

Cost-Effective Construction Arbitration

By James P. Wiesel



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Over the last few years, arbitration as a form of alternative dispute resolution has come under considerable scrutiny, both within the construction industry and beyond. Several leading commentators have pointed out the proliferation of litigation tactics and procedures in arbitration, which can turn arbitration into a new form of litigation.¹ These commentators have raised the question

whether arbitration, especially of larger disputes, offers any real cost advantage over litigation. The construction industry professionals responsible for revisions to the standard form construction contracts have eliminated contract provisions requiring arbitration of disputes, and replaced them with provisions making arbitration optional at the election of the parties.² The American Arbitration Association (AAA), in response, has focused its self-evaluation and arbitrator training efforts on means and techniques to make arbitration less costly for the parties. The AAA Construction Industry Arbitration Rules were revised in 2009 to include provisions that are designed to reduce the cost of this process, and other provisions that make it clear that the arbitrator or panel of arbitrators has authority to implement procedures, whether identified in the AAA Rules or not, to achieve an “efficient and cost-effective dispute resolution process.”³ The College of Commercial Arbitrators, a nationwide association of experienced commercial arbitrators, has issued a set of Protocols for Expedious, Cost-Effective Commercial Arbitration, including a great many detailed suggestions from its members.⁴

In view of these developments, it is particularly appropriate to examine, in some detail, what *cost-effective* means in the context of arbitration, and how it can be achieved in the specific context of construction arbitration. How is cost-effectiveness to be measured? How can arbitration be made more cost-effective than litigation? How can some arbitration procedures be made more cost-effective than others? Who is responsible for achieving a “cost-effective

dispute resolution process”? Who is to blame when the process is not cost-effective? These questions are basic, but their answers are complex.

Cost-effective arbitration is possible, but only if the arbitrator and counsel exert control over the legal, expert, and arbitrator costs through continual cost-benefit analysis of procedural alternatives throughout the arbitration process. The cost-benefit analysis requires more than the simple enforcement of arbitration rules. It requires the evaluation of alternative arbitration procedures, including their associated fees and fee trade-offs, and comparison to the costs of alternative litigation procedures. The analysis is necessarily case-specific and requires the exercise of judgment by an experienced and well-informed arbitrator.

Judicial Economy and How It Affects the Costs of Litigation

Arbitration as an alternative to litigation has traditionally differed in that the costs of arbitration have been subject to greater control. Litigation, under either federal or state rules of civil procedure, is a process that is generally not controlled by a neutral with a primary goal of making the proceeding cost-effective. The litigating parties are given full access to the tools of discovery (interrogatories, subpoenas, document requests, depositions, etc.), and it is left to counsel to use the tools in a cost-effective manner, frequently with little help from the judge except the threat of sanctions. Sanctions are typically used to punish parties for refusing to provide discovery to other parties but are otherwise not used as a means to make discovery cost-effective. Counsel are typically motivated by considerations of cost-effectiveness, i.e., they want the best result for their client at the lowest cost, but they often assume that the best strategy toward that goal is to make the litigation process as expensive for their opponents as possible. The choice of discovery tools then can become a matter of interdependent strategic decisions, in which each side tries to impose costs on the other, with the expectation that the other side will do the same, either independently or in retaliation. At worst, the result is a discovery process that looks like unregulated retaliation iterated ad nauseum. Experience demonstrates that the threat of sanctions is not sufficient to keep discovery from becoming a long, tedious, and extremely expensive process.

Judges are generally motivated to minimize the time they spend on any particular case because of the time demands of their dockets. Their motivation is reinforced by the judicial system, through many of the procedural rules and practices, in both state and federal courts, driven by considerations of judicial economy. Such considerations do not necessarily lead to the most cost-effective control of the litigation process.

James P. Wiesel is a shareholder with Kronick, Moskowitz, Tiedemann & Girard, Sacramento, California, and a member of the National Panel of Construction Arbitrators, American Arbitration Association, and the Panel of Arbitrators, California Office of Administrative Hearings, Public Works Contract Arbitration Program.

The pretrial process illustrates this point in several ways. Pretrial rules and orders often require the parties to make early disclosures of the entirety of their case (contentions, supporting documents, legal arguments, percipient witnesses, expert witnesses, their expected testimony, reports, etc.).⁵ These disclosures impose incremental legal fees at the front end of a lawsuit for two purposes. First, they are meant to make it easier for the judge to understand and manage the case. Second, they are meant to promote early evaluation of the case by the parties, leading to settlement. The overall goal is judicial economy, but the cost of pursuing that goal may be additional legal fees for the parties, incurred in preparing the required disclosures. This incremental cost is not necessarily cost-effective because it does not necessarily result in any offsetting reduction in subsequent legal fees or other litigation costs sufficient to create an overall reduction in the costs of the litigation.

Experience demonstrates that the threat of sanctions is not sufficient to keep discovery from becoming a long, tedious, and extremely expensive process.

Considerations of judicial economy also often result in the relative lack of judicial control of the discovery process. Pretrial discovery in civil cases is recognized as a process meant to promote the resolution of cases short of trial.⁶ As such, it has advanced the goal of judicial economy by eliminating trial time, but it has imposed potentially substantial legal fees on the parties in the process, and it has imposed new costs on the judicial system, required for the resolution of discovery disputes. Considerations of judicial economy also have substantially reduced the role of the judicial system in the resolution of discovery disputes. Court procedures require counsel to try to resolve discovery disputes without judicial involvement (the meet and confer process) or by use of a special master or discovery referee paid for by the parties.⁷ The result can be additional legal fees and master's or referee's fees incurred in the interest of judicial economy, but which are potentially avoidable at lower overall cost by greater judicial control of discovery before disputes arise.

Over the last thirty years, federal and state courts have implemented a number of procedures for greater judicial control of the case management process, coupled with court-supervised alternative dispute resolution. Under these procedures, the judge takes a more managerial role in tracking the pretrial progress of a lawsuit, and the judicial system provides managed alternative dispute resolution,

either through court-employed mediators, volunteers from the legal community, or reference to private mediators.⁸ By taking a more active role in case management and providing supervised access to alternative dispute resolution, courts are better able to control their dockets.⁹ The judge who spends incrementally more time managing a case pretrial may avoid trial time altogether. As it has evolved, the current role of the judiciary includes the management of multiple dispute resolution processes offered to litigating parties as alternatives to trial.¹⁰ In most cases, however, the judge does not control the pretrial and trial process for the purpose and with the goal of reducing litigation costs and making the process cost-effective for the parties.¹¹

The Basic Economics of Arbitration

Arbitration, by contrast, entails its own unique costs, starting with the costs of the neutral and related administrative fees. The administrative fees (charged by AAA or JAMS) and arbitrator fees substantially exceed the filing fees and jury fees charged by state and federal courts.¹² The administrative fees and arbitrator fees are paid by the parties pro rata, but both the AAA Rules and JAMS Rules allow the arbitrator to assess both administrative and arbitrator fees against any party as part of an arbitration award.¹³ Arbitration thus has an inherent cost disadvantage in comparison to litigation because of the cost of the neutral and the administrative fees. This disadvantage is compounded when there are three neutrals (a panel) rather than one. It is reduced when there are more parties to share the costs of the neutral or panel. If arbitration is to be more cost-effective than litigation, it must overcome this inherent cost disadvantage by reducing other costs in comparison to litigation.

It has generally been recognized that several inherent advantages of arbitration can overcome this cost disadvantage. First, the expertise of the neutral, particularly in complicated construction cases involving many technical issues, can substantially reduce the hearing time compared to trial time, thereby reducing legal fees for the parties. Second, the expertise of the neutral can reduce study time and time spent preparing an award. Third, the neutral can reduce and streamline the prehearing submission and discovery process, thereby reducing legal fees for the parties. Fourth, arbitration typically does not involve the costly pretrial motion process (dispositive and evidentiary motions) characteristic of litigation. Fifth, an arbitration award is meant to be a final resolution, which is not subject to appeal for errors of fact or law, and can be vacated only for fraud, corruption, or an arbitrator exceeding his or her powers; the parties avoid the legal fees incident to the appellate process but may incur the legal fees of confirming or vacating the award.¹⁴ Sixth, as a result of the first five advantages, the overall arbitration process is meant to be shorter and less time-consuming than litigation. The expertise of the neutral and the streamlining of the prehearing and hearing processes are the twin advantages of arbitration over litigation that AAA has traditionally

emphasized and that have been widely recognized by the courts.¹⁵ These generalizations, however, have recently been questioned.¹⁶ To evaluate the cost-effectiveness of arbitration over litigation, a more careful consideration of the comparative costs is required.

What Affects the “Cost-Effectiveness” of Arbitration?

At the outset, the comparative economics of arbitration versus litigation obviously depend on the cost of the arbitrator. For example, if the arbitrator is to make a hearing more cost-effective than a trial, the arbitrator must reduce the hearing time in comparison to trial time such that the resulting reduction in attorneys’ fees for each party is not absorbed by the arbitrator fees. To achieve a cost advantage, the neutral must not only take less hearing time than trial time, but must reduce the hearing time to the extent that the saved legal fees exceed the arbitrator fees. To be a “cost-effective arbitrator,” the neutral must save more than he or she charges.

The ability of a neutral to save more than he or she charges is affected not only by his or her billing rate, but also by certain prearbitration choices of the parties and the nature of the dispute itself. The parties ultimately control the choice of arbitrator, arbitration service, and arbitration rules. Typically, the choice of arbitrator is made after the nature of the dispute is known, but the choice of arbitration service and arbitration rules is made long before any dispute has arisen. Often, and perhaps unfortunately, the parties agree to a contractual arbitration clause simply out of mutual distaste for litigation, without addressing the question of how to make arbitration more cost-effective than litigation. By not addressing that question predispute, the parties may defer legal expenses, but at the price of greater legal costs once a dispute has arisen. In the construction context, the choice of arbitration over litigation of construction disputes also may be driven by the general perception that construction arbitrators are much more knowledgeable about construction disputes than judges or jurors. Yet the technical complexity of a particular dispute may itself constrain the ability of the most experienced construction arbitrator to be cost-effective.

Arbitration rules themselves enable the parties to make choices affecting the cost of the proceeding, before the arbitration commences but after the dispute is recognized. An example of such choice is the form of the arbitrator’s award. Under the AAA Rules, the parties can choose prearbitration whether they require the arbitrator to prepare an award that simply calculates damages, or also explains his or her reasoning (a *reasoned award*), or includes findings of fact and conclusions of law.¹⁷ The requirement for added detail obviously imposes incremental costs. The parties may have reasons, quite apart from considerations of cost, to require a more detailed award (e.g., issues of insurance coverage or other rights of indemnity). These reasons may constrain the arbitrator’s cost-effectiveness from the outset.

The choice of a single arbitrator versus a panel, which is also a prearbitration choice left to the parties under both

the AAA Rules and JAMS Rules, similarly affects cost-effectiveness.¹⁸ The relative cost of a panel of arbitrators obviously has a substantial effect on any cost comparison of arbitration versus litigation. The cost of a panel creates a strong economic incentive to minimize the time spent by the panel in controlling the arbitration, understanding the issues and positions of the parties, conducting the hearing, and deciding the case. The panel costs can be reduced by limiting the involvement of panel members in managing the case (e.g., by giving more case management responsibility to the chair of the panel) or by transferring tasks from the panel to the attorneys.¹⁹ In the latter case, the price of minimizing panel costs may be an increase in legal fees for the parties.

The Award of Arbitration Costs as a Means to Enforce Cost-Effective Procedures

A neutral or panel has the ability, within arbitration rules, to control its own costs as well as how they are spread among the parties. The arbitrator can, to some extent, enforce cost-effective procedures by making recalcitrant parties pay for tactics that are not cost-effective. Both the AAA Rules and JAMS Rules give the neutral or panel the discretion to award its own fees and associated administrative costs in whole or in part against any party or combination of parties.²⁰ The JAMS Rules, but not the AAA Rules, also empower the arbitrator to award sanctions, including both arbitrator fees and attorney fees.²¹ In practice, the neutral or panel may effectively have greater discretion to shift arbitrator fees and administrative fees than attorney fees. The ability to shift attorney fees is more circumscribed by law, since attorney fees are generally not recoverable absent an attorney fees clause in the contract under arbitration.

The *in terrorem* effect of a potential award of arbitrator’s and administrative fees may, in certain cases, enable the neutral or panel to prevent the parties from engaging in excessively adversarial disputes that undermine overall cost-effectiveness. In contrast, the inability to award attorney fees inhibits such enforcement. But the threat of an award of either arbitrator fees or attorney fees is clearly no substitute for the rigorous control of such fees.

The Evaluation of Cost-Effective Arbitration Choices

The arbitration rules provide only a general framework within which a neutral or panel must make choices to achieve a cost-effective result. The choices involve the evaluation and control of alternative arbitration procedures. Far more is involved than simply the question of how the arbitrator and administrative fees should be apportioned, and whether any party can be made to bear another party’s attorney fees. Cost-shifting questions are typically addressed at the end of the arbitration process, whereas cost control questions should be addressed throughout. The discussion that follows addresses the choices available at each stage of the arbitration process, and considers the potential costs and trade-offs.

The Cost-Effective Choice of Prehearing Submissions

Consideration of what is cost-effective should begin at the outset of the arbitration process with the choice of prehearing submissions. This choice entails a trade-off of arbitrator fees for legal fees. Prehearing submissions involve legal fees but can reduce arbitrator fees. The potential reduction in arbitrator fees is particularly significant when a panel is involved. Several commentators have suggested that the costs of the panel can be reduced if the parties simplify the work of the panel by providing the panel with additional prehearing submissions, e.g., statements of claims, proposed discovery plans, proposed hearing schedules, proposed statements of decision and awards, “scorecards” that identify issues to be decided, etc.²² These prehearing submissions can go substantially beyond the ordinary prehearing submission requirements under either the AAA Rules or JAMS Rules.²³ There is no question but that they can greatly reduce the costs of the panel. However, to require these additional prehearing submissions, with their resulting legal fees, is cost-effective only if it reduces the administrative costs of the panel, or other legal fees, by an amount greater than the additional legal fees incurred by the parties in complying with such prehearing submission requirements.

The expertise of the neutral and the streamlining of the prehearing and hearing processes are the twin advantages of arbitration over litigation.

Moreover, if prehearing submission requirements are comparable between arbitration and litigation, there will be no comparative cost advantage. Prehearing disclosures will then give arbitration an economic advantage over litigation only insofar as they enable the neutral, or the panel, to reduce the hearing time or time spent preparing the award, or reduce the costs of prehearing discovery in comparison to the uncontrolled pretrial discovery of the litigation process. To be cost-effective in comparison to litigation, the resulting streamlining of discovery, the hearing, and the posthearing process must result in an overall reduction in legal fees in comparison to litigation, sufficient to overcome the arbitrator or panel fees. Moreover, the incremental prehearing submission requirements, to be cost-effective, must be necessary to enable such streamlining.

At a minimum, these considerations suggest that the choice of prehearing submission requirements in a complex construction arbitration should be made carefully, with the specific goal of providing the neutral with information necessary to streamline discovery, control the or-

der of proof at the hearing, and reduce hearing time and the posthearing process. These considerations also suggest that it may be more cost-effective for the arbitrator or panel to make decisions about prehearing submission requirements at different stages of the prehearing process, as necessary, rather than at the outset of that process. Submissions of detailed statements of claims and discovery plans may well be necessary to control the discovery process, and the submissions of hearing schedules are necessary to control the hearing process, but the arbitrator or panel may want to defer the submission of proposed awards, findings, and conclusions, or “scorecards” until such time as they are determined to be necessary. A deferred submission may become unnecessary, in which case its legal and arbitrator fees are avoided entirely.

The Cost-Effective Control of the Arbitration Discovery Process

Turning from the submission process to the prehearing discovery process, the streamlining so characteristic of AAA arbitration becomes a matter of controlling access to discovery procedures. Here the role of the arbitrator is very different from the role of a judge. Discovery rights in litigation are created by statutes and rules of procedure, and the limited role of the typical judge (or discovery referee/special master acting in lieu of a judge) is to enforce such rights. In contrast, the arbitrator has greater potential control over access to discovery procedures, can take a very proactive role in streamlining discovery, and can focus the parties and counsel on the evaluation and choice of cost-effective alternatives. The AAA Rules provide that the choice of discovery procedures is within the discretion of the arbitrator, and specifically provide that, at least in “regular track” cases, any discovery beyond the exchange of exhibits and lists of witnesses is to be permitted only in exceptional circumstances.²⁴ AAA arbitrators thus control whether depositions are taken and on what terms and have the exclusive power to issue third-party subpoenas in connection with any arbitration. In contrast, the JAMS Rules require the voluntary exchange of all relevant documents and provide for two depositions per party, with further depositions to be controlled by the arbitrator.²⁵ The cost-effective arbitrator should generally consider whether (1) a particular discovery procedure is necessary to either discover the merits of the case or assist any party in presenting its case at the hearing, (2) it is likely to be the most cost-effective alternative, and (3) it will help the parties avoid hearing costs by resolving the case. These considerations are case-specific, but several general observations about discovery procedures may be useful.

Which Project-Related Documents Should Be Shared and Why?

First, document discovery, specifically the exchange of project files and cost records, is a potentially expensive but also potentially cost-effective means for each party to a construction arbitration to communicate substantial

evidentiary material and information to the other parties. Copying and legal review costs are incurred, but the production of job files and cost records provides the parties with information that often affects settlement negotiations and shortens the overall case. Production of such documents also can make other forms of prearbitration discovery (e.g., depositions) unnecessary, or at least allow the arbitrator or panel to streamline them.

The scope of document production can either affect, or be affected by, the choice of prehearing submissions. Some commentators have suggested that document discovery should be stayed at the outset of a case because (1) the parties normally have the necessary information in their files already and (2) the prehearing submission of detailed claims with supporting documents in advance of documentary discovery allows the arbitrator to control the scope of discovery, thereby reducing legal and copying fees.²⁶ Similarly, the JAMS Rules provide for claim submission before document exchange, but then require voluntary exchange of all relevant documents.²⁷ If documents are to be exchanged, is it necessarily more cost-effective to require claims submissions first? Pre-exchange claim submissions can facilitate the streamlining of discovery. However, it is not necessarily the case, especially in the context of multiparty construction arbitrations, that the parties all have all the necessary information in their files at the outset of a case. An owner may not have access to a contractor's or subcontractor's project cost reports or financial statements. A subcontractor may not have access to an owner's or a contractor's project files. Access to project files and cost documentation can affect the factual contentions and legal theories that the parties advance. Document discovery at the outset of a case can potentially prevent the duplication and avoidable legal fees incurred in amending claims and contentions. Early document discovery also can effectuate expert analysis necessary to develop such claims and contentions. The cost-effective arbitrator may, in certain cases, streamline the process of preparing prehearing submissions and discovery plans by allowing some document discovery to proceed first.

The cost-effective control of electronic discovery presents a separate set of issues for the arbitrator and the parties. The only arbitration rules to have specifically addressed discovery of electronic documents are the JAMS Rules, which broadly include "electronically stored information (ESI)" in the category of documentation to be voluntarily exchanged by the parties.²⁸ The College of Commercial Arbitrators, by contrast, has made very specific suggestions aimed at "managing electronic records and handling electronic discovery much more efficiently than is currently done in federal and state courts."²⁹ These suggestions include limiting the designation of custodians of electronic information to those individuals whose electronic data are reasonably expected to be material and unavailable from other sources, filtering the data to eliminate overbreadth and duplications, and limiting the data to those that are retrievable from primary storage facilities, excluding backup

tapes, backup servers, cell phones, PDAs, voicemails, etc., absent a showing of exceptional need.³⁰ By implementing such restrictions, the cost-effective arbitrator can reduce the costs of electronic discovery at a relatively minimal expenditure of arbitrator fees. The cost-effective arbitrator also can specify the form of production of electronically stored information (whether paper printouts, PDF-format, TIFF-format, or "native format" in the software as originally created with metadata).³¹ By controlling the form of production, the arbitrator can exercise significant control over production costs.

Can Expert Fees and Work Product Be Controlled?

The use of experts can strongly affect the cost-effectiveness of the arbitration process. In a typical large construction case, the overall dispute resolution process is often controlled by the time and effort required for the consultants to review documents, analyze schedules and project cost reports, and prepare various analyses and other expert work product. Whether the dispute resolution process leads to a mediation, an arbitration, or a settlement negotiation, the work of the consultants is often on the critical path of that process.

Cost-shifting questions are typically addressed at the end of the arbitration process, whereas cost control questions should be addressed throughout.

Although there is much the neutral can do to structure the discovery process, the expenditure of monies for expert investigation and analysis is essentially outside that process. The AAA Rules allow the neutral to set deadlines for the exchange of expert reports and other expertise materials, which at least allows the neutral to set a time horizon on prehearing consultant fees. The JAMS Rules require expert reports to be exchanged fourteen days after the close of discovery, subject to the discretion of the arbitrator to modify this deadline.³² The cost-effective neutral, depending on the case, also may be able to reduce the duplication of forensic investigation and testing results by requiring joint investigation or testing, or the sharing of testing protocols and test data. The cost-effective neutral also may be able to reduce the expenditure of consultant fees by requiring the exchange of information in electronic format (as opposed to hard-copy format), including test data, summaries, construction schedules, project cost reports, other financial records, and the experts' work product itself. Depending on the case, the neutral may be able to shortcut the work of the consultants by directing that

certain calculations, summaries, or databases be prepared and exchanged. The goal of the neutral should be to make the consultants' investigation more efficient.

The Cost-Effective Control of Depositions in Arbitration

The cost-effective arbitrator also can take a number of steps to streamline the deposition process. In construction projects, it is rarely the case that a dispute is not memorialized in writing or by some electronic communication. The exchange of project document files at the outset of the prearbitration process may give the parties access to writings, email, and other communications that set forth in detail every side of every dispute. When that happens, a subsequent deposition that devolves into a review of every last piece of correspondence and a rehashing of the parties' positions can be a waste of time and legal fees. Under the AAA Rules, the cost-effective arbitrator has the discretion to help the parties prevent such wasteful depositions from happening in several ways. First, the arbitrator can require any party seeking to take a deposition to demonstrate "extraordinary circumstances" under the AAA Rules, or alternatively the arbitrator can limit the number and length of depositions available to each party without proof of such extraordinary circumstances.

In the end, perhaps the single greatest factor affecting the cost of the hearing is the availability of the arbitrator, counsel, experts, and parties.

Second, the arbitrator can order, in advance of any depositions, that all project correspondence related to any dispute is deemed admitted into evidence at the hearing. Third, the arbitrator can require the parties to identify, in advance of depositions, areas of necessary inquiry that go beyond the content of project documents and communications, and limit the scope of depositions to such areas of inquiry. Fourth, the arbitrator can strictly limit nonparty depositions by controlling the issuance of deposition subpoenas, to prevent unnecessary "fishing expeditions" and allow only the production of documents and preservation of necessary testimony.³³ The JAMS Rules, as mentioned earlier, allow the parties two depositions each, but otherwise give the arbitrator control over all depositions taken.³⁴ Except for the JAMS allowance for two depositions per party, the JAMS Rules and AAA Rules provide the arbitrator with the same inherent authority to similarly limit the number and length of depositions, and the areas of inquiry.

In most construction arbitrations, depositions are potentially useful only as a means of discovering the merits

of the case, and many depositions of opposing parties in construction cases are not necessary to discover the merits of the case. A party may believe that the deposition of an opponent will be cost-effective if only because it will run up the legal fees for the opponent. The cost-effective arbitrator should exercise his or her discretion to prevent such depositions. A deposition undertaken simply to impose costs on the opponent only invites retaliation. The arbitrator, unlike most judges, can prevent both the retaliation and the discovery tactic that provoked it.

The cost-effective arbitrator also can take steps to control the depositions of experts. Expert depositions, which are not provided for by any arbitration rules, are often the most expensive discovery procedure in any construction litigation. The costs to each party to participate in an expert deposition (including legal and consultant fees, court, and videographer) often can exceed \$1,000 per hour per party, not to mention the hours of preparation. The threshold question is: Is it ever cost-effective to incur such costs in an arbitration? A general answer is that expert depositions should be permitted only where necessary to develop facts not ascertainable from an expert's written work product, and only if there is no less expensive alternative.³⁵ Even then, the expenditure for expert depositions is money well spent only if the process is so controlled by the neutral that the parties, experts, and neutral know in advance of the deposition what each expert has done by way of investigation and work product, and also how each expert responds to the investigation and work product of the other experts. The cost-effective arbitrator should require prehearing disclosure not only of the experts' anticipated testimony and work product, but also of anticipated rebuttal of experts' testimony and work product. This may require multiple disclosures over time, allowing the parties to prepare their rebuttals. Depending on the case, the neutral also may be able to limit the scope of inquiry at expert depositions to avoid waste of time on such issues as the expert's background, credentials, prior testimony in other cases, etc. The arbitrator's goals should be to allow the parties to understand in advance of expert depositions which experts may need to be deposed and which do not, to minimize the time spent in expert depositions, and to avoid multiple depositions of the same expert. Because expert depositions are so expensive, it becomes cost-effective to expend arbitrator and legal fees to control such depositions.

The Cost-Effective Control of the Hearing Process

Lastly, the cost-effective arbitrator can take a number of steps to streamline the arbitration hearing itself. In a typical AAA construction arbitration, the parties provide the arbitrator with briefs and exhibits shortly before the hearing and the arbitrator reviews them immediately before (e.g., the night before) the hearing commences. This just-in-time approach is typically dictated by the desire of the parties to defer the legal fees of preparing briefs and exhibits, as well as the arbitrator fees, until the last

minute, when it becomes clear that the case cannot be resolved short of a hearing. In larger and more complex construction arbitration, this approach is not necessarily cost-effective. In such cases, the parties and the arbitrator need to know well in advance the order of proof at the hearing. The order of proof in this context can mean not only the order among parties (i.e., who puts on their case in what order) but also the order among issues (i.e., what issues are to be heard in what order) and the order among witnesses. Determination of the order of proof affects not only the length of the hearing but also when and how the parties are to incur the legal fees to prepare for each part of the hearing.

In a complex construction arbitration, resolution of the order of proof may entail a considerable expenditure of legal and arbitrator fees. Where the arbitration is before a panel, there is a substantial incentive to simplify this resolution process itself, to reduce the panel fees incurred in the process. This suggests that, at least in complex cases before a panel (and perhaps in all complex construction cases), the process of resolving the order of proof should be viewed as a separate prehearing submission process, in addition to the submission of briefs, exhibits, and witness lists under AAA Rules.³⁶ At a minimum, resolution of the order of proof should entail each party providing the arbitrator and the other parties with a proposed order of parties, an order of witnesses, and a proposed schedule. Depending on the case, the parties should also provide a proposed order of issues for resolution. Other commentators have suggested that the panel should require submissions of proposed "scorecards" that identify all the issues to be resolved. Having received proposed scorecards, the panel then prepares its own scorecard and uses it to resolve the case issue by issue.³⁷

The cost-effective arbitrator also can take steps to control and perhaps prevent the use of prehearing dispositive and evidentiary motions. In litigation, such motions have the purpose of either avoiding trial entirely (by pretrial disposition) or limiting the evidence that is admitted at trial (by orders *in limine*). In the litigation context, a dispositive or evidentiary motion entails incremental legal fees, sometimes very substantial, but potentially avoids trial entirely or at least minimizes trial time. In the arbitration context, the AAA Rules allow for prehearing motions but provide no motion procedures, leaving such procedures to the arbitrator or panel.³⁸ The JAMS Rules provide for summary disposition but leave the procedure to the arbitrator.³⁹ The College of Commercial Arbitrators has suggested a pre-motion procedure, whereby the arbitrator requires a party to submit a letter or otherwise demonstrate, before any motion is filed, that a contemplated motion is likely to succeed and produce a net savings of time and money.⁴⁰

In general, the AAA Rules contemplate a paradigm of arbitration in which the arbitrator renders a decision and award based on evidence adduced at the hearing and not otherwise, and that the arbitrator is not constrained by rules of evidence. This model is also reflected in ar-

bitration statutes, which often provide that failure to allow parties to submit pertinent evidence is among the few grounds to vacate an arbitrator's award.⁴¹ Such statutes do not promote the widespread use of prehearing dispositive or evidentiary motions. The College of Commercial Arbitrators has recognized that, next to prehearing discovery, prehearing motions are the leading cause of excessive costs in commercial arbitrations, and they have identified the problem as both the excessive use of motions and the "reflexive denial of motions by arbitrators pending a full-blown hearing on the merits of the entire case."⁴²

In the arbitration context, a prehearing dispositive or evidentiary motion often achieves nothing, wastes legal and arbitrator fees, and potentially disrupts the hearing schedule. However, the cost-effective arbitrator can potentially eliminate the expenditure of legal fees for prehearing motions, as part of the process of controlling the order of proof. Where it is possible to eliminate claims or avoid the taking of evidence on certain issues, the cost-effective arbitrator can potentially order the proof to address potentially dispositive or limiting issues first. This can be done as part of the hearing process without the need for separate prehearing motions or, indeed, without any substantial incremental legal fees. The arbitrator can issue decisions on a by-issue basis, based on evidence submitted as part of the hearing and not by prehearing affidavit. This can be achieved, however, only if the potentially dispositive issues are recognized at the time the order of proof is resolved prehearing. The scorecards can aid this process.⁴³


In addition to the regulation of the order of proof, several other procedures have been suggested and used as a means to reduce hearing time and the resulting arbitrator or panel fees and legal fees. These include (1) the presentation of written direct testimony, reserving live testimony only for cross-examination and redirect; (2) the use of expert witness panels to allow simultaneous interrogation of multiple experts by counsel and by the panel; and (3) the use of so-called chess clocks to control time of presentation and enforce the hearing schedule.⁴⁴ All of these procedures are specifically designed to reduce the costs of the neutral or panel. All are cost-effective insofar as they reduce the panel fees, expert fees, and legal fees incurred in the hearing process by an amount that exceeds any incremental legal fees that may be incurred in the prehearing preparations. All such alternative hearing procedures should be evaluated for costs, cost trade-offs, cost savings, and benefits on a case-by-case basis.

Another approach, which may be very cost-effective in certain types of cases, is to require certain disputes to be resolved solely based on written submissions. The AAA Rules currently provide that construction disputes under \$10,000 are to be resolved solely based on written submissions, with no taking of live testimony unless the arbitrator so orders.⁴⁵ If such disputes are included in a larger construction arbitration, the AAA Rules provide that the dispute will ordinarily be heard by a panel.⁴⁶ It is obviously not cost-effective to have a panel sit and take live testimony

about multiple small, discrete contract disputes that are included in a much larger arbitration. The cost-effective solution in that case may be to require smaller disputes to be resolved without live testimony, solely based on written submissions, reserving larger disputes for live testimony. For example, in a construction case that involves delay and disruption claims as well as a number of disputed change order claims, the change order claims might be resolved based on written submissions. In a construction case with multiple subcontractor claimants, the subcontractor claims could be resolved by written submissions only, thus reducing the number of participants during the live testimony, and thereby streamlining that process.

In the end, perhaps the single greatest factor affecting the cost of the hearing is the availability of the arbitrator, counsel, experts, and parties. A complex construction arbitration is rarely completed in a single session of hearings. Given the schedules of arbitrators, counsel, and witnesses, multiple hearing sessions are commonplace. When a panel is involved, the problem of coordinating schedules to allow for blocks of hearing days becomes more complicated and dictates stricter measures to comply with hearing schedules. Multiple blocks of hearings inevitably require multiple preparations by counsel and witnesses, which drive up the cost of arbitration and tend to undermine any cost savings from the overall reduction of hearing days in comparison to trial days.⁴⁷ Perhaps the single best strategy to reduce the overall cost of the hearing is to enforce a procedure (schedule, written submissions, chess clock, etc.) that either requires or otherwise incentivizes the parties to complete the hearing in one block of hearing days without reconvening the proceeding. One alternative, suggested by the College of Commercial Arbitrators, is to incorporate into the arbitration agreement a deadline (e.g., one year from filing) for the completion of any arbitration.⁴⁸ Alternatively, both JAMS and AAA offer expedited arbitration procedures for certain cases.⁴⁹

Focus on Cost-Effectiveness

Construction arbitration rules offer many potentially cost-saving procedures, but there is no single procedure that is guaranteed to make arbitration more cost-effective than litigation. The greatest advantage of arbitration over litigation is the ability of the arbitrator and counsel to tailor the process, within the arbitration rules, to fit the dispute and reduce the dispute resolution costs by appropriate streamlining. At a minimum, however, the arbitrator who is focused on cost-effective dispute resolution should be able to focus the parties and their counsel on the pertinent cost trade-offs and the evaluation of alternative arbitration procedures as potential means of cost avoidance or reduction. In the long run, the arbitrator who focuses on considerations of cost-effectiveness should be able to provide the parties with a more carefully controlled and cost-effective dispute resolution process than most courts. 

Endnotes

1. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 ILL. L. REV. 1 (2010); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COMM. L.J. 383 (2009); L. Tyrone Holt, *Whither Arbitrations? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects,* 7 DEPAUL BUS. & COMM. L.J. 455 (2009); Gerald Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 1 (AAA) 37 (Feb.–Apr. 2003); Steven A. Arbittier, *Conditional Arbitration: A New Approach to Construction Arbitration,* 61 DISP. RESOL. J. 2 at 40 (May–July 2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies,* 56 DEPAUL L. REV. 335 (2007); Benjamin J.C. Wolf, *Online But Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet,* 14 CARDOZO J. INT'L & COMP. L. 281 (2006). At least one court, reviewing these commentators, has concluded that the problem is entirely one of contract draftsmanship: "Thus, if the parties want to avoid long and expensive litigation, they should draft an arbitration agreement to accomplish that goal." *Greenspan v. LADT, LLC*, 185 Cal. App. 4th 1413, 1461 (2010).

2. See American Institute of Architects (AIA), AIA Document A201-2007, General Conditions of the Contract for Construction, art. 15; AIA Document B101-2007, Standard Form of Agreement Between Owner and Architect, art. 8; Consensus Docs LLC, Consensus Docs 240; Standard Form of Agreement Between Owner and Architect/Engineer, art. 9.5 (<http://wvhepc-doc.wvnet.edu/resources/pmanualforms/ConstructionServices/AIAA201-97GeneralConditionsforConst.pdf>).

3. See AMERICAN ARBITRATION ASSOCIATION (AAA), CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES [hereinafter AAA RULES], www.adr.org/sp.asp?id=22004; AAA RULES R-23, Preliminary Management Hearing.

4. See THE COLLEGE OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION (2010) [hereinafter CCA PROTOCOLS], available at www.thecca.net/CCA_Protocols.pdf (reprinted as an appendix to THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (2d ed., JurisNet LLC 2010) [hereinafter CCA GUIDE]). Page citations to the CCA Protocols will refer to pages in the appendix to the CCA Guide.

5. See, e.g., FED. R. CIV. P. 26(a)(1). Voluntary information exchange under this rule is designed to eliminate paperwork otherwise involved in requesting such information, and to enable early evaluation of the case by counsel. See William Schwarzer, *In Defense of Automatic Disclosure in Discovery*, 27 GA. L. REV. 655 (1993); Charles W. Sorenson Jr., *Disclosures Under Federal Rule of Civil Procedure 26(a)—Much Ado About Nothing?*, 46 HASTINGS L.J. 679 (1995); Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events That Have Transpired Since Its Adoption*, 21 SETON HALL LEGIS. J. 425 (1997).

6. Discovery in civil cases promotes settlement to the extent that it provides the parties with access to enough facts to arrive at similar assessments of the legal risks of trial. In the words of one commentator, "[m]odern civil procedure is structured to facilitate the interaction between litigation and settlement." Michael L. Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORD. L. REV. 1203, 1206 (2009). See generally William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703 (1989) (recognizing that discovery "now tends to dominate the litigation and inflict disproportionate costs and burdens").

7. See, e.g., FED. R. CIV. P. 53. See Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 AM. BAR FOUND. RES. J. 287.

8. See Donna Shestowsky, *Disputants' Preferences for*

Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008); Susan Keilitz, Geoff Gallas & Roger Hanson, *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, 12 STATE CT. J. 4 (1988).

9. Readers who have never recognized any similarity between federal court litigation and fine dining may want to ponder the following observations by a particularly distinguished federal judge:

Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers.

Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement* (1984), 78 FORD. L. REV. 1265 (2009).

10. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155; Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 170 OHIO ST. J. ON DISP. RESOL. 1 (2001); Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1 (1985).

11. Perhaps the most pointed single criticism of the litigation system is the following comment from a US magistrate judge:

In federal courts (and it appears, in state courts in urban areas), less than 2% of civil cases that are filed go to trial. Between 5% and 15% of civil cases are resolved by a court ruling on a contested motion. Thus, it appears that most civil cases leave the judicial system before receiving any service of real value from the court. In real-world effect, what the judiciary gives to the majority of civil litigants who turn to the traditional adjudication process for help is nothing.

Wayne D. Brazil, *The Center of the Center for Alternative Dispute Resolution*, 6 PEPP. DISP. RESOL. L.J. 313, 316–17 (2006); see also Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241 (2006); Moffitt, *supra* note 6, at 1229 (on the history of court-sponsored ADR).

12. AAA charges both an initial filing fee and a final fee due at the time of hearing. Fees vary with the size of the claim or counterclaim. See *Administrative Fee Schedule*, AM. ARBITRATION ASSN., www.adr.org/si.asp?id=6267. JAMS charges a case management fee computed as ten percent of its arbitrator fees.

13. See AAA RULES R-45, R-52, R-53, R-54. See JAMS ENG'G & CONSTR. ARBITRATION RULES & PROCEDURES R 24(f) [hereinafter JAMS RULES], www.jamsadr.com/rules-construction-arbitration.

14. The Federal Arbitration Act (FAA) provides statutory grounds for vacatur of an award, which include “corruption, fraud or undue means”; “evident partiality or corruption in the arbitrators”; misconduct of the arbitrators, including failure to consider material evidence; and the arbitrators having “exceeded their powers.” 9 U.S.C. § 10(a). The Uniform Arbitration Act and Revised Uniform Arbitration Act are similar. See 7 U.L.A. § 23 (2000). Recent case law also has recognized nonstatutory, judicially created grounds for vacatur, including most importantly “manifest disregard of the law.” In *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the US Supreme Court held that parties may not expand by private agreement the

FAA grounds to vacate an award. Other cases since *Hall Street* have adopted the view that “manifest disregard of the law” is an act in excess of an arbitrator’s powers and is thus a statutory ground to vacate under the FAA. See *Edstrom Indus. v. Companion Life Ins. Co.*, 516 F.3d 546 (7th Cir. 2008); *Comedy Club v. Improv West*, 553 F.3d 1277 (9th Cir. 2008). Most recently in *Stolt-Neilsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), the US Supreme Court expressly declined to decide whether “manifest disregard” survives the *Hall Street* case as an independent ground for vacatur or as a “judicial gloss on the enumerated grounds for vacatur” set forth in the FAA. 130 S. Ct. at 1768 n.3. See generally Thomas J. Brewer & Lawrence R. Mills, *When Arbitrators “Exceed Their Powers”*, 64 DISP. RESOL. J. 46 (Feb.–Apr. 2009).

15. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992); *Schlessinger v. Rosenfeld, Meyer & Sussman*, 40 Cal. App. 4th 1196 (1995). See generally Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988); Curtis E. von Kann, *A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*, 7 DEPAUL BUS. & COMM. L.J. 499 (2009).

16. See *supra* note 1. See also CCA PROTOCOLS, *supra* note 4, at 245–51 (noting that “criticism of American commercial arbitration is at a crescendo” (*id.* at 245) and that that “migration of commercial cases from litigation to arbitration has, predictably, brought into arbitration some of the practices associated with commercial case litigation” (*id.* at 249)).

17. See AAA RULE R-43.

18. The AAA Construction Industry Rules provide that the procedures for large, complex construction disputes shall apply to claims of \$1 million or more. See AAA RULE R-1. Under AAA Rule L-3, large, complex construction disputes are to be heard by a panel of three, unless the parties agree otherwise. Under JAMS Rule 7(a), construction arbitrations are heard by panels of three unless the parties agree to a single arbitrator.

19. Among the many suggested protocols of the College of Commercial Arbitrators is the suggestion that the chair of a panel decide all discovery disputes and procedural matters. CCA PROTOCOLS, *supra* note 4, at 281.

20. See AAA RULE R-44; JAMS RULES 24(f), 29.

21. See JAMS RULE 29. See generally Philip D. O’Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, 60 DISP. RESOL. J. 60 (Nov. 2005–Jan. 2006).

22. See Allen L. Overcash & Erin L. Gerdes, *Five Steps to Fast-Track the Large, Complex Construction Case*, 64 DISP. RESOL. J. 2 at 1 (May–July 2009).

23. The AAA Construction Industry Rules require the following: (1) the filing of a demand for arbitration including statement of the nature of the claim, relief sought, and the amount involved (AAA Rule R-4) and (2) the prehearing exchange of exhibits and witness lists (rule R-24). All other submission requirements are discretionary with the arbitrator (rule R-24(d)). The JAMS Rules require the initial exchange of claims (rule 9) followed by voluntary disclosure of all relevant documents and identities of persons with information (rule 17(a)).

24. See AAA RULES R-24(d), L-5 (Large, Complex Construction Disputes).

25. See JAMS RULES 17(a), (b).

26. See Overcash & Gerdes, *supra* note 22, at 3.

27. See JAMS RULES R. 12. The College of Commercial Arbitrators suggests alternative approaches to limiting document discovery, including more specific standards for information exchange than the JAMS Rule 12. One suggested approach is to require initial exchange of documents upon which each party relies to support its position, and further production of documents only upon specific request and a showing of a specific

need. See CCA PROTOCOLS, *supra* note 4, at 290–93.

28. See JAMS RULES 17(a). The reference to “electronically stored information” tracks the language of the Federal Rules of Civil Procedure. See, e.g., FED. R. OF CIV. P. 26(a).

29. See CCA PROTOCOLS, *supra* note 4, at 290.

30. *Id.* The College of Commercial Arbitrators also suggests that requests for backup data, deleted files, and metadata be granted only if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered in anticipation of arbitration or litigation, outside of usual document retention policies. *Id.* at 298–99 n.173.

31. In contrast, the Federal Rules of Civil Procedure allow a requesting party to specify the form of production of electronically stored information, and allow the producing party to object and specify an alternative form of production. See FED. R. CIV. P. 34(b)(i)(C), (D) & (E). See generally Todd H. Flaming, *If You Don't Ask, You Won't Receive: Form of Production Under the New Rules*, E-DISCOVERY (ABA Sec. of Litig. 2007); Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, 61 DISP. RESOL. J. 9, 10 (Nov. 2006–Jan. 2007).

32. See JAMS RULES 11(b).

33. Whether an arbitrator can issue a subpoena for a witness to appear at a deposition is ultimately determined by the law of the forum in which the arbitration is taking place, and any applicable arbitration rules. The Federal Arbitration Act (FAA) provides that arbitrators can issue subpoenas but is silent as to deposition subpoenas. See 9 U.S.C. § 7. The federal circuit courts are split over the availability of deposition subpoenas for arbitrators under the FAA. See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000) (arbitrators can issue subpoenas for production of documents but not for depositions); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008) (no subpoenas for documents or depositions); *Cosat Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999) (no subpoenas for documents or depositions); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (no subpoenas for documents or depositions); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988) (subpoenas for both documents and depositions); *Hires Parts Serv., Inc. v. NCR Corp.*, 859 F. Supp. 349 (N.D. Ill. 1994) (subpoenas for both documents and depositions). See generally Sara Rosenberg, *Toward a Functional Alternative to Courtroom Adjudication: The Federal Arbitration Act and Third Party Document Discovery*, 79 *FORD. L. REV.* 1333 (2010). The laws of the different states differ as to whether an arbitrator can issue a subpoena for a deposition. See Revised Uniform Arbitration Act § 17, 7 U.L.A. § 17 (arbitrators can issue subpoenas and order discovery); CAL. CIV. PROC. CODE § 1283.05 (arbitrators can enforce discovery where arbitration agreement creates discovery right). See generally Leslie Trager, *The Use of Subpoenas in Arbitration*, 67 *DISP. RESOL. J.* 1 (Nov. 2007–Jan. 2008); David W. Lannetti, *Protecting Contracting Parties in Construction Arbitrations Based on the Availability—or Nonavailability—of Nonparty Discovery*, 29 *CONSTR. LAW.* 4 at 24 (2009). Under the AAA Rules, the arbitrator may issue hearing subpoenas to third parties upon the request of any party or independently. See AAA RULES R-33(d), Rule L-4 (Large, Complex Construction Disputes). The JAMS Rules similarly allow the arbitrator to issue hearing subpoenas to third parties. See JAMS RULES 19(c), 21.

34. See JAMS RULES 17(b). The CCA Protocols follow the JAMS Rules in suggesting that depositions be limited to cases where there is a demonstrated need and no alternative procedure to discover information. CCA PROTOCOLS, *supra* note 4, at 290.

35. The College of Commercial Arbitrators suggests that the arbitrator can reduce expert discovery costs by offering the parties the option of either exchanging expert reports or taking expert depositions. CCA GUIDE, *supra* note 4, at 121.

36. The AAA procedures for large, complex construction disputes contemplate that the “prehearing activities and hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedures Order.” See AAA RULES L-4, L-5.

37. See *supra* note 22, at 5.

38. The AAA Rules provide that the arbitrator has the discretion to “direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues, the decision of which could dispose of all or part of the case.” The AAA Rules also provide that the arbitrator “may entertain motions, including motions that dispose of all aspects of a claim, or that may expedite the proceedings.” AAA RULES R-32(b), (c). See Alfred G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, 62 *DISP. RESOL. J.* 17 (2007).

39. See JAMS RULES 18.

40. See CCA PROTOCOLS, *supra* note 4, at 317–18.

41. Under section 10 of the Federal Arbitration Act, an arbitrator’s refusal to hear evidence “pertinent and material to the controversy” is one ground to vacate an award. See 9 U.S.C. § 10(a)(3). The Revised Uniform Arbitration Act (section 23) provides that an award can be vacated if an arbitrator refused to consider evidence “material to the controversy.” 7 U.L.A. § 23 (2000).

42. See CCA PROTOCOLS, *supra* note 4, at 300.

43. See Overcash & Gerdes, *supra* note 22, at 6. The College of Commercial Arbitrators recognizes that “there are matters for which a dispositive motion, especially a motion for pretrial summary disposition, might provide an opportunity for shortening, streamlining or focusing the arbitration process as, for example, where arbitrators are able to rule on a statute of limitations defense, determine whether contract permits claims for certain kinds of damages, or construed key provision.” CCA PROTOCOLS, *supra* note 4, at 317.

44. See Mark E. Appel, *The Chess Clock: A Time Management Technique for Complex Cases*, 61 *DISP. RESOL. J.* 83 (May–July 2006); Zela G. Claiborne, *Constructing a Fair, Efficient and Cost-Effective Arbitration*, 26 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* 186 (2008); CCA PROTOCOLS, *supra* note 4, at 319.

45. See AAA RULES F-1 (Fast Track Procedures).

46. See AAA RULES R-1 (Regular Track Procedures).

47. The AAA Rules, endorsed by the CCA Protocols, require hearings to be scheduled on consecutive days or blocks of consecutive days. See AAA RULES L-4; CCA PROTOCOLS, *supra* note 4, at 316.

48. See CCA PROTOCOLS, *supra* note 4, at 270–71.

49. AAA offers fast-track procedures applicable to cases under \$75,000 (AAA Rule F-2), which provide inter alia that the arbitration shall be completed within sixty calendar days of confirmation of the arbitrator’s appointment, unless the parties agree otherwise or extraordinary circumstances require an extension (Rule F-12). JAMS offers, as an alternative to its Engineering and Construction Arbitration Rules and Procedures, a set of JAMS Streamlined Arbitration Rules and Procedures [hereinafter JAMS STREAMLINED RULES], www.jamsadr.com/rules-streamlined-arbitration. These apply to claims up to \$250,000. By their terms, they are to apply where the claims fall below that limit and the parties specify JAMS Rules in general but do not specify other specific JAMS Rules in their arbitration agreement. See JAMS STREAMLINED RULES 1. Neither the JAMS Engineering and Construction Rules nor the JAMS Streamlined Rules specify a deadline for completion of an arbitration. The College of Commercial Arbitrators recommends that arbitration providers adopt procedures that include a “presumptive deadline” for the completion of arbitration and offer the parties procedural choices including one set of procedures with relatively short presumptive deadlines for all phases of the arbitration process. CCA PROTOCOLS, *supra* note 4, at 299.