

Pleading Practice in Arbitration Proceedings

A Practical Guidance® Practice Note by Theodore K. Cheng, ADR Office of Theo Cheng LLC



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This practice note discusses the prevailing pleading practices in arbitration proceedings and provides practical tips on how best to prepare and submit pleadings to maximize your client's ability to streamline the arbitration proceeding by eliminating much of the formalism found in court rules.

Arbitration is intended as an alternative to court litigation to resolve disputes. Its principal objective is to achieve a final, binding resolution of a dispute in a fair, expeditious, and cost-effective manner.

Because of its inherent flexibility and customizability, arbitration is meant to be faster and less expensive than court litigation. This objective is often (but not always) accomplished through the parties' negotiations and drafting of a dispute resolution clause or provision in their applicable contract.

Thus, arbitration is often referred to as a "creature of contract" because the right to an arbitral forum for dispute resolution arises from the parties' agreement to arbitrate. Consistent with the objective of a more cost-effective and expeditious dispute resolution process is the existence of procedural and other agreed-upon rules in the arbitral forum that are quite different from civil court procedural rules, including those that may address pleading standards.

For arbitration pleading templates, see:

- [AAA Demand for Arbitration](#)
- [AAA Answer with Counterclaims](#)

- [CPR Notice of Arbitration](#)
- [CPR Administered Arbitration Notice of Defense with Counterclaims \(International\)](#)
- [CPR Administered Arbitration Notice of Defense with Counterclaims \(U.S.\)](#)
- [ICDR Notice of Arbitration](#)
- [ICDR Answer with Counterclaims](#)
- [JAMS Demand for Arbitration](#)
- [JAMS Response to Demand with Counterclaims](#)

Sources of Authority in Arbitration Proceedings

Initially, there are three main sources of authority for conducting an arbitration proceeding:

- The parties' arbitration agreement (or a provision or clause evidencing an agreement to arbitrate)
- Any procedural rulesets affirmatively adopted by the parties or automatically applied by an administering institution –and–
- Any applicable background arbitration procedural statute

The Arbitration Agreement

The parties' own agreement may contain specific requirements for pleadings in the arbitral forum. For example, it might, in very general terms, require that the party commencing the arbitration proceeding (referred to as the "claimant") state in succinct terms the nature of the claim or claims being asserted against the other party (referred to as the "respondent") and the relief requested.

More often than not, the agreement will require far less than even the standards for notice pleading found in most court

civil procedural rules. Rarely, a clause or provision might require heightened language or other particularization in pleading claims, or at least for certain types of claims (e.g., fraud or mistake).

For a compilation of guidance on arbitration clauses, see [Arbitration Clauses Resource Kit](#).

For a related video, see [Arbitration Clauses: The Good, and the \(Very Bad and\) Ugly Video](#).

Existing Administering Institution Procedural Rules

If the parties' arbitration agreement calls for the administration of the dispute before an established administering institution, those institutions generally will only apply their own promulgated procedural rulesets (also known as "administered rules") in administering the matter.

Below are links to the administered rules (principally for commercial disputes) for the following institutions:

- [American Arbitration Association \(AAA\)](#)
- [International Institute for Conflict Prevention and Resolution \(CPR Institute\)](#)
- Financial Industry Regulatory Association (FINRA)
 - [Code of Arbitration Procedure for Customer Disputes](#)
 - [Code of Arbitration Procedure for Industry Disputes](#)
- [International Chamber of Commerce \(ICC\)](#)
- [International Centre for Dispute Resolution \(ICDR\)](#)
- [JAMS](#)
- [Resolute Systems](#)

The role of these institutions is to serve as a provider of arbitration services—essentially back-office support much like a clerk's office in a court—and it is highly unlikely that a proceeding could be commenced before one institution and be administered under the rules promulgated by a different institution.

If the parties' arbitration agreement does not call for the involvement of an administering institution, that means that the parties have opted to have their matter be non-administered. In that case, the arbitration tribunal (a sole arbitrator or a panel), the parties, and their counsel will work together to have the matter proceed on a stand-alone or ad hoc basis, self-administered, in large part, by the tribunal.

Even in those circumstances, because the background arbitration procedural statutes are usually quite bare (see Arbitration Procedural Statutes below), it is always a best practice to agree upon some set of procedural rules that would govern the matter. Doing so will assist all arbitration participants by acknowledging certain default procedures and presumptions as the participants work their way through the process.

The most commonly used rulesets in this context are those promulgated by the CPR Institute and the United Nations Commission on International Trade Law (UNCITRAL). See [CPR Non-Administered Arbitration Rules \(March 1, 2018\)](#); [UNCITRAL Arbitration Rules \(2013\)](#).

Arbitration Procedural Statutes

Every arbitration proceeding will also be subject to some governing procedural statute. Generally, there are three possibilities:

- The Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.)
- State arbitration procedural statutes, including:
 - [Uniform Arbitration Act \(1955\)](#)
 - [Revised Uniform Arbitration Act \(2000\)](#)
 - New York law (N.Y. C.P.L.R. Article 75) –and–
- Another country's arbitration procedural statute

The above statutes can differ markedly from each other, particularly in terms of the:

- Nature and scope of permissible prehearing exchange of information and documents (i.e., discovery), if at all –and–
- Powers of the tribunal

Some statutes provide minimal guidance and authority, while others are more detailed and robust. However, as a general matter, they largely do not address pleading requirements or standards, leaving that to the parties' agreement or the specifics of any applicable procedural rulesets.

Nonetheless, you should become facile with both the applicable statute itself and the existing decisional law interpreting it for additional guidance and practice limitations.

For detailed discussion of U.S. arbitration statutes, see [Federal Arbitration Act Fundamentals](#), [Revised Uniform Arbitration Act Fundamentals](#), and [Arbitration State Law Survey](#).

For more information on arbitration discovery processes, see [Discovery in Arbitration: Limiting Discovery \(U.S.\)](#), [Nonparty Discovery in Domestic Arbitration Proceedings \(U.S.\)](#), [Discovery Pursuant to 28 U.S.C. § 1782 in Support of Arbitration \(International\)](#), and [Document Production in Arbitration \(International\)](#).

Commencing an Arbitration Proceeding

Generally, it is far easier to commence an arbitration than a lawsuit, particularly when an administering institution is involved, and the rulesets adopted or agreed upon by the parties usually set forth the necessary steps.

Arbitration Is Not About Technical Pleading Requirements

By way of example, the following rules set forth the requirements for commencing an arbitration proceeding under the applicable procedural rulesets:

- AAA Commercial Arbitration Rules, Rule R-4
- CPR Administered Arbitration Rules, Rules 3.1–3.3
- FINRA Code of Arbitration Procedure for Customer Disputes, Rules 12300, 12302
- FINRA Code of Arbitration Procedure for Industry Disputes, Rules 13300, 13302
- ICC Arbitration Rules, Art. 4
- ICDR International Dispute Resolution Procedures, Art. 2
- JAMS Comprehensive Arbitration Rules & Procedures, Rules 5, 9
- Resolute Systems Commercial Arbitration Rules, Rule 2(A)
- CPR Non-Administered Arbitration Rules, Rules 3.1–3.3
- UNCITRAL Arbitration Rules, Arts. 3, 20

Specifically, under the AAA Commercial Arbitration Rules, the initiating party (called the “claimant”) files the following with the AAA:

- A “Demand for Arbitration” (more simply referred to as the “demand”)
- An administrative filing fee –and–
- A copy of the applicable arbitration agreement from the parties’ contract that provides for arbitration

See AAA Commercial Arbitration Rules, Rule R-4(a).

The filing with the AAA should include:

- The name of each party
- The address for each party, including telephone and fax numbers and email addresses
- If applicable, the names, addresses, telephone and fax numbers, and email addresses of any known representative for each party
- The locale requested if the arbitration agreement does not specify one –and–
- A statement setting forth the nature of the claim including the:
 - Relief sought –and–
 - Amount involved

See AAA Commercial Arbitration Rules, Rule R-4(a)(iv).

For discussion of the forms of relief you can seek in arbitration, see [Arbitration Damages \(International\)](#), [Non-pecuniary Remedies in Arbitration \(International\)](#), and [Pre-](#)

[award and Post-award Interest: Requesting and Awarding in Domestic Arbitration Proceedings \(U.S.\)](#).

Like in court, it is possible to have multiple claimants and multiple respondents identified in the same demand, so long as there exists one or more applicable arbitration agreements. Moreover, a claimant’s legal theory seeking a particular remedy is still generally referred to as a “claim” or “cause of action,” and there may also be counterclaims interposed by the respondent(s). See Counterclaims below.

However, as is the case in a court proceeding, such labels are not determinative, and a tribunal will generally be guided by the substance of what is being pled and, ultimately, the evidence adduced at the merits hearing.

No Specific Format Requirements

No specific format is required in preparing the demand so long as the above information is provided. In that regard, the minimum pleading standard for a demand in an arbitration proceeding is far more lenient than in court, in which either a notice pleading standard or the more stringent plausibility standard would apply. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Indeed, all of the required information can also be provided by completing the standard AAA Commercial Arbitration Demand Form, but a claimant is not required to use this form to commence a proceeding administered by the AAA.

Accordingly, while you should pay attention to the particular requirements of each administering institution, it is comparatively easy and straightforward to commence an arbitration proceeding, which is exactly how this process is intended to be. Arbitration affords disputants a cost-effective and expeditious mechanism for resolution that is materially different from, and a true alternative to, court litigation.

For templates to be used to commence arbitration, see:

- [AAA Demand for Arbitration](#)
- [CPR Notice of Arbitration](#)
- [ICDR Notice of Arbitration](#)
- [JAMS Demand for Arbitration](#)

The Decision to Submit a Statement of Claim

Notwithstanding the foregoing, particularly in more sophisticated disputes or ones with a complex or complicated factual background, advocates often submit an additional document, styled as a “Statement of Claim,” to accompany the demand. These documents typically:

- Contain factual averments, usually pleaded upon information and belief
- Use consecutively numbered paragraphs –and–
- Conclude with a prayer for relief

Thus, as is the case with many matters filed in court and/or when experienced advocates are involved, commencement documents often look very much like a lawsuit complaint.

Filing a statement of claim along with the formal demand is a strategic opportunity for the claimant to persuade the trier of fact (in this case, the tribunal) well in advance of the evidentiary hearing because it is one of the few documents provided to the tribunal even before the preliminary hearing conference (or initial arbitration case management conference) in the proceeding. See [Preliminary Hearings in Arbitration: The Arbitrator's Perspective \(U.S.\)](#).

Like a complaint, a statement of claim could include a section setting forth an "introduction," "nature of case," or "relevant background" that permits the advocate to frame the issues and serve in the role of a storyteller akin to giving an opening statement to a judge or jury.

Additionally, in the absence of formal pleading rules like in court, an advocate has a lot of flexibility and leeway in crafting the statement of claim and, hence, can take a fair amount of liberties with the text without the fear of having to later defend the equivalent of a motion to strike for having pled "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Cost Considerations

Of course, preparing such a document entails incurring additional legal fees and thus increases the cost to file the matter in the first instance. But if the stakes or the amount in controversy are high enough, the additional cost may be warranted.

The filing fees involved in commencing an arbitration may be (but are not always) greater than the filing fees required to commence a litigation, and the overall cost of an arbitration proceeding may be even larger if the parties' agreement calls for one party to bear a disproportionate amount of the arbitration costs, such as in employment and consumer matters. For some parties, that can be a deterrent in selecting the arbitral forum, at least as an ex ante matter when the dispute resolution clause is being negotiated.

Thus, you should carefully consider the advantages and disadvantages of utilizing arbitration versus litigation to resolve both anticipated and unanticipated future disputes between the parties, which is beyond the scope of this practice note. See, e.g., [Steven M. Greenspan and Conna A. Weiner, "Reassessing Commercial Arbitration: Making It Work For Your Company," ACC Docket \(Mar. 2017\); Arbitration vs. Litigation \(Federal\)](#).

For more on arbitration costs, see:

- [Arbitration Costs \(International\)](#)
- [UNCITRAL Arbitration: Costs \(International\)](#)

- [ICC \(2021\) Arbitration: Fees, Advances, and Costs \(International\)](#)
- [Delay and Excessive Cost in Arbitration Checklist \(U.S.\)](#)

No Formal Service of Process

Finally, the claimant must also provide a copy of the demand and any supporting documents to the prospective respondent(s). See, e.g., AAA Commercial Arbitration Rules, Rule R-4(b)(ii). However, no formal process server needs to be engaged.

In turn, the administering institution usually provides notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied. See, e.g., AAA Commercial Arbitration Rules, Rule R-4(b)(iv); CPR Administered Arbitration Rules, Rule 3.5; FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12302(c); FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13302(c); ICC Arbitration Rules, Arts. 4(1), 4(5); ICDR International Dispute Resolution Procedures, Art. 2(5).

Answering a Demand/ Statement of Claim

Answering a demand or statement of claim is likewise a more streamlined process than answering a court complaint. Under most rulesets, formal answers are not strictly required. You should nonetheless, whether through a filing or some other mechanism in advance of the merits hearing, apprise the claimant of the defenses you intend to pursue. Although not encouraged, you may also test the sufficiency of the demand or statement of claim.

Testing the Sufficiency of the Statement of Claim

In responding to the demand, one issue that arises with respect to how matters are commenced in an arbitration proceeding is, to what extent a claimant, who chooses to file a detailed statement of claim instead of simply submitting a demand form, should be held to any deficiencies in that document, as might be the case for a deficient complaint in a court proceeding.

Although a respondent might be tempted to file a motion akin to one to dismiss under Fed. R. Civ. P. 12(b)(6), applications to address the sufficiency of a statement of claim are generally discouraged in arbitration proceedings. The reason is that undertaking such a procedure is, in most cases, at odds with the expeditiousness of the arbitration mechanism for resolving disputes, lengthening the duration of the case, increasing the costs, and reducing efficiency.

Nonetheless, if there is a clear basis for a motion that would significantly dispose of the entire case and/or narrow the issues in the case, thereby resulting in savings to the parties in terms of time and cost, such a motion may be appropriate. The rules below address the standards for early dispositive motions:

- AAA Commercial Arbitration Rules, Rule R-34(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 dispose of or narrow the issues in the case.”)
- CPR Administered Arbitration Rules, Rule 12.6
- FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12504(a)
- FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13504(a)
- ICDR International Dispute Resolution Procedures, Art. 23(1) (“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.”)
- JAMS Comprehensive Arbitration Rules & Procedure, Rule 18 (“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 request. 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.”)
- CPR Non-Administered Arbitration Rules, Rule 9.3(c)

For a related chart, see [AAA, JAMS, FINRA, and CPR Dispositive Motion Rules Comparison Chart](#).

For example, if the claimant should plead factual averments in the statement of claim that, even if taken as true, do not rise to the level of a legally cognizable claim, those circumstances might justify an early dismissal by the tribunal upon the respondent’s motion.

For detailed discussion of dispositive motions in arbitration, see [Dispositive Motions in Arbitration \(U.S.\)](#) and [AAA Dispositive Motions](#).

For a template motion, see [AAA Arbitration Dispositive Motion](#).

Pre-Motion Leave Process

Generally, the issue of potentially filing any motions directed at the demand or statement of claim should be raised by the respondent during the preliminary hearing conference. The tribunal should then read the statement of claim as broadly as possible and discuss the alleged deficiencies with the parties to ensure that the basis for the claim (or claims) truly exists and perhaps explore ways to test any threshold issues on the merits, such as bifurcating the proceeding between issues.

For more on preliminary hearing conferences, see [Preliminary Hearings in Arbitration: The Arbitrator’s Perspective \(U.S.\)](#) and [Preliminary Hearings and Procedural Orders in Arbitration \(U.S.\)](#).

If the respondent is insistent on filing a motion to test the sufficiency of one or more claims, one way to handle the matter is for the respondent to submit a letter application seeking leave to file the motion, followed by a response from the claimant. The tribunal can then entertain whether to permit the motion to be filed. See, e.g., CPR Administered Arbitration Rules, Rule 12.6(a)–(c); ICDR International Dispute Resolution Procedures, Art. 23(1).

For a related template, see [AAA Commercial Arbitration Request for Leave to Submit Dispositive Motion](#).

If such a motion, even if successful, would not materially reduce the evidence that would have to be presented at the merits hearing or materially impact the nature and scope of the information and document exchange, then it is unlikely that the tribunal would, on balance, permit such a motion to be prosecuted due to the lack of any real savings in time or cost to the overall proceeding, especially after accounting for the legal fees and tribunal compensation incurred in briefing the motion and having the tribunal decide it.

Moreover, a deficiency that can easily be cured through repleading probably counsels for forgoing such a motion because all that would be accomplished is increased cost and delay in the proceeding. This principle is reflected in the following rules:

- AAA Commercial Arbitration Rules, Rule 34(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.”)
- CPR Administered Arbitration Rules, Rule 12.6(c) (“The Tribunal shall promptly review the preliminary application and any responses from the other party(ies) and determine whether there is a reasonable likelihood that hearing the motion for early disposition may result in increased efficiency in resolving the overall dispute while not unduly delaying the rendering of a final award.”)

Undertaking this pre-motion leave process—which does not add significantly to the cost of the proceeding—may also have the benefit of causing the claimant to withdraw patently deficient claims and/or properly replead the claims in question. During this process, you should meet and confer to find some agreement as to the precise ruling on which you would like the tribunal to issue. After all, it is ultimately the tribunal’s responsibility to clarify the claims and issues in the case.

No Formal Answer Required

Aside from a preliminary motion to test the sufficiency of the statement of claim, unlike in court, no formal answer or response (referred to as the “answering statement”) to a demand is generally required. In such a situation, the respondent is deemed to have denied all the claims in the demand, as illustrated by the following rules:

- AAA Commercial Arbitration Rules, Rule 5(a)
- CPR Administered Arbitration Rules, Rules 3.6
- JAMS Comprehensive Arbitration Rules & Procedure, Rule 9(e)
- Resolute Systems Commercial Arbitration Rules, Rule 2(A)
- CPR Non-Administered Arbitration Rules, Rule 3.4

Some rulesets do, however, require an answering statement:

- FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12303(a) (mandating that an answering statement be filed and providing that “[p]arties that fail to answer in the time provided may be subject to default proceedings under Rule 12801”)

- FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13303(a) (same)
- ICC Arbitration Rules, Art. 5 (mandating the submission of an answer statement by the respondent and omitting any provision for the automatic denial of claims if no answer is submitted)
- ICDR International Dispute Resolution Procedures, Art. 3 (same)
- UNCITRAL Arbitration Rules, Art. 21 (same)

See Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.”).

For responsive pleading templates, see:

- [AAA Answer with Counterclaims](#)
- [CPR Administered Arbitration Notice of Defense with Counterclaims \(International\)](#)
- [CPR Administered Arbitration Notice of Defense with Counterclaims \(U.S.\)](#)
- [ICDR Answer with Counterclaims](#)
- [JAMS Response to Demand with Counterclaims](#)

If a respondent chooses to file an answering statement, under the AAA Commercial Arbitration Rules, it may do so within 14 calendar days after notice of the filing of the demand is sent by the AAA and must also send a copy of the document to the claimant and all other parties to the arbitration. See AAA Commercial Arbitration Rules, Rule R-5(a).

Other rulesets may contain additional particulars that need to be included in an answering statement and/or different time periods within which an answering statement may or should be filed, like the following:

Ruleset	Rule	Time to Answer
CPR Administered Arbitration Rules	Rule 3.5	20 days
FINRA Code of Arbitration Procedure for Customer Disputes	Rule 12303(a)	45 days
FINRA Code of Arbitration Procedure for Industry Disputes	Rule 13303(a)	45 days
ICC Arbitration Rules	Art. 5(1)	30 days
ICDR International Dispute Resolution Procedures	Art. 3(1)	30 days
JAMS Comprehensive Arbitration Rules & Procedure	Rule 9(c)	14 days
Resolute Systems Commercial Arbitration Rules	Rule 2(A)	21 days
CPR Non-Administered Arbitration Rules	Rule 3.4	20 days
UNCITRAL Arbitration Rules	Art. 21(1)	Allows tribunal to set the time period

Counterclaims

A respondent may file a counterclaim at any time after the AAA sends notice of the filing of the demand (subject to certain limitations set forth in AAA Commercial Arbitration Rule R-6) and send a copy of the counterclaim to the claimant and all other parties to the arbitration. See [AAA Answer with Counterclaims](#).

If a counterclaim is asserted, it should include a statement setting forth the:

- Nature of the counterclaim
- Relief sought –and–
- Amount involved

An additional filing fee must also be paid. See AAA Commercial Arbitration Rules, Rule R-5(b).

Rulesets containing counterclaim procedures include:

- CPR Administered Arbitration Rules, Rule 3.8
- FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12303(b)
- FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13303(b)
- ICC Arbitration Rules, Art. 5(5)
- ICDR International Dispute Resolution Procedures, Arts. 3(2), 3(3)
- JAMS Comprehensive Arbitration Rules & Procedure, Rule 9(c)
- Resolute Systems Commercial Arbitration Rules, Rule 2(A)
- CPR Non-Administered Arbitration Rules, Rule 3.6
- UNCITRAL Arbitration Rules, Art. 4(2)(e)

No Specific Format Requirements

The information required in an answering statement or counterclaim is again set forth in the standard [AAA Commercial Arbitration Answering Statement Form](#), and, again, a respondent is not required to use this form in a AAA-administered proceeding.

No specific format is required so long as the above information is provided. However, as a practical matter, because an answering statement is also one of the few documents provided to the tribunal before the preliminary hearing in the proceeding, preparing one—much like preparing a detailed statement of claim—can be an opportunity to persuade the tribunal.

Like an answer or responsive pleading in court, these more detailed answering statements, in general:

- Contain general and specific denials
- Include some additional factual averments, again pleaded upon information and belief

- Utilize consecutively numbered paragraphs
- Interpose affirmative defenses –and–
- Conclude with a prayer for relief

Consequently, you should view whether to submit an answering statement as a strategic decision to be considered by both the advocate and the client. Moreover, as discussed above (see “Testing the Sufficiency of the Statement of Claim” under Answering a Demand/Statement of Claim above), as a claimant, you should be circumspect in considering the raising of any potential motions directed at a respondent’s answering statement or counterclaim.

Apprising the Claimant of the Defenses Being Pursued

An issue that arises at this stage of the proceeding if the respondent chooses not to file an answering statement is whether it nonetheless has some obligation to apprise the claimant (and the tribunal) of the defenses it intends to pursue in the proceeding. If the respondent does file an answering statement and interposes affirmative defenses, another issue that arises is whether the respondent is now somehow limited to those articulated defenses, even though it had no obligation to file an answering statement in the first instance. If handled poorly, either situation could inject confusion, a degree of uncertainty, and perhaps unfairness into the proceeding.

Both situations can be properly addressed at a well-conducted preliminary hearing where the parties can explore defenses and the arbitrator can set forth an appropriate information and document exchange process in the scheduling order. Additionally, status conferences along the way can address the bases for new defenses that arise during the proceeding.

For more on preliminary hearings, see [Preliminary Hearings in Arbitration: The Arbitrator’s Perspective \(U.S.\)](#) and [Preliminary Conferences in International Arbitration Chart](#).

For a related template, see [Preliminary Hearing Report and Scheduling Order for Arbitration \(U.S.\)](#).

The tribunal could also set forth a deadline by which the respondent must disclose its defenses to avoid any surprise to the claimant and to ensure an orderly information and document exchange process. Doing so would later permit the tribunal to issue an order barring the respondent from pursuing a defense it had not timely disclosed. For example:

- FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12308(b) (“[i]f a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing”)

- FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13308(b) (same)

At the very least, the final prehearing conference would be the last opportunity before the evidentiary hearing for the tribunal to clarify the defenses that are anticipated to be presented and pursued during the hearing so that all parties and the tribunal can properly prepare themselves. Of course, the foregoing discussion could apply equally to any new claims that a claimant seeks to pursue that arise during the proceeding.

For information on preparing for arbitration conferences and oral advocacy, see [Arbitration Hearings: Conducting Virtual Hearings](#) and [Oral Advocacy: Preparing for and Conducting Oral Advocacy in Arbitration \(International\)](#).

Amending Claims and Counterclaims

Consistent with streamlining procedural matters in the arbitral forum, amending a claim or counterclaim is, as a general matter, easily accomplished. Applicable ruleset provisions are:

- AAA Commercial Arbitration Rules, Rule 6
- CPR Administered Rules, Rule 3.10
- FINRA Code of Arbitration Procedure for Customer Disputes, Rules 12309–12311
- FINRA Code of Arbitration Procedure for Industry Disputes, Rules 13309–13311
- ICDR International Dispute Resolution Procedures, Art. 10
- JAMS Comprehensive Arbitration Rules & Procedure, Rule 10
- CPR Non-Administered Rules, Rule 3.8
- UNCITRAL Arbitration Rules, Art. 22

For example, under the AAA Commercial Arbitration Rules, a party may, at any time before the close of the hearing (or a date set by the tribunal), increase or decrease the amount of its claim or counterclaim by providing written notice to the AAA. See AAA Commercial Arbitration Rules, Rule R-6(a). Any new or different claim or counterclaim must be filed with the AAA and a copy provided to the other parties, who will have 14 calendar days to file an answering statement to the proposed change of claim or counterclaim. See *id.*, Rule R-6(b). However, after the appointment of the tribunal, no new or different claim may be submitted absent consent from the arbitrator or panel. See *id.*; see also ICC Arbitration Rules, Arts. 3(2), 23(4).

Practice Tips

The initial pleadings in arbitration proceedings can, when strategically used, set the factual and legal stage for the dispute. They can also help the tribunal better understand the context for any early proposals or requests made by the parties, such as case management schedules, the need for a confidentiality or protective order, and discovery disputes.

Tell a Clear Story

While the flexibility and relative freedom afforded by the lack of pleading standards can encourage the submission of pleadings that look more like court pleadings, you should be mindful to avoid getting lost in the weeds and losing sight of the forest for the trees. Providing too many unnecessary details or distracting facts can have the opposite impact on a tribunal. Instead, use this opportunity to tell a clear, concise, and logical story that helps the client establish some initial credibility with the tribunal.

Another strategic consideration is to remember that the scope of prehearing information and document exchange may be tied to the nature and scope of the dispute as it is described in the pleadings. Thus, pleadings should provide the tribunal and the other party with a solid understanding of the dispute by sufficiently setting forth and explaining the key claims, defenses, and the relief requested.

Beware of Boilerplate Attorneys' Fees Requests

In drafting either the demand/statement of claim or answering statement, it is also very common for the parties to insert, almost as boilerplate, a request that the tribunal award reasonable attorneys' fees and/or costs in the prayer for relief. Doing so can have unintended consequences.

A tribunal is not permitted to award attorneys' fees unless:

- The parties contractually authorized such an award –or–
- The governing substantive law provides for such an award

See, e.g., 17 U.S.C. § 505 (authorizing award of attorneys' fees in copyright infringement cases); 42 U.S.C. § 1988(b) (authorizing award of attorneys' fees to prevailing party in civil rights cases).

If, however, the parties independently request an award of attorneys' fees in their arbitration pleadings, at least under the AAA's Commercial Arbitration Rules (which appear to be unique in this regard), those requests can operate to provide authority to the tribunal to render such an award. See AAA Commercial Arbitration Rules, Rule R-49(d)(ii) ("The award of the arbitrator may include: . . . an award of attorneys' fees if all parties have requested such an award or it is authorized by law or the parties' arbitration agreement."); see also *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 713–14 (8th Cir. 2011) (affirming Wells Fargo's contention

that, because both parties had requested attorneys' fees in their pleadings, the applicable AAA rule permitted the award of such fees); *B/E Aerospace, Inc. v. Jet Aviation St. Louis, Inc.*, 2012 U.S. Dist. LEXIS 62371, at *13 (S.D.N.Y. May 3, 2012) (holding that the fact that both parties sought attorneys' fees in their pleadings made the award of such fees permissible under the applicable AAA rule); *Lasco Inc. v. Inman Constr. Corp.*, 467 S.W.3d 467, 471–75 (Tenn. Ct. App. 2015) (holding that, because both parties had requested their respective attorneys' fees during the proceedings, such an award was proper under the applicable AAA rule, even though the parties' agreement did not expressly authorize such an award).

Evidentiary Considerations

Be mindful that, unlike court pleadings, the demand/statement of claim and answering statement are almost always reflexively marked as exhibits at or before the evidentiary hearing by the parties and/or the tribunal and are often deemed admitted as part of the evidentiary record. Thus, any statements made in these pleadings that end up being inconsistent with the actual evidence adduced at the hearing may create certain evidentiary difficulties at the end of the proceeding.

That said, it is still ultimately up to the tribunal to determine the evidentiary weight to be accorded the pleadings, as provided by the following rules:

- AAA Commercial Arbitration Rules, Rule R-35(a)-(b) ("Conformity to legal rules of evidence shall not be necessary. . . . 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.")
- CPR Administered Arbitration Rules, Rule 12.2 ("The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.")
- FINRA Code of Arbitration Procedure for Customer Disputes, Rule 12604(a) ("The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.")
- FINRA Code of Arbitration Procedure for Industry Disputes, Rule 13604(a) (same)
- ICC Arbitration Rules, Art. 19 ("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.")

- ICDR International Dispute Resolution Procedures, Art. 22(7) ("The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.")
- JAMS Comprehensive Arbitration Rules & Procedure, Rule 22(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.")
- Resolute Systems Commercial Arbitration Rules, Rule 16 ("The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.")
- CPR Non-Administered Arbitration Rules, Rule 12.2 ("The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered.")
- UNCITRAL Arbitration Rules, Art. 27(4) ("The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.")

Mastering Procedural Rules

The foregoing practice tips serve to highlight how important it is for advocates (and their clients) to know, understand, and appreciate the impact of the applicable procedural rules governing the arbitration proceeding. They also underscore the importance for transactional counsel to be familiar with these rules, or at least coordinate with litigation/dispute resolution counsel, so that a dispute resolution clause customized to the parties' needs, concerns, and interests, as well as any anticipated circumstances or preferences, are negotiated and included in the underlying contract.

Beyond simply knowing and appreciating the applicable procedural rules, because arbitration best practices and the law governing arbitration proceedings are constantly changing, attending timely continuing legal education programs and hearing from and/or speaking with arbitrators about their views on the current state of pleading practice in arbitration proceedings can be highly illuminative.

Finally, consulting authoritative and helpful resources will be of enormous assistance in navigating this field. See, e.g., [Stephen K. Huber & James E. Lawrence, eds., "AAA Yearbook on Arbitration & the Law" \(JurisNet, LLC 30th ed. 2018\)](#); [James M. Gaitis, A. Holt Gwyn, Laura A. Kaster, John J. McCauley, eds., "College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration" \(JurisNet, LLC 4th ed. 2017\)](#).

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Theo has conducted over 600 arbitrations and mediations involving commercial and business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and intellectual property infringement contentions. The New Jersey State Bar Association Dispute Resolution Section presented Theo with the 2020 James B. Boskey ADR Practitioner of the Year Award, and the *National Law Journal* named him a 2017 ADR Champion. He was also voted in the Top 3 of the 2022 Best Individual Arbitrators by the readers of the *New York Law Journal* and the 2021 Best Mediator/Arbitrator by the readers of the *New Jersey Law Journal*.

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