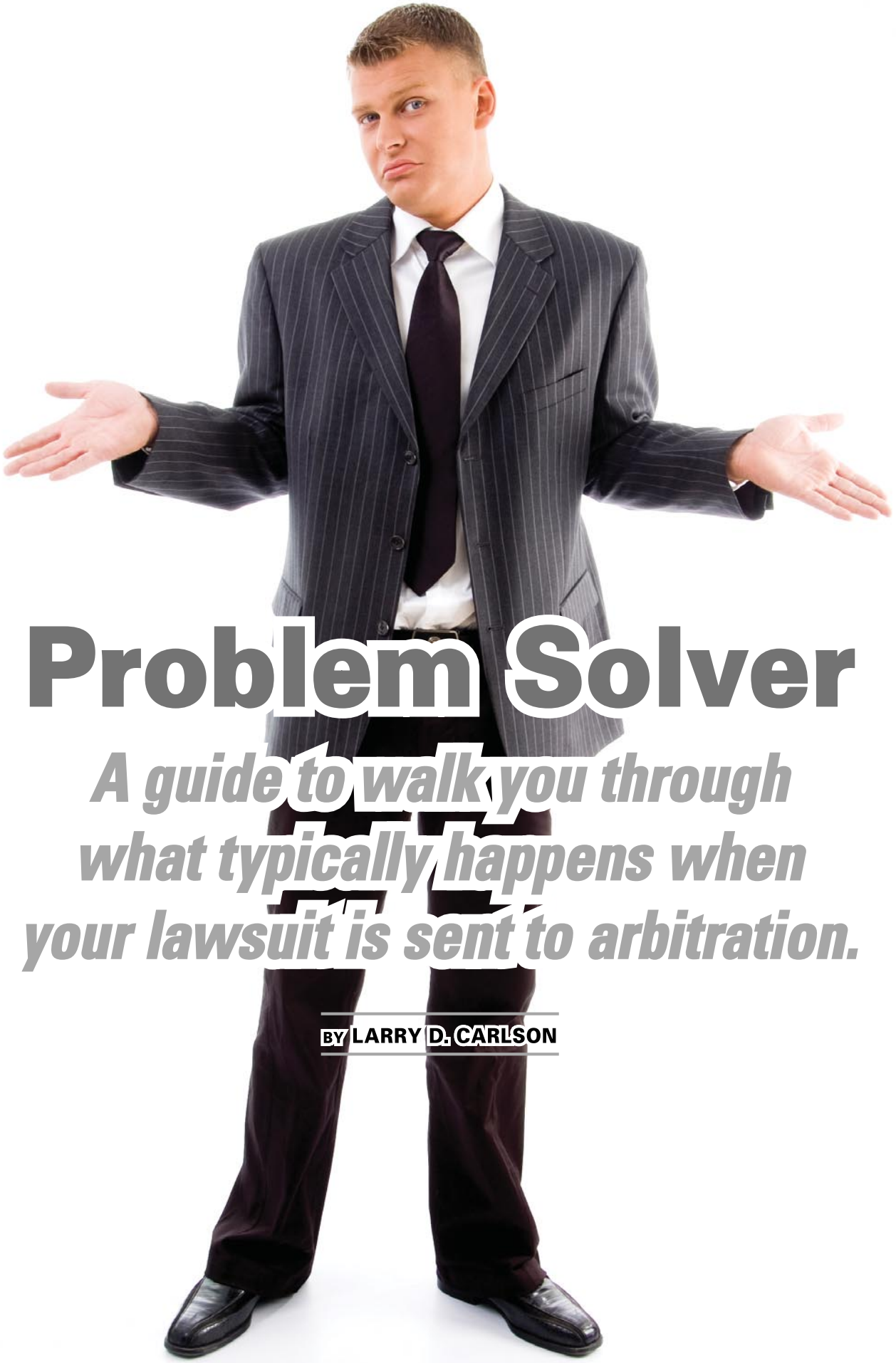

Problem Solver

A guide to walk you through what typically happens when your lawsuit is sent to arbitration.

BY LARRY D. CARLSON

Your client was sued in federal court for millions of dollars on a commercial contracts claim. You found an arbitration provision in one of the relevant contracts and, after consultation with your client, moved to compel arbitration. Over the plaintiff's opposition, the district court judge granted your motion, ordered the claim to arbitration, and stayed the litigation pending a final award in an arbitration proceeding.

Good reasons support your client's preference for arbitration over litigation. With an effective ("muscular" is the current popular term) single arbitrator or three-person arbitration panel, your client's dispute should be resolved efficiently.[1,2,3] And the prevalent myth that arbitrators typically "split the baby," or issue compromise awards, is false.[4]

FIRST STEPS

So, what happens now? The next move belongs to the plaintiff, now called the claimant, who will file a claim (called a demand) with the administering organization noted in the arbitration provision, such as the American Arbitration Association or Judicial Arbitration and Mediation Services. The claim need not have the formality of a federal court complaint or state court petition. Typically, all that is required is a short one-sentence description of the nature of the claim, the names and addresses of the parties, the amount claimed, and the requested location of the hearing.[5]

When you receive the claim, review the arbitration provision again. It will likely select a set of governing rules, such as the AAA Commercial Arbitration Rules[6] or JAMS Comprehensive Arbitration Rules & Procedures. The arbitration provision may select a locale for the proceeding, set forth a procedure for selection of the arbitrator, state whether (and to what extent) discovery will be allowed and whether evidence rules will apply, and will likely provide that the award of the arbitrator or panel is binding.

Unless you are already familiar with them, it is a good idea to read the selected rules from start to finish. Pay particular attention to early deadlines. Under the rules of the AAA and JAMS, the demand for arbitration and any counterclaim may not be changed after appointment of the arbitrator, absent arbitrator consent.[7] Under the AAA rules, an objection to the arbitrability of a claim must be made no later than the answering statement's filing, and a request for a reasoned award must be made in writing before appointment of the arbitrator.[8] While many arbitrators freely reset these early deadlines after appointment, some do not.

SELECTION OF ARBITRATOR(S)

The arbitration provision may say whether there will be one arbitrator or a three-person panel. Under AAA rules, absent agreement on this issue and subject to a financial hardship exception, there will be a three-person panel for claims of $1 million or more and a single arbitrator for claims of less than that amount.[9] Under the JAMS rules, there will be a single arbitrator unless the parties have agreed otherwise.[10]

The arbitration provision may also provide a method for arbitrator selection. Absent agreement on this issue, the selected rules will govern. Under a typical method, the administering organization provides the parties with a slate of candidates from a roster or panel of arbitrators maintained by the organization. The parties strike candidates they deem objectionable and number the remaining candidates based on preference. The organization then selects the arbitrator(s) most preferred by both parties.[11]

After arbitrator selection, under the rules of most administering organizations, the arbitrator must disclose information that might give rise to a justifiable doubt about his or her impartiality, including information about relationships to the parties and counsel.[12] The parties then have an opportunity to object to the selected arbitrator based on the disclosed information.

Arbitrator selection is important. You want a capable arbitrator whose professional background and experience suggest that the arbitrator will be fairly receptive to your claim or defense. You want an arbitrator unburdened by relationships to the opposing party or opposing counsel. You might want an arbitrator with experience in a particular industry or experience with a particular type of technology or type of case (for example, a labor lawyer for an employment case or an intellectual property lawyer for a patent case). Investigate the candidates. Check their websites. Use a search engine. Review their social media profiles. Ask other lawyers and any colleagues who regularly arbitrate if they know of the candidates. Some administering organizations may allow the parties to submit written questions to the candidates or to conduct telephone interviews of the candidates (with counsel for both parties being on the call).

If you learn of an undisclosed relationship between the arbitrator and the opposing party or counsel that creates a question about the arbitrator's impartiality, you may be tempted to withhold that information for possible later use in support of a court action to vacate an adverse award. Resist that temptation. Courts uniformly hold that if a party is aware of undisclosed information that calls into question an arbitrator's fitness to serve and does not object to the arbitrator before the final award, the objection is waived.[13] Some courts have found waiver even with respect to information that a party learned *after*

the award when it is determined that the party could have discovered the information earlier with a reasonable investigation.[14] Accordingly, if the undisclosed information reasonably invites further investigation, investigate immediately. If the undisclosed information furnishes a fair basis to object to the arbitrator, object immediately. The administering organization will likely receive and make a determination on the objection without notice to the arbitrator, so the parties can object without risk of offending the arbitrator.

THE PRELIMINARY HEARING

After arbitrator selection, the administering organization will schedule a preliminary hearing, which usually takes place by telephone. The organization or arbitrator will probably provide an agenda for the hearing,[15] and you may be asked to confer with opposing counsel beforehand. At the preliminary hearing, the arbitrator will want to create a schedule for the entire case, set limits on discovery, create a gating procedure for motions, and deal with housekeeping matters, such as filing and service methods and rules concerning communication with the arbitrator. Be prepared to give a short, persuasive, nonargumentative description of your claim or principal defenses and to explain what discovery you need. The arbitrator will probably want to lock in dates for the final evidentiary hearing, so have calendar information handy for yourself and any client representatives and important witnesses that will need to attend the final hearing. For a medium-sized case, expect the arbitrator to want to set the final evidentiary hearing four to six months from the preliminary hearing.

Consider the possibility of submitting your case to the arbitrator through documents (affidavits, relevant contracts, correspondence, etc.), perhaps followed by a telephone hearing for argument and discussion, as opposed to submission by an in-person hearing with witnesses. Cases best suited for document submission are small-dollar cases in which the arbitrator will not have to make witness credibility determinations. Ordinarily, the arbitrator will allow submission via documents if both parties agree to it, but will provide for an in-person hearing if either or both parties request one.

At the preliminary hearing, the arbitrator may ask the parties what type of award they want.[16] The three most common types of awards are standard, findings of fact and conclusions of law, and reasoned. A standard award is bare bones—it simply announces who wins and, if the award is in favor of a party seeking money damages, how much is awarded. A reasoned award sets forth the bases for the arbitrator's award and will probably entail an additional expense because the arbitrator will want to charge for the time needed to prepare the award. Talk to your client about the form of the award; in the event of an adverse result, your client may want an explanation for the loss.

DOS AND DON'TS FOR THE ENTIRE PROCEEDING

Your behavior before an arbitrator should be guided by the same common sense principles that guide your behavior before a judge. In a jury case, if your relationship with the trial judge sours, you have the protections that a jury will decide the facts and that an adverse result can be appealed. In an arbitration proceeding, you have neither of those protections. Be professional and courteous to opposing counsel. Be on time. Do not interrupt or talk over the arbitrator. Above all else, be honest. Do not misstate legal authority or evidence.

Do not call the arbitrator "Your Honor" unless the arbitrator previously was a judge. Unless—and until—told otherwise, address the arbitrator as "Arbitrator Jones."

Do everything possible to meet all deadlines and to present your case at the time originally selected for the final evidentiary hearing. Most arbitrators are loath to postpone or continue a final hearing setting, absent extraordinary circumstances.

EXCHANGE OF INFORMATION AND THIRD-PARTY DISCOVERY

You likely will be forced to be efficient in the use of discovery. (Party discovery in arbitration is more accurately termed "exchange of information.") Most arbitrators will limit deposition discovery (by the number of deponents or the overall number of hours) and document discovery and may not allow interrogatories and requests for admission.

Obtaining a deposition or document from a third party can be problematic. Although the arbitrator can sign the subpoena, you will have to enlist the assistance of a court to enforce it.

The Federal Arbitration Act provides that "[t]he arbitrators selected . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[17] This language suggests that documents can be obtained from a third party only at the final evidentiary hearing. Federal appeals courts considering this language have reached different conclusions concerning whether (and how) parties to an arbitration proceeding can obtain documents from a third party before the final hearing. The 2nd and 3rd U.S. Circuit Courts of Appeals have held that, under the FAA, documents cannot be obtained from a third party in advance of the final evidentiary hearing.[18] The 8th Circuit, however, reached a different conclusion, reasoning that "implicit in an arbitration panel's power to subpoena relevant docu-

ments for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[19] The 4th Circuit has approved pre-final hearing document production from a third party in cases of "special need or hardship."[20] Some courts have approved a procedure by which the arbitrator convenes a preliminary hearing, to be attended by the arbitrator and parties, before the final hearing, for the sole purpose of having a third party appear and produce documents in response to a subpoena.[21] The 5th Circuit has not spoken on this issue.[22]

If the third party witness is in Texas, consider having a Texas court issue the subpoena and urging the applicability of the Texas Arbitration Act, which expressly authorizes obtaining a document production from a third party before the final hearing.[23]

MOTION PRACTICE

Most arbitrators create a mechanism for limiting motions because extensive motion practice is inconsistent with the efficiency goal of arbitration. A typical motion-gating mechanism might require the parties to confer before allowing the movant to file a short (one- or two-page) letter explaining the proposed motion. The arbitrator can then act on the letter, ask for a short response, set due dates and page limits for any additional briefing, if any, and perhaps set a telephone hearing.

Motions for summary judgment are rarely granted in arbitration. The federal and Texas arbitration acts both provide that an award may be vacated when the arbitrator refuses to hear material evidence,[24] and some arbitrators believe that granting a summary judgment in an arbitration proceeding potentially subjects the award to risk of vacatur under these provisions. AAA Commercial Arbitration Rule R-33 provides that an arbitrator can allow the filing of a dispositive motion and make rulings on the motion only if "the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

THE FINAL EVIDENTIARY HEARING

The arbitrator will likely schedule a telephone hearing two to four weeks before the final evidentiary hearing to discuss the final hearing. He or she will have an agenda for this call, but you should be prepared to ask questions. Will rules of evidence be applied? How should exhibits be organized? Will there be an opportunity to file pre-hearing briefs? Will there be opening statements? Closing arguments? Does the arbitrator prefer to see and hear videotaped depositions played at the hearing or simply to receive highlighted transcripts? Does the arbitrator prefer copies of paper exhibits, or would projecting the document on a screen be helpful? Should proof of attorneys' fees be offered at the hearing or later? For proof of attorneys' fees, does the arbitrator expect testimony, or are redacted billing records sufficient? May witnesses be presented by telephone? What are daily start and stop times?

At the final evidentiary hearing, be efficient and nonrepetitive. Consider agreeing with the other side to a time limit on presentations. Make every effort to complete presentation of the evidence within the number of days allocated for the final evidentiary hearing. If the arbitrator has already said that evidence rules will not be applied, do not make frequent legal objections. Advise the arbitrator as early as possible of any scheduling issues, such as the need to call a witness out of order.

The arbitration provision may say whether rules of evidence will be applied at the final evidentiary hearing. In the absence of such guidance, under the AAA's Commercial Arbitration Rules, "[c]onformity to legal rules of evidence shall not be necessary," but the arbitrator has the power to exclude "cumulative or irrelevant" evidence and must honor legal privileges such as the attorney-client privilege.[25]

At the final evidentiary hearing, be efficient and nonrepetitive. Consider agreeing with the other side to a time limit on presentations. Make every effort to complete presentation of the evidence within the number of days allocated for the final evidentiary hearing. If the arbitrator has already said that evidence rules will not be applied, do not make frequent legal objections. Advise the arbitrator as early as possible of any scheduling issues, such as the need to call a witness out of order. If you are claiming pre-judgment interest, have an interest calculation with citation to the relevant statute or other legal authority. Have highlighted copies of any key cases. Do not be surprised if the arbitrator questions witnesses.

AFTER THE AWARD

Once an award is issued, an arbitrator can amend or modify it only for clerical or computational errors.[26] Do not, therefore, file a motion for rehearing or write the arbitrator a letter asking for reconsideration.

If you lose, you will be tempted to file a court action seeking to vacate the award. Because the grounds for setting aside arbitration awards are exceedingly narrow under both the FAA and the Texas Arbitration Act, most court actions seeking vacature fail. The 7th U.S. Circuit Court of Appeals recently cautioned: "[C]hallenges to commercial arbitration awards bear a high risk of sanctions."[27]

If you are the claimant and obtain an award that grants money damages and the other side does not promptly pay, file an action in court seeking confirmation of the award. A court order or judgment confirming an arbitration award is enforceable in the same manner that any other judgment is enforceable.

CHECKLIST

Here is a checklist for the major events and activities that occur in most arbitration situations:

- Review the arbitration agreement and the applicable arbitration rules. Confirm that any preconditions (such as a requirement for mediation) have been met. Calendar early deadlines.
- Prepare and file your demand for arbitration or answer any counterclaim.
- Practice due diligence when researching potential arbitrator candidates. Object if you learn of information that reasonably calls into question a candidate's impartiality.
- To prepare for the preliminary hearing, go over any agenda provided by the administering organization or arbitrator, consult with opposing counsel if requested to do so, and have calendar information available so that the date(s) for the final evidentiary hearing may be locked in.
- Initiate discovery at the earliest permissible time, particularly with respect to subpoenas that will need to be served on third parties.
- There will usually be a telephone hearing two to four weeks before the final evidentiary hearing to discuss the final hearing. Be prepared to ask questions that will assist you.
- Work with opposing counsel to create a single book for the final evidentiary hearing that contains all claimant and respondent exhibits without duplication.
- If necessary, arrange for a court reporter to report the final hearing and for a technical consultant to oversee electronic presentation of documents and recorded depositions.
- If allowed, prepare and serve a pre-hearing brief.
- Prepare the deposition excerpts you will want to offer as evidence at the final hearing.
- For disputed legal issues, have highlighted copies of cases and statutes at the final hearing. If you are claiming prejudgment interest, have an interest calculation with citation to supporting legal authority.
- Interview your witnesses, then prepare and go over direct examinations together. For the other side's witnesses, outline their depositions, marshal documents relevant to each witness, and prepare cross-examination outlines.
- Prepare your opening statement. Create an initial outline for a closing argument.
- If an award is not paid in a timely manner, move in court to confirm the award. If an award is unfavorable, analyze the provisions of the Federal Arbitration Act, the Texas Arbitration Act, if applicable, the arbitration agreement, and the relevant arbitration rules to determine if you have a realistic basis to challenge the award, such as by an action to vacate. TBJ

NOTES

1. A civil lawsuit can easily take two years or more at the trial court level and take another year or more before final resolution on appeal. By contrast, the AAA found that the median time to final award for moderate-sized arbitration cases (claims between $75,000 and $500,000) was 9.9 months from filing of the demand and just six months from the preliminary hearing. https://apps.adr.org/ecenter/roadmap/index.htm.
2. Civil lawsuits can become bogged down in excessive and expensive pretrial discovery and motion practice. In most arbitration proceedings, the arbitrator will limit deposition and document discovery, may disallow interrogatories and requests for admission altogether, and will take steps to minimize or eliminate motion practice. Because of the absence of a jury in arbitration proceedings, lengthy jury charges, motions in limine, and motions for judgment as a matter of law are entirely unnecessary. These features of arbitration reduce costs as compared to civil litigation.
3. Under both the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Texas Arbitration Act, Tex. Civ. Prac. & Rem. Code, ch. 171, the grounds for setting aside an arbitration award are limited to extraordinary situations such as corruption, fraud, evident partiality, or a refusal to hear material evidence.
4. A study of AAA commercial cases in which awards were issued in 2012 showed that 18 percent of such awards denied the claim outright (strong respondent win) and 52 percent awarded 81 percent or more of the amount sought by the claimant (strong claimant win). In only 5 percent of these cases was the award in the range

of 41 percent to 60 percent of the amount claimed. http://go.adr.org/nosplit. Studies of cases awarded in 2010 and 2005 also showed that most arbitration awards are decisively in favor of one party or the other. http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7Bc5bfac41-5971-406d-bf4b-675e4656c6da%7D_SplittheBaby_2010Data.pdf; http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B401cb4ff-53a1-4178-b26a-57d7d5909012%7D_SplittheBaby_2007Data.pdf.

5. *E.g.*, AAA Commercial Arbitration Rules (hereinafter AAA Rules) R-4(e). The Commercial Arbitration Rules were amended effective Oct. 1, 2013. The old rules continue to apply to cases filed before Oct. 1, 2013.
6. The AAA Commercial Arbitration Rules, which apply to "domestic commercial dispute[s]," are supplemented by a set of Expedited Procedures for cases where no claim exceeds $75,000 and a set of Procedures for Large, Complex Commercial Disputes for cases where any party claims $500,000 or more. *Id.* R-1(b), (c). In addition, the AAA has separate sets of rules for employment, construction, wills and trusts, collective bargaining, and healthcare payor/provider disputes. The AAA's international division, the International Centre for Dispute Resolution, has its own International Dispute Resolution Procedures for international disputes. The AAA recently adopted Optional Appellate Arbitration Rules that, when agreed to by the parties, provides a streamlined procedure for review of awards by an appellate arbitral panel.
7. AAA Rules, *supra* note 5, R-6(b); JAMS Comprehensive Arbitration Rules & Procedures (hereinafter JAMS Rules) R. 10.
8. AAA Rules, *supra* note 5, R-7(c), R-46(b).
9. AAA Procedures for Large, Complex Commercial Disputes L-2(a),(b).
10. JAMS Rules, *supra* note 7, R-7(a).
11. AAA Rules, *supra* note 5, R-12(a),(b); JAMS Rules, *supra* note 7, R. 15(b),(c).
12. *E.g.*, AAA Rules, *supra* note 5, R-17(a).
13. *E.g.*, *Infobilling, Inc. v. Transaction Clearing, LLC*, No. SA-12-CV-01116-DAE, 2013 WL 1501570, at *3 (W.D. Tex. Apr. 10, 2013) (plaintiff waived complaint that arbitrator and defendant's counsel had offices in the same 10-story building when plaintiff learned of that relationship at the arbitration hearing and did not object); *Burlington N. R.R. v. TUCO, Inc.*, 960 S.W.2d 629, 637 n.9 (Tex. 1997) ("[A] party who learns of a conflict before the arbitrator issues his or her decision must promptly object to avoid waiving the complaint."); *Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co.*, 345 S.W.3d 672, 683-84 (Tex. App.—Dallas 2011, pet. denied) (appellants waived complaint that an arbitrator was on the board of directors of a company that had done business with appellees when appellants had "actual knowledge" of this relationship for years before the arbitration and failed to object.). AAA Commercial Arbitration Rule R-17 provides that the duty to disclose applies to parties, as well as to the arbitrator, and states that "[f]ailure on the part of a party . . . to comply with this rule may result in the waiver of the right to object to an arbitrator. . . ."
14. *E.g.*, *Dealer Computer Servs., Inc. v. Michael Motor Co.*, No. 11-20053, 2012 WL 3317809, at *3 n.4 (5th Cir. Aug. 14, 2012) ("Federal case law holds that arbitrating parties have a reasonable duty to investigate information of potential partiality."); *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004) ("[W]e have declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship . . . or could have learned of the relationship 'just as easily before or during the arbitration rather than after it lost its case.'") (citation omitted). In *Mariner Fin. Grp. Inc. v. Bossley*, 79 S.W.3d 30, 33 (Tex. 2002), a five-justice majority of the court declined to decide whether, as a matter of Texas law, parties to an arbitration proceeding have a "duty to discover" facts that might, post-award, furnish a basis to challenge the award. Four concurring justices stated that "[a]n arbitration award should not be vacated for 'evident partiality' based solely on a failure to disclose if the party seeking to vacate the award could reasonably have been expected to know the undisclosed facts." *Id.* at 35-36.
15. A comprehensive preliminary hearing checklist is provided by AAA Preliminary Hearing Procedures P-2.
16. R-46(b) of the AAA Commercial Arbitration Rules provides that the award must be a reasoned award if the parties requested a reasoned award in writing before arbitrator appointment or if "the arbitrator determines that a reasoned award is appropriate." Rule 24(h) of the JAMS Comprehensive Arbitration Rules & Procedures provides that unless the parties have agreed otherwise, "the Award shall . . . contain a concise written statement of the reasons for the Award."
17. 9 U.S.C. § 7.
18. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-17 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407-11 (3d Cir. 2004).
19. *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).
20. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999).
21. *E.g.*, *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 810-11 (N.D. Ill. 2011).
22. In 2010, Chief Judge Fitzwater of the Northern District of Texas sided with the 2nd and 3rd Circuits, holding "that § 7 of the FAA does not authorize arbitrators to compel production of documents from a non-party, unless they are doing so in connection with the non-party's attendance at an arbitration hearing." *Empire Fin. Grp., Inc. v. Penson Fin. Servs., Inc.*, No. 3:09-CV-2155-D, 2010 WL 742579, at *3 (N.D. Tex. Mar. 3, 2010).
23. Tex. Civ. Prac. & Rem. Code § 171.051.
24. 9 U.S.C. § 10(a)(3); Tex. Civ. Prac. & Rem. Code § 171.088(a)(3)(C).
25. AAA Rules, *supra* note 5, R-34(a),(b),(c). The relevant provisions of the JAMS Comprehensive Arbitration Rules & Procedures are similar. JAMS Rules, *supra* note 7, R. 22(d).
26. Under the AAA's Commercial Arbitration Rules, upon request of a party made within 20 days of an award, an arbitrator may "correct any clerical, typographical, or computational errors," but "is not empowered to redetermine the merits of any claim already decided." AAA Rules, *supra* note 5, R-50. The JAMS Comprehensive Arbitration Rules & Procedures similarly allow for correction of "any computational, typographical or other similar error." JAMS Rules, *supra* note 7, R. 24(j).
27. *Johnson Controls, Inc. v. Edman Controls, Inc.*, Nos. 12-2308 & 12-2623, 2013 WL 1098411, at *7 (7th Cir. Mar. 18, 2013).

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