD	415
8-3:1	Introduction	415
8-3:1a	A Warning Re: Interlocutory Orders.....	415
8-3:2	Timing and Procedure	416
8-3:2.1	Federal Procedure.....	417
8-3:2.1a	Subject-Matter, Standing, and Personal Jurisdiction.....	417
8-3:2.1b	Papers Required.....	419
8-3:2.1c	Service	420
8-3:2.1d	Confirm	420

Table of Contents

	8-3:2.1e	Modify, Vacate, or Correct.....	421
	8-3:2.1f	Sanctions	422
	8-3:2.2	New Jersey State Procedure	423
	8-3:2.2a	Confirm	424
	8-3:2.2b	Modify, Vacate or Correct; Evidence; Discovery.....	424
	8-3:3	Remand/Rehearing	425
	8-3:4	Attorneys' Fees on Motions; Post-Award Interest.....	428
	8-3:5	Appeals.....	429
	8-3:6	Enforcing the Judgment on a Confirmed Award; Effect	430
	8-3:7	Legal Standards Generally.....	432
	8-3:8	Review of an Arbitrator's Application of the Law ...	439
	8-3:9	Manifest Disregard in the Federal Circuits	446
	8-3:10	Other Statutory Standards.....	448
	8-3:11	New Jersey Expanded Review.....	449
8-4	REPRESENTATION OF A PARTY AFTER ARBITRATION		449
8-5	PRESERVING CONFIDENCES.....		450
8-6	DISPOSITION OF FILES AND RECORDS		450
Chapter 9: Other Arbitration Regimes			453
9-1	NON-BINDING ARBITRATION.....		453
9-2	STATE COURT-ANNEXED ARBITRATION PROGRAM		454
9-3	FEDERAL COURT-ANNEXED ARBITRATION PROGRAM		458
9-4	FAMILY LAW ARBITRATION		459
9-5	PROBATE, FORECLOSURE, PARTITION VS. SUBDIVISION, VARIANCE OR OTHER SPECIALIZED ARBITRATION.....		462
9-6	MEDIATION-ARBITRATION (MED-ARB) OR ARBITRATION-MEDIATION (ARB-MED)		463
9-7	HIGH-LOW ARBITRATION.....		466
9-8	"BASEBALL" ARBITRATION		468
9-9	DELAWARE RAPID ARBITRATION		469
9-10	NEW JERSEY INTERNATIONAL ARBITRATION, MEDIATION, AND CONCILIATION ACT		469
9-11	RELIGIOUS ARBITRATION.....		470

Table of Contents

Appendix 1: American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (2022)..... 471

Appendix 2: AAA Consumer Arbitration Rules (2014)..... 523

Appendix 3: AAA/ICDR Arbitration Rules (2021) 564

Appendix 4: AAA Code of Ethics for Arbitrators in Commercial Disputes..... 605

Appendix 5: Federal Arbitration Act, 9 U.S.C. §§ 1-16 and §§ 401-402 623

Appendix 6: Revised New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to 36..... 632

Appendix 7: Summaries of New Jersey Arbitration Cases 2013-2023 654

Appendix 8: Recent Case Law Index 2020-2023 723

Table of Cases..... 771

Table of Statutes and Rules 849

Index 859