COMMERCIAL ARBITRATION: CASES AND PROBLEMS

Third Edition

2023 Update

By

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Chapter 1 Introduction to Commercial Arbitration

Add the following as new note 5 after the Tullock excerpt on page 8 and renumber the existing notes accordingly:

5. In March 2015, the Consumer Financial Protection Bureau issued its Final Report to Congress on the use of pre-dispute arbitration clauses in consumer financial services contracts. *See* CFPB, Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter CFPB Final Report]. The study was required by Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010). Among the study's many findings about AAA arbitration proceedings were the following:

- "From 2010 through 2012, an average of 616 individual AAA cases were filed per year for six product markets combined: credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans."

- "Forty percent of the arbitration filings involved a dispute over the amount of debt a consumer allegedly owed to a company, with no additional affirmative claim by either party. In another 29% of the filings, consumers disputed alleged debts, but also brought affirmative claims against companies."

- "The average consumer affirmative claim amount in arbitration filings with affirmative consumer claims was around $27,000. The median was around $11,500. Across all six product markets, about 25 disputes a year involved affirmative consumer claims of $1,000 or less."

- "Almost all of the arbitration proceedings involved companies with repeat experience in the forum. And when consumers had counsel, counsel was generally a repeat player in arbitration."

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- "Of the 1,060 arbitration cases filed in 2010 and 2011, so far as we could determine, arbitrators issued decisions in just under 33%. In approximately 25%, the record reflects that the parties reached a settlement. The remaining cases ended in an unknown manner or were technically pending but dormant as of early 2013."

- "Of the 341 cases filed in 2010 and 2011 that were resolved by an arbitrator and where we were able to ascertain the outcome, consumers obtained relief regarding their affirmative claims in 32 disputes. Consumers obtained debt forbearance in 46 cases (in five of which the consumers also obtained affirmative relief). The total amount of affirmative relief awarded was $172,433 and total debt forbearance was $189,107."

- "Of the 244 cases in which companies made claims or counterclaims that were resolved by arbitrators in a manner that we were able to determine, companies obtained relief in 227 disputes. The total amount of such relief was $2,806,662."

CFPB Final Report, *supra*, at 11-12.

Add the following to the end of note 1 after *Smith v. AAA* on page 18:

; Roberts v. AT&T Mobility LLC, 877 F.3d 833, 837 (9th Cir. 2017) ("There is no state action here…. The FAA merely gives AT&T the private choice to arbitrate, and does not 'encourage' arbitration such that AT&T's conduct is attributable to the state."), cert. denied, 138 S. Ct. 2653 (2018); Everett v. Paul Davis Restoration, Inc., 771 F.3d 380, 386 (7th Cir. 2014) ("Ms. Everett also alleges that the arbitration agreement violated Ms. Everett's due process rights. We find this argument wholly unavailing, as this argument fails at the most basic level—none of the parties involved are state actors."); Mave Enterprises, Inc. v. Travelers Indem. Co., 162 Cal. Rptr. 3d 671, 695 (Cal. App. 2013) ("Nor does the confirmation of an arbitration award constitute state action."). *Cf.* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1949 (2015) (Alito, J., concurring) ("No one believes that an arbitrator exercises '[t]he judicial Power of the United States,' Art. III, § 1, in an ordinary, run-of-the mill arbitration.").

Revise the citations to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration on page 19 as follows:

Update the citations from Restatement § 1-1 to Restatement § 1.1.

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Add the following to the end of note 1 after *AMF Brunswick* on page 22:

See Druco Restaurants, Inc. v. Steak n Shake Enterprises, Inc., 2013 WL 5779646, at *6 (S.D. Ind. Oct. 9, 2013) (citing "split amongst the Circuit Courts of Appeals as to whether or not non-binding arbitration is subject to the FAA"), *aff'd on other grounds*, 765 F.3d 776 (7th Cir. 2014).

Add the following after the citation to *Lynn* in note 2 after *AMF Brunswick* on page 23:

; Trujillo v. Gomez, 2015 WL 1757870, at *9 (S.D. Cal. Apr. 17, 2015) ("Absent authority for compelling mediation in an action brought by Plaintiffs, the Court declines to do so.") (following *Advanced Bodycare*).

Replace the first two paragraphs of note 2 after the Ware excerpt on page 60 with the following:

2. As discussed in Chapter 3, in recent years Congress has enacted a number of statutes limiting the enforceability of pre-dispute arbitration agreements in particular types of contracts and or as to particular types of claims—most recently adding a new Chapter 4 to the FAA making such agreements unenforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." 9 U.S.C. § 402(a). Congress also has considered but not enacted bills that would restrict the use of arbitration clauses in nursing home contracts and consumer lending agreements, among others. In addition, the proposed Forced Arbitration Injustice Repeal (FAIR) Act provides more broadly that "no predispute arbitration agreement … shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." S. 1376, § 3 (2023) (adding 9 U.S.C. § 502(a)), *reprinted at* pages 160-164 of this Update. The House of Representatives passed a prior version of the FAIR Act on March 17, 2022, but the Senate did not act on it. The current version of the bill is included in this Update.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), gives both the SEC and the Consumer Financial Protection Bureau (CFPB) authority to prohibit or impose conditions on the use of pre-dispute arbitration agreements in contracts they regulate, *id.* §§ 921 & 1028. On July 10, 2017, the CFPB issued a final rule regulating the use of arbitration clauses in consumer financial services contracts. *See* Consumer Financial Protection Bureau, Final Rule: Arbitration Agreements (July 2017), *reprinted at* pages 149-159 of this Update. On November 1, 2017, President Trump signed into law Public Law No.

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115-74, 131 Stat. 1243 (2017), disapproving the CFPB rule under the Congressional Review Act. For further discussion of the CFPB Rule and rules proposed or adopted by other federal agencies, see § 3.02, *infra* at pages 34-40.

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Chapter 2 Enforcing Domestic Agreements to Arbitrate

Add the following to the end of note 5 after *Prima Paint* on page 69:

In Signature Leasing, LLC v. Buyer's Grp., LLC, 466 P.3d 544 (Okla. 2020), the Oklahoma Supreme Court held that *Shaffer* was no longer good law after the State's adoption of the Revised Uniform Arbitration Act (in particular § 6(c) of RUAA, codified at 12 Okla. Stat. § 1857(C)). The Court explained:

> The language in section 1857, in light of its amendment after prior judicial pronouncement, mandates that determination of fraudulent inducement to the entire contract is a question for the arbitrator. Section 1857(C) makes Oklahoma's law uniform with the majority of other states in application of arbitration laws, thus following the legislative intent [of RUAA]. Section 1857(C) also makes Oklahoma's policy on separability fall in line with the United States Supreme Court's interpretation of title 9, section 2 of the Federal Arbitration Act on the issue of who determines claims of fraud in the inducement to the entirety of a contract that contains an arbitration clause.

Id. at 550.

Add the following as new note 5 after *First Options* on page 76:

5. In *BG Group PLC v. Republic of Argentina*, the Supreme Court addressed the question whether, "[i]n disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?" Petn. for Certiorari, at i, BG Group PLC v. Republic of Argentina (No. 12-138) (July 27, 2012). Multi-step dispute resolution clauses — which require parties to negotiate or mediate before they can go to arbitration — are increasingly common. *BG* group involved a less common form of "multi-staged dispute resolution process": a bilateral investment treaty (BIT) that

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required a party to litigate for 18 months before proceeding to arbitration. The D.C. Circuit had held that a court, rather than the arbitrators, should determine whether the condition precedent in the treaty had been satisfied. Republic of Argentina v. BG Group PLC, 665 F.3d 1363, 1373 (D.C. Cir. 2012). The Supreme Court reversed, finding "the local litigation requirement [to be] highly analogous to procedural provisions that … this Court ha[s] found are for arbitrators, not courts, primarily to interpret and to apply" and concluding that the fact that the case involved an investment arbitration did not change that usual result. BG Group PLC v. Republic of Argentina, 572 U.S. 25, 35-36 (2014) (citing *Howsam*).

Add the following citation to the end of note 2 after *Buckeye* on page 80:

But see In re StockX Customer Data Sec. Breach Litig., 19 F.4th 873, 883-84 (6th Cir. 2021) ("Here, plaintiffs' infancy argument does not concern the formation or existence of a contract. It makes no difference whether infancy under state law renders a contract void or voidable…. Instead, the relevant inquiry is whether the minor plaintiffs' infancy defense amounts to an argument that the agreement "was [n]ever concluded." That is not the case here.").

Add the following citation to the end of note 5 after *Buckeye* on page 81:

; see also Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 22 (2012) (per curiam) (summarily reversing Oklahoma Supreme Court and holding that arbitrator must decide whether noncompetition agreement that included arbitration clause is illegal).

Add the following citations to the end of note 3 after *Rent-A-Center* on page 87:

; Tiri v. Lucky Chances, Inc., 226 Cal. App. 4th 231, 246 (2014) ("Although we conclude that the delegation clause is a contract of adhesion and procedurally unconscionable, we conclude that it is nonetheless valid because it is not substantively unconscionable. The delegation clause is not overly harsh, and does not sanction one-sided results."); Mohamed v. Uber Tech., Inc., 109 F. Supp. 3d 1185, 1208 (N.D. Cal. 2015) (holding delegation clause substantively unconscionable because plaintiff "would be unable to access the arbitral forum to even litigate delegation issues if the fee-splitting clause is enforced"), *rev'd in part*, 848 F.3d 1201, 1211 (9th Cir. 2016) (holding delegation clause not procedurally unconscionable because of opt-out right in contract; therefore no need to address substantive unconscionability). *But see* Lim v. TForce Logistics, LLC, 8 F.4th 992, 1005 (9th Cir. 2021) ("[B]ased on the cost-splitting, fee-shifting, and Texas venue provisions, the

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district court correctly concluded the delegation clause was substantively unconscionable ….”); Bielski v. Coinbase, Inc., 2022 WL 1062049, at *6 (N.D. Cal. Apr. 8, 2022) (holding delegation clause unconscionable when it “only delegates questions of arbitrability that emerge from the user agreement’s tripartite dispute-resolution procedure, not arbitration, generally”).

Insert the following as note 4 on page 87 and renumber previous note 4 as note 5:

4. Should the court consider whether a party’s argument in favor of arbitration is “wholly groundless” before sending the case to the arbitrators pursuant to a delegation clause? In Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019), the U.S. Supreme Court held that the FAA “does not contain a ‘wholly groundless’ exception …. When the parties’ contract delegates the arbitrability question to an arbitrator, the court must respect the parties’ decision as embodied in the contract.” Id. at 528. The Court expressly left open the question whether and when institutional arbitration rules act as a delegation clause (discussed in the next note) because the court of appeals had not decided that question. Id. at 531.

On remand, the Eleventh Circuit again refused to order the case to arbitration, this time because the arbitration clause carved actions for injunctive relief out of the obligation to arbitrate. Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274, 277 (5th Cir. 2019) (“‘Any dispute arising under or related to this Agreement (*except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of Pelton & Crane*), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.’”) (quoting arbitration clause; emphasis added),. According to the court of appeals, “[t]he plain language [of the arbitration clause] incorporates the AAA rules—and therefore delegates arbitrability—for all disputes except those under the carve-out.” Id. at 281. On June 15, 2020, the Supreme Court granted certiorari for the second time in *Henry Schein*, 141 S. Ct. 107 (2020), this time to resolve the question: “Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.” Petn. for Certiorari, at I, Henry Schein, Inc. v. Archer & White Sales, Inc., (No. 19-963) (June 15, 2020). But after oral argument, the Court dismissed the petition as improvidently granted, without resolving the question presented. Henry Schein, Inc v. Archer & White Sales, Inc., 141 S. Ct. 656 (2021).

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Revise the citations to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration on pages 87-88 as follows:

Update the citation from Restatement § 4-14 to Restatement § 4.12.

Revise the quoted language from Rule R-7(a) of the AAA Commercial Arbitration Rules in the first sentence of former note 4 after *Rent-A-Center* on page 87 to read as follows:

"[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court"

Add the following to the end of note 4 after *Rent-A-Center* on page 88:

The last clause of Rule R-7(a), adding "without any need to refer such matters first to a court," is new. When the AAA added similar language to its international arbitration rules, it issued a publication explaining:

> As there is potential controversy regarding whether reference to arbitral rules constitutes a clear delegation of the issue of arbitrability to the tribunal, Article 21(1) clarifies and further strengthens the concept that the tribunal has the jurisdiction to determine arbitrability objections without court involvement. The reason for this change is to counteract any doubt about the effect on this rule by the recently adopted Restatement of the U.S. Law of International Commercial and Investor State Arbitration (ALI 2019) (Restatement). The Restatement adopted a position, contrary to the weight of case law, concerning when the incorporation of arbitration rules into an arbitration agreement may constitute the "clear and unmistakeable evidence" of an intention to delegate questions of arbitrability to arbitrators, rather than to courts, as required by the Supreme Court in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

Ann Ryan Robertson, The 2021 ICDR® International Dispute Resolution Procedures 4 (2021), available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf.

Does the new language make it more likely or less likely that the rule operates as a delegation clause—i.e., delegates final decisionmaking authority to the arbitrators?

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Insert the following before *Perry Homes* on page 89:

MORGAN v. SUNDANCE, INC.
United States Supreme Court
142 S. Ct. 1708 (May 23, 2022)

Justice KAGAN delivered the opinion of the Court.

When a party who has agreed to arbitrate a dispute instead brings a lawsuit, the Federal Arbitration Act (FAA) entitles the defendant to file an application to stay the litigation. See 9 U.S.C. § 3. But defendants do not always seek that relief right away. Sometimes, they engage in months, or even years, of litigation—filing motions to dismiss, answering complaints, and discussing settlement—before deciding they would fare better in arbitration. When that happens, the court faces a question: Has the defendant's request to switch to arbitration come too late?

Most Courts of Appeals have answered that question by applying a rule of waiver specific to the arbitration context. Usually, a federal court deciding whether a litigant has waived a right does not ask if its actions caused harm. But when the right concerns arbitration, courts have held, a finding of harm is essential: A party can waive its arbitration right by litigating only when its conduct has prejudiced the other side. That special rule, the courts say, derives from the FAA's "policy favoring arbitration."

We granted certiorari to decide whether the FAA authorizes federal courts to create such an arbitration-specific procedural rule. We hold it does not.

I

Petitioner Robyn Morgan worked as an hourly employee at a Taco Bell franchise owned by respondent Sundance. When applying for the job, she signed an agreement to "use confidential binding arbitration, instead of going to court," to resolve any employment dispute.

Despite that agreement, Morgan brought a nationwide collective action against Sundance in federal court for violations of the Fair Labor Standards Act. Under that statute, employers must pay overtime to covered employees who work more than 40 hours in a week. Morgan alleged that Sundance routinely flouted the Act—most notably, by recording hours worked in one week as instead worked in another to prevent any week's total from exceeding 40.

Sundance initially defended itself against Morgan's suit as if no arbitration agreement existed. Sundance first moved to dismiss the suit as duplicative of a collective action previously brought by other Taco Bell employees. In that motion,

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Sundance suggested that Morgan either "join" the earlier suit or "refile her claim on an individual basis." But Morgan declined the invitation to litigate differently, and the District Court denied Sundance's motion. Sundance then answered Morgan's complaint, asserting 14 affirmative defenses—but none mentioning the arbitration agreement. Soon afterward, Sundance met in a joint mediation with the named plaintiffs in both collective actions. The other suit settled, but Morgan's did not. She and Sundance began to talk about scheduling the rest of the litigation.

And then—nearly eight months after the suit's filing—Sundance changed course. It moved to stay the litigation and compel arbitration under Sections 3 and 4 of the FAA. Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by litigating for so long. Sundance responded that it had asserted its right as soon as this Court's decision in *Lamps Plus*, *Inc.* v. *Varela*, 139 S. Ct. 1407 (2019), clarified that the arbitration would proceed on a bilateral (not collective) basis.

The courts below applied Eighth Circuit precedent to decide the waiver issue. Under that Circuit's test, a party waives its contractual right to arbitration if it knew of the right; "acted inconsistently with that right"; and—critical here—"prejudiced the other party by its inconsistent actions." *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (C.A.8 2011)….

Although the District Court found the prejudice requirement satisfied, the Court of Appeals disagreed and sent Morgan's case to arbitration. The panel majority reasoned that the parties had not yet begun formal discovery or contested any matters "going to the merits." Judge Colloton dissented. He argued that Sundance had "led Morgan to waste time and money" opposing the motion to dismiss and "engaging in a fruitless mediation." More fundamentally, he raised doubts about the Eighth Circuit's prejudice requirement. Outside the arbitration context, Judge Colloton observed, prejudice is not needed for waiver. In line with that general principle, he continued, "some circuits allow a finding of waiver of arbitration without a showing of prejudice."

We granted certiorari to resolve that circuit split. Nine circuits, including the Eighth, have invoked "the strong federal policy favoring arbitration" in support of an arbitration-specific waiver rule demanding a showing of prejudice. Two circuits have rejected that rule. We do too.

II

We decide today a single issue, responsive to the predominant analysis in the Courts of Appeals, rather than to all the arguments the parties have raised. In their briefing, the parties have disagreed about the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to

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arbitrate. The parties have also quarreled about whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness. We do not address those issues. The Courts of Appeals, including the Eighth Circuit, have generally resolved cases like this one as a matter of federal law, using the terminology of waiver. For today, we assume without deciding they are right to do so. We consider only the next step in their reasoning: that they may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's "policy favoring arbitration." *Moses H. Cone*. They cannot. For that reason, the Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice.

Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. Waiver, we have said, "is the intentional relinquishment or abandonment of a known right." To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other…. So in demanding that kind of proof before finding the waiver of an arbitration right, the Eighth Circuit applies a rule found nowhere else—consider it a bespoke rule of waiver for arbitration.

The Eighth Circuit's arbitration-specific rule derives from a decades-old Second Circuit decision, which in turn grounded the rule in the FAA's policy. See *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (C.A.2 1968). "[T]here is," the Second Circuit declared, "an overriding federal policy favoring arbitration." [*Id.*] For that reason, the court held, waiver of the right to arbitrate "is not to be lightly inferred": "[M]ere delay" in seeking a stay of litigation, "without some resultant prejudice" to the opposing party, "cannot carry the day." Over the years, both that rule and its reasoning spread. Circuit after circuit (with just a couple of holdouts) justified adopting a prejudice requirement based on the "liberal national policy favoring arbitration."

But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration

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contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

And indeed, the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here. Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—"shall be made and heard in the manner provided by law for the making and hearing of motions" (unless the statute says otherwise). A directive to a federal court to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration. As explained above, the usual federal rule of waiver does not include a prejudice requirement. So Section 6 instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.

Stripped of its prejudice requirement, the Eighth Circuit's current waiver inquiry would focus on Sundance's conduct. Did Sundance, as the rest of the Eighth Circuit's test asks, knowingly relinquish the right to arbitrate by acting inconsistently with that right? On remand, the Court of Appeals may resolve that question, or (as indicated above) determine that a different procedural framework (such as forfeiture) is appropriate. Our sole holding today is that it may not make up a new procedural rule based on the FAA's "policy favoring arbitration."

* * *

For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Replace notes 2 and 3 after *Perry Homes* on page 96 with the following:

2. The Supreme Court in *Morgan v. Sundance* resolved a circuit split over the proper test for finding that a party has waived its right to arbitrate, holding that prejudice to the non-waiving party is not required. Accordingly, the analysis in section V of the *Perry Homes* opinion is no longer good law. As the Court in *Morgan* notes, the opinion leaves open a number of questions raised by the parties in the case, such as whether federal or state law applies and whether the appropriate doctrine to use is waiver, estoppel, laches, or something else. How might the open questions affect the analysis of waiver (or whatever doctrine is used) in the future?

3. What is the appropriate standard to apply in evaluating claims of waiver after *Morgan v. Sundance*? Is it enough to establish waiver that, in the words of the

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court in *Perry Homes*, a party "substantially invok[e] the judicial process"? Would *Perry Homes* have been decided differently after *Morgan*? What about *Morgan* itself? Will it come out differently on remand?

Regardless of the verbal formulation of the test, courts often apply a variety of factors, making a determination of waiver dependent on the facts of the case. How does that affect the ability of attorneys to advise their clients on whether a party has waived the right to arbitrate?

Revise the citations to the AAA Commercial Arbitration Rules in Chapter 2 as follows:

p.97, n.5: Update the citation from AAA Rule R-48(a) to AAA Rule R-54(a)

p.99, Problem 2.5(f): Update the citation from AAA Rule R-48(a) to AAA Rule R-54(a)

Add the following citation before the phrase "By comparison" in note 4 after *Specht* on page 112:

See also Sgouros v. TransUnion Corp., 817 F.3d 1029, 1035 (7th Cir. 2016) ("But what cinches the case for Sgouros is the fact that TransUnion's site actively misleads the customer. The block of bold text below the scroll box told the user that clicking on the box constituted his authorization for TransUnion to obtain his personal information. It says nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement."). *Compare* Meyer v. Uber Techs., Inc., 868 F.3d 66, 79 (2d Cir. 2017) (concluding that "the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law") with Cullinane v. Uber Techs., Inc., 893 F.3d 53, 64 (1st Cir. 2018) (concluding that "the terms of the [Uber] Agreement were not reasonably communicated to the Plaintiffs").

Add the following citation to the end of note 3 after *Gateway* on page 124:

See generally Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 982 (10th Cir. 2014) ("The problem is Ferrellgas's rolling contract formation theory may be about as controversial an idea as exists today in the staid world of contract law. Some states endorse the theory, but others reject it—holding that a seller's later-arriving written contract constitutes at most only a proposal to modify a preexisting oral

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contract, and that a buyer's assent to the proposed modification won't be inferred simply from the buyer's continuing the preexisting oral contract.").

Replace *Gibson* on pages 125-128 with the following:

BAKER v. BRISTOL CARE, INC.
Supreme Court of Missouri
450 S.W.3d 770 (2014)

Richard B. Teitelman, Judge

Bristol Care Inc. and David Furnell (Appellants) appeal an order overruling their motion to compel arbitration. They contend that the circuit court erred by not compelling arbitration because the arbitration agreement between Bristol and its employee, Carla Baker, is valid and enforceable.

This Court affirms the circuit court's order because there was no consideration to create a valid arbitration agreement. First, Baker's continued at-will employment does not provide consideration for the arbitration agreement. Second, the fact that Bristol retroactively could modify, amend or revoke the agreement means that Bristol's promise to arbitrate is illusory and does not constitute consideration for Baker's agreement to arbitrate.

FACTS

Bristol promoted Baker from her position as an hourly employee to a salaried managerial position at one of Bristol's long-term care facilities. Bristol drafted an employment agreement and arbitration agreement for Baker to sign. The parties signed the agreements contemporaneously at the time of Baker's promotion.

The employment agreement provided that Baker's employment would "continue indefinitely" unless Baker gave 60 days notice or Bristol elected to terminate her employment in one of four ways: (1) with five days' written notice "at [Bristol's] sole option;" (2) without notice if Bristol paid Baker five days' compensation; (3) without notice if, in Bristol's "sole opinion," Baker violates the employment agreement in a way that "jeopardizes the general operation of the facility or the care, comfort or security of its residents;" or (4) without notice for "dishonesty, insubordination, moral turpitude or incompetence." The employment agreement also provided that Baker would receive increased pay and employment benefits, including a license to live in the facility rent-free.

The arbitration agreement provides that all legal claims the parties may have against one another will be resolved by binding arbitration. The arbitration

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agreement provides that consideration consists of Baker's continued employment and mutual promises to resolve claims through arbitration. Section 3 of the arbitration agreement, titled "Employment–At–Will," provides:

> This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and does not alter Employee's status as an at-will employee.
>
> Notwithstanding this Agreement, either Employee or Company can terminate the employment ... at any time, for any reason, with or without cause at the option of the Employee or the Company.

Finally, the arbitration agreement provides that Bristol specifically "reserves the right to amend, modify or revoke this agreement upon thirty (30) days' prior written notice to the Employee."

Bristol terminated Baker from her position as administrator of the long-term care facility. Baker filed a class action lawsuit against Appellants seeking compensation for allegedly unpaid overtime hours. Appellants filed a motion to compel arbitration. The circuit court overruled the motion. This appeal followed.

ANALYSIS

…

II. Validity of Arbitration Agreement

… "The essential elements of any contract, including one for arbitration, are '"offer, acceptance, and bargained for consideration."' Consideration "consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party."

Appellants argue that there are two sources of consideration for the arbitration agreement: (1) Baker's promotion, continued employment and attendant benefits; and (2) Bristol's promise to arbitrate its claims arising out of the employment relationship between it and Baker and to assume the costs of arbitration.…

A. Continued Employment

Bristol argues that Baker's acceptance of continued employment, with the attendant increase in salary and benefits, plus the limits on Bristol's right to terminate her employment, constitute consideration to support the arbitration agreement. Baker argues that her employment remained at-will and that continued at-will employment does not constitute valid consideration to support the arbitration agreement.

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The Missouri Court of Appeals has held that continued at-will employment is not valid consideration to support an agreement requiring the employee to arbitrate his or her claims against the employer. [*See, e.g.*, *Morrow v. Hallmark Cards, Inc.,* 273 S.W.3d 15, 25 (Mo.App.2008).] An offer of continued at-will employment is not valid consideration because the employer makes no legally enforceable promise to do or refrain from doing anything it is not already entitled to do. The employer still can terminate the employee immediately for any reason. While the federal courts have reached a different result, this Court rejects that approach and, instead, adopts the analysis employed [in the] court of appeals cases, which hold that continued at-will employment is not valid consideration to create an enforceable contract.[1] The issue becomes whether the employment and arbitration agreements altered Baker's status as an at-will employee.

…

The employment agreement provides that Baker's employment will "continue indefinitely" unless Bristol elected to terminate Baker by giving her five days' written notice "at [Bristol's] sole option" or terminating her without notice and paying Baker five days' compensation. The employment agreement permits Bristol to terminate Baker immediately without notice for any reason by paying her what amounts to a severance package worth five days' pay. There is no guaranteed duration of employment. The lack of a defined duration of employment is consistent with at-will employment.

The arbitration agreement drafted by Bristol confirms that the parties understood that Baker was an at-will employee. Section 3 of the arbitration agreement provides that the agreement "does not alter Employee's status as an at-will employee." The agreement then provides that "[n]otwithstanding this Agreement, either Employee or Company can terminate the employment ... at any time, for any reason, with or without cause at the option of the Employee or the Company." These provisions amount to an unequivocal, positive representation by Bristol that Baker's status is that of "an at-will employee." Under these facts, Baker is an at-will employee. The various promises that the parties exchanged were all incidents of Baker's continued at-will employment. Neither Baker's continued at-will employment nor the incidents of that employment provide consideration supporting an obligation to arbitrate disputes with Bristol.

…

[1] The principal federal case is *Berkley v. Dillard's Inc.,* 450 F.3d 775, 777 (8th Cir. 2006). In *Berkley*, the Eighth Circuit held that continued employment constitutes consideration and acceptance sufficient to create an enforceable contract. Subsequent federal district court cases have followed *Berkley*.

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B. Mutual Promises to Arbitrate

Appellants contend that the arbitration agreement also is supported by mutual promises to arbitrate. As the dissent explains at length, bilateral contracts are supported by consideration and enforceable when each party promises to undertake some legal duty or liability. These promises, however, must be binding, not illusory. *A* promise is illusory when one party retains the unilateral right to amend the agreement and avoid its obligations.

In this case, Bristol's alleged mutual promise to arbitrate is conditioned on Bristol's unilateral "right to amend, modify or revoke this agreement upon thirty (30) days' prior written notice to the Employee." The quoted language does not limit Bristol's authority to modify the arbitration agreement unilaterally and retroactively. If Bristol retains unilateral authority to amend the agreement retroactively, its promise to arbitrate is illusory and is not consideration.[2]

Bristol asserts that the requirement of prior written notice means that any modifications must apply prospectively only. The fact that Bristol must give prior written notice of an amendment to the arbitration agreement does not preclude Bristol from giving Baker prior written notice that, effective in thirty days, Bristol retroactively is disclaiming a promise made in the arbitration agreement. For instance, if in the course of an ongoing arbitration process, Bristol concluded that the process was not favorable, Bristol could provide Baker notice that, effective in 30 days, it no longer would consider itself bound by the results of the arbitration. While the dissent concludes summarily that no court would adopt a construction of the agreement allowing Bristol to disclaim or modify its arbitration promises unilaterally at any time for its own benefit, the fact remains that the language of the agreement would permit Bristol to do just that.

…

Conclusion

Baker's continued at-will employment and Bristol's promise to resolve claims through arbitration do not provide consideration to form a valid arbitration agreement. The judgment overruling appellant's motion to compel arbitration is affirmed.

---

[2] The dissent lists the various arbitration promises that both parties made. The list is accurate. The list overlooks the fact that each of these arbitration-related promises is subject to unilateral modification or abrogation by Bristol. Just as adding several zeros equals zero, adding several illusory promises equals an illusory promise.

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PAUL C. WILSON, Judge.

…

Where I part company with the majority opinion … is its conclusion that no contract was formed between Ms. Baker and Bristol Care because there was no consideration to make their respective promises legally binding. I disagree on this point and, therefore, respectfully dissent.

…

II. Consideration as an Element of Contract Formation

…

There have been numerous opinions from this Court and others on the subject of consideration, and scholars have filled countless pages in their efforts to explain what those opinions mean. The subtle nuances in the application of this doctrine at the outer edges are as complex as any in the common law. But no matter how much these nuances may thrill scholars, haunt courts, and torture first-year law students, they are unnecessary to the decision of this case. This case requires only the straightforward application of three basic principles of consideration that have been stated and applied by Missouri courts without hesitation or qualification for generations.

…

The first relevant principle of consideration is that it is a bargained-for exchange. In other words, when a promise is given in exchange for a benefit to the promisor, or in exchange for a detriment to the promisee, this bargain supplies the consideration needed to form a contract. In this way, consideration demonstrates the seriousness of the parties' bargain and provides assurance that they intended a promise to be enforceable in a court of law.

…

The second relevant principle regarding consideration is that it requires no qualitative analysis. Consideration either is present (and a contract is formed), or it is not. Courts have no authority to attempt to value the bargained-for consideration in an effort to determine whether the promisor is—or is not—receiving "adequate" return for the promise given.

…

The third relevant principle is that all contemporaneous promises by one party are deemed to have been given in exchange for the aggregate benefit to that party or the aggregate detriment to the other party. Courts are not allowed to unravel the parties' bargain in hindsight, i.e., to allocate the consideration between and among some—but not all—of the promisor's undertakings, and then use the results of this exercise as a basis for refusing to enforce the entirety of the parties' bargain. Accordingly, there does not have to be separate consideration for each promise when a collection of promises is given in exchange for a collection of promises.

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III. There was Consideration for the Parties' Exchange of Promises

Prior to her promotion as facility administrator, Ms. Baker worked as an hourly (i.e., "non-exempt") employee pursuant to a simple unilateral contract. Bristol Care promised to pay a specified wage if Ms. Baker worked—not promised to work—in Bristol Care's facilities. That contract was terminable at any time by either party. The agreement with respect to Ms. Baker's promotion to facility administrator, however, was quite different. As Ms. Baker concedes, she was "required to sign the employment document and the arbitration document as a condition of her employment" as facility administrator. The following is a list of some, though not all, of the promises each party made to the other at the outset of their new arrangement.

Bristol Care promised:

- To employ Ms Baker as the Administrator of its facility for an indefinite term, subject to its right to terminate her employment: (a) without notice for certain specified grounds, and (b) with either five days' notice or five days' pay in all other circumstances
- To pay Ms. Baker a monthly salary for her services
- To advance, without interest, $350 to Ms. Baker in the middle of each month against her salary, which was to be paid at the end of each month
- To pay Ms. Baker a bonus if specified financial targets are met, the amount of which would be increased or decreased based on Ms. Baker's performance, though Bristol Care retained the right to eliminate the bonus program without notice
- To allow Ms. Baker a specific number of paid vacation days during her first three and a half years of service and, thereafter, in accordance with company policy
- To provide Ms. Baker (and one approved co-habitant) with living accommodations in the company's facility during her employment and subject to stated limitations
- To provide all utilities, including basic cable television, for Ms. Baker's living accommodations
- To arbitrate, with specified exceptions, all claims or controversies Ms. Baker may have against the company arising out of, relating to, or in association with her employment
- To arbitrate, with specified exceptions, all claims or controversies the company may have against Ms. Baker arising out of, relating to, or in association with her employment
- To initiate and conduct the arbitration of such claims before a single arbitrator using the procedures (including the arbitrator selection procedures) in the American Arbitration Association's Rules for the Resolution of Employment Disputes in effect at the time the claim is filed

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- To pay all arbitration fees, including the arbitrator's fees and expenses, except for the filing fee for claims initiated by Ms. Baker or the fees and expenses of Ms. Baker, her attorney, and her witnesses
- To maintain the confidentiality of the existence, subject, and results of any arbitration with Ms. Baker

Ms. Baker promised:

- To serve as Administrator in Bristol Care's facility for an indefinite period, subject to her right to terminate this employment with 60 days prior notice
- To operate the facility in accordance with state rules and regulations governing residential care facilities, as well as the Bristol Care's Administrative Guide and other policies, and to manage facility staff in accordance with the Bristol Care Employee Handbook
- To refrain, during her employment and for a period of two years thereafter, from disseminating any of Bristol Care's confidential information to individuals outside the company
- To refrain, during her employment and for a period of two years thereafter, from soliciting or rendering residential care services to persons who were (a) residents of the facility during the last year of Ms. Baker's employment, or (b) solicited to become residents by Ms. Baker during the last six months of her employment
- To refrain, during her employment and for a period of two years thereafter, from disrupting or interfering with contractual or other relationships between Bristol Care and its residents, managers or vendors
- To abide by the policies of Bristol Care and the State of Missouri concerning residents' rights and the handling of residents' funds, and to refrain (and ensure that all hourly employees at the facility and all of Ms. Baker's relatives residing with her at the facility refrain) from engaging in specified transactions with residents
- To arbitrate, with specified exceptions, all claims or controversies Bristol Care may have against her arising out of, relating to, or in association with her employment
- To arbitrate, with specified exceptions, all claims or controversies she may have against Bristol Care arising out of, relating to, or in association with her employment
- To initiate and conduct the arbitration of such claims before a single arbitrator using the procedures (including the arbitrator selection procedures) in the American Arbitration Association's Rules for the Resolution of Employment Disputes in effect at the time the claim is filed
- To maintain the confidentiality of the existence, subject, and results of any arbitration with Bristol Care

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Applying the principles set forth above, the exchange of promises in this bilateral contract supplies consideration to make all of the parties' promises binding. Ms. Baker concedes that she signed the two agreements—and thus made each of the promises memorialized in those agreements—in order to receive the collection of promises Bristol Care was making to her (e.g., the promotion and related benefits). By the same token, Bristol Care made its collection of promises in exchange for the collection of promises Ms. Baker made. The amount of consideration is immaterial because any bargained-for exchange of benefits or detriments, no matter how small, supplies the consideration needed to make these promises binding.

…

Ms. Baker argues that none of Bristol Care's promises in the "Mandatory Arbitration Agreement," nor the combined effect of all of those promises, supplies consideration for the promises she made in that agreement. Because Ms. Baker agreed to give Bristol Care the right to "amend, modify or revoke this agreement upon thirty (30) days' prior written notice to the Employee," she now insists that right renders all of Bristol Care's promises illusory.

Bristol Care counters that, because it is bound to give written notice 30 days before any change, it agreed to be bound by the "Mandatory Arbitration Agreement" for at least 30 days. In addition, Bristol Care emphasizes that both parties agreed to be bound by the AAA rules in effect at the time a claim was filed and, therefore, Bristol Care had no right to alter the agreement as to any claim pending at the time of—or filed within 30 days after—any notice from Bristol Care that it was intending to change the agreement.

There is no question that the construction of this provision that Bristol Care offers is the one this Court would adopt if Bristol Care were trying to realize a retrospective advantage from some unilateral alteration to the agreement. Nor is there any question that the construction volunteered by Bristol Care now is the one that any court would adopt in the future should Bristol Care try to alter its obligations to Ms. Baker under this agreement with respect to the claims she has already asserted. Accordingly, there is no justification for refusing to adopt this construction here, especially when the consequences of that refusal is that ***none*** of the promises made by either party—not just in the "Mandatory Arbitration Agreement" but on any aspect of her promotion to facility administrator—will be enforceable.

…

For the reasons set forth above, I would hold that Ms. Baker's arbitration promise was supported by consideration and, therefore, should be enforced pursuant to Bristol Care's motion and the FAA. Because the majority opinion allows Ms. Baker to litigate her claim in state court despite her having promised not to do so, I respectfully dissent.

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Insert the following as note 1 on page 146 after *Hodges* and number previous note as note 2:

1. For approaches other courts have taken to the issue in *Hodges*, see, *e.g.*, Inman v. Grimmer, 485 P.3d 396, 407(Wyo. 2021) ("Utah R. Prof. Conduct 1.8 comment [14] affirms that lawyers may enter into agreements with clients "to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement." The rules nowhere suggest that in order to ensure the client is fully informed, an attorney must verbally explain the arbitration provision. And Ms. Inman does not argue that the written provision alone was insufficient to fully inform her of its scope and effect. The provision clearly covered malpractice claims, and plainly listed the rights Ms. Inman relinquished when she signed the agreement."); Delaney v. Dickey, 242 A.3d 257, 273-74 (N.J. 2020) ("The arbitration provision at issue in this case—on its face—would be enforceable if the Sills retainer agreement were a typical contract between a commercial vendor and a customer…. But Delaney was not purchasing a telephone, a refrigerator, or an automobile—he was retaining the services of an attorney, licensed to practice law in New Jersey and subject to the Rules of Professional Conduct promulgated by this Court. As earlier discussed, a retainer agreement is not an ordinary contract -- it must conform not only to the legal principles governing contracts, but also to the ethical obligations imposed on attorneys by the RPCs."); Innovative Images, LLC v. Summerville, 848 S.E.2d 75, 81-83 (Ga. 2020) (holding that "attorney-client agreements mandating arbitration of prospective legal malpractice claims [are not] categorically against public policy in Georgia"; a contract is not void as against public policy when a "change in the process of entering into such an agreement[—such as explaining the arbitration process to the client—]will render it legal and fully enforceable").

Replace notes 2 and 3 after *Green Tree* on pages 164-165 with the following:

2. In footnote 2 in *Green Tree*, the Supreme Court reserved the question whether, consistent with FAA § 3, district courts can dismiss rather than stay cases in which the parties have agreed to arbitrate. Courts and commentators have asserted that there is a widespread split among the circuits on the issue, with some circuits holding that a stay is mandatory and others concluding that, at least when all issues are subject to arbitration, the district court has discretion to dismiss rather than stay the case. *E.g.*, Richard A. Bales & Melanie A. Goff, *An Analysis of an Order to Compel Arbitration: To Dismiss or Stay?*, 115 PENN. ST. L. REV. 539, 548-50 (2011) (distinguishing between the "must stay approach" and the "may dismiss approach").

In fact, the issue is more complex, as illustrated by the Second Circuit's decision in Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655 (2d Cir.

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2022). The district court in *Bissonnette* had dismissed rather than stayed the case pending arbitration, and the court of appeals held that as a result it had jurisdiction consistent with *Green Tree* to decide the appeal. Judge Jacobs concurred, arguing as follows:

> In 2015, our decision in Katz v. Cellco Partnership, 794 F.3d 341 (2d Cir. 2015) ("*Katz*"), articulated the rule as follows: a stay is mandatory when "all claims have been referred to arbitration *and a stay requested*." Following *Katz*, courts in this Circuit are split on whether a stay is required even if no party requests one.
>
> This issue is consequential. When a case is stayed pending arbitration, the order compelling or directing arbitration is interlocutory, and therefore unappealable; the parties must proceed forthwith to arbitration. But when such a case is dismissed, the party resisting arbitration can appeal at once, and thereby delay the arbitration, with associated costs and uncertainties….
>
> *Katz* construed Section 3 of the FAA to mandate a stay when "all claims have been referred to arbitration and a stay requested." However, the FAA mandates a stay whether or not a party requests one. This construal is consistent with the purpose of the FAA.
>
> Properly construed, the text of Section 3 bars a court from enforcing an arbitration clause *sua sponte*; but if a party applies for enforcement of the clause, Section 3 requires a court that enforces it to stay proceedings in the interim …. Read naturally and in context, the referenced "application of one of the parties" [in FAA § 3] is the application to enforce the arbitration clause. The text does not contemplate (let alone require) a separate application to *stay* proceedings in district court.

Id. at 664-65.

By contrast, Judge Pooler dissented on other grounds, but responded to the concurrence on the stay issue as follows:

> My second brief point is in response to the concurrence's view that, once a court decides that arbitration is appropriate, "the FAA mandates a stay whether or not a party requests one." To be clear, because I conclude that arbitration should not have been compelled here, resolution of this issue is not necessary to my analysis. I write only to correct what I see as the concurrence's misreading of Section 3 of the FAA…. Section 3's use of the mandatory "shall," we have held,

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> means that where a party specifically applies for a stay pending the outcome of arbitration, the district court lacks discretion to dismiss the case instead. *Katz.*
>
> It does not follow, however, that where a party does not request a stay—or where, as here, a party expressly seeks dismissal—a district court is still required to issue a stay. Section 3 is triggered "on application of one of the parties [to] stay the trial" and where, among other things, the "applicant for the stay is not in default." This reference to the "applicant for the stay" thus squarely contradicts the concurrence's assertion that "[t]he text does not contemplate (let alone require) a separate application to stay proceedings in the district court." Accordingly, where a party does not request a stay, there is no "application [to] stay the trial," and a district court retains the authority to dismiss the action.

Id. at 673-74. *Compare* Forrest v. Spizzirri, 62 F.4th 1201, 1203 (9th Cir. 2023) ("Although the plain text of the FAA appears to mandate a stay pending arbitration upon application of a party, binding precedent establishes that district courts may dismiss suits when, as here, all claims are subject to arbitration," even when party requests a stay); *id.* at 1206 (Graber, C.J. & Desai, C.J., concurring) ("I encourage the Supreme Court to take up this question, which it has sidestepped previously, and on which the courts of appeals are divided ….").

3. If the district court refuses to order arbitration and the party seeking arbitration takes an immediate appeal, does the district court have to stay its proceedings while the appeal is pending? The Supreme Court resolved a split among the circuits over the issue in Coinbase, Inc. v. Bielski, 143 S. Ct. 1915, 1919 (2023), holding that "a district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing." The Court explained:

> Section 16(a) does not say whether the district court proceedings must be stayed. But Congress enacted § 16(a) against a clear background principle prescribed by this Court's precedents: An appeal, including an interlocutory appeal, "divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).
>
> The *Griggs* principle resolves this case. Because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially "involved in the appeal." 459 U.S. at 58. As Judge Easterbrook cogently explained, when a party appeals the denial of a motion to compel arbitration, whether "the litigation may go forward in the district court is precisely what the

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> court of appeals must decide." Bradford-Scott Data Corp. v. Physician Computer Network, Inc., 128 F.3d 504, 506 (C.A.7 1997).... Here, as elsewhere, it "makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." Apostol v. Gallion, 870 F.2d 1335, 1338 (C.A.7 1989). In short, *Griggs* dictates that the district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing.

Id. at 1919-20 (2023)

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Chapter 3 Federal Law Restrictions on the Enforceability of Arbitration Agreements

Replace the carryover paragraph on pages 174-175 with the following:

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), Congress adopted a variety of provisions dealing with arbitration. The Dodd-Frank Act precluded residential mortgage agreements from including pre-dispute arbitration clauses, *id.* § 1414; made several causes of action created by the Act nonarbitrable, *id.* §§ 748, 922, & 1057; and gave both the SEC and the newly created Consumer Financial Protection Bureau authority to prohibit or impose conditions on the use of pre-dispute arbitration agreements in contracts they regulate. *Id.* §§ 921 & 1028.

Most recently, in 2022 Congress passed and President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, Pub. L. No. 117-90 (2022), which adds a new Chapter 4 to the FAA. After defining terms such as "sexual assault dispute" and "sexual harassment dispute" in § 401, the Act provides in § 402(a) that:

> [A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

9 U.S.C. § 402(a). Section 402(b) of the Act then specifies that (1) federal law determines whether the Act applies; (2) a court rather than the arbitrator decides not only whether the Act applies but also "the validity and enforceability of an agreement to which this chapter applies,"; and (3) a court so decides regardless of whether the challenge is directed at the arbitration agreement itself or the main

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contract, and regardless of whether the arbitration agreement includes a delegation clause. *Id.* § 402(b).

Number the note on page 184 after *Cox* as note 1 and add the following as note 2:

2. As illustrated by *Cox*, when first implemented by the Department of Defense, the Military Lending Act applied to a relatively narrow group of consumer credit products: certain payday loans, auto title loans, and tax refund anticipation loans. By final rule dated July 22, 2015, the Department of Defense expanded the definition of consumer credit so that it reaches much more broadly, as explained by the Consumer Financial Protection Bureau (responsible, in part, for enforcing the MLA):

> The final rule announced today amends the definition of "consumer credit" covered by the regulation to more closely align with the broad, traditional definition of credit covered by the Truth in Lending Act. The rule generally covers consumer credit offered or extended to active-duty servicemembers or their dependents, as long as the credit is subject to a finance charge or payable by written agreement in more than four installments. In accordance with the statute, the MLA regulation would continue to exclude residential mortgages and credit extended to finance the purchase of, and secured by, personal property, such as vehicle purchase loans.

CFPB, *CFPB Statement on Department of Defense Military Lending Act Final Rule* (July 21, 2015), *available at* http://www.consumerfinance.gov/newsroom/cfpb-statement-on-department-of-defense-military-lending-act-final-rule/; *see* 32 C.F.R. § 232.3(f)(1) ("*Consumer credit* means credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is: (i) Subject to a finance charge; or (ii) Payable by a written agreement in more than four installments.").

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Replace *Holmes* and the notes after *Holmes* on pages 184-188 with the following:

SANTORO v. ACCENTURE FEDERAL SERVICES, LLC
United States Court of Appeals for the Fourth Circuit
748 F.3d 217 (2014)

Shedd, Circuit Judge:

Dr. Armand Santoro appeals the district court's order granting the motion by Accenture Federal Services, LLC (Accenture) to compel arbitration. Because we agree with the district court that the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank) does not invalidate the arbitration agreement between Accenture and Santoro, we affirm.

I.

Santoro began his employment with Accenture in 1997 as a senior manager. From 1998 until 2007, Santoro served as the program manager for the Internal Revenue Service's website, IRS.gov. From 2007 until September 2011, Santoro served as the account lead for Accenture's Department of the Treasury account. In August 2005, Santoro entered into an employment contract with Accenture. The contract indicated that it would renew on September 1 of each subsequent year unless either party provided timely notice that the contract would not be extended. The contract, among other provisions, included an arbitration clause ….

In 2010, Santoro was given a new supervisor, who, according to Santoro's complaint, "instantly disliked" him. In September 2011, Santoro was terminated from his employment as an account executive as part of a cost-cutting measure. Santoro, who was 66 years old at the time, was replaced by a younger male employee.

In response to his termination, Santoro filed a complaint against Accenture in the Superior Court for the District of Columbia, alleging claims for age discrimination under the District of Columbia Human Rights Act. Accenture moved to compel arbitration; Santoro opposed Accenture's motion, contending that the clause was void under three whistleblower provisions of Dodd–Frank: 7 U.S.C. § 26(n)(2), 18 U.S.C. § 1514A(e)(2), and 12 U.S.C. § 5567(d)(2). The Superior Court rejected Santoro's argument and granted the motion. The court also stayed the case pending arbitration.

While that motion to compel arbitration was pending with the Superior Court, Santoro received a right-to-sue letter from the Equal Employment Opportunity Commission and filed an action in the Eastern District of Virginia,

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alleging claims under the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act (ERISA). Accenture moved in the district court to compel arbitration of these federal claims as well. Following a hearing, the district court granted the motion. Ruling from the bench, the district court concluded that Dodd–Frank "only applies to certain situations when whistleblowers are involved." That is, Dodd–Frank's provisions "appl[y] only in the situations that [are] set out by the statute," and the statute only "applies to whistleblowers." Thus, because Santoro did not bring a Dodd–Frank whistleblower claim, he could not use Dodd–Frank to invalidate an otherwise valid arbitration agreement. Santoro noted a timely appeal.

II.

On appeal, Santoro contends that the district court erred in compelling arbitration.…

…

Here, it is undisputed that (1) Santoro's employment contract had an arbitration agreement; and (2) Santoro's federal claims fall within the broad "all disputes" language of that agreement. Santoro, however, seeks to avoid arbitration by pointing to recent limitations on arbitration made by Dodd–Frank. In Santoro's view, Dodd–Frank represents a "contrary congressional command" that overrides the otherwise valid arbitration clause in his employment contract.

C.

As relevant here, one of the goals of Dodd–Frank was to strengthen whistleblower protections for employees reporting illegal or fraudulent activity by their employer. To this end, Congress enacted 7 U.S.C. § 26, which amended the Commodities Exchange Act by adding a provision prohibiting retaliation by a covered employer against a "whistleblower." 7 U.S.C. § 26(h)(1)(A). The statute creates a cause of action for whistleblowers, § 26(h)(1)(B)(i), and then protects the cause of action through § 26(n), which provides:

> (n) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes
>
> (1) Waiver of rights and remedies
>
> The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement.
>
> (2) Predispute arbitration agreements

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> No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

7 U.S.C. § 26(n).

In addition to this amendment to the Commodities Exchange Act, Dodd–Frank amended 18 U.S.C. § 1514A, which was first enacted as part of the Sarbanes–Oxley Act of 2002. This provision is titled "Civil Action to protect against retaliation in fraud cases," and the first subsection is expressly labeled "Whistleblower protection for employees of publicly traded companies." Subsections (b) and (c) create a cause of action and remedies for violations of the substantive whistleblower provision. The final subsection, § 1514A(e), then mirrors the language of 7 U.S.C. § 26(n) ….

Santoro contends that these provisions invalidate *all* predispute arbitration agreements lacking a Dodd–Frank carve-out, even for plaintiffs who are not pursuing any whistleblower claims. Under Santoro's reading of the statute, because his contract with Accenture does not carve out Dodd–Frank claims from arbitration and thus "requires arbitration" of such claims, the entire arbitration agreement is not "valid or enforceable."

D.

Initially, it is clear that Dodd–Frank prohibits predispute agreements to arbitrate whistleblower claims. The Supreme Court in dicta has pointed to Congress's language in Dodd–Frank as a model of "clarity" for limiting arbitration, and we agree. Dodd–Frank works to render "nonenforceabl[e]" "certain provisions" that require "arbitration of disputes" "under this section." Thus, an agreement to arbitrate whistleblower claims is not "valid or enforceable." This language represents a clear Congressional command that Dodd–Frank whistleblower claims are not subject to predispute arbitration. It does not follow, however, that Dodd–Frank likewise prohibits the arbitration of non-whistleblower claims simply because an arbitration agreement does not carve out Dodd–Frank whistleblower claims. Instead, we think the language, context, and enactment of the statute lead to the opposite conclusion.

To begin, the statute's language does not support Santoro's reading. Subsections (1) and (2) both focus on the rights and remedies "in this" and "under this" "section," i.e., whistleblower claims, and the prohibition of any provision that would waive or limit judicial resolution of *those* claims, not of the many variety of claims that may arise during an employment relationship. Subsection (1) specifies that the rights under the statute—the whistleblower cause of action—cannot be "waived" by predispute arbitration. Subsection (2) simply reiterates that

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whistleblowers cannot waive their right to a civil action in a judicial forum by agreeing to arbitrate. Accenture is not requiring Santoro to arbitrate a claim "arising under this section"; rather, it is requiring him to arbitrate claims arising under other federal statutes pursuant to an otherwise valid arbitration agreement. Under Dodd–Frank, Congress has protected the right to bring a whistleblower cause of action in a judicial forum, nothing more.

Santoro seeks to unmoor subsection (2) from its placement in Dodd–Frank and instead apply it as a broad, free-standing right, creating a windfall for non-whistleblowing employees. By doing so, he overlooks both the limiting language within subsection (2) and the broader context of the statute, in violation of the "cardinal rule" that the "statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." To that end, even if we assume that the "ordinary meaning" of the phrase "[n]o predispute arbitration agreement shall be valid" is "expansive," "its application is limited by the 'broader context' of [§ 1514A] as a whole."

Dodd–Frank created causes of action for whistleblowers and then protected those causes of action by barring their *waiver* in "predispute arbitration agreements." Nothing in Dodd–Frank suggests that Congress sought to bar arbitration of every claim if the arbitration agreement in question did not exempt Dodd–Frank claims.[5] Nothing in Dodd–Frank even refers to arbitration apart from this limited reference in these statutory provisions that are otherwise concerned solely with the creation of a cause of action for whistleblowing employees. To conclude otherwise would be to forget that "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not one might say, hide elephants in mouseholes." But that is exactly what Santoro requests—concluding that in this mousehole, Congress essentially grafted a new section onto the FAA by requiring every employer's arbitration agreement to carve out an exception for whistleblowers. Given the statute's language and context, Santoro cannot meet his burden of showing that Dodd–Frank represents a contrary congressional command overriding the validity of arbitration clauses as to non-whistleblower claims.

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[5] Santoro notes that Congress has used more circumscribed language in other statutes that bar claims from being arbitrated to support his reading of Dodd–Frank. *See, e.g.,* 12 U.S.C. § 5567(d)(2) (provision of the Consumer Financial Protection Act that prohibits arbitration agreements only "to the extent that [they require] arbitration of a dispute arising under this section"). The fact that Congress used alternate language in another statutory context does not persuade us that Congress intended Dodd–Frank to be as expansive as Santoro suggests, nor does it mean that Congress cannot make the same point using different language.

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Our conclusion is further buttressed by the context surrounding the enactment of Dodd–Frank. At the time Congress enacted these provisions of Dodd–Frank it was legislating against two background pieces of information. First, courts had consistently held that whistleblower claims under Sarbanes–Oxley were subject to arbitration. In addition, the Supreme Court had noted in dicta that "non-waiver of rights" provisions—like § 26(n)(1) and § 1514A(e)(1)—"did not explicitly preclude arbitration or other nonjudicial resolution of claims."

"Congress is presumed to act with awareness of a judicial interpretation of a statute." Thus, in enacting Dodd–Frank, Congress would have been aware that Sarbanes–Oxley whistleblower claims were subject to arbitration and that non-waiver of rights provisions like § 26(n)(1) and § 1514A(e)(1) may not, standing alone, override the FAA. This background further supports the conclusion that Dodd–Frank simply overrules [that prior caselaw] and makes clear—by supporting the non-waiver of rights language of subsection (1) with the explicit language of subsection (2)—that whistleblower claims cannot be subject to predispute agreements to arbitrate.

Accordingly, we hold that, where the plaintiff is not pursuing Dodd–Frank whistleblower claims, neither 7 U.S.C. § 26(n)(2), nor 18 U.S.C. § 1514A(e)(2) overrides the FAA's mandate that arbitration agreements are enforceable.[8] Because Santoro is not pursuing a "dispute under this section" Dodd Frank does not bar arbitration of Santoro's federal claims.

III.

For the foregoing reasons, we affirm the district court's order compelling arbitration of Santoro's federal claims.

AFFIRMED

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[8] In reaching this conclusion, we find ourselves in accord with the Fifth Circuit. *See Holmes v. Air Liquide USA, LLC,* 498 Fed. App'x 405, 407 (5th Cir. 2012) (enforcing arbitration agreement where "[plaintiff] brings no Dodd–Frank claims," and the "Agreement does not 'require arbitration of a dispute arising under'" Dodd–Frank). Our conclusion likewise comports with several district courts to have considered the issue, *see Yegin v. BBVA Compass,* 2013 WL 622565, *2 (N.D. Ala. Feb. 19, 2013); *Rodriguez v. Charles Schwab Corp.,* 2013 WL 911959, *5 (W.D. Tenn. Jan. 29, 2013), and is consistent with those decisions concluding that Dodd–Frank does bar arbitration of covered whistleblower claims, *see Wong v. CKX, Inc.,* 890 F. Supp. 2d 411, 421 (S.D.N.Y. 2012) (noting "whistleblower claims are no longer arbitrable"); *Pezza v. Investors Capital Corp.,* 767 F. Supp. 2d 225, 227 (D. Mass. 2011) (noting "Dodd–Frank Act enacted a bar to predispute arbitration agreements for whistleblower claims").

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Notes

1. The provisions of Dodd-Frank at issue in *Santoro* are different from the other federal statutes restricting the enforcement of arbitration agreements we have looked at. The Dodd-Frank provisions make the enforceability of the arbitration agreement turn on the type of federal statutory claim at issue. By comparison, the other statutes we have looked at (as well as another provision of Dodd-Frank, dealing with consumer mortgage agreements) make arbitration agreements unenforceable in certain types of contracts. Which approach is better?

2. What do you think of *Santoro*'s interpretation of the Dodd-Frank nonarbitrability provisions? Do you think Congress intended to invalidate all arbitration clauses that do not express exclude Dodd-Frank claims from their scope, even if no such claim could plausibly be brought in the case?

3. *Santoro* does identify an important distinction among the Dodd-Frank nonarbitrability provisions: whether they invalidate the entire arbitration agreement or whether they make the agreement unenforceable only as to the particular federal statutory claim. Under the former type of statute, the entire case will proceed in court (because the arbitration agreement is unenforceable in its entirety), while under the later type of statute, only the federal statutory claim will be adjudicated in court while the rest of the case will proceed in arbitration. Keep this distinction in mind while working through the materials in the rest of this Chapter.

4. As noted earlier, in addition to making arbitration agreements unenforceable in consumer mortgage loans and making certain claims nonarbitrable, the Dodd-Frank Act also expressly authorizes the Consumer Financial Protection Bureau (CFPB) to regulate arbitration agreements—after conducting a study of the use of arbitration clauses in consumer financial services contracts. Dodd-Frank Act § 1028(b), codified at 12 U.S.C. § 5518(b). The CFPB released the results of its study in March 2015, issued a notice of proposed rulemaking in May 2016, and published its final arbitration rule in July 2017. *See* Consumer Financial Protection Bureau, Final Rule: Arbitration Agreements (July 2017), *reprinted at* pages 149-159 of this Update.

The CFPB's arbitration rule did not prohibit the use of arbitration clauses in consumer financial services contracts. Instead, it did two things. First, it precluded providers of consumer financial services from "rely[ing] in any way on a pre-dispute arbitration agreement . . . with respect to any aspect of a class action . . ., including to seek a stay or dismissal of particular claims or the entire action." *Id.* (12 C.F.R. § 1040.4(a)). Second, it required consumer financial services companies to provide various records from arbitration proceedings (including claims and awards) as well

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as court filings relying on a pre-dispute arbitration agreement "to seek dismissal, deferral, or stay of any aspect of a case." *Id.* (12 C.F.R. § 1040.4(b)). The rule was to take effect 60 days after publication in the Federal Register, and would have applied only to arbitration agreements entered into 180 days after its effective date—i.e., existing arbitration agreements are not affected. *Id.* (12 C.F.R. § 1040.5(a)). But on November 1, 2017, President Trump signed Public Law No. 115-74, 131 Stat. 1243 (2017), into law, disapproving the CFPB Rule under the Congressional Review Act, 5 U.S.C. §§ 801-802. Accordingly, the CFPB rule "has no force or effect." *See* CFPB, Arbitration Agreements Rule, 82 Fed. Reg. 55500, 55500 (Nov. 22, 2017).

5. Other federal agencies also have proposed or issued rules that would restrict the use of arbitration clauses in certain types of contracts, albeit without the express authority to do so that Dodd-Frank provides to the CFPB.

Workplaces Executive Order and Federal Contractor Rule. On July 31, 2014, President Obama issued Executive Order No. 13673—Fair Play and Safe Workplaces. *See* https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces. Among other things, the Workplaces Executive Order provided that federal contracts over $1 million "shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise." *Id.* § 6(a). The federal government issued regulations implementing the Workplaces Executive Order in August 2016. *See* Federal Acquisition Regulation; Fair Play and Safe Workplaces, 81 Fed. Reg. 58562, 58651 (Aug. 25, 2016) (adding § 52.222-61). On October 24, 2016, a federal district court issued a preliminary injunction against the arbitration provision of the regulations as contrary to the FAA. *See* Associated Builders & Contractors of S.E. Tex. v. Rung, 2016 WL 8188655, at *14 (E.D. Tex. Oct. 24, 2016) ("Contrary to Defendants' attempt to distinguish a rule prohibiting new arbitration agreements from a rule prohibiting enforcement of existing agreements, neither type of rule is authorized by the FAA in the absence of any congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms. . . . Such overstepping of authority in the guise of enhancing federal procurement practices is unwarranted."). Thereafter, on March 27, 2017, President Trump revoked the Workplaces Executive Order, *see* https://trumpwhitehouse.archives.gov/presidential-actions/presidential-executive-order-revocation-federal-contracting-executive-orders/, and signed a congressional resolution under the Congressional Review Act invalidating the implementing regulations, *see* Pub. L. No. 115-11, 131 Stat. 175 (Mar. 27, 2017).

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Department of Health and Human Services: Long-Term Care Facilities. On October 4, 2016, the Department of Health and Human Services (HHS) issued a final rule prohibiting the use of pre-dispute arbitration agreements in contracts between long-term care facilities and residents. *See* Dep't of Health & Human Services, Reform of Requirements for Long-Term Care Facilities: Arbitration Agreements, 81 Fed. Reg. 68688, 68867 (October 4, 2016) (42 C.F.R. § 483.70(n)(1)). An industry trade association challenged the rule in court, and the U.S. District Court for the Northern District of Mississippi entered a preliminary injunction against its enforcement on November 11, 2016, reasoning as follows:

> This case places this court in the undesirable position of preliminarily enjoining a Rule which it believes to be based upon sound public policy. As discussed in section I of this order, this court believes that nursing home arbitration litigation suffers from fundamental defects originating in the mental competency issue, rendering it an inefficient and wasteful form of litigation. . . . As sympathetic as this court may be to the public policy considerations which motivated the Rule, it is unwilling to play a role in countenancing the incremental "creep" of federal agency authority beyond that envisioned by the U.S. Constitution. While this court does not exclude the possibility that CMS could, in the future, make a sufficiently strong showing that it had the authority to enact the Rule it did, it seems unlikely, based on the administrative record in this case, that it will be held to have done so here.

Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 946 (N.D. Miss. 2016). '

Subsequently, in June 2017, HHS proposed a revised rule that would remove the prohibition on pre-dispute arbitration clauses but would include various disclosure and transparency requirements. *See* Dep't of Health & Human Services, Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26649, 26653 (June 8, 2017). On June 18, 2019, HHS issued a final rule that does not ban the use of pre-dispute arbitration agreements, but instead precludes long-term care facilities from requiring residents to sign arbitration agreements as a condition for admission to or continuing to receive care at the facility. The final rule also adopted most of the disclosure and transparency requirements as proposed. *See* Dep't of Health & Human Services, Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 84 Fed. Reg. 34718, 34735–36 (July 18, 2019) (codified at 42 C.F.R. § 483.70(n)).

A number of long-term care facilities sought judicial review of the rule. The U.S. District Court for the Western District of Arkansas upheld the rule, and the Eighth Circuit affirmed, reasoning:

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> In our reading, the Supreme Court has never applied the FAA to prohibit a federal agency from generally regulating the use of arbitration agreements as CMS does here. Rather, it has construed the FAA simply to limit the circumstances in which arbitration agreements, once entered into, can be rendered invalid or unenforceable….
>
> The Revised Rule … does not invalidate or render unenforceable any arbitration agreement. Instead, it establishes the conditions for receipt of federal funding through the Medicare and Medicaid programs. So, for example, if an LTC facility entered into an arbitration agreement with a resident without complying with the Revised Rule by requiring the resident to sign as a condition of admission to the facility, the arbitration agreement would nonetheless be enforceable, absent a showing of "generally applicable contract defenses, such as fraud, duress, or unconscionability." CMS would simply enforce the regulation through a combination of administrative remedies, including denial of payment and civil monetary penalties.
>
> … Because the Revised Rule does not, in words or effect, render arbitration agreements entered into in violation thereof invalid or unenforceable, it does not conflict with the FAA.

Northport Health Servs. of Arkansas, LLC v. U.S. Dep't of Health & Hum. Servs., 14 F.4th 856, 867-69 (8th Cir. 2021).

Department of Education: Higher Education Institutions. The Department of Education issued a final rule on November 1, 2016 prohibiting the use of pre-dispute arbitration agreements and class action waivers as applied to borrower defense claims against schools participating in the federal student loan program. Dep't of Education, Student Assistance General Provisions, 81 Fed. Reg. 75926, 76087-76089 (Nov. 1, 2016) (34 C.F.R. § 685.300(e) & (f)). After the rule was challenged in court (and after the change of presidential administrations), the Department of Education stayed the effective date of the rule. In litigation challenging the delays, the U.S. District Court for the District of Columbia held that the agency's actions in delaying implementation of the final rule were unlawful, see Bauer v. DeVos, 325 F. Supp. 3d 74, 79 (D.D.C. 2018), and vacated the stay of its effectiveness, see Bauer v. DeVos, 332 F. Supp. 3d 181, 183 (D.D.C. 2018). As a result, the 2016 rule took effect.

In the meantime, from November 2017 through February 2018, the Department of Education held a series of negotiated rulemaking sessions that addressed a number of issues, including arbitration. An issue paper for the final session included a proposal requiring schools that used arbitration clauses and

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class waivers to explain them to students, but did not prohibit their use. Dep't of Education, Borrower Defenses and Financial Responsibility Negotiated Rulemaking, Issue Paper 4 (Session 3: Feb. 12-15, 2018), at 5. On September 2,3 0219, the agency issued a Final Rule rescinding the current rule and replacing it with regulations of the sort proposed in the issue paper. Dep't of Education, Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788, (Sept. 23, 2019).

The challenge to the 2016 rule proceeded, however, with the parties agreeing and the district court concluding that the challenge was not moot because the new rule had not yet taken effect. *See* California Ass'n of Private Postsecondary Sch. v. DeVos, 436 F. Supp. 3d 333, 341 (D.D.C. 2020). The court rejected a challenge that the 2016 rule was inconsistent with the Federal Arbitration Act, explaining that "[f]ederal agencies are, of course, free to contract on whatever terms they conclude are prudent and that are otherwise lawful, and the FAA does not preclude federal agencies from declining to include arbitration clauses in government contracts and grant agreements. Id. at 347. On appeal, however, the Ninth Circuit vacated the district court's decision and dismissed the case as moot. California Ass'n of Priv. Postsecondary Sch. v. DeVos, 2020 WL 9171125, at *1 (D.C. Cir. Oct. 14, 2020).

On November 1, 2022, the Department of Education issued a new Final Rule addressing, among other topics, the enforceability of arbitration clauses in student loan contracts. Office of Postsecondary Education, Dep't of Education, Institutional Eligibility Under the Higher Education Act of 1965, 87 Fed. Reg. 65904 (Nov. 1, 2022), *reprinted as codified at* pages 141-147 of this Update.. As summarized by a later Department of Education, publication, the Rule prohibits:

1. "Internal dispute resolution requirements (34 CFR 685.300(d)). An institution may not compel any student to pursue a complaint based upon a 'borrower defense claim' (generally, a claim that is or could be asserted as a borrower defense claim by a borrower under the Department's administrative process …) through an internal dispute process before the student presents the complaint to an accrediting agency or a government agency authorized to hear the complaint."

2. "Class action bans (34 CFR 685.300(e)). An institution may not seek to rely on a pre-dispute arbitration agreement or any other pre-dispute agreement with a student who has obtained or benefited from a Direct Loan with respect to any aspect of a class action related to a borrower defense claim as defined above."

3. "Pre-dispute arbitration agreements (34 CFR 685.300(f)). An institution may not enter into or seek to rely on a pre-dispute agreement to arbitrate

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> any aspect of a borrower defense claim as defined above with a student who obtained or benefited from a Direct Loan."

In addition, the Final Rule requires institutions to file with the Department of Education:

1. "Arbitral records (34 CFR 685.300(g)). An institution must submit copies of certain records related to any claim filed in arbitration by or against the institution concerning a borrower defense claim."

2. "Judicial records (34 CFR 685.200(h)). An institution must submit copies of certain judicial records related to any claim concerning a borrower defense claim filed in a lawsuit by the institution against the student or by any party, including a government agency, against the institution."

See Letter from Annmarie Weisman, Dep't of Education, Implementation and Policy Guidance of the Pre-Dispute Arbitration Agreement Provisions (July 3, 2023) (GEN-23-10), available at https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-07-03/implementation-and-policy-guidance-pre-dispute-arbitration-agreement-provisions.

A challenge to the Final Rule, including its arbitration provisions, was filed on February 28, 2023 in the U.S. District Court for the Northern District of Texas. *See* Career Colleges & Schools of Texas v. U.S. Dep't of Education, No. 4:23-CV-206 (N.D. Tex.) (complaint available at https://www.career.org/uploads/7/8/1/1/78110552/complaint.pdf. On April 17, 2023, that court transferred the case to the Western District of Texas. Career Colleges & Sch. of Texas v. United States Dep't of Educ., 2023 WL 2975164, at *4 (N.D. Tex. Apr. 17, 2023). Subsequently, on June 30, 2023, the U.S. District Court for the Western District of Texas denied the challenger's motion for a preliminary injunction against operation of the rule on the ground that it had "failed to meet its burden of clearly establishing that it or its members face irreparable harm in the absence of a preliminary injunction." Career Colleges & Sch. of Texas v. United States Dep't of Educ., 2023 WL 4291992, at *10 (W.D. Tex. June 30, 2023). The case is currently pending on appeal before the Fifth Circuit.

Department of Labor: Fiduciary Rule. The Department of Labor limited exemptions from its expanded definition of "fiduciaries," subject to conflict of interest rules, to financial institutions and investment advisors who meet certain requirements, including that they:

> do not in any contract, instrument, or communication . . . purport to waive or qualify the right of the Retirement Investor to bring or participate in a class action or other representative action in court in a

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> dispute with the Advisor or Financial Institution, or require arbitration or mediation of individual claims in locations that are distant or that otherwise unreasonably limit the ability of the Retirement Investors to assert the claims safeguarded by this exemption.

See Dep't of Labor, *Best Interest Contract Exemption*, § II(g)(5), 81 Fed. Reg. 21002, 21079 (Apr. 8, 2016). Among the challenges brought by the U.S. Chamber of Commerce in a broad ranging challenge to the Fiduciary Rule, the Chamber argued that the FAA barred the Department of Labor from precluding the use of arbitration clauses with class arbitration waivers. (Evidently no challenge was made to the prohibition on distant forums in arbitration or mediation.) The district court rejected the Chamber's argument, concluding that "the exemptions' contract requirements do not render arbitration agreements between a financial institution and investor invalid, revocable, or unenforceable" because "[i]nstitutions and advisers may invoke and enforce arbitration agreements, including terms that waive or qualify the right to bring a class action or any representative action; such contracts remain enforceable, but do not 'meet the conditions for relief from the prohibited transaction provisions of ERISA and the Code.'" *See* Chamber of Commerce of the U.S.A. v. Hugler, 2017 WL 514424, at *42 (N.D. Tex. Feb. 8, 2017). With the change of presidential administration, however, the Department of Labor is no longer defending the class action provision of its rule on appeal. Nick Thornton, *Labor Drops its Defense of Fiduciary Rule's Class-Action Provision*, Benefits Pro (July 7, 2017), www.benefitspro.com/2017/07/07/labor-drops-its-defense-of-fiduciary-rules-class-a?slreturn=1499819650&page=3. The Fifth Circuit thereafter concluded that the rule was "unsustainable" and "violates the Federal Arbitration Act," stating that the fact "[t]hat DOL has retreated from its overreach (although not yet by formal rule amendment) does not detract from the impermissible nature of the provisions in the first place." Chamber of Commerce of United States of Am. v. United States Dep't of Labor, 885 F.3d 360, 385 (5th Cir. 2018).

Federal Communications Commission. In October 2016, then-FCC Chair Tom Wheeler announced that the FCC had "begun an internal process designed to produce a Notice of Proposed Rulemaking on [mandatory arbitration in communications services contracts] by February, 2017. *See* Federal Communications Comm'n, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, WC Docket No. 16-106, at 14114 (Oct. 27, 2016) (statement of Chairman Tom Wheeler). With the change of presidential administrations, however, and a new FCC chair, the FCC "put[] off those plans." *See* Perry Cooper, *Arbitration Update: CFPB Rule Uncertain, Mixed Fates for Others*, Bloomberg BNA News (June 1, 2017).

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Add the following after Problem 3.6 on page 213:

EPIC SYSTEMS CORP. v. LEWIS
United States Supreme Court
138 S. Ct. 1612 (2018)

Justice GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP v. Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by ... a court" in the relevant jurisdiction. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings."

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying

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them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U.S.C. § 216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause" removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," 29 U.S.C. § 157, of pursuing claims as a class or collective action.

…

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms.

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D.R. Horton, Inc.,* 357 N.L.R.B. 2277. Initially, this agency decision received a cool reception in court. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion.

II

We begin with the Arbitration Act and the question of its saving clause.

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Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration….

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See § 3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); § 4 (providing for "an order directing that ... arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *Italian Colors Restaurant* (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs…. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law ... for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. Put to the side the question of what it takes to qualify as a ground for "revocation" of a contract. Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. The clause "permits agreements to arbitrate to be

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invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same…. In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. But *Concepcion* 's essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepcion* 's rationale and rule. Illegality, like unconscionability, may be a

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traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. The intention must be "'clear and manifest.'" And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

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> “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn’t create the modern class action until 1966; class arbitration didn’t emerge until later still; and even the Fair Labor Standards Act’s collective action provision postdated Section 7 by years. And while some forms of group litigation existed even in 1935, Section 7’s failure to mention them only reinforces that the statute doesn’t speak to such procedures.

…

The NLRA’s broader structure underscores the point. After speaking of various “concerted activities” in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them…. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it’s not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn’t speak to class and collective action procedures in the first place.

…

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court

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has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.… Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors,* this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made "no mention of class actions" and was adopted before Rule 23 introduced its exception to the "usual rule" of "individual" dispute resolution. In *Gilmer,* this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the Age Discrimination in Employment Act "expressly permitted collective legal actions." And in *CompuCredit,* this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a "right to sue," "repeated[ly]" used the words "action" and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be "void." If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings.… Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

…

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. But even under *Chevron* 's terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

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The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron* 's essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment.

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable. In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage."

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. But like most apocalyptic warnings, this one proves a false alarm.

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Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." Those rights stand every bit as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows…. [T]he dissent's real complaint lies with the mountain of [this Court's arbitration] precedent itself … that no party has asked us to revisit.

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and its saving clause. *Concepcion*. And that, of course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. But legislative history is not the law….

…

Ultimately, the dissent retreats to policy arguments…. The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017); Pub. L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That,* we had always understood, was *Lochner* 's sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to

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displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic,* No. 16–285, and *Ernst & Young,* No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil,* No. 16–307, is affirmed.

So ordered.

Justice THOMAS, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act…. As I have previously explained, grounds for revocation of a contract are those that concern "'the formation of the arbitration agreement.'" *Italian Colors Restaurant* (concurring opinion) (quoting *Concepcion* (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is a public-policy defense. Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here. For this reason, and the reasons in the Court's opinion, the employees' arbitration agreements must be enforced according to their terms.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.,* and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA) permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA) "to engage in ... concerted activities" for their "mutual aid or protection"? The answer should be a resounding "No."

…

I

…

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Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of ... mutual aid or protection." 29 U.S.C. § 157 (emphasis added).

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of ... mutual aid or protection." 29 U.S.C. § 157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.,* at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation.

…

Since the Act's earliest days, the Board and federal courts have understood § 7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, legislative bodies, and government agencies….

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7." The Court pays scant heed to this longstanding line of decisions.

…

Because I would hold that employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* "waivers," are unlawful…. § 8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their § 7 rights. 29 U.S.C. § 158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their § 7 rights by mandating that they prospectively renounce those rights in individual employment agreements. The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court.

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II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections….

…

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today.

…

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*. Congress thus provided in § 2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc. v. Casarotto.*

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts § 12.1 (4th ed. 2009). "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." For the reasons stated [above], I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

Here, …the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced" to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' § 7 rights….

III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.

…

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If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called “yellow dog,” and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their “mutual aid or protection.” Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

Notes

1. A study released shortly before oral argument in *Epic Systems* found that an estimated 53.9% of private-sector nonunion employers in the United States used arbitration clauses for their employees, and 30.1% of those employers also included class arbitration waivers. See Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration 1-2 (Sept. 27, 2017), *available at* https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/. Would you expect those numbers to change after *Epic Systems*? Why or why not?

2. Did the Court properly rule on the merits of the employees’ illegality defense? Or was that a matter for the arbitrators under *Buckeye Check Cashing*?

3. The employees in *Epic Systems* argued that the arbitration clause was illegal as a matter of federal law. What if the defense was based on state law instead—i.e., what if a state adopted a law making arbitration clauses in employment contracts illegal when they preclude class relief? The majority assumes without deciding that federal and state law defenses should be treated the same under the FAA § 2 savings clause. Is the same true for the dissent? Under the dissent’s interpretation of the savings clause, would such a state statute conflict with the FAA?

4. The majority relies heavily on the Court’s earlier decisions in *Concepcion* and, to a lesser degree, in *Italian Colors*. As the majority opinion indicates, *Concepcion* involved federal preemption of state law rather than a conflict between two federal statutes. That topic is addressed in Chapter 4. *Italian Colors*, *reprinted at* pp. 54-62 of this Update, appears later in this Chapter. As you read those opinions, decide for yourself whether either of them requires the result in *Epic Systems*.

5. Given that the majority concluded that an arbitration clause with a class waiver was not illegal under the NLRA, did it even need to address the scope of the § 2 savings clause?

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6. Which side offers the more persuasive interpretation of § 7 of the NLRA?

7. *Epic Systems* is the Supreme Court's first discussion of *Chevron* deference in the arbitration context. Lower courts, however, have considered *Chevron* deference in connection with the arbitrability of claims under the Magnuson-Moss Warranty Act, an issue considered in the next section. How does *Epic Systems* apply in that context, do you think?

Add the following to the end of note 1 after *American Homestar* on page 219:

In a review of its interpretations of the Magnuson-Moss Act, the FTC "reaffirm[ed] its long-held view that the MMWA disfavors, and authorizes the Commission to prohibit, mandatory binding arbitration in warranties." Federal Trade Comm'n, Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act, 80 Fed. Reg. 42710, 42719 (July 20, 2015) (with one Commissioner dissenting).

Insert the following after note 4 following *Green Tree* on page 234:

AMERICAN EXPRESS CO. v. ITALIAN COLORS RESTAURANT
United States Supreme Court
570 U.S. 228 (2013)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

I

Respondents are merchants who accept American Express cards. Their agreement with petitioners — American Express and a wholly owned subsidiary — contains a clause that requires all disputes between the parties to be resolved by arbitration. The agreement also provides that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."

Respondents brought a class action against petitioners for violations of the federal antitrust laws. According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.

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This tying arrangement, respondents said, violated § 1 of the Sherman Act. They sought treble damages for the class under § 4 of the Clayton Act.

Petitioners moved to compel individual arbitration under the Federal Arbitration Act (FAA). In resisting the motion, respondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled. The District Court granted the motion and dismissed the lawsuits. The Court of Appeals reversed and remanded for further proceedings. It held that because respondents had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver," the waiver was unenforceable and the arbitration could not proceed.

We granted certiorari, vacated the judgment, and remanded for further consideration in light of *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp* …. The Court of Appeals stood by its reversal, stating that its earlier ruling did not compel class arbitration. It then *sua sponte* reconsidered its ruling in light of *AT&T Mobility LLC* v. *Concepcion* …. Finding *AT&T Mobility* inapplicable because it addressed pre-emption, the Court of Appeals reversed for the third time. It then denied rehearing en banc with five judges dissenting. We granted certiorari to consider the question "[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."

II

Congress enacted the FAA in response to widespread judicial hostility to arbitration. Th[e] text [of the Act] reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify *with whom* [the parties] choose to arbitrate their disputes" and "the rules under which that arbitration will be conducted." That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "'overridden by a contrary congressional command.'"

III

No contrary congressional command requires us to reject the waiver of class arbitration here. Respondents argue that requiring them to litigate their claims individually — as they contracted to do — would contravene the policies of the antitrust laws. But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Congress has taken some measures to facilitate the litigation of antitrust claims — for example, it enacted a multiplied-

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damages remedy. See 15 U. S. C. § 15 (treble damages). In enacting such measures, Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. “[N]o legislation pursues its purposes at all costs.”

The antitrust laws do not “evinc[e] an intention to preclude a waiver” of class-action procedure. *Mitsubishi Motors*. The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” The parties here agreed to arbitrate pursuant to that “usual rule,” and it would be remarkable for a court to erase that expectation.

Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights. To begin with, it is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an “abridg[ment]” or modif[ication]” of a “substantive right” forbidden to the Rules, see 28 U. S. C. § 2072(b). But there is no evidence of such an entitlement in any event. The Rule imposes stringent requirements for certification that in practice exclude most claims. And we have specifically rejected the assertion that one of those requirements (the class-notice requirement) must be dispensed with because the “prohibitively high cost” of compliance would “frustrate [plaintiff’s] attempt to vindicate the policies underlying the antitrust” laws. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 166-168, 175-176 (1974). One might respond, perhaps, that federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition in *AT&T Mobility*.

IV

Our finding of no “contrary congressional command” does not end the case. Respondents invoke a judge-made exception to the FAA which, they say, serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the “effective vindication” of a federal statutory right. Enforcing the waiver of class arbitration bars effective vindication, respondents contend, because they have no economic incentive to pursue their antitrust claims individually in arbitration.

The “effective vindication” exception to which respondents allude originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on “public policy” grounds, arbitration agreements that “operat[e] . . . as a prospective

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waiver of a party's *right to pursue* statutory remedies." (emphasis added). Dismissing concerns that the arbitral forum was inadequate, we said that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Subsequent cases have similarly asserted the existence of an "effective vindication" exception, see, *e.g., Gilmer*, but have similarly declined to apply it to invalidate the arbitration agreement at issue.

And we do so again here. As we have described, the exception finds its origin in the desire to prevent "prospective waiver of a party's *right to pursue* statutory remedies," *Mitsubishi Motors* (emphasis added). That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. See *Green Tree Financial Corp.-Ala.* v. *Randolph*. But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.[3] The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. Or, to put it differently, the individual suit that was considered adequate to assure "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.[4]

…

Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of

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[3] The dissent contends that a class-action waiver may deny a party's right to pursue statutory remedies in the same way as a clause that bars a party from presenting economic testimony. That is a false comparison for several reasons: To begin with, it is not a given that such a clause would constitute an impermissible waiver; we have never considered the point. But more importantly, such a clause, assuming it makes vindication of the claim impossible, makes it impossible not just as a class action but even as an individual claim.

[4] … The dissent … says that the agreement bars other forms of cost sharing — existing before the Sherman Act — that could provide effective vindication. Petitioners denied that, and that is not what the Court of Appeals decision under review here held. It held that, because other forms of cost sharing were not economically feasible ("the *only economically feasible* means for . . . enforcing [respondents'] statutory rights is *via a class action*"), the class-action waiver was unenforceable. (emphasis added). (The dissent's assertion to the contrary cites not the opinion on appeal here, but an earlier opinion that was vacated.) That is the conclusion we reject.

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arbitration." "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system."[5]

* * *

The regime established by the Court of Appeals' decision would require — before a plaintiff can be held to contractually agreed bilateral arbitration — that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

[Concurring opinion by JUSTICE THOMAS omitted.]

JUSTICE KAGAN, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Here is the nutshell version of this case, unfortunately obscured in the Court's decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a

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[5] In dismissing *AT&T Mobility* as a case involving pre-emption and not the effective-vindication exception, the dissent ignores what that case established — that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said, is "unrelated" to the FAA. Accordingly, the FAA does, contrary to the dissent's assertion, favor the absence of litigation when that is the consequence of a class-action waiver, since its "'principal purpose'" is the enforcement of arbitration agreements according to their terms.

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variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability — even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.

And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.

…

Start with an uncontroversial proposition: We would refuse to enforce an exculpatory clause insulating a company from antitrust liability — say, "Merchants may bring no Sherman Act claims" — even if that clause were contained in an arbitration agreement. Congress created the Sherman Act's private cause of action not solely to compensate individuals, but to promote "the public interest in vigilant enforcement of the antitrust laws." Accordingly, courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract.

…

If the rule were limited to baldly exculpatory provisions, however, a monopolist could devise numerous ways around it. Consider several alternatives that a party drafting an arbitration agreement could adopt to avoid antitrust liability, each of which would have the identical effect. On the front end: The agreement might set outlandish filing fees or establish an absurd (*e.g.*, one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator's authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability — say, by prohibiting any economic testimony (good luck proving an antitrust claim without that!). Or else the agreement might appoint as an arbitrator an obviously biased person — say, the CEO of Amex. The possibilities are endless — all less direct than an express exculpatory clause, but no less fatal. So the rule against prospective waivers of federal rights can work only if it applies not just to a contract clause explicitly barring a claim, but to others that operate to do so.

And sure enough, our cases establish this proposition: An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result….

Applied as our precedents direct, the effective-vindication rule furthers the purposes not just of laws like the Sherman Act, but of the FAA itself…. What the FAA prefers to litigation is arbitration, not *de facto* immunity. The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution….

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…

And this is just the kind of case the rule was meant to address…. As this case comes to us, the evidence shows that Italian Colors cannot prevail in arbitration without an economic analysis defining the relevant markets, establishing Amex's monopoly power, showing anticompetitive effects, and measuring damages. And that expert report would cost between several hundred thousand and one million dollars. So the expense involved in proving the claim in arbitration is ten times what Italian Colors could hope to gain, even in a best-case scenario. That counts as a "prohibitive" cost, in *Randolph*'s terminology, if anything does. No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.

An arbitration agreement could manage such a mismatch in many ways, but Amex's disdains them all. As the Court makes clear, the contract expressly prohibits class arbitration. But that is only part of the problem. The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report. And still more: The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails. And beyond all that: Amex refused to enter into any stipulations that would obviate or mitigate the need for the economic analysis. In short, the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.

…

The [third] paragraph [of Part IV] of the Court's decision … is the key: It contains almost the whole of the majority's effort to explain why the effective-vindication rule does not stop Amex from compelling arbitration. The majority's first move is to describe *Mitsubishi* and *Randolph* as covering only discrete situations …. Those cases are not this case, the majority says: Here, the agreement's provisions went to the possibility of "*proving* a statutory remedy."

But the distinction the majority proffers, which excludes problems of proof, is one *Mitsubishi* and *Randolph* (and our decisions reaffirming them) foreclose. Those decisions establish what in some quarters is known as a principle: When an arbitration agreement prevents the effective vindication of federal rights, a party may go to court. That principle, by its nature, operates in diverse circumstances — not just the ones that happened to come before the Court…. The variations matter not at all. Whatever the precise mechanism, each "operate[s] … as a prospective waiver of a party's [federal] right[s]" — and so confers immunity on a wrongdoer. And that is what counts under our decisions.

…

That leaves the three last sentences in the majority's core paragraph. Here, the majority conjures a special reason to exclude "class-action waiver[s]" from the

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effective-vindication rule's compass. Rule 23, the majority notes, became law only in 1938 — decades after the Sherman Act. The majority's conclusion: If federal law in the interim decades did not eliminate a plaintiff's rights under that Act, then neither does this agreement.

But that notion, first of all, rests on a false premise: that this case is only about a class-action waiver. It is not, and indeed could not sensibly be. The effective-vindication rule asks whether an arbitration agreement *as a whole* precludes a claimant from enforcing federal statutory rights….

In any event, the age of the relevant procedural mechanisms (whether class actions or any other) does not matter, because the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute. Whether a particular procedural device preceded or post-dated a particular statute, the question remains the same: Does the arbitration agreement foreclose a party—right now—from effectively vindicating the substantive rights the statute provides?...

Still, the majority takes one last stab: "Truth to tell," it claims, *AT&T Mobility LLC* v. *Concepcion*, "all but resolves this case."… [J]ust as this case is not about class actions, *AT&T Mobility* was not — and could not have been — about the effective-vindication rule. Here is a tip-off: *AT&T Mobility* nowhere cited our effective-vindication precedents….

… *AT&T Mobility* involved a *state* law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so — as the Court found in *AT&T Mobility* — the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them. Again, then, *AT&T Mobility* had no occasion to address the issue in this case. The relevant decisions are instead *Mitsubishi* and *Randolph*.

* * *

The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled….

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As a result, Amex's contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome. The FAA conceived of arbitration as a "method of *resolving* disputes" — a way of using tailored and streamlined procedures to facilitate redress of injuries. (emphasis added). In the hands of today's majority, arbitration threatens to become more nearly the opposite — a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action. I respectfully dissent.

Replace the notes and Problem 3.10 after *Graham Oil* on pages 239-242 with the following:

Notes

1. The "effective vindication" doctrine discussed in *Green Tree* and *Amex*, and applied in *Graham Oil*, often overlaps with unconscionability as a basis for challenging the enforceability of arbitration agreements. How do the theories differ? In one sense, the effective vindication doctrine is narrower because it requires the challenge to the arbitration agreement to be based on an inconsistency with a particular federal statute. Unconscionability has no such limitation. But after the Supreme Court's decision in *Concepcion* (discussed in § 4.04) — holding that the FAA preempts at least some unconscionability challenges to arbitration agreements — the effective vindication doctrine gained increased prominence, culminating in the Supreme Court's decision in *Amex*.

2. What is the status of the effective vindication doctrine after *Amex*? Under what circumstances can a party rely on the doctrine to challenge the enforceability of an arbitration clause? Is the decision in *Graham Oil* still good law after *Amex*?

3. Are there any circumstances in which a party can challenge a class arbitration waiver using the effective vindication doctrine after *Amex*? What if the federal statute expressly authorized class actions? Addressed how damages were to be calculated in a class action? Was enacted after the Federal Rules of Civil Procedure were adopted? Was enacted after the current version of Federal Rule 23 was adopted?

4. What if the parties' contract, in addition to waiving class relief, also obliged them to keep the existence of any dispute confidential and precluded them from cooperating with other similarly situated parties in bringing a claim? The majority and dissent disagree about whether other provisions in the contract in

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Amex also interfered with the plaintiffs' federal statutory rights. If they did, would that have changed the outcome of the case?

5. Is the reasoning of *Amex* limited to arbitration clauses? What if the parties waive class relief in a contract that does not include an arbitration clause? Would the Court have come out the same way it did in *Amex*?

6. Assuming that some sort of effective vindication doctrine remains available after *Amex*, additional questions arise. First, what if the provision of the arbitration clause alleged to interfere with the effective vindication of statutory rights is ambiguous?

Consider, for example, the punitive damages provision of the arbitration agreement in *Graham Oil*, which provided that "[t]he arbitrator(s) may not assess punitive or exemplary damages." Does that language constitute a waiver of the right to recover punitive damages, or does it merely define the scope of the arbitrator's authority, permitting a court later to award punitive damages if appropriate? *Compare* Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of the Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 540–42 (1994) (arguing that language denying arbitrator authority to award punitive damages waives altogether claim for punitive damages) *with* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 35 (1997) (arguing that punitive damages remain available in court after arbitration proceeding is completed).

In PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003), the Supreme Court held that resolving such an ambiguity was a matter for the arbitrator, not the court. The district court in *PacifiCare* had refused to compel arbitration of a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) because of a provision in the arbitration agreement that precluded the award of "punitive damages." The district court concluded that the provision would prevent the arbitrator from awarding treble damages as provided for under RICO, and so might deny the claimant "meaningful relief for allegations of statutory violations in an arbitration forum." The Supreme Court reversed, explaining that the language in the arbitration agreement was ambiguous and that "we should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved." *Id.* at 406-07. The Court explained that "the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability" that a court could decide." *Id.* at 407 n.2. "[S]ince we do not know how the arbitrator will construe the remedial limitations," the Court concluded, "the proper course is to compel arbitration." *Id.* at 407.

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7. Second, what if the statutory rights derive from state law rather than federal law? In Feeney v. Dell Inc., 989 N.E.2d 439 (Mass. 2013), the Massachusetts Supreme Court invalidated an arbitration clause with a class arbitration waiver on the ground that it precluded the plaintiffs from vindicating their rights under Massachusetts consumer protection statutes, and expressly refused to limit the effective vindication doctrine to federal statutory rights. The dissent in *Amex*, however, rejected the application of the doctrine to state statutory rights, suggesting that even the dissent would conclude that *Feeney* was wrongly decided. The Massachusetts Supreme Court thereafter reversed itself and concluded that "the analysis the Court set forth in *Concepcion* (and reinforced in *Amex*) applies without regard to whether the claim sought to be vindicated arises under Federal or State law." Feeney v. Dell Inc., 993 N.E.2d 329, 331 (Mass. 2013).

8. Third, assume that the court, as in *Graham Oil*, concludes that several provisions of the arbitration clause are unenforceable under the effective vindication doctrine. Should the court invalidate the entire arbitration clause or sever the unenforceable provisions and enforce the rest of the clause? The majority and the dissent in *Graham Oil* disagreed about the proper approach in that case, with the majority holding the provisions nonseverable and invalidating the entire clause. Was that approach proper?

Severability was the subject of an opinion by now-Chief Justice John Roberts while serving on the D.C. Circuit. In Booker v. Robert Half Int'l, Inc., 413 F.3d 77 (D.C. Cir. 2005), the court of appeals held that the district court had properly severed a provision precluding the award of punitive damages, which the parties agreed was unenforceable. In so doing, the court surveyed the law on severability and distinguished *Graham Oil*:

> Booker next argues that enforcing the remainder of the arbitration clause contravenes the federal policy interest in ensuring the effective vindication of statutory rights. He contends that responding to illegal provisions in arbitration agreements by judicially pruning them out leaves employers with every incentive to "overreach" when drafting such agreements. If judges merely sever illegal provisions and compel arbitration, employers would be no worse off for trying to include illegal provisions than if they had followed the law in drafting their agreements in the first place. On the other hand, because not every claimant will challenge the illegal provisions, some employees will go to the arbitral table without all their statutory rights.
>
> We have never addressed this issue, but Booker's argument — bolstered by support from the EEOC — has helped persuade some

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circuits to strike arbitration clauses in their entirety, rather than simply sever offending provisions. Other circuits, however, have invoked the federal policy in favor of enforcing agreements to arbitrate to reject policy arguments like Booker's and uphold severance of illegal provisions. The differing results may well reflect not so much a split among the circuits as variety among different arbitration agreements. Decisions striking an arbitration clause entirely often involved agreements without a severability clause, or agreements that did not contain merely one readily severable illegal provision, but were instead pervasively infected with illegality. Decisions severing an illegal provision and compelling arbitration, on the other hand, typically considered agreements with a severability clause and discrete unenforceable provisions.

. . .

We agree with the district court that severing the punitive damages bar and enforcing the arbitration clause was proper here. Not only does the agreement contain a severability clause, but Booker identifies only one discrete illegal provision in the agreement. . . . This one unenforceable provision does not infect the arbitration clause as a whole. The district court did not unravel "a highly integrated" complex of interlocking illegal provisions, but rather removed a punitive damages bar that appears to have been grafted onto an intact and functioning framework, for the AAA commercial rules — incorporated by reference in the clause — already contain provisions on remedies that do not prohibit punitive damages. Indeed, by severing a remedial component of the arbitration clause, the district court removed a provision generally understood as not being essential to a contract's consideration, and thus more readily severable.

The *Graham Oil* decision, on which Booker relies, struck the entire arbitration agreement after noting that "the offensive provisions clearly represent an attempt . . . to achieve through arbitration what Congress has expressly forbidden." There is no evidence of that here. At the time the parties signed the agreement . . . the law of this circuit was unclear as to whether bars on punitive damages in arbitration clauses were enforceable in this context. Moreover, the AAA did not promulgate the employment arbitration rules favored by Booker — and assented to by RHI in pre-litigation negotiations — until after the parties signed the employment agreement.

By invoking the severability clause to remove a discrete remedial provision, the district court honored the intent of the parties reflected in the employment agreement, which included not only the punitive damages bar but the explicit severability clause as well. In

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> doing so, the court was also faithful to the federal policy which "requires that we rigorously enforce agreements to arbitrate."

Id. at 84-86.

9. In response to *Amex*, the congressional sponsors of the Arbitration Fairness Act introduced a new version of the Act, which provides that no pre-dispute arbitration agreements is enforceable "with respect" to an "antitrust dispute." *See* Forced Arbitration Injustice Repeal Act (FAIR Act), *reprinted at* pages 160-164 of this Update. The FAIR Act defines an "antitrust dispute" as a dispute:

> '(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a))) or State antitrust laws; and
>
> '(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law.

Id. The bill would not make all antitrust claims nonarbitrable, but would make predispute arbitration agreements unenforceable in any case in which an antitrust plaintiff brings a class action, apparently without regard to whether the class action could properly be certified under Rule 23 and without regard to whether the case could economically be brought on an individual basis.

Problem 3.10

In addition to providing for binding arbitration, the Send-A-Wreck franchise agreement (see Problem 3.5) also provides that (1) the arbitration shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association; (2) the arbitrator shall have no authority to award punitive damages; (3) each party shall bear its own attorney's fees; (4) any claim not filed within one year shall be barred as untimely; and (5) all claims must proceed only on an individual basis; class relief of any sort is barred.

Patricia Cairns now files a class action alleging an unlawful tying arrangement in violation of the federal antitrust laws and claiming actual damages on behalf of the class of $15,000,000. (Her individual damages, and the damages of each individual class member, are only $5,000, however.) Cairns seeks recovery of treble damages (three times actual damages) and of her attorney's fees, both of which are statutorily authorized for successful antitrust plaintiffs. Her suit is filed more than a year after the claim arose, but within the time permitted by the statute

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of limitations under the federal antitrust laws. In opposing Send-A-Wreck's petition to compel arbitration, Cairns' attorney also submits (1) an affidavit from Cairns asserting that she cannot afford to arbitrate the dispute because her annual income is only $20,000; (2) biographies of prospective arbitrators showing that they charge a minimum of $1,000 per day to serve as arbitrator; and (3) an affidavit from an expert witness stating that it would cost at least $100,000 to do the sort of economic study necessary to establish an unlawful tying arrangement on the facts of the case.

Should a court order Cairns to arbitrate her antitrust claim? Would your answer differ if her claim was based solely on state law rather than federal law?

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Chapter 4 The Federal Arbitration Act and State Law

Add the following citation to end of note 2 after *Alafabco* on page 269:

; Garlock v. 3DS Properties, L.L.C., 930 N.W.2d 503, 511 (Neb. 2019) ("[W]hile more complex transactions may implicate interstate commerce, we hold that a simple contract for the sale of residential real estate is an inherently intrastate activity. On the facts of this case, the UAA governs the purchase agreement."); Jeffers v. Babera Mgmt. Corp., 2014 U.S. Dist. LEXIS 79645, at 3-4 (C.D. Cal. June 3, 2014) ("Defendant has offered no argument regarding this transaction's effect on interstate commerce. The Court finds that this residential lease agreement for California property, entered into by California residents, did not affect interstate commerce. As such, the agreement is not subject to Section 2 of the Federal Arbitration Act."); Genger v. Genger, 2017 WL 2239551, at *4 (S.D.N.Y. May 9, 2017) (holding that arbitration of a dispute arising out of allocation of assets in divorce settlement "does not involve commerce").

Renumber the current note after *Circuit City* on page 277 as note 1, and add the following as notes 2 and 3:

2. What sorts of workers are "engaged in foreign or interstate commerce" within the meaning of FAA § 1? In Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022), the Supreme Court held that a ramp supervisor for Southwest Airlines, whose "work frequently requires her to load and unload baggage, airmail, and commercial cargo on and off airplanes that travel across the country," was engaged in interstate commerce and excluded from the FAA. *Id.* at 1787. The Court agreed with Southwest that application of the § 1 exclusion depends on "the actual work that the members of the class, as a whole, typically carry out," not what the employer "does generally." *Id.* at 1788. Relying on its decision in *Circuit City*, the Court stated that to qualify for the § 1 exclusion, "transportation workers must be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* at 1790. Here, "[c]argo loaders exhibit this

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central feature of a transportation worker": "one who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (e.g., transportation) of that cargo." *Id.*

3. How does the employment exception in FAA § 1 apply to disputes about whether a person is an employee or an independent contractor? In New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019), the U.S. Supreme Court held that: (1) it was for a court rather than the arbitrator to decide whether the FAA applies, *id.* at 537; and (2) the FAA's employment exception applies not just to employees, but also to independent contractors, because "[w]hen Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work," *id.* at 543-44.

Replace Problem 4.6 on page 278 with the following:

Problem 4.6

An associate at an Iowa law firm enters into a written contract with her employer. The employment contract contains an arbitration clause. Part of the attorney's practice consists of representing national companies in litigation all over the country.

(a) The attorney asserts a breach of contract claim against the firm, and the firm seeks to have the dispute arbitrated. Iowa law provides:

> A provision in a written contract to submit to arbitration a future controversy arising between the parties is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the contract. This subsection shall not apply to any of the following:
>
> …
>
> b. A contract between employers and employees.

IOWA CODE § 679A.1. Is the arbitration clause enforceable in state court in Iowa?

(b) Same facts as (a) except that Iowa has adopted a law identical to the following California statute:

> (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California

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> Fair Employment and Housing Act … or this code, including the right to file and pursue a civil action or a complaint with … any court ….
>
> (b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with … any court ….
>
> …
>
> (f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

CAL. LABOR CODE § 432.6, *reprinted at* pages 171-172 of this Update. Is the arbitration clause enforceable in state court in Iowa? *See* Chamber of Commerce of U.S. v. Bonta, 62 F.4th 473 (9th Cir. 2023) (on rehearing).

Replace notes 5, 6, and 9 after *Concepcion* on pages 286-87 with the following:

5. What if the case involves a federal statutory claim? Can a court refuse to enforce an arbitration clause with a class arbitration waiver on the ground that the clause would prevent consumers from vindicating their federal statutory rights? The Supreme Court rejected such a contention in *American Express Co. v. Italian Colors Restaurant*, *reprinted at* pages 54-62 of this Update.

6. Other possible limits on *Concepcion* might come from state statutes such as California statutes providing for public injunctive relief; *see* McGill v. Citibank, N.A., 393 P.3d 85, 94-95 (Cal. 2017) ("[A] provision in *any* contract—even a contract that has no arbitration provision—that purports to waive, in all fora, the statutory right to seek public injunctive relief under the UCL, the CLRA, or the false advertising law is invalid and unenforceable under California law. The FAA does not require enforcement of such a provision, in derogation of this generally applicable contract defense, merely because the provision has been inserted into an arbitration agreement.") *and* Blair v. Rent-A-Ctr., Inc., 928 F.3d 819, 831 (9th Cir. 2019) (holding "that the FAA does not preempt the *McGill* rule"). See also the discussion of whether the FAA preempts California's Private Attorney General's Act below in *Viking River Cruises, Inc. v. Moriana*.

…

9. In response to *Concepcion*, Representative Hank Johnson and Senator Richard Blumenthal introduced into Congress the Forced Arbitration Injustice Repeal Act, the current version of which is *reprinted at* pages 160-164 of this Update.

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As noted earlier, the House of Representatives passed a previous version of the FAIR Act on March 17, 2022, but the Senate did not act on the bill.

VIKING RIVER CRUISES, INC. v. MORIANA
United States Supreme Court
142 S. Ct. 1906 (2022)

Justice ALITO delivered the opinion of the Court.*

We granted certiorari in this case to decide whether the Federal Arbitration Act (FAA) preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004. Cal. Lab. Code Ann. § 2698 *et seq*.

I
A

The California Legislature enacted the Labor Code Private Attorneys General Act (PAGA) to address a perceived deficit in the enforcement of the State's Labor Code. California's Labor and Workforce Development Agency (LWDA) had the authority to bring enforcement actions to impose civil penalties on employers for violations of many of the code's provisions. But the legislature believed the LWDA did not have sufficient resources to reach the appropriate level of compliance, and budgetary constraints made it impossible to achieve an adequate level of financing. The legislature thus decided to enlist employees as private attorneys general to enforce California labor law, with the understanding that labor-law enforcement agencies were to retain primacy over private enforcement efforts.

By its terms, PAGA authorizes any "aggrieved employee" to initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by the State in an LWDA enforcement action. Cal. Lab. Code Ann. § 2699(a). As the text of the statute indicates, PAGA limits statutory standing to "aggrieved employees"—a term defined to include "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." § 2699(c)…. In any successful PAGA action, the LWDA is entitled to 75 percent of the award. § 2699(i). The remaining 25 percent is distributed among the employees affected by the violations at issue.

* THE CHIEF JUSTICE joins Parts I and III of this opinion.

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California law characterizes PAGA as creating a "type of *qui tam* action." Although the statute's language suggests that an "aggrieved employee" sues "on behalf of himself or herself and other current or former employees," California precedent holds that a PAGA suit is a " 'representative action' " in which the employee plaintiff sues as an " 'agent or proxy' " of the State.

As the California courts conceive of it, the State "is always the real party in interest in the suit."[2] The primary function of PAGA is to delegate a power to employees to assert "the same legal right and interest as state law enforcement agencies." In other words, the statute gives employees a right to assert the State's claims for civil penalties on a representative basis, but it does not create any private rights or private claims for relief….

California precedent also interprets the statute to contain what is effectively a rule of claim joinder. Rules of claim joinder allow a party to unite multiple claims against an opposing party in a single action. PAGA standing has the same function. An employee with statutory standing may "seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself." An employee who alleges he or she suffered a single violation is entitled to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability. This mechanism radically expands the scope of PAGA actions. The default penalties set by PAGA are $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation. Cal. Lab. Code Ann. § 2699(f)(2). Individually, these penalties are modest; but given PAGA's additive dimension, low-value claims may easily be welded together into high-value suits.

B

Petitioner Viking River Cruises, Inc. (Viking), is a company that offers ocean and river cruises around the world. When respondent Angie Moriana was hired by Viking as a sales representative, she executed an agreement to arbitrate any dispute arising out of her employment. The agreement contained a "Class Action Waiver" providing that in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action. It also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court. But under that severability clause, if any "portion" of the waiver remained valid, it would be "enforced in arbitration."

[2] The extent to which PAGA plaintiffs truly act as agents of the State rather than complete assignees is disputed…. For purposes of this opinion, we assume that PAGA plaintiffs are agents.

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After leaving her position with Viking, Moriana filed a PAGA action against Viking in California court. Her complaint contained a claim that Viking had failed to provide her with her final wages within 72 hours, as required by §§ 101–102 of the California Labor Code. But the complaint also asserted a wide array of other code violations allegedly sustained by other Viking employees, including violations of provisions concerning the minimum wage, overtime, meal periods, rest periods, timing of pay, and pay statements. Viking moved to compel arbitration of Moriana's "individual" PAGA claim—here meaning the claim that arose from the violation she suffered—and to dismiss her other PAGA claims. The trial court denied that motion, and the California Court of Appeal affirmed, holding that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable "representative" claims.

This ruling was dictated by the California Supreme Court's decision in *Iskanian*. In that case, the court held that pre-dispute agreements to waive the right to bring "representative" PAGA claims are invalid as a matter of public policy….

Iskanian's principal rule … prevents parties from waiving *representative standing* to bring PAGA claims in a judicial or arbitral forum. But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate "individual PAGA claims for Labor Code violations that an employee suffered," on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA.

In this case, *Iskanian*'s principal prohibition required the lower courts to treat the representative-action waiver in the agreement between Moriana and Viking as invalid insofar as it was construed as a wholesale waiver of PAGA standing. The agreement's severability clause, however, allowed enforcement of any "portion" of the waiver that remained valid, so the agreement still would have permitted arbitration of Moriana's individual PAGA claim even if wholesale enforcement was impossible. But because California law prohibits division of a PAGA action into constituent claims, the state courts refused to compel arbitration of that claim as well. We granted certiorari, and now reverse.

II

[Section 2 of the FAA] … establish[es] "an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " *Kindred Nursing*….

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But under our decisions, even rules that are generally applicable as a formal matter are not immune to preemption by the FAA. Section 2's mandate protects a right to enforce arbitration agreements. That right would not be a right to *arbitrate* in any meaningful sense if generally applicable principles of state law could be used to transform "traditiona[l] individualized ... arbitration" into the "litigation it was meant to displace" through the imposition of procedures at odds with arbitration's informal nature. And that right would not be a right to arbitrate based on an *agreement* if generally applicable law could be used to coercively impose arbitration in contravention of the "first principle" of our FAA jurisprudence: that "[a]rbitration is strictly 'a matter of consent.'"

Based on these principles, we have held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." The " 'shift from bilateral arbitration to class-action arbitration' " mandates procedural changes that are inconsistent with the individualized and informal mode of arbitration contemplated by the FAA. As a result, class procedures cannot be imposed by state law without presenting unwilling parties with an unacceptable choice between being compelled to arbitrate using procedures at odds with arbitration's traditional form and forgoing arbitration altogether. Putting parties to that choice is inconsistent with the FAA.

Viking contends that these decisions require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding….

Moriana offers a very different characterization of the statute. As she sees it, any conflict between *Iskanian* and the FAA is illusory because PAGA creates nothing more than a substantive cause of action….

We disagree with both characterizations of the statute. Moriana is correct that the FAA does not require courts to enforce contractual waivers of substantive rights and remedies. The FAA's mandate is to enforce "*arbitration agreements*." *Concepcion* (emphasis added). And as we have described it, an arbitration agreement is "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum.' "[5]

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[5] In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous. The basis of this principle is not anything unique about federal statutes. It is that the FAA requires only the

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But Moriana's premise that PAGA creates a unitary private cause of action is irreconcilable with the structure of the statute and the ordinary legal meaning of the word "claim." California courts interpret PAGA to provide employees with delegated authority to assert the State's claims on a representative basis, not an individual cause of action. And a PAGA action asserting multiple code violations affecting a range of different employees does not constitute "a single claim" in even the broadest possible sense, because the violations asserted need not even arise from a common "transaction" or "nucleus of operative facts."

Viking's position, on the other hand, elides important structural differences between PAGA actions and class actions that preclude any straightforward application of our precedents invalidating prohibitions on class-action waivers. Class-action procedure allows courts to use a representative plaintiff 's individual claims as a basis to "adjudicate claims of multiple parties at once, instead of in separate suits."…

PAGA actions also permit the adjudication of multiple claims in a single suit, but their structure is entirely different. A class-action plaintiff can raise a multitude of claims because he or she represents a multitude of absent individuals; a PAGA plaintiff, by contrast, represents a single principal, the LWDA, that has a multitude of claims. As a result of this structural difference, PAGA suits exhibit virtually none of the procedural characteristics of class actions. The plaintiff does not represent a class of injured individuals, so there is no need for certification. PAGA judgments are binding only with respect to the State's claims, and are not binding on nonparty employees as to any individually held claims. This obviates the need to consider adequacy of representation, numerosity, commonality, or typicality. And although the statute gives other affected employees a future interest in the penalties awarded in an action, that interest does not make those employees "parties" in any of the senses in which absent class members are, or give those employees anything more than an inchoate interest in litigation proceeds.

Because PAGA actions do not adjudicate the individual claims of multiple absent third parties, they do not present the problems of notice, due process, and adequacy of representation that render class arbitration inconsistent with arbitration's traditionally individualized form. Of course, as a practical matter, PAGA actions *do* have something important in common with class actions. Because PAGA plaintiffs represent a principal with a potentially vast number of claims at its disposal, PAGA suits "greatly increas[e] risks to defendants." But our precedents

---

enforcement of "provision[s]" to settle a controversy "by arbitration," § 2, and not any provision that happens to appear in a contract that features an arbitration clause. That is why we mentioned this principle in *Preston*, which concerned claims arising under state law.

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do not hold that the FAA allows parties to contract out of *anything* that might amplify defense risks. Instead, our cases hold that States cannot coerce individuals into forgoing arbitration by taking the individualized and informal *procedures* characteristic of traditional arbitration off the table…. The question, then, is whether PAGA contains any procedural mechanism at odds with arbitration's basic form.

…

III

We think that such a conflict between PAGA's procedural structure and the FAA does exist, and that it derives from the statute's built-in mechanism of claim joinder. As we noted at the outset, that mechanism permits "aggrieved employees" to use the Labor Code violations they personally suffered as a basis to join to the action any claims that could have been raised by the State in an enforcement proceeding. *Iskanian*'s secondary rule prohibits parties from contracting around this joinder device because it invalidates agreements to arbitrate only "individual PAGA claims for Labor Code violations that an employee suffered."

This prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine "the issues subject to arbitration" and "the rules by which they will arbitrate," and does so in a way that violates the fundamental principle that "arbitration is a matter of consent."… This means that parties cannot be coerced into arbitrating a claim, issue, or dispute "absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.' "

…

A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration. Such a rule would permit parties to superadd new claims to the proceeding, regardless of whether the agreement between them committed those claims to arbitration. Requiring arbitration procedures to include a joinder rule of that kind compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether. Either way, the parties are coerced into giving up a right they enjoy under the FAA.

When made compulsory by way of *Iskanian*, the joinder rule internal to PAGA functions in exactly this way. Under that rule, parties cannot agree to restrict the scope of an arbitration to disputes arising out of a particular " ' "transaction" ' " or " 'common nucleus of facts.' " If the parties agree to arbitrate "individual" PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties. The only way for parties to agree to arbitrate *one* of an

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employee's PAGA claims is to also "agree" to arbitrate *all other* PAGA claims in the same arbitral proceeding.

… As a result, *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than "forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution." This result is incompatible with the FAA.

IV

We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. This holding compels reversal in this case…. Based on th[e severability clause in the agreement], Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim. The lower courts refused to do so based on the rule that PAGA actions cannot be divided into individual and non-individual claims. Under our holding, that rule is preempted, so Viking is entitled to compel arbitration of Moriana's individual claim.

The remaining question is what the lower courts should have done with Moriana's non-individual claims. Under our holding in this case, those claims may not be dismissed simply because they are "representative." *Iskanian*'s rule remains valid to that extent. But as we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding…. As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.

For these reasons, the judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, concurring.

I join the Court's opinion in full….

The Court concludes that the FAA poses no bar to the adjudication of respondent Angie Moriana's "non-individual" PAGA claims, but that PAGA itself "provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." Thus, the Court reasons, based on available guidance from California courts, that Moriana lacks "statutory standing" under PAGA to litigate her "non-individual" claims separately in state court. Of course, if this Court's understanding of state

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law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits. With this understanding, I join the Court's opinion.

Justice BARRETT, with whom Justice KAVANAUGH joins, and with whom THE CHIEF JUSTICE joins except as to the footnote, concurring in part and concurring in the judgment.

I join Part III of the Court's opinion. I agree that reversal is required under our precedent because PAGA's procedure is akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement. I would say nothing more than that. The discussion in Parts II and IV of the Court's opinion is unnecessary to the result, and much of it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case.[*]

Justice THOMAS, dissenting.

I continue to adhere to the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, does not apply to proceedings in state courts. Accordingly, the FAA does not require California's courts to enforce an arbitration agreement that forbids an employee to invoke the State's Private Attorneys General Act. On that basis, I would affirm the judgment of the California Court of Appeal.

Notes

1. What did the concurring judges agree with in the opinion for the Court, and what did they disagree with? What did the Court actually decide in the case?

2. In her concurring opinion, Justice Sotomayor notes that "if this Court's understanding of state law [that Moriana lacks 'statutory standing' under PAGA to litigate her 'non-individual' claims separately in state court] is wrong, California courts, in an appropriate case, will have the last word." And the California Supreme Court has done precisely that. In Adolph v. Uber Technologies, Inc., the California Supreme Court unanimously held that when "a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA." 2023 WL 4553702, at *1 (Cal. July 17, 2023). The Court explained how such a case might proceed:

[*] The same is true of Part I.

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> First, the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the Code of Civil Procedure. Following the arbitrator's decision, any party may petition the court to confirm or vacate the arbitration award under section 1285 of the Code of Civil Procedure. If the arbitrator determines that Adolph is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment (Code Civ. Proc., § 1287.4), would be binding on the court, and Adolph would continue to have standing to litigate his nonindividual claims. If the arbitrator determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Adolph could no longer prosecute his non-individual claims due to lack of standing.

Id. at *8. Given the decision in *Adolph*, how much impact will arbitration clauses have on the litigation of PAGA cases in California? What if the trial court does not exercise its discretion to stay the non-individual claims pending arbitration?

3. What effect, if any, does *Viking River Cruises* have on the line of California cases holding that pre-dispute arbitration agreements are unenforceable as applied to actions for public injunctive relief? (See note 6 after *Concepcion*.)

Insert the following after note 4 following *Keystone* on page 296:

KINDRED NURSING CENTERS L.P. v. CLARK
United States Supreme Court
137 S. Ct. 1421 (2017)

Justice KAGAN delivered the opinion of the Court.

The Federal Arbitration Act (FAA or Act) requires courts to place arbitration agreements "on equal footing with all other contracts." *DIRECTV, Inc. v. Imburgia*. In the decision below, the Kentucky Supreme Court declined to give effect to two arbitration agreements executed by individuals holding "powers of attorney"—that is, authorizations to act on behalf of others. According to the court, a general grant of power (even if seemingly comprehensive) does not permit a legal representative to enter into an arbitration agreement for someone else; to form such a contract, the representative must possess specific authority to "waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury." *Extendicare Homes, Inc. v. Whisman,* 478 S.W.3d 306, 327 (2015). Because that rule singles out arbitration agreements for disfavored treatment, we hold that it violates the FAA.

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I

Petitioner Kindred Nursing Centers L.P. operates nursing homes and rehabilitation centers. Respondents Beverly Wellner and Janis Clark are the wife and daughter, respectively, of Joe Wellner and Olive Clark, two now-deceased residents of a Kindred nursing home called the Winchester Centre.

At all times relevant to this case, Beverly and Janis each held a power of attorney, designating her as an "attorney-in-fact" (the one for Joe, the other for Olive) and affording her broad authority to manage her family member's affairs. In the Wellner power of attorney, Joe gave Beverly the authority, "in my name, place and stead," to (among other things) "institute legal proceedings" and make "contracts of every nature in relation to both real and personal property." In the Clark power of attorney, Olive provided Janis with "full power ... to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way," including the power to "draw, make, and sign in my name any and all ... contracts, deeds, or agreements."

Joe and Olive moved into the Winchester Centre in 2008, with Beverly and Janis using their powers of attorney to complete all necessary paperwork. As part of that process, Beverly and Janis each signed an arbitration agreement with Kindred on behalf of her relative. The two contracts, worded identically, provided that "[a]ny and all claims or controversies arising out of or in any way relating to ... the Resident's stay at the Facility" would be resolved through "binding arbitration" rather than a lawsuit.

When Joe and Olive died the next year, their estates (represented again by Beverly and Janis) brought separate suits against Kindred in Kentucky state court. The complaints alleged that Kindred had delivered substandard care to Joe and Olive, causing their deaths. Kindred moved to dismiss the cases, arguing that the arbitration agreements Beverly and Janis had signed prohibited bringing their disputes to court. But the trial court denied Kindred's motions, and the Kentucky Court of Appeals agreed that the estates' suits could go forward.

The Kentucky Supreme Court, after consolidating the cases, affirmed those decisions by a divided vote. The court began with the language of the two powers of attorney. The Wellner document, the court stated, did not permit Beverly to enter into an arbitration agreement on Joe's behalf. In the court's view, neither the provision authorizing her to bring legal proceedings nor the one enabling her to make property-related contracts reached quite that distance. By contrast, the court thought, the Clark power of attorney extended that far and beyond. Under that document, after all, Janis had the capacity to "dispose of all matters" affecting Olive. "Given this extremely broad, universal delegation of authority," the court

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acknowledged, "it would be impossible to say that entering into [an] arbitration agreement was not covered."

And yet, the court went on, both arbitration agreements—Janis's no less than Beverly's—were invalid. That was because a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so. The Kentucky Constitution, the court explained, protects the rights of access to the courts and trial by jury; indeed, the jury guarantee is the sole right the Constitution declares "sacred" and "inviolate." Accordingly, the court held, an agent could deprive her principal of an "adjudication by judge or jury" only if the power of attorney "expressly so provide[d]." And that clear-statement rule—so said the court—complied with the FAA's demands. True enough that the Act precludes "singl[ing] out arbitration agreements." But that was no problem, the court asserted, because its rule would apply not just to those agreements, but also to some other contracts implicating "fundamental constitutional rights." In the future, for example, the court would bar the holder of a "non-specific" power of attorney from entering into a contract "bind[ing] the principal to personal servitude."

Justice Abramson dissented, in an opinion joined by two of her colleagues. In their view, the Kentucky Supreme Court's new clear-statement rule was "clearly not ... applicable to 'any contract' but [instead] single[d] out arbitration agreements for disfavored treatment." Accordingly, the dissent concluded, the rule "r[a]n afoul of the FAA."

We granted certiorari.

II

A

The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*. The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim." And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements. In *Concepcion,* for example, we described a hypothetical state law declaring unenforceable any contract that "disallow[ed] an ultimate disposition [of a dispute] by a jury." Such a law might avoid referring to

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arbitration by name; but still, we explained, it would "rely on the uniqueness of an agreement to arbitrate as [its] basis"—and thereby violate the FAA.

The Kentucky Supreme Court's clear-statement rule, in just that way, fails to put arbitration agreements on an equal plane with other contracts. By the court's own account, that rule (like the one *Concepcion* posited) serves to safeguard a person's "right to access the courts and to trial by jury." In ringing terms, the court affirmed the jury right's unsurpassed standing in the State Constitution: The framers, the court explained, recognized "that right and that right alone as a divine God-given right" when they made it "the *only* thing" that must be "'held sacred'" and "'inviolate.'" So it was that the court required an explicit statement before an attorney-in-fact, even if possessing broad delegated powers, could relinquish that right on another's behalf. And so it was that the court did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial. Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment.[1]

And the state court's sometime-attempt to cast the rule in broader terms cannot salvage its decision. The clear-statement requirement, the court suggested, could also apply when an agent endeavored to waive other "fundamental constitutional rights" held by a principal. But what other rights, really? No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees. Nor did the opinion below indicate that such a grant would be needed for the many routine contracts—executed day in and day out by legal representatives—meeting that description. For example, the Kentucky Constitution protects the "inherent and inalienable" rights to "acquir[e] and protect[ ] property" and to "freely communicat[e] thoughts and opinions." Ky. Const. § 1. But the state court nowhere cautioned that an attorney-in-fact would now need a specific authorization to, say, sell her principal's furniture or commit her principal to a non-disclosure agreement. (And were we in the business of giving legal advice, we would tell the agent not to worry.) Rather, the court hypothesized a slim set of both patently objectionable and utterly fanciful contracts that would be subject to its

[1] Making matters worse, the Kentucky Supreme Court's clear-statement rule appears not to apply to other kinds of agreements relinquishing the right to go to court or obtain a jury trial. Nothing in the decision below (or elsewhere in Kentucky law) suggests that explicit authorization is needed before an attorney-in-fact can sign a settlement agreement or consent to a bench trial on her principal's behalf. Mark that as yet another indication that the court's demand for specificity in powers of attorney arises from the suspect status of arbitration rather than the sacred status of jury trials.

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rule: No longer could a representative lacking explicit authorization waive her "principal's right to worship freely" or "consent to an arranged marriage" or "bind [her] principal to personal servitude." Placing arbitration agreements within that class reveals the kind of "hostility to arbitration" that led Congress to enact the FAA. And doing so only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans.[2]

B

The respondents, Janis and Beverly, primarily advance a different argument—based on the distinction between contract formation and contract enforcement—to support the decision below. Kentucky's clear-statement rule, they begin, affects only contract formation, because it bars agents without explicit authority from entering into arbitration agreements. And in their view, the FAA has "no application" to "contract formation issues." The Act, to be sure, requires a State to enforce all arbitration agreements (save on generally applicable grounds) once they have come into being. But, the respondents claim, States have free rein to decide—irrespective of the FAA's equal-footing principle—whether such contracts are validly created in the first instance.

Both the FAA's text and our case law interpreting it say otherwise. The Act's key provision, once again, states that an arbitration agreement must ordinarily be treated as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. By its terms, then, the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"—that is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made. Precedent confirms that point. In *Concepcion,* we noted the impermissibility of applying a contract defense like duress "in a fashion that disfavors arbitration." But the doctrine of duress, as we have elsewhere explained, involves "unfair dealing at the contract formation stage." Our discussion of duress would have made no sense if the FAA, as the respondents contend, had nothing to say about contract formation.

And still more: Adopting the respondents' view would make it trivially easy for States to undermine the Act—indeed, to wholly defeat it. As the respondents have acknowledged, their reasoning would allow States to pronounce *any* attorney-in-fact incapable of signing an arbitration agreement—even if a power of attorney specifically authorized her to do so. And why stop there? If the respondents were

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[2] We do not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case. We simply reiterate here what we have said many times before—that the rule must in fact apply generally, rather than single out arbitration.

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right, States could just as easily declare *everyone* incompetent to sign arbitration agreements. (That rule too would address only formation.) The FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration.

III

As we did just last Term, we once again "reach a conclusion that . . . falls well within the confines of (and goes no further than) present well-established law." *DIRECTV*. The Kentucky Supreme Court specially impeded the ability of attorneys-in-fact to enter into arbitration agreements. The court thus flouted the FAA's command to place those agreements on an equal footing with all other contracts.

Our decision requires reversing the Kentucky Supreme Court's judgment in favor of the Clark estate. As noted earlier, the state court held that the Clark power of attorney was sufficiently broad to cover executing an arbitration agreement. The court invalidated the agreement with Kindred only because the power of attorney did not specifically authorize Janis to enter into it on Olive's behalf. In other words, the decision below was based exclusively on the clear-statement rule that we have held violates the FAA. So the court must now enforce the Clark–Kindred arbitration agreement.

By contrast, our decision might not require such a result in the Wellner case. The Kentucky Supreme Court began its opinion by stating that the Wellner power of attorney was insufficiently broad to give Beverly the authority to execute an arbitration agreement for Joe. If that interpretation of the document is wholly independent of the court's clear-statement rule, then nothing we have said disturbs it. But if that rule at all influenced the construction of the Wellner power of attorney, then the court must evaluate the document's meaning anew. The court's opinion leaves us uncertain as to whether such an impermissible taint occurred. We therefore vacate the judgment below and return the case to the state court for further consideration. On remand, the court should determine whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney.

For these reasons, we reverse in part and vacate in part the judgment of the Kentucky Supreme Court, and we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

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Justice THOMAS, dissenting.

I continue to adhere to the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.,* does not apply to proceedings in state courts. In state-court proceedings, therefore, the FAA does not displace a rule that requires express authorization from a principal before an agent may waive the principal's right to a jury trial. Accordingly, I would affirm the judgment of the Kentucky Supreme Court.

Notes

1. What does *Kindred Nursing Centers* add to the analysis of FAA preemption? Does it break new ground? Or is it simply a straightforward application of well settled principles of FAA preemption, as the Court states?

2. Is *Keystone* good law after *Kindred Nursing Centers*? How about the Louisiana Supreme Court's decision in *Hodges v. Reasonover* in § 2.05[D]? Is it preempted by the FAA under *Kindred Nursing Centers*?

Add the following as new note 3 after *Mastrobuono* on page 310:

3. The Supreme Court returned to the effect of the FAA on state contract interpretation in DIRECTV v. Imburgia, 577 U.S. 47 (2015). At issue in *Imburgia* was a provision in DIRECTV's arbitration clause, which provided that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Imburgia v. DIRECTV, Inc., 225 Cal. App. 4th 338, 341 (Cal. App. 2014). The California Court of Appeal, in decision that conflicted with one by the Ninth Circuit, held that the "law of your state" referred to California law (as stated in *Discover Bank*) to the exclusion of preemptive federal law (as stated in *Concepcion*). *See id.* at 343-44. In an opinion by Justice Breyer, the U.S. Supreme Court reversed, holding that the California court's interpretation was preempted by the FAA. The Court explained:

> [T]he underlying question of contract law at the time the Court of Appeal made its decision was whether the "law of your state" included *invalid* California law. We must now decide whether answering *that* question in the affirmative is consistent with the Federal Arbitration Act. After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way.

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DIRECTV v. Imburgia, 577 U.S.. at 55. As a result, according to the Court, "California's interpretation of the phrase 'law of your state' does not place arbitration contracts 'on equal footing with all other contracts,'" and so "is pre-empted by the Federal Arbitration Act." *Id.* at 58 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

Is *Imburgia* consistent with *Volt* and *Mastrobuono*? Is the outcome in *Imburgia* required by those cases?

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Chapter 5 Enforcing International Agreements to Arbitrate

Add the following as new note 6 after *Kahn Lucas* on page 335:

6. Recall the discussion in § 2.06 of the various theories under which courts have held non-signatories bound by or entitled to invoke arbitration agreements. In Outokumpu Stainless USA, LLC v. Converteam SAS, 902 F.3d 1316 (11th Cir. 2018), the United States Court of Appeals for the Eleventh Circuit held that the "agreement in writing" requirement makes those theories unavailable in actions brought under the New York Convention. The Supreme Court reversed, reasoning that:

> . . . the only provision of the Convention that addresses the enforcement of arbitration agreements is Article II(3). We do not read the nonexclusive language of that provision to set a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements. Thus, nothing in the text of the Convention "conflict[s] with" the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA.
>
> . . .
>
> The Court of Appeals did not analyze whether Article II(3) of the New York Convention conflicts with equitable estoppel. Instead, the court held that Article II(1) and (2) include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." But those provisions address the recognition of arbitration agreements, not who is bound by a recognized agreement. Article II(1) simply requires contracting states to "recognize an agreement in writing," and Article II(2) defines the term "agreement in writing." Here, the three agreements at issue were both written and signed. Only Article II(3) speaks to who may request referral under those agreements, and it does not prohibit the application of domestic law.

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GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1645, 1647-48 (2020).

Replace Problem 5.4 on page 350 with the following:

Problem 5.4

International Trading, Inc., located in the United States, enters into a written signed contract with Epervier Manufacturing, Ltd., a company located in Togo, a small, west African country. The contract was for the purchase of clothing manufactured in Togo, and provided for arbitration in India. Does the New York Convention apply? What if International Trading entered a contract with Delhi Manufacturing, located in India, and the contract provided for arbitration in Togo? Does the New York Convention apply?

Revise the citation to the AAA/ICDR International Arbitration Rules on page 358 as follows:

Update the citation from AAA/ICDR Rule art. 15 to AAA/ICDR Rule art. 21.

Revise the citations to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration on page 361 as follows:

Update the citation from Restatement § 4-14 to Restatement § 4.12.

Add the following citation at the end of note 3 after *ESAB Group* on page 386:

See also CLMS Mgmt. Servs. Ltd. P'ship v. Amwins Brokerage of Georgia, LLC, 8 F.4th 1007, 1017-18 (9th Cir. 2021) ("Article II, Section 3 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards is self-executing, and it requires enforcement of the parties' arbitration agreement. Because the Convention is not an 'Act of Congress' subject to reverse-preemption by the McCarran-Ferguson Act, the district court correctly granted defendants' motion to compel arbitration."), *cert. denied*, 142 S. Ct. 862 (2022); Green Enterprises, LLC v. Hiscox Syndicates Ltd. at Lloyd's of London, 68 F.4th 662, 667 (1st Cir. 2023) (following *CLMS Mgmt.*).

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Replace the citation in Problem 5.10(f) on page 402 with the following:

AAA/ICDR International Arbitration Rules, art. 19.

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Chapter 6 The Arbitration Proceeding

Revise the citations to the AAA Commercial Arbitration Rules in Chapter 6 as follows (some additional changes are explained in more detail at the appropriate place in the Chapter):

p.406: Update the citation from AAA Rule R-4(a) to AAA Rule R-4(a)(1)
p.406: Update the citation from AAA Rule R-4(b) to AAA Rules R-5(a) & R-5(b)
p.407: Update the citation from AAA Rule R-4(c) to AAA Rule R-5(a)
p.407: Update the citation from AAA Rule R-29 to AAA Rule R-32
p.412: Update the citation from AAA Rule R-24 to AAA Rule R-27 and change "other authorized representative" to "any other representative of the party's choosing"
p.426: Update the citation from AAA Rule R-15 to AAA Rule R-17(a)
p.427: Update the citation from AAA Rule R-11(a) to AAA Rule R-13(a)
p.427: Update the citation from AAA Rule R-11(b) to AAA Rule R-13(b)
p.433: Update the citation from AAA Rule R-11(b) to AAA Rule R-13(b)
p.433: Update the citation from AAA Rule R-13(b) to AAA Rule R-15(b)
p.436: Update the citation from AAA Rule R-16(a) to AAA Rule R-18(a)
p.451: Update the citation from AAA Rule R-17(a)(iii) to AAA Rule R-19(b)
p.452: Update the citation from AAA Rule R-17(b) to AAA Rule R-19(c)
p.454: Update the citation from AAA Rule R-34(a) to AAA Rule R-38(a)
p.460: Update the citation from AAA Rule R-48(a) to AAA Rule R-54(a)
p.503: Update the citation from AAA Rule R-23 to AAA Rule R-26
p.516: Update the citation from AAA Rule R-22 to AAA Rule R-25
p.516: Update the citation from AAA Rule R-30(a), (c) to AAA Rule R-33(a), (d)
p.516: Update the citation from AAA Rule R-30(a) to AAA Rule R-33(a)
p.516: Update the citation from AAA Rule R-31(a) to AAA Rule R-35(a)
p.516: Update the citation from AAA Rule R-31(b) to AAA Rule R-35(b)
p.533: Update the citation from AAA Rule R-40 to AAA Rule R-46(a)
p.533: Update the citation from AAA Rule R-42(a) to AAA Rule R-48(a)
p.533: Update the citation from AAA Rule R-42(b) to AAA Rule R-48(b)
p.533: Update the citation from AAA Rule R-41 to AAA Rule R-47 (and insert "calendar" between "30" and "days")

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p.533: In the parenthetical description of AAA Rule E-9, insert "calendar" between "14" and "days"
p.536, n.1: Update the citation from AAA Rule R-35 to AAA Rule R-40(a)
p.536, n.1: Update the citation from AAA Rule R-35 to AAA Rule R-40(c)
p.537, n.3: Update the citation from AAA Rule R-43(a) to AAA Rule R-49(a)
p.544, n.5: Update the citation from AAA Rule R-43(c) to AAA Rule R-49(c)

Revise the citations to the AAA/ICDR International Arbitration Rules in Chapter 6 as follows:

p.426: Update the citation from AAA/ICDR Rule art. 5 to AAA/ICDR Rule art. 12 (and revise the parenthetical so that it reads "because of the size, complexity, or other circumstances of the case")
p.451: Update the citation from AAA/ICDR Rule art. 7(2) to AAA/ICDR Rule art. 14(6) (and replace "third arbitrator" with "presiding arbitrator")
p.484: Update the citation from AAA/ICDR Rule arts. 19(2) & (3) to AAA/ICDR Rule art. 24(10) (and add the following parenthetical: ("Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.")
p.510: Update the citation from AAA/ICDR Rule art. 16(2) to AAA/ICDR Rule art. 22(2)
pp.543-544: Update the citation from AAA/ICDR Rule art. 28(5) to AAA/ICDR Rule art. 34(5) (and replace "a statute" with "any applicable law(s)")

Replace the sentence with the quotation from AAA Rule 4(a) at the bottom of page 406 with the following:

Under the AAA Commercial Arbitration Rules, the demand shall include the name, address, and contact information for each party and any known representative for a party; "a statement setting forth the nature of the claim including the relief sought and the amount involved"; and "the locale requested if the arbitration agreement does not specify one." AAA Rule 4(a)(iv).

Replace notes 1 and 2 after *Birbrower* on page 424 with the following:

1. A contrary to view to that of the *Birbrower* court was stated by Judge Jed S. Rakoff of the United States District Court for the Southern District of New York:

> Although . . . arbitration proceedings have become more protracted and complex, not to mention costly, they still retain in most settings

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> their essential character of private contractual arrangements for the relatively informal resolution of disputes. Indeed, the Court notes that the rules of the New York Stock Exchange, where the . . . arbitration [at issue here] was held, do not require members of the arbitration panel to be lawyers at all. *See* N.Y. Stock Exch. Rule 607. It would be incongruous to apply a state's unauthorized practice rules in such an informal setting. Whatever beneficent purposes New York's prohibition against the unauthorized practice of law may serve in protecting clients and regulating lawyers' conduct, it is not designed as a trap for the unwary or as a basis on which New York lawyers can extend a monopoly over every private contractual dispute-resolving mechanism.

Prudential Equity Group, LLC v. Ajamie, 538 F. Supp. 2d 605, 608 (S.D.N.Y 2008); *see also* Superadio Ltd. P'ship v. Winstar Radio Prods., L.L.C., 844 N.E.2d 246, 252 (Mass. 2006); Donald J. Williamson, P.A. v. John D. Quinn Constr. Corp., 537 F. Supp. 613, 615-16 (S.D.N.Y 1982). *But see* Fought & Co. v. Steel Eng. & Erection, Inc., 951 P.2d 487, 498 (Hawaii 1998) (following *Birbrower* in connection with representation in mediation, but holding fees recoverable because Oregon attorney retained local counsel who was "at all times 'in charge' of . . . representation within the jurisdiction").

2. The California legislature responded to the *Birbrower* case by amending the state arbitration statute to permit "an attorney admitted to the bar of any other state" to represent a party "in the course of, or in connection with, an arbitration proceeding in this state," but only if the non-California attorney retains local counsel and the arbitrators approve. CAL. CIV. PROC. CODE § 1282.4(b), (c). The out-of-state attorney also has to agree "to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California." *Id.* § 1282.4(c)(9).

But the statutory response did not address foreign (i.e., non-U.S. lawyers). As the court notes in *Birbrower*, the California international arbitration statute already provided that the parties may "be represented or assisted by any person of their choice" who "need not be a member of the legal profession or licensed to practice law in California." *Id.* § 1297.351. But that provision appears in the section of the statute dealing only with conciliation, not arbitration. Thus, the majority in *Birbrower* describes the statute as applicable to a "a commercial conciliation in California involving international commercial disputes."

Perhaps because of uncertainty about the ability of foreign lawyers to appear in international arbitrations in the state, California has been perceived as being a less attractive arbitral seat than other U.S. jurisdictions. To address such concerns, in 2018 California enacted legislation to permit lawyers not licensed in California

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"to provide legal services in an international commercial arbitration … if any of the following conditions is satisfied:

> (1) The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter.
>
> (2) The services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice.
>
> (3) The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice.
>
> (4) The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice.
>
> (5) The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction."

Id. § 1297.186(a); *see also id.* § 1297.186(b) (excluding consumer, employment, or health care disputes from its application). The statute added that an attorney "rendering legal services pursuant to this article is subject to the jurisdiction of the courts and disciplinary authority of this state with respect to the California Rules of Professional Conduct and the laws governing the conduct of attorneys to the same extent as a member of the State Bar of California." *Id.* § 1297.188(a).

Add the following to the first paragraph on the top of page 428 (after the cite to the UNCITRAL Model Law):

; *see also* AAA/ICDR Int'l Rules, art. 13(6) (ICDR "list method" unless parties have agreed otherwise)

Add the following to note 5 after *Khan v. Dell, Inc.* on page 434:

; Schuiling v. Harris, 747 S.E.2d 833, 838 (Va. 2013) ("[R]elying on the intention of the parties as expressed in the language of the Agreement, we conclude that the NAF's designation as arbitrator is not integral and is severable in order to give effect to the arbitration agreement ….")

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Add the following after the citation to *Sphere Drake* in note 6 after *Positive Software Solutions* on page 450:

; see also Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs., 892 F.3d 501, 503–04 (2d Cir. 2018) (holding "that a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party")

Replace the second paragraph of note 1 after *Janvey* on page 459 with the following:

The American Arbitration Association, like other arbitration providers, has responded to this difficulty by maintaining an emergency panel that can rapidly rule on requests for provisional remedies before the parties have appointed their arbitrators. In its revised Commercial Arbitration Rules effective October 1, 2013, the AAA makes its procedures for emergency measures of protection applicable unless the parties agree otherwise (the previous version of the rules required parties to opt in to the procedures, and evidently few parties did). AAA Commercial Arbitration Rules, Rule R-39; *see also* AAA/ICDR Int'l Rules, art. 7. Given that few parties opted in to the procedures, is it appropriate to change the default? Does the limited opt in under the old rules indicate that few parties want such procedures? Or does it indicate that it is more difficult to change default rules than sometimes believed?

For a recent, highly publicized use of emergency arbitrator rules, see the Temporary Restraining Order in EC LLC v. Peterson, ADRS Case No. 18-1118-JAC (Feb. 27, 2018), *available at* https://www.nytimes.com/files/stormy-Daniels-restraining-order.pdf (prohibiting Peggy Peterson, a.k.a. Stormy Daniels, "from disclosing or inducing, promoting or actively inspiring anyone to disclose Confidential Information" as defined in her "Confidential Settlement Agreement and Mutual Release" with David Dennison, allegedly a.k.a. Donald Trump).

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Add the following after *Stolt-Nielsen* on page 476:

Oxford Health Plans LLC v. Sutter
United States Supreme Court
569 U.S. 564 (2013)

JUSTICE KAGAN delivered the opinion of the Court.

Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt-Nielsen*. In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act. We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.

I

Respondent John Sutter, a pediatrician, entered into a contract with petitioner Oxford Health Plans, a health insurance company. Sutter agreed to provide medical care to members of Oxford's network, and Oxford agreed to pay for those services at prescribed rates. Several years later, Sutter filed suit against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford. The complaint alleged that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreements and various state laws.

Oxford moved to compel arbitration of Sutter's claims, relying on the following clause in their contract:

> "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator."

The state court granted Oxford's motion, thus referring the suit to arbitration.

The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did. Noting that the question turned on "construction of the parties' agreement," the arbitrator focused on the text of the arbitration clause quoted above. He reasoned that the clause sent to arbitration "the same universal class of disputes" that it barred the parties from bringing "as civil actions" in court: The "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process." And a class action, the arbitrator continued, "is plainly one of the possible forms of civil

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action that could be brought in a court" absent the agreement. Accordingly, he concluded that "on its face, the arbitration clause … expresses the parties' intent that class arbitration can be maintained."

Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded [his] powers" under § 10(a)(4) of the FAA. The District Court denied the motion, and the Court of Appeals for the Third Circuit affirmed.

While the arbitration proceeded, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." The parties in *Stolt-Nielsen* had stipulated that they had never reached an agreement on class arbitration. Relying on § 10(a)(4), we vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had "simply … imposed [their] own view of sound policy."

Oxford immediately asked the arbitrator to reconsider his decision on class arbitration in light of *Stolt-Nielsen*. The arbitrator issued a new opinion holding that *Stolt-Nielsen* had no effect on the case because this agreement authorized class arbitration. Unlike in *Stolt-Nielsen*, the arbitrator explained, the parties here disputed the meaning of their contract; he had therefore been required "to construe the arbitration clause in the ordinary way to glean the parties' intent." And in performing that task, the arbitrator continued, he had "found that the arbitration clause unambiguously evinced an intention to allow class arbitration." The arbitrator concluded by reconfirming his reasons for so construing the clause.

Oxford then returned to federal court, renewing its effort to vacate the arbitrator's decision under § 10(a)(4). Once again, the District Court denied the motion, and the Third Circuit affirmed….

We granted certiorari to address a circuit split on whether § 10(a)(4) allows a court to vacate an arbitral award in similar circumstances. Holding that it does not, we affirm the Court of Appeals.

II

Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process."

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Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough ... to show that the [arbitrator] committed an error — or even a serious error." Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000) (quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 599 (1960); *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 38 (1987); internal quotation marks omitted). Only if "the arbitrator act[s] outside the scope of his contractually delegated authority" — issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract" — may a court overturn his determination. *Eastern Associated Coal* (quoting *Misco*). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.[2]

And we have already all but answered that question just by summarizing the arbitrator's decisions; they are, through and through, interpretations of the parties' agreement. The arbitrator's first ruling recited the "question of construction" the parties had submitted to him: "whether [their] Agreement allows for class action arbitration." To resolve that matter, the arbitrator focused on the arbitration clause's text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration. The arbitrator concluded, based on that textual exegesis, that the clause "on its face … expresses the parties' intent that class action arbitration can be maintained." When Oxford requested reconsideration in light of *Stolt-Nielsen*, the arbitrator explained that his prior decision was "concerned solely with the parties' intent as evidenced by the

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[2] We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions — which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy" — are presumptively for courts to decide. *Bazzle* (plurality opinion). A court may therefore review an arbitrator's determination of such a matter *de novo* absent "clear[] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986). *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. Indeed, Oxford submitted that issue to the arbitrator not once, but twice — and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability.

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words of the arbitration clause itself." He then ran through his textual analysis again, and reiterated his conclusion: "[T]he text of the clause itself authorizes" class arbitration. Twice, then, the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not "exceed[ ] [his] powers." § 10(a)(4).

Oxford's contrary view relies principally on *Stolt-Nielsen*.... Oxford takes that decision to mean that "even the 'high hurdle' of Section 10(a)(4) review is overcome when an arbitrator imposes class arbitration without a sufficient contractual basis." Under *Stolt-Nielsen*, Oxford asserts, a court may thus vacate "as *ultra vires*" an arbitral decision like this one for misconstruing a contract to approve class proceedings.

But Oxford misreads *Stolt-Nielsen*: We overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a "sufficient" one. The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. In that circumstance, we noted, the panel's decision was not — indeed, could not have been — "based on a determination regarding the parties' intent." Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement. Instead, "the panel simply imposed its own conception of sound policy" when it ordered class proceedings. But "the task of an arbitrator," we stated, "is to interpret and enforce a contract, not to make public policy." In "impos[ing] its own policy choice," the panel "thus exceeded its powers."

The contrast with this case is stark. In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Stolt-Nielsen* and this case thus fall on opposite sides of the line that §10(a)(4) draws to delimit judicial review of arbitral decisions.

The remainder of Oxford's argument addresses merely the merits: ... At bottom, Oxford maintains, this is a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures.

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We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error — even his grave error — is not enough. So long as the arbitrator was "arguably construing" the contract — which this one was — a court may not correct his mistakes under § 10(a)(4). The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel*, 363 U. S. at 599. The arbitrator's construction holds, however good, bad, or ugly.

In sum, Oxford chose arbitration, and it must now live with that choice.… Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

… [U]nlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't. If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred "[a]n implicit agreement to authorize class-action arbitration … from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen.*

With no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute. Arbitration "is a matter of consent, not coercion," and the absent members of the plaintiff class have not submitted themselves to this arbitrator's authority in any way. It is true that they signed contracts with arbitration clauses materially identical to those signed by the plaintiff who brought this suit. But an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination.…

The distribution of opt-out notices does not cure this fundamental flaw in the class arbitration proceeding in this case. "[A]rbitration is simply a matter of contract between the parties," and an offeree's silence does not normally modify the

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terms of a contract. Accordingly, at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.

Class arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." In the absence of concessions like Oxford's, this possibility should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide. But because that argument was not available to petitioner in light of its concession below, I join the opinion of the Court.

Replace note 2 after *Stolt-Nielsen* on page 477 with the following:

2. Institutional arbitration rules traditionally have not addressed the authority of arbitrators to order consolidated arbitration proceedings involving multiple parties. Increasingly, however, institutions are revising their rules to permit consolidation. An example is Article 10 of the 2021 ICC Rules, which provides as follows:

> The [ICC] Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
>
> a) the parties have agreed to consolidation; or
>
> b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or
>
> c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.
>
> In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

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> When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

See also AAA Commercial Arbitration Rules, Rule R-8 (consolidation and joinder); AAA/ICDR Int'l Rules, arts. 8 (joinder), 9 (consolidation). In addition, occasionally an arbitration clause will authorize some degree of consolidation of related proceedings.

Replace notes 9-11 after *Stolt-Nielsen* on pages 481-482 with the following:

9. One important question that the Court did not address in *Stolt-Nielsen* is what sort of evidence would be sufficient to show that the parties had agreed to class arbitration (see footnote 10 of the opinion). One would think that if the contract included a class arbitration waiver, that would be pretty good evidence the parties had not agreed to arbitrate on a class basis—perhaps even if the waiver is held unconscionable. Conversely, only very rarely do parties expressly agree to class arbitration. So what about the remaining cases—when the arbitration clause does not expressly address class arbitration? In five of the first eight AAA clause construction awards (62.5%) issued after *Stolt-Nielsen* and available on the AAA web site, the arbitrator construed the arbitration agreement as permitting class arbitration—even though the agreement did not expressly authorize class arbitration. See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQUETTE L. REV. 1103, 1157-58 (2011). In Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019), however, the U.S. Supreme Court held that an ambiguous arbitration agreement cannot "provide the necessary 'contractual basis' for compelling class arbitration," a conclusion that the Court stated "follow[ed] directly from [its] decision in *Stolt-Nielsen*." Id. at 1415. Whether the *Lamps Plus* decision will finish closing the door on class arbitration remains to be seen.

10. After *Stolt-Nielsen*, the circuits split over whether to vacate awards that construed silent agreements as permitting class arbitration. The Supreme Court resolved that split in *Sutter*, deferring to the arbitrators' interpretations of the parties' contract. What is left of *Stolt-Nielsen* after *Sutter*? Will *Sutter* lead to a revival of class arbitration? Or merely slow its inevitable decline? For a decision applying *Sutter* to uphold an award construing an arbitration clause to authorize class arbitration, see Southern Communs. Servs. v. Thomas, 720 F.3d 1352, 1360 (11th Cir. 2013), *cert. denied*, 571 U.S. 1163 (2014).

11. Who decides whether an arbitration agreement authorizes class arbitration after *Stolt-Nielsen* and *Sutter*? In both of those cases, the parties had agreed to have the arbitrator decide the issue so the "who decides" question was not

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before the Court. Indeed, in footnote 2 in *Sutter* the Court makes clear that it is not deciding the issue and that the issue remains open.

As noted above, courts have consistently held that determining whether an arbitration agreement permits consolidation is an issue for the arbitrators, and have distinguished class arbitration from consolidation in so deciding. Moreover, "numerous courts have continued to apply the plurality's ruling in *Bazzle* even after *Stolt-Nielsen* was decided." Brookdale Senior Living, Inc. v. Dempsey, 2012 WL 1430402, at * 3 (M.D. Tenn. Apr. 25, 2012). That said, the trend in the circuits is very much the opposite: the courts of appeals have regularly been rejecting the *Bazzle* position and holding that whether an arbitration clause authorizes class arbitration is a gateway issue for the courts finally to resolve. *See* Del Webb Communities, Inc. v. Carlson, 817 F.3d 867, 873 (4th Cir.) ("We … hold that whether an arbitration clause permits class arbitration is a gateway question of arbitrability for the court."), *cert. denied*, 137 S. Ct. 567 (2016); Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 753 (3d Cir.) (same), *cert. denied*, 137 U.S. 40 (2016); Opalinski v. Robert Half Int'l Inc., 677 F. App'x 738, 741 (3d Cir.), *cert. denied*, 138 S. Ct. 378 (2017) (same); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 335 (3d Cir. 2014) (same), *cert. denied*, 135 S. Ct. 1530 (2015); Reed Elsevier v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013) (same), *cert. denied*, 572 U.S. 1114 (2014). *But see* Sandquist v. Lebo Auto., Inc., 376 P.3d 506, 514 (2016) ("conclud[ing], as a matter of state contract law, [that] the parties' arbitration provisions allocate the decision on the availability of class arbitration to the arbitrator, rather than reserving it for a court").

12. *American Express Co. v. Italian Colors*, *reprinted at* pages 54-62 of this Update, and *AT&T Mobility, LLC v. Concepcion* in § 4.04 also address the relationship between individual arbitrations and class arbitrations. Are those decisions consistent with *Stolt-Nielsen*? With *Sutter*? What do they add?

13. If neither class actions nor class arbitrations are available to claimants, how else might they proceed? In several recent high-profile cases, claimants have brought "mass arbitrations"—largely identical individual arbitrations numbering in the thousands. For example, thousands and tens of thousands of drivers for Uber, Lyft, DoorDash, and Postmates have brought mass arbitrations alleging violations of wage-and-hour laws; less commonly consumers also have brought mass arbitrations. *See, e.g.,* Alison Frankel, *Mass Consumer Arbitration Is On! Ed Tech Company Hit With 15,000 Data Breach Claims*, Reuters (May 12, 2020), https://www.reuters.com/article/legal-us-otc-chegg-idUSKBN22O33E; Michael Corkery and Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. Times (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html.

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An important tactic in these cases is to put pressure on the business respondent to settle. Businesses commonly agree to pay most or all of the arbitration fees for claims brought by consumers and employees. (*See* § 3.03[C].) In a mass arbitration, businesses can face total arbitration fees in the tens of millions of dollars, which may make it cheaper to settle than to proceed with the arbitration. In individual cases, consumer and employee claimants often argue that a business waives its right to arbitrate when it fails to pay its share of arbitration fees. *E.g.,* Brown v. Dillard's, Inc., 430 F.3d 1004 (9th Cir. 2005); *see also* Cal. Code Civ. Pro. § 1281.97(a), *reprinted at* page 167-168 of this Update. In mass arbitration cases, by comparison, the claimants seek to compel arbitration, to ensure the business remains liable for paying the agreed-upon fees.

At least one court, in enforcing the agreement to arbitrate in a mass arbitration, has noted the irony of businesses that included arbitration clauses in their standard form contracts later trying to avoid enforcement of those clauses when a large group of claimants has asserted claims:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration.

Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067–68 (N.D. Cal. 2020).

In November 2020, a new fee structure for "multiple case filings" (both consumer and employment) administered by the AAA took effect. The new fee structure, which significantly reduces the asymmetry between fees paid by the consumer or employee and fees paid by the business, applies when:

> a. Twenty-five (25) or more similar claims for arbitration or mediation are filed,
> b. Claims are against or on behalf of the same party or parties, and
> c. Counsel for the parties is consistent or coordinated across all cases.

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How is the new fee structure likely to affect filings of mass arbitrations in consumer and employment cases, do you think?

Replace the paragraph at the bottom of page 483 and the top of page 484 (through the description of the AAA Rules) with the following:

The limited discovery available in domestic arbitration is reflected in institutional arbitration rules. Rule R-23 of the AAA Commercial Arbitration Rules provides that "[t]he arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." Rule R-22(a). The rule specifically addresses document production in arbitration, providing that:

> The arbitrator may, on application of a party or on the arbitrator's own initiative:
>
> i. require the parties to exchange documents in their possession or custody on which they intend to rely;
>
> ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
>
> iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, and reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and
>
> iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

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Rule R-23(b). The AAA Commercial Arbitration Rules do not address the availability of depositions, but the AAA's Procedures for Large, Complex Commercial Disputes provide that "[i]n exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case." Rule L-3(f).

Add the following citation at the end of note 1 after *Hay Group* on page 489:

; see also CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("Given the clear statutory language, we reject the proposition that section 7 grants arbitrators implicit powers to order document discovery from third parties prior to a hearing. Further, we decline HMC's invitation to create additional discovery powers for arbitrators beyond those granted in section 7.").

Revise the citation to the IBA Rules in note 4 after *Hay Group* on page 489 as follows:

Update the citation from IBA rules, art. 9(5) to IBA Rules, art. 9(6).

Add the following citation after the citation to the JAMS Employment Arbitration Rules in note 4 after *Hay Group* on page 489:

AAA Commercial Arbitration Rules, Rules R-24, R-60;

Replace *JAS Forwarding* and note 3 after *JAS Forwarding* on pages 495-502 with the following:

3. A number of courts had relied on 28 U.S.C. § 1782 to order discovery in support of international arbitrations, particularly (although not exclusively) investor-State arbitrations. Section 1782 provides that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

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Id. § 1782. In ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (2022), however, the Supreme Court held that neither an international commercial arbitration nor an ad hoc investor-State arbitration qualify as "a proceeding in a foreign or international tribunal," so that § 1782 is not available in connection with such proceedings.

Replace the second paragraph of note 6 after *Parilla* on pages 509-10 with the following:

Investment treaty arbitrations have been at the forefront of the move toward transparency. UNCITRAL has promulgated new rules on the subject, *see* United Nations Commission on International Trade Law, Rules on Transparency in Treaty-based Investor-State Arbitration (2013), *reprinted at* pages 293-300 of this Update, and some investment arbitration tribunals allow third parties to participate as amici curiae and permitting the public to attend hearings, *see* Statement by the OECD Investment Committee, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures* ¶¶ 22-35 (June 2005). On the domestic front, arbitration remains largely a private process, although a clear exception is the AAA's class arbitration docket. Rule 9(a) of the AAA's Supplementary Rules for Class Arbitrations provides that "[t]he presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations" and that "all class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances." As noted in § 6.06, the AAA's class arbitration docket, including case filings, is available on the AAA web site (although the web page is not always current).

Replace the last half of the paragraph at the bottom of page 510 with the following:

In particular, many arbitration rules authorize or require arbitrators to conduct a pre-hearing conference "to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute." AAA Commercial Arbitration Rules, Rule R-22(b), (a) ("[a]t the discretion of the arbitrator, and depending on the size and complexity of the arbitration"); Rule P-1(b) ("Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious."); Rule P-2 (suggesting "subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case"); Rule L-3(b) (for complex commercial disputes, "a preliminary

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hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules"); AAA/ICDR Int'l Rules, art. 22(2).

Replace the paragraph at the bottom of page 511 and the top of page 512 with the following:

Another way courts can control the course of proceedings is by ruling on dispositive motions. Motions practice is not as common in arbitration as it is in court litigation. Neither the FAA, the UAA, nor the UNCITRAL Model Law addresses dispositive motions. The Revised Uniform Arbitration Act, by contrast, provides that "[a]n arbitrator may decide a request for summary disposition of a claim or particular issue" if all parties agree, or on the request of one party on notice and an opportunity to respond. RUAA § 15(b). The AAA Commercial Arbitration Rules now provide that "[t]he arbitrator may allow the filing of and make rulings upon a dispositive motion," but "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." Rule R-34(a).

In the absence of an express provision of an arbitration statute or rule, do arbitrators have the authority to consider and decide dispositive motions?

Revise the citations to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration on page 521 as follows:

Update the citation from Restatement § 4-21(b) to Restatement § 4.19(2).

Revise the reference to the IBA Rules on page 527 as follows:

Change "International Commercial Arbitration" in the title to "International Arbitration"

Change the date the revised version of the Rules was issued to December 17, 2020.

Replace the quote from the Rules with the following: "intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions."

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Revise the citation to the ICC Rules of Arbitration on page 527 as follows:

Update the citation from ICC Rules of Arbitration, art. 25(4) to ICC Rules of Arbitration, art. 25(3).

Revise the citation to the ICC Rules of Arbitration on page 527 as follows:

Update the citation from ICC Rules of Arbitration, art. 25(4) to ICC Rules of Arbitration, art. 25(3).

Revise the citations to the ICC Rules of Arbitration on page 533 as follows:

Update the citation from ICC Rules of Arbitration, art. 31(1) to ICC Rules of Arbitration, art. 32(1).

Update the citation from ICC Rules of Arbitration, art. 30(1) to ICC Rules of Arbitration, art. 31(1).

Replace the sentence with the quotation from the AAA Consumer-Related Disputes Supplementary Procedures near the bottom of page 543 with the following:

Interestingly, Rule R-44(a) of the AAA Consumer Arbitration Rules provides that "[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case."

Add the following as note 5 after the UNCITRAL excerpt on page 551:

5. The COVID-19 pandemic has made online arbitration proceedings, or at least the use of online technologies to conduct arbitration hearings, the "new normal." Luke Nottage, *Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?*, Kluwer Arbitration Blog (July 16, 2020), http://arbitrationblog.kluwerarbitration.com/2020/07/16/will-the-covid-19-pandemic-be-a-long-term-game-changer-for-international-arbitration/?doing_wp_cron=1595108681.4419701099395751953125. Domestic and international arbitral institutions have issued detailed procedures to facilitate the use of virtual hearings and other online procedures. See, for example, the following:

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- Am. Arb. Ass'n/Int'l Center for Disp. Resol., AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference, https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf

- Int'l Chamber of Commerce, ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (Apr. 9, 2020), https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/

Indeed, thirteen leading international institutions issued a joint statement on "Arbitration and COVID-19," in which they "committed to working together … to support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment." Indeed, the statement emphasized that "[c]ollaboration is particularly important as each of our institutions looks to ensure that we make the best use of digital technologies for working remotely." *See* https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf.

Is the increased use of online procedures and virtual hearings in arbitration likely to continue if and when the pandemic subsides? Or are parties and their lawyers likely to resume in-person hearings as soon as they can?

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Chapter 7 Enforcing Arbitral Awards

Revise the citations to the AAA Commercial Arbitration Rules in Chapter 7 as follows:

p.553: Update the citation from AAA Rule R-46 to AAA Rule R-52(a) and add replace "correction" with "the arbitrator to 'interpret the award or correct'"

p.593: Update the citation from AAA Rule R-48(c) to AAA Rule R-54(c)

Revise the citations to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration in Chapter 7 as follows:

p.562: Update the citation from Restatement § 1-1, cmt. w to Restatement § 1.1, cmt. jj.

p.563: Update the citation from Restatement §§ 4-35 & 4-36 to Restatement §§ 4.33 & 4.34

p.588: Update the citation from Restatement § 4-22, cmt. g to Restatement § 4.20, cmt. g.

p.590: Update the citations from Restatement § 4-22(b)(5) & rptrs. note to cmt. f to Restatement § 4.20(b)(5) & rptrs. note to cmt. f.

p.597-98: Update the citations from Restatement § 4-32(e) & rptrs. note to cmt. e to Restatement § 4.30(e) & rptrs. note to cmt. e.

p.612: Update the citation from Restatement § 4-4(b) to Restatement § 1.4(b) & (c).

p.621: Update the citation from Restatement § 4-27(a) to Restatement § 4.25(b).

p.622: Update the citation from Restatement § 4-29(a) to Restatement § 4.27(a).

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p.636: Update the citations from Restatement § 4-16(b) to Restatement § 4.20(c); § 4-22(a) to § 4.20(b); and §§ 4-12 through 4-18 to §§ 4.10 through 4.16.

p.643: Update the citation from Restatement § 4-2 to Restatement § 4.2.

p.656: Update the citations from Restatement § 4-16(a) & cmt. d to Restatement § 4.14(b) & cmt. d.

p.658: Update the citation from Restatement § 4-24 to Restatement § 4.22.

p.666: Update the citation from Restatement § 4-23, rptrs. note to cmt. c to Restatement § 4.21, rptrs. note to cmt c.

p.612: Update the citations from Restatement §§ 4-9 & 4-10 to Restatement §§ 4.35 & 4.36.

Add the following to note 2 after *Colonial Penn* on page 562:

But see Savers Property & Cas. Ins Co. v. National Union Fire Ins. Co., 748 F.3d 708, 719 (6th Cir. 2014) ("Here, the arbitration panel issued an interim award resolving only the matter of liability; the panel retained jurisdiction to compute National Union's damages. Under these circumstances, the arbitration was not complete because there was no 'final' award.").

Add the following after the third sentence of note 3 after *Colonial Penn* on page 562:

Similarly, the American Arbitration Association has issued Optional Appellate Arbitration Rules effective November 1, 2013. *See* https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf

Revise the citation to the ICC Rules of Arbitration on page 562 as follows:

Update the citation from ICC Rules of Arbitration, art. 27 to ICC Rules of Arbitration, art. 34.

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Add the following to note 4 after *Comprehensive Accounting* on page 578:

Compare *Stolt-Nielsen* to the following description of the standard for vacating awards under § 10(a)(4) from *Oxford Health Plans v. Sutter*, *reprinted at* pages 98-103 of this Update:

> Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough ... to show that the [arbitrator] committed an error — or even a serious error." Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. Only if "the arbitrator act[s] outside the scope of his contractually delegated authority" — issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract" — may a court overturn his determination. So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

569 U.S. at 569 (citations omitted). Is *Sutter* consistent with *Stolt-Nielsen*? How does § 10(a)(4) apply when the contract is silent on the question before the arbitrators — i.e., when the arbitrators are filling gaps in the contract? Or when the issue before the arbitrators involves a federal statutory claim rather than a matter of contract interpretation? Does *Sutter* provide the standard? *Stolt-Nielsen*? Or neither?

Replace *Siegel v. Prudential Insurance Co.* on pages 591-593 with the following:

FINN v. BALLENTINE PARTNERS, LLC
Supreme Court of New Hampshire
143 A.3d 859 (2016)

LYNN, J.

The plaintiff, Alice Finn, appeals an order of the Superior Court … denying her motion to affirm and granting the motion of the defendants, Ballentine Partners, LLC (BPLLC), Ballentine & Company, Inc., Roy C. Ballentine, [and four others], to vacate a final arbitration award in part pursuant to RSA 542:8. Because we conclude that the trial court did not err in ruling that RSA 542:8 is not

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preempted by the Federal Arbitration Act (FAA), and in ruling, pursuant to RSA 542:8, that the arbitration panel committed a plain mistake of law by concluding that res judicata did not bar Finn's claim, we affirm.

I

The record supports the following facts. Ballentine and Finn founded Ballentine Finn & Company, Inc. (BFI), a New Hampshire subchapter S corporation, in 1997. Each owned one half of the company's stock, and Finn served as the Chief Executive Officer. Later, four other individuals became shareholders of BFI. In 2008, Ballentine and the other shareholders forced Finn out of the corporation and terminated her employment….

Pursuant to the Agreement, Finn challenged her termination before an arbitration panel in 2009. This first arbitration panel found that Finn's termination was unlawful and awarded her $5,721,756 for the stock that BFI forced her to sell and $720,000 in lost wages. The panel recognized that BFI likely did not have sufficient liquidity to pay the award immediately, so it authorized BFI to make periodic payments through December 31, 2012.

After the first panel award, BFI formed BPLLC, contributed all of its assets and some of its liabilities to BPLLC, and became its sole member. BFI then changed its name to Ballentine & Company (Ballentine & Co.). After the reorganization, Ballentine & Co. sold 4,000 preferred units, a 40% membership interest in BPLLC, to Perspecta Investments, LLC (Perspecta). Perspecta paid $7,000,000 to Ballentine & Co. and made a $280,000 capital contribution to BPLLC. The defendants asserted that the membership interest had to be sold in order to raise funds to pay the arbitration award to Finn.

In 2013, Finn filed a complaint and a motion to compel arbitration in superior court, alleging that she was entitled to relief under the "Claw Back" provision of the Agreement. That provision provides, in essence, that if a founding shareholder of BFI sells shares back to the corporation and those shares are resold at a higher price within eight years, the founder is entitled to recover a portion of the additional price paid for the shares. The defendants moved to dismiss Finn's complaint, arguing that it was barred by res judicata.

The trial court did not rule on the motion to dismiss; instead, it stayed the court proceedings and granted Finn's motion to compel arbitration, concluding that the issue of res judicata must be decided by arbitration in the first instance.

A second arbitration panel held a five-day hearing to decide Finn's new claims, which included breach of contract and unjust enrichment. It ruled that "[t]he findings of the first panel essentially resolve[d] Finn's contract claim for

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'Claw Back' benefits because the predicate facts needed to support a contractual 'Claw Back' claim were found against Finn by that panel." The second panel concluded, however, that Finn was entitled to an award based upon her unjust enrichment claim. Although it agreed with the defendants' argument that a party cannot be awarded relief under a theory of unjust enrichment when "there is an available contract remedy identified," the panel stated that this "legal principle cannot equitably pertain where the breaching party has, because of its wrongdoing, effectively eliminated the opposing party's contractual remedy, as happened here." Therefore, the panel concluded that the defendants had been unjustly enriched by the sale of shares to Perspecta. Using the "Claw Back" provision in the Agreement as a guide only, the second panel awarded Finn $600,000 in equitable relief.

Returning to court, Finn moved to affirm, and the defendants moved to vacate in part, the second arbitration award. Applying the plain mistake standard of review found in RSA 542:8, the trial court ruled that the second panel's award of additional damages to Finn on her unjust enrichment claim was barred, under settled principles of res judicata, by the award of damages she received from the first panel.

Finn moved for reconsideration, arguing that … the trial court should have applied the more deferential FAA standard in reviewing the arbitration award because the FAA preempts state law. The trial court denied the motion, and this appeal followed.

II

On appeal, Finn asserts that the trial court erred in applying RSA 542:8 to review the second arbitration panel's award because state law is preempted by the FAA. Alternatively, she argues that, even if RSA 542:8 applies, the trial court erred because it did not afford sufficient deference to the panel's findings of fact and rulings of law…. We examine her arguments in turn.

A

Finn argues that the trial court erred in reviewing the second panel's award under RSA 542:8 instead of §§ 9 and 10 of the FAA. Relying primarily upon the decision of the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, she asserts that RSA 542:8 is impliedly preempted by the FAA because the Agreement is a contract affecting interstate commerce to which the FAA applies, and that failing to employ the more deferential federal standard of judicial review of arbitration awards "foils the objective Congress seeks to advance with the FAA." …

…

The trial court reviewed the second panel's award pursuant to RSA 542:8,

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which creates a procedure for parties to seek confirmation, modification, or vacatur of an arbitral award:

> At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers….

We have construed this statute to grant a court the authority to vacate an award for plain mistake if it "determine[s] that an arbitrator misapplied the law to the facts."…

…

Finn's argument relies upon §§ 9, 10 and 11 of the FAA. In *Hall* Street, the Supreme Court held that the listed grounds for vacation, correction or modification of an arbitral award by a federal court, as set forth in §§ 10 and 11 of the FAA, may not be supplemented by the terms of the arbitration agreement entered into by the parties. These provisions provide much more limited grounds for review of an arbitration award than does "plain mistake" review under RSA 542:8.

We do not agree with Finn's first argument that the FAA is the exclusive method by which to review the second panel's award because we conclude that §§ 9–11 of the FAA apply only to arbitration review proceedings commenced in federal courts…. [T]he FAA creates some substantive rules that apply to arbitration agreements in both federal and state courts when the contract to arbitrate affects commerce. Section 2 of the act applies in state courts to prevent anti-arbitration laws from invalidating otherwise lawful arbitration agreements. However, it does not follow that the FAA applies to state courts in its entirety. In fact, the Supreme Court has suggested that some of the statute's provisions apply only in federal courts. *See Volt.* In considering whether other sections of the FAA apply in state courts, the Court noted that it has "never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, ... are nonetheless applicable in state court." This comment clearly contemplates that the Court considers the application to the states of each section individually, rather than the application of the Act as a whole. Therefore, we consider whether §§ 9–11 of the FAA also use language that limits their application to federal courts.

The sections at issue in *Volt* made reference to either "the courts of the United States" or "any United States district court." Likewise, §§ 10 and 11, the sections that establish the limited grounds upon which arbitration awards may be upset, reference only the federal courts. 9 U.S.C. §§ 10, 11. Although § 9 of the FAA could be read to encompass state courts as well as federal courts, and to contemplate that state courts reviewing covered arbitration awards *(i.e.,* those involving contracts affecting interstate commerce) must utilize exclusively the

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standards set forth in §§ 10 and 11, the Court has not interpreted the FAA in this fashion. In *Hall Street,* the Court not only acknowledged the potential for review of arbitration awards under state law, but even noted the possibility of a federal court reviewing an arbitration award under its "case management authority independent of the FAA." If the FAA were, in all circumstances, the exclusive grounds for review of arbitration awards subject to the FAA, these possible alternative paradigms of judicial review that the Court described would have been completely foreclosed….

Here, the FAA applied to the extent that it required the parties to arbitrate their dispute, as the trial court noted when it referred Finn's claim to the second arbitration panel. That does not mean that all aspects of the FAA are applicable to this proceeding. Based upon our review of the pertinent case law, we conclude that neither *Hall Street,* nor any other precedents by which we are bound, requires that we accept plaintiff's position that §§ 10 and 11 provide the exclusive grounds for state court review of arbitration awards subject to the FAA.

We next consider Finn's argument that so-called "obstacle preemption" supports her assertion that RSA 542:8 is invalidated by the FAA. The "obstacle" branch of conflict preemption requires more than a showing that some tension between the state and federal laws exists. A party must show that "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."…

The Supreme Court has provided guidance regarding the purpose of the FAA. It has described the primary purpose of the FAA as "foreclos[ing] state legislative attempts to undercut the enforceability of arbitration agreements." This purpose is rooted in § 2 of the FAA…. For example, the Court held preempted a state law that required notice of an arbitration clause upon the first page of the contract, *Doctor's Associates, Inc. v. Casarotto*, and a law that required administrative procedures before a case could proceed to arbitration, *Preston v. Ferrer*. Thus, at the heart of the Court's FAA preemption doctrine is its effort to enforce Congressional intent by thwarting the recurring refusal of state courts to enforce an otherwise valid contract because it embodied the parties' agreement to arbitrate. In short, preemption under the FAA is at its apex when parties cannot get to arbitration because state law attempts to force them to resolve their dispute in court.

In *AT & T Mobility LLC v. Concepcion*, the Court considered California's application of the doctrine of unconscionability to an arbitration agreement…. It concluded that, by requiring that class actions be available in a particular subset of arbitration agreements, California courts had "sacrifice[d] the principal advantage of arbitration–its informality." Class arbitrations take more time to reach a final award on the merits than bilateral arbitration and require procedural formality to make the award binding upon absent parties. These complications, the Court determined, departed significantly from arbitration as envisioned by the FAA and,

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therefore, were a thinly veiled refusal to enforce arbitration agreements. The California rule was therefore preempted because it required drastic procedural changes before the court would enforce the agreement to arbitrate.

In contrast, state rules that slow or change procedures without the potential consequence of invalidating an arbitration agreement are not preempted. In *Volt,* the Court considered whether the FAA preempted a state court from interpreting a choice-of-law provision as applying state procedural rules. The state procedure that the trial court applied stayed the arbitration when the FAA would not, thus delaying the arbitration.… Although the Court had held preempted state laws that required judicial resolution of claims despite parties contracting to resolve them by arbitration, it distinguished the FAA's procedural rules: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."

The fact that a state law affecting arbitration is less deferential to an arbitrator's decision than the FAA does not create an obstacle so insurmountable as to preempt state law. *Volt* demonstrates that not all obstacles to arbitration are repugnant to the FAA. The procedural rule in *Volt* delayed arbitration, and simplified it, by staying the proceedings until non-arbitral issues had been resolved. On the other hand, the state rule at issue in *AT & T Mobility* contemplated an extreme alteration of arbitration procedure, risks, and efficiency, and failure to comply with its requirement would make the agreement to arbitrate unenforceable. It thus had such a profound effect upon arbitration as to effectively deter parties from choosing arbitration.

RSA 542:8 is more like the rule at issue in *Volt* than that at issue in *AT & T Mobility*…. RSA 542:8's more rigorous standard of judicial review of arbitral decisions is not an impediment to enforcement of the parties' *agreement to arbitrate* as per the terms of the Agreement. In fact, it does not even slow the enforcement of an agreement to arbitrate, but instead applies *after* an agreement to arbitrate has already been enforced, arbitration conducted, and a final award issued. It allows the trial court to ensure that no plain mistakes made by the arbitrators will go uncorrected.

In this case, the trial court did not refuse to enforce the parties' agreement to arbitrate. Instead it applied RSA 542:8 to review the second panel's award, which was produced because the trial court had complied with the FAA and enforced their agreement to arbitrate. RSA 542:8 does not interfere with the FAA's principal purpose of protecting arbitration agreements from perceived judicial hostility. Because our state standard of review does not impede the enforcement of an arbitration agreement nor mandate drastic changes to the procedures by which arbitration is to be conducted, it is not preempted by the FAA.

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Finn nonetheless insists that the Court's discussion in *Hall Street* about the dangers of "full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," thus "bring[ing] arbitration theory to grief in postarbitration process," demands that we hold RSA 542:8 preempted by the FAA. She argues that, although the Court acknowledged that parties may seek review of arbitral decisions through other avenues of enforcement, these "are only permissible where they are *more restrictive* than federal standards of review."…

…

… *Hall Street* does not support Finn's contention that the Court has held preempted state standards of review that are more rigorous than the FAA.… *Hall Street* was a question of statutory interpretation, not preemption. It considered only federal law as it applied to a federal court. Although it based its conclusions upon a "national policy," it did not do so in the context of a state law. Not only did the Court recognize that other statutes existed that would conflict with the Court's interpretation of the FAA, it suggested that such avenues remained open to parties, even after its decision. Thus, it implied that although "more searching review," was in conflict with the "national policy favoring arbitration with just limited review," the conflict may not effectively preempt such avenues of review.

The California Supreme Court reached a similar conclusion when it considered whether its rule allowing parties to expand judicial review by contract was preempted in the aftermath of *Hall Street* …. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 599 (Cal.2008). We agree with the California court. To conclude from Hall Street that the Court intended to establish a new policy with preemptive effect is unreasonable given both the context and express limitation of the case's holding, as well as the federalism concerns that would be implicated by such a broad reading of the case.

Here, the Agreement included a choice-of-law clause, and Finn and the other shareholders selected New Hampshire law as the governing law: "This Agreement shall be governed by and construed in accordance with the internal laws of the State of New Hampshire, without regard to conflict of laws principles." Their choice to govern their agreement by New Hampshire law includes the agreement to arbitrate; the arbitration clause does not reference the use of any other governing law. The parties opted for judicial review through a mechanism other than the FAA, an avenue left undisturbed by the Court in *Hall Street.* By applying RSA 542:8 to the arbitral award, the trial court was faithful to the parties' intent. Not only does *Hall Street* contemplate the possibility of such an outcome, enforcing parties' agreements according to their terms remains at the heart of the FAA. We therefore conclude that the FAA does not preempt RSA 542:8, and that the trial court did not err by applying it to the second arbitral award.

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B

Finn next argues that the trial court erred because it did not give deference to the second panel's findings of fact and rulings of law…. We are not persuaded ….

We have construed RSA 542:8 to grant the trial court the power to vacate an arbitration award for a "plain mistake" of law or fact…. In past cases we have defined a "plain mistake" as "an error that is apparent on the face of the record and which would have been corrected had it been called to the arbitrators' attention."…

…

The second panel should have applied res judicata to bar Finn's second action. The panel acknowledged that the denial of benefits was based upon the same injury to Finn that was the subject of the first arbitration. Given its findings, it should have concluded that the action arose from the same factual occurrence and merely sought additional damages for the same injury. The record cannot support any other determination than that res judicata barred Finn's unjust enrichment claim. The second panel therefore committed a plain mistake, and the trial court did not err when it vacated the second panel's final award.

III

For the reasons stated above, the judgment of the superior court is hereby affirmed.

Affirmed.

Replace *Greenberg* and the notes after *Greenberg* on pages 598-602 with the following:

BADGEROW v. WALTERS
United States Supreme Court
142 S. Ct. 1310 (Mar. 31, 2022)

Justice KAGAN delivered the opinion of the Court.

…

In *Vaden v. Discover Bank*, we assessed whether there was a jurisdictional basis to decide a Section 4 petition to compel arbitration by means of examining the parties' underlying dispute. The text of Section 4, we reasoned, instructs a federal court to "look through" the petition to the "underlying substantive controversy" between the parties—even though that controversy is not before the court. If the underlying dispute falls within the court's jurisdiction—for example, by presenting a federal question—then the court may rule on the petition to compel. That is so regardless whether the petition alone could establish the court's jurisdiction.

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The question presented here is whether that same "look-through" approach to jurisdiction applies to requests to confirm or vacate arbitral awards under the FAA's Sections 9 and 10. We hold it does not. Those sections lack Section 4's distinctive language directing a look-through, on which *Vaden* rested. Without that statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction.

I

This case grows out of the arbitration of an employment dispute. Petitioner Denise Badgerow worked as a financial advisor for REJ Properties, a firm run by respondents Greg Walters, Thomas Meyer, and Ray Trosclair. (For ease of reference, we refer from now on only to Walters.) Badgerow's contract required her to bring claims arising out of her employment to arbitration, rather than to court. So when she was (in her view, improperly) fired, she initiated an arbitration action against Walters, alleging unlawful termination under both federal and state law. The arbitrators sided with Walters, dismissing Badgerow's claims.

What happened afterward—when Badgerow refused to give up—created the jurisdictional issue we address today. Believing that fraud had tainted the arbitration proceeding, Badgerow sued Walters in Louisiana state court to vacate the arbitral decision. Walters responded by removing the case to Federal District Court—and, once there, applying to confirm the arbitral award. Finally, Badgerow moved to remand the case to state court, arguing that the federal court lacked jurisdiction over the parties' requests—under Sections 10 and 9, respectively—to vacate or confirm the award.

The District Court assessed its jurisdiction under the look through approach this Court adopted in *Vaden* v. *Discover Bank*….

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's finding of jurisdiction ….

Courts have divided over whether the look-through approach used in *Vaden* can establish jurisdiction in a case like this one—when the application before the court seeks not to compel arbitration under Section 4 but to confirm, vacate, or modify an arbitral award under other sections of the FAA. We granted certiorari to resolve the conflict, and now reverse the judgment below.

II

The district courts of the United States are courts of limited jurisdiction, defined (within constitutional bounds) by federal statute…. District courts have

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power to decide diversity cases—suits between citizens of different States as to any matter valued at more than $75,000. See 28 U.S.C. § 1332(a). And they have power to decide federal-question cases—suits "arising under" federal law. § 1331. Typically, an action arises under federal law if that law "creates the cause of action asserted." So when federal law authorizes the action, the party bringing it—once again, typically—gets to go to federal court.

But that is not necessarily true of FAA-created arbitration actions…. [T]he FAA authorizes parties to arbitration agreements to file specified actions in federal court—most prominently, petitions to compel arbitration (under Section 4) and applications to confirm, vacate, or modify arbitral awards (under Sections 9 through 11). But those provisions, this Court has held, do not themselves support federal jurisdiction. (Were it otherwise, every arbitration in the country, however distant from federal concerns, could wind up in federal district court.) A federal court may entertain an action brought under the FAA only if the action has an "independent jurisdictional basis." That means an applicant seeking, for example, to vacate an arbitral award under Section 10 must identify a grant of jurisdiction, apart from Section 10 itself, conferring "access to a federal forum." If she cannot, the action belongs in state court.[2]

The issue here is about where a federal court should look to determine whether an action brought under Section 9 or 10 has an independent jurisdictional basis. An obvious place is the face of the application itself. If it shows that the contending parties are citizens of different States (with over $75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction. Or if it alleges that federal law (beyond Section 9 or 10 itself) entitles the applicant to relief, then § 1331 gives the court federal-question jurisdiction. But those possibilities do Walters no good. He and Badgerow are from the same State. And their applications raise no federal issue. Recall that the two are now contesting not the legality of Badgerow's firing but the enforceability of an arbitral award. That award is no more than a contractual resolution of the parties' dispute—a way of settling legal claims. And quarrels about legal settlements—even settlements of federal claims—typically

[2] This Court has held that the FAA's core substantive requirement—Section 2's command to enforce arbitration agreements like other contracts—applies in state courts, just as it does in federal courts. See *Southland Corp.* We have never decided whether the FAA's more procedural provisions, including Sections 4 and 9 through 11, also apply in state courts. But we have made clear that Section 2 "carries with it" a duty for States to provide certain enforcement mechanisms equivalent to the FAA's. And most, if not all, States in fact provide procedural vehicles, similar to those in the FAA, to enforce arbitration agreements—including, as here, to resolve post-arbitration disputes by means of confirming, modifying, or vacating arbitral awards. See, *e.g.,* Revised Uniform Arbitration Act of 2000 §§ 22–24 (adopted in 21 States and the District of Columbia) ….

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involve only state law, like disagreements about other contracts. So the District Court here, as Walters recognizes, had to go beyond the face of the Section 9 and 10 applications to find a basis for jurisdiction. It had to proceed downward to Badgerow's employment action, where a federal-law claim satisfying § 1331 indeed exists. In other words, the court had to look through the Section 9 and 10 applications to the underlying substantive dispute, although that dispute was not before it. Could the court do so?

In *Vaden,* this Court approved the look-through approach for a Section 4 petition, relying on that section's express language….

…

But Sections 9 and 10, in addressing applications to confirm or vacate an arbitral award, contain none of the statutory language on which *Vaden* relied. Most notably, those provisions do not have Section 4's "save for" clause. They do not instruct a court to imagine a world without an arbitration agreement, and to ask whether it would then have jurisdiction over the parties' dispute. Indeed, Sections 9 and 10 do not mention the court's subject-matter jurisdiction at all. So under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply…. Congress could have replicated Section 4's look-through instruction in Sections 9 and 10. Or for that matter, it could have drafted a global look-through provision, applying the approach throughout the FAA. But Congress did neither. And its decision governs.

Nothing in that conclusion changes because a jurisdictional question is before us. The federal "district courts may not exercise jurisdiction absent a statutory basis." And the jurisdiction Congress confers may not "be expanded by judicial decree."… The look-through rule is a highly unusual one: It locates jurisdiction not in the action actually before the court, but in another controversy neither there nor ever meant to be. We recognized that rule in *Vaden* because careful analysis of Section 4's text showed that Congress wanted it applied to petitions brought under that provision. But Congress has not so directed in Sections 9 and 10…. And because a statutory basis for look-through jurisdiction is lacking here, we cannot reach the same result as in *Vaden*: That would indeed be jurisdictional "expan[sion] by judicial decree."

Walters contests that view of the statute…. Walters's argument comes in two parts. First, Walters says, the language in Section 4 that *Vaden* construed does not in fact authorize the use of the look-through jurisdictional method. In his view, that sentence is only a capacious "*venue* provision," serving to "expand[ ] venue to the limits of [federal] jurisdiction" (and thus to give an applicant a broad choice *among* federal courts possessing jurisdiction). Second, Walters claims that Section 6 provides the basis for an FAA-wide look-through jurisdictional rule. Under Section 6, any FAA application "shall be made and heard in the manner provided by law for the making and hearing of motions." That provision, Walters claims,

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requires use of the look-through approach because "[f]ederal courts have jurisdiction over motions when they have jurisdiction over the underlying action."…

But Walters's understanding of Section 4 does not comport with what it says. The language of that provision never mentions "venue"; it refers only to "jurisdiction." That is a signal, sharp and clear, that the section provides a jurisdictional rule….

And that is how *Vaden* understood Section 4. Our decision, like the relevant text, never once referred to venue. Instead, we spoke, throughout the opinion, of the way Section 4 provides for jurisdiction….

Walters's theory fares no better in construing Section 6's mention of motions to prescribe a look-through rule for the whole FAA. Here, Walters commits the opposite of his fault in reading Section 4: He now reads a provision containing no express reference to jurisdiction in fact to set out a jurisdictional rule…. The look-through method, as noted before, is a jurisdictional outlier. For Congress to prescribe it by telling courts, a la Section 6, to treat FAA applications like motions in other kinds of litigation would be not just oblique but simply bizarre. Courts, after all, do not possess jurisdiction to decide ordinary motions by virtue of the look-through method. A motion (unlike a typical FAA application) is part of a case actually in court. Jurisdiction to decide the case includes jurisdiction to decide the motion; there is no need to "look through" the motion in search of a jurisdictional basis outside the court. And if the look-through rule does not apply to motions, then Section 6's reference to motions cannot direct the look-through rule….

Walters's more thought-provoking arguments sound not in text but in policy. Here, Walters … preaches the virtues of adopting look-through as a "single, easy-to-apply jurisdictional test" that will produce "sensible" results….

Walters himself quotes back to us the topline answer to those theories, reflecting its obviousness: "Even the most formidable policy arguments cannot overcome a clear statutory directive."… However the pros and cons shake out, Congress has made its call. We will not impose uniformity on the statute's non-uniform jurisdictional rules.

And anyway, we think Walters oversells the superiority of his proposal. First, uniformity in and of itself provides no real advantage in this sphere. A court can tell in an instant whether an application arises under Section 4 or, as here, under Section 9 or 10; so it can also tell in an instant whether to apply the look-through method or the usual jurisdictional rules. Second, the use of those ordinary rules—most notably, relating to diversity jurisdiction—is hardly beyond judicial capacity…. Indeed, past practice belies Walters's … gloomy predictions…. [He fails] to identify any actual problems that have arisen from courts' longstanding

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application of diversity standards to FAA applications (without using look-through). And Walters's solution does not even avoid the (purported) difficulty of which he complains. For he does not claim (nor could he) that look-through is the exclusive means of establishing federal jurisdiction….

Finally, we can see why Congress chose to place fewer arbitration disputes in federal court than Walters wishes. The statutory plan, as suggested above, makes Section 9 and 10 applications conform to the normal—and sensible—judicial division of labor: The applications go to state, rather than federal, courts when they raise claims between non-diverse parties involving state law…. To be sure, Congress created an exception to those ordinary jurisdictional principles for Section 4 petitions to compel. But it is one thing to make an exception, quite another to extend that exception everywhere…. We have never detected a similar congressional worry about judges' willingness to enforce arbitration awards already made. So Congress might well have thought an expansion of federal jurisdiction appropriate for petitions to compel alone. Applications about arbitral decisions could and should follow the normal rules.

The result, as Walters laments, is to give state courts a significant role in implementing the FAA. But we have long recognized that feature of the statute. "[E]nforcement of the Act," we have understood, "is left in large part to the state courts." *Moses H. Cone.* As relevant here, Congress chose to respect the capacity of state courts to properly enforce arbitral awards. In our turn, we must respect that evident congressional choice.

* * *

For the reasons stated, we reverse the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

[Dissenting opinion of Justice BREYER omitted]

Notes

1. Does the Court's opinion in *Badgerow* properly distinguish its prior decision in *Vaden v. Discover Bank* (in § 4.07)? As the court notes, the language of Sections 9 and 10 of the FAA is different from the language of Section 4 relied on in *Vaden*. But the FAA certainly contemplates that a party that obtains a stay of a case in federal court can go back to that court to seek confirmation of the award—effectively basing subject matter jurisdiction in the vacatur action on the basis for

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jurisdiction in the original lawsuit. Why should the result be different if no case was filed in federal court in the first place?

2. What if a party seeking to vacate the award argues that the arbitrator's decision was in manifest disregard of federal law? Does that give rise to a federal question allowing the vacatur action to be brought in federal court?

3. In many cases, actions to confirm or to vacate arbitration awards will be brought in federal court on the basis of diversity rather than federal question jurisdiction. In those cases, how should a court determine whether the amount in controversy exceeds the $75,000 jurisdictional minimum? Courts have taken various approaches to the question:

> Courts that have confronted this issue generally follow one of two approaches—the award approach or the demand approach. Karsner v. Lothian, 532 F.3d 876, 882 (D.C. Cir. 2008). "[U]nder the award approach, the amount in controversy is determined by the amount of the underlying arbitration award regardless of the amount sought." *Id.*; Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997); Ford v. Hamilton Invs., Inc., 29 F.3d 255, 260 (6th Cir. 1994). In contrast, "[under] the demand approach, the amount in controversy is the amount sought in the underlying arbitration rather than the amount awarded." *Id.*; Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000); Am. Guar. Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934).
>
> In its order denying Appellants' motion to dismiss, the district court concluded that the demand approach was the correct one: "[e]ach approach has strengths and weaknesses, and the issue is one that will be resolved by the Fifth Circuit. However, having considered . . . [the cited authority] the Court finds that the demand approach is more appropriate."
>
> We agree. Based on Appellants' arbitration demand of $80 million, the district court correctly concluded that the $75,000 amount in controversy requirement was met. First, the demand approach recognizes the true scope of the controversy between the parties. The only logical assumption about Appellants' efforts to prevent confirmation of this arbitration award is that they want a second chance to pursue their claims. The $10,000 award "is but the last stage of litigation" that began with an $80 million controversy. Therefore, the amount at stake is the $80 million that Appellants initially sought in arbitration, not the minimal award for arbitration-related costs.

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Pershing, L.L.C. v. Kiebach, 819 F.3d 179, 182 (5th Cir. 2016). Which approach is the best?

Replace the note 2 after *Toys "R" Us* on page 649 with the following:

Until recently, the circuits were divided on whether the FAA § 10 grounds or the grounds in Article V of the New York Convention apply in actions to vacate Convention awards made in the United States. The majority approach was that taken by the Second Circuit in *Toys "R" Us*, holding that the FAA § 10 grounds apply. The Eleventh Circuit, meanwhile, was the sole circuit using the Article V grounds for actions to vacate Convention awards made in the United States. But the Eleventh Circuit sitting en banc now has overruled its prior precedent and joined the rest of the circuits in following the *Toys "R" Us* approach. *See* Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A., 66 F.4th 876, 890 (11th Cir. 2023) ("We hold that in a New York Convention case where the arbitration is seated in the United States, or where United States law governs the conduct of the arbitration, Chapter 1 of the FAA provides the grounds for vacatur of an arbitral award."). The Restatement adopts that approach as well. *See* § 4.9 & rptrs. note to cmt. a. (That said, under the Restatement, the practical effect of the issue is minimal (if not nonexistent) because it construes the two sets of grounds as essentially the same. *See, e.g., id.* § 4.20(b).)

Add the following to note 1 after *Chromalloy* on page 656:

Compare Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 642 (2d Cir. 2016) (holding district court did not abuse its discretion in enforcing award vacated in Mexico; district court found that Mexican decision "violated basic notions of justice" because decision "appli[ed] a law and policy that were not in existence at the time of the parties' contract"), *cert. dismissed*, 137 S. Ct. 1622 (2017) *with* Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic, 997 F. Supp. 2d 214, 227 (S.D.N.Y. 2014) (refusing to enforce award vacated in Malaysia, distinguishing *Pemex* because"[t]his is not a case in which the Respondent is an entity of Malaysia's government, which might raise a suspicion of the Malaysian courts' partiality; rather, Malaysia is a neutral, third country that the parties mutually chose as the seat of the arbitration"), aff'd, 864 F.3d 172 (2d Cir. 2017) (affirming refusal of district court to vacate prior judgment confirming award).

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Revise the reference to the LCIA Arbitration Rules on page 658 as follows:

Update the citation from LCIA Arbitration Rules, art. 26.9 to LCIA Arbitration Rules, art. 26.8, and revise the quotations from the Rule so that they read "[e]very award (including reasons for such award) shall be final and binding on the parties" and "parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law."

Add the following to the second paragraph of the introductory material in § 7.05 on page 658:

; In re Wal-Mart Wage & Hour Employment Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013) ("Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract.").

Add the following to the end of note 6 after *Vandenberg* on page 675:

But see In re Houng, 499 B.R. 751, 760-62 (C.D. Cal. 2013) ("The Supreme Court and Ninth Circuit have consistently held that, under federal law, an unreviewed arbitration decision does not have preclusive effect in a federal court action."), *aff'd*, 636 F. App'x 396 (9th Cir. 2016).

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Chapter 8 Drafting Arbitration Clauses

Update the citation to the Rutledge and Drahozal excerpt on page 683 to the following:

2013 B.Y.U. L. REV. 1

Update the citation to the AAA's *Drafting Dispute Resolution Clauses* in note 2 after the Townsend article on page 712 to the following:

American Arbitration Association, Drafting Dispute Resolution Clauses—A Practical Guide (2013), *available at* https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf

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Documentary Supplement

Add the following to the list of countries that have ratified the New York Convention on pages 5-6 of the Documentary Supplement:

Andorra, Angola, Belize, Bhutan, Burundi, Cabo Verde, Comoros, Democratic Republic of the Congo, Ethiopia, Guyana, Iraq, Malawi, Maldives, Myanmar, Palau, Papua New Guinea, Sao Tome and Principe, Seychelles, Sierra Leone, State of Palestine, Sudan, Suriname, Timor-Leste, Tonga, Turkmenistan

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Insert the following after the Federal Arbitration Act on page 20 of the Documentary Supplement:

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT

Public Law 117-90
117th Congress
March 3, 2022

An Act

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021".

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) In General.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

"Sec.
"401. Definitions.
"402. No validity or enforceability.

"Sec. 401. Definitions

"In this chapter:

"(1) Predispute arbitration agreement.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

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"(2) Predispute joint-action waiver.—The term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"(3) Sexual assault dispute.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

"(4) Sexual harassment dispute.—The term 'sexual harassment dispute' means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

"Sec. 402. No validity or enforceability

"(a) In General.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

"(b) Determination of Applicability.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.'".

(b) Technical and Conforming Amendments.—

(1) In general.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting "or as otherwise provided in chapter 4" before the period at the end;

(B) in section 208—

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(i) in the section heading, by striking "Chapter 1; residual application" and inserting "Application"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4"; and

(C) in section 307—

(i) in the section heading, by striking "Chapter 1; residual application" and inserting "Application"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) Table of sections.—

(A) Chapter 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following: "208. Application.".

(B) Chapter 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following: "307. Application.".

(3) Table of chapters.—The table of chapters for title 9, United States Code, is amended by adding at the end the following: :4. Arbitration of disputes involving sexual assault and sexual harassment.....................401".

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

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Replace 10 U.S.C. § 987(i)(2) on page 25 of the Documentary Supplement with the following:

(2) Dependent. The term "dependent", with respect to a covered member, means a person described in subparagraph (A), (D), (E), or (I) of section 1072(2) of this title.

[Editor's note: The referenced provisions of 10 U.S.C. §1072(2) are as follows:

(A) the spouse;
…
(D) a child who—

(i) has not attained the age of 21;

(ii) has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary and is, or was at the time of the member's or former member's death, in fact dependent on the member or former member for over one-half of the child's support; or

(iii) is incapable of self-support because of a mental or physical incapacity that occurs while a dependent of a member or former member under clause (i) or (ii) and is, or was at the time of the member's or former member's death, in fact dependent on the member or former member for over one-half of the child's support;

(E) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household;
…
(I) an unmarried person who--

(i) is placed in the legal custody of the member or former member as a result of an order of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months;

(ii) either—

(I) has not attained the age of 21;

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(II) has not attained the age of 23 and is enrolled in a full time course of study at an institution of higher learning approved by the administering Secretary; or

(III) is incapable of self support because of a mental or physical incapacity that occurred while the person was considered a dependent of the member or former member under this subparagraph pursuant to subclause (I) or (II);

(iii) is dependent on the member or former member for over one-half of the person's support;

(iv) resides with the member or former member unless separated by the necessity of military service or to receive institutional care as a result of disability or incapacitation or under such other circumstances as the administering Secretary may by regulation prescribe; and

(v) is not a dependent of a member or a former member under any other subparagraph.]

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Replace 48 C.F.R. § 252.222-7006 on pages 32-33 of the Documentary Supplement with the following:

252.222–7006 Restrictions on the Use of Mandatory Arbitration Agreements.

As prescribed in 222.7405, use the following clause:

Restrictions on the Use of Mandatory Arbitration Agreements (Jan 2023)

(a) Definitions. As used in this clause—

Covered subcontractor means any entity that has a subcontract valued in excess of $1 million, except a subcontract for the acquisition of commercial products or commercial services, including commercially available off-the-shelf items.

Subcontract means any contract, as defined in Federal Acquisition Regulation subpart 2.1, to furnish supplies or services for performance of this contract or a higher-tier subcontract thereunder.

(b) The Contractor—

(1) Agrees not to—

(i) Enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration—

(A) Any claim under title VII of the Civil Rights Act of 1964; or

(B) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(ii) Take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration—

(A) Any claim under title VII of the Civil Rights Act of 1964; or

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(B) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; and

(2) Certifies, by signature of the contract, that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce, any provision of any existing agreements, as described in paragraph (b)(1) of this clause, with respect to any employee or independent contractor performing work related to such subcontract.

(c) The prohibitions of this clause do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the applicability of the restrictions of paragraph (b) of this clause in accordance with Defense Federal Acquisition Regulation Supplement 222.7404.

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Insert the following after 48 C.F.R. pt. 222.74 on page 33 of the Documentary Supplement:

Excerpts from 34 C.F.R. § 665.300

34 C.F.R. § 665.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

(a) General. Participation of a school in the Direct Loan Program means that eligible students at the school may receive Direct Loans. To participate in the Direct Loan Program, a school must—

(1) Demonstrate to the satisfaction of the Secretary that the school meets the requirements for eligibility under the Act and applicable regulations; and

(2) Enter into a written program participation agreement with the Secretary.

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to—

…

(11) Comply with the provisions of paragraphs (d) through (i) of this section regarding student claims and disputes;

…

(d) Borrower defense claims in an internal dispute process. The school will not compel any student to pursue a complaint based on allegations that would provide a basis for a borrower defense claim through an internal dispute process before the student presents the complaint to an accrediting agency or government agency authorized to hear the complaint.

(e) Class action bans.

(1) The school will not seek to rely in any way on a pre-dispute arbitration agreement or on any other pre-dispute agreement with a student who has obtained or benefited from a Direct Loan, with respect to any aspect of a class action that is related to a borrower defense claim, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

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(2) Reliance on a pre-dispute arbitration agreement, or on any other pre-dispute agreement, with a student, with respect to any aspect of a class action includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a class action;

(ii) Seeking to exclude a person or persons from a class in a class action;

(iii) Objecting to or seeking a protective order intended to avoid responding to discovery in a class action;

(iv) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action;

(v) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved; and

(vi) Filing a claim in arbitration against a student who has filed a claim on the same issue in a class action, after the trial court in that class action has granted a motion to dismiss the claim and noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

(3) Required provisions and notices:

(i) After the effective date of this regulation, the school must include the following provision in any agreements with a student recipient of a Direct Loan for attendance at the school, or a student for whom the PLUS loan was obtained, that include pre-dispute arbitration or any other pre-dispute agreement addressing class actions: “We agree that this agreement cannot be used to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court, or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or our provision of educational services for which the Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the

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making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(ii) When a pre-dispute arbitration agreement or any other pre-dispute agreement addressing class actions has been entered into before the effective date of this regulation and does not contain the provision described in paragraph (e)(3)(i) of this section, the school must either ensure the agreement is amended to contain that provision or provide the student to whom the agreement applies with written notice of that provision.

(iii) The school must ensure the agreement described in paragraph (e)(3)(ii) of this section is amended to contain the provision set forth in paragraph (e)(3)(i) or must provide the notice to students specified in that paragraph no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment, whichever is earlier.

> (A) Agreement provision. "We agree that neither we, nor anyone else who later becomes a party to this agreement, will use it to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court, or you may be a member of a class action lawsuit in court even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."
>
> (B) Notice provision. "We agree not to use any pre-dispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court, or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that the court has exclusive jurisdiction to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct

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Loan or the provision of educational services for which the loan was obtained."

(f) Pre-dispute arbitration agreements.

(1)(i) The school will not enter into a pre-dispute agreement to arbitrate a borrower defense claim or rely in any way on a pre-dispute arbitration agreement with respect to any aspect of a borrower defense claim.

(ii) A student may enter into a voluntary post-dispute arbitration agreement with a school to arbitrate a borrower defense claim.

(2) Reliance on a pre-dispute arbitration agreement with a student with respect to any aspect of a borrower defense claim includes, but is not limited to, any of the following:

(i) Seeking dismissal, deferral, or stay of any aspect of a judicial action filed by the student, including joinder with others in an action;

(ii) Objecting to or seeking a protective order intended to avoid responding to discovery in a judicial action filed by the student; and

(iii) Filing a claim in arbitration against a student who has filed a suit on the same claim.

(3) Required provisions and notices:

(i) The school must include the following provision in any pre-dispute arbitration agreements with a student recipient of a Direct Loan for attendance at the school, or, with respect to a Parent PLUS Loan, a student for whom the PLUS loan was obtained, that include any agreement regarding arbitration and that are entered into after the effective date of this regulation: "We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim, or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the

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making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."

(ii) When a pre-dispute arbitration agreement has been entered into before the effective date of this regulation, that did not contain the provision specified in paragraph (f)(3)(i) of this section, the school must either ensure the agreement is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or provide the student to whom the agreement applies with the written notice specified in paragraph (f)(3)(iii)(B) of this section.

(iii) The school must ensure the agreement described in paragraph (f)(3)(ii) of this section is amended to contain the provision specified in paragraph (f)(3)(iii)(A) of this section or must provide the notice specified in paragraph (f)(3)(iii)(B) of this section to students no later than the exit counseling required under § 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment, whichever is earlier.

> (A) Agreement provision. "We agree that neither we, nor anyone else who later becomes a party to this pre-dispute arbitration agreement, will use it to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim, or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained."
>
> (B) Notice provision. "We agree not to use any pre-dispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim, or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the

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Direct Loan or the provision of educational services for which the loan was obtained."

(g) Submission of arbitral records.

(1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection with any borrower defense claim filed in arbitration by or against the school:

(i) The initial claim and any counterclaim;

(ii) The arbitration agreement filed with the arbitrator or arbitration administrator;

(iii) The judgment or award, if any, issued by the arbitrator or arbitration administrator;

(iv) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the school's failure to pay required filing or administrative fees, any communication the school receives from the arbitrator or arbitration administrator related to such a refusal; and

(v) Any communication the school receives from an arbitrator or an arbitration administrator related to a determination that a pre-dispute arbitration agreement regarding educational services provided by the school does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs;

(2) A school must submit any record required pursuant to paragraph (g)(1) of this section within 60 days of filing by the school of any such record with the arbitrator or arbitration administrator and within 60 days of receipt by the school of any such record filed or sent by someone other than the school, such as the arbitrator, the arbitration administrator, or the student.

(3) The Secretary will publish the records submitted by schools in paragraph (g)(1) of this section in a centralized database accessible to the public.

(h) Submission of judicial records.

(1) A school must submit a copy of the following records to the Secretary, in the form and manner specified by the Secretary, in connection

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with any borrower defense claim filed in a lawsuit by the school against the student or by any party, including a government agency, against the school:

(i) The complaint and any counterclaim;

(ii) Any dispositive motion filed by a party to the suit; and

(iii) The ruling on any dispositive motion and the judgment issued by the court;

(2) A school must submit any record required pursuant to paragraph (h)(1) of this section within 30 days of filing or receipt, as applicable, of the complaint, answer, or dispositive motion, and within 30 days of receipt of any ruling on a dispositive motion or a final judgment;

(3) The Secretary will publish the records submitted by schools in paragraph (h)(1) in a centralized database accessible to the public.

(i) Definitions. For the purposes of paragraphs (d) through (h) of this section, the term—

(1) Borrower defense claim means a claim based on an act or omission that is or could be asserted as a borrower defense as defined in:

(i) § 685.206(c)(1);

(ii) § 685.222(a)(5);

(iii) § 685.206(e)(1)(iii); or

(iv) § 685.401(a);

(2) Class action means a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23;

(3) Dispositive motion means a motion asking for a court order that entirely disposes of one or more claims in favor of the party who files the motion without need for further court proceedings;

(4) Pre-dispute arbitration agreement means any agreement, regardless of its form or structure, between a school or a party acting on behalf of a school and a student that provides for arbitration of any future dispute between the parties.

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Add the following to the end of 48 C.F.R. § 222.7404(c) on page 32 of the Documentary Supplement:

and PGI 222.7404(c)

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Insert the following after the Dodd-Frank Wall Street Reform and Consumer Protection Act on page 38 of the Documentary Supplement:

FINAL RULE: ARBITRATION AGREEMENTS CONSUMER FINANCIAL PROTECTION BUREAU (July 2017)

Disapproved under the Congressional Review Act by Public Law No. 115-74, 131 Stat. 1243 (2017)

Authority and Issuance

For the reasons set forth above, the Bureau adds 12 CFR part 1040 to Chapter X in Title 12 of the Code of Federal Regulations, as set forth below:

PART 1040—ARBITRATION AGREEMENTS

Sec.
1040.1 Authority and purpose.
1040.2 Definitions.
1040.3 Coverage and exclusions from coverage.
1040.4 Limitations on the use of pre-dispute arbitration agreements.
1040.5 Compliance date and temporary exception.
Supplement I to Part 1040—Official Interpretations.

Authority: 12 U.S.C. 5512(b) and (c) and 5518(b).

§ 1040.1 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to sections 1022(b)(1) and (c) and 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (12 U.S.C. 5512(b)(1) and (c) and 5518(b)).

(b) *Purpose.* The purposes of this part are the furtherance of the public interest and the protection of consumers regarding the use of agreements for consumer financial products and services providing for arbitration of any future dispute, and also to monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.

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§ 1040.2 Definitions.

(a) *Class action* means a lawsuit in which one or more parties seek or obtain class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(b) *Consumer* means an individual or an agent, trustee, or representative acting on behalf of an individual.

(c) *Pre-dispute arbitration agreement* means an agreement between a covered person as defined by 12 U.S.C. 5481(6) and a consumer providing for arbitration of any future dispute concerning a consumer financial product or service covered by § 1040.3(a).

(d) *Provider* means:

(1) A person as defined by 12 U.S.C. 5481(19) that engages in an activity covered by § 1040.3(a) to the extent that the person is not excluded under § 1040.3(b); or

(2) An affiliate of a provider as defined in paragraph (d)(1) of this section when that affiliate is acting as a service provider to the provider with which the service provider is affiliated consistent with 12 U.S.C. 5481(6)(B).

§ 1040.3 Coverage and exclusions from coverage.

(a) *Covered products and services.* Except for persons when excluded from coverage pursuant to paragraph (b) of this section, this part applies to the offering or provision of the following products or services when such offering or provision is a consumer financial product or service as defined by 12 U.S.C. 5481(5):

(1)(i) Providing an "extension of credit" that is "consumer credit" when performed by a "creditor" as those terms are defined in Regulation B, 12 CFR 1002.2;

(ii) "Participat[ing] in [] credit decision[s]" within the meaning of 12 CFR 1002.2(l) when performed by a "creditor" with regard to "consumer credit" as those terms are defined in 12 CFR 1002.2;

(iii)(A) Referring applicants or prospective applicants for "consumer credit" to creditors when performed by a "creditor" as those terms are defined in 12 CFR 1002.2; or

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(B) Selecting or offering to select creditors to whom requests for “consumer credit” may be made when done by a “creditor” as those terms are defined in 12 CFR 1002.2;

(C) Except that this paragraph (a)(1)(iii) does not apply when the referral or selection activity by the creditor described in paragraphs (a)(1)(iii)(A) or (B) of this section is incidental to a business activity of that creditor that is not covered by this section;

(iv) Acquiring, purchasing, or selling an extension of consumer credit covered by paragraph (a)(1)(i) of this section; or

(v) Servicing an extension of consumer credit covered by paragraph (a)(1)(i) of this section;

(2) Extending automobile leases as defined by 12 CFR 1090.108 or brokering such leases;

(3)(i) Providing services to assist with debt management or debt settlement, modify the terms of any extension of consumer credit covered by paragraph (a)(1)(i) of this section, or avoid foreclosure;

(ii) Providing products or services represented to remove derogatory information from, or improve, a person’s credit history, credit record, or credit rating;

(4) Providing directly to a consumer a consumer report, as defined by the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), a credit score, as defined by 15 U.S.C. 1681g(f)(2)(A), or other information specific to a consumer derived from a consumer file, as defined by 15 U.S.C. 1681a(g), in each case except for a consumer report provided solely in connection with an adverse action as defined in 15 U.S.C. 1681a(k) with respect to a product or service that is not covered by this section;

(5) Providing accounts subject to the Truth in Savings Act, 12 U.S.C. 4301 et seq., as implemented by 12 CFR part 707 and Regulation DD, 12 CFR part 1030;

(6) Providing accounts or remittance transfers subject to the Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq., as implemented by Regulation E, 12 CFR part 1005;

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(7) Transmitting or exchanging funds as defined by 12 U.S.C. 5481(29) except when necessary to another product or service if that product or service:

(i) Is offered or provided by the person transmitting or exchanging funds; and

(ii) Is not covered by this section;

(8) Accepting financial or banking data or providing a product or service to accept such data directly from a consumer for the purpose of initiating a payment by a consumer via any payment instrument as defined by 12 U.S.C. 5481(18) or initiating a credit card or charge card transaction for the consumer, except by a person selling or marketing a good or service that is not covered by this section, for which the payment or credit card or charge card transaction is being made;

(9) Providing check cashing, check collection, or check guaranty services; or

(10) Collecting debt arising from any of the consumer financial products or services described in paragraphs (a)(1) through (9) of this section when performed by:

(i) A person offering or providing the product or service giving rise to the debt being collected, an affiliate of such person, or a person acting on behalf of such person or affiliate;

(ii) A person purchasing or acquiring an extension of consumer credit covered by paragraph (a)(1)(i) of this section, an affiliate of such person, or a person acting on behalf of such person or affiliate; or

(iii) A debt collector as defined by 15 U.S.C. 1692a(6).

(b) *Excluded persons.* This part does not apply to the following persons in the following circumstances:

(1)(i) A person regulated by the Securities and Exchange Commission as defined by 12 U.S.C. 5481(21); or

(ii) A person to the extent regulated by a State securities commission as described in 12 U.S.C. 5517(h) as either:

(A) A broker dealer; or

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(B) An investment adviser; or

(iii) A person regulated by the Commodity Futures Trading Commission as defined by 12 U.S.C. 5481(20) or a person with respect to any account, contract, agreement, or transaction to the extent subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. 1 et seq.

(2)(i) A Federal agency as defined in 28 U.S.C. 2671;

(ii) Any State, Tribe, or other person to the extent such person qualifies as an "arm" of a State or Tribe under Federal sovereign immunity law and the person's immunities have not been abrogated by the U.S. Congress;

(3) Any person with respect to a product or service described in paragraph (a) of this section that the person and any of its affiliates collectively provide to no more than 25 consumers in the current calendar year and to no more than 25 consumers in the preceding calendar year;

(4) A merchant, retailer, or other seller of nonfinancial goods or services to the extent such person:

(i) Offers or provides an extension of consumer credit covered by paragraph (a)(1)(i) of this section that is of the type described in 12 U.S.C. 5517(a)(2)(A)(i); and

(A) Is not subject to the Bureau's rulemaking authority under 12 U.S.C. 5517(a)(2)(B); or

(B) Is subject to the Bureau's rulemaking authority only under 12 U.S.C. 5517(a)(2)(B)(i) but not 12 U.S.C. 5517(a)(2)(B)(ii) or (iii); or

(ii) Purchases or acquires an extension of consumer credit excluded by paragraph (b)(4)(i) of this section.

(5) Any "employer" as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), to the extent it is offering or providing a product or service described in paragraph (a) of this section to its employee as an employee benefit; or

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(6) A person to the extent providing a product or service in circumstances where they are excluded from the Bureau's rulemaking authority including pursuant to 12 U.S.C. 5517 or 5519.

§ 1040.4 Limitations on the use of pre-dispute arbitration agreements.

(a) *Use of pre-dispute arbitration agreements in class actions*—

(1) *General rule*. A provider shall not rely in any way on a pre-dispute arbitration agreement entered into after the date set forth in § 1040.5(a) with respect to any aspect of a class action that concerns any of the consumer financial products or services covered by § 1040.3, including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or such review has been resolved such that the case cannot proceed as a class action.

(2) *Provision required in covered pre-dispute arbitration agreements*. Upon entering into a pre-dispute arbitration agreement for a consumer financial product or service covered by § 1040.3 after the date set forth in § 1040.5(a):

(i) Except as provided elsewhere in this paragraph (a)(2) or in § 1040.5(b), a provider shall ensure that any such pre-dispute arbitration agreement contains the following provision: "We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."

(ii) When the pre-dispute arbitration agreement applies to multiple products or services, only some of which are covered by § 1040.3, the provider may include the following alternative provision in place of the one required by paragraph (a)(2)(i) of this section: "We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. The following provision applies only to class action claims concerning the products or services covered by that Rule: We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."

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(iii) When the pre-dispute arbitration agreement existed previously between other parties and does not contain either the provision required by paragraph (a)(2)(i) of this section or the alternative permitted by paragraph (a)(2)(ii) of this section:

(A) The provider shall either ensure the pre-dispute arbitration agreement is amended to contain the provision specified in paragraph (a)(2)(i) or (a)(2)(ii) of this section or provide any consumer to whom the agreement applies with the following written notice: "We agree not to rely on any pre-dispute arbitration agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else." When the pre-dispute arbitration agreement applies to multiple products or services, only some of which are covered by § 1040.3, the provider may, in this written notice, include the following optional additional language: "This notice applies only to class action claims concerning the products or services covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau."

(B) The provider shall ensure the pre-dispute arbitration agreement is amended or provide the notice to consumers within 60 days of entering into the pre-dispute arbitration agreement.

(iv) A provider may add any one or more of the following sentences at the end of the disclosures required by paragraphs (a)(2)(i) and (ii) of this section:

(A)(1) "This provision does not apply to parties that entered into this agreement before [INSERT DATE 60 DAYS AND 181 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]."

(2) "This provision does not apply to products or services first provided to you before [INSERT DATE 60 DAYS AND 181 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] that are subject to an arbitration agreement entered into before that date."

(B) "This provision does not apply to persons that are excluded from the Consumer Financial Protection Bureau's Arbitration Agreements Rule."

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(C) "This provision also applies to the delegation provision." A provider using this sentence as part of the disclosure required by paragraph (a)(2)(i) or (ii) of this section in a predispute arbitration agreement is not required to separately insert the disclosure required by paragraph (a)(2)(i) or (ii) of this section into a delegation provision that relates to such a predispute arbitration agreement.

(v) In any provision or notice required by this paragraph (a)(2), if the provider uses a standard term in the rest of the agreement to describe the provider or the consumer, the provider may use that term instead of the term "we" or "you."

(vi) In any provision or notice required by this paragraph (a)(2), if a person has a genuine belief that sovereign immunity from suit under applicable law may apply to any person that may seek to assert the pre-dispute arbitration agreement, then the provision or notice may include, after the sentence reading "You may file a class action in court or you may be a member of a class action filed by someone else," the following language: "However, the defendants in the class action may claim they cannot be sued due to their sovereign immunity. This provision does not create or waive any such immunity." In the preceding sentence, the word "notice" may be substituted for the word "provision" when the included language is in a notice.

(vii) A provider may provide any provision or notice required by this paragraph (a)(2) in a language other than English if the pre-dispute arbitration agreement also is written in that other language.

(b) *Submission of arbitral and court records*. For any pre-dispute arbitration agreement for a consumer financial product or service covered by § 1040.3 entered into after the date set forth in § 1040.5(a), a provider shall comply with the requirements set forth below.

(1) *Records to be submitted*. A provider shall submit a copy of the following records to the Bureau, in the form and manner specified by the Bureau:

(i) In connection with any claim filed in arbitration by or against the provider concerning any of the consumer financial products or services covered by § 1040.3:

(A) The initial claim and any counterclaim;

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(B) The answer to any initial claim and/or counterclaim, if any;

(C) The pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator;

(D) The judgment or award, if any, issued by the arbitrator or arbitration administrator; and

(E) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the provider's failure to pay required filing or administrative fees, any communication the provider receives from the arbitrator or an arbitration administrator related to such a refusal;

(ii) Any communication the provider receives from an arbitrator or an arbitration administrator related to a determination that a pre-dispute arbitration agreement for a consumer financial product or service covered by § 1040.3 does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs; and

(iii) In connection with any case in court by or against the provider concerning any of the consumer financial products or services covered by § 1040.3:

(A) Any submission to a court that relies on a pre-dispute arbitration agreement in support of the provider's attempt to seek dismissal, deferral, or stay of any aspect of a case; and

(B) The pre-dispute arbitration agreement relied upon in the motion or filing.

(2) *Deadline for submission.* A provider shall submit any record required pursuant to paragraph (b)(1) of this section within 60 days of filing by the provider of any such record with the arbitrator, arbitration administrator, or court, and within 60 days of receipt by the provider of any such record filed or sent by someone other than the provider, such as the arbitration administrator, the court, or the consumer.

(3) *Redaction*. Prior to submission of any records pursuant to paragraph (b)(1) of this section, a provider shall redact the following information:

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(i) Names of individuals, except for the name of the provider or the arbitrator where
either is an individual;

(ii) Addresses of individuals, excluding city, State, and zip code;

(iii) Email addresses of individuals;

(iv) Telephone numbers of individuals;

(v) Photographs of individuals;

(vi) Account numbers;

(vii) Social Security and tax identification numbers;

(viii) Driver's license and other government identification numbers; and

(ix) Passport numbers.

(4) *Internet posting of arbitral and court records*. The Bureau shall establish and maintain on its publicly available internet site a central repository of the records that providers submit to it pursuant to paragraph (b)(1) of this section, and such records shall be easily accessible and retrievable by the public on its internet site.

(5) *Further redaction prior to internet posting*. Prior to making records identified in paragraph (b)(1) of this section easily accessible and retrievable by the public as required by paragraph (b)(4) of this section, the Bureau shall make such further redactions as are needed to comply with applicable privacy laws.

(6) *Deadline for internet posting of arbitral and court records*. The Bureau shall initially make records submitted to the Bureau by providers under paragraph (b)(1) of this section easily accessible and retrievable by the public on its internet site no later than July 1, 2019. The Bureau will annually make records submitted under paragraph (b)(1) available each year thereafter for documents received by the end of the prior calendar year.

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§ 1040.5 Compliance date and temporary exception.

(a) *Compliance date*. Compliance with this part is required for any pre-dispute arbitration agreement entered into on or after [INSERT DATE 60 DAYS AND 181 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

(b) *Exception for pre-packaged general-purpose reloadable prepaid card agreements*. Section 1040.4(a)(2) shall not apply to a provider that enters into a pre-dispute arbitration agreement for a general-purpose reloadable prepaid card if the requirements set forth in either paragraphs (b)(1) or (2) of this section are satisfied.

(1) For a provider that does not have the ability to contact the consumer in writing:

(i) The consumer acquires a general-purpose reloadable prepaid card in person at a retail store;

(ii) The pre-dispute arbitration agreement was inside of packaging material when the general-purpose reloadable prepaid card was acquired; and

(iii) The pre-dispute arbitration agreement was packaged prior to the compliance date of the rule.

(2) For a provider that has the ability to contact the consumer in writing:

(i) The requirements set forth in paragraphs (b)(1)(i) through (iii) of this section are satisfied; and

(ii) Within 30 days of obtaining the consumer's contact information, the provider notifies the consumer in writing that the pre-dispute arbitration agreement complies with the requirements of § 1040.4(a)(2) by providing an amended pre-dispute arbitration agreement to the consumer.

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Replace the Arbitration Fairness Act of 2011 on pages 39-42 of the Documentary Supplement with the following:

FORCED ARBITRATION INJUSTICE REPEAL ACT

S. 1376

IN THE SENATE OF THE UNITED STATES

April 27, 2023

A BILL

To amend title 9 of the United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Forced Arbitration Injustice Repeal Act of 2022".

SEC. 2. PURPOSES.

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) In General—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 5--ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

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“Sec.
“501. Definitions.
“502. No validity and enforceability.

Sec. 501. Definitions

“In this chapter—

“(1) the term ‘antitrust dispute’ means a dispute—

“(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a))) or State antitrust laws; and

“(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

“(2) the term ‘civil rights dispute’ means a dispute—

“(A) arising from an alleged violation of—

“(i) the Constitution of the United States or the constitution of a State; or

“(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or a State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

“(B) in which at least 1 party alleging a violation described in subparagraph (A) is one or more individuals (or an authorized representative of an individual), including an individual seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

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"(3) the term 'consumer dispute' means a dispute between—

"(A) 1 or more individuals, including an individual who seeks certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law, who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes; and

"(B) (i) the seller or provider of such property, services, securities or other investments, money, or credit; or

"(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

"(4) the term 'employment dispute' means—

"(A) a dispute between 1 or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work; and

"(B) includes—

"(i) a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

"(ii) a dispute in which an individual seeks certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

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"(5) the term 'predispute arbitration agreement' means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

"(6) the term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"Sec. 502. No validity and enforceability

"(a) In General—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

"(b) Applicability—

"(1) In general— An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

"(2) Collective bargaining agreements –Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.".

(b) Technical and Conforming Amendments—

(1) In general—Title 9 of the United States Code is amended—

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(A) in section 1, by striking "of seamen," and all that follows through "interstate commerce" and inserting "of individuals, regardless of whether the individuals are designated as employees or independent contractors for other purposes";

(B) in section 2, by inserting "or 5" before the period at the end;

(C) in section 208, in the second sentence, by inserting "or 5" before the period at the end; and

(D) in section 307, in the second sentence, by inserting "or 5" before the period at the end.

(2) Table of chapters—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

"5. Arbitration of employment, consumer, antitrust, and civil rights disputes 501".

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date.

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Replace Cal. Civ. Proc. Code § 1281.96 on pages 67-68 of the Documentary Supplement with the following:

§ 1281.96. Private arbitration companies; quarterly or semiannual publication of consumer arbitration information; format and accessibility; costs; liability; legislative intent; application

(a) Except as provided in paragraph (2) of subdivision (c), a private arbitration company that administers or is otherwise involved in a consumer arbitration, shall collect, publish at least quarterly, and make available to the public on the internet website of the private arbitration company, if any, and on paper upon request, a single cumulative report that contains all of the following information regarding each consumer arbitration within the preceding five years:

(1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

(2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

(3) The nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment; or other. If the dispute involved employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars ($100,000), one hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and over two hundred fifty thousand dollars ($250,000). If the employee chooses not to provide wage information, it may be noted.

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, “prevailing party” includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

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(7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any.

(8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

(11) The name of the arbitrator, the arbitrator's total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.

(12) Demographic data, reported in the aggregate, relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as self-reported by the arbitrators. Demographic data disclosed or released pursuant to this paragraph shall also indicate the percentage of respondents who declined to respond.

(b) The information required by this section shall be made available in a format that allows the public to search and sort the information using readily available software, and shall be directly accessible from a conspicuously displayed link on the internet website of the private arbitration company with the identifying description: "consumer case information."

(c)(1) If the information required by subdivision (a) is provided by the private arbitration company in compliance with subdivision (b) and may be downloaded without a fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required by subdivision (a) is not accessible by the internet in compliance with subdivision (b), the company shall provide that information without charge to any person who requests the information on paper.

(2) Notwithstanding paragraph (1), a private arbitration company that receives funding pursuant to Chapter 8 (commencing with Section 465) of

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Division 1 of the Business and Professions Code and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(d) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.

(e) A private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section.

(f) It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.

(g) The amendments to subdivision (a) made by the act adding this subdivision shall not apply to any consumer arbitration administered by a private arbitration company before January 1, 2015.

§ 1281.97. Fees and costs of arbitration initiation; invoice; breach of agreement; sanctions

(a) (1) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration administrator, the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2.

(2) After an employee or consumer meets the filing requirements necessary to initiate an arbitration, the arbitration provider shall immediately provide an invoice for any fees and costs required before the arbitration can proceed to all of the parties to the arbitration. The invoice shall be provided in its entirety, shall state the full amount owed and the date that payment is due, and shall be sent to all parties by the same means on the same day. To avoid delay, absent an express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as due upon receipt.

(b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may do either of the following:

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(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction.

(2) Compel arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration.

(c) If the employee or consumer withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction under paragraph (1) of subdivision (b), the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum.

(d) If the employee or consumer proceeds with an action in a court of appropriate jurisdiction, the court shall impose sanctions on the drafting party in accordance with Section 1281.99.

§ 1281.98. Fees and costs of arbitration continuance; invoice; breach of agreement; sanctions

(a)(1) In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, that the drafting party pay certain fees and costs during the pendency of an arbitration proceeding, if the fees or costs required to continue the arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach.

(2) The arbitration provider shall provide an invoice for any fees and costs required for the arbitration proceeding to continue to all of the parties to the arbitration. The invoice shall be provided in its entirety, shall state the full amount owed and the date that payment is due, and shall be sent to all parties by the same means on the same day. To avoid delay, absent an express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as due upon receipt. Any extension of time for the due date shall be agreed upon by all parties.

(b) If the drafting party materially breaches the arbitration agreement and is in default under subdivision (a), the employee or consumer may unilaterally elect to do any of the following:

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(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction. If the employee or consumer withdraws the claim from arbitration and proceeds with an action in a court of appropriate jurisdiction, the statute of limitations with regard to all claims brought or that relate back to any claim brought in arbitration shall be tolled as of the date of the first filing of a claim in any court, arbitration forum, or other dispute resolution forum.

(2) Continue the arbitration proceeding, if the arbitration provider agrees to continue administering the proceeding, notwithstanding the drafting party's failure to pay fees or costs. The neutral arbitrator or arbitration provider may institute a collection action at the conclusion of the arbitration proceeding against the drafting party that is in default of the arbitration for payment of all fees associated with the employment or consumer arbitration proceeding, including the cost of administering any proceedings after the default.

(3) Petition the court for an order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay under the arbitration agreement or the rules of the arbitration provider.

(4) Pay the drafting party's fees and proceed with the arbitration proceeding. As part of the award, the employee or consumer shall recover all arbitration fees paid on behalf of the drafting party without regard to any findings on the merits in the underlying arbitration.

(c) If the employee or consumer withdraws the claim from arbitration and proceeds in a court of appropriate jurisdiction pursuant to paragraph (1) of subdivision (b), both of the following apply:

(1) The employee or consumer may bring a motion, or a separate action, to recover all attorney's fees and all costs associated with the abandoned arbitration proceeding. The recovery of arbitration fees, interest, and related attorney's fees shall be without regard to any findings on the merits in the underlying action or arbitration.

(2) The court shall impose sanctions on the drafting party in accordance with Section 1281.99.

(d) If the employee or consumer continues in arbitration pursuant to paragraphs (2) through (4) of subdivision (b), inclusive, the arbitrator shall impose appropriate sanctions on the drafting party, including monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions.

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§ 1281.99. Breach of arbitration agreement; monetary sanctions; additional sanctions

(a) The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach.

(b) In addition to the monetary sanction described in subdivision (a), the court may order any of the following sanctions against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(1) An evidence sanction by an order prohibiting the drafting party from conducting discovery in the civil action.

(2) A terminating sanction by one of the following orders:

(A) An order striking out the pleadings or parts of the pleadings of the drafting party.

(B) An order rendering a judgment by default against the drafting party.

(3) A contempt sanction by an order treating the drafting party as in contempt of court.

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Add the following after the Selected Provisions of California Code of Civil Procedure on page 72 in the Documentary Supplement:

Assembly Bill No. 51
CHAPTER 711

An act to add Section 12953 to the Government Code, and to add Section 432.6 to the Labor Code, relating to employment.

[Approved by Governor October 10, 2019. Filed with Secretary of State October 10, 2019.]

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares that it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) and the Labor Code.

(b) It is the purpose of this act to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion.

SEC. 2. Section 12953 is added to the Government Code, to read:

12953. It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code.

SEC. 3. Section 432.6 is added to the Labor Code, to read:

432.6. (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to

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consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.

(d) In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees.

(e) This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization.

(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.). (g) This section does not apply to postdispute settlement agreements or negotiated severance agreements.

(h) This section applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

(i) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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Revise the California Ethics Standards on pages 73-93 of the Documentary Supplement to reflect the following changes:

**JUDICIAL COUNCIL OF CALIFORNIA
AMENDMENTS TO THE
STANDARDS FOR NEUTRAL ARBITRATORS
IN CONTRACTUAL ARBITRATION
Effective July 1, 2014**

Standard 2. Definitions

As used in these standards:

(a) Arbitrator and neutral arbitrator

(1) * * *

(2) Where the context includes events or acts occurring before an appointment is final, "arbitrator" and "neutral arbitrator" include a person who has been served with notice of a proposed nomination or appointment. For purposes of these standards, "proposed nomination" does not include nomination of persons by a court under Code of Civil Procedure section 1281.6 to be considered for possible selection as an arbitrator by the parties or appointment as an arbitrator by the court.

(b)–(n) * * *

(o) "Member of the arbitrator's extended family" means the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator's spouse or domestic partner or the spouse or domestic partner of such person.

(p)–(s) * * *

Standard 2 amended effective July 1, 2014.

Standard 3. Application and effective date

(a) * * *

(b) These standards do not apply to:

(1) * * *

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(2) Any arbitrator serving in:

(A)–(C) * * *

(D) An automobile warranty dispute resolution process certified under California Code of Regulations title 16, division 33.1 or an informal 1 dispute settlement procedure under Code of Federal Regulations title 16, chapter 1, part 703;

(E)–(F) * * *

(G) An arbitration of a complaint filed against a contractor with the Contractors State License Board under Business and Professions Code sections 7085 through 7085.7; ~~or~~

(H) An arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.; or

(I) An arbitration proceeding governed by rules adopted by a securities self-regulatory organization and approved by the United States Securities and Exchange Commission under federal law.

(c) The following persons are not subject to the standards or to specific amendments to the standards in certain arbitrations:

(1) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards in those arbitrations.

(2) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to standard 8 in those arbitrations.

(3) Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2014, are not subject to the amendments to standards 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014 in those arbitrations.

Standard 3 amended effective July 1, 2014.

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Comment to Standard 3

With the exception of standard 8 and the amendments to standards 2, 7, 8, 12, 16, and 17 that took effect July 1, 2014, these standards apply to all neutral arbitrators appointed on or after July 1, 2002, who meet the criteria of subdivision (a). Arbitration provider organizations, although not themselves subject to these standards, should be aware of them when performing administrative functions that involve arbitrators who are subject to these standards. A provider organization's policies and actions should facilitate, not impede, compliance with the standards by arbitrators who are affiliated with the provider organization.

Subdivision (b)(2)(I) is intended to implement the decisions of the California Supreme Court in *Jevne v. Superior Court* ((2005) 35 Cal.4th 935) and of the United States Court of Appeals for the Ninth Circuit in *Credit Suisse First Boston Corp. v. Grunwald* ((9th Cir. 2005) 400 F.3d 1119).

Standard 7. Disclosure

(a) * * *

(b) General provisions

For purposes of this standard:

(1) * * *

(2) *Offers of employment or professional relationship*

(A) Except as provided in (B), if an arbitrator has disclosed to the parties in an arbitration that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12, the arbitrator is not also required under this standard to disclose to the parties in that arbitration any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending.

(B) In a consumer arbitration, if an arbitrator has disclosed to the parties that he or she will entertain offers of employment or of professional relationships from a party or lawyer for a party while the arbitration is pending as required by subdivision (b) of standard 12 and has informed the parties in the pending arbitration about any such offer and the acceptance of any such offer as required by

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subdivision (d) of standard, the arbitrator is not also required under this standard to disclose that offer or the acceptance of that offer to the parties in that arbitration.

(3) * * *

(c) Time and manner of disclosure

(1) *Initial disclosure*

Within ~~ten~~ 10 calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing all matters listed in subdivisions (d) and (e) of this standard of which the arbitrator is then aware.

(2) *Supplemental disclosure*

If an arbitrator subsequently becomes aware of a matter that must be disclosed under either subdivision (d) or (e) of this standard, the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter.

(d) Required disclosures

~~A person who is nominated or appointed as an arbitrator~~ A proposed arbitrator or arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be impartial, including, but not limited to, all of the following:

(1) *Family relationships with party*

The arbitrator or a member of the arbitrator's immediate or extended family is:

(A) A party~~,~~;

(B) ~~a party's~~The spouse or domestic partner~~,~~ of a party; or

(C) An officer, director, or trustee of a party.

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(2) *Family relationships with lawyer in the arbitration*

(A) Current relationships

The arbitrator, or the spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator's spouse or domestic partner is:

~~(A)~~(i) * * *

~~(B)~~(ii) * * *

~~(C)~~(iii) * * *

(B) Past relationships

The arbitrator or the arbitrator's spouse or domestic partner was associated in the private practice of law with a lawyer in the arbitration within the preceding two years.

(3) * * *

(4) *Service as arbitrator for a party or lawyer for party*

(A) The arbitrator is serving or, within the preceding five years, has served:

(i)-(ii) * * *

(iii) As a neutral arbitrator in another prior or pending noncollective bargaining case in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration.

(B)-(C) * * *

(5) *Compensated service as other dispute resolution neutral*

The arbitrator is serving or has served as a dispute resolution neutral other than an arbitrator in another pending or prior noncollective bargaining case involving a party or lawyer for a party and the arbitrator received or expects to receive any form of compensation for serving in this capacity.

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(A) Time frame

For purposes of this paragraph (5), "prior case" means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator's proposed nomination or appointment~~, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002~~.

(B)-(C) * * *

(6)-(7) * * *

(8) *Employee, expert witness, or consultant relationships*

The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party or for a lawyer in the arbitration. -

~~(8)~~(9) *Other professional relationships*

Any other professional relationship not already disclosed under paragraphs (2)-~~(7)~~(8) that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or lawyer for a party.~~, including the following:~~

~~(A) The arbitrator was associated in the private practice of law with a lawyer in the arbitration within the last two years.~~

~~(B) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party; and~~

~~(C) The arbitrator or a member of the arbitrator's immediate family is or within the preceding two years, was an employee of or an expert witness or a consultant for a lawyer in the arbitration.~~

(10) * * *

~~(10)~~(11) * * *

~~(11)~~(12) * * *

~~(12)~~(13) * * *

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~~(13)~~(14) *Membership in organizations practicing discrimination*

The arbitrator~~'s membership in~~ is a member of any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. Membership in a religious organization, an official military organization of the United States, or a nonprofit youth organization need not be disclosed unless it would interfere with the arbitrator's proper conduct of the proceeding or would cause a person aware of the fact to reasonably entertain a doubt concerning the arbitrator's ability to act impartially.

~~(14)~~(15) Any other matter that:

(A)-(C) * * *

(e) ~~Inability to conduct or timely complete proceedings~~ Other required disclosures

In addition to the matters that must be disclosed under subdivision (d), ~~an~~ a proposed arbitrator or arbitrator must also disclose:

(1) *Professional discipline*

(A) If the arbitrator has been disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere. The disclosure must specify the date of the revocation, what professional or occupational disciplinary agency or licensing board revoked the license, and the reasons given by that professional or occupational disciplinary agency or licensing board for the revocation.

(B) If the arbitrator has resigned his or her membership in the State Bar or another professional or occupational licensing agency or board, whether in California or elsewhere, while public or private disciplinary charges were pending. The disclosure must specify the date of the resignation, what professional or occupational disciplinary agency or licensing board had charges pending against the arbitrator at the time of the resignation, and what those charges were.

(C) If within the preceding 10 years public discipline other than that covered under (A) has been imposed on the arbitrator by a professional or occupational disciplinary agency or licensing board,

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whether in California or elsewhere. "Public discipline" under this provision means any disciplinary action imposed on the arbitrator that the professional or occupational disciplinary agency or licensing board identifies in its publicly available records or in response to a request for information about the arbitrator from a member of the public. The disclosure must specify the date the discipline was imposed, what professional or occupational disciplinary agency or licensing board imposed the discipline, and the reasons given by that professional or occupational disciplinary agency or licensing board for the discipline.

(2) *Inability to conduct or timely complete proceedings*

~~(1)~~(A) If the arbitrator is not able to properly perceive the evidence or properly conduct the proceedings because of a permanent or temporary physical impairment; and

~~(2)~~(B) Any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner.

(f) * * *

Standard 7 amended effective July 1, 2014.

Comment to Standard 7

This standard requires proposed arbitrators to disclose to all parties, in writing within 10 days of service of notice of their proposed nomination or appointment, all matters they are aware of at that time that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial as well as those matters listed under subdivision (e). ~~and to disclose~~ This standard also requires that if arbitrators subsequently become aware of any additional such matters, they must make supplemental disclosures of these matters within 10 days of becoming aware of them. This latter requirement is intended to address both matters existing at the time of nomination or appointment of which the arbitrator subsequently becomes aware and new matters that arise based on developments during the arbitration, such as the hiring of new counsel by a party.

Timely disclosure to the parties is the primary means of ensuring the impartiality of an arbitrator. It provides the parties with the necessary information to make an informed selection of an arbitrator by disqualifying or ratifying the ~~proposed~~ arbitrator following disclosure. See also standard 12, concerning disclosure and disqualification requirements relating to concurrent and subsequent

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employment or professional relationships between an arbitrator and a party or attorney in the arbitration. A party may disqualify an arbitrator for failure to comply with statutory disclosure obligations (see Code Civ. Proc., § 1281.91(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is a ground for *vacatur* of the arbitrator's award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

The arbitrator's overarching duty under subdivision (d) of this standard, which mirrors the duty set forth in Code of Civil Procedure section 1281.9, is to inform parties about matters that could cause a person aware of the facts to reasonably entertain a doubt that the ~~proposed~~ arbitrator would be able to be impartial. While the remaining subparagraphs of subdivision (d) require the disclosure of specific interests, relationships, or affiliations, these are only examples of common matters that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial. The ~~absence of the particular~~ fact that none of the interests, relationships, or affiliations specifically listed in the subparagraphs of (d) are present in a particular case does not necessarily mean that there is no matter that could reasonably raise a question about the arbitrator's ability to be impartial and that therefore must be disclosed. Similarly, the fact that a particular interest, relationship, or affiliation present in a case is not specifically enumerated in one of the examples given in these subparagraphs does not mean that it must not be disclosed. An arbitrator must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under ~~paragraph~~ subdivision (d): is the matter something that could cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial?

Code of Civil Procedure section 1281.85 specifically requires that the ethics standards adopted by the Judicial Council address the disclosure of interests, relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity. Section 1281.85 further provides that the standards "shall be consistent with the standards established for arbitrators in the judicial arbitration program and may expand but may not limit the disclosure and disqualification requirements established by this chapter [chapter 2 of title 9 of part III, Code of Civil Procedure, sections 1281-1281.95]."

Code of Civil Procedure section 1281.9 already establishes detailed requirements concerning disclosures by arbitrators, including a specific requirement that arbitrators disclose the existence of any ground specified in Code of Civil Procedure section 170.1 for disqualification of a judge. This standard does not eliminate or otherwise limit those requirements; in large part, it simply consolidates and integrates those existing statutory disclosure requirements by

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topic area. This standard does, however, expand upon or clarify the existing statutory disclosure requirements in the following ways:

- Requiring arbitrators to ~~disclose~~ make supplemental disclosures to the parties regarding any matter about which they become aware after the time for making an initial disclosure has expired, within 10 calendar days after the arbitrator becomes aware of the matter (subdivision ~~(f)~~(c)).

- Expanding required disclosures about the relationships or affiliations of an arbitrator's family members to include those of an arbitrator's domestic partner (subdivisions (d)(1) and (2); see also definitions of immediate and extended family in standard 2).

- Requiring arbitrators, in addition to making statutorily required disclosures regarding prior service as an arbitrator for a party or attorney for a party, to disclose both prior services ~~both~~ as a neutral arbitrator selected by a party arbitrator in the current arbitration and prior compensated service as any other type of dispute resolution neutral for a party or attorney in the arbitration (e.g., temporary judge, mediator, or referee) (subdivisions (d)(4)~~(C)~~(A)(iii) and (5)).

- If a disclosure includes information about five or more cases, requiring arbitrators to provide a summary of that information (subdivisions (d)(4)(C) and (5)(C).

- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family is or, within the preceding two years, was an employee, expert witness, or consultant for a party or a lawyer in the arbitration (subdivisions (d)(8) ~~(A) and (B))~~.

- Requiring the arbitrator to disclose if he or she or a member of his or her immediate family has an interest that could be substantially affected by the outcome of the arbitration (subdivision (d)~~(11)~~(12)).

~~If a disclosure includes information about five or more cases, requiring arbitrators to provide a summary of that information (subdivisions (d)(4) and (5).~~

- Requiring arbitrators to disclose membership in organizations that practice invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation (subdivision (d)~~(13)~~(14)).

- Requiring the arbitrator to disclose if he or she was disbarred or had his or her license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, resigned membership in

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the State Bar or another licensing agency or board while disciplinary charges were pending, or had any other public discipline imposed on him or her by a professional or occupational disciplinary agency or licensing board within the preceding 10 years (subdivision (e)(1)). The standard identifies the information that must be included in such a disclosure; however, arbitrators may want to provide additional information to assist parties in determining whether to disqualify an arbitrator based on such a disclosure.

- Requiring the arbitrator to disclose any constraints on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner (subdivision ~~(d)~~(e)(2)).

- Clarifying that the duty to make disclosures is a continuing obligation, requiring disclosure of matters that were not known at the time of nomination or appointment but that become known afterward (subdivision ~~(e)~~(f)).

It is good practice for an arbitrator to ask each participant to make an effort to disclose any matters that may affect the arbitrator's ability to be impartial.

Standard 8. Additional disclosures in consumer arbitrations administered by a provider organization

(a) General provisions

(1) *Reliance on information provided by provider organization*

Except as to the information in (c)(1), an arbitrator may rely on information supplied by the administering provider organization in making the disclosures required by this standard only if the provider organization represents that the information the arbitrator is relying on is current through the end of the immediately preceding calendar quarter. If the information that must be disclosed is available on the Internet, the arbitrator may comply with the obligation to disclose this information by providing in the disclosure statement required under standard 7(c)(1) the Internet address of the specific web page at which the information is located and notifying the party that the arbitrator will supply hard copies of this information upon request.

(2) * * *

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(b) Additional disclosures required

In addition to the disclosures required under standard 7, in a consumer arbitration as defined in standard 2 in which a dispute resolution provider organization is coordinating, administering, or providing the arbitration services, a ~~person~~ proposed arbitrator who is nominated or appointed as an arbitrator on or after January 1, 2003 must disclose the following within the time and in the same manner as the disclosures required under standard 7(c)(1):

(1) *Relationships between the provider organization and party or lawyer in arbitration*

Any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration. Information that must be disclosed under this standard includes:

(A) The provider organization has a financial interest in a party.

~~(A)~~(B) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of or has a financial interest in the provider organization.

~~(B)~~(C) Within the preceding two years the provider organization has received a gift, bequest, or favor from a party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated.

~~(C)~~(D) The provider organization has entered into, or the arbitrator currently expects that the provider organization will enter into, an agreement or relationship with any party or lawyer in the arbitration or a law firm with which a lawyer in the arbitration is currently associated under which the provider organization will administer, coordinate, or provide dispute resolution services in other noncollective bargaining matters or will provide other consulting services for that party, lawyer, or law firm.

~~(D)~~(E) The provider organization is coordinating, administering, or providing dispute resolution services or has coordinated, administered, or provided such services in another pending or prior noncollective bargaining case in which a party or lawyer in the arbitration was a party or a lawyer. For purposes of this paragraph, “prior case” means a case in which the dispute resolution neutral affiliated with the provider organization concluded his or her service

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within the two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the dispute resolution neutral concluded his or her service before July 1, 2002.

(2) *Case information*

If the provider organization is acting or has acted in any of the capacities described in paragraph (1)~~(D)~~(E), the arbitrator must disclose:

(A)-(C) * * *

(3) *Summary of case information*

If the total number of cases disclosed under paragraph (1)~~(D)~~(E) is greater than five, the arbitrator must also provide a summary of these cases that states:

(A)-(D) * * *

(c) Relationship between provider organization and arbitrator

If a relationship or affiliation is disclosed under ~~paragraph~~ subdivision (b), the arbitrator must also provide information about the following:

(1)-(4) * * *

(d) * * *

Standard 8 amended effective July 1, 2014.

Comment to Standard 8

This standard only applies in consumer arbitrations in which a dispute resolution provider organization is administering the arbitration. Like standard 7, this standard expands upon the existing statutory disclosure requirements. Code of Civil Procedure section 1281.95 requires arbitrators in certain construction defect arbitrations to make disclosures concerning relationships between their employers or arbitration services and the parties in the arbitration. This standard requires arbitrators in all consumer arbitrations to disclose any financial or professional relationship between the administering provider organization and any party, attorney, or law firm in the arbitration and, if any such relationship exists, then the arbitrator must also disclose his or her relationship with the dispute resolution provider organization. This standard ~~does not~~ requires an arbitrator to disclose if

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the provider organization has a financial interest in a party or lawyer in the arbitration or if a party or lawyer in the arbitration has a financial interest in the provider organization ~~because~~ even though provider organizations are prohibited under Code of Civil Procedure section 1281.92 from administering any consumer arbitration where any such relationship exists.

Subdivision (b). Currently expected relationships or affiliations that must be disclosed include all relationships or affiliations that the arbitrator, at the time the disclosure is made, expects will be formed. For example, if the arbitrator knows that the administering provider organization has agreed in concept to enter into a business relationship with a party, but they have not yet signed a written agreement formalizing that relationship, this would be a "currently expected" relationship that the arbitrator would be required to disclose.

Standard 12. Duties and limitations regarding future professional relationships or employment

(a) * * *

(b) Offers for ~~other~~ employment or professional relationships other than as a lawyer, expert witness, or consultant

(1) In addition to the disclosures required by standards 7 and 8, within ten calendar days of service of notice of the proposed nomination or appointment, a proposed arbitrator must disclose to all parties in writing if, while that arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case.

(2) If the arbitrator discloses that he or she will entertain such offers of employment or new professional relationships while the arbitration is pending:

(A) In consumer arbitrations, the disclosure must also state that the arbitrator will inform the parties as required under (d) if he or she subsequently receives an offer while that arbitration is pending.

(B) In all other arbitrations, the disclosure must also state that the arbitrator will not inform the parties if he or she subsequently receives an offer while that arbitration is pending.

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(3) A party may disqualify the arbitrator based on this disclosure by serving a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91(b).

(c) Acceptance of offers under (b) prohibited unless intent disclosed

If an arbitrator fails to make the disclosure required by subdivision (b) of this standard, from the time of appointment until the conclusion of the arbitration the arbitrator must not entertain or accept any such offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral.

(d) Required notice of offers under (b)

If, in the disclosure made under subdivision (b), the arbitrator states that he or she will entertain offers of employment or new professional relationships covered by (b), the arbitrator may entertain such offers. However, in consumer arbitrations, from the time of appointment until the conclusion of the arbitration, the arbitrator must inform all parties to the current arbitration of any such offer and whether it was accepted as provided in this subdivision.

(1) The arbitrator in a consumer arbitration must notify the parties in writing of any such offer within five days of receiving the offer and, if the arbitrator accepts the offer, must notify the parties in writing within five days of that acceptance. The arbitrator's notice must identify the party or attorney who made the offer and provide a general description of the employment or new professional relationship that was offered including, if the offer is to serve as a dispute resolution neutral, whether the offer is to serve in a single case or multiple cases.

(2) If the arbitrator fails to inform the parties of an offer or an acceptance as required under (1), that constitutes a failure to comply with the arbitrator's obligation to make a disclosure required under these ethics standards.

(3) If an arbitrator has informed the parties in a pending arbitration about an offer as required under (1):

(A) Receiving or accepting that offer does not, by itself, constitute corruption in or misconduct by the arbitrator;

(B) The arbitrator is not also required to disclose that offer or its acceptance under standard 7; and

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(C) The arbitrator is not subject to disqualification under standard 10(a)(2), (3), or (5) solely on the basis of that offer or the arbitrator's acceptance of that offer.

(4) An arbitrator is not required to inform the parties in a pending arbitration about an offer under this subdivision if:

(A) He or she reasonably believes that the pending arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration;

(B) The offer is to serve as an arbitrator in an arbitration conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements; or

(C) The offer is for uncompensated service as a dispute resolution neutral.

~~(d)~~(e) * * *

Standard 12 amended effective July 1, 2014.

Comment to Standard 12

Subdivision (d)(1). A party may disqualify an arbitrator for failure to make required disclosures, including disclosures required by these ethics standards (see Code Civ. Proc., § 1281.91(a) and standard 10(a)). Failure to disclose, within the time required for disclosure, a ground for disqualification of which the arbitrator was then aware is also a ground for *vacatur* of the arbitrator's award (see Code Civ. Proc., § 1286.2(a)(6)(A)).

Subdivision (d)(4)(B). The arbitrations identified under this provision are only those in which, under Code of Civil Procedure section 1281.85(b) and standard 3(b)(2)(H), the ethics standards do not apply to the arbitrator.

Standard 16. Compensation

(a) * * *

(b) Before accepting appointment, an arbitrator, a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must

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inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees; ~~and~~ any special fees for cancellation, research and preparation time, or other purposes; any requirements regarding advance deposit of fees; and any practice concerning situations in which a party fails to timely pay the arbitrator's fees including whether the arbitrator will or may stop the arbitration proceedings.

Standard 16 amended effective July 1, 2014.

Comment to Standard 16

This standard is not intended to affect any authority a court may have to make orders with respect to the enforcement of arbitration agreements or arbitrator fees. It is also not intended to require any arbitrator or arbitration provider organization to establish a particular requirement or practice concerning fees or deposits, but only to inform the parties if such a requirement or practice has been established.

Standard 17. Marketing

(a) An arbitrator must be truthful and accurate in marketing his or her services. An arbitrator may advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment ~~and~~ but must not make any representation that directly or indirectly implies favoritism or a specific outcome. An arbitrator must ensure that his or her personal marketing activities and any activities carried out on his or her behalf, including any activities of a provider organization with which the arbitrator is affiliated, comply with this requirement.

(b) * * *

(c) An arbitrator must not solicit appointment as an arbitrator in a specific case or specific cases.

(d) As used in this standard, "solicit" means to communicate in person, by telephone, or through real-time electronic contact to any prospective participant in the arbitration concerning the availability for professional employment of the arbitrator in which a significant motive is pecuniary gain. The term solicit does not include:

(1) responding to a request from all parties in a case to submit a proposal to provide arbitration services in that case; or (2) responding to

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inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

Standard 17 amended effective July 1, 2014.

Comment to Standard 17

Subdivision (b) and (c). Arbitrators should keep in mind that, in addition to these restrictions on solicitation, several other standards contain related disclosure requirements. For example, under standard 7(d)(4)-(6), arbitrators must disclose information about their past, current, and prospective service as an arbitrator or other dispute resolution for a party or attorney in the arbitration. Under standard 8(b)(1)(C) and (D), in consumer arbitrations administered by a provider organization, arbitrators must disclose if the provider organization has coordinated, administered, or provided dispute resolution services, is coordinating, administering, or providing such services, or has an agreement to coordinate, administer, or provide such services for a party or attorney in the arbitration. And under standard 12 arbitrators must disclose if, while an arbitration is pending, they will entertain offers from a party or attorney in the arbitration to serve as a dispute resolution neutral in another case.

~~This~~ These provisions ~~is~~ are not intended to prohibit an arbitrator from accepting another arbitration from a party or attorney in the arbitration while the first matter is pending, as long as the arbitrator complies with the provisions of standard 12 and there was no express solicitation of this business by the arbitrator.

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Replace the AAA Commercial Arbitration Rules on pages 125-147 of the Documentary Supplement with the following:

AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES*

Amended and Effective September 1, 2022
Fee Schedule Amended and Effective May 1, 2018

R-1. Agreement of Parties+

(a) The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These Rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these Rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties agree or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $100,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. Parties may also agree to use these Procedures in larger cases. Unless the parties agree otherwise, these Procedures will not apply in cases involving more

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+ The AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.

+ Beginning June 1, 2021, the AAA will apply the Consumer Arbitration Fee Schedule to any dispute between an online marketplace or platform and an individual user or subscriber (using or subscribed to the service as an individual and not incorporated) and the dispute does not involve work or work-related claims.

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than two parties. The Expedited Procedures shall be applied as described in Procedures E-1 through E-10, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $1,000,000, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under $1,000,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Procedures L-1 through L-3 in addition to any other portion of these Rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Procedure E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-60 of these Rules.

R-2. AAA and Delegation of Duties

(a) When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration.

(b) The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

(c) The AAA requires that parties and their representatives conduct themselves in accordance with the AAA's Standards of Conduct for Parties and Representatives when utilizing the AAA's services. Failure to do so may result in the AAA's declining to further administer a particular case or caseload.

(d) For cases proceeding under the Procedures for Large, Complex Commercial Disputes, and for other cases where the AAA, in its sole discretion, deems it appropriate, the AAA may act through its Administrative Review Council to take the following administrative actions:

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i) determine challenges to the appointment or continuing service of an arbitrator;

ii) make an initial determination as to the locale of the arbitration, subject to the power of the arbitrator to make a final determination; or

iii) decide whether a party has met the administrative requirements to file an arbitration under these Rules.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators (“National Roster”) and shall appoint arbitrators as provided in these Rules. The term “arbitrator” in these Rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements and Procedures

(a) Filing Requirements

i) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party (“claimant”) filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties’ contract which provides for arbitration. The filing fee must be paid before a matter is considered properly filed.

ii) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties’ contract which provides for arbitration.

a) The filing party shall include a copy of the court order.

b) The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.

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c) The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to Rule R-33.

iii) Parties to any existing dispute who have not previously agreed to use these Rules may commence an arbitration under these Rules by filing a written Submission Agreement and the administrative filing fee. To the extent that the parties' Submission Agreement contains any variances from these Rules, such variances should be clearly stated in the Submission Agreement.

iv) Information to be included with any arbitration filing includes:

a) the name of each party;

b) the address of each party and, if known, the telephone number and email address;

c) if applicable, the name, address, telephone number, and email address of any known representative for each party;

d) a statement setting forth the nature of the claim including the relief sought and the amount involved; and

e) the locale requested if the arbitration agreement does not specify one.

(b) Filing Procedures

i) The initiating party may file or submit a dispute to the AAA in the following manner:

a) through AAA WebFile®, located at www.adr.org;

b) by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing; or

c) by emailing the complete Demand or Submission to casefiling@adr.org, with payment to follow as directed by the AAA.

ii) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.

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iii) Any papers, notices, or process necessary or proper for the initiation of an arbitration under this Rule may be served on a party:

a) by mail addressed to the party or its authorized representative at their last known address;

b) by electronic service/email, with the prior agreement of the party being served;

c) by personal service; or

d) by any other service methods provided for under the applicable procedures of the courts of the state where the party to be served is located.

iv) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.

v) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised with the arbitrator for determination.

vi) The AAA has the authority to make an administrative determination whether the filing requirements set forth in this Rule have been met.

vii) If the filing does not satisfy the filing requirements set forth in Section (a) above, the AAA shall acknowledge to all named parties receipt of the incomplete filing, and the filing may be returned to the initiating party.

(c) Authority of arbitrator. Any decision made by the AAA regarding filing requirements and procedures shall not interfere with the arbitrator's authority to determine jurisdiction pursuant to Rule R-7.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The

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respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of filing. The claimant may file an answering statement or reply in response to the counterclaim with the AAA within 14 calendar days after notice of the filing of the counterclaim is sent by the AAA.

(c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

(d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

(a) A party may at any time prior to the close of the hearing or by any earlier date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in the administrative fee, the balance of the fee is due before the change of claim or counterclaim amount may be accepted by the arbitrator. After the arbitrator is appointed, however, a party may increase the amount of its claim or counterclaim, or alter its request for non-monetary relief, only with the arbitrator's consent.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent.

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(c) A party that filed a claim or counterclaim of an undisclosed or undetermined amount must specify the amount of the claim or counterclaim to the AAA, all parties, and the arbitrator at least seven calendar days prior to the commencement of the hearing or by any other date established by the arbitrator. If the disclosed amount of the claim or counterclaim results in an increased filing fee, that fee must be paid at the time the claim or counterclaim amount is disclosed. For good cause shown and with the consent of the arbitrator, a party may proceed to the hearing with an undisclosed or undetermined claim or counterclaim, provided that the final amount of the claim or counterclaim is set forth in a post-hearing brief or submission and any appropriate filing fee is paid.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Consolidation and Joinder

(a) Consolidation

i) Two or more arbitrations may be consolidated if all parties to all of the arbitrations to be consolidated so agree.

ii) Unless all parties agree to consolidation, the party requesting consolidation of two or more arbitrations must file with the AAA and serve on all other parties a written request for consolidation with the supporting reasons for such request within 90 days of the date the AAA determines that all administrative filing requirements were satisfied for the last-filed case that is part of the consolidation request. Such time limit may be extended by the arbitrator appointed in the first-filed case upon a showing of good cause

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for the late request. The other parties to the arbitrations shall provide their written responses to the consolidation request within 10 calendar days after the AAA sends notice of receipt of the request.

iii) At its discretion, the AAA either may direct that the consolidation request be decided by the arbitrator appointed in the first-filed case or may appoint a consolidation arbitrator for the sole purpose of deciding the consolidation request.

iv) The arbitrator deciding consolidation may order consolidation of two or more cases for all purposes or for such limited purposes and under such conditions as the arbitrator may direct.

v) Absent agreement of all parties, an arbitrator appointed for the sole purpose of deciding the consolidation request shall have no further power to act, and shall be removed from the case, after the consolidation request is decided.

vi) In deciding whether to consolidate, the arbitrator or consolidation arbitrator shall take into account all relevant circumstances, including:

a) the terms and compatibility of the agreements to arbitrate,

b) applicable law,

c) the timeliness of the request to consolidate and the progress already made in the arbitrations,

d) whether the arbitrations raise common issues of law and/or fact, and

e) whether consolidation of the arbitrations would serve the interests of
justice and efficiency.

(b) Joinder

i) Additional parties may be joined to an arbitration if all parties to the arbitration and the parties proposed to be joined so agree.

ii) Absent such consent, all requests for joinder must be submitted to the AAA prior to the appointment of an arbitrator pursuant to these Rules or within 90 days of the date the AAA determines that all administrative filing

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requirements have been satisfied. The arbitrator may extend this deadline on a showing of good cause for the late request.

iii) If the existing parties and the parties proposed to be joined are unable to agree to the joinder of those additional parties to an ongoing arbitration, the arbitrator shall decide whether parties should be joined. If an arbitrator has not yet been appointed in the case, the AAA may appoint an arbitrator for the sole purpose of deciding the joinder request. Absent agreement of all parties, the arbitrator appointed for the sole purpose of deciding the joinder request shall have no further power to act, and shall be removed from the case, after the joinder request is decided.

iv) The party requesting the joinder of one or more parties to a pending arbitration must file with the AAA a written request that provides the names and contact information for such parties; the names and contact information for the parties' representatives, if known; and the supporting reasons for such request, including applicable law. The requesting party must provide a copy of the joinder request to all parties in the arbitration and all parties it seeks to join at the same time it files the request with the AAA. The other parties to the arbitration and the parties sought to be joined shall provide their written responses to the joinder request within 14 days after the AAA sends notice of receipt of the request for joinder.

v) The requesting party shall comply with the provisions of Rule R-4(a) as to all parties sought to be joined.

(c) If an arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also determine:

i) whether any arbitrator previously appointed to an existing case that was consolidated shall remain on the newly constituted case;

ii) whether any arbitrator previously appointed to a case where additional parties have been joined shall remain;

iii) if appropriate, a process for selecting the arbitrator(s) to fill any vacancies; and

iv) unless agreed otherwise by the parties, the allocation among the parties of arbitrator compensation and expenses, subject to reapportionment by the arbitrator appointed to the ongoing or newly constituted case in the final award.

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(d) The AAA may take reasonable administrative actions to accomplish any consolidation or joinder ordered by the arbitrator or as agreed to by the parties. Pending the determination on a consolidation or joinder request, the AAA shall have the authority to stay the arbitration or arbitrations impacted by the consolidation or joinder request, at its sole discretion.

R-9. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-10. Mediation

In all cases where a claim or counterclaim exceeds $100,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this Rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this Rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-11. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person, by videoconference or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-12. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator that the

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applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.

Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days after the AAA sends notice of the filing of the Demand or by the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the locale, subject to the power of the arbitrator after appointment to make a final determination on the locale.

(b) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

(c) If the parties' arbitration agreement specifies more than one possible locale, the filing party may select any of the specified locales at the time of filing, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-13. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. At its discretion, the AAA may limit the number of strikes permitted. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved

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on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-14. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. If a party selects an arbitrator for appointment, it shall file the name, address, telephone number, and email address of the arbitrator with the AAA. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-19 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Rule R-19(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-15. Appointment of Chairperson by Party-Appointed Arbitrators, Parties, or the AAA

(a) Where there is a panel of three or more arbitrators, one arbitrator will be designated as the panel chairperson. Such designation will be according to the terms of the parties' arbitration agreement. However, if the parties' arbitration agreement does not specify how the chairperson is to be selected, the chairperson can be designated, at the AAA's discretion, by the party-appointed arbitrators, the parties, the panel, or the AAA.

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(b) If the arbitration agreement specifies a period of time for appointment of the chairperson and no appointment is made within that period or any agreed extension, the AAA may appoint the chairperson. If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) Absent the agreement of the parties, the chairperson shall be appointed from the National Roster, and the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Rule R-13, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Rule.

R-16. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these Rules.

R-17. Number of Arbitrators

(a) The parties may agree on the number of arbitrators to hear and determine the case. If the arbitration agreement does not specify the number of arbitrators or is ambiguous, and the parties do not otherwise agree, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Use of terms such as “the arbitrator”, “an arbitrator”, or “the arbitrators” in the arbitration agreement, without further specifying the number of arbitrators, shall not be deemed by the AAA to reflect an agreement as to the number of arbitrators.

(c) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the Rule R-6-required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

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R-18. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this Rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-42.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) Disclosure of information pursuant to this Rule R-18 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-19. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:

i) partiality or lack of independence,

ii) inability or refusal to perform his or her duties with diligence and in good faith, and

iii) any grounds for disqualification provided by applicable law.

(b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Rule R-14 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified on the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

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R-20. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to R-14 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Rule R-20(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Rule R-19(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Rule R-19(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-20(a) should nonetheless apply prospectively.

(c) As set forth in Rule R-44, unless otherwise instructed by the AAA, in the Rules, or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-21. Vacancies

(a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-22. Preliminary Hearing

(a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to

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attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person, by video conference or by telephone.

(b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Procedures P-1 and P-2 of these Rules address the issues to be considered at the preliminary hearing.

R-23. Pre-Hearing Exchange and Production of Information

(a) Authority of arbitrator. The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

(b) Documents. The arbitrator may, on application of a party or on the arbitrator's own initiative:

i) require the parties to exchange documents in their possession or custody on which they intend to rely;

ii) require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;

iii) require the parties, in response to reasonable document requests, to make available to the other party documents in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, and reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv) require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

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R-24. Enforcement Powers of Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of Rules R-22 and R-23 and any other rule or procedure and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

(a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;

(b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-25. Date, Time, Place, and Method of Hearing

The arbitrator shall set the date, time, place, and method (including video, audio or other electronic means when appropriate) for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-26. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

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R-27. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-28. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-29. Official Record of Proceedings

(a) Any party desiring a transcribed record shall make arrangements directly with a transcriber or transcription service and shall notify the arbitrator and other parties of these arrangements at least seven calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording any proceeding will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties at the direction of the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the transcription or other recording.

R-30. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

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R-31. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-32. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-33. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may 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.

(c) The arbitrator may also allow for some or all of the presentation of evidence by alternative means including video, audio or other electronic means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the *Procedures for Resolution of Disputes Through Document Submission*, found in Procedure E-6.

R-34. Dispositive Motions

(a) The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines the moving party has shown that the motion is likely to succeed and to dispose of or narrow the issues in the case.

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(b) Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion.

(c) Fees, expenses, and compensation associated with a motion or an application to make a motion may be assessed as provided for in Rule R-49(c).

R-35. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-36. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

(a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

(b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to

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do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.

(c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-37. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-38. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-39. Emergency Measures of Protection

(a) Unless the parties agree otherwise, the provisions of this Rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013. This Rule shall not apply to cases administered pursuant to the Expedited Procedures.

(b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must

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include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

(c) Within one business day of receipt of notice from the AAA initiating the request referenced in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall expeditiously disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

(d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule R-7, including the authority to rule on her or his own jurisdiction, and shall resolve any disputes over the applicability of this Rule R-39.

(e) If, after consideration, the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief under applicable law, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.

(f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the non-emergency ("merits") arbitrator is appointed; thereafter such a request shall be addressed to the merits arbitrator. The emergency arbitrator shall have no further power to act after the merits arbitrator is appointed unless the emergency arbitrator is named as the merits arbitrator or as a member of the panel.

(g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.

(h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this Rule, and the references

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to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

(i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the merits arbitrator to determine finally the apportionment of such costs. The emergency arbitrator may take into consideration whether the request for emergency relief was made in good faith.

R-40. Closing of Hearing

(a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

(b) If documents or responses are to be filed as provided in Rule R-36, or if briefs are to be filed, the hearing shall be declared closed as of the date the arbitrator is satisfied that the record is complete, and such date shall occur no later than seven calendar days from the date of receipt of the last such submissions or hearing transcript.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-41. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties , the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (or 14 calendar days if the case is governed by the Expedited Procedures).

R-42. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

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R-43. Extensions of Time

The parties may modify by mutual agreement any period of time established by these Rules or the parties' arbitration agreement. The AAA or the arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-44. Serving of Notice and Communications

(a) The service methods set forth in Rule R-4(b)(iii) may also be used for the delivery of any filing, notice or communication throughout the course of the arbitration proceeding.

(b) The AAA, the arbitrator, and the parties may also use alternative methods of communication or other platforms as directed by the AAA or as agreed by the parties or directed by the arbitrator to exchange any communication or other notice required by these Rules during the course of the arbitration.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any party submitting any document or written communication to another party, the AAA or the arbitrator, shall simultaneously provide that material to all other participants, including the AAA.

(d) Failure to provide the other party with copies of communications provided to the AAA or the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.

(e) The AAA may direct that any oral or written communications sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to comply with any such direction may result in the AAA's refusal to consider the issue raised in the communication

(f) The AAA may initiate administrative communications with the parties or their representatives either jointly or individually.

(g) Any method of service on or notice to a party must be made in such a manner to provide that party with reasonable opportunity to be heard with regard to the dispute.

R-45. Confidentiality

(a) Unless otherwise required by applicable law, court order, or the parties' agreement, the AAA and the arbitrator shall keep confidential all matters relating to the arbitration or the award.

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(b) Upon the agreement of the parties or the request of any party, the arbitrator may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

R-46. Majority Decision

(a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this Rule, a majority of the arbitrators must make all decisions.

(b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

(c) Absent an objection of a party or another member of the panel, the chairperson may sign any order on behalf of the panel.

R-47. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-48. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. Signatures may be executed in electronic or digital form. The award shall be executed in the form and manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-49. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any

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interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award or any order disposing of all of the case, the arbitrator shall assess the fees, expenses, and compensation provided in Rules R-55, R-56, and R-57. The arbitrator may also assess such fees, expenses, and compensation in any order or award disposing of part of the case. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-50. Award Upon Settlement – Consent Award

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses as set forth in Rule R-49(c).

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-51. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-52. Modification of Award

(a) Within 20 calendar days after the transmittal of any award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, interpret the award or correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to re-determine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond

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to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

(b) If the arbitrator has established a different schedule for such requests, responses, and disposition, the arbitrator's schedule will supersede the deadlines set forth in this Rule.

R-53. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-54. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration or any other services provided by the AAA.

(c) Parties to an arbitration under these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Rules shall be deemed to have consented that the AAA shall not be liable to any party in any action for damages, or injunctive or other relief, for any act or omission in connection with any arbitration administered in whole or in part by the AAA or conducted under these Rules. Parties shall also be deemed to have consented that the arbitrator shall not be liable to any party in any action for damages, or injunctive or other relief, for an act or omission in connection with any arbitration administered in whole or in part by the AAA.

(e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

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R-55. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fee schedule in effect when the Demand is filed will apply throughout the pendency of the case. The administrative fees shall be paid initially by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-56. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-57. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation at the time their AAA resume is presented to the parties for consideration pursuant to Rule R-13, unless otherwise determined by the AAA. Such compensation will be consistent with the provisions of the arbitrator's executed *Notice of Compensation Arrangements*.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-58. Deposits

(a) The AAA will require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's compensation and expenses, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case. A party's failure to make the requested deposits by the date established by the AAA may result in the AAA's or the arbitrator's taking any appropriate steps as set forth in Rule R-59.

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(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.

(c) The AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

(d) The AAA will allocate the deposits requested among the parties and will establish due dates for the collection of those deposits.

R-59. Remedies for Nonpayment

If arbitrator compensation or expenses or the AAA's administrative fees have not been paid in full, the AAA may so inform the parties so that one of them may advance the required payment.

(a) Upon receipt of information from the AAA that payment for administrative fees or deposits for arbitrator compensation or expense have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment. Such measures may include, but are not limited to:

i) limiting a party's ability to assert or pursue its claim, and

ii) prohibiting a non-paying party from filing any motion.

(b) In no event, however, shall a party be precluded from defending a claim or counterclaim.

(c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.

(d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.

(e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

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(f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-60. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these Rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

PRELIMINARY HEARING PROCEDURES

P-1. General

(a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.

(b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

(a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:

i) the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to Rule R-10;

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ii) whether all necessary or appropriate parties are included in the arbitration;

iii) whether a party will seek a more detailed statement of claims, counterclaims or defenses;

iv) whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;

v) which:

a) arbitration rules;

b) procedural law; and

c) substantive law govern the arbitration;

vi) issues related to cybersecurity, privacy and data protection to provide for an appropriate level of security and compliance in connection with the proceeding;

vii) whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation:

a) any preconditions that must be satisfied before proceeding with the arbitration;

b) whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;

c) consolidation of the claims or counterclaims with another arbitration; or

d) bifurcation of the proceeding.

viii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;

ix) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;

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x) how costs of any searches for requested information or documents that would result in substantial costs should be borne;

xi) whether any measures are required to protect confidential information;

xii) Whether the parties shall disclose:

a) whether any non-party (such as a third-party funder or an insurer) has undertaken to pay or to contribute to the cost of a party's participation in the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the undertaking; and

b) whether any non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) has an economic interest in the outcome of the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the interest;

xiii) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;

xiv) whether, according to a schedule set by the arbitrator, the parties will:

a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;

b) exchange and pre-mark documents that each party intends to submit; and

c) exchange pre-hearing submissions, including exhibits;

xv) the date, time and place of the arbitration hearing;

a) whether, at the arbitration hearing,

b) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;

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xvi) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;

xvii) whether any procedure needs to be established for the issuance of subpoenas;

xviii) the identification of any ongoing, related litigation or arbitration;

xix) whether post-hearing submissions will be filed;

xx) the form of the arbitration award; and

xxi) any other matter the arbitrator considers appropriate or a party wishes to raise.

(b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

EXPEDITED PROCEDURES

E-1. Limitation on Extensions

(a) Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Rule R-5.

(b) Any other extension requests may be granted only after consideration of Procedure E-7.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, any time prior to the appointment of the arbitrator. However, after the arbitrator is appointed, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $100,000, the case will be administered under the regular Commercial Arbitration Rules unless all parties and the arbitrator agree that the case may continue to be administered under the Expedited Procedures.

E-3. Serving of Notice

In addition to notice provided by Rule R-44, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such

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oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Rule R-19.

The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Discovery, Motions, and Conduct of Proceedings

(a) At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

(b) No other discovery shall be permitted except as allowed by the arbitrator for good cause shown. If the arbitrator allows additional discovery, the AAA, in consultation with the arbitrator, may remove the case from the Expedited Procedures.

(c) There shall be no motions except as allowed by the arbitrator for good cause Shown.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds $25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall

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be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

(a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

(b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.

(c) If the parties agree to in-person hearings after a previous agreement to proceed under this Procedure, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this Procedure, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

(d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(e) Unless the parties have agreed to a form of award other than that set forth in Rule R-48, when the parties have agreed to resolve their dispute by this Procedure, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(f) If the parties agree to a form of award other than that described in Rule R-48, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(g) The award is subject to all other provisions of the regular Commercial Arbitration Rules which pertain to awards.

E-7. Date, Time, Place, and Method of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, place, and method of the hearing, to be scheduled to take place no more than 60 days after the preliminary hearing or as otherwise mutually agreed to between the parties and the arbitrator. The AAA will notify the parties in advance of the hearing date.

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E-8. The Hearing

(a) Absent good cause shown, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing.

(b) For good cause shown, the arbitrator may schedule one additional day of hearings to be completed within seven business days after the initial day of hearing or as soon as practicable as determined by the arbitrator. In cases where the hearing is scheduled to exceed one day, the AAA, in consultation with the arbitrator, may remove the case from the Expedited Procedures.

(c) Generally, there will be no stenographic record. Any party desiring a transcribed record of the hearing may arrange for one pursuant to the provisions of Rule R-29.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

(a) Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

(b) For cases that are removed from the Expedited Procedures after the preliminary hearing is held, the arbitrator shall be compensated pursuant to Rule R-57.

PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES

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 or video conference. The conference will take place as soon as practicable 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

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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.

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. With the exception in paragraph (b) below, if the parties do not agree upon the number of arbitrators and a claim or counterclaim involves at least $3,000,000 then three arbitrators shall hear and determine the case; otherwise one arbitrator shall hear and determine the case.

(b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, regardless of the size of the claim involved in the dispute.

(c) The AAA shall appoint arbitrator 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 shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

(a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.

(b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with Procedures P-1 and P-2 of these rules.

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(c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.

(d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with Rule R-23 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within a scheduling order.

(e) The arbitrator, or any single member of the panel, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within their discretion, including, without limitation, the issuance of orders set forth in Rules R-23 and R-24 of the AAA Commercial Rules.

(f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

(g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fees

Administrative Fee Schedules

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The AAA offers parties two options for the payment of administrative fees.

For both schedules, administrative fees are based on the amount of the claim or counterclaim and are to be paid by the party bringing the claim or counterclaim at the time the demand or claim is filed with the AAA. *Arbitrator compensation is not included in either schedule.* Unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in an award.

Standard Fee Schedule: A two-payment schedule that provides for somewhat higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing.

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Flexible Fee Schedule: A three-payment schedule that provides for lower initial filing fee and then spreads subsequent payments out over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing.

Standard Fee Schedule

Amount of Claim	Initial Filing Fee	Final Fee
Less than $75,000	$925	$800
$75,000 to less than $150,000	$1,925	$1,375
$150,000 to less than $300,000	$2,900	$2,200
$300,000 to less than $500,000	$4,400	$3,850
$500,000 to less than $1,000,000	$5,500	$6,825
$1,000,000 to less than $10,000,000	$7,700	$8,475
$10,000,000 and above	$11,000 plus .01% of the amount of the claim above $10,000,000 up to $65,000	$13,750
Undetermined Monetary Claims	$7,700	$8,475
Nonmonetary Claims	$3,500	$2,750
Deficient Filing Fee	$500	
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. *See below for additional details.*	

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.

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- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.

- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.

- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of $4,400 and a Final Fee of $3,850.

- **Nonmonetary Claims:** The non-monetary filing fee is the minimum filing fee for any case requesting non-monetary relief. Where a party seeks both monetary damages and non-monetary relief, the higher of the two filing fees will apply.

Refunds—Standard Fee Schedule:

Initial Filing Fees: Subject to a $500 minimum non-refundable Initial Filing Fee for all cases, refunds of Initial Filing Fees for settled or withdrawn cases will be calculated from the date the AAA receives the demand for arbitration as follows:

- within 5 calendar days of filing—100%.
- between 6 and 30 calendar days of filing—50%
- between 31 and 60 calendar days of filing—25%

However, *no refunds will be made once:*

- any arbitrator has been appointed (including one arbitrator on a three-arbitrator panel).

Final Fees: If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the AAA is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

Flexible Fee Schedule

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Less than $75,000	Only available for claims $150,000 and above		

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$75,000 to less than $150,000			
$150,000 to less than $300,000	$1,825	$1,875	$2,200
$300,000 to less than $500,000	$2,200	$3,300	$3,850
$500,000 to less than $1,000,000	$2,750	$4,725	$6,825
$1,000,000 to less than $10,000,000	$3,850	$6,275	$8,475
$10,000,000 and above	$5,500	$10,000 plus .01% of the claim amount above $10,000,000 up to $65,000	$13,750
Undetermined Monetary Claims	$3,850	$6,275	$8,475
Nonmonetary Claims	$2,200	$2,475	$2,750
Deficient Filing Fee	$500		
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. *See below for additional details.*		

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.

- The **Proceed Fee** must be paid within 90 days of the filing of the demand for arbitration or a counterclaim before the AAA will proceed with the further administration of the arbitration, including the arbitrator appointment process.

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  - If a Proceed Fee is not submitted within 90 days of the filing of the Claimant's Demand for Arbitration, the AAA will administratively close the file and notify all parties.

  - If the Flexible Fee Schedule is being used for the filing of a counterclaim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.

- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.

- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of $2,200, a $3,300 Proceed Fee and a Final Fee of $3,850.

- **Nonmonetary Claims:** The non-monetary filing fee is the minimum filing fee for any case requesting non-monetary relief. Where a party seeks both monetary damages and non-monetary relief, the higher of the two filing fees will apply.

Refunds—Flexible Fee Schedule:

Under the Flexible Fee Schedule, **Filing Fees** and **Proceed Fees** are ***NON-REFUNDABLE*** once incurred.

Final Fees: If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the AAA is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

Additional Fees Applicable to the Standard Fee and Flexible Fee Schedules

Additional Party Fees: Additional Party Fees will be charged as described above, and in addition:

- Additional Party Fees are payable by the party, whether a claimant or respondent, that names the additional parties to the arbitration.

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- Such fees shall not exceed 50% of the base fees in the fee schedule, except that the AAA reserves the right to assess additional fees where there are more than 10 separately represented parties.

- An example of the Additional Party Fee is as follows: A single claimant represented by one attorney brings an arbitration against two separate respondents, however, both respondents are represented by the same attorney. No Additional Party Fees are due. However, if the respondents are represented by different attorneys, or if one of the respondents is self-represented and the other is represented by an attorney, an additional 10% of the Initial Filing fee is charged to the claimant. If the case moves to the Proceed Fee stage or the Final Fee stage, an additional 10% of those fees will also be charged to the claimant.

Incomplete or Deficient Filings: Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of all parties to have the arbitration administered by the AAA.

- Where the AAA is unable to obtain the parties' agreement to have the AAA administer the arbitration, the AAA will not proceed further and will administratively close the case. The AAA will also return the filing fees to the filing party, less the amount specified in the fee schedule above for deficient filings.

- Parties that file Demands for Arbitration that are incomplete or otherwise do not meet the filing requirements contained in the rules shall also be charged the amount specified above for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

Arbitrations in Abeyance: Cases held in abeyance by mutual agreement for one year will be assessed an annual abeyance fee of $500, to be split equally among the parties. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the arbitration will be administratively closed. All filing requirements, including the payment of filing fees, must be met before a matter will be placed in abeyance.

Fees for Additional Services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA that go beyond those provided for in the AAA's rules, but which are required as a result of the parties' agreement or stipulation.

Hearing Room Rentals: The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

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Replace the AAA Consumer-Related Disputes Supplementary Procedures on pages 149-154 of the Documentary Supplement with the following:

AMERICAN ARBITRATION ASSOCIATION
CONSUMER ARBITRATION RULES*

Rules Amended and Effective September 1, 2014
Cost of Arbitration Effective November 1, 2020

Filing a Case and Initial AAA Administrative Steps

R-1. Applicability (When the AAA Applies These Rules)

(a) The parties shall have made these Consumer Arbitration Rules ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and

1) have specified that these Consumer Arbitration Rules shall apply;

2) have specified that the Supplementary Procedures for Consumer-Related Disputes shall apply, which have been amended and renamed the Consumer Arbitration Rules;

3) the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules; or

4) the arbitration agreement is contained within a consumer agreement, as defined below, that specifies a particular set of rules other than the Consumer Arbitration Rules.

When parties have provided for the AAA's rules or AAA administration as part of their consumer agreement, they shall be deemed to have agreed that the application of the AAA's rules and AAA administration of the consumer arbitration shall be an essential term of their consumer agreement.

The AAA defines a consumer agreement as an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use.

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Examples of contracts that typically meet the criteria for application of these Rules, if the contract is for personal or household goods or services and has an arbitration provision, include, but are not limited to the following:

- Credit card agreements
- Telecommunications (cell phone, ISP, cable TV) agreements
- Leases (residential, automobile)
- Automobile and manufactured home purchase contracts
- Finance agreements (car loans, mortgages, bank accounts)
- Home inspection contracts
- Pest control services
- Moving and storage contracts
- Warranties (home, automobile, product)
- Legal funding
- Health and fitness club membership agreements
- Travel services
- Insurance policies
- Private school enrollment agreements

Examples of contracts that typically do not meet the criteria for application of these Rules, should the contract contain an arbitration provision, include, but are not limited to the following:

- Home construction and remodeling contracts
- Real estate purchase and sale agreements
- Condominium or homeowner association by-laws
- Business insurance policies (including crop insurance)
- Commercial loan and lease agreements
- Commercial guaranty agreements

(b) When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

(c) The consumer and the business may agree to change these Rules. If they agree to change the Rules, they must agree in writing. If the consumer and the business want to change these Rules after the appointment of the arbitrator, any changes may be made only with the approval of the arbitrator.

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(d) The AAA administers consumer disputes that meet the due process standards contained in the Consumer Due Process Protocol and the Consumer Arbitration Rules. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the Consumer Due Process Protocol. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

(e) The AAA has the initial authority to apply or not to apply the Consumer Arbitration Rules. If either the consumer or the business disagrees with the AAA's decision, the objecting party must submit the objection by the due date for filing an answer to the demand for arbitration. If an objection is filed, the arbitrator shall have the authority to make the final decision on which AAA rules will apply.

(f) If, within 30 days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration for 30 days to permit the party to obtain a stay of arbitration from the court.

(g) Where no disclosed claims or counterclaims exceed $25,000, the dispute shall be resolved by the submission of documents only/desk arbitration (see R-29 and the Procedures for the Resolution of Disputes through Document Submission below). Any party, however, may ask for a hearing. The arbitrator also may decide that a hearing is necessary.

R-2. Starting Arbitration under an Arbitration Agreement in a Contract

(a) Arbitration filed under an arbitration agreement naming the AAA shall be started in the following manner:

(1) The party who starts the arbitration (referred to as the "claimant" throughout the arbitration) must contact, in writing, the party that the case is filed against (referred to as the "respondent" throughout the arbitration) that it wishes to arbitrate a dispute. This written contact is referred to as the Demand for Arbitration ("Demand"). The Demand must do the following:

- Briefly explain the dispute
- List the names and addresses of the consumer and the business, and, if known, the names of any representatives of the consumer and the business
- Specify the amount of money in dispute, if applicable

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- Identify the requested location for the hearing if an in-person hearing is requested
- State what the claimant wants

(2) The claimant must also send one copy of the Demand to the AAA at the same time the demand is sent to the respondent. When sending a Demand to the AAA, the claimant must also send the following:

- A copy of the arbitration agreement contained in the contract and/or agreement and/or purchase document
- The proper filing fee; the amount of the filing fee can be found in the Costs of Arbitration section at the end of these Rules.

(3) If the arbitration is pursuant to a court order, the claimant must send one copy of the Demand to the AAA at the same time the Demand is sent to the respondent. When sending a demand to the AAA, the claimant must also send the following:

- A copy of the court order
- A copy of the arbitration agreement contained in the contract and/or agreement and/or purchase document
- The proper filing fee

The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party either to make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.

The claimant may file by mail. The mailing address of the AAA's Case Filing Services is:

American Arbitration Association Case Filing Services
1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043

Or, the claimant may file online using AAA WebFile: https://www.adr.org

Or, the claimant may file at any of the AAA's offices.

(b) The AAA will send a written notice letting the consumer and the business know the Demand for Arbitration has been received.

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(c) The respondent may submit a written response to the Demand, known as an "answer," which describes how the respondent responds to the claimant's claim. The answer must be sent to the AAA within 14 calendar days after the date the AAA notifies the parties that the Demand for Arbitration was received and all filing requirements were met. The answer must be

- in writing,
- sent to the AAA, and
- sent to the claimant at the same time.

(d) The respondent may also file a counterclaim, which is the respondent filing a Demand against the claimant. If the respondent has a counterclaim, the counterclaim must briefly explain the dispute, specify the amount of money involved, and state what the respondent wants.

(e) If no answer is filed within 14 calendar days, the AAA will assume that the respondent does not agree with the claim filed by the claimant. The case will move forward after 14 days regardless of whether an answer is filed.

(f) When sending a Demand or an answer, the consumer and the business are encouraged to provide enough details to make the dispute clear to the arbitrator.

R-3. Agreement to Arbitrate When There is No AAA Arbitration Clause

If the consumer and business do not have an arbitration agreement or their arbitration agreement does not name the AAA, the parties may agree to have the AAA arbitrate their dispute. To start the arbitration, the parties must send the AAA a submission agreement, which is an agreement to arbitrate their case with the AAA, signed by the consumer and the business (email communications between all parties to a dispute reflecting an agreement to arbitrate also is acceptable). The submission agreement must

- be in writing (electronic communication is acceptable);
- be signed by both parties;
- briefly explain the dispute;
- list the names and addresses of the consumer and the business;
- specify the amount of money involved;
- specify the requested location for the hearing if an in-person hearing is requested; and
- state the solution sought.

The parties should send one copy of the submission agreement to the AAA. They must also send the proper filing fees. A fee schedule can be found in the Costs of Arbitration section at the end of these Rules.

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R-4. AAA Administrative Fees

As a not-for-profit organization, the AAA charges fees to compensate it for the cost of providing administrative services. The fee schedule in effect when the case is filed shall apply for all fees charged during the administration of the case. The AAA may, in the event of the consumer's extreme hardship, defer or reduce the consumer's administrative fees.

AAA fees shall be paid in accordance with the Costs of Arbitration section found at the end of these Rules.

R-5. Neutral Arbitrator's Compensation

(a) Arbitrators serving under these Rules shall be compensated at a rate established by the AAA.

(b) Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

(c) Arbitrator compensation shall be paid in accordance with the Costs of Arbitration section found at the end of these Rules.

R-6. Depositing Neutral Arbitrator's Compensation with the AAA

The AAA may require the parties to deposit in advance of any hearings such sums of money as it decides are necessary to cover the expense of the arbitration, including the arbitrator's fee, and shall render an accounting to the parties and return any unused money at the conclusion of the case.

R-7. Expenses

Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne in accordance with the Costs of Arbitration section found at the end of these Rules.

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R-8. Changes of Claim

Once a Demand has been filed, any new claims or counterclaims, or changes to the claim or counterclaim, must be made in writing and sent to the AAA. The party making the new or different claim or counterclaim shall send a copy to the opposing party. As with the original Demand or counterclaim, a party shall have 14 calendar days from the date the AAA notifies the parties it received the new or different claim or counterclaim to file an answering statement with the AAA.

If an arbitrator has already been appointed, a new or different claim or counterclaim may only be considered if the arbitrator allows it.

R-9. Small Claims Option for the Parties

If a party's claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration as follows:

(a) The parties may take their claims to small claims court without first filing with the AAA.

(b) After a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA, a party can send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case.

(c) After the arbitrator is appointed, if a party wants to take the case to small claims court and notifies the opposing party and the AAA, it is up to the arbitrator to determine if the case should be decided in arbitration or if the arbitration case should be closed and the dispute decided in small claims court.

R-10. Administrative Conference with the AAA

At the request of any party or if the AAA should so decide, the AAA may have a telephone conference with the parties and/or their representatives. The conference may address issues such as arbitrator selection, the possibility of a mediated settlement, exchange of information before the hearing, timing of the hearing, the type of hearing that will be held, and other administrative matters.

R-11. Fixing of Locale (the city, county, state, territory and/or country where the arbitration will take place)

If an in-person hearing is to be held and if the parties do not agree to the locale where the hearing is to be held, the AAA initially will determine the locale of the arbitration. If a party does not agree with the AAA's decision, that party can

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ask the arbitrator, once appointed, to make a final determination. The locale determination will be made after considering the positions of the parties, the circumstances of the parties and the dispute, and the Consumer Due Process Protocol.

R-12. Business Notification and Publicly-Accessible Consumer Clause Registry

Beginning September 1, 2014, a business that provides for or intends to provide for these Rules or another set of AAA Rules in a consumer contract (as defined in R-1) should

1. notify the AAA of the existence of such a consumer contract or of its intention to do so at least 30 days before the planned effective date of the contract.

2. provide the AAA a copy of the arbitration agreement.

Upon receiving the arbitration agreement, the AAA will review the agreement for material compliance with due process standards contained in the Consumer Due Process Protocol and the Consumer Arbitration Rules (see Rule 1(d)). There is a nonrefundable fee to conduct this initial review and maintain a publicly-available clause registry, which is detailed in the Costs of Arbitration section found at the end of these Rules. Any subsequent changes, additions, deletions, or amendments to a currently-registered arbitration agreement must be resubmitted for review and a review fee will be assessed at that time. The AAA will decline to administer consumer arbitrations arising out of that arbitration agreement where the business fails to pay the review fee.

If a business does not submit its arbitration agreement for review and a consumer arbitration then is filed with the AAA, the AAA will conduct an expedited review at that time. Along with any other filing fees that are owed for that case, the business also will be responsible for paying the nonrefundable review and Registry fee (including any fee for expedited review at the time of filing) for this initial review, which is detailed in the Costs of Arbitration section found at the end of these Rules. The AAA will decline to administer consumer arbitrations arising out of that arbitration agreement if the business declines to pay the review and Registry fee.

After the AAA reviews the submitted consumer clause, receives the annual consumer registry fee, and determines it will administer consumer-related disputes filed pursuant to the consumer clause, the business will be included on the publicly-accessible Consumer Clause Registry. This Consumer Clause Registry maintained by the AAA will contain the name of the business, the address, and the consumer arbitration clause, along with any related documents as deemed necessary by the

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AAA. The AAA's review of a consumer arbitration clause and determination whether or not to administer arbitrations pursuant to that clause is only an administrative determination by the AAA and cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause. Consumer arbitration agreements may be registered at: www.adr.org/consumerclauseregistry or via email at consumerreview@adr.org.

For more information concerning the Consumer Clause Registry, please visit the AAA's website at www.adr.org/consumerclauseregistry.

The Registry fee to initially review a business's agreement and maintain the clause registry list is a yearly, non-refundable fee for the business's arbitration agreement. Any different arbitration agreements submitted by the same business or its subsidiaries must be submitted for review and are subject to the current review fee.

If the AAA declines to administer a case due to the business's non-compliance with this notification requirement, the parties may choose to submit their dispute to the appropriate court.

R-13. AAA and Delegation of Duties

When the consumer and the business agree to arbitrate under these Rules or other AAA rules, or when they provide for arbitration by the AAA and an arbitration is filed under these Rules, the parties also agree that the AAA will administer the arbitration. The AAA's administrative duties are set forth in the parties' arbitration agreement and in these Rules. The AAA will have the final decision on which office and which AAA staff members will administer the case. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-14. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

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(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

Appointing the Arbitrator

R-15. National Roster of Arbitrators

The AAA maintains a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators from this National Roster to resolve the parties' dispute(s).

R-16. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not agreed to a process for appointing the arbitrator, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint an arbitrator from the National Roster.

(b) If the parties' arbitration agreement provides for three or more arbitrators and they have not appointed the arbitrators and have not agreed to a process for appointing the arbitrators, immediately after the filing of the submission agreement or the answer, or after the deadline for filing the answer, the AAA will administratively appoint the arbitrators from the National Roster. The AAA will appoint the chairperson.

(c) Arbitrator(s) serving under these Rules will be neutral and must meet the standards of R-19 with respect to being impartial and independent.

R-17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators and the parties do not agree on the number, the dispute shall be heard and decided by one arbitrator.

R-18. Disclosure

(a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, must provide information to the AAA of any circumstances likely to raise justifiable doubt as to whether the arbitrator can remain impartial or independent. This disclosure of information would include

(1) any bias;

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(2) any financial interest in the result of the arbitration;

(3) any personal interest in the result of the arbitration; or

(4) any past or present relationship with the parties or their representatives.

Such obligation to provide disclosure information remains in effect throughout the arbitration. A failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-50.

(b) If the AAA receives such information from the arbitrator or another source, the AAA will communicate the information to the parties. If the AAA decides it is appropriate, it will also communicate the information to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosing such information does not mean that the arbitrator considers the disclosed information will likely affect his or her ability to be impartial or independent.

R-19. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties carefully and in good faith. The AAA may disqualify an arbitrator who shows

(1) partiality or lack of independence;

(2) inability or refusal to perform his or her duties with diligence and in good faith; or

(3) any grounds for disqualification provided by applicable law.

(b) If a party objects to the continued service of an arbitrator, or if the AAA should so decide to raise the issue of whether the arbitrator should continue on the case, the AAA will decide if the arbitrator should be disqualified. After gathering the opinions of the parties, the AAA will decide and that decision shall be final and conclusive.

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R-20. Vacancies

If for any reason an arbitrator cannot or is unwilling to perform the duties of the office, the AAA may declare the office vacant. Any vacancies shall be filled based on the original procedures used to appoint the arbitrator. If a substitute arbitrator is appointed, the substitute arbitrator will decide if it is necessary to repeat all or part of any prior ruling or hearing.

Pre-Hearing Preparation

R-21. Preliminary Management Hearing with the Arbitrator

(a) If any party asks for, or if the AAA or the arbitrator decides to hold one, the arbitrator will schedule a preliminary management hearing with the parties and/or their representatives as soon as possible. The preliminary management hearing will be conducted by telephone unless the arbitrator decides an in-person preliminary management hearing is necessary.

(b) During the preliminary management hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of issues and claims, scheduling of the hearings, and any other preliminary matters.

(c) The arbitrator shall promptly issue written orders that state the arbitrator's decisions made during or as a result of the preliminary management hearing. The arbitrator may also conduct additional preliminary management hearings if the need arises.

R-22. Exchange of Information between the Parties

(a) If any party asks or if the arbitrator decides on his or her own, keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct

1) specific documents and other information to be shared between the consumer and business, and

2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.

(b) Any exhibits the parties plan to submit at the hearing need to be shared between the parties at least five business days before the hearing, unless the arbitrator sets a different exchange date.

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(c) No other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.

(d) The arbitrator has authority to resolve any disputes between the parties about exchanging information.

R-23. Enforcement Powers of the Arbitrator

The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to:

(a) an order setting the conditions for any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing in order to preserve such confidentiality;

(b) to the extent the exchange of information takes place pursuant to R-22, imposing reasonable search limitations for electronic and other documents if the parties are unable to agree;

(c) allocating costs of producing documentation, including electronically-stored documentation;

(d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and

(e) issuing any other enforcement orders that the arbitrator is empowered to issue under applicable law.

R-24. Written Motions (except for Dispositive Motions—see R-33)

The arbitrator may consider a party's request to file a written motion (except for Dispositive Motions— see R-33) only after the parties and the arbitrator conduct a conference call to attempt to resolve the issue that gives rise to the proposed motion. Only after the parties and the arbitrator hold the call may the arbitrator consider a party's request to file a written motion. The arbitrator has the sole discretion to allow or deny the filing of a written motion and his or her decision is final.

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R-25. Representation of a Party

Any party may participate in the arbitration without representation, or may be represented by counsel or other authorized representative, unless such choice is prohibited by applicable law. A party intending to be represented shall give the opposing party and the AAA the name, address, and contact information of the representative at least three business days before the hearing where that representative will first appear in the case. It will be considered proper notice if a representative files the arbitration demand or answer or responds for a party during the course of the arbitration.

While parties do not need an attorney to participate in arbitration, arbitration is a final, legally-binding process that may impact a party's rights. As such, parties may want to consider consulting an attorney.

R-26. Setting the Date, Time, and Place (the physical site of the hearing within the designated locale) of Hearing

The arbitrator will set the date, time, and place for each hearing within the locale as determined in R-11. A hearing may be by telephone or in person. For their part, the parties commit to

(1) respond promptly to the arbitrator when he or she asks what dates the parties are available to have the hearings;

(2) cooperate in the scheduling of the hearing on the earliest possible date; and

(3) follow the hearing schedule set up by the arbitrator.

The AAA will send a notice of the hearing to the parties at least 10 days before the hearing date, unless the parties agree to a different time frame.

R-27. Written Record of Hearing

(a) If a party wants a written record of the hearing, that party must make such arrangement directly with a stenographer (court reporter) and notify the opposing parties, the AAA, and the arbitrator of these arrangements at least three business days before the hearing. The party or parties who request the written record shall pay the cost of the service.

(b) No other type of recording will be allowed unless the parties agree or the arbitrator directs a different form of recording.

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(c) The arbitrator may resolve disputes between the parties over who will pay the costs of the written record or other type of recording.

(d) The parties can agree or the arbitrator may decide that the transcript (written record) is the official record of the hearing. If it is the official record of the hearing, the transcript must be given to the arbitrator and made available to all the parties so that it can be reviewed. The date, time, and place of the inspection will be decided by the arbitrator.

R-28. Interpreters

If a party wants an interpreter present for any part of the process, that party must make arrangements directly with the interpreter and shall pay for the costs of the service.

R-29. Documents-Only Procedure

Disputes may be resolved by submission of documents and without in-person or telephonic hearings. For cases being decided by the submission of documents only, the Procedures for the Resolution of Disputes through Document Submission (found at the end of these Rules) shall supplement these Rules. These Procedures will apply where no disclosed claims or counterclaims exceed $25,000 (see R-1(g)), unless any party requests an in-person or telephonic hearing or the arbitrator decides that a hearing is necessary.

Hearing Procedures

R-30. Attendance at Hearings

The arbitrator and the AAA will keep information about the arbitration private except to the extent that a law provides that such information shall be shared or made public. The parties and their representatives in the arbitration are entitled to attend the hearings. The arbitrator will determine any disputes over whether a non-party may attend the hearing.

R-31. Oaths

Before starting the hearing, each arbitrator may take an oath of office and, if required by law, shall do so. If the arbitrator determines that witnesses shall testify under oath, then the arbitrator will direct the oath be given by a duly-qualified person.

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R-32. Conduct of Proceedings

(a) The claimant must present evidence to support its claim. The respondent must then present evidence to support its defense. Witnesses for each party also must answer questions from the arbitrator and the opposing party. The arbitrator may change this procedure, as long as each party has the right to be heard and is given a fair opportunity to present its case.

(b) When the arbitrator decides it is appropriate, the arbitrator may also allow the parties to present evidence in alternative ways, including web conferencing, Internet communication, and telephonic conferences. All procedures must provide the parties with a full and equal opportunity to present any evidence that the arbitrator decides is material and relevant to deciding the dispute. If the alternative ways to present evidence involve witnesses, those ways may include that the witness submit to direct and cross-examination questioning.

(c) The arbitrator will use his or her discretion to resolve the dispute as quickly as possible and may direct the parties to present the evidence in a certain order, or may split the proceedings into multiple parts and direct the parties in the presentation of evidence.

(d) The hearing generally will not exceed one day. However, if a party shows good cause, the arbitrator may schedule additional hearings within seven calendar days after the initial day of hearing.

(e) The parties may agree in writing to waive oral hearings.

R-33. Dispositive Motions

The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

(a) The parties may offer relevant and material evidence and must produce any evidence the arbitrator decides is necessary to understand and decide the dispute. Following the legal rules of evidence shall not be necessary. All evidence should be taken in the presence of the arbitrator and all of the parties, unless any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine what evidence will be admitted, what evidence is relevant, and what evidence is material to the case. The arbitrator may also exclude evidence that the arbitrator decides is cumulative or not relevant.

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(c) The arbitrator shall consider applicable principles of legal privilege, such as those that involve the confidentiality of communications between a lawyer and a client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so on the request of any party or on the arbitrator's own determination. If a party requests the arbitrator sign a subpoena, that party shall copy the request to the other parties in the arbitration at the same time it is provided to the arbitrator.

R-35. Evidence by Affidavit and Post-Hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit rather than in-person testimony but will give this evidence only such credence as the arbitrator decides is appropriate. The arbitrator will consider any objection to such evidence made by the opposing party.

(b) If the parties agree or the arbitrator decides that documents or other evidence need to be submitted to the arbitrator after the hearing, those documents or other evidence will be filed with the AAA so that they can be sent to the arbitrator. All parties will be given the opportunity to review and respond to these documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to inspect property or conduct an investigation in connection with the arbitration will request that the AAA inform the parties. The arbitrator will set the date and time of the inspection and investigation, and the AAA will notify the parties. Any party who would like to be present at the inspection or investigation may attend. If one or all parties are not present at the inspection or investigation, the arbitrator will make an oral or written report to the parties and allow them an opportunity to comment.

R-37. Interim Measures (a preliminary decision made by the arbitrator involving part or all of the issue(s) in dispute in the arbitration)

(a) The arbitrator may grant whatever interim measures he or she decides are necessary, including granting an injunction and ordering that property be protected.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require a security payment for the costs of such measures.

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(c) When making a decision on an interim measure, the arbitrator may grant any remedy, relief, or outcome that the parties could have received in court.

(d) A party to an arbitration agreement under these Rules may instead file in state or federal court for interim relief. Applying to the court for this type of relief, including temporary restraining orders, is consistent with the agreement to arbitrate and will not be considered a waiver of the right to arbitrate.

R-38. Postponements

The arbitrator may postpone any hearing

(a) if requested by a party, and the party shows good cause for the postponement;

(b) if all parties agree to a postponement;

(c) on his or her own decision.

R-39. Arbitration in the Absence of a Party or Representative

The arbitration may proceed even if any party or representative is absent, so long as proper notice was given and that party or representative fails to appear or obtain a postponement from the arbitrator. An award cannot be made only because of the default of a party. The arbitrator shall require the party who participates in the hearing to submit the evidence needed by the arbitrator to make an award.

Conclusion of the Hearing

R-40. Closing of Hearing

The arbitrator must specifically ask all parties whether they have any further proofs to offer or witnesses to be heard. When the arbitrator receives negative replies or he or she is satisfied that the record is complete, the arbitrator will declare the hearing closed.

If briefs or other written documentation are to be filed by the parties, the hearing shall be declared closed as of the final date set by the arbitrator. Absent agreement of the parties, the time that the arbitrator has to make the award begins upon the closing of the hearing. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

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R-41. Reopening of Hearing

If a party requests, or if the arbitrator decides to do so, the hearing may be reopened at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. If the arbitrator reopens the hearing, he or she shall have 30 days from the closing of the reopened hearing within which to make an award.

R-42. Time of Award

The award shall be issued promptly by the arbitrator and, unless the parties agree differently or the law indicates a different time frame, no later than 30 calendar days from the date the hearing is closed, or, if the case is a documents-only procedure, 14 calendar days from the date the arbitrator set for his or her receipt of the final statements and proofs. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

R-43. Form of Award

(a) Any award shall be in writing and executed in the form and manner required by law.

(b) The award shall provide the concise written reasons for the decision unless the parties all agree otherwise. Any disagreements over the form of the award shall be decided by the arbitrator.

(c) The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.

R-44. Scope of Award

(a) The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and divide up the fees, expenses, and compensation related to such award as the arbitrator decides is

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appropriate, subject to the provisions and limitations contained in the Costs of Arbitration section.

(c) The arbitrator may also allocate compensation, expenses as defined in sections (v) and (vii) of the Costs of Arbitration section, and administrative fees (which include Filing and Hearing Fees) to any party upon the arbitrator's determination that the party's claim or counterclaim was filed for purposes of harassment or is patently frivolous.

(d) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-4, R-5, and R-7 in favor of any party, subject to the provisions and limitations contained in the Costs of Arbitration section.

R-45. Award upon Settlement

If the parties settle their dispute at any point during the arbitration and at the parties' request, the arbitrator may lay out the terms of the settlement in a "consent award" (an award drafted and signed by the arbitrator that reflects the settlement terms of the parties). A consent award must include a division of the arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses. Consent awards will not be made available to the public per Rule 43(c) unless the parties agree otherwise.

R-46. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-47. Modification of Award for Clerical, Typographical, or Mathematical Errors

(a) Within 20 days after the award is transmitted, any party, upon notice to the opposing parties, may contact the AAA and request that the arbitrator correct any clerical, typographical, or mathematical errors in the award. The arbitrator has no power to re-determine the merits of any claim already decided.

(b) The opposing parties shall be given 10 days to respond to the request. The arbitrator shall make a decision on the request within 20 days after the AAA transmits the request and any responses to the arbitrator.

(c) If applicable law provides a different procedural time frame, that procedure shall be followed.

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Post Hearing

R-48. Release of Documents for Judicial Proceedings

The AAA shall give a party certified copies of any records in the AAA's possession that may be required in judicial proceedings relating to the arbitration, except for records determined by the AAA to be privileged or confidential. The party will have to pay a fee for this service.

R-49. Applications to Court and Exclusion of Liability

(a) No court or judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA, AAA employees, nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA, or any AAA employee as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA, and AAA employees are not competent to and may not testify as witnesses in any such proceeding.

General Procedural Rules

R-50. Waiver of Rules

If a party knows that any of these Rules have not been followed, it must object in writing before proceeding with arbitration or it will lose its right to object that the rule has not been followed.

R-51. Extensions of Time

The parties may agree to change any period of time provided for in the Rules, except that any such modification that negatively affects the efficient resolution of

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the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of time in these Rules, except as set forth in R-42. The AAA will notify the parties of any extension.

R-52. Serving of Notice and AAA and Arbitrator Communications

(a) Any papers or notices necessary for the initiation or continuation of an arbitration under these Rules, or for the entry of judgment on any award made under these Rules, may be served on a party by mail or email addressed to the party or its representative at the last-known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator, and the parties also may use overnight delivery, electronic facsimile transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be sent by other methods of communication.

(c) Unless directed differently by the AAA or by the arbitrator, any documents and all written communications submitted by any party to the AAA or to the arbitrator also shall be sent at the same time to all parties to the arbitration.

(d) A failure to provide the other parties with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained within those communications.

(e) A party and/or someone acting on behalf of a party cannot have any communications with an arbitrator or a potential arbitrator about the arbitration outside of the presence of the opposing party. All such communications shall be conducted through the AAA.

(f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or its representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or

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a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

R-54. Remedies for Nonpayment

(a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may inform the parties so that one of them may forward the required payment.

(b) Once the AAA informs the parties that payments have not been received, a party may request an order from the arbitrator directing what measures might be taken in light of a party's nonpayment.

Such measures may include limiting a party's ability to assert or pursue its claim. However, a party shall never be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for relief with the opportunity to respond prior to making any determination. In the event that the arbitrator grants any request for relief that limits any party's participation in the arbitration, the arbitrator will require the party who is making a claim and who has made appropriate payments to submit the evidence required to make an award.

(c) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If arbitrator compensation or AAA administrative fees remain unpaid after a determination to suspend an arbitration due to nonpayment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator. The impact of the termination for nonpayment of the Consumer Clause Registry fee is the removal from the "Registered" section of the Registry.

R-55. Declining or Ceasing Arbitration

The AAA in its sole discretion may decline to accept a Demand for Arbitration or stop the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative.

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Costs of Arbitration

Where the AAA determines that a business's failure to pay their portion of arbitration costs is a violation of the *Consumer Arbitration Rules*, the AAA may decline to administer future consumer arbitrations with that business.

Party	Desk/Documents-Only Arbitration	In-Person, Virtual or Telephonic Hearing Arbitration
Individual	**Single Consumer Case Filing Fee**: $200 **Multiple Consumer Case Filing Fee:** $100 or $50 per case depending on tier $0 if Case Filed by Business	**Single Consumer Case Filing Fee**: $200 **Multiple Consumer Case Filing Fee:** $100 or $50 per case depending on tier $0 if Case Filed by Business
Business	**Single Consumer Case Filing Fee**: $300 for 1 or $425 for 3 arbitrators is due once the consumer claimant meets the filing requirements; $500 for 1 arbitrator or $625 for 3 arbitrators if Case Filed by Business is due at the time the arbitration is filed. **Multiple Consumer Case Filing Fee:** $300, $225, $150, or $75 per case depending on tier, due once the individual claimant meets the filing requirements. Business's must pay both the Individual's Filing Fee and Business's Filing Fee if the case is filed by Business, due at the time the arbitration is filed. **Case Management Fee**: $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed and must be paid prior to the arbitrator appointment process. **Arbitrator Compensation**: $1500 per case*	**Single Consumer Case Filing Fee**: $300 for 1 or $425 for 3 arbitrators is due once the consumer claimant meets the filing requirements; $500 for 1 arbitrator or $625 for 3 arbitrators if Case Filed by Business is due at the time the arbitration is filed. **Multiple Consumer Case Filing Fee:** $300, $225, $150, or $75 per case depending on tier, due once the individual claimant meets the filing requirements. Business's must pay both the Individual's Filing Fee and Business's Filing Fee if the case is filed by Business, due at the time the arbitration is filed. **Case Management Fee**: $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed and must be paid prior to the arbitrator appointment process. **Hearing Fee**: $500 **Arbitrator Compensation**: $2,500 per day of hearing* per arbitrator
	*A Desk/Documents-Only Case will not exceed document submissions of more than 100 pages in total and 7 total hours of time for the arbitrator to review the submissions and render the Award. Beyond 100 pages and 7 hours of time, the business will be responsible for	* The arbitrator compensation encompasses one preliminary conference, one day of in-person, virtual, or telephonic hearing, and one final award. For cases with additional procedures, such as multiple telephone conferences, motion practice, post-hearing briefing, interim or partial awards, awards containing findings of

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	additional arbitrator compensation at a rate of $300 per hour. Arbitrator compensation is not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.	fact and conclusions of law, or other processes not provided for in the Rules, the business will be responsible for additional arbitrator compensation. Arbitrator compensation is not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

AAA Administrative Fees

In cases where the business is the filing party, either as the claimant or filing on behalf of the individual, the business shall be responsible for all administrative fees that includes, filings fees, case management fees and hearing fees charged by the AAA.

Arbitrator compensation is not included as a part of the AAA's administrative fees.

Note that with regard to all AAA administrative fees, the AAA retains the discretion to interpret and apply this fee schedule to a particular case or cases.

(i) Filing Fees*

The business's share of the filing fees is due as soon as the AAA confirms in writing that the individual filing meets the filing requirements, even if the matter is settled or withdrawn.

* Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA at 1-800-778-7879, if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003)

* Pursuant to New Jersey Statutes § 2A:23B-1 et seq, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the New Jersey Arbitration Act, and to all consumer arbitrations conducted in New Jersey. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA at 1-800-778-7879, if you have any questions regarding the waiver of administrative fees. (Effective May 1, 2020)

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There shall be no filing fee charged for a counterclaim.

A. Single Consumer Case Filing:

In cases before a single arbitrator where the individual is the Claimant, a **non-refundable**** filing fee, capped in the amount of $200, is payable in full by the individual when a case is filed unless the parties' agreement provides that the consumer pay less. A **non-refundable** filing fee in the amount of $300 is payable by the business once the individual claimant meets the filing requirements, unless the parties' agreement provides that the business pay more.

In cases before three or more arbitrators, where the individual is the Claimant, a **non-refundable**** filing fee capped in the amount of $200 is payable in full by the individual when a case is filed, unless the parties' agreement provides that the individual pay less. A **non-refundable** filing fee in the amount of $425 is payable by the business once the individual claimant meets the filing requirements, unless the parties' agreement provides that the business pay more.

In cases where the business is the Claimant, the business shall be responsible for all filing fees. The **non-refundable** filing fee is $500 for a single arbitrator or $625 for 3 arbitrators.

** In the event the single consumer case filing is closed due to non-payment of initial filing fees by the business the AAA will return any filing fee received from the individual.

B. Multiple Consumer Case Filings:

These multiple consumer case filings fees will apply to all cases when the American Arbitration Association (AAA) determines in its sole discretion that the following conditions are met:

a. Twenty-five (25) or more similar claims for arbitration or mediation are filed,

b. Claims are against or on behalf of the same party or parties, and

c. Counsel for the parties is consistent or coordinated across all cases.

The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.

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All fees listed below are **non-refundable*** ** and will be assessed to the parties as described below, unless the clause provides that the individual pay less or the clause provides that the business is responsible for the entire fee.

***In the event any multiple case filings are closed due to non-payment of filing fees by the business, the AAA will return any filing fees received from the individuals. Filing fees are non-refundable in the event the cases are closed due to settlement or withdrawal.

AAA, in its sole discretion, may consider an alternative payment process for multiple case filings.

Filing Fees for Cases Filed by the Individuals:

AAA reserves the right to determine what tier of fees applies to multiple cases filed subsequent to the initial filing.

For multiple case filings that contain more than 500 cases, each tier will be applied to the number of cases that fall within that tier.

	First 500 Cases	Cases 501 to 1,500	Cases 1,501 to 3,000	Cases 3,001 and beyond
Individual filing fee per case	$100	$50	$50	$50
Business filing fee per case	$300	$225	$150	$75

(ii) Case Management Fees

A non-refundable case management fee of $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed to the business and must be paid prior to the arbitrator appointment process.

(iii) Hearing Fees

For telephonic hearings, virtual hearings or in-person hearings held, a Hearing Fee of $500 is payable by the business. If a case is settled or withdrawn prior to the hearing taking place, the Hearing Fee will be refunded, or cancelled if not yet paid. However, if the AAA is not notified of a cancellation at least two business days before a scheduled hearing, the Hearing Fee will remain due and will not be refunded.

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There is no AAA hearing fee for the initial Administrative Conference (see R-10).

Neutral Arbitrator's Compensation

The business shall pay the arbitrator's compensation unless the individual, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation.

- **Desk/Documents-Only Arbitration** – Arbitrators serving on a desk/ documents-only arbitration will receive compensation at a rate of $1,500 per case. A desk/documents-only arbitration will not exceed document submissions of more than 100 pages in total and 7 total hours of time for the arbitrator to review the submissions and render the Award. Beyond 100 pages and 7 hours of time, the business will be responsible for additional arbitrator compensation at a rate of $300 per hour.

- **In-Person, Virtual or Telephonic Hearing Arbitration** – Arbitrators serving on an in-person, virtual or telephonic hearing arbitration case will receive compensation at a rate of $2,500 per day of hearing per arbitrator. The arbitrator compensation encompasses one preliminary conference, one day of in-person, virtual or telephonic hearing, and one final award. For cases with additional procedures, such as multiple telephone conferences, motion practice, post-hearing briefing, interim or partial awards, awards containing findings of fact and conclusions of law, or other processes not provided in the Rules, the business will be responsible for additional arbitrator compensation.

Once a Preliminary Management Hearing is held by the arbitrator, the arbitrator is entitled to one-half of the arbitrator compensation rate. Once evidentiary hearings are held or all parties' documents are submitted for a desk/ documents-only arbitration, the arbitrator is entitled to the full amount of the arbitrator compensation rate.

For in-person, virtual or telephonic hearing arbitrations, if an evidentiary hearing is cancelled fewer than 2 business days before the hearing, the arbitrator is entitled to receive compensation at the first day of hearing rate.

Any determination by the AAA on whether the business will be responsible for additional arbitrator compensation is in the sole discretion of the AAA and such decision is final and binding.

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Reallocation of Arbitrator Compensation, AAA Administrative Fees and Certain Expenses

Arbitrator compensation, expenses, and administrative fees (which include Filing Fees, Case Management Fees and Hearing Fees) are not subject to reallocation by the arbitrator(s) except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

Hearing Room Rental

The hearing fees described above do not cover the rental of hearing rooms. The AAA maintains rental hearing rooms in most offices for the convenience of the parties. Check with the administrator for availability and rates. Hearing room rental fees will be borne by the business.

Abeyance Fee

(i) For Single Consumer Case Filing

Parties on cases held as inactive for one year will be assessed an annual abeyance fee of $500. If a party refuses to pay the assessed fee, the opposing party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed. All filing requirements, including payment of filing or other administrative fees, must be met before a matter may be placed in abeyance.

(ii) For Multiple Consumer Case Filings

Should the cases be stayed to allow for settlement negotiations or for any other reason, including judicial intervention, the AAA shall assess a single, non-refundable administrative fee of $2,500 for the stayed cases, and an additional, single, non-refundable administrative fee of $2,500 for the stayed cases every six months the cases are held in abeyance. All abeyance fees are to be paid by the business. All filing requirements, including payment of filing and other administrative fees, must be met before a matter may be placed in abeyance.

Expenses

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the business.

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Consumer Clause Review and Registry Fee

Please note that all fees described below are **non-refundable.**

For businesses submitting a clause, the cost of reviewing the clause and maintaining that clause on the Registry is $500. A yearly Registry fee of $500 will be charged to maintain each clause on the Registry for each calendar year thereafter.

If the AAA receives a demand for consumer arbitration from an arbitration clause that was not previously submitted to the AAA for review and placement on the Registry, the business will incur an additional $250 fee to conduct an immediate review of the clause.

Any subsequent changes, additions, deletions, or amendments to currently registered arbitration agreement must be resubmitted for review and a review fee of $500 will assessed at that time.

Procedures for the Resolution of Disputes through Document Submission

D-1. Applicability

(a) In any case, regardless of claim size, the parties may agree to waive in-person/ telephonic hearings and resolve the dispute through submission of documents to one arbitrator. Such agreement should be confirmed in writing no later than the deadline for the filing of an answer.

(b) Where no disclosed claims or counterclaims exceed $25,000, the dispute shall be resolved by these Procedures, unless a party asks for a hearing or the arbitrator decides that a hearing is necessary.

(c) If one party makes a request to use the Procedures for the Resolution of Disputes through Document Submission (Procedures) and the opposing party is unresponsive, the arbitrator shall have the power to determine whether to proceed under the Procedures. If both parties seek to use the Procedures after the appointment of an arbitrator, the arbitrator must also consent to the process.

(d) When parties agree to these Procedures, the procedures in Sections D-1 through D-4 of these Rules shall supplement other portions of these rules which are not in conflict with the Procedures.

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D-2. Preliminary Management Hearing

Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator shall convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

D-3. Removal from the Procedures

(a) The arbitrator has the discretion to remove the case from the Procedures if the arbitrator determines that an in-person or telephonic hearing is necessary.

(b) If the parties agree to in-person or telephonic hearings after a previous agreement to proceed under the Procedures, the arbitrator shall conduct such hearings. If a party seeks to have in-person or telephonic hearings after agreeing to the Procedures, but there is not agreement among the parties to proceed with in-person or telephonic hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

D-4. Time of Award

(a) The arbitrator shall establish the date for either final written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing, and the time for the rendering of the award shall commence on that day as well.

(b) The arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(c) The award is subject to all other provisions of these Rules that pertain to awards.

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Replace the JAMS Employment Arbitration Rules and Procedures on pages 161-177 of the Documentary Supplement with the following:

JAMS Employment Arbitration Rules & Procedures
Effective June 1, 2021

Rule 1. Scope of Rules

(a) The JAMS Employment Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, the disputes or claims are employment-related, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration Agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Employment Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ("NAC") or the office of JAMS General Counsel or their designees.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-filing) means the electronic transmission of documents to JAMS for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents to a party, attorney or representative under these Rules.

Rule 2. Party Self-Determination

(a) The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies (including, without limitation, the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness and Rules 15(i), 30 and 31). The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall

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confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

(b) When an Arbitration Agreement provides that the Arbitration will be non-administered or administered by an entity other than JAMS and/or conducted in accordance with rules other than JAMS Rules, the Parties may agree to modify that Agreement to provide that the Arbitration will be administered by JAMS and/or conducted in accordance with JAMS Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS issues a Commencement Letter based upon the existence of one of the following:

(i) A post-dispute Arbitration Agreement fully executed by all Parties specifying JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the employment dispute or claim and specifying JAMS administration or use of any JAMS Rules or that the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) The Respondent's failure to timely object to JAMS administration, where the Parties' Arbitration Agreement does not specify JAMS administration or JAMS Rules; or

(v) A copy of a court order compelling Arbitration at JAMS.

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(b) The issuance of the Commencement Letter confirms that requirements for commencement have been met, that JAMS has received all payments required under the applicable fee schedule and that the Claimant has provided JAMS with contact information for all Parties together with evidence that the Demand for Arbitration has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate, and, pursuant to Rule 19, the Arbitrator, once appointed, shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter but is not intended to be applicable to any legal requirement, such as the statute of limitations; any contractual limitations period; or any claims notice requirement. The term "commencement," as used in this Rule, is intended only to pertain to the operation of this and other Rules (such as Rules 3, 13(a), 17(a) and 31(a)).

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses, and the relative resources of the Parties shall be considered, but in no event will the Hearing be scheduled in a location that precludes attendance by the Employee.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must

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advise JAMS in writing within thirty (30) calendar days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Arbitration.

(e) Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate two or more of the Arbitrations into a single Arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances he or she deems relevant and applicable.

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Rule 7. Number and Neutrality of Arbitrators; Appointment and Authority of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator, unless all Parties agree otherwise. In these Rules, the term “Arbitrator” shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator, the Parties shall agree on, or, in the absence of agreement, JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed, in advance of the Arbitration Hearing, to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) JAMS or the Arbitrator may at any time require electronic filing and service of documents in an Arbitration, including through the JAMS Electronic Filing System. If JAMS or the Arbitrator requires electronic filing and service, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of documents and notifications. Any document filed via the JAMS Electronic Filing System shall be considered as filed when the transmission to the JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender’s time zone) shall be deemed filed on that date.

(b) Every document filed with the JAMS Electronic Filing System shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to the JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney.

(c) Delivery of e-service documents through the JAMS Electronic Filing System shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through the JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service or JAMS completes the transmission of the electronic document(s) to the JAMS Electronic Filing System for e-filing and/or e-service.

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(d) If an electronic filing and/or service via the JAMS Electronic Filing System does not occur due to technical error in the transmission of the document, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed and/or served nunc pro tunc to the date it was first attempted to be transmitted electronically. In such cases a Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document.

(f) In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. mail, three (3) calendar days shall be added to the prescribed period. If the last day for the performance of any act that is required by these rules to be performed within a specific time falls on a Saturday, Sunday or other legal holiday, the period is extended to and includes the next day that is not a holiday.

Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5. It shall include a statement of the remedies sought. The Demand for Arbitration may attach and incorporate a copy of a Complaint previously filed with a court. In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and a statement of any affirmative defenses, including jurisdictional challenges, or counterclaims it may have. JAMS may grant reasonable extensions of time to file a response or counterclaim prior to the appointment of the Arbitrator.

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(d) Within fourteen (14) calendar days of service of a counterclaim, a Claimant may submit to JAMS and serve on other Parties a response to such counterclaim and any affirmative defenses, including jurisdictional challenges, it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

(f) Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.

Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third Party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted, except with the Arbitrator's approval. A Party may request a hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(c) or (d).

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(c) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(d) The Arbitrator may, upon a showing of good cause or sua sponte, when necessary to facilitate the Arbitration, extend any deadlines established in these

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Rules, provided that the time for rendering the Award may only be altered in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone number and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone number and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

(c) The Arbitrator may withhold approval of any intended change or addition to a Party's legal representative(s) where such change or addition could compromise the ability of the Arbitrator to continue to serve, the composition of the Panel in the case of a tripartite Arbitration or the finality of any Award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitrator shall have regard to the circumstances, including the general principle that a Party may be represented by a legal representative chosen by that Party, the stage that the Arbitration has reached, the potential prejudice resulting from the possible disqualification of the Arbitrator, the efficiency resulting from maintaining the composition of the Panel (as constituted throughout the Arbitration), the views of the other Party or Parties to the Arbitration and any likely wasted costs or loss of time resulting from such change or addition.

Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5), except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and the Arbitrator. However, the opposing Parties may, within seven (7) calendar days of such notice, request that the Arbitrator condition the withdrawal upon such terms as he or she may direct.

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Rule 14. Ex Parte Communications

(a) No Party may have any ex parte communication with a neutral Arbitrator, except as provided in section (b) of this Rule. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have ex parte communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts, as well as in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive ex parte communication between a Party and a non-neutral Arbitrator. More extensive communications with a non-neutral Arbitrator may also be permitted by applicable law and rules of ethics.

Rule 15. Arbitrator Selection, Disclosures and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and at least ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may add names to or replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service upon the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

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(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, or fails to respond according to the instructions provided by JAMS, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities or individuals are adverse for purposes of Arbitrator selection, considering such factors as whether they are represented by the same attorney and whether they are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule, unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstances likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties and their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties, who may respond within seven (7) calendar days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the party that did not appoint that Arbitrator.

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Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

(a) The exchange of information in accordance with Rule 17 or otherwise;

(b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;

(c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;

(d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;

(e) The attendance of witnesses as contemplated by Rule 21;

(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits, the preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals whom they may call as witnesses at the Arbitration Hearing and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report, which may be introduced at

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the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take at least one deposition of an opposing Party or an individual under the control of the opposing Party. The Parties shall attempt to agree on the number, time, location, and duration of the deposition(s). Absent agreement, the Arbitrator shall determine these issues, including whether to grant a request for additional depositions, based upon the reasonable need for the requested information, the availability of other discovery and the burdensomeness of the request on the opposing Parties and the witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

(e) The Parties may take discovery of third parties with the approval of the Arbitrator.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the motion. The Request may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.

Rule 19. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the

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Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date, unless the law of the relevant jurisdiction allows for, or the Parties have agreed to, shorter notice.

(c) The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena duces tecum to a third-party witness.

Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts; (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony; and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other copies of any such exhibits to the extent that they have not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit a concise written statement of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing

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pursuant to this Rule or Rule 19(c). The subpoena or subpoena duces tecum shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so. It is expected that the Employee will attend the Arbitration Hearing, as will any other individual party with information about a significant issue.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise at the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony, even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

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(g) The Arbitrator has full authority to determine that the Hearing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form. If some or all of the witnesses or other participants are located remotely, the Arbitrator may make such orders and set such procedures as the Arbitrator deems necessary or advisable.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial Awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date determined by the Arbitrator, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted, or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments, whichever is later.

(i) At any time before the Award is rendered, the Arbitrator may, sua sponte or on application of a Party for good cause shown, reopen the Hearing. If the Hearing is reopened, the time to render the Award shall be calculated from the date the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) Any Party may arrange for a stenographic record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. No other means of recording the proceedings shall be permitted absent agreement of the Parties or by direction of the Arbitrator.

(i) The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

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(ii) If there is no agreement to share the cost, the stenographic record may not be provided to the Arbitrator and may not be used in the proceeding, unless the Party arranging for the stenographic record agrees to provide access to the stenographic record either at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to the Optional Arbitration Appeal Procedure (see Rule 34), they shall, if possible, ensure that a stenographic or other record is made of the Hearing.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing, as defined in Rule 22(h) or (i), or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (1) by the agreement of the Parties; (2) upon good cause for an extension of time to render the Award; or (3) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

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(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim or Partial Final Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the Parties' Agreement or by applicable law. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law. When the Arbitrator is authorized to award attorneys' fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator's discovery orders caused delay to the proceeding or additional costs to the other Parties.

(h) The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. The Award shall also contain a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based. The Parties may agree to any other form of Award, unless the Arbitration is based on an Arbitration Agreement that is required as a condition of employment.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and file with JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31 or on account of the effect of an offer to allow judgment), or the Arbitrator may sua sponte propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file and serve any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may

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extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either the Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1, et seq., or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

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Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree, pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request, unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; any other costs occasioned by the actionable conduct, including reasonable attorneys' fees; exclusion of certain evidence; drawing adverse inferences; or, in extreme cases, determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS

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employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Except as provided in paragraph (c) below, unless the Parties have agreed to a different allocation, each Party shall pay its pro rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration. To the extent possible, the allocation of such fees and expenses shall not be disclosed to the Arbitrator. JAMS' agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Arbitrator may preclude a Party that has failed to deposit its pro rata or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) If an Arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an Employee may be required to pay is the initial JAMS Case Management Fee. JAMS does not preclude an Employee from contributing to administrative and Arbitrator fees and expenses. If an Arbitration is not based on a clause or agreement that is required as a condition of employment, the Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

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(d) Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS shall determine whether the interests between entities or individuals are adverse for purpose of fees, considering such factors as whether the entities or individuals are represented by the same attorney and whether the entities or individuals are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS and provide to JAMS a copy of their written agreement setting forth the agreed-upon minimum and maximum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

Rule 33. Final Offer (or Baseball) Arbitration Option

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide copies of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award, the Arbitrator shall choose between the Parties' last proposals, selecting

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the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

Rule 34. Optional Arbitration Appeal Procedure

The Parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedures to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

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Insert the following at the end of Article I of the UNCITRAL Arbitration Rules on page 186 of the Documentary Supplement:

4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.

5. The Expedited Arbitration Rules in the appendix shall apply to the arbitration where the parties so agree.

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Insert the following after the UNCITRAL Arbitration Rules on page 196 of the Documentary Supplement:

Appendix – UNCITRAL Expedited Arbitration Rules (2021)

Scope of application

Article 1

Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Expedited Arbitration Rules ("Expedited Rules"), then such disputes shall be settled in accordance with the UNCITRAL Arbitration Rules as modified by these Expedited Rules and subject to such modification as the parties may agree.[***]

Article 2

1. At any time during the proceedings, the parties may agree that the Expedited Rules shall no longer apply to the arbitration.

2. At the request of a party, the arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, determine that the Expedited Rules shall no longer apply to the arbitration. The arbitral tribunal shall state the reasons upon which that determination is based.

3. When the Expedited Rules no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall remain in place and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules.

Conduct of the parties and the arbitral tribunal

Article 3

1. The parties shall act expeditiously throughout the proceedings.

[***] Unless otherwise agreed by the parties, the following articles in the UNCITRAL Arbitration Rules do not apply to expedited arbitration: article 3(4)(a) and (b); article 6(2); article 7; article 8(1); first sentence of article 20(1); first sentence of article 21(1); article 21(3); article 22; and second sentence of article 27(2).

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2. The arbitral tribunal shall conduct the proceedings expeditiously taking into account the fact that the parties agreed to refer their dispute to expedited arbitration and the time frames in the Expedited Rules.

3. The arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to conduct the proceedings, including to communicate with the parties and to hold consultations and hearings remotely.

Notice of arbitration and statement of claim

Article 4

1. A notice of arbitration shall also include:

(a) A proposal for the designation of an appointing authority, unless the parties have previously agreed thereon; and

(b) A proposal for the appointment of an arbitrator.

2. When communicating its notice of arbitration to the respondent, the claimant shall also communicate its statement of claim.

3. The claimant shall communicate the notice of arbitration and the statement of claim to the arbitral tribunal as soon as it is constituted.

Response to the notice of arbitration and statement of defence

Article 5

1. Within 15 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall also include responses to the information set forth in the notice of arbitration pursuant to article 4(1)(a) and (b) of the Expedited Rules.

2. The respondent shall communicate its statement of defence to the claimant and the arbitral tribunal within 15 days of the constitution of the arbitral tribunal.

Designating and appointing authorities

Article 6

1. If all parties have not agreed on the choice of an appointing authority 15 days after a proposal for the designation of an appointing authority has been

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received by all other parties, any party may request the Secretary-General of the Permanent Court of Arbitration (hereinafter called the "PCA") to designate the appointing authority or to serve as appointing authority.

2. When making the request under article 6(4) of the UNCITRAL Arbitration Rules, a party may request the Secretary-General of the PCA to serve as appointing authority.

3. If requested to serve as appointing authority in accordance with paragraph 1 or 2, the Secretary-General of the PCA will serve as appointing authority unless it determines that in view of the circumstances of the case, it is more appropriate to designate an appointing authority.

Number of arbitrators

Article 7

Unless otherwise agreed by the parties, there shall be one arbitrator.

Appointment of a sole arbitrator

Article 8

1. A sole arbitrator shall be appointed jointly by the parties.

2. If the parties have not reached agreement on the appointment of a sole arbitrator 15 days after a proposal has been received by all other parties, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority in accordance with article 8(2) of the UNCITRAL Arbitration Rules.

Consultation with the parties

Article 9

Promptly after and within 15 days of its constitution, the arbitral tribunal shall consult the parties, through a case management conference or otherwise, on the manner in which it will conduct the arbitration.

Discretion of the arbitral tribunal with regard to periods of time

Article 10

Subject to article 16 of the Expedited Rules, the arbitral tribunal may at any time, after inviting the parties to express their views extend or abridge any period

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of time prescribed under the UNCITRAL Arbitration Rules and the Expedited Rules or agreed by the parties.

Hearings

Article 11

The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held.

Counterclaims or claims for the purpose of set-off

Article 12

1. A counterclaim or a claim for the purpose of a set-off shall be made no later than in the statement of defence provided that the arbitral tribunal has jurisdiction over it.

2. The respondent may not make a counterclaim or rely on a claim for the purpose of a set-off at a later stage in the arbitral proceedings, unless the arbitral tribunal considers it appropriate to allow such claim having regard to the delay in making it or prejudice to other parties or any other circumstances.

Amendments and supplements to a claim or defence

Article 13

During the course of the arbitral proceedings, a party may not amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it appropriate to allow such amendment or supplement having regard to when it is requested or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Further written statements

Article 14

The arbitral tribunal may, after inviting the parties to express their views, decide whether any further written statement shall be required from the parties or may be presented by them.

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Evidence

Article 15

1. The arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. The arbitral tribunal may reject any request, unless made by all parties, to establish a procedure whereby each party can request another party to produce documents.

2. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing and signed by them.

3. The arbitral tribunal may decide which witnesses, including expert witnesses, shall testify to the arbitral tribunal if hearings are held.

Period of time for making the award

Article 16

1. The award shall be made within six months from the date of the constitution of the arbitral tribunal unless otherwise agreed by the parties.

2. The arbitral tribunal may, in exceptional circumstances and after inviting the parties to express their views, extend the period of time established in accordance with paragraph 1. The extended period of time shall not exceed a total of nine months from the date of the constitution of the arbitral tribunal.

3. If the arbitral tribunal concludes that it is at risk of not rendering an award within nine months from the date of the constitution of the arbitral tribunal, it shall propose a final extended time limit, state the reasons for the proposal, and invite the parties to express their views within a fixed period of time. The extension shall be adopted only if all parties express their agreement to the proposal within the fixed period of time.

4. If there is no agreement to the extension in paragraph 3, any party may make a request that the Expedited Rules no longer apply to the arbitration. After inviting the parties to express their views, the arbitral tribunal may determine to continue to conduct the arbitration in accordance with the UNCITRAL Arbitration Rules

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Insert the following after the UNCITRAL Arbitration Rules on page 196 of the Documentary Supplement:

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

Article 1 — Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")[1] concluded on or after 1st April 2014, unless the Parties to the treaty[2] have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1st April 2014, these Rules shall apply only when:

(a) the parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or,

(b) the Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1st April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

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[1] For the purpose of the Rules on Transparency, a 'treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

[2] For the purpose of the Rules on Transparency, any reference to a 'Party to the treaty' or a 'State' includes, for example, a regional economic integration organization where it is a Party to the treaty.

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(a) the disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

(b) the arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) the disputing parties' interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

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Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Article 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party(ies) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under

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article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the cost of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty, ("third person(s)") to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person);

(b) disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) describe the nature of the interest that the third person has in the arbitration; and

(e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

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3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) whether the third person has a significant interest in the arbitral proceedings; and

(b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) be dated and signed by the person filing the submission on behalf of the third person;

(b) be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) set out a precise statement of the third person's position on issues; and

(d) only address matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for

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greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) confidential business information;

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(b) information that is protected against being made available to the public under the treaty;

(c) information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public including by putting in place, as appropriate:

(a) time limits in which a disputing party, non-disputing Party to the treaty, or third person shall give notice that it seeks protection for such information in documents;

(b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 7.

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7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations, or an institution named by UNCITRAL.

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Replace the AAA/ICDR International Arbitration Rules on pages 197-213 of the Documentary Supplement with the following:

AMERICAN ARBITRATION ASSOCIATION
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INTERNATIONAL ARBITRATION RULES*

Rules Amended and Effective March 1, 2021

Article 1: Scope of these Rules

1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by either the International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), or the AAA without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.

2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration. These Rules specify the duties and responsibilities of the ICDR as the Administrator. The Administrator may provide services through any of the ICDR's case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so.

4. Unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $500,000 USD exclusive of interest and the costs of arbitration. The parties may also agree to use the International Expedited Procedures in other cases. The International Expedited Procedures shall be applied as described in Articles E-1 through E-10 of these Rules, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures. Where

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no party's claim or counterclaim exceeds $100,000 USD exclusive of interest, attorneys' fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary.

Commencing the Arbitration

Article 2: Notice of Arbitration and Statement of Claim

1. The party initiating arbitration ("Claimant") shall, in compliance with Article 11, give written Notice of Arbitration to the Administrator and at the same time to the party against whom a claim is being made ("Respondent"). The Claimant may also initiate the arbitration online through the Administrator's AAA WebFile at www.icdr.org or via email at casefiling@adr.org.

2. The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.

3. The Notice of Arbitration shall contain the following information:

a. a demand that the dispute be referred to arbitration;

b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives;

c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;

d. a reference to any contract out of or in relation to which the dispute arises;

e. a description of the claim and of the facts supporting it;

f. the relief or remedy sought and any amount claimed; and

g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language of the arbitration, and whether the party filing the Notice of Arbitration is willing to mediate the dispute prior to or concurrently with the arbitration.

4. The Notice of Arbitration shall be accompanied by the appropriate filing fee.

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5. Upon receipt of the Notice of Arbitration, the Administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

Article 3: Answer and Counterclaim

1. Within 30 days after the Administrator confirms receipt of the Notice of Arbitration, Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.

2. At the time Respondent submits its Answer, Respondent may make any counterclaims covered by the agreement to arbitrate or assert any setoffs and Claimant shall within 30 days submit to Respondent, to any other parties, and to the Administrator a written Answer to the counterclaim or setoffs.

3. A counterclaim or setoff shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

4. Respondent shall within 30 days after the Administrator confirms receipt of the Notice of Arbitration submit to Claimant, to any other parties, and to the Administrator a response to any proposals by Claimant not previously agreed upon, or submit its own proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of the arbitration, the language of the arbitration, and whether Respondent is willing to mediate the dispute prior to or concurrently with the arbitration.

5. The arbitral tribunal, or the Administrator if the tribunal has not yet been constituted, may extend any of the time limits established in this Article if it considers such an extension justified.

6. Failure of Respondent to submit an Answer shall not preclude the arbitration from proceeding.

7. In arbitrations with multiple parties, Respondent may make claims or assert setoff against another Respondent and Claimant may make claims or assert setoffs against another Claimant in accordance with the provisions of this Article 3.

Article 4: Administrative Conference

The Administrator may conduct an administrative conference before the arbitral tribunal is constituted to facilitate party discussion and agreement on

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issues such as arbitrator selection, mediating the dispute, process efficiencies, and any other administrative matters.

Article 5: International Administrative Review Council

When the Administrator is called upon to act under these Rules, the Administrator may act through its International Administrative Review Council (IARC) to take any action. Such actions may include determining challenges to the appointment or continuing service of an arbitrator, deciding disputes regarding the number of arbitrators to be appointed, or determining whether a party has met the administrative requirements to initiate or file an arbitration contained in the Rules. If the parties do not agree on the place of arbitration, the IARC may make an initial determination as to the place of arbitration, subject to the power of the arbitral tribunal to make a final determination.

Article 6: Mediation

Subject to (a) any agreement of the parties otherwise or (b) the right of any party to elect not to participate in mediation, the parties shall mediate their dispute pursuant to the ICDR's International Mediation Rules concurrently with the arbitration.

Article 7: Emergency Measures of Protection

1. A party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written application to the Administrator and to all other parties setting forth:

a. the nature of the relief sought;

b. the reasons why such relief is required on an emergency basis before the tribunal is appointed;

c. the reasons why the party is likely to be found to be entitled to such relief; and

d. what injury or prejudice the party will suffer if relief is not provided.

The application shall be submitted concurrent with or following the submission of a Notice of Arbitration. Such application may be filed by email, or as otherwise permitted by Article 11, and must include payment of any applicable fees and a statement certifying that all parties have been notified or an explanation of the steps taken in good faith to notify all parties.

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2. Within one business day of receipt of the application for emergency relief as provided in Article 7(1), and upon being satisfied that the requirements of Article 7(1) have been met, the Administrator shall appoint a single emergency arbitrator. Upon accepting appointment, a prospective emergency arbitrator shall, in accordance with Article 14, disclose to the Administrator any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the Administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

3. The emergency arbitrator shall as soon as possible, and in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing. The emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 21, including the authority to rule on the emergency arbitrator's jurisdiction, and shall resolve any disputes over the applicability of this Article.

4. The emergency arbitrator shall have the power to order or award any interim or conservatory measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 27 and shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay.

5. The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may affirm, reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

6. Any interim award or order of emergency relief may be conditioned on provision of appropriate security by the party seeking such relief.

7. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 7 or with the agreement to arbitrate or a waiver of the right to arbitrate.

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8. The costs associated with applications for emergency relief shall be addressed by the emergency arbitrator, subject to the power of the arbitral tribunal to determine finally the allocation of such costs.

Article 8: Joinder

1. A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless (a) all parties, including the additional party, otherwise agree, or (b) the arbitral tribunal once constituted determines that the joinder of an additional party is appropriate, and the additional party consents to such joinder. The party wishing to join the additional party shall, at that same time, send the Notice of Arbitration to the additional party and all other parties. The date on which such Notice of Arbitration is received by the Administrator shall be deemed to be the date of the commencement of arbitration against the additional party. Any joinder shall be subject to the provisions of Articles 13 and 21.

2. The request for joinder shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

3. The additional party shall submit an Answer in accordance with the provisions of Article 3.

4. The additional party may make claims, counterclaims, or assert setoffs against any other party in accordance with the provisions of Article 3.

Article 9: Consolidation

1. At the request of a party or on its own initiative, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:

a. the parties have expressly agreed to appoint a consolidation arbitrator; or

b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or

c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same or related parties; the disputes in the arbitrations arise in connection

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with the same legal relationship; and the arbitration agreements may be compatible.

2. A consolidation arbitrator shall be appointed as follows:

a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.

b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.

c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.

d. The provisions of Articles 14-16 of these Rules shall apply to the appointment of the consolidation arbitrator.

3. In deciding whether to consolidate, the consolidation arbitrator shall consult the parties, may consult the arbitral tribunal(s), and may take into account all relevant circumstances, including:

a. applicable law;

b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;

c. the progress already made in the arbitrations;

d. whether the arbitrations raise common issues of law and/or facts; and

e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency.

4. The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.

5. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator decides otherwise.

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6. Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceedings.

7. The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

Article 10: Amendment or Supplement of Claim, Counterclaim, or Defense

Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate. The tribunal may permit an amendment or supplement subject to an award of costs and/or the payment of filing fees as determined by the Administrator.

Article 11: Notices

1. Unless otherwise agreed by the parties or ordered by the arbitral tribunal, all notices and written communications may be transmitted by any means of communication that allows for a record of its transmission, including email, mail, courier, fax, or other written forms of electronic communication addressed to the party or its representative at its last- known address, or by personal service.

2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is made. If the last day of such period is an official holiday at the place received, the period is extended until the first business day that follows. Official holidays occurring during the running of the period of time are included in calculating the period.

The Tribunal

Article 12: Number of Arbitrators

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If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.

Article 13: Appointment of Arbitrators

1. The parties may agree upon any procedure for appointing arbitrators and shall inform the Administrator as to such procedure. In the absence of party agreement as to the method of appointment, the Administrator may use the ICDR list method as provided in Article 13(6).

2. The parties may agree to select arbitrators, with or without the assistance of the Administrator. When such selections are made, the parties shall take into account the arbitrators' availability to serve and shall notify the Administrator so that a Notice of Appointment can be communicated to the arbitrators, together with a copy of these Rules.

3. If within 45 days after the commencement of the arbitration, all parties have not agreed on a procedure for appointing the arbitrator(s) or have not agreed on the selection of the arbitrator(s), the Administrator shall, at the written request of any party, appoint the arbitrator(s).Where the parties have agreed upon a procedure for selecting the arbitrator(s), but all appointments have not been made within the time limits provided by that procedure, the Administrator shall, at the written request of any party, perform all functions provided for in that procedure that remain to be performed.

4. In making appointments, the Administrator shall, after inviting consultation with the parties, endeavor to appoint suitable arbitrators, taking into account their availability to serve. At the request of any party or on its own initiative, the Administrator may appoint or submit a list(s) including nationals of a country other than that of any of the parties.

5. If there are more than two parties to the arbitration, the Administrator may appoint all arbitrators unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration.

6. If the parties have not selected an arbitrator(s) and have not agreed upon any other method of appointment, the Administrator, at its discretion, may appoint the arbitrator(s) in the following manner using the ICDR list method. The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as arbitrator(s). The parties are encouraged to agree to an arbitrator(s) from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon an arbitrator(s), each party shall have 15 days from the transmittal date in which to

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strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite an arbitrator(s) to serve. If the parties fail to agree on any of the persons listed, or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding arbitrator in consultation with the tribunal.

7. The appointment of an arbitrator is effective upon receipt by the Administrator of the Administrator's Notice of Appointment completed and signed by the arbitrator.

Article 14: Impartiality and Independence of Arbitrator

1. Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with these Rules, the terms of the Notice of Appointment provided by the Administrator, and with The Code of Ethics for Arbitrators in Commercial Disputes.

2. Upon accepting appointment, an arbitrator shall sign the Notice of Appointment provided by the Administrator affirming that the arbitrator is available to serve and is independent and impartial. The arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence and any other relevant facts the arbitrator wishes to bring to the attention of the parties.

3. If, at any stage during the arbitration, circumstances arise that may give rise to such doubts, an arbitrator or party shall promptly disclose such information to all parties and to the Administrator. Upon receipt of such information from an arbitrator or a party, the Administrator shall communicate it to all parties and to the tribunal.

4. Disclosure by an arbitrator or party does not necessarily indicate belief by the arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's impartiality or independence.

5. Failure of a party to disclose any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence within a

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reasonable period after the party becomes aware of such information constitutes a waiver of the right to challenge an arbitrator based on those circumstances.

6. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

7. On the application of a party, or on its own initiative after consulting the parties, the tribunal may require the parties to disclose:

a. Whether any non-party (such as a third-party funder or an insurer) has undertaken to pay or to contribute to the cost of a party's participation in the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the undertaking.

b. Whether any non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) has an economic interest in the outcome of the arbitration, and if so, to identify the person or entity concerned and to describe the nature of the interest.

Article 15: Challenge of an Arbitrator

1. A party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, or independence, or for failing to perform the arbitrator's duties. Unless a shorter time period is otherwise agreed by the parties, specified by law, or determined by the Administrator, a party shall send a written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party. The challenge shall state in writing the reasons for the challenge. The party shall not send this notice to any member of the arbitral tribunal.

2. Upon receipt of such a challenge, the Administrator shall notify the other party of the challenge and give such party an opportunity to respond. The Administrator shall not send the notice of challenge to any member of the tribunal but shall notify the tribunal that a challenge has been received, without identifying the party challenging. When an arbitrator has been challenged by a party, the other

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party may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall be removed. The Administrator may advise the challenged arbitrator of the challenge and request information from the challenged arbitrator relating to the challenge. The challenged arbitrator, after consultation with the Administrator, also may withdraw in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

3. If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Administrator shall make the decision on the challenge.

4. The Administrator, on its own initiative, may remove an arbitrator for failing to perform or if the arbitrator becomes incapable of performing the duties of an arbitrator.

Article 16: Replacement of an Arbitrator

1. If an arbitrator withdraws, is incapable of performing the duties of an arbitrator, or is removed for any reason, and the office becomes vacant, a substitute arbitrator, if needed, shall be appointed pursuant to the provisions of Article 13, unless the parties otherwise agree.

2. If a substitute arbitrator is appointed under this Article, unless the parties otherwise agree the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.

3. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for any reason, and unless otherwise agreed to by the parties, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order, or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling, order, or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case.

4. In the event that the two other arbitrators do not agree to continue the arbitration without the participation of the third arbitrator, the Administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 13, unless the parties otherwise agree.

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Article 17: Arbitral Tribunal Secretary

The tribunal may, with the consent of the parties, appoint an arbitral tribunal secretary, who will serve in accordance with ICDR guidelines.

General Conditions

Article 18: Party Representation

Any party may be represented in the arbitration. The names, addresses, telephone numbers, fax numbers, and email addresses of representatives shall be communicated in writing to the other party and to the Administrator. Unless instructed otherwise by the Administrator, once the arbitral tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal with simultaneous copies to the other party and, unless otherwise instructed by the Administrator, to the Administrator. The conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.

Article 19: Place of Arbitration

1. If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.

2. The tribunal may meet at any location it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate, and, if done elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.

Article 20: Language

If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

Article 21: Arbitral Jurisdiction

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to arbitrability, to the existence, scope, or

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validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration, without any need to refer such matters first to a court.

2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

3. A party must object to the jurisdiction of the tribunal or to arbitral jurisdiction respecting the admissibility of a claim, counterclaim, or setoff no later than the filing of the Answer, as provided in Article 3, to the claim, counterclaim, or setoff that gives rise to the objection. The tribunal may extend such time limit and may rule on any objection under this Article as a preliminary matter or as part of the final award.

4. Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and shall be referred to the tribunal once constituted for determination.

Article 22: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a procedural hearing with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including video, audio, or other electronic means, could be used to increase the efficiency and economy of the proceedings.

3. At the procedural hearing, the tribunal shall discuss with the parties cybersecurity, privacy, and data protection to provide for an appropriate level of security and compliance in connection with the proceeding.

4. The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.

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5. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 24.

6. Documents or information submitted to the tribunal by one party shall at the same time be transmitted by that party to all parties and, unless instructed otherwise by the Administrator, to the Administrator.

7. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.

8. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.

Article 23: Early Disposition

1. A party may request leave from the arbitral tribunal to submit an application for disposition of any issue presented by any claim or counterclaim in advance of the hearing on the merits ("early disposition"). The tribunal shall allow a party to submit an application for early disposition if it determines that the application (a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits.

2. Each party shall have the right to be heard and a fair opportunity to present its case regarding whether or not such application should be heard and, if permission to make the application is given, whether early disposition should be granted.

3. The arbitral tribunal shall have the power to make any order or award in connection with the early disposition of any issue presented by any claim or counterclaim that the tribunal deems necessary or appropriate. The tribunal shall provide reasoning for any award.

Article 24: Exchange of Information

1. The arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same

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time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

2. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority. To the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.

3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.

4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

6. When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.

7. The tribunal may, on application, require a party to permit inspection on reasonable notice of relevant premises or objects.

8. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

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10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

Article 25: Privilege

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.

Article 26: Hearing

1. The arbitral tribunal shall give the parties reasonable notice of the date, time, and place of any oral hearing.

2. A hearing or a portion of a hearing may be held by video, audio, or other electronic means when: (a) the parties so agree; or (b) the tribunal determines, after allowing the parties to comment, that doing so would be appropriate and would not compromise the rights of any party to a fair process. The tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence.

3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.

4. Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses should be presented in the form of written statements signed by them. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may make such order it deems appropriate, which may include reducing the weight to be given to the statement(s) or disregarding such statement(s).

5. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and contact information of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony.

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6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.

Article 27: Interim Measures

1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.

2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.

3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

4. The arbitral tribunal may allocate costs associated with applications for interim relief in any interim order or award or in the final award.

5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 7.

Article 28: Tribunal-Appointed Expert

1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.

2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.

3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.

4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

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Article 29: Default

1. If a party fails to submit an Answer in accordance with Article 3, the arbitral tribunal may proceed with the arbitration.

2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing.

3. If a party, duly invited or ordered to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

Article 30: Closure of Hearing

1. The arbitral tribunal may ask the parties if they have any further submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the arbitral hearing closed.

2. The tribunal on its own motion, or upon application of a party, may reopen the arbitral hearing at any time before the award is made.

Article 31: Waiver

A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object.

Article 32: Awards, Orders, Decisions and Rulings

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings.

2. When there is more than one arbitrator, any award, order, decision, or ruling of the tribunal shall be made by a majority of the arbitrators.

3. When the parties or the tribunal so authorize, the presiding arbitrator may make orders, decisions, or rulings on questions of procedure, including exchanges of information, subject to revision by the tribunal.

4. An order or award may be signed electronically, unless (a) the applicable law requires a physical signature, (b) the parties agree otherwise, or (c) the arbitral tribunal or Administrator determines otherwise.

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Article 33: Time, Form, and Effect of the Award

1. Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing pursuant to Article 30. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.

2. An award shall be signed by the arbitrator(s) and shall state the date on which the award was made and the place of arbitration pursuant to Article 19. Where there is more than one arbitrator and any of them fails to sign an award, the award shall include or be accompanied by a statement of the reason for the absence of such signature.

3. The award shall be transmitted in draft form by the tribunal to the Administrator. The award shall be communicated to the parties by the Administrator.

4. If applicable law requires an award to be filed or registered, the tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the tribunal.

Article 34: Applicable Laws and Remedies

1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

3. The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so.

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4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).

5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner. This provision shall not apply to an award of arbitration costs to a party to compensate for misconduct in the arbitration.

Article 35: Settlement or Other Reasons for Termination

1. If the parties settle the dispute before a final award is made, the arbitral tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of a consent award on agreed terms. The tribunal is not obliged to give reasons for such an award.

2. If continuation of the arbitration becomes unnecessary or impossible due to the non-payment of deposits required by the Administrator, the arbitration may be suspended or terminated as provided in Article 39(3).

3. If continuation of the arbitration becomes unnecessary or impossible for any reason other than as stated in Sections 1 and 2 of this Article, the tribunal shall inform the parties of its intention to terminate the arbitration. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

Article 36: Interpretation and Correction of Award

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.

3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

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4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

Article 37: Costs of Arbitration

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case. Such costs may include:

a. the fees and expenses of the arbitrators, including applicable taxes;

b. the costs of any assistance required by the tribunal;

c. the fees and expenses of the Administrator;

d. the reasonable legal and other costs incurred by the parties;

e. any costs incurred in connection with a request for interim or emergency relief pursuant to Articles 7 or 27;

f. any costs incurred in connection with a request for consolidation pursuant to Article 9; and

g. any costs associated with information exchange pursuant to Article 24.

Article 38: Fees and Expenses of Arbitral Tribunal

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.

2. As soon as practicable after the commencement of the arbitration, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the parties and all arbitrators, taking into account the arbitrators' stated rate of compensation and the size and complexity of the case.

3. Any dispute regarding the fees and expenses of the arbitrators shall be determined by the Administrator.

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Article 39: Deposits

1. The Administrator may request that the parties deposit appropriate amounts as an advance for the costs referred to in Article 37.

2. During the course of the arbitration, the Administrator may request supplementary deposits from the parties.

3. Failure of a party asserting a claim or counterclaim to pay the required fees or deposits shall be deemed a withdrawal of the claim or counterclaim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

4. If the deposits requested as referred to in Article 37(a) and 37(b) are not paid promptly and in full, the Administrator shall so inform the parties in order that one or more of them may make the required deposits. If any such deposit is made by one or more of the parties, the tribunal may, upon request, make a separate award in favor of the paying party(s) for recovery of the deposit, together with any interest.

5. If no party is willing to make the requested deposits, the arbitral tribunal may order the suspension or termination of the proceedings. If the tribunal has not yet been appointed, the Administrator may suspend or terminate the proceedings.

6. After the final award has been made, the Administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Article 40: Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 40.3, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.

2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise.

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4. The ICDR may also publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details unless a party has objected in writing to publication within 6 months from the date of the award.

Article 41: Exclusion of Liability

The members of the arbitral tribunal, any emergency arbitrator appointed under Article 7, any consolidation arbitrator appointed under Article 9, any arbitral tribunal secretary, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The parties agree that no arbitrator, emergency arbitrator, consolidation arbitrator, or arbitral tribunal secretary, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.

Article 42: Interpretation of Rules

The arbitral tribunal, any emergency arbitrator appointed under Article 7, and any consolidation arbitrator appointed under Article 9, shall interpret and apply these Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other Rules.

International Expedited Procedures

Article E-1: Scope of Expedited Procedures

These Expedited Procedures supplement the International Arbitration Rules as provided in Article 1(4).

Article E-2: Detailed Submissions

Parties are to present detailed submissions on the facts, claims, counterclaims, setoffs and defenses, together with all of the evidence then available on which such party intends to rely, in the Notice of Arbitration and the Answer. The arbitrator, in consultation with the parties, shall establish a procedural order, including a timetable, for completion of any written submissions.

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Article E-3: Administrative Conference

The Administrator may conduct an administrative conference with the parties and their representatives to discuss the application of these procedures, arbitrator selection, mediating the dispute, and any other administrative matters.

Article E-4: Objection to the Applicability of the Expedited Procedures

If an objection is submitted before the arbitrator is appointed, the Administrator may initially determine the applicability of these Expedited Procedures, subject to the power of the arbitrator to make a final determination. The arbitrator shall take into account the amount in dispute and any other relevant circumstances.

Article E-5: Changes of Claim or Counterclaim

If, after filing of the initial claims and counterclaims, a party amends its claim or counterclaim to exceed $500,000 USD exclusive of interest and the costs of arbitration, the case will continue to be administered pursuant to these Expedited Procedures unless the parties agree otherwise, or the Administrator or the arbitrator determines otherwise. After the arbitrator is appointed, no new or different claim, counterclaim or setoff and no change in amount may be submitted except with the arbitrator's consent.

Article E-6: Appointment and Qualifications of the Arbitrator

A sole arbitrator shall be appointed as follows. The Administrator shall simultaneously submit to each party an identical list of five proposed arbitrators. The parties may agree to an arbitrator from this list and shall so advise the Administrator. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list, number the remaining names in order of preference, and return the list to the Administrator within 10 days from the transmittal date of the list to the parties. The parties are not required to exchange selection lists. If the parties fail to agree on any of the arbitrators or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator may make the appointment without the circulation of additional lists. The parties will be given notice by the Administrator of the appointment of the arbitrator, together with any disclosures.

Article E-7: Procedural Hearing and Order

After the arbitrator's appointment, the arbitrator may schedule a procedural hearing with the parties, their representatives, and the Administrator to discuss

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the procedure and schedule for the case. Within 14 days of appointment, the arbitrator shall issue a procedural order.

Article E-8: Proceedings by Written Submissions

In expedited proceedings based on written submissions, all submissions are due within 60 days of the date of the procedural order, unless the arbitrator determines otherwise. The arbitrator may require an oral hearing if deemed necessary.

Article E-9: Proceedings with an Oral Hearing

In expedited proceedings in which an oral hearing is to be held, the arbitrator shall set the date, time, and location of the hearing. The oral hearing shall take place within 60 days of the date of the procedural order unless the arbitrator deems it necessary to extend that period. Hearings may take place in person or via video, audio, or other electronic means, at the discretion of the arbitrator. Generally, there will be no transcript or stenographic record. Any party desiring a stenographic record may arrange for one. The oral hearing shall not exceed one day unless the arbitrator determines otherwise. The Administrator will notify the parties in advance of the hearing date.

Article E-10: The Award

Awards shall be made in writing and shall be final and binding on the parties. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the award shall be made not later than 30 days from the date of the closing of the hearing or from the time established for final written submissions.

Administrative Fees

Administrative Fee Schedules

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT www.adr.org/internationalfeeschedule.

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Replace the ICC Arbitration Rules on pages 220-253 of the Documentary Supplement with the following:

ICC Rules of Arbitration*
In force as from 1 January 2021

INTRODUCTORY PROVISIONS

Article 1: International Court of Arbitration

1. The International Court of Arbitration (the “Court”) of the International Chamber of Commerce (“ICC”) is the independent arbitration body of ICC. The statutes of the Court are set forth in Appendix I.

2. The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of ICC (the “Rules”). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the “Internal Rules”).

3.The President of the Court (the “President”) shall have the power to take urgent decisions on behalf of the Court, provided that any such decision is reported to the Court at one of its next sessions. At the President’s request, in the President’s absence or otherwise where the President is unable to act, one of the Vice-Presidents shall have the same power.

4. As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at one of its next sessions.

5. The Court is assisted in its work by the Secretariat of the Court (the “Secretariat”) under the direction of its Secretary General (the “Secretary General”).

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Article 2: Definitions

In the Rules:

(i) "arbitral tribunal" includes one or more arbitrators;

(ii) "claimant" includes one or more claimants, "respondent" includes one or more respondents, and "additional party" includes one or more additional parties;

(iii) "party" or "parties" include claimants, respondents or additional parties;

(iv) "claim" or "claims" include any claim by any party against any other party;

(v) "award" includes, inter alia, an interim, partial, final, or additional award.

Article 3: Written Notifications or Communications; Time Limits

1. Save as otherwise provided in Articles 4(4)(b) and 5(3), all pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be sent to each party, each arbitrator, and the Secretariat. Any notification or communication from the arbitral tribunal to the parties shall also be sent in copy to the Secretariat.

2. All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by any other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.

3. A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).

4. Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country

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where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

COMMENCING THE ARBITRATION

Article 4: Request for Arbitration

1. A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.

2. The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.

3. The Request shall contain the following information:

(a) the name in full, description, address and other contact details of each of the parties;

(b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;

(c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;

(d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

(e) any relevant agreements and, in particular, the arbitration agreement(s);

(f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;

(g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

(h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

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The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

4. Together with the Request, the claimant shall:

(a) make payment of the filing fee required by Appendix III ("Arbitration Costs and Fees") in force on the date the Request is submitted; and

(b) submit a sufficient number of copies of the Request for each other party, each arbitrator and the Secretariat where the claimant requests transmission of the Request by delivery against receipt, registered post or courier.

In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

5. The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fee.

Article 5: Answer to the Request; Counterclaims

1. Within 30 days from receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information:

(a) its name in full, description, address and other contact details;

(b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;

(c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;

(d) its response to the relief sought;

(e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with

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the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and

(f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.

2. The Secretariat may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice and, where required by Articles 12 and 13, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules.

3. The Answer shall be submitted in a sufficient number of copies for each other party, each arbitrator and the Secretariat where the respondent requests transmission thereof by delivery against receipt, registered post or courier.

4. The Secretariat shall communicate the Answer and the documents annexed thereto to all other parties.

5. Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:

(a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;

(b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;

(c) any relevant agreements and, in particular, the arbitration agreement(s); and

(d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

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The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.

6. The claimant shall submit a reply to any counterclaim within 30 days from receipt of the counterclaims communicated by the Secretariat. Prior to the transmission of the file to the arbitral tribunal, the Secretariat may grant the claimant an extension of time for submitting the reply.

Article 6: Effect of the Arbitration Agreement

1. Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

2. By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.

3. If any party against which a claim has been made does not submit an Answer, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

4. In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. In particular:

(i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7(1), with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist; and

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b)

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that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

5. In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.

6. Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement.

7. Where the Court has decided pursuant to Article 6(4) that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.

8. If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

9. Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.

MULTIPLE PARTIES, MULTIPLE CONTRACTS AND CONSOLIDATION

Article 7: Joinder of Additional Parties

1. A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. Unless all parties, including the additional party, otherwise agree, or as provided for in Article 7(5), no additional party may be joined after the confirmation or appointment of any arbitrator. The Secretariat may fix a time limit for the submission of a Request for Joinder.

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2. The Request for Joinder shall contain the following information:

(a) the case reference of the existing arbitration;

(b) the name in full, description, address and other contact details of each of the parties, including the additional party; and

(c) the information specified in Article 4(3), subparagraphs (c), (d), (e) and (f).

The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.

3. The provisions of Articles 4(4) and 4(5) shall apply, mutatis mutandis, to the Request for Joinder.

4. The additional party shall submit an Answer in accordance, mutatis mutandis, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

5. Any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. In deciding on such a Request for Joinder, the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.

Article 8: Claims Between Multiple Parties

1. In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)-6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).

2. Any party making a claim pursuant to Article 8(1) shall provide the information specified in Article 4(3) subparagraphs (c), (d), (e) and (f).

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3. Before the Secretariat transmits the file to the arbitral tribunal in accordance with Article 16, the following provisions shall apply, mutatis mutandis, to any claim made: Article 4(4) subparagraph b); Article 4(5); Article 5(1) except for subparagraphs (a), (b), (e) and (f); Article 5(2); Article 5(3) and Article 5(4). Thereafter, the arbitral tribunal shall determine the procedure for making a claim.

Article 9: Multiple Contracts

Subject to the provisions of Articles 6(3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

Article 10: Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

(a) the parties have agreed to consolidation; or

(b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or

(c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

THE ARBITRAL TRIBUNAL

Article 11: General Provisions

1. Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.

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2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.

3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

4. The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final.

5. By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.

6. Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

7. In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.

Article 12: Constitution of the Arbitral Tribunal

Number of Arbitrators

1. The disputes shall be decided by a sole arbitrator or by three arbitrators.

2. Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within 15 days from receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within 15 days from receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

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Sole Arbitrator

3. Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party or parties, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

Three Arbitrators

4. Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

5. Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

6. Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.

7. Where an additional party has been joined, (Article 7(1)), and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13 and subject to Article 7(5).

8. In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such cases, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

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9. Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.

Article 13: Appointment and Confirmation of the Arbitrators

1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).

2. The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at one of its next sessions. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.

3. Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of an ICC National Committee or Group that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

4. The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:

(a) one or more of the parties is a state or may be considered to be a state entity;

(b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or

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(c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.

5. Where the Court is to appoint the sole arbitrator or the president of the arbitral tribunal, such sole arbitrator or president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Secretariat, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

6. Whenever the arbitration agreement upon which the arbitration is based arises from a treaty, and unless the parties agree otherwise, no arbitrator shall have the same nationality of any party to the arbitration.

Article 14: Challenge of Arbitrators

1. A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

2. For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

3. The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

Article 15: Replacement of Arbitrators

1. An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.

2. An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented de jure or de facto from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.

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3. When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

4. When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.

5. Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

THE ARBITRAL PROCEEDINGS

Article 16: Transmission of the File to the Arbitral Tribunal

The Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

Article 17: Party Representation

1. Each party must promptly inform the Secretariat, the arbitral tribunal and the other parties of any changes in its representation.

2. The arbitral tribunal may, once constituted and after it has afforded an opportunity to the parties to comment in writing within a suitable period of time, take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings.

3. At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

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Article 18: Place of the Arbitration

1. The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.

2. The arbitral tribunal may, after consulting the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.

3. The arbitral tribunal may deliberate at any location it considers appropriate.

Article 19: Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

Article 20: Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

Article 21: Applicable Rules of Law

1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

3. The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.

Article 22: Conduct of the Arbitration

1. The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

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2. In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties. Such measures may include one or more of the case management techniques described in Appendix IV.

3. Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

4. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

5. The parties undertake to comply with any order made by the arbitral tribunal.

Article 23: Terms of Reference

1. As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

(a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

(b) the addresses to which notifications and communications arising in the course of the arbitration may be made;

(c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

(d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

(e) the names in full, address and other contact details of each of the arbitrators;

(f) the place of the arbitration; and

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(g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono.

2. The Terms of Reference shall be signed by the parties and the arbitral tribunal. Within 30 days from the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

3. If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court, the arbitration shall proceed.

4. After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

Article 24: Case Management Conference and Procedural Timetable

1. When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall hold a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2).

2. During such conference, or as soon as possible thereafter, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the efficient conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.

3. To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.

4. Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management

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conference and may request the attendance at any case management conference of the parties in person or through an internal representative.

Article 25: Establishing the Facts of the Case

1. The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.

2. The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.

3. The arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.

4. At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.

5. The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

Article 26: Hearings

1. A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.

2. If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.

3. The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.

4. The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

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Article 27: Closing of the Proceedings and Date for Submission of Draft Awards

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

(a) declare the proceedings closed with respect to the matters to be decided in the award; and

(b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 34.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

Article 28: Conservatory and Interim Measures

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

2. Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

Article 29: Emergency Arbitrator

1. A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the

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Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

2. The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.

3. The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.

4. The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

5. Articles 29(1)-29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.

6. The Emergency Arbitrator Provisions shall not apply if:

(a) the arbitration agreement under the Rules was concluded before 1 January 2012;

(b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or

(c) the arbitration agreement upon which the application is based arises from a treaty.

7. The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

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Article 30: Expedited Procedure

1. By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the "Expedited Procedure Provisions") shall take precedence over any contrary terms of the arbitration agreement.

2. The Expedited Procedure Rules set forth in Appendix VI shall apply if:

(a) the amount in dispute does not exceed the limit set out in Article 1(2) of Appendix VI at the time of the communication referred to in Article 1(3) of that Appendix; or

(b) the parties so agree.

3. The Expedited Procedure Provisions shall not apply if:

(a) the arbitration agreement under the Rules was concluded before the date on which the Expedited Procedure Provisions came into force;

(b) the parties have agreed to opt out of the Expedited Procedure Provisions; or

(c) the Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances to apply the Expedited Procedure Provisions.

AWARDS

Article 31: Time Limit for the Final Award

1. The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2).

2. The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

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Article 32: Making of the Award

1. When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.

2. The award shall state the reasons upon which it is based.

3. The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

Article 33: Award by Consent

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

Article 34: Scrutiny of the Award by the Court

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

Article 35: Notification, Deposit and Enforceability of the Award

1. Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to ICC by the parties or by one of them.

2. Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.

3. By virtue of the notification made in accordance with Article 35(1), the parties waive any other form of notification or deposit on the part of the arbitral tribunal.

4. An original of each award made in accordance with the Rules shall be deposited with the Secretariat.

5. The arbitral tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary.

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6. Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

Article 36: Correction and Interpretation of the Award; Additional Award; Remission of Awards

1. On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days from notification of the award by the Secretariat pursuant to Article 35(1).

2. Any application of a party for the correction of an error of the kind referred to in Article 36(1), or for the interpretation of an award, must be made to the Secretariat within 30 days from receipt of the award by such party.

3. Any application of a party for an additional award as to claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide must be made to the Secretariat within 30 days from receipt of the award by such party.

4. After transmission of an application pursuant to Articles 36(2) or 36(3) to the arbitral tribunal, the latter shall grant the other party or parties a short time limit, normally not exceeding 30 days, from receipt of the application by that party or parties, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days from expiry of the time limit for the receipt of any comments from the other party or parties or within such other period as the Court may decide. A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. A decision to grant the application under paragraph 3 shall take the form of an additional award. The provisions of Articles 32, 34 and 35 shall apply mutatis mutandis.

5. Where a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35 and this Article 36 shall apply mutatis mutandis to any addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

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COSTS

Article 37: Advance to Cover the Costs of the Arbitration

1. After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration

(a) until the Terms of Reference have been drawn up; or

(b) when the Expedited Procedure Provisions apply, until the case management conference.

Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 37.

2. As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators, the ICC administrative expenses and any other expenses incurred by ICC related to the arbitration for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 37(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 37(2) shall be payable in equal shares by the claimant and the respondent.

3. Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.

4. Where claims are made under Article 7 or 8, the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 37, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 37(4), and the amount of any advance previously paid by any party will be considered as a partial payment by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 37(4).

5. The amount of any advance on costs fixed by the Court pursuant to this Article 37 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.

6. When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the

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arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.

7. If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

Article 38: Decision as to the Costs of the Arbitration

1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

2. The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5. In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

6. In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

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MISCELLANEOUS

Article 39: Modified Time Limits

1. The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.

2. The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 39(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.

Article 40: Waiver

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

Article 41: Limitation of Liability

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

Article 42: General Rule

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.

Article 43: Governing Law and Settlement of Disputes

Any claims arising out of or in connection with the administration of the arbitration proceedings by the Court under the Rules shall be governed by French law and settled by the Paris Judicial Tribunal (Tribunal Judiciaire de Paris) in France, which shall have exclusive jurisdiction.

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APPENDIX I: STATUTES OF THE INTERNATIONAL COURT OF ARBITRATION

Article 1: Function

1. The function of the International Court of Arbitration of the International Chamber of Commerce (the "Court") is to ensure the application of the Rules of Arbitration of ICC, and it has all the necessary powers for that purpose.

2. As an autonomous body, it carries out these functions in complete independence from ICC and its organs.

3. Its members are independent from the ICC National Committees and Groups.

Article 2: Composition of the Court

The Court shall consist of a President, Vice-Presidents, and members and alternate members (collectively designated as members). In its work it is assisted by its Secretariat (Secretariat of the Court).

Article 3: Appointment

1. The President is elected by the ICC World Council upon the recommendation of the Executive Board of ICC based on the proposal of an independent selection committee which includes highly distinguished arbitration practitioners.

2. On the proposal of the President, the ICC World Council appoints the Vice-Presidents of the Court from among the members of the Court or otherwise. The President and the Vice-Presidents of the Court form the Bureau of the Court.

3. The members of the Court are appointed by the ICC World Council on the proposal of ICC National Committees or Groups, one member for each National Committee or Group. On the proposal of the President, the World Council may appoint alternate members.

4. On the proposal of the President, the ICC World Council may appoint members and alternate members in countries and territories:

(a) where there is no National Committee or Group; or

(b) where the National Committee or Group is suspended.

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5. The term of office of all members, including, for the purposes of this paragraph, the President and Vice-Presidents, is three years and may be renewed once. If a member is no longer in a position to exercise the member's functions, a successor is appointed by the World Council for the remainder of the term.

6. No Court member shall serve for more than two full consecutive terms, unless the World Council decides otherwise upon the recommendation of the Executive Board further to the proposal of the President, in particular where a Court member is proposed for election as Vice-President.

Article 4: Committees

1. Save as provided in Articles 5(1), 6 and 7 of this Appendix, the Court conducts its work in Committees of three members.

2. Members of the Committees consist of a president and two other members.

Article 5: Special Committees

1. The Court may conduct its work in Special Committees:

(a) to decide on matters under Articles 14 and 15(2) of the Rules;

(b) to scrutinise draft awards in the presence of dissenting opinions;

(c) to scrutinise draft awards in cases where one or more of the parties is a state or may be considered to be a state entity;

(d) to decide on matters transferred to a Special Committee by a Committee which did not reach a decision or deemed it preferable to abstain, having made any suggestions it deemed appropriate; or

(e) upon request of the President.

2. Members of the Special Committee consist of a president and at least six other members.

Article 6: Single-member Committees

The Court may scrutinize draft awards under the Expedited Procedure Provisions in Single-member Committees.

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Article 7: Plenary of the Court

1. The Court meets in plenary during its annual working session. It also meets in plenary whenever so convened by the President.

2. The plenary of the Court may take any decision under Articles 4(1), 5(1) and 6 of this Appendix.

3. Members of the plenary consist of the President, the Vice-Presidents and all Court members who have accepted to attend and are in attendance.

Article 8: Confidentiality

The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.

Article 9: Modification of the Rules of Arbitration

Any proposal of the Court for a modification of the Rules is laid before the Commission on Arbitration and ADR before submission to the Executive Board of ICC for approval, provided, however, that the Court, in order to take account of developments in information technology, may propose to modify or supplement the provisions of Article 3 of the Rules or any related provisions in the Rules without laying any such proposal before the Commission.

Article 10

The decisions of the Court shall be deemed to be made in Paris, France.

APPENDIX II: INTERNAL RULES OF THE INTERNATIONAL COURT OF ARBITRATION

Article 1: Confidential Character of the Work of the International Court of Arbitration

1. For the purposes of this Appendix, members of the Court include the President and Vice-Presidents of the Court.

2. The sessions of the Court are open only to its members and to the Secretariat.

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3. However, in exceptional circumstances, the President of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court.

4. The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court, to the Secretariat and to persons authorized by the President to attend Court sessions.

5. The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.

6. Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from publishing anything based upon information contained therein without having previously submitted the text for approval to the Secretary General of the Court.

7. The Secretariat will in each case submitted to arbitration under the Rules retain in the archives of the Court all awards, Terms of Reference and decisions of the Court, as well as copies of the pertinent correspondence of the Secretariat.

8. Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing within a period fixed by the Secretariat the return of such documents, communications or correspondence. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.

Article 2: Participation of Members of the International Court of Arbitration in ICC Arbitration

1. The President and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC Arbitration.

2. The Court shall not appoint Vice-Presidents or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.

3. When the President, a Vice-President or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before

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the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.

4. Such person must be absent from the Court session whenever the matter is considered by the Court and shall not participate in the discussions or in the decisions of the Court.

5. Such person will not receive any material documentation or information pertaining to such proceedings.

Article 3: Relations between the Members of the Court and the ICC National Committees and Groups

1. By virtue of their capacity, the members of the Court are independent of the ICC National Committees and Groups which proposed them for appointment by the ICC World Council.

2. Furthermore, they must regard as confidential, vis-à-vis the said National Committees and Groups, any information concerning individual cases with which they have become acquainted in their capacity as members of the Court, except when they have been requested by the President of the Court, by a Vice-President of the Court authorized by the President of the Court, or by the Court's Secretary General to communicate specific information to their respective National Committees or Groups.

Article 4: Constitution, Quorum and Decision-making

1. The members of Committees, Special Committees and Single-member Committees are appointed by the President from among the Vice-Presidents or the other members of the Court. In the President's absence or otherwise where the President is unable to act, they are appointed by a Vice-President at the request of the Secretary General or the Deputy Secretary General of the Court.

2. Committees and Special Committees meet whenever convened by their president.

3. The President of the Court acts as the president of the Committee, the Special Committee and the plenary. A Vice-President of the Court may act as president of a Committee, Special Committee or the plenary (i) at the request of the President or (ii) in the President's absence or otherwise where the President is unable to act, at the request of the Secretary General or the Deputy Secretary General of the Court. In exceptional circumstances, another member of the Court may act as president of a Committee or Special Committee following the same procedure.

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4. The President of the Court, a Vice-President and any Court member may act in, and convene, the Single-member Committee.

5. Decisions on the constitution of Committees, Special Committees and Single-member Committees are reported to the Court at one of its next sessions.

6. Deliberations shall be valid:

(a) At the Committee, when at least two members are present.

(b) At the Special Committee and plenary, when at least six members, and the President or designated Vice-President, are present.

7. Decisions at Committees are taken unanimously. When a Committee cannot reach a unanimous decision or deems it preferable to abstain, it transfers the case to a Special Committee, making any suggestions it deems appropriate.

8. Decisions at Special Committees and the plenary are taken by majority, the President or Vice-President, as the case may be, having a casting vote in the event of a tie.

Article 5: Communication of Reasons of Decisions

1. Upon request of any party, the Court will communicate the reasons for Articles 6(4), 10, 12(8), 12(9), 14 and 15(2).

2. Any request for the communications of reasons must be made in advance of the decision in respect of which reasons are sought. For decisions pursuant to Article 15(2), a party shall address its request to the Court when invited to comment pursuant to Article 15(3).

3. In exceptional circumstances, the Court may decide not to communicate the reasons for any of the above decisions.

Article 6: Court Secretariat

1. In the Secretary General's absence or otherwise at the Secretary General's request, the Deputy Secretary General and/or the General Counsel shall have the authority to refer matters to the Court, confirm arbitrators, certify true copies of awards request the payment of a provisional advance and authorize the payment of advances in instalments, respectively provided for in Articles 6(3), 13(2), 35(2) and 37(1) of the Rules and Article 1(6) of Appendix III, as well as to take the measure provided for in Article 37(6).

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2. The Secretariat may, with the approval of the Court, issue notes and other documents for the information of the parties and the arbitrators, or as necessary for the proper conduct of the arbitral proceedings.

3. Offices of the Secretariat may be established outside the headquarters of the ICC. The Secretariat shall keep a list of offices designated by the Secretary General. Requests for Arbitration may be submitted to the Secretariat at any of its offices, and the Secretariat's functions under the Rules may be carried out from any of its offices, as instructed by the Secretary General, Deputy Secretary General or General Counsel.

Article 7: Scrutiny of Arbitral Awards

When the Court scrutinizes draft awards in accordance with Article 34 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration.

APPENDIX III: ARBITRATION COSTS AND FEES

Article 1: Advance on Costs

1. Each request to commence an arbitration pursuant to the Rules must be accompanied by a filing fee of US$ 5,000. Such payment is non-refundable and shall be credited to the claimant's portion of the advance on costs.

2. The provisional advance fixed by the Secretary General according to Article 37(1) of the Rules shall normally not exceed the amount obtained by adding together the ICC administrative expenses, the minimum of the fees (as set out in the scale hereinafter) based upon the amount of the claim and the expected reimbursable expenses of the arbitral tribunal incurred with respect to the drafting of the Terms of Reference or the holding of the case management conference. If such amount is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. Payment by the claimant shall be credited to its share of the advance on costs fixed by the Court.

3. In general, the arbitral tribunal shall, in accordance with Article 37(6) of the Rules, proceed only with respect to those claims or counterclaims in regard to which the whole of the advance on costs has been paid.

4. The advance on costs fixed by the Court according to Articles 37(2) or 37(4) of the Rules comprises the fees of the arbitrator or arbitrators (hereinafter referred to as "arbitrator"), any arbitration-related expenses of the arbitrator and the ICC administrative expenses.

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5. Each party shall pay its share of the total advance on costs in cash. However, if a party's share of the advance on costs is greater than US$ 500,000 (the "Threshold Amount"), such party may post a bank guarantee for any amount above the Threshold Amount. The Court may modify the Threshold Amount at any time at its discretion.

6. The Secretary-General may authorize the payment of advances on costs, or any party's share thereof, in instalments, subject to such conditions as the Court thinks fit.

7. A party that has already paid in full its share of the advance on costs fixed by the Court may, in accordance with Article 37(5) of the Rules, pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee.

8. When the Court has fixed separate advances on costs pursuant to Article 37(3) of the Rules, the Secretariat shall invite each party to pay the amount of the advance corresponding to its respective claim(s).

9. When, as a result of the fixing of separate advances on costs, the separate advance fixed for the claim of either party exceeds one half of such global advance as was previously fixed (in respect of the same claims and counterclaims that are the subject of separate advances), a bank guarantee may be posted to cover any such excess amount. In the event that the amount of the separate advance is subsequently increased, at least one half of the increase shall be paid in cash.

10. The Secretariat shall establish the terms governing all bank guarantees which the parties may post pursuant to the above provisions.

11. As provided in Article 37(5) of the Rules, the advance on costs may be subject to readjustment at any time during the arbitration, in particular to take into account fluctuations in the amount in dispute, changes in the amount of the estimated expenses of the arbitrator, or the evolving difficulty or complexity of arbitration proceedings.

12. Before any expertise ordered by the arbitral tribunal can be commenced, the parties, or one of them, shall pay an advance on costs fixed by the arbitral tribunal sufficient to cover the expected fees and expenses of the expert as determined by the arbitral tribunal. The arbitral tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses.

13. The amounts paid as advances on costs do not yield interest for the parties or the arbitrator.

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Article 2: Costs and Fees

1. Subject to Article 38(2) of the Rules, the Court shall fix the fees of the arbitrator in accordance with the scale hereinafter set out or, where the amount in dispute is not stated, at its discretion.

2. In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 38(2) of the Rules), at a figure higher or lower than those limits.

3. When a case is submitted to more than one arbitrator, the Court, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of one arbitrator.

4. The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules.

5. The Court shall fix the ICC administrative expenses of each arbitration in accordance with the scale hereinafter set out or, where the amount in dispute is not stated, at its discretion. Where the parties have agreed upon additional services, or in exceptional circumstances, the Court may fix the ICC administrative expenses at a lower or higher figure than that which would result from the application of such scale, provided that such expenses shall normally not exceed the maximum amount of the scale.

6. At any time during the arbitration, the Court may fix as payable a portion of the ICC administrative expenses corresponding to services that have already been performed by the Court and the Secretariat.

7. The Court may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses as a condition for holding an arbitration in abeyance at the request of the parties or of one of them with the acquiescence of the other.

8. If an arbitration terminates before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses at its discretion, taking into account the stage attained by the arbitral proceedings and any other relevant circumstances.

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9. Any amount paid by the parties as an advance on costs exceeding the costs of the arbitration fixed by the Court shall be reimbursed to the parties having regard to the amounts paid.

10. In the case of an application under Articles 36(2) or 36(3) of the Rules or of a remission pursuant to Article 36(5) of the Rules, the Court may fix an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses and may make the transmission of such application to the arbitral tribunal subject to the prior cash payment in full to ICC of such advance. The Court shall fix at its discretion the costs of the procedure following an application or a remission, which shall include any possible fees of the arbitrator and ICC administrative expenses, when approving the decision of the arbitral tribunal.

11. The Secretariat may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses for any expenses arising in relation to a request pursuant to Article 35(5) of the Rules.

12. When an arbitration is preceded by proceedings under the ICC Mediation Rules, one half of the ICC administrative expenses paid for such proceedings shall be credited to the ICC administrative expenses of the arbitration.

13. Amounts paid to the arbitrator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.

14. ICC administrative expenses do not include VAT, taxes, imposts or any other charges of a similar nature. They may be increased by the amount of VAT, taxes, imposts or any charges of a similar nature at the prevailing rate. Parties have a duty to pay any such charges pursuant to invoices issued by ICC.

Article 3: Scales of Administrative Expenses and Arbitrator's Fees

1. The scales of administrative expenses and arbitrator's fees set forth below shall be effective as of 1 January 2017 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations.

2. To calculate the ICC administrative expenses and the arbitrator's fees, the amounts calculated for each successive tranche of the amount in dispute must be added together, except that where the amount in dispute is over US$ 500 million, a flat amount of US$ 150,000 shall constitute the entirety of the ICC administrative expenses.

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3. The scales of administrative expenses and arbitrator's fees for the expedited procedure set forth below shall be effective as of 1 March 2017 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations. When parties have agreed to the expedited procedure pursuant to Article 30(2), subparagraph b), the scales for the expedited procedure will apply.

4. All amounts fixed by the Court or pursuant to any of the appendices to the Rules are payable in US$ except where prohibited by law or decided otherwise by the Court, in which case ICC may apply a different scale and fee arrangement in another currency.

SCALES OF ADMINISTRATIVE EXPENSES AND ARBITRATOR'S FEES

…

Amount in Dispute	B. Administrative Expenses*
(in US dollars)	(in US dollars)
up to 50,000	5,000
from 50,001 to 100,000	5,000 + 1.53% of amt. over 50,000
from 100,001 to 200,000	5,765 + 2.72% of amt. over 100,000
from 200,001 to 500,000	8,485 + 2.25% of amt. over 200,000
from 500,001 to 1,000,000	15,235 + 1.62% of amt. over 500,000
from 1,000,001 to 2,000,000	23,335 + 0.788% of amt. over 1,000,000
from 2,000,001 to 5,000,000	31,215 + 0.46% of amt. over 2,000,000
from 5,000,001 to 10,000,000	45,015 + 0.25% of amt. over 5,000,000
from 10,000,001 to 30,000,000	57,515 + 0.10% of amt. over 10,000,000
from 30,000,001 to 50,000,000	77,515 + 0.09% of amt. over 30,000,000
from 50,000,001 to 80,000,000	95,515 + 0.01% of amt. over 50,000,000
from 80,000,001 to 500,000,000	98,515 + 0.0123% of amt. over 80,000,000
over 500,000,000	150,000

* Amounts excluding VAT….

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Amount in Dispute	A. Arbitrators' Fees	
(in US dollars)	(in US dollars)	
	Minimum	Maximum
Up to 50,000	3,000	18.0200% of amount in dispute
from 50,001 to 100,000	3,000 + 2.6500% of amt. over 50,000	9,010 + 13.5680% of amt. over 50,000
from 100,001 to 200,000	4,325 + 1.4310% of amt. over 100,000	15,794 + 7.6850% of amt. over 100,000
from 200,001 to 500,000	5,756 + 1.3670% of amt. over 200,000	23,479 + 6.8370% of amt. over 200,000
from 500,001 to 1,000,000	9,857 + 0.9540% of amt. over 500,000	43,990 + 4.0280% of amt. over 500,000
From 1,000,001 to 2,000,000	14,627 + 0.6890% of amt. over 1,000,000	64,130 + 3.6040% of amt. over 1,000,000
from 2,000,001 to 5,000,000	21,517 + 0.3750% of amt. over 2,000,000	100,170 + 1.3910% of amt. over 2,000,000
from 5,000,001 to 10,000,000	32,767 + 0.1280% of amt. over 5,000,000	141,900 + 0.9100% of amt. over 5,000,000
from 10,000,001 to 30,000,000	39,167 + 0.0640% of amt. over 10,000,000	187,400 + 0.2410% of amt. over 10,000,000
from 30,000,001 to 50,000,000	51,967 + 0.0590% of amt. over 30,000,000	235,600 + 0.2280% of amt. over 30,000,000
from 50,000,001 to 80,000,000	63,767 + 0.0330% of amt. over 50,000,000	281,200 + 0.1570% of amt. over 50,000,000
from 80,000,001 to 100,000,000	73,667 + 0.0210% of amt. over 80,000,000	328,300 + 0.1150% of amt. over 80,000,000
from 100,000,001 to 500,000,000	77,867 + 0.0110% of amt. over 100,000,000	351,300 + 0.0580% of amt. over 100,000,000
over 500,000,000	121,867 + 0.0100% of amt. over 500,000,000	583,300 + 0.0400% of amt. over 500,000,000

…

APPENDIX IV : CASE MANAGEMENT TECHNIQUES

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

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(a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.

(b) Identifying issues that can be resolved by agreement between the parties or their experts.

(c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.

(d) Production of documentary evidence:

(i) requiring the parties to produce with their submissions the documents on which they rely;

(ii) avoiding requests for document production when appropriate in order to control time and cost;

(iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;

(iv) establishing reasonable time limits for the production of documents;

(v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.

(e) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.

(f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.

(g) Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing.

(h) Settlement of disputes:

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(i) encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules;

(ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Additional techniques are described in the ICC publication entitled "Controlling Time and Costs in Arbitration".

APPENDIX V: EMERGENCY ARBITRATOR RULES

Article 1: Application for Emergency Measures

1. A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the Rules of Arbitration of ICC (the "Rules") shall submit its Application for Emergency Measures (the "Application") to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the Rules.

2. The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat where the party submitting the Application requests transmission thereof by delivery against receipt, registered post or courier.

3. The Application shall contain the following information:

(a) the name in full, description, address and other contact details of each of the parties;

(b) the name in full, address and other contact details of any person(s) representing the applicant;

(c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;

(d) a statement of the Emergency Measures sought;

(e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;

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(f) any relevant agreements and, in particular, the arbitration agreement;

(g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;

(h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and

(i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

4. The Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.

5. If and to the extent that the President of the Court (the "President") considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall transmit a copy of the Application to them for information.

6. The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days from the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.

Article 2: Appointment of the Emergency Arbitrator; Transmission of the File

1. The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application.

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2. No emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal pursuant to Article 16 of the Rules. An emergency arbitrator appointed prior thereto shall retain the power to make an order within the time limit permitted by Article 6(4) of this Appendix.

3. Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator. Thereafter, all written communications from the parties shall be submitted directly to the emergency arbitrator with a copy to each other party and the Secretariat. A copy of any written communications from the emergency arbitrator to the parties shall be submitted to the Secretariat.

4. Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.

5. Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Secretariat shall provide a copy of such statement to the parties.

6. An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application.

Article 3: Challenge of an Emergency Arbitrator

1. A challenge against the emergency arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

2. The challenge shall be decided by the Court after the Secretariat has afforded an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time.

Article 4: Place of the Emergency Arbitrator Proceedings

1. If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules.

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2. Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication.

Article 5: Proceedings

1. The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.

2. The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

Article 6: Order

1. Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").

2. In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.

3. The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.

4. The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.

5. Within the time limit established pursuant to Article 6(4) of this Appendix, the emergency arbitrator shall send the Order to the parties, with a copy to the Secretariat, by any of the means of communication permitted by Article 3(2) of the Rules that the emergency arbitrator considers will ensure prompt receipt.

6. The Order shall cease to be binding on the parties upon:

(a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;

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(b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;

(c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or

(d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.

7. The emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security.

8. Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.

Article 7: Costs of the Emergency Arbitrator Proceedings

1. The applicant must pay an amount of US$ 40,000, consisting of US$ 10,000 for ICC administrative expenses and US$ 30,000 for the emergency arbitrator's fees and expenses. Notwithstanding Article 1(5) of this Appendix, the Application shall not be notified until the payment of US$ 40,000 is received by the Secretariat.

2. The President may, at any time during the emergency arbitrator proceedings, decide to increase the emergency arbitrator's fees or the ICC administrative expenses taking into account, inter alia, the nature of the case and the nature and amount of work performed by the emergency arbitrator, the Court, the President and the Secretariat. If the party which submitted the Application fails to pay the increased costs within the time limit fixed by the Secretariat, the Application shall be considered as withdrawn.

3. The emergency arbitrator's Order shall fix the costs of the emergency arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

4. The costs of the emergency arbitrator proceedings include the ICC administrative expenses, the emergency arbitrator's fees and expenses and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings.

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5. In the event that the emergency arbitrator proceedings do not take place pursuant to Article 1(5) of this Appendix or are otherwise terminated prior to the making of an Order, the President shall determine the amount to be reimbursed to the applicant, if any. An amount of US$ 5,000 for ICC administrative expenses is non-refundable in all cases.

Article 8: General Rule

1. The President shall have the power to decide, at the President's discretion, all matters relating to the administration of the emergency arbitrator proceedings not expressly provided for in this Appendix.

2. In the President's absence or otherwise at the President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President.

3. In all matters concerning emergency arbitrator proceedings not expressly provided for in this Appendix, the Court, the President and the emergency arbitrator shall act in the spirit of the Rules and this Appendix.

APPENDIX VI: EXPEDITED PROCEDURE RULES

Article 1: Application of the Expedited Procedure Rules

1. Insofar as Article 30 of the Rules of Arbitration of ICC (the "Rules") and this Appendix VI do not provide otherwise, the Rules shall apply to an arbitration under the Expedited Procedure Rules.

2. The amount referred to in Article 30(2), subparagraph a) of the Rules is:

(a) US$ 2,000,000 if the arbitration agreement under the Rules was concluded on or after 1 March 2017 and before 1 January 2021 or

(b) US$ 3,000,000 if the arbitration agreement under the Rules was concluded on or after 1 January 2021.

3. Upon receipt of the Answer to the Request pursuant to Article 5 of the Rules, or upon expiry of the time limit for the Answer or at any relevant time thereafter and subject to Article 30(3) of the Rules, the Secretariat will inform the parties that the Expedited Procedure Provisions shall apply in the case.

4. The Court may, at any time during the arbitral proceedings, on its own motion or upon the request of a party, and after consultation with the arbitral tribunal and the parties, decide that the Expedited Procedure Provisions shall no

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longer apply to the case. In such case, unless the Court considers that it is appropriate to replace and/or reconstitute the arbitral tribunal, the arbitral tribunal shall remain in place.

Article 2: Constitution of the Arbitral Tribunal

1. The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.

2. The parties may nominate the sole arbitrator within a time limit to be fixed by the Secretariat. In the absence of such nomination, the sole arbitrator shall be appointed by the Court within as short a time as possible.

Article 3: Proceedings

1. Article 23 of the Rules shall not apply to an arbitration under the Expedited Procedure Rules.

2. After the arbitral tribunal has been constituted, no party shall make new claims, unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration, any cost implications and any other relevant circumstances.

3. The case management conference convened pursuant to Article 24 of the Rules shall take place no later than 15 days from the date on which the file was transmitted to the arbitral tribunal. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

4. The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. In particular, the arbitral tribunal may, after consultation with the parties, decide not to allow requests for document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).

5. The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts.

Article 4: Award

1. The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference. The Court may extend the time limit pursuant to Article 31(2) of the Rules.

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2. The fees of the arbitral tribunal shall be fixed according to the scales of administrative expenses and arbitrator's fees for the expedited procedure set out in Appendix III.

Article 5: General Rule

In all matters concerning the expedited procedure not expressly provided for in this Appendix, the Court and the arbitral tribunal shall act in the spirit of the Rules and this Appendix.

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Replace the LCIA Arbitration Rules on pages 249-269 of the Documentary Supplement with the following:

LCIA Arbitration Rules*
Effective 1 October 2020

Preamble

Where any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not) provides in whatsoever manner for arbitration under the rules of or by the LCIA, the London Court of International Arbitration, the London Court of Arbitration or the London Court, the parties thereto shall be taken to have agreed in writing that any arbitration between them shall be conducted in accordance with the LCIA Rules or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration and that such LCIA Rules form part of their agreement (collectively, the "Arbitration Agreement"). These LCIA Rules comprise this Preamble, the Articles and the Index, together with the Annex to the LCIA Rules and the Schedule of Costs as both from time to time may be separately amended by the LCIA (the "LCIA Rules").

Article 1 Request for Arbitration

1.1 Any party wishing to commence arbitration under the LCIA Rules (the "Claimant") shall deliver to the Registrar of the LCIA Court (the "Registrar") a written request for arbitration (the "Request"), containing or accompanied by:

(i) the full name, nationality and all contact details (including email address, postal address and telephone number) of the Claimant for the purpose of receiving delivery of all documentation in the arbitration in accordance with Article 4; and the same particulars of the Claimant's authorised representatives (if any) and of all other parties to the arbitration;

(ii) the full terms of the Arbitration Agreement (excepting the LCIA Rules) invoked by the Claimant to support its claim, together with a copy of any contractual or other documentation in which those terms are contained and to which the Claimant's claim relates;

(iii) a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the

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arbitration (each such other party being here separately described as a "Respondent");

(iv) a statement of any procedural matters for the arbitration (such as the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities) upon which the parties have already agreed in writing or in respect of which the Claimant makes any proposal under the Arbitration Agreement;

(v) if the Arbitration Agreement (or any other written agreement) howsoever calls for any form of party nomination of arbitrators, the full name, email address, postal address and telephone number of the Claimant's nominee;

(vi) confirmation that the registration fee prescribed in the Schedule of Costs has been or is being paid to the LCIA, without actual receipt of which the Request shall be treated by the Registrar as not having been delivered and the arbitration as not having been commenced under the Arbitration Agreement; and

(vii) confirmation that copies of the Request (including all accompanying documents) have been or are being delivered to all other parties to the arbitration in accordance with Article 4 by one or more means to be identified specifically in such confirmation, to be supported then or as soon as possible thereafter by documentary proof satisfactory to the LCIA Court of actual delivery (including the date of delivery) or, if actual delivery is demonstrated to be impossible to the LCIA Court's satisfaction, sufficient information as to any other effective form of notification.

1.2 A Claimant wishing to commence more than one arbitration under the LCIA Rules (whether against one or more Respondents and under one or more Arbitration Agreements) may serve a composite Request in respect of all such arbitrations, provided that the requirements of Article 1.1 are complied with to the satisfaction of the LCIA Court in respect of each arbitration. In particular, in any composite Request the Claimant must identify separately the estimated monetary amount or value in dispute, the transaction(s) at issue and the claim advanced by the Claimant against any other party in each arbitration. Each arbitration so commenced shall proceed separately and in accordance with the LCIA Rules, subject to the LCIA Court or the Arbitral Tribunal determining otherwise.

1.3 The Request (including all accompanying documents) shall be submitted to the Registrar in electronic form in accordance with Article 4.1.

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1.4 The arbitration shall be treated as having commenced for all purposes on the date upon which the Request (including all accompanying documents) is received electronically by the Registrar (the "Commencement Date"), provided that the LCIA has received the registration fee. Where the registration fee is received subsequently the Commencement Date will be the date of the LCIA's actual receipt of the registration fee.

1.5 At any time after the Commencement Date but prior to the appointment of the Arbitral Tribunal the LCIA Court may allow a Claimant to supplement, modify or amend its Request to correct any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature, after giving the parties a reasonable opportunity to state their views and upon such terms as the LCIA Court may decide.

1.6 There may be one or more Claimants (whether or not jointly represented); and in such event, where appropriate, the term "Claimant" shall be so interpreted under the Arbitration Agreement.

Article 2 Response

2.1 Within 28 days of the Commencement Date, or such lesser or greater period to be determined by the LCIA Court upon application by any party or upon its own initiative (pursuant to Article 22.5), the Respondent shall deliver to the Registrar a written response to the Request (the "Response"), containing or accompanied by:

(i) the Respondent's full name, nationality and all contact details (including email address, postal address and telephone number) for the purpose of receiving delivery of all documentation in the arbitration in accordance with Article 4 and the same particulars of its authorised representatives (if any);

(ii) confirmation or denial of all or part of the claim advanced by the Claimant in the Request, including the Claimant's invocation of the Arbitration Agreement in support of its claim;

(iii) if not full confirmation, a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the defence advanced by the Respondent, and also indicating any counterclaim advanced by the Respondent against any Claimant and any cross-claim against any other Respondent;

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(iv) a response to any statement of procedural matters for the arbitration contained in the Request under Article 1.1(iv), including the Respondent's own statement relating to the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities and any other procedural matter upon which the parties have already agreed in writing or in respect of which the Respondent makes any proposal under the Arbitration Agreement;

(v) if the Arbitration Agreement (or any other written agreement) howsoever calls for party nomination of arbitrators, the full name, email address, postal address and telephone number of the Respondent's nominee; and

(vi) confirmation that copies of the Response (including all accompanying documents) have been or are being delivered to all other parties to the arbitration in accordance with Article 4 by one or more means of delivery to be identified specifically in such confirmation, to be supported then or as soon as possible thereafter by documentary proof satisfactory to the LCIA Court of actual delivery (including the date of delivery) or, if actual delivery is demonstrated to be impossible to the LCIA Court's satisfaction, sufficient information as to any other effective form of notification.

2.2 Where the Request is a composite Request, the Respondent may serve a composite Response in respect of all or any of the arbitrations, provided that the requirements of Article 2.1 are complied with to the satisfaction of the LCIA Court in respect of each arbitration to which the Response responds. In particular, in any composite Response the Respondent must identify separately the estimated monetary amount or value in dispute, the transaction(s) at issue and the defence, counterclaim or cross-claim advanced by the Respondent against any other party to each arbitration.

2.3 The Response (including all accompanying documents) shall be submitted to the Registrar in electronic form in accordance with Article 4.1.

2.4 Failure to nominate or propose any arbitrator candidate within the time for delivery of a Response or such other time period as is agreed by the parties shall constitute an irrevocable waiver of that party's opportunity to nominate or propose any arbitrator candidate. Failure to deliver any or any part of a Response within time or at all shall not (by itself) preclude the Respondent from denying any claim or from advancing any defence, counterclaim or cross-claim in the arbitration.

2.5 Subject to Article 2.4, at any time prior to the appointment of the Arbitral Tribunal the LCIA Court may allow a party to supplement, modify or amend its Response to correct any error in computation, any clerical or typographical error,

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any ambiguity or any mistake of a similar nature, after giving the parties a reasonable opportunity to state their views and upon such terms as the LCIA Court may decide.

2.6 There may be one or more Respondents (whether or not jointly represented); and in such event, where appropriate, the term "Respondent" shall be so interpreted under the Arbitration Agreement.

Article 3 LCIA Court and Registrar

3.1 The functions of the LCIA Court under the Arbitration Agreement shall be performed in its name by the President of the LCIA Court (or any of its Vice Presidents, Honorary Vice Presidents or former Vice Presidents) or by a division of three or more members of the LCIA Court appointed by its President or any Vice President (the "LCIA Court").

3.2 The functions of the Registrar under the Arbitration Agreement shall be performed under the supervision of the LCIA Court by the Registrar or any deputy Registrar.

3.3 All communications in the arbitration to the LCIA Court from any party, authorised representative of a party, arbitrator, tribunal secretary or expert to the Arbitral Tribunal shall be addressed to the Registrar. All such communications with the Registrar from any party or authorised representative of a party shall be copied to all other parties.

Article 4 Written Communications and Periods of Time

4.1 The Claimant shall submit the Request under Article 1.3 and the Respondent the Response under Article 2.3 in electronic form, either by email or other electronic means including via any electronic filing system operated by the LCIA. Prior written approval should be sought from the Registrar, acting on behalf of the LCIA Court, to submit the Request or the Response by any alternative method.

4.2 Save with the prior written approval or direction of the Arbitral Tribunal, or, prior to the constitution of the Arbitral Tribunal, the Registrar acting on behalf of the LCIA Court, any written communication in relation to the arbitration shall be delivered by email or any other electronic means of communication that provides a record of its transmission.

4.3 Delivery by email or other electronic means of communication shall be as agreed or designated by a party for the purpose of receiving any communication in regard to the Arbitration Agreement. Any written communication (including the

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Request and Response) delivered to such party by that electronic means shall be treated as having been received by such party. In the absence of such agreement or designation or order by the Arbitral Tribunal, if delivery by electronic means has been regularly used in the parties' previous dealings, any written communication (including the Request and Response) may be delivered to a party by that electronic means and shall be treated as having been received by such party, subject to the LCIA Court or the Arbitral Tribunal being informed of any reason why the communication will not actually be received by such party including electronic delivery failure notification. Notwithstanding the above, the LCIA Court or the Arbitral Tribunal may direct that any written communication be delivered to a party at any address and by any means it considers appropriate.

4.4 For the purpose of determining the commencement of any time limit, unless otherwise ordered by the Arbitral Tribunal or the Registrar acting on behalf of the LCIA Court, a written communication sent by electronic means shall be treated as having been received by a party on the day it is transmitted (such time to be determined by reference to the recipient's time zone). If delivery by any other means is permitted or directed under this Article 4, a written communication shall be treated as having been received by a party on the day it is delivered (such time to be determined by reference to the recipient's time zone).

4.5 For the purpose of determining compliance with a time limit, unless otherwise ordered by the Arbitral Tribunal or the Registrar acting on behalf of the LCIA Court, a written communication shall be treated as having been made by a party if transmitted or delivered prior to or on the date of the expiration of the time limit (such time to be determined by reference to the sender's time zone).

4.6 For the purpose of calculating a period of time, such period shall begin to run on the day following the day when a written communication is received by the addressee. If the last day of such period is an official holiday or non-business day at the place of that addressee (or the place of the party against whom the calculation of time applies), the period shall be extended until the first business day which follows that last day. Official holidays and non-business days occurring during the running of the period of time shall be included in calculating that period.

4.7 A party shall inform the Registrar, the Arbitral Tribunal and all other parties as soon as reasonably practical of any changes to its full name and contact details (including email address, postal address and telephone number) or to those of its authorised representatives.

Article 5 Formation of Arbitral Tribunal

5.1 The formation of the Arbitral Tribunal by the LCIA Court shall not be impeded by any controversy between the parties relating to the sufficiency of the

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Request or the Response. The LCIA Court may also proceed with the arbitration notwithstanding that the Request is incomplete or the Response is missing, late or incomplete.

5.2 The expression the "Arbitral Tribunal" includes a sole arbitrator (including, where appropriate, an Emergency Arbitrator) or all the arbitrators where more than one.

5.3 All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or authorised representative of any party. No arbitrator shall give advice to any party on the parties' dispute or the conduct or outcome of the arbitration.

5.4 Before appointment by the LCIA Court, each arbitrator candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present); the candidate shall also agree in writing fee rates conforming to the Schedule of Costs; the candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; and (ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. The candidate shall promptly furnish such agreement and declaration to the Registrar.

5.5 Each arbitrator shall assume a continuing duty, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, any other members of the Arbitral Tribunal and all parties in the arbitration.

5.6 The LCIA Court shall appoint the Arbitral Tribunal promptly following delivery to the Registrar of the Response or, if no Response is received, promptly after 28 days from the Commencement Date (or such other lesser or greater period to be determined by the LCIA Court pursuant to Article 22.5).

5.7 No party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties or nomination by the other candidates or arbitrators).

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5.8 A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).

5.9 The LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. The LCIA Court shall also take into account the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances.

5.10 The President of the LCIA Court shall only be eligible to be appointed as an arbitrator if the parties agree in writing to nominate him or her as the sole or presiding arbitrator; and the Vice Presidents of the LCIA Court and the Chair of the LCIA Board of Directors (the latter being ex officio a member of the LCIA Court) shall only be eligible to be appointed as arbitrators if nominated in writing by a party or parties or by the other candidates or arbitrators – provided that no such nominee shall have taken or shall take thereafter any part in any function of the LCIA Court or LCIA relating to such arbitration.

Article 6 Nationality of Arbitrators and Parties

6.1 Upon request of the Registrar, the parties shall each inform the Registrar and all other parties of their nationality. Where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitrator candidate all agree in writing otherwise.

6.2 For the purposes of Article 6.1, in the case of a natural person, nationality shall mean citizenship, whether acquired by birth or naturalisation or other requirements of the nation concerned. In the case of a legal person, nationality shall mean the jurisdiction in which it is incorporated and has its seat of effective management. A legal person that is incorporated in one jurisdiction but has its seat of effective management in another shall be treated as a national of both jurisdictions. The nationality of a party that is a legal person shall be treated as including the nationalities of its controlling shareholders or interests.

6.3 A person who is a citizen of two or more States shall be treated as a national of each State; citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality; a citizen of a State's overseas territory shall be treated as a national of that territory and not of that State; and a legal person incorporated in a State's overseas territory shall be treated as such and not (by such fact alone) as a national of or a legal person incorporated in that State.

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Article 7 Party and Other Nominations

7.1 If the parties have agreed howsoever that any arbitrator is to be appointed by one or more of them or by any third person (other than the LCIA Court), that agreement shall be treated under the Arbitration Agreement as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to that nominee's compliance with Articles 5.3 to 5.5; and the LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable.

7.2 Where the parties have howsoever agreed that the Claimant or the Respondent or any third person (other than the LCIA Court) is to nominate an arbitrator and such nomination is not made within time (in the Request, Response or otherwise), the LCIA Court may appoint an arbitrator notwithstanding the absence of a nomination. The LCIA Court may, but shall not be obliged to, take into consideration any late nomination.

7.3 In the absence of written agreement between the Parties, no party may unilaterally nominate a sole arbitrator or presiding arbitrator.

Article 8 Three or More Parties

8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate "sides" for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.

8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone.

Article 9A Expedited Formation of Arbitral Tribunal

9.1 In the case of exceptional urgency, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal under Article 5.

9.2 Such an application shall be made to the Registrar in writing by electronic means, together with a copy of the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent), and shall be delivered or notified forthwith to all other parties to the arbitration. The application shall set out the

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specific grounds for exceptional urgency requiring the expedited formation of the Arbitral Tribunal.

9.3 The LCIA Court shall determine the application as expeditiously as possible in the circumstances. If the application is granted, for the purpose of forming the Arbitral Tribunal the LCIA Court may set or abridge any period of time under the Arbitration Agreement or other agreement of the parties (pursuant to Article 22.5).

Article 9B Emergency Arbitrator

9.4 Subject always to Article 9.16 below, in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal (under Articles 5 or 9A), any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the "Emergency Arbitrator").

9.5 Such an application shall be made to the Registrar in writing by electronic means, together with a copy of the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent), delivered or notified forthwith to all other parties to the arbitration. The application shall set out, together with all relevant documentation: (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claim, with reasons, for emergency relief. The application shall be accompanied by the applicant's written confirmation that the applicant has paid or is paying to the LCIA the Special Fee under Article 9B, without actual receipt of which the application shall be dismissed by the LCIA Court. The Special Fee shall be subject to the terms of the Schedule of Costs. Its amount is prescribed in the Schedule, covering the fees and expenses of the Emergency Arbitrator and the administrative charges and expenses of the LCIA, with additional charges (if any) of the LCIA Court. After the appointment of the Emergency Arbitrator, the amount of the Special Fee payable by the applicant may be increased by the LCIA Court in accordance with the Schedule. Save as provided in Section 5(vi) of the Schedule of Costs, Article 24 shall not apply to any Special Fee paid to the LCIA.

9.6 The LCIA Court shall determine the application as soon as possible in the circumstances. If the application is granted, an Emergency Arbitrator shall be appointed by the LCIA Court within three days of the Registrar's receipt of the application (or as soon as possible thereafter). Articles 5.1, 5.7, 5.9, 5.10, 6, 9C, 10 and 16.2 (last sentence) shall apply to such appointment. The Emergency Arbitrator shall comply with the requirements of Articles 5.3, 5.4 and (until the emergency proceedings are finally concluded) Article 5.5.

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9.7 The Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, if possible, an opportunity to be consulted on the claim for emergency relief (whether or not it avails itself of such opportunity), the claim and reasons for emergency relief and the parties' further submissions (if any). The Emergency Arbitrator is not required to hold any hearing with the parties whether in person, or virtually by conference call, videoconference or using other communications technology and may decide the claim for emergency relief on available documentation. In the event of a hearing, which may consist of several part-hearings (as decided by the Emergency Arbitrator), Articles 16.3, 19.2, 19.3 and 19.4 shall apply.

9.8 The Emergency Arbitrator shall decide the claim for emergency relief as soon as possible, but no later than 14 days following the Emergency Arbitrator's appointment. This deadline may only be extended by the LCIA Court in exceptional circumstances (pursuant to Article 22.5) or by the written agreement of all parties to the emergency proceedings. The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement; and, in addition, may make any order adjourning the consideration of all or any part of the claim for emergency relief to the proceedings conducted by the Arbitral Tribunal (when formed).

9.9 An order of the Emergency Arbitrator shall be made in writing, with reasons. An award of the Emergency Arbitrator shall comply with Article 26.2 and, when made, take effect as an award under Article 26.8 (subject to Articles 9.11 and 9.12). The Emergency Arbitrator shall be responsible for delivering any order or award to the Registrar, who shall transmit the same promptly to the parties by electronic means.

9.10 The Special Fee paid shall form a part of the Arbitration Costs under Article 28.1, the amount of which shall be determined by the LCIA Court. Any legal or other expenses incurred by any party during the emergency proceedings shall form a part of the Legal Costs under Article 28.3. The Emergency Arbitrator may determine the amount of the Legal Costs relating to the emergency proceedings and the proportions in which the parties shall bear the Legal Costs and the Arbitration Costs of the emergency proceedings. Alternatively, the Emergency Arbitrator may leave such determination of all or part of the costs of the emergency proceedings to be decided by the Arbitral Tribunal.

9.11 Any order or award of the Emergency Arbitrator (apart from any order adjourning to the Arbitral Tribunal, when formed, any part of the claim for emergency relief) may be confirmed, varied, discharged or revoked, in whole or in

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part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.

9.12 Prior to the formation of the Arbitral Tribunal, the Emergency Arbitrator may, upon application by any party or upon its own initiative:

(i) confirm, vary, discharge or revoke, in whole or in part, any order of the Emergency Arbitrator and/or issue an additional order;

(ii) correct any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature in any award of the Emergency Arbitrator; and/or

(iii) make an additional award as to any claim for emergency relief presented in the emergency proceedings but not decided in any award of the Emergency Arbitrator.

9.13 Notwithstanding Article 9B, a party may apply to a competent state court or other legal authority for any interim or conservatory measures before the formation of the Arbitral Tribunal; and Article 9B shall not be treated as an alternative to or substitute for the exercise of such right. During the emergency proceedings, any application to and any order by such court or authority shall be communicated promptly in writing to the Emergency Arbitrator, the Registrar and all other parties.

9.14 Articles 3.3, 4, 13.1-13.4, 14.1-14.2, 14.5, 14A, 16, 17, 18, 22.3-22.4, 23, 24A, 25.1, 25.3, 28, 29, 30, 30A, 31 and 32 and the Annex shall apply to emergency proceedings. In addition to the provisions expressly set out there and in this Article 9B, the Emergency Arbitrator and the parties to the emergency proceedings shall also be guided by other provisions of the Arbitration Agreement, whilst recognising that several such provisions may not be fully applicable or appropriate to emergency proceedings. Wherever relevant, the LCIA Court may set or abridge any period of time under any such provisions (pursuant to Article 22.5).

9.15 The LCIA Court shall have the power to decide, at its discretion, all matters relating to the administration of the emergency proceedings not expressly provided for in this Article 9B.

9.16 Article 9B shall not apply if either: (i) the parties have concluded their arbitration agreement before 1 October 2014 and the parties have not agreed in writing to 'opt in' to Article 9B; or (ii) the parties have agreed in writing at any time to 'opt out' of Article 9B.

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Article 9C Expedited Appointment of Replacement Arbitrator

9.17 Any party may apply to the LCIA Court to expedite the appointment of a replacement arbitrator under Article 11.

9.18 Such an application shall be made in writing to the Registrar by electronic means, delivered or notified forthwith to all other parties to the arbitration; and it shall set out the specific grounds requiring the expedited appointment of the replacement arbitrator.

9.19 The LCIA Court shall determine the application as expeditiously as possible in the circumstances. If the application is granted, for the purpose of expediting the appointment of the replacement arbitrator the LCIA Court may set or abridge any period of time in the Arbitration Agreement or any other agreement of the parties (pursuant to Article 22.5).

Article 10 Revocation and Challenges

10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator, to be copied to all parties and all other members of the Arbitral Tribunal (if any); (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.

10.2 The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry.

10.3 A party challenging an arbitrator under Article 10.1 shall, within 14 days of the formation of the Arbitral Tribunal or (if later) within 14 days of becoming aware of any grounds described in Article 10.1 or 10.2, deliver a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties. A party may challenge an arbitrator whom it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made by the LCIA Court.

10.4 If all other parties agree in writing to the challenge within 14 days of receipt of the written statement, the LCIA Court shall revoke that arbitrator's appointment (without reasons).

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10.5 Unless the parties so agree or the challenged arbitrator resigns in writing within 14 days of receipt of the written statement, the LCIA Court shall decide the challenge. The LCIA Court may conduct the challenge proceedings in any manner it considers to be appropriate in the circumstances but shall in any event provide the other parties and the challenged arbitrator a reasonable opportunity to comment on the challenging party's written statement. The LCIA Court may require at any time further information and materials from the challenging party, the challenged arbitrator, other parties, any authorised representative of a party, other members of the Arbitral Tribunal and the tribunal secretary (if any).

10.6 The LCIA Court's decision shall be made in writing, with reasons; and a copy shall be transmitted by the Registrar to the parties, the challenged arbitrator and other members of the Arbitral Tribunal (if any). If the challenge is upheld, the LCIA Court shall revoke that arbitrator's appointment. A challenged arbitrator who resigns in writing prior to the LCIA Court's decision shall not be considered as having admitted any part of the written statement.

10.7 The LCIA Court shall determine the amount of fees and expenses (if any) to be paid for the former arbitrator's services, as it may consider appropriate in the circumstances. The LCIA Court may also determine whether, in what amount and to whom any party should pay all or any part of the costs of the challenge; and the LCIA Court may also refer all or any part of such costs to the later decision of the Arbitral Tribunal and/or the LCIA Court under Article 28.

Article 11 Nomination and Replacement

11.1 In the event that the LCIA Court determines that justifiable doubts exist as to any arbitrator candidate's suitability, independence or impartiality, or if a nominee declines appointment as arbitrator, or if an arbitrator is to be replaced for any reason, the LCIA Court may determine whether or not to follow the original nominating process for such arbitral appointment.

11.2 The LCIA Court may determine that any opportunity given to a party to make any re- nomination (under the Arbitration Agreement or otherwise) shall be waived if not exercised within 14 days (or such lesser or greater time as the LCIA Court may determine), after which the LCIA Court shall appoint the replacement arbitrator without such re-nomination.

11.3 Save for any award rendered, the Arbitral Tribunal (when reconstituted) shall determine whether, and if so to what extent, the previous proceedings in the arbitration shall stand.

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Article 12 Majority Power to Continue Deliberations

12.1 Where an arbitrator without good cause refuses or persistently fails to participate in the deliberations of an Arbitral Tribunal, the remaining arbitrators jointly may give written notice of such refusal or failure to the LCIA Court, the parties and the absent arbitrator. In exceptional circumstances, the remaining arbitrators may decide to continue the arbitration (including the making of any award) notwithstanding the absence of that other arbitrator, subject to the written approval of the LCIA Court.

12.2 In deciding whether to continue the arbitration, the remaining arbitrators shall take into account the stage of the arbitration, any explanation made by or on behalf of the absent arbitrator for his or her refusal or failure to participate, the likely effect upon the legal recognition or enforceability of any award at the seat of the arbitration and such other matters as they consider appropriate in the circumstances. The reasons for such decision shall be stated in any award made by the remaining arbitrators without the participation of the absent arbitrator.

12.3 In the event that the remaining arbitrators decide at any time after giving written notice of such refusal or failure not to continue the arbitration without the participation of the absent arbitrator, the remaining arbitrators shall notify in writing the parties and the LCIA Court of such decision; and, in that event, the remaining arbitrators or any party may refer the matter to the LCIA Court for the revocation of the absent arbitrator's appointment and the appointment of a replacement arbitrator under Articles 10 and 11.

Article 13 Communications between Parties and Arbitral Tribunal

13.1 Following the formation of the Arbitral Tribunal, all communications shall take place directly between the Arbitral Tribunal and the parties (to be copied to the Registrar), unless the Arbitral Tribunal decides that communications should continue to be made through the Registrar.

13.2 Where the Registrar sends any written communication to one party on behalf of the Arbitral Tribunal or the LCIA Court, he or she shall send a copy to each of the other parties.

13.3 Where any party delivers to the Arbitral Tribunal any communication (including statements and documents under Article 15) it shall deliver a copy to each arbitrator, all other parties and the Registrar; and it shall confirm to the Arbitral Tribunal in writing that it has done or is doing so.

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13.4 During the arbitration proceedings, no party shall deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties' dispute with any member of the LCIA Court exercising any function in regard to the arbitration or, from the Arbitral Tribunal's formation onwards, any member of the Arbitral Tribunal or the tribunal secretary (if any), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal and the Registrar. Notwithstanding Article 3.3, a party may, however, have unilateral contact with the Registrar regarding administrative matters.

13.5 Prior to the Arbitral Tribunal's formation, unless the parties agree otherwise in writing, any arbitrator, candidate or nominee who is required to participate in the selection of a presiding arbitrator may consult any party in order to obtain the views of that party as to the suitability of any candidate or nominee as presiding arbitrator, provided that such arbitrator, candidate or nominee promptly informs any other arbitrator, candidate or nominee involved in the selection process and the Registrar of such consultation.

Article 14 Conduct of Proceedings

14.1 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:

(i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and

(ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.

14.2 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duty.

14.3 The parties and the Arbitral Tribunal shall make contact (whether by a hearing in person or virtually by conference call, videoconference or using other communications technology or exchange of correspondence) as soon as practicable but no later than 21 days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal.

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14.4 The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal.

14.5 Without prejudice to the generality of the Arbitral Tribunal's discretion, after giving the parties a reasonable opportunity to state their views, the Arbitral Tribunal may, subject to the LCIA Rules, make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration.

14.6 The Arbitral Tribunal's power under Article 14.5 includes the making of any procedural order with a view to expediting the procedure to be adopted in the arbitration by:

(i) limiting the length or content of, or dispensing with, any written statement to be delivered under Article 15;

(ii) limiting the written and oral testimony of any witness in accordance with Article 20.4;

(iii) employing technology to enhance the efficiency and expeditious conduct of the arbitration (including any hearing);

(iv) deciding the stage of the arbitration at which any issue or issues shall be determined, and in what order, in accordance with Article 22.1(vii) below;

(v) dispensing with a hearing, subject always to Article 19;

(vi) exercising its powers of Early Determination under Article 22.1(viii);

(vii) setting an appropriate period of time for any stage of, or step to be taken in, the arbitration including with regard to the conduct of any hearing;

(viii) abridging any period of time in accordance with Article 22.1(ii); and

(ix) making any other order that the Arbitral Tribunal considers appropriate in the circumstances of the arbitration.

14.7 In the case of an Arbitral Tribunal other than a sole arbitrator, the presiding arbitrator, with the prior agreement of its other members and all parties, may make procedural decisions alone.

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Article 14A Tribunal Secretary

14.8 Subject to Articles 14.9 to 14.15, and to any applicable law, an Arbitral Tribunal may obtain assistance from a tribunal secretary in relation to an arbitration. Under no circumstances may an Arbitral Tribunal delegate its decision-making function to a tribunal secretary. All tasks carried out by a tribunal secretary shall be carried out on behalf of, and under the supervision of, the Arbitral Tribunal which shall retain its responsibility to ensure that all tasks are performed to the standard required by the LCIA Rules.

14.9 Before assisting an Arbitral Tribunal, each tribunal secretary candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; and (ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the tasks to be performed by the tribunal secretary. The candidate shall furnish promptly such written declaration to the Arbitral Tribunal and to the Registrar.

14.10 An Arbitral Tribunal may only obtain assistance from a tribunal secretary once the tribunal secretary has been approved by all parties. A tribunal secretary is approved once:

(i) the parties have agreed the tasks that may be carried out by the tribunal secretary;

(ii) if an hourly rate is to be charged and the tribunal secretary is to be entitled to have expenses reimbursed, the parties have agreed to this hourly rate and entitlement to reimbursement;

(iii) the written declaration referred to in Article 14.9 has been provided to the parties; and

(iv) the parties have agreed to the particular person filling the role of tribunal secretary.

14.11 If additional tasks to those agreed under Article 14.10(i) are to be undertaken by the tribunal secretary, or the hourly rate to be charged by the tribunal secretary is to increase, the Arbitral Tribunal must obtain prior agreement from all parties.

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14.12 A party will be deemed to have agreed to the matters set out in Articles 14.10 and 14.11 if that party has not objected within such reasonable time as is set by the Arbitral Tribunal.

14.13 Any fees charged by, or expenses reimbursed to, a tribunal secretary shall form a part of the Arbitration Costs determined by the LCIA Court (as to the amount of Arbitration Costs) under Article 28.1.

14.14 A tribunal secretary shall assume a continuing duty, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that tribunal secretary after the date of his or her written declaration (under Article 14.9) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, the Arbitral Tribunal and all parties in the arbitration.

14.15 A tribunal secretary may be removed by the Arbitral Tribunal at its discretion. Article 10 above shall also apply, with necessary changes, to any tribunal secretary.

Article 15 Written Stage of the Arbitration

15.1 Unless the parties have agreed or jointly proposed in writing otherwise or the Arbitral Tribunal should decide differently, the written stage of the arbitration and its procedural timetable shall be as set out in this Article 15.

15.2 Within 28 days of receipt of the Registrar's written notification of the Arbitral Tribunal's formation, the Claimant shall deliver to the Arbitral Tribunal and all other parties either: (i) its written election to have its Request treated as its Statement of Case complying with this Article 15.2; or (ii) its written Statement of Case setting out in sufficient detail the relevant facts and legal submissions on which it relies, together with the relief claimed against all other parties, and all documents relied upon.

15.3 Within 28 days of receipt of the Claimant's Statement of Case or the Claimant's election to treat the Request as its Statement of Case, the Respondent shall deliver to the Arbitral Tribunal and all other parties either: (i) its written election to have its Response treated as its Statement of Defence and (if applicable) Counterclaim complying with this Article 15.3; or (ii) its written Statement of Defence and (if applicable) Statement of Counterclaim setting out in sufficient detail the relevant facts and legal submissions on which it relies, together with the relief claimed against all other parties, and all documents relied upon.

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15.4 Within 28 days of receipt of the Respondent's Statement of Defence and (if applicable) Statement of Counterclaim or the Respondent's election to treat the Response as its Statement of Defence and (if applicable) Counterclaim, the Claimant shall deliver to the Arbitral Tribunal and all other parties a written Statement of Reply which, where there is any counterclaim, shall also include a Statement of Defence to Counterclaim in the same manner required for a Statement of Defence, together with all documents relied upon.

15.5 If the Statement of Reply contains a Statement of Defence to Counterclaim, within 28 days of its receipt the Respondent shall deliver to the Arbitral Tribunal and all other parties its written Statement of Reply to the Defence to Counterclaim, together with all documents relied upon.

15.6 No party may submit any further written statement following the last of these Statements, unless otherwise ordered by the Arbitral Tribunal.

15.7 The Arbitral Tribunal may provide additional or alternative directions as to any part of the written stage of the arbitration, including but not limited to directions for:

(i) further written submissions;

(ii) written statements with respect to any party's cross-claims;

(iii) the service of written evidence from any fact or expert witness;

(iv) the service of any other form of written evidence; and

(v) the sequence, timing and composition of the written stage of the arbitration.

15.8 If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Counterclaim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or as otherwise ordered by the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards.

15.9 As soon as practicable following the written stage of the arbitration, the Arbitral Tribunal shall proceed in such manner as has been agreed in writing by the parties or pursuant to its authority under the Arbitration Agreement.

15.10 In any event, the Arbitral Tribunal shall seek to make its final award as soon as reasonably possible and shall endeavour to do so no later than three

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months following the last submission from the parties (whether made orally or in writing), in accordance with a timetable notified to the parties and the Registrar as soon as practicable (if necessary, as revised and re-notified from time to time). When the Arbitral Tribunal (not being a sole arbitrator) establishes a time for what it contemplates shall be the last submission from the parties (whether written or oral), it shall set aside adequate time for deliberations (whether in person or otherwise) as soon as possible after that last submission and notify the parties of the time it has set aside.

Article 16 Seat of Arbitration, Place(s) of Hearing and Applicable Law

16.1 The parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal.

16.2 In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate. Such default seat shall not be considered as a relevant circumstance by the LCIA Court in appointing any arbitrator or Emergency Arbitrator under Articles 5, 9A, 9B, 9C and 11.

16.3 If any hearing is to be held in person, the Arbitral Tribunal may hold such hearing at any convenient geographical place in consultation with the parties. If the Arbitral Tribunal is to meet in person to hold its deliberations, it may do so at any geographical place of its own choice. If such place(s) should be elsewhere than the seat of the arbitration, or if any hearing or deliberation takes place otherwise than in person (in whole or in part), the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat.

16.4 Subject to Article 16.5 below, the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.

16.5 Notwithstanding Article 16.4, the LCIA Rules shall be interpreted in accordance with the laws of England.

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Article 17 Language(s) of Arbitration

17.1 The initial language of the arbitration (until the formation of the Arbitral Tribunal) shall be the language or prevailing language of the Arbitration Agreement, unless the parties have agreed in writing otherwise.

17.2 In the event that the Arbitration Agreement is written in more than one language of equal standing, the LCIA Court may, unless the Arbitration Agreement provides that the arbitration proceedings shall be conducted from the outset in more than one language, determine which of those languages shall be the initial language of the arbitration.

17.3 A non-participating or defaulting party shall have no cause for complaint if communications to and from the LCIA Court and Registrar are conducted in the initial language(s) of the arbitration or of the arbitral seat.

17.4 Following the formation of the Arbitral Tribunal, unless the parties have agreed upon the language or languages of the arbitration, the Arbitral Tribunal shall decide upon the language(s) of the arbitration after giving the parties a reasonable opportunity to make written comments and taking into account the initial language(s) of the arbitration and any other matter it may consider appropriate in the circumstances.

17.5 If any document is expressed in a language other than the language(s) of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal may order or (if the Arbitral Tribunal has not been formed) the Registrar may request that party to submit a translation of all or any part of that document in any language(s) of the arbitration or of the arbitral seat.

Article 18 Authorised Representatives of a Party

18.1 Any party may be represented in the arbitration by one or more authorised representatives appearing by name before the Arbitral Tribunal.

18.2 Until the Arbitral Tribunal's formation, the Registrar may request from any party: (i) written proof of the authority granted by that party to any authorised representative designated in its Request or Response; and (ii) written confirmation of the names, email and postal addresses of all such party's authorised representatives in the arbitration. After its formation, at any time, the Arbitral Tribunal may order any party to provide similar proof or confirmation in any form it considers appropriate.

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18.3 Following the Arbitral Tribunal's formation, any intended change or addition by a party to its authorised representatives shall be notified promptly in writing to all other parties, the Arbitral Tribunal, the tribunal secretary (if any) and the Registrar; and any such intended change or addition shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal.

18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party's authorised representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict of interest or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be represented by an authorised representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.

18.5 Each party shall ensure that all its authorised representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any authorised representative so to appear, a party shall thereby represent that the authorised representative has agreed to such compliance.

18.6 In the event of a complaint by one party against another party's authorised representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that authorised representative a reasonable opportunity to answer the complaint, whether or not the authorised representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the authorised representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.1(i) and (ii).

Article 19 Hearing(s)

19.1 Any party has the right to a hearing before the Arbitral Tribunal prior to any ruling of the Arbitral Tribunal on its jurisdiction and authority (pursuant to Article 23) or any award on the merits. The Arbitral Tribunal may itself decide that a hearing should be held at any stage, unless the parties have agreed in writing upon a documents-only arbitration. For these purposes, a hearing may consist of several part-hearings (as decided by the Arbitral Tribunal).

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19.2 The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties' dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed.

19.3 The Arbitral Tribunal shall give to the parties reasonable notice in writing of any hearing.

19.4 All hearings shall be held in private, unless the parties agree otherwise in writing.

Article 20 Witnesses

20.1 The provisions of this Article 20 shall apply to any fact or expert witness on whose evidence a party relies.

20.2 Before any hearing, the Arbitral Tribunal may order any party to give written notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject matter of that witness's testimony, its content and its relevance to the issues in the arbitration.

20.3 Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document.

20.4 The Arbitral Tribunal may decide the time, manner and form in which these written materials shall be exchanged between the parties and presented to the Arbitral Tribunal; and it may allow, refuse or limit the written and oral testimony of witnesses.

20.5 The Arbitral Tribunal and any party may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to secure the attendance of that witness and the witness refuses or fails to attend the hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances.

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20.6 Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its authorised representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing.

20.7 Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party.

20.8 Subject to the mandatory provisions of any applicable law, the Arbitral Tribunal shall be entitled (but not required) to administer any appropriate oath or affirmation to any witness at any hearing, prior to the oral testimony of that witness.

20.9 Any witness who gives oral testimony at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony.

Article 21 Expert to Arbitral Tribunal

21.1 The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal.

21.2 Any such expert shall be and remain impartial and independent of the parties; and he or she shall sign a written declaration to such effect, delivered to the Arbitral Tribunal and copied to all parties.

21.3 The Arbitral Tribunal may require any party at any time to give to such expert any relevant information or to provide access to any relevant documents, goods, samples, property, site or thing for inspection under that party's control on such terms as the Arbitral Tribunal thinks appropriate in the circumstances.

21.4 If any party so requests or the Arbitral Tribunal considers it necessary, the Arbitral Tribunal may order the expert, after delivery of the expert's written report, to attend a hearing at which the parties shall have a reasonable opportunity to question the expert on the report and to present witnesses in order to testify on relevant issues arising from the report. Articles 20.8 and 20.9 of the LCIA Rules shall apply, with necessary changes, to any expert to the Arbitral Tribunal.

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21.5 The fees and expenses of any expert appointed by the Arbitral Tribunal under this Article 21 may be paid out of the Advance Payment for Costs payable by the parties under Article 24 and shall form part of the Arbitration Costs under Article 28.1.

Article 22 Additional Powers

22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub- paragraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

(i) to allow a party to supplement, modify or amend any claim, defence, counterclaim, cross-claim, defence to counterclaim, defence to cross-claim and reply, including a Request, Response and any other written statement, submitted by such party;

(ii) to abridge or extend (even where the period of time has expired) any period of time prescribed under the Arbitration Agreement, any other agreement of the parties or any order made by the Arbitral Tribunal;

(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;

(iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal;

(v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant;

(vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;

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(vii) to decide the stage of the arbitration at which any issue or issues shall be determined, in what order, and the procedure to be adopted at each stage in accordance with Article 14 above;

(viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination");

(ix) to order compliance with any legal obligation or payment of compensation for breach of any legal obligation or specific performance of any agreement (including any arbitration agreement or any contract relating to land);

(x) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration; and

(xi) to order the discontinuance of the arbitration if it appears to the Arbitral Tribunal that the arbitration has been abandoned by the parties or all claims and any counterclaims or cross-claims have been withdrawn by the parties, after giving the parties a reasonable opportunity to state their views.

22.2 By agreeing to arbitration under the Arbitration Agreement, the parties shall be treated as having agreed not to apply to any state court or other legal authority for any order available from the Arbitral Tribunal (if formed) under Article 22.1, except with the agreement in writing of all parties.

22.3 The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.

22.4 The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono", "amiable composition" or "honourable engagement" where the parties have so agreed in writing.

22.5 Subject to any order of the Arbitral Tribunal under Article 22.1(ii), the LCIA Court may also set, abridge or extend any period of time under the

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Arbitration Agreement or other agreement of the parties (even where the period of time has expired).

22.6 Without prejudice to Article 22.1(xi), the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, that the arbitration shall be discontinued if it appears to the LCIA Court that the arbitration has been abandoned by the parties or all claims and any counterclaims or cross-claims have been withdrawn by the parties.

Article 22A Power to Order Consolidation/Concurrent Conduct of Arbitrations

22.7 The Arbitral Tribunal shall have the power to order with the approval of the LCIA Court, upon the application of any party, after giving all affected parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

(i) the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing;

(ii) the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such arbitral tribunal(s) is(are) composed of the same arbitrators; and

(iii) that two or more arbitrations, subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, shall be conducted concurrently where the same arbitral tribunal is constituted in respect of each arbitration.

22.8 Without prejudice to the generality of Article 22.7, the LCIA Court may:

(i) consolidate an arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing; and

(ii) determine, after giving the parties a reasonable opportunity to state their views, that two or more arbitrations, subject to the LCIA Rules

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and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, shall be consolidated to form one single arbitration subject to the LCIA Rules, provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.

Article 23 Jurisdiction and Authority

23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.

23.2 For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.

23.3 An objection by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be raised as soon as possible but not later than the time for its Statement of Defence; and a like objection by any party responding to a counterclaim or cross-claim shall be raised as soon as possible but not later than the time for its Statement of Defence to Counterclaim or Cross-Claim. An objection that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to act upon the matter alleged to lie beyond its authority. The Arbitral Tribunal may nevertheless admit an untimely objection as to its jurisdiction or authority if it considers the delay justified in the circumstances.

23.4 The Arbitral Tribunal may decide the objection to its jurisdiction or authority in an award as to jurisdiction or authority or later in an award on the merits, as it considers appropriate in the circumstances.

23.5 By agreeing to arbitration under the Arbitration Agreement, after the formation of the Arbitral Tribunal the parties shall be treated as having agreed not to apply to any state court or other legal authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except (i) with the prior agreement in writing of all parties to the arbitration, or (ii) the prior authorisation of the Arbitral Tribunal, or (iii) following the latter's award on the objection to its jurisdiction or authority.

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Article 24 Advance Payment for Costs

24.1 The LCIA Court may direct the parties, in such proportions and at such times as it thinks appropriate, to make one or more payments to the LCIA (the "Advance Payment for Costs") in order to secure payment of the Arbitration Costs under Article 28.1. Such payments by the parties may be applied by the LCIA to pay any item of such Arbitration Costs (including the LCIA's own fees and expenses) in accordance with the LCIA Rules.

24.2 The Advance Payment for Costs shall be the property of the LCIA, to be disbursed or otherwise applied by the LCIA in accordance with the LCIA Rules and invested having regard to the interests of the LCIA. The parties agree that the LCIA shall not act as trustee and its sole duty to the parties in respect of the Advance Payment for Costs shall be to act pursuant to these LCIA Rules.

24.3 In the event that, at the conclusion of the arbitration, the Advance Payment for Costs exceeds the total amount of the Arbitration Costs under Article 28.1, the excess amount shall be transferred by the LCIA to the parties in such proportions as the parties may agree in writing or, failing such agreement, in the same proportions and to the same parties as the Advance Payment for Costs was paid to the LCIA, subject to any order of the Arbitral Tribunal.

24.4 The LCIA will make reasonable attempts to contact the parties in order to arrange for the transfer of the excess amount, using the contact details provided to the LCIA during the proceedings. If a response is not received from a party so contacted within 30 days, the LCIA will provide that party with written notice of its intention to retain the excess amount. If no response is received within a further 60 days, the party will be deemed irrevocably to have waived any right to claim and/or receive the excess amount.

24.5 Save for exceptional circumstances, the Arbitral Tribunal should not proceed with the arbitration without having ascertained from the Registrar that the LCIA is or will be in requisite funds as regards outstanding and future Arbitration Costs.

24.6 In the event that a party fails or refuses to make any payment on account of the Arbitration Costs as directed by the LCIA Court, the LCIA Court may direct the other party or parties to effect a further Advance Payment for Costs in an equivalent amount to allow the arbitration to proceed (subject to any order or award on Arbitration Costs).

24.7 In such circumstances, the party effecting the further Advance Payment for Costs may request the Arbitral Tribunal to make an order or award in order to

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recover that amount as a debt immediately due and payable to that party by the defaulting party, together with any interest.

24.8 Failure by a claiming, counterclaiming or cross-claiming party to make promptly and in full any required payment may be treated by the LCIA Court or the Arbitral Tribunal as a withdrawal from the arbitration of the claim, counterclaim or cross-claim respectively, thereby removing such claim, counterclaim or cross-claim (as the case may be) from the scope of the Arbitral Tribunal's jurisdiction under the Arbitration Agreement, subject to any terms decided by the LCIA Court or the Arbitral Tribunal as to the reinstatement of the claim, counterclaim or cross-claim in the event of subsequent payment by the claiming, counterclaiming or cross-claiming party. Such a withdrawal shall not preclude the claiming, counterclaiming or cross-claiming party from defending as a respondent any claim, counterclaim or cross-claim made by another party.

Article 24A Compliance

24.9 Any dealings between a party and the LCIA will be subject to any requirements applicable to that party or the LCIA relating to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions ("Prohibited Activity"), and the LCIA will deal with any party on the understanding that it is complying with all such requirements.

24.10 The LCIA may refuse to act on any instruction and/or accept or make any payment if the LCIA determines (in its sole discretion and without the need to state any reasons) that doing so may involve Prohibited Activity, or breach any law, regulation, or other legal duty which applies to it, or that doing so might otherwise expose the LCIA to enforcement action or censure from any regulator or law enforcement agency.

24.11 The parties agree to provide the LCIA with any information and/or documents reasonably requested by the LCIA for the purpose of compliance with laws relating to Prohibited Activity. The LCIA may take any action it considers appropriate to comply with any applicable obligations relating to Prohibited Activity, including disclosure of any information and documents to courts, law enforcement agencies or regulatory authorities.

Article 25 Interim and Conservatory Measures

25.1 The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:

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(i) to order any respondent party to a claim, counterclaim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;

(ii) to order the preservation, storage, sale or other disposal of any monies, documents, goods, samples, property, site or thing under the control of any party and relating to the subject- matter of the arbitration; and

(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.

25.2 The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming, counterclaiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances. Such terms may include the provision by the applicant of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant, counterclaimant or cross-claimant in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration. In the event that a claiming, counterclaiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims, counterclaims or cross-claims or dismiss them by an award.

25.3 A party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party

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to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties.

25.4 By agreeing to arbitration under the Arbitration Agreement, the parties shall be taken to have agreed not to apply to any state court or other legal authority for any order for security for Legal Costs or Arbitration Costs.

Article 26 Award(s)

26.1 The Arbitral Tribunal may make separate awards on different issues at different times, including interim payments on account of any claim, counterclaim or cross-claim (including Legal and Arbitration Costs under Article 28). Such awards shall have the same status as any other award made by the Arbitral Tribunal.

26.2 The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it. Unless the parties agree otherwise, or the Arbitral Tribunal or LCIA Court directs otherwise, any award may be signed electronically and/or in counterparts and assembled into a single instrument.

26.3 An award may be expressed in any currency, unless the parties have agreed otherwise.

26.4 Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with.

26.5 Where there is more than one arbitrator and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the presiding arbitrator shall decide that issue.

26.6 If any arbitrator refuses or fails to sign an award, the signatures of the majority or (failing a majority) of the presiding arbitrator shall be sufficient, provided that the reason for any omitted signature is stated in the award by the majority or by the presiding arbitrator.

26.7 The sole or presiding arbitrator shall be responsible for delivering the award to the LCIA Court, which shall transmit to the parties the award

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authenticated by the Registrar as an LCIA award, provided that all Arbitration Costs have been paid in full to the LCIA in accordance with Articles 24 and 28. Such transmission may be made by any electronic means, and (if so requested by any party or if transmission by electronic means to a party is not possible) in paper form. In the event of any disparity between electronic and paper forms, the electronic form shall prevail.

26.8 Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.

26.9 In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing (a "Consent Award"), provided always that such Consent Award shall contain an express statement on its face that it is an award made at the parties' joint request and with their consent. A Consent Award need not contain reasons or a determination in relation to the Arbitration Costs or Legal Costs. If the parties do not jointly request a Consent Award, on written confirmation by the parties to the LCIA Court that a final settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded by the LCIA Court, subject to payment by the parties of any outstanding Arbitration Costs in accordance with Articles 24 and 28.

Article 27 Correction of Award(s) and Additional Award(s)

27.1 Within 28 days of receipt of any award, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature. If, after consulting the parties, the Arbitral Tribunal considers the request to be justified, it shall make the correction by recording it in an addendum to the award within 28 days of receipt of the request. If, after consulting the parties, the Arbitral Tribunal does not consider the request to be justified it may nevertheless issue an addendum to the award dealing with the request, including any Arbitration Costs and Legal Costs related thereto.

27.2 The Arbitral Tribunal may also correct any error (including any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature) upon its own initiative in the form of an addendum to the award within 28 days of the date of the award, after consulting the parties.

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27.3 Within 28 days of receipt of the final award, a party may by written notice to the Registrar (copied to all other parties), request the Arbitral Tribunal to make an additional award as to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award. If, after consulting the parties, the Arbitral Tribunal considers the request to be justified, it shall make the additional award within 56 days of receipt of the request. If, after consulting the parties, the Arbitral Tribunal does not consider the request to be justified it may nevertheless issue an addendum to the award dealing with the request, including any Arbitration Costs and Legal Costs related thereto.

27.4 As to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award, the Arbitral Tribunal may also make an additional award upon its own initiative within 28 days of the date of the award, after consulting the parties.

27.5 The provisions of Article 26.2 to 26.7 shall apply to any addendum to an award or additional award made hereunder. An addendum to an award shall be treated as part of the award.

Article 28 Arbitration Costs and Legal Costs

28.1 The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the "Arbitration Costs") shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the LCIA and the Arbitral Tribunal for such Arbitration Costs.

28.2 The Arbitral Tribunal shall specify by an order or award the amount of the Arbitration Costs determined by the LCIA Court. The Arbitral Tribunal shall decide the proportions in which the parties shall bear such Arbitration Costs (in the absence of a final settlement of the parties' dispute regarding liability for such costs). If the Arbitral Tribunal has decided that all or any part of the Arbitration Costs shall be borne by a party other than a party which has already covered such costs by way of a payment to the LCIA under Article 24, the latter party shall have the right to recover the appropriate amount of Arbitration Costs from the former party.

28.3 The Arbitral Tribunal shall also have the power to decide by an order or award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.

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28.4 The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the conduct of the parties and that of their authorised representatives in the arbitration, including any cooperation in facilitating the proceedings as to time and cost and any non-cooperation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the order or award containing such decision (unless it is a Consent Award).

28.5 In the event that the parties have howsoever agreed before their dispute that one or more parties shall pay the whole or any part of the Arbitration Costs or Legal Costs whatever the result of any dispute, arbitration or award, such agreement (in order to be effective) shall be confirmed by the parties in writing after the Commencement Date.

28.6 If the arbitration is abandoned, suspended, withdrawn or concluded, by agreement or otherwise, before the final award is made, the parties shall remain jointly and severally liable to pay to the LCIA and the Arbitral Tribunal the Arbitration Costs determined by the LCIA Court.

Article 29 Determinations and Decisions by LCIA Court

29.1 The determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court. Save for reasoned decisions on arbitral challenges under Article 10, such determinations are to be treated as administrative in nature; and the LCIA Court shall not be required to give reasons for any such determination.

29.2 To the extent permitted by any applicable law, the parties shall be taken to have waived any right of appeal or review in respect of any determination and decision of the LCIA Court to any state court or other legal authority. If such appeal or review takes place due to mandatory provisions of any applicable law or otherwise, the LCIA Court may determine whether or not the arbitration should continue, notwithstanding such appeal or review.

Article 30 Confidentiality

30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the

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proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider.

30.2 Article 30.1 of the LCIA Rules shall also apply, with necessary changes, to the Arbitral Tribunal, any tribunal secretary and any expert to the Arbitral Tribunal. Notwithstanding any other provision of the LCIA Rules, the deliberations of the Arbitral Tribunal shall remain confidential to its members and if appropriate any tribunal secretary, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26.6 and 27.5.

30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.

Article 30A Data Protection

30.4 Any processing of personal data by the LCIA is subject to applicable data protection legislation, and the LCIA's data protection notice can be found on the LCIA website.

30.5 In accordance with its duties under Article 14.1, at an early stage of the arbitration the Arbitral Tribunal shall, in consultation with the parties and where appropriate the LCIA, consider whether it is appropriate to adopt:

(i) any specific information security measures to protect the physical and electronic information shared in the arbitration; and

(ii) any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation.

30.6 The LCIA and the Arbitral Tribunal may issue directions addressing information security or data protection, which shall be binding on the parties, and in the case of those issued by the LCIA, also on the members of the Arbitral Tribunal, subject to the mandatory provisions of any applicable law or rules of law.

Article 31 Limitation of Liability and Jurisdiction Clause

31.1 None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents,

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former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.

31.2 After the award has been made and all possibilities of any addendum to the award or additional award under Article 27 have lapsed or been exhausted, none of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator, any tribunal secretary and any expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration; nor shall any party seek to make any of these bodies or persons a witness in any legal or other proceedings arising out of the arbitration.

31.3 Any party agreeing to arbitration under or in accordance with the LCIA Rules irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to hear and decide any action, suit or proceedings between that party and the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice Presidents, Honorary Vice Presidents, former Vice Presidents and members), the LCIA Board (including any board member), the Registrar (including any deputy Registrar) any arbitrator, any Emergency Arbitrator, any tribunal secretary and/or any expert to the Arbitral Tribunal which may arise out of or in connection with any such arbitration and, for these purposes, each party irrevocably submits to the jurisdiction of the courts of England and Wales.

Article 32 General Rules

32.1 A party who knows that any provision of the Arbitration Agreement has not been complied with and yet proceeds with the arbitration without promptly stating its objection as to such non- compliance to the Registrar (before the formation of the Arbitral Tribunal) or the Arbitral Tribunal (after its formation), shall be treated as having irrevocably waived its right to object for all purposes.

32.2 For all matters not expressly provided in the Arbitration Agreement, the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times in good faith, respecting the spirit of

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the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.

32.3 If and to the extent that any part of the Arbitration Agreement is decided by the Arbitral Tribunal, the Emergency Arbitrator, or any court or other legal authority of competent jurisdiction to be invalid, ineffective or unenforceable, such decision shall not, of itself, adversely affect any order or award by the Arbitral Tribunal or the Emergency Arbitrator or any other part of the Arbitration Agreement which shall remain in full force and effect, unless prohibited by any applicable law.

ANNEX TO THE LCIA RULES

General Guidelines for the Authorised Representatives of the Parties (Articles 18.5 and 18.6 of the LCIA Rules)

Paragraph 1: These general guidelines are intended to promote the good and equal conduct of the authorised representatives of the parties appearing by name within the arbitration. Nothing in these guidelines is intended to derogate from the Arbitration Agreement or to undermine any authorised representative's primary duty of loyalty to the party represented in the arbitration or the obligation to present that party's case effectively to the Arbitral Tribunal. Nor shall these guidelines derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to an authorised representative appearing in the arbitration.

Paragraph 2: An authorised representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the Arbitral Tribunal where such challenges are known to be unfounded by that authorised representative.

Paragraph 3: An authorised representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court.

Paragraph 4: An authorised representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court.

Paragraph 5: An authorised representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.

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Paragraph 6: During the arbitration proceedings, an authorised representative should not deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties' dispute with any member of the LCIA Court exercising any function in regard to the arbitration or, from the Arbitral Tribunal's formation onwards, any member of the Arbitral Tribunal or the tribunal secretary (if any), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal and the Registrar in accordance with Article 13.4. An authorised representative may, however, have unilateral contact with the Registrar regarding administrative matters.

Paragraph 7: In accordance with Articles 18.5 and 18.6, the Arbitral Tribunal may decide whether an authorised representative has violated these general guidelines and, if so, how to exercise its discretion to impose any or all of the sanctions listed in Article 18.6.

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Replace the Restatement (Third) of the U.S. Law of International Commercial Arbitration on pages 271-284 of the Documentary Supplement with the following:

SELECTED SECTIONS OF THE RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION*
(Proposed Final Draft April 24, 2019)

§ 1.1. Definitions

(e) "Commercial" matters or relationships are those matters or relationships, whether contractual or not, that affect commerce.

(j) A "Convention award made in the United States" (or "U.S. Convention award") is an international arbitral award made in the United States that is reasonably related to one or more foreign States.

(p) A "foreign award" is an international arbitral award made in an arbitration seated outside the United States.

(dd) An arbitral award is "made" when and where the award is deemed to come into existence under the arbitration law and rules governing the proceedings that gave rise to the award.

(oo) The "seat" (or "arbitral seat") is the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration.

(uu) A "vacatur" proceeding is a legal action by which a party seeks to have a U.S. court annul a Convention award made in the United States.

(vv) A "writing" is a record of information that is inscribed in a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

§ 1.4 Requirements for Application of New York and Panama Conventions

(a) Subject to paragraph (d), both the New York Convention and the Panama Convention are applicable to an arbitration agreement that:

(1) arises out of a legal relationship that is "commercial" as defined in § 1.1(e);

(2) has a reasonable relationship with one or more foreign States; and

(3) is in writing as defined in § 1.1(vv).

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(b) Subject to paragraph (d), the New York Convention is applicable to an arbitral award that:

(1) arises out of a legal relationship that is "commercial" as defined in § 1.1(e);

(2) has a reasonable relationship with one or more foreign States;

(3) is in "writing" and arises from an arbitration agreement in "writing," as defined in § 1.1(vv); and

(4) was made in a Contracting State to the New York Convention.

(c) Subject to paragraph (d), the Panama Convention is applicable to an arbitral award that:

(1) arises out of a legal relationship that is "commercial" as defined in § 1.1(e);

(2) has a reasonable relationship with one or more foreign States;

(3) is in "writing" and arises from an arbitration agreement in "writing," as defined in § 1.1(vv); and

(4) was made in a Contracting State to the Panama Convention.

(d) Unless expressly agreed otherwise by the parties, in cases in which both the New York and Panama Conventions apply, a court applies the New York Convention unless a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Panama Convention and are member States of the Organization of American States.

§ 2.7. Separability of the Arbitration Agreement

(a) An international arbitration agreement is presumed to be separable from the contract in which it is found.

(b) As a consequence of the separability of an international arbitration agreement:

(1) the arbitration agreement can be enforced notwithstanding the invalidity or unenforceability of the underlying contract;

(2) the laws and rules applicable to the arbitration agreement can differ from those governing the underlying contract; and

(3) the decisionmaking authority as between arbitrators and courts is allocated as specified [elsewhere in this Restatement].

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(c) The presumption of separability may be overcome by agreement of the parties.

§ 2.8. Competence of the Tribunal to Determine its Own Jurisdiction

Unless the arbitration agreement provides otherwise, an arbitral tribunal may rule on issues relating to its own jurisdiction, including but not limited to the existence, validity, or scope of an international arbitration agreement.

§ 4.5. Reciprocity for Post-Award Relief

(a) A court recognizes or enforces a Convention award only if the State in which the award is made is a Contracting State to the applicable Convention. Recognition or enforcement of a Convention award is not subject to any other reciprocity requirement.

(b) Recognition or enforcement of a non-Convention award is not subject to any reciprocity requirement unless imposed by treaty or by state arbitration law that is not preempted by federal law as provided in Chapter 1.

§ 4.14. Award Set Aside or Subject to Set-Aside Proceedings

(a) Upon request, a court may deny recognition or enforcement of a Convention award to the extent that the award has been set aside by a competent authority of the country in which, or under the arbitration law of which, the award was made.

(b) Even if a Convention award has been set aside by a competent authority, a court of the United States may recognize or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court, or in other extraordinary circumstances.

(c) If a Convention award is the subject of a set-aside proceeding before a competent authority, a court of the United States may defer the decision whether to recognize or enforce the award pending the outcome of that proceeding.

(d) If the parties designate an arbitration law to govern the arbitration, other than the arbitration law of the seat, the authority competent to set aside the award is a court or other body in the jurisdiction whose arbitration law was chosen.

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Replace the UNCITRAL Notes on Organizing Arbitral Proceedings on pages 295-315 of the Documentary Supplement with the following updated version:

UNCITRAL Notes on Organizing Arbitral Proceedings (2016), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf

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Replace the IBA Rules on the Taking of Evidence in International Arbitration on pages 317-328 of the Documentary Supplement with the following:

INTERNATIONAL BAR ASSOCIATION RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION*

Adopted by a resolution of the IBA Council 17 December 2020

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.

2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.

3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

'Arbitral Tribunal' means a sole arbitrator or a panel of arbitrators;

'Claimant' means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

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'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Evidentiary Hearing' means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;

'Expert Report' means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

'IBA Rules of Evidence' or 'Rules' means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

'Party' means a party to the arbitration;

'Party-Appointed Expert' means a person or organization appointed by a Party in order to report on specific issues determined by the Party;

'Remote Hearing' means a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Respondent' means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counterclaim;

'Tribunal-Appointed Expert' means a person or organization appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

'Witness Statement' means a written statement of testimony by a witness of fact.

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Article 1 Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.

2. Where the Parties have agreed to apply the IBA Rules of Evidence, in whole or in part, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.

3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish, to the extent possible, the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.

5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including, to the extent applicable:

(a) the preparation and submission of Witness Statements and Expert Reports;

(b) the taking of oral testimony at any Evidentiary Hearing;

(c) the requirements, procedure and format applicable to the production of Documents;

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(d) the level of confidentiality protection to be afforded to evidence in the arbitration;

(e) the treatment of any issues of cybersecurity and data protection; and

(f) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.

3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:

(a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or

(b) for which a preliminary determination may be appropriate.

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.

2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.

3. A Request to Produce shall contain:

(a)(i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(c)(i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the

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requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Articles 9.2 or 9.3, or a failure to satisfy any of the requirements of Article 3.3. If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.

6. Upon receipt of any such objection and response, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in timely fashion, consider the Request to Produce, the objection and any response thereto. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the

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requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Articles 9.2 or 9.3 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation. Any Party may object to the request for any of the reasons set forth in Articles 9.2 or 9.3. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.

11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.

12. With respect to the form of submission or production of Documents, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise:

(a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;

(b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients;

(c) a Party is not obligated to produce multiple copies of Documents which are essentially identical;

(d) Documents to be produced in response to a Request to Produce need not be translated; and

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(e) Documents in a language other than the language of the arbitration that are submitted to the Arbitral Tribunal shall be accompanied by translations marked as such.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.

2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

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5. Each Witness Statement shall contain:

(a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;

(b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

(c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

(d) an affirmation of the truth of the Witness Statement; and

(e) the signature of the witness and its date and place.

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to:

(a) matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration; or

(b) new factual developments that could not have been addressed in a previous Witness Statement.

7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.

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9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. Any Party may object for any of the reasons set forth in Articles 9.2 or 9.3.

Article 5 Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

2. The Expert Report shall contain:

(a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions.

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Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to:

(a) matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration; or

(b) new developments that could not have been addressed in a previous Expert Report.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefor.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

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6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.

2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Articles 9.2 and 9.3, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.

4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:

(a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;

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(b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;

(d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(f) the signature of the Tribunal-Appointed Expert and its date and place; and

(g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.

6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.

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7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.

8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection

Subject to the provisions of Articles 9.2 and 9.3, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangements for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.3, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal.

2. At the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing. In that event, the Arbitral Tribunal shall consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address:

(a) the technology to be used;

(b) advance testing of the technology or training in use of the technology;

(c) the starting and ending times considering, in particular, the time zones in which participants will be located;

(d) how Documents may be placed before a witness or the Arbitral Tribunal; and

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(e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

3. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Articles 9.2 or 9.3. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.

4. With respect to oral testimony at an Evidentiary Hearing:

(a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;

(b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

(c) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

(d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;

(e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;

(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

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(g) the Arbitral Tribunal may ask questions to a witness at any time.

5. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony, in which event the Arbitral Tribunal may nevertheless permit further oral direct testimony.

6. Subject to the provisions of Articles 9.2 and 9.3, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below);

(c) unreasonable burden to produce the requested evidence;

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

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(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

3. The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally.

4. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

(e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

5. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit Documents to be produced, and evidence to be presented or considered subject to suitable confidentiality protection.

6. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

7. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal

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to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

8. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

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Replace the IBA Guidelines on Conflicts of Interest in International Arbitration on pages 345-359 of the Documentary Supplement with the following:

INTERNATIONAL BAR ASSOCIATION GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION*

Approved 23 October 2014

Introduction

1. Arbitrators and party representatives are often unsure about the scope of their disclosure obligations. The growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues. Parties have more opportunities to use challenges of arbitrators to delay arbitrations, or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges. At the same time, it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration.

2. Parties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure. In addition, institutions and courts face difficult decisions when an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing.

3. It is in the interest of the international arbitration community that arbitration proceedings are not hindered by ill-founded challenges against arbitrators and that the legitimacy of the process is not affected by uncertainty and a lack of uniformity in the applicable standards for disclosures, objections and challenges. The 2004 Guidelines reflected the view that the standards existing at the time lacked sufficient clarity and uniformity in their application. The

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Guidelines, therefore, set forth some 'General Standards and Explanatory Notes on the Standards'. Moreover, in order to promote greater consistency and to avoid unnecessary challenges and arbitrator withdrawals and removals, the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Such lists, designated 'Red', 'Orange' and 'Green' (the 'Application Lists'), have been updated and appear at the end of these revised Guidelines.

4. The Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Standards below. The General Standards and the Application Lists are based upon statutes and case law in a cross-section of jurisdictions, and upon the judgement and experience of practitioners involved in international arbitration. In reviewing the 2004 Guidelines, the IBA Arbitration Committee updated its analysis of the laws and practices in a number of jurisdictions. The Guidelines seek to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international arbitration. Both the 2004 Working Group and the Subcommittee in 2012/2014 have sought and considered the views of leading arbitration institutions, corporate counsel and other persons involved in international arbitration through public consultations at IBA annual meetings, and at meetings with arbitrators and practitioners. The comments received were reviewed in detail and many were adopted. The IBA Arbitration Committee is grateful for the serious consideration given to its proposals by so many institutions and individuals.

5. The Guidelines apply to international commercial arbitration and investment arbitration, whether the representation of the parties is carried out by lawyers or non-lawyers, and irrespective of whether or not non-legal professionals serve as arbitrators.

6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that, as was the case for the 2004 Guidelines and other sets of rules and guidelines of the IBA Arbitration Committee, the revised Guidelines will find broad acceptance within the international arbitration community, and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation.

7. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be exhaustive, nor could they be. Nevertheless, the IBA Arbitration Committee is confident that the Application Lists

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provide concrete guidance that is useful in applying the General Standards. The IBA Arbitration Committee will continue to study the actual use of the Guidelines with a view to furthering their improvement.

8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

Part I: General Standards Regarding Impartiality, Independence and Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

Explanation to General Standard 1:

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable. The question has arisen as to whether this obligation should extend to the period during which the award may be challenged before the relevant courts. The decision taken is that this obligation should not extend in this manner, unless the final award may be referred back to the original Arbitral Tribunal under the relevant applicable law or relevant institutional rules. Thus, the arbitrator's obligation in this regard ends when the Arbitral Tribunal has rendered the final award, and any correction or interpretation as may be permitted under the relevant rules has been issued, or the time for seeking the same has elapsed, the proceedings have been finally terminated (for example, because of a settlement), or the arbitrator otherwise no longer has jurisdiction. If, after setting aside or other proceedings, the dispute is referred back to the same Arbitral Tribunal, a fresh round of disclosure and review of potential conflicts of interests may be necessary.

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(2) Conflicts of Interest

(a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4.

(c) Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

Explanation to General Standard 2:

(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.

(b) In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test'). Again, as described in the Explanation to General Standard 3(e), this standard applies regardless of the stage of the proceedings.

(c) Laws and rules that rely on the standard of justifiable doubts often do not define that standard. This General Standard is intended to provide some context for making this determination.

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(d) The Non-Waivable Red List describes circumstances that necessarily raise justifiable doubts as to the arbitrator's impartiality or independence. For example, because no one is allowed to be his or her own judge, there cannot be identity between an arbitrator and a party. The parties, therefore, cannot waive the conflict of interest arising in such a situation.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.

(b) An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

(c) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, and, therefore, capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset, or resigned.

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(e) When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.

Explanation to General Standard 3:

(a) The arbitrator's duty to disclose under General Standard 3(a) rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. Accordingly, General Standard 3(d) provides that any doubt as to whether certain facts or circumstances should be disclosed should be resolved in favour of disclosure. However, situations that, such as those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the arbitrator under General Standard 2. The duty of disclosure under General Standard 3(a) is ongoing in nature.

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(b) The IBA Arbitration Committee has considered the increasing use by prospective arbitrators of declarations in respect of facts or circumstances that may arise in the future, and the possible conflicts of interest that may result, sometimes referred to as 'advance waivers'. Such declarations do not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a). The Guidelines, however, do not otherwise take a position as to the validity and effect of advance declarations or waivers, because the validity and effect of any advance declaration or waiver must be assessed in view of the specific text of the advance declaration or waiver, the particular circumstances at hand and the applicable law.

(c) A disclosure does not imply the existence of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination, or resigned. An arbitrator making a disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. It is hoped that the promulgation of this General Standard will eliminate the misconception that disclosure itself implies doubts sufficient to disqualify the arbitrator, or even creates a presumption in favour of disqualification. Instead, any challenge should only be successful if an objective test, as set forth in General Standard 2 above, is met. Under Comment 5 of the Practical Application of the General Standards, a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue.

(d) In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.

(e) Disclosure or disqualification (as set out in General Standards 2 and 3) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. As a practical matter, arbitration institutions may make a distinction depending on the stage of the arbitration. Courts may likewise apply different standards. Nevertheless, no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw

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after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

(a) If, within 30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection based on such facts or circumstances at a later stage.

(b) However, if facts or circumstances exist as described in the Non-Waivable Red List, any waiver by a party (including any declaration or advance waiver, such as that contemplated in General Standard 3(b)), or any agreement by the parties to have such a person serve as arbitrator, shall be regarded as invalid.

(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the Waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator, or continue to act as an arbitrator, if the following conditions are met: (i) all parties, all arbitrators and the arbitration institution, or other appointing authority (if any), have full knowledge of the conflict of interest; and (ii) all parties expressly agree that such a person may serve as arbitrator, despite the conflict of interest.

(d) An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.

Explanation to General Standard 4:

(a) Under General Standard 4(a), a party is deemed to have waived any potential conflict of interest, if such party has not raised an objection in respect of

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such conflict of interest within 30 days. This time limit should run from the date on which the party learns of the relevant facts or circumstances, including through the disclosure process.

(b) General Standard 4(b) serves to exclude from the scope of General Standard 4(a) the facts and circumstances described in the Non-Waivable Red List. Some arbitrators make declarations that seek waivers from the parties with respect to facts or circumstances that may arise in the future. Irrespective of any such waiver sought by the arbitrator, as provided in General Standard 3(b), facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure.

(c) Notwithstanding a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, the parties may wish to engage such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. Persons with a serious conflict of interest, such as those that are described by way of example in the Waivable Red List, may serve as arbitrators only if the parties make fully informed, explicit waivers.

(d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well-established in some jurisdictions, but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. Certain jurisdictions may require such consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective, if the mediation is unsuccessful. In giving their express consent, the parties should realise the consequences of the arbitrator assisting them in a settlement process, including the risk of the resignation of the arbitrator.

(5) Scope

(a) These Guidelines apply equally to tribunal chairs, sole arbitrators and co-arbitrators, howsoever appointed.

(b) Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

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Explanation to General Standard 5:

(a) Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards do not distinguish between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrators appointed by an institution.

(b) Some arbitration institutions require arbitral or administrative secretaries and assistants to sign a declaration of independence and impartiality. Whether or not such a requirement exists, arbitral or administrative secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration. Furthermore, this duty applies to arbitral or administrative secretaries and assistants to either the Arbitral Tribunal or individual members of the Arbitral Tribunal.

(6) Relationships

(a) The arbitrator is in principle considered to bear the identity of his or her law firm, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case. The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact should be considered in each individual case, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.

(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

Explanation to General Standard 6:

(a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators. The arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the

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arbitrator's firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator's firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case. General Standard 6(a) uses the term 'involve' rather than 'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel. When a party to an arbitration is a member of a group of companies, special questions regarding conflicts of interest arise. Because individual corporate structure arrangements vary widely, a catch-all rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies, and the relationship of that entity with the arbitrator's law firm, should be considered in each individual case.

(b) When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Each situation should be assessed individually, and General Standard 6(b) clarifies that such legal persons and individuals may be considered effectively to be that party. Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

(7) Duty of the Parties and the Arbitrator

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of any relationship, including membership of the same barristers' chambers, between its counsel and

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the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.

(c) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide any relevant information available to it.

(d) An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.

Explanation to General Standard 7:

(a) The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment. The parties' duty of disclosure of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.

(b) Counsel appearing in the arbitration, namely the persons involved in the representation of the parties in the arbitration, must be identified by the parties at the earliest opportunity. A party's duty to disclose the identity of counsel appearing in the arbitration extends to all members of that party's counsel team and arises from the outset of the proceedings.

(c) In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence.

(d) In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them.

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Part II: Practical Application of the General Standards

1. If the Guidelines are to have an important practical influence, they should address situations that are likely to occur in today's arbitration practice and should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or should not be disclosed. For this purpose, the Guidelines categorise situations that may occur in the following Application Lists. These lists cannot cover every situation. In all cases, the General Standards should control the outcome.

2. The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2(d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances (see General Standard 2(b)). The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict. The Waivable Red List covers situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

3. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).

4. Disclosure does not imply the existence of a conflict of interest; nor should it by itself result either in a disqualification of the arbitrator, or in a presumption regarding disqualification. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence. If the conclusion is that there are no justifiable doubts, the arbitrator can act. Apart from the situations covered by the Non-Waivable Red List, he or she can also act if there is no timely objection by the parties or, in situations covered by the Waivable Red List, if there is a specific

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acceptance by the parties in accordance with General Standard 4(c). If a party challenges the arbitrator, he or she can nevertheless act, if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification.

5. A later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in non-appointment, later disqualification or a successful challenge to any award. Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.

6. Situations not listed in the Orange List or falling outside the time limits used in some of the Orange List situations are generally not subject to disclosure. However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts as to his or her impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointments by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. Likewise, an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances. While the Guidelines do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal, or with one of the counsel in the current proceedings, an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure.

7. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. As stated in the Explanation to General Standard 3(a), there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.

8. The borderline between the categories that comprise the Lists can be thin. It can be debated whether a certain situation should be on one List instead of another. Also, the Lists contain, for various situations, general terms such as 'significant' and 'relevant'. The Lists reflect international principles and best

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practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive.

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

2.2 Arbitrator's direct or indirect interest in the dispute

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.

2.2.2 A close family member[3] of the arbitrator has a significant financial interest in the outcome of the dispute.

[3] Throughout the Application Lists, the term 'close family member' refers to a: spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists.

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2.2.3 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate[4] of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial or personal interest in one of the parties, or an affiliate of one of the parties.

[4] Throughout the Application Lists, the term 'affiliate' encompasses all companies in a group of companies, including the parent company.

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3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

3.1.2 The arbitrator has, within the past three years, served as counsel against one of the parties, or an affiliate of one of the parties, in an unrelated matter.

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.[5]

3.1.4 The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

3.2 Current services for one of the parties

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator.

3.2.2 A law firm or other legal organisation that shares significant fees or other revenues with the arbitrator's law firm renders services to one of the parties, or an affiliate of one of the parties, before the Arbitral Tribunal.

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[5] It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.

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3.2.3 The arbitrator or his or her firm represents a party, or an affiliate of one of the parties to the arbitration, on a regular basis, but such representation does not concern the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel

3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.

3.3.2 The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.

3.3.3 The arbitrator was, within the past three years, a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the arbitration.

3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties, or an affiliate of one of the parties.

3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

3.3.6 A close personal friendship exists between an arbitrator and a counsel of a party.

3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration.

3.3.8 The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

3.3.9 The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.

3.4 Relationship between arbitrator and party and others involved in the arbitration

3.4.1 The arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties.

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3.4.2 The arbitrator has been associated with a party, or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner.

3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award to be rendered in the arbitration; or any person having a controlling influence, such as a controlling shareholder interest, on one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert.

3.4.5 If the arbitrator is a former judge, he or she has, within the past three years, heard a significant case involving one of the parties, or an affiliate of one of the parties.

3.5 Other circumstances

3.5.1 The arbitrator holds shares, either directly or indirectly, that by reason of number or denomination constitute a material holding in one of the parties, or an affiliate of one of the parties, this party or affiliate being publicly listed.

3.5.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

3.5.3 The arbitrator holds a position with the appointing authority with respect to the dispute.

3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

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4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

4.2 Current services for one of the parties

4.2.1 A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.

4.3 Contacts with another arbitrator, or with counsel for one of the parties

4.3.1 The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network.

4.3.2 The arbitrator and counsel for one of the parties have previously served together as arbitrators.

4.3.3 The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties.

4.3.4 The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.

4.4 Contacts between the arbitrator and one of the parties

4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.

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4.4.2 The arbitrator holds an insignificant amount of shares in one of the parties, or an affiliate of one of the parties, which is publicly listed.

4.4.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case.

4.4.4 The arbitrator has a relationship with one of the parties or its affiliates through a social media network.

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Add the following after the IBA Guidelines on Conflicts of Interest on page 359 of the Documentary Supplement:

International Bar Association, IBA Guidelines on Party Representation in International Arbitration (2013), available at https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F

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Replace the AAA's *Drafting Dispute Resolution Clauses* on pages 361-383 with the following updated version:

American Arbitration Association, Drafting Dispute Resolution Clauses—A Practical Guide (2013), *available at* https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf

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