

Table of Contents

Chapter 1: Overview of Arbitration in the Dispute Resolution Process;		
	Drafting Arbitration Agreements	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	15
	1-4:1 Statutory Mandates	15
	1-4:2 Court Rules Mandates	17
	1-4:3 Bankruptcy	18
	1-4:4 Limitations	18
	1-4:5 Statutes of Limitations	19
1-5	CONTRACTUAL ARBITRATION.....	20
	1-5a “A Written Provision . . . or an Agreement in Writing”	20
	1-5b “In a Record”	22
	1-5c Other Issues	24
	1-5:1 Principal Authorizing Statutes	25
	1-5:1.1 Federal Arbitration Act	25
	1-5:1.2 New Jersey Arbitration Acts	30
	1-5:1.3 Choice of Law Issues; Alternative Law Designations	32
	1-5:1.3a Choice of Law	32
	1-5:1.3b Alternative Designations.....	35
	1-5:1.3c A Word of Caution.....	36
	1-5:2 Contracts in Which Arbitration is Permitted	38
	1-5:3 Contract Formation Elements	50
	1-5:3.1 Generally	50
	1-5:3.2 Means of Indicating Assent	61
	1-5:3.2a Capacity; Authority; Infancy/Minors	66
	1-5:3.3 Failures in Indicating Assent.....	69

Table of Contents

1-5:4	Terms To Be Included in Arbitration Provisions.....	70
1-5:4.1	Location of Clause	71
1-5:4.1a	Notice	73
1-5:4.1b	Multiple Locations or Documents/Termination	75
1-5:4.1c	Adoption by Reference	77
1-5:4.1d	Internet Issues; Click-Wrap Agreements.....	78
1-5:4.1e	Carve-Outs	80
1-5:4.1f	Boilerplate	82
1-5:4.2	Scope and Delegation	84
1-5:4.2a	Generally	84
1-5:4.2b	Scope	86
1-5:4.2c	Statutory Claims; Post-Termination; Relationship.....	89
1-5:4.2d	Delegation	91
1-5:4.3	Administered and Non-Administered Arbitration.....	95
1-5:4.3a	Administered	95
1-5:4.3b	Non-Administered.....	100
1-5:4.3c	No Selection of Provider or Arbitrator: <i>Flanzman</i>	102
1-5:4.4	Choice of Law and Rules.....	104
1-5:4.4a	Applicable Law	104
1-5:4.4b	Forum Rules	107
1-5:4.5	Parties to Be Bound	108
1-5:4.6	Pre-Arbitration Mediation; Non-Binding Arbitration.....	112
1-5:4.7	Arbitrator Number, Selection, and Qualifications.....	113
1-5:4.8	Confidentiality, Timing, Discovery, Hearings, Class/Mass Actions, Remedies, Notice and Location	114
1-5:4.8a	Confidentiality	115
1-5:4.8b	Discovery	116
1-5:4.8c	Hearings; Motions; Witnesses ...	116
1-5:4.8d	Relief Permitted; Legal Errors; Limitations	118
1-5:4.8e	Notice; Service	119
1-5:4.8f	Location or Site/Seat of the Arbitration/Hearings	120

	1-5:4.8g	Class/Mass Actions.....	121
	1-5:4.9	Allocation/Shifting of Fees and Costs.....	122
	1-5:4.9a	Administrative and Arbitrator's Fees and Costs.....	122
	1-5:4.9b	Attorneys' Fees and Costs.....	123
	1-5:4.10	Award (<i>e.g.</i> , Form and Remedies; Interest)	124
	1-5:4.11	Appeals.....	125
1-6	GENERATIVE AI.....		126
1-7	ARBITRATE, BUT FOSTER SETTLEMENTS		126
Chapter 2: Commencing the Arbitration.....			129
2-1	INTRODUCTION: JOINT SUBMISSION; DEMAND; MOTION TO COMPEL OR STAY		129
2-1:1	Demand for Arbitration		129
	2-1:1.1	Generally	129
	2-1:1.2	Notice/Service; Statute of Limitations	132
2-1:2	Petition or Motion to Compel Arbitration and/or Stay/Dismiss Litigation or Arbitration		133
	2-1:2.1	Generally	133
	2-1:2.1a	Severance: Claims, Parties, or Terms.....	140
	2-1:2.2	State Court Procedure.....	142
	2-1:2.3	Federal Court Procedure.....	145
2-1:3	Motion to Stay/Enjoin Arbitration/Arbitrator.....		148
2-1:4	Appeals/Mandamus.....		150
	2-1:4.1	State Court Appeal	150
	2-1:4.2	Federal Court Appeal/Mandamus	151
2-1:5	Sanctions		153
2-2	WHO MAY REPRESENT A PARTY?.....		153
2-2:1	Generally: <i>Pro Se</i> Representation		153
2-2:2	Unauthorized Practice of Law; Entities.....		154
2-2:3	Disqualification: Conflicts of Interest		156
2-3	CONSIDERATIONS REGARDING THE ARBITRATOR		157
2-3:1	Qualifications; Experience; Diversity; Availability		157
	2-3:1a	Qualifications; Experience	157
	2-3:1b	Diversity	158
	2-3:1c	Availability.....	158
	2-3:1d	Replacement; Other	159
2-3:2	Number of Arbitrators		160
	2-3:2a	Considerations.....	160

Table of Contents

	2-3:2b	Process for Selecting More than One Arbitrator	161
	2-3:3	The Arbitrator Is Usually a “Neutral”; Immunity; Practice of Law	161
	2-3:4	Disclosure: Duties of Arbitrators and Parties	163
	2-3:5	Non-Neutral (Canon X) Arbitrators	166
	2-3:6	Continuing Duty to Disclose	167
	2-3:7	Removal.....	168
	2-3:8	Arbitrator Billing.....	169
2-4		WHO DECIDES WHAT?.....	170
	2-4:1	Severability	170
	2-4:1a	FAA Section 1 Exemption	177
	2-4:2	Delegation	178
	2-4:2.1	Generally	178
	2-4:2.2	Specific Language and Clause Structure.....	180
	2-4:2.3	Rules-Based Delegation	183
	2-4:2.4	Delegation in Non-Administered Cases....	186
	2-4:2.5	Multiple Documents	187
	2-4:3	Conditions Precedent.....	189
	2-4:4	Strategic Considerations	191
2-5		ISSUES REGARDING JURISDICTION/ ARBITRABILITY/AMBIGUITY	197
	2-5:1	The Authority to Arbitrate	197
	2-5:1a	Consideration	198
	2-5:1b	Notice and Mutual Assent; Authority; Signatures	199
	2-5:2	Required Additions to Contracts Affecting Some Statutory or Constitutional Rights in New Jersey.....	202
	2-5:3	Unconscionability	209
	2-5:4	Waiver; Late Applications After or During Litigation; Superseding Agreements	212
	2-5:4a	Federal Waiver Standard: <i>Morgan</i>	212
	2-5:4b	State Waiver Standard: <i>Cole</i>	215
	2-5:4c	Examples of Waiver Conduct	215
	2-5:4d	Arbitration as Waiver or Estoppel	217
	2-5:4e	Failing to Pay Fees; Superseding Agreement; Other	218
	2-5:4f	Who Decides?	219
	2-5:5	Non-Signatories; Estoppel; Bifurcation	220

2-6	GOVERNING LAW AND PREEMPTION; CLASS ACTIONS	227
2-6:1	Governing Law	227
2-6:2	Class-Action Waivers, Adoption, and Preemption	232
2-6:2.1	The Case Law	232
2-6:2.1a	Generally	232
2-6:2.1b	Designating Class-Action Arbitration.....	237
2-6:2.1c	Class-Action Waivers Not in Arbitration	240
2-6:2.2	The AAA Rules: Class Actions and Mass Arbitration	241
2-6:2.2a	Class Actions	241
2-6:2.2b	Supplementary Rules for Mass Arbitration	242
2-7	CONSOLIDATED ARBITRATIONS; JOINDER	243
Chapter 3: Before the Hearing		245
3-1	PRE-HEARING CONSIDERATIONS	245
3-1:1	Emergent/Injunctive Relief; Jurisdiction and Arbitrability.....	245
3-1:1.1	Generally	245
3-1:1.2	Court Enforcement	249
3-1:1.3	Jurisdiction and Arbitrability Orders	250
3-1:2	Answer and Counterclaims/Cross-Claims/ Third-Party Claims; Amendments	251
3-1:3	Pre-Hearing Conferences	252
3-1:3.1	Checklist for a Case Management & Scheduling Order	259
3-1:4	Pre-Hearing Motion Practice.....	265
3-1:5	Discovery	268
3-1:5.1	In General.....	268
3-1:5.2	Document Exchanges	273
3-1:5.2a	In General.....	273
3-1:5.2b	Documents from Non-Parties....	274
3-1:5.3	Litigation Holds	276
3-1:5.4	E-Discovery	277
3-1:5.5	Privilege Claims	278
3-1:5.6	Depositions.....	281
3-1:5.7	Experts: Reports, Depositions, and Testimony	283
3-1:5.8	Non-Party Summons/Subpoenas	285

Table of Contents

	3-1:5.8a	Subpoenas to Non-Party Witnesses	286
	3-1:5.8a1	Federal (FAA)	286
	3-1:5.8a2	New Jersey (NJRUA)	288
	3-1:5.8a3	Generally; Privilege; Immunity	288
	3-1:5.8b	New York Model Summons Annotated Study	289
	3-1:5.8c	Costs of Non-Party Subpoenas	294
3-2	ADJOURNMENTS		295
3-3	OPEN OR CLOSED PROCEEDINGS— CONFIDENTIALITY		298
3-4	MOTIONS <i>IN LIMINE</i>		300
3-5	DISPOSITIVE MOTIONS		302
3-6	INTERIM RELIEF AND AWARDS		303
3-7	APPLICATION TO ENJOIN SUCCESSIVE ARBITRATION OR LITIGATION		304
3-8	BANKRUPTCY		305
3-9	FINAL PRE-HEARING CONFERENCE		306
Chapter 4: Evidence Law Considerations			309
4-1	INTRODUCTION TO EVIDENCE LAW IN ARBITRATION		309
	4-1:1	The Arbitrator’s Mindset Concerning Evidence Law	309
	4-1:2	Preliminary Findings	310
	4-1:3	Decision-Making	311
4-2	THE NEW JERSEY OR FEDERAL ANNOTATED RULES OF EVIDENCE		312
4-3	SOURCES OF EVIDENCE LAW		313
4-4	WHAT IS “EVIDENCE”?		313
	4-4:1	Traditional “Evidence”	313
	4-4:2	Other “Evidence”	314
Chapter 5: Selected Evidence Provisions			315
5-1	NOTICE OF LAW AND FACTS		315
5-2	PRESUMPTIONS		316
5-3	RELEVANT EVIDENCE AND ITS EXCLUSION		317
5-4	CHARACTER EVIDENCE		319

Table of Contents

5-5	HABIT, ROUTINE PRACTICE, AND CUSTOM	320
5-6	REMEDIAL MEASURES, SETTLEMENT OFFERS, PLEAS, AND INSURANCE	320
5-7	PRIVILEGES	321
5-7:1	Self-Critical Analysis Privilege	322
5-7:2	Attorney Work Product Privilege	322
5-7:3	Attorney-Client Privilege	324
5-7:4	Settlement/Mediation; Conflict-of-Laws	325
5-7:5	Other Privileges	325
5-7:5a	Litigation Privilege	326
5-7:6	How to Treat Stricken Evidence That Has Already Been Heard	326
5-8	COMPETENCY OF WITNESSES TO TESTIFY—OATHS AND INTERPRETERS	327
5-9	ENHANCEMENTS OF OR ATTACKS ON CREDIBILITY	329
5-10	REFRESHING RECOLLECTION	331
5-11	PRIOR STATEMENT OF A WITNESS	331
5-12	SEQUESTRATION OF WITNESSES	332
5-13	OPINION AND EXPERT TESTIMONY	333
5-13:1	Lay Opinion	333
5-13:2	Expert Opinion Testimony	334
5-13:3	Independent Experts	338
5-14	HEARSAY AND ITS EXCEPTIONS	338
5-14:1	In General	338
5-14:2	Federal vs. New Jersey Classifications	339
5-14:2.1	Prior Inconsistent Statement of a Witness	339
5-14:2.2	Admission of a Party	339
5-14:3	Exceptions Where the Witness Is Available	340
5-14:3.1	Present Sense Impression	340
5-14:3.2	Excited Utterances	341
5-14:3.3	State of Mind	341
5-14:3.4	Statement for Purposes of Medical Diagnosis or Treatment	341
5-14:3.5	Recorded Recollection	342
5-14:3.6	Business and Official Records	342
5-14:3.7	Learned Treatises	344
5-14:3.8	Statement Against Interest	344
5-14:3.9	Other Exceptions When Witness Is Available	345
5-14:4	Exceptions When the Witness is Unavailable	346

Table of Contents

5-14:4.1	What Is “Unavailable?”	346
5-14:4.2	Prior Testimony of a Witness.....	346
5-14:4.3	Dying Declaration	347
5-14:4.4	Statement Against Interest.....	347
5-14:4.5	Trustworthy Statements by Deceased Declarants	347
5-14:4.6	Other Miscellaneous Exceptions	348
5-14:5	Use and Scope of Admissible Hearsay.....	349
5-14:5.1	Included Hearsay	349
5-14:5.2	Included Expert Opinion	349
5-14:5.3	Attack on Declarant’s Credibility	349
5-15	AUTHENTICATION AND IDENTIFICATION	350
5-16	CONTENTS OF WRITINGS AND PHOTOGRAPHS	351
5-17	RULE OF COMPLETENESS	352
5-18	RELAXATION OF EVIDENCE RULES.....	352
Chapter 6: The Hearing		353
6-1	THE ARBITRATOR AND COUNSEL ARE PARTS OF A SEARCH FOR THE TRUTH	353
6-1:1	The Arbitrator’s Role in the Case.....	353
6-1:2	The Arbitrator’s Direct Participation	357
6-1:2.1	Questioning of Witnesses.....	357
6-1:2.2	Witnesses Called by the Arbitrator	360
6-1:2.2a	Expert Witnesses.....	360
6-1:2.2b	Fact Witnesses	362
6-1:2.2c	The Arbitrator’s Research of Facts and Law.....	363
6-2	THE ARBITRATOR’S CONTROL OF AN ADVERSARY HEARING	364
6-2:1	General Control by the Arbitrator	364
6-2:2	Analysis of the Elements of Testimony.....	367
6-2:3	Cross-Examination—Its Purpose and Scope.....	371
6-2:4	Objections to Evidence	372
6-2:4.1	Leading Questions—Discouraged But Permitted	372
6-2:4.1a	Definition of “Leading”	372
6-2:4.1b	Leading on Cross-Examination	373
6-2:4.1c	Permissive Leading on Direct Examination	374
6-2:4.1d	Sanctions for Violations.....	375

Table of Contents

	6-2:4.2	Questions Calling for Narrative Answers (General Questions).....	375
	6-2:4.3	Question Assuming a Fact Not in Evidence	376
	6-2:4.4	Compound Question	376
	6-2:4.5	Ambiguous/Unintelligible Questions	377
	6-2:4.6	Asked and Answered Questions (Badgering a Witness).....	377
	6-2:4.7	Intimidating or Abusing the Witness	378
	6-2:4.8	Argumentative Questions.....	378
	6-2:4.9	Speculative Questions (Those That Call for the Witness to Speculate)	378
	6-2:4.10	Unresponsive Answers.....	379
	6-2:5	Handling Coaching (Speaking) Objections	379
	6-2:6	Replacing the Arbitrator; Removal	379
6-3		OTHER HEARING ROOM PROBLEMS.....	382
	6-3:1	Extraneous Influences; Threats	382
	6-3:2	Sleeping, Talkative, or Inattentive Attendees	382
	6-3:3	The Tired Arbitrator or Counsel; Objections.....	383
	6-3:4	Demeanor of Witnesses; Other Credibility Indicia ...	383
	6-3:5	Disruptive Behavior	384
	6-3:6	Sidebar or Arbitrators' Conferences	384
	6-3:7	Control of Dress.....	385
6-4		ADDITIONAL INFORMATION AND ADVICE	386
	6-4:1	How to "Disregard" Stricken Material	386
	6-4:2	Burden of Proof	386
	6-4:3	The Record	387
	6-4:3.1	Transcripts.....	387
	6-4:3.2	The Arbitrator's Personal Notes	389
	6-4:4	The Arbitrator's Legal and Factual Rulings.....	390
	6-4:5	Adjournments and Extensions; Dismissal.....	392
	6-4:6	Defaults	393
	6-4:7	Sanctions, Fees, and Costs—Proportionate Relief ...	394
	6-4:7.1	Costs and Remedies for Nonpayment	396
	6-4:7.1a	Costs.....	396
	6-4:7.1b	Failure to Pre-Pay Arbitration Fees.....	396
	6-4:7.2	Attorneys' Fees.....	398
	6-4:7.3	Punitive and Multiple Damages	403
	6-4:7.4	Interest	404
	6-4:8	Courtesy to All	404
	6-4:9	An Arbitrator Is Appointed, Not Anointed.....	406

Table of Contents

6-4:9.1	Prepare for Each Session and Keep an Open Mind	406
6-4:9.2	Do Not Forget Common Sense.....	406
6-4:9.3	Do Not Be Afraid To Bend and To Be “Human”	407
6-5	PHONE OR VIDEO HEARINGS	407
6-6	COUNSEL’S PREPARATION IS PARAMOUNT	408
6-7	PERMIT THE PARTIES TO PRESENT THE CASE IN FULL; REBUTTAL; CONCLUDING THE TESTIMONY/EVIDENCE AND HEARING.....	408
6-8	RE-OPENING THE HEARING	411
Chapter 7: The Award.....		413
7-1	TIME	413
7-2	FORM; STRUCTURE; NOMENCLATURE.....	414
7-2:1	Form.....	414
7-2:2	Structure; Style	417
7-2:3	Nomenclature	419
7-2:3.1	Generally	419
7-2:3.2	Bifurcation.....	421
7-2:3.3	Attorneys’ Fees and Costs/Expenses; Interest.....	422
7-3	SCOPE; REMEDIES; SANCTIONS.....	424
7-3:1	Scope	424
7-3:2	Remedy.....	425
7-3:3	Sanctions	426
7-4	SIGNING AND FILING/NOTICE	429
7-5	“APPEALS” OF ARBITRAL AWARDS.....	430
7-5:1	AAA/ICDR Appellate Arbitration	431
7-5:2	Appeals in CPR, JAMS, and Other Matters	433
7-6	CONSENT AWARDS.....	435
Chapter 8: After the Award.....		437
8-1	INTRODUCTION.....	437
8-2	POST-AWARD MOTIONS IN THE ARBITRATION AND <i>FUNCTUS OFFICIO</i>	437
8-2:1	Modification, Correction, or Clarification	437
8-2:2	Timing and Procedure	442
8-3	MOTIONS IN COURT TO MODIFY, VACATE, OR CONFIRM AN AWARD	443
8-3:1	Introduction	443
8-3:1a	A Warning Re: Interlocutory Orders.....	443

Table of Contents

8-3:2	Timing and Procedure	445
8-3:2.1	Federal Procedure.....	445
8-3:2.1a	Subject-Matter, Standing, and Personal Jurisdiction	445
8-3:2.1b	Papers Required	450
8-3:2.1c	Service	451
8-3:2.1d	Confirm	452
8-3:2.1e	Modify, Vacate, or Correct.....	453
8-3:2.1f	Sanctions on Post-Award Petitions.....	454
8-3:2.2	New Jersey State Procedure	455
8-3:2.2a	Confirm	456
8-3:2.2b	Modify, Vacate or Correct; Evidence; Discovery.....	457
8-3:3	Remand/Rehearing	458
8-3:4	Attorneys' Fees on Motions; Sanctions; Post-Award Interest	461
8-3:5	Appeals.....	462
8-3:6	Enforcing the Judgment on a Confirmed Award; Effect	463
8-3:7	Legal Standards Generally.....	465
8-3:8	Review of an Arbitrator's Application of the Law	474
8-3:9	Manifest Disregard in the Federal Circuits	481
8-3:10	Other Statutory Standards.....	483
8-3:11	New Jersey Expanded Review	484
8-4	REPRESENTATION OF A PARTY AFTER ARBITRATION	484
8-5	PRESERVING CONFIDENCES	485
8-6	DISPOSITION OF FILES AND RECORDS	485
	Chapter 9: Other Arbitration Regimes	487
9-1	NON-BINDING ARBITRATION.....	487
9-2	STATE COURT-ANNEXED ARBITRATION PROGRAM	488
9-3	FEDERAL COURT-ANNEXED ARBITRATION PROGRAM	493
9-4	FAMILY LAW ARBITRATION	494
9-5	PROBATE, FORECLOSURE, PARTITION VS. SUBDIVISION, VARIANCE OR OTHER SPECIALIZED ARBITRATION.....	497
9-6	MEDIATION-ARBITRATION (MED-ARB) OR ARBITRATION-MEDIATION (ARB-MED)	498

Table of Contents

9-6:1 Stepped Clauses..... 498

9-6:2 Mediation-Arbitration 499

9-6:3 Arbitration-Mediation 502

9-7 HIGH-LOW ARBITRATION..... 503

9-8 “BASEBALL” ARBITRATION 505

9-9 DELAWARE RAPID ARBITRATION 505

9-10 NEW JERSEY INTERNATIONAL ARBITRATION,
MEDIATION, AND CONCILIATION ACT 506

9-11 RELIGIOUS ARBITRATION..... 506

**Appendix 1: American Arbitration Association Commercial
Arbitration Rules and Mediation Procedures (2022)..... 509**

**Appendix 2: AAA Consumer Arbitration Rules and
Mediation Procedures (2025)..... 561**

Appendix 3: AAA/ICDR Arbitration Rules (2021) 599

**Appendix 4: AAA Code of Ethics for Arbitrators
in Commercial Disputes..... 640**

**Appendix 5: Federal Arbitration Act, 9 U.S.C. §§ 1-16
and §§ 401-402..... 658**

**Appendix 6: Revised New Jersey Arbitration Act,
N.J.S.A. 2A:23B-1 to 36..... 667**

**Appendix 7: Summaries of New Jersey Arbitration Cases
2013-Early 2025..... 689**

Table of Cases..... 829

Table of Statutes and Rules 911

Index 921