

A GUIDE TO THE
**Management of
Large, Complex Cases**

Effective August 1, 2003



American Arbitration Association
Dispute Resolution Services Worldwide

www.adr.org

Table of Contents

Managing Disputes When the Stakes Get High	2
Highly Sophisticated Arbitration Services	3
Qualification and Selection Criteria for Neutrals	4
Specialized Expertise	5
Special Procedures	6
Flexibility/Senior Administrators	7
Application of the Procedures	7
FAQs	8
Our Pledge	10
Procedures for Large, Complex Commercial Disputes with Commentary	11
L-1 Administrative Conference	11
Commentary	11
L-2 Arbitrators	12
Commentary	13
L-3 Preliminary Hearing	14
Commentary	15
L-4 Management of Proceedings	19
Commentary	20

A Guide to the Management of Large, Complex Commercial Cases

Managing Disputes When the Stakes Get High

Resolving business disputes in a timely, fair and cost-effective manner is an integral – and often, when managed properly, routine – part of successfully running and growing a competitive enterprise.

However, as soon as an organization becomes involved in a large, complex dispute, the situation changes dramatically. Those charged with its management and resolution – senior corporate executives, general counsel, litigation managers, corporate legal staff, and outside counsel – find themselves under unrelenting pressure because the stakes have become far higher, and not just in terms of the money involved. Other considerations include the value of preserving important customer relationships, the impact on employee morale, and the damage that a protracted and public dispute can inflict on an organization's reputation.

It has long been recognized that alternative dispute resolution (ADR) offers businesses a range of flexible, economical, private, fast and impartial processes for handling all types of business disputes. More recently, a growing number of organizations are turning away from the courts and toward ADR solutions for complicated disputes involving substantial dollar amounts. Since 1993 the American Arbitration Association, a leader in the ADR movement, has been providing both a framework and specific conflict-management procedures to handle large, complex disputes that carry a minimum value of \$500,000, but have ranged as high as \$3 billion.

The spectrum of issues arbitrated under our large, complex case (LCC) program is broad. It extends from breach of fiduciary duty and disputes over land development to patent infringement, construction disputes, and breach of contract cases. The diversity of parties utilizing these services is just as wide, ranging from multi-billion dollar Fortune 500 companies to companies with \$50 million in revenue. Parties involved in our LCC program have included an international tennis star with licensing disputes, senior corporate executives involved in employment and golden parachute conflicts, defense contractors doing business with foreign governments, and technology firms providing software and hardware installations to state and local governments.

Highly Sophisticated Arbitration Services

The LCC framework offered by the AAA includes a 900-member panel of nationally recognized, expert neutrals and tailored procedures that help to cut quickly through the conflict. The benefits? An attenuation of the natural animosity that builds among parties locked in protracted courtroom trials and a reduction of both time spent and legal expense. Equally important, the AAA and its neutrals serving on large, complex cases are equipped to provide highly sophisticated arbitration services in terms of industry expertise, process and procedures, and service infrastructure.

Specifically, to manage large, complex cases, the AAA offers:

- > an experienced panel of expert neutrals – all recognized leaders in either specific industries or in the legal community and all experienced in dispute management techniques,
- > procedures designed expressly for the management and resolution of large, complex disputes,
- > flexibility in the implementation of these procedures so that parties can more speedily and efficiently resolve their disputes, and
- > case administration by specially trained, experienced AAA staff.

AAA large case procedures and services are regularly reviewed and revised to adapt to changing needs and conditions. We are accustomed to working in unusually demanding situations that involve tight time constraints, the need for site visits, and an ability to deal with volumes of highly confidential information. We also continually upgrade our service centers. For example, certain AAA offices are now equipped with video conferencing capabilities that permit multiple-site participation, contributing to savings in time and expense.

Qualification and Selection Criteria for Neutrals

The qualifications and continuing training that we demand of our neutrals are among the most stringent in the ADR sector:

Experience and Competence

- Minimum of 15 years of business or professional practice involving complex legal or business matters
- Extensive experience in conflict management
- Evidence of scholarship and continuing education
- Successful completion of mandatory AAA panel training stressing the management of complex cases

Neutrality

- Commitment to impartiality and objectivity
- Independence from any type of prejudice

Judicial Skills

- Demonstrated dispute resolution skills
- Appropriate temperament – unbiased, patient, professional
- Facility with adjudication, negotiation and conciliation

Reputation

- Commands highest respect among bar association peers, relevant professional organizations and/or the business community

Commitment and Availability

- Willingness to serve, if chosen, in accordance with the needs of the parties
- Ability to devote time and effort to major disputes

Specialized Expertise

We offer neutrals with expertise in virtually every business area. Listed below are examples of some of the most frequently requested fields of expertise for our neutrals serving in large, complex cases:

- > Aerospace
- > Banking
- > Data Communications
- > Construction
- > Employment
- > Energy
- > Environmental
- > Health Care
- > Insurance
- > Intellectual Property
- > International
- > Mediation
- > Real Estate
- > Retired Federal and State Judges

Special Procedures

LCC rules incorporate timesaving case-management techniques developed over the years by the AAA, providing parties with procedures that deal with complex and technical issues typically encountered in larger cases.

In the next section of this booklet, the LCC procedures are presented in their entirety with explanatory commentary. In particular, the LCC procedures include the following:

- > mandatory, comprehensive early administrative conference with the AAA prior to the appointment of arbitrators,
- > customized programs for neutral selection are available where the AAA pre-screens a number of applicants who then are interviewed jointly by the parties,
- > mandatory three member panel of arbitrators when the claim amount is \$1MM or more,
- > mandatory preliminary hearing(s) with the arbitrator(s),
- > appropriate discovery as agreed by the parties or directed by the arbitrator,
- > award accompanied by a statement of reasons if requested by the parties or at the discretion of the neutral,
- > possibility of the use of mediation or other settlement processes to resolve some or all issues at an early stage, and
- > specific arbitrator authority to award interest and, if the parties request or so authorize, attorneys' fees.

Flexibility/Senior Administrators

The hallmark of the AAA's handling of large, complex cases is flexibility and party control. Parties can agree that the procedures will apply entirely or in part, and, once that is decided upon, senior case managers consult with the parties to design the most effective case-management plan for the dispute in question.

Application of the Procedures

The AAA's procedures for large, complex cases are applied on all cases involving more than \$500,000, unless the parties opt out. When a case of this amount is filed with the AAA, it is assigned to a senior case manager at the appropriate case management center. The list of potential arbitrators for the case is drawn up from members of the LCC panel once the case manager and the parties have discussed the type of expertise required in terms of the issues raised in the dispute. Here, too, the flexibility of the process is important. Parties with cases involving more than \$500,000 may choose not to use members of the LCC panel and select from our full, larger panel of expert neutrals. Even in complex, complicated cases of less than \$500,000, parties may elect to use the LCC procedures.

Future Application – The parties can provide for application of the procedures by including the following arbitration clause in their contract:

Any controversy or claim arising from or relating to this contract or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its [applicable] Large, Complex Commercial Arbitration Procedures, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Current Application – An existing dispute can be referred to the procedures by the completion of a Submission to Arbitration form (available at any AAA office or online at www.adr.org) if the underlying contract documents do not provide for AAA administration.

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its [applicable] Large, Complex Commercial Arbitration Procedures the following controversy [describe briefly]. Judgment of any court having jurisdiction may be entered on the award.

FAQs

Q What defines a “large, complex” dispute?

A The procedures generally are used for cases with a \$500,000 minimum. However, a dispute can often be of a complex and highly technical nature while involving smaller amounts or no clearly defined monetary claims. For this reason, parties can opt to use the Procedures for Large, Complex Disputes whenever there is an agreement that doing so would aid in the resolution of the dispute.

Q Is participation mandatory with a case involving a large amount of money or complicated issues?

A The Procedures for Large, Complex Disputes will be utilized when specifically called for in the parties contract or when there is a domestic commercial dispute with a claim amount of at least \$500,000, excluding claimed interest, arbitration fees and costs. As with most AAA rules, parties can voluntarily agree to use other AAA rules and can agree to modify specific provisions of the Procedures for Large, Complex Disputes to meet their particular needs.

Q How many LCC panelists are there?

A There are over 900 LCC panelists.

Q Exactly how are the arbitrators appointed in particular cases?

A This is primarily up to the parties. If the underlying agreement specifies a particular method of arbitrator appointment, this will be followed unless the parties agree to some other method. At the administrative conference, the AAA staff will work with the parties to design an appropriate arbitrator-appointment plan. This can range from the traditional AAA listing process (each side is given an identical list of proposed arbitrators and is permitted to strike any names for any reason) to sophisticated customized programs where the AAA pre-screens a number of applicants who then are interviewed jointly by the parties.

Q Are any LCC panelists trained mediators?

A More than 150 of the LCC panelists are trained AAA mediators. Parties in large, complex disputes are encouraged to try mediation, which generally has an 85% success rate. Parties to pending AAA LCC arbitrations may mediate without payment of an additional administrative fee.

Q Which takes precedence if there is a conflict between the special Procedures for Large, Complex Disputes and the rules under which the parties are arbitrating?

A The procedures will control unless the parties agree otherwise.

Q What are the administrative charges for using the LCC process?

A The costs are the same as arbitrating under the Commercial Arbitration Rules and Mediation Procedures. The AAA does not assess an extra administrative charge for the additional administrative services it provides.

Q Who can provide more information regarding the LCC procedures?

A Please contact your local AAA office for further assistance. Contact information can also be found on our Web site at www.adr.org.

Our Pledge

The American Arbitration Association pledges the most responsive, up-to-date service for the specialized needs of large, complex cases. To achieve this, the rules are continually refined and panelists, fees, and management procedures are evaluated as an ongoing policy. Current and former users of the LCC process are surveyed for their feedback on the service as well as for their suggestions on ways of enhancing the process.

Procedures for Large, Complex Disputes with Commentary

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) to obtain conflicts statements from the parties; and
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

Commentary

The AAA attempts to conduct administrative conferences on every large, complex case prior to the arbitrator's appointment. These conferences are conducted over the telephone and are arranged by the case manager. Administrative conferences usually involve only the parties' representatives and the case manager or other AAA representative. In order to expedite large, complex cases, the conference will be held within 14 days of the commencement of the arbitration. If the parties are unable to agree upon a mutually acceptable time for the conference, the AAA can contact the parties individually to discuss administrative issues. In this way, the large, complex case administrative issues are dealt with early in the process, allowing the arbitration to proceed quickly and efficiently.

The administrative conference is the best place for the parties to address any administrative issues with both the other party or parties and the AAA. Below are some examples of typical issues addressed during an administrative conference. Parties should not feel constrained by these examples and the parties are encouraged to raise any other administrative issues that will improve the AAA's administration of their case. Typical issues include:

- status of any settlement discussions;
- specifications of claims and counterclaims;
- estimated number of hearing days;
- date(s), time(s), and place for hearing;
- number and qualifications of arbitrators;
- exchange of information;
- stenographic record;
- the possibility of mediation.

L-2. Arbitrators

- (a) Large, Complex Commercial Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than \$1,000,000, then one arbitrator shall hear and determine the case.

- (b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the Regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

Commentary

If the parties' arbitration agreement does not specify the number of arbitrators, and the amount of each claim or counterclaim is less than \$1,000,000, one arbitrator is appointed to hear the case. If the parties' arbitration agreement does not specify the number of arbitrators, and the amount of the claim or counterclaim is at least \$1,000,000, three arbitrators are appointed to hear the case. Of course, the parties are always free to agree on the number of arbitrators after the case is filed, even if the agreement does not specify the number of arbitrators.

Parties may appoint as arbitrator anyone to whom they mutually agree. The arbitrator need not come from the AAA's Large, Complex Case Panel. If the arbitration provision of the parties' contract specifies the method for arbitrator selection and/or the qualifications the arbitrator must have, the AAA follows that method unless the parties subsequently agree otherwise.

When arbitrators are to be selected from the AAA's Large, Complex Case Panel, the AAA compiles the list from members of the panel who are knowledgeable in the subject matter of the dispute. The list is accompanied by the resumes of each proposed arbitrator.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

- (a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);
- (b) stipulations to uncontested facts;
- (c) the extent to which discovery shall be conducted;
- (d) exchange and premarking of those documents which each party believes may be offered at the hearing;
- (e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;
- (f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;
- (g) the extent to which hearings will proceed on consecutive days;
- (h) whether a stenographic or other official record of the proceedings shall be maintained;
- (i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
- (j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

Commentary

A preliminary hearing is extremely beneficial for getting a case on the right course at an early stage in the arbitration process. Unless the parties request an in-person hearing, the preliminary hearing is conducted via conference call arranged by the AAA case manager. The case manager assigned to the case will likely participate to offer procedural guidance. Based on information provided by the arbitrator, the case manager prepares and distributes a written confirmation of all arrangements agreed to during the preliminary hearing.

If any party feels it has serious discovery needs, a preliminary hearing is usually the best forum in the arbitration process for seeking relief. Typical issues addressed in a preliminary hearing are:

- specification of claims and counterclaims;
- identification of any affiliated, related, or successor persons or entities;
- stipulation of uncontested facts;
- information to be exchanged and a schedule for the exchange (including reports from experts);
- lists of witnesses with outlines of testimony (including biographies and reports of expert witnesses);
- advance filing and advance identification of exhibits (schedules for filing of affidavits or conducting depositions);
- estimated length of case (i.e., number of hearing days);
- schedule of evidentiary hearings;
- number of copies of exhibits to be made;
- whether or not briefs (post- or pre-hearing) will be necessary;
- form of the award (e.g., reasoned award);
- whether or not the parties are interested in utilizing mediation or other non-binding dispute resolution mechanisms;
- procedures for the issuance of subpoenas.

At the beginning of the preliminary hearing, the arbitrator will most likely explain to the parties the purpose of the hearing and clearly indicate what they expect to accomplish during the preliminary hearing.

Below is a list of items arbitrators will generally go over with the parties:

1. *Statement of Claims and Issues:* Arbitrators may give the parties an opportunity to describe the subject of the dispute briefly, which issues are expected to be resolved, and other brief comments that will educate them about the issues to be decided.
2. *Specification of Claims and Counterclaims:* Arbitrators will encourage the parties to specify their claims and counterclaims, quantify the amount of damages associated with each segment of their respective claims, and provide such information about their claims to the AAA. A firm date should be set for exchanging the specifications and filing them with the AAA.
3. *Estimated Length of the Case and the Scheduled Hearings:* At the preliminary hearing, the parties should be prepared to give a realistic estimate as to the number of hearing days needed to present their respective cases, and they should be ready to agree to a schedule for the evidentiary hearings as soon as feasible. Keeping in mind that a prompt award is an important part of the arbitration process, arbitrators will encourage the scheduling of consecutive hearing days, including evenings or weekends if necessary (where permitted by law).

This is also the point at which arbitrators will want to speak about how the evidentiary hearing will be conducted. Arbitrators may want to advise the parties that documents and/or pictures should be self-identifying wherever possible and that the presentation of repetitious testimony and evidence will not be viewed favorably. Whatever other timesaving devices arbitrators think will expedite the arbitration are indicated at this time. Finally, full hearing days will be scheduled with minimal lapses for lunch and breaks. Arbitrators will make it clear that requests to postpone scheduled hearings will be granted only for good cause.

4. *Exchanging of Information and a Schedule for the Exchange (Including Reports from Experts)*: Arbitrators will inform the parties that they are required to cooperate in committing to, conducting and completing an exchange of information concerning their documents and witnesses. If parties do not agree to exchange particular information, arbitrators will hear their disagreement and make a ruling on the issue. When the information to be exchanged has been specified, arbitrators will set the date and method for the exchange.
5. *Advanced Filing and Advanced Identification of Exhibits*: Arbitrators may inform the parties that they will be required, pursuant to Section L-4 (e) of the rules, to identify and exchange exhibits in advance of the evidentiary hearing. A firm date will be set for the filing and exchange, normally ten business days prior to the hearing. It will save time and effort if the parties know how many copies of exhibits and other evidence to provide (enough for each arbitrator and each party). Arbitrators may encourage the parties to submit their exhibits in tabbed “exhibit notebooks” for easy reference.
6. *Lists of Witnesses with Outlines of Testimony (Including Biographies of Expert Witnesses)*: Arbitrators will inform the parties that they will be required to provide each other with lists of intended witnesses, arranged in the order in which they will be called. Among other things, this helps arbitrators identify potential disclosures prior to the hearing. A summary, by name, for each witness, with the subject matter of the anticipated testimony of each, should also be submitted. A firm date will be set for the exchange.
7. *Supplemental Issues: Stipulation of Uncontested Facts* – Any facts to which the parties can stipulate should be reduced to writing. The arbitrator(s) may set a procedure for developing such a stipulation with a deadline established for the preparation, execution, and filing of same with the AAA. Briefs – Arbitrators may discuss whether briefs will be required. This applies to both pre-hearing and post-hearing briefs. Pre-hearing briefs are usually a luxury and may only be needed on extremely complex cases. Some

arbitrators find concise (five pages or less) position papers useful. Post-hearing briefs are often beneficial for summary and final identification of issues. They will also often provide arbitrators with the opportunity to see if the parties made any increases in their claims or counterclaims. When such changes are indicated in a party's brief, arbitrators will notify the case manager immediately as it will likely impact the administrative fee the party must pay. When briefs are to be filed, arbitrators will set a firm date for their filing and exchange. Briefs are to be filed with the AAA for transmittal to the arbitrator. Also, if arbitrators think it appropriate, they may set a page limit on the length of the briefs.

8. *Form of Award:* Arbitrators are not required to provide a reasoned award *unless* all parties have made such a request, in writing, prior to their appointment or unless arbitrators determine that a reasoned award is appropriate.
9. *Concluding Remarks:* At the conclusion of the preliminary hearing, arbitrators will likely reiterate their intention to move the arbitration to a fair and speedy conclusion.
10. *Scheduling and Procedure Order:* Arbitrators will advise the parties that the AAA case manager will provide them with a confirmation of all arrangements made at the preliminary hearing.

L-4. Management of Proceedings

- (a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.
- (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.
- (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.
- (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.
- (e) The parties shall exchange copies of all exhibits they intend to submit at the hearing ten business days prior to the hearing unless the arbitrator(s) determine otherwise.
- (f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.
- (g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
- (h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Commentary

To effectively present one's case, parties sometimes need documentary or other evidence in the opposing party's possession. Under this section of the rules, arbitrators have the explicit authority to control the production of documents and discovery requests of the parties. Arbitrators at all times retain the power to resolve any disputes concerning the exchange of information. Arbitrators will typically follow the "general rules" listed below in managing this aspect of the arbitration process:

- Limit information requests only to information relevant to the dispute, and
- Limit the time frame within which the information exchange must be conducted and concluded. For example, "all information must be exchanged within two weeks from today," or "all information must be exchanged 21 days prior to the start of the hearing," etc.

Under this section, the parties must also exchange, at least ten business days before the hearing, copies of all exhibits they intend to submit at the hearing.

Upon good cause shown, the arbitrator(s) are also authorized to order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

All of the arbitrator(s) determinations and/or parties' agreements regarding the exchange of information shall also be included within the Scheduling and Procedure Order.

Rules, forms, procedures and guides, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating. To ensure that you have the most current information, see our Web site at www.adr.org.

©2005, all rights are reserved by the American Arbitration Association.



American Arbitration Association

Dispute Resolution Services Worldwide