A BRIEF INTRODUCTION TO ARBITRATION PRACTICE

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A NOTE CONCERNING THE PROGRAM MATERIALS

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THE PRESENTERS

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JOHN W. HAYS is a member in the Lexington office of Jackson & Kelly, PLLC and practices primarily in the areas of construction litigation, contracts, and commercial litigation. He also has extensive training and experience as a mediator in construction, commercial, employment, and personal injury disputes and is on the CPR Regional Panel of Neutrals and the Commercial Arbitration Panel for the American Arbitration Association. Mr. Hays received his undergraduate degree from Princeton University and his J.D., with distinction, from the University of Kentucky College of Law where he was a member of the Kentucky Law Journal and graduated Order of the Coif. He is admitted to practice before the United States Court of Appeals for the Sixth Circuit and all state and federal courts within the Commonwealth of Kentucky. Mr. Hays is a member of the Fayette County, Kentucky and American Bar Associations and is active in the ABA Forum for the Construction Industry and the KBA's ADR Section and Construction and Public Contract Law Section. He has been a member of the National Academy of Distinguished Neutrals since 2012 and was named the 2016 Lexington Construction Law "Lawyer of the Year" by Best Lawyers.

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Justice by Agreement

- Arbitration – A process whereby parties to a dispute agree to allow one or more neutrals to hear the dispute and make a binding decision on it.

- Arbitration is an ancient form of dispute resolution that existed long before judicial systems.

Favored Process

- Federal Arbitration Act (1925)
  - 9 U.S.C. §1, et seq.

- Uniform Arbitration Act (1955)

Defined by Agreement

- Enforceability
- Limitations on Application
- Venue
- Arbitration Service Provider
- Costs
- Procedures
- Limitations on Remedies
- Appeal
Read the Rules

- Procedures
  - Initiation
  - Response
- Costs and Fees
- Panel Size
- Discovery
- Hearing
- Remedies
- Post-Hearing

Arbitration Providers

- AAA – American Arbitration Association
- CPR – International Institute for Conflict Prevention and Resolution
- FINRA – Financial Industry Regulatory Authority
- JAMS – (originally Judicial Arbitration and Mediation Services)

AAA vs. FINRA

- We will compare and contrast commonly used arbitration rules from AAA and FINRA to highlight the need to "Read the Rules."
AAA Rules

- Vary by type of case
  - Commercial, construction, employment, labor, consumer, international
- Vary by amount of claim
  - Expedited – Less than $75,000
  - Large, Complex – More than $500,000

FINRA Rules

- Vary by parties involved:
  - Customer Code: Applies to arbitrations between investors and industry parties.
  - Industry Code: Applies to arbitrations between or among industry parties only.

Step One:
Demand/Answer/Counterclaim

- Form
- Essential Information
- Service
Demand – AAA

• R-4. Filing Requirements

(e) Information to be included with any arbitration filing includes:

i. the name of each party;

ii. the address for each party, including telephone and fax numbers and e-mail addresses;

Demand – AAA, cont.

iii. if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;

iv. a statement setting forth the nature of the claim including the relief sought and the amount involved; and

v. the locale requested if the arbitration agreement does not specify one.

Demand – FINRA*

• 12302. Filing an Initial Statement of Claim

(a) Filing Claim with the Director

To initiate an arbitration, a claimant must file the following with the Director:

• Signed and dated Submission Agreement; and
Demand – FINRA*, cont.

• A statement of claim specifying the relevant facts and remedies requested.

The claimant may include any additional documents supporting the statement of claim. The claimant may file the documents: (1) in hard copy; or (2) electronically through the Online Arbitration Claim Filing system that can be accessed at www.finra.org.

*Customer Code

Answer – AAA

• 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 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.

Answer – FINRA

• 12303. Answering the Statement of Claim

  (a) Respondent(s) must directly serve each other party with the following documents within forty-five days of receipt of the statement of claim:
  • Signed and dated Submission Agreement; and
Answer – FINRA, cont.

- An answer specifying the relevant facts and available defenses to the statement of claim.

The respondent may include any additional documents supporting the answer to the statement of claim. Parties that fail to answer in the time provided may be subject to default proceedings under Rule 12801.

Counterclaim – AAA

- R-5(b)
  (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 the filing of any counterclaim.

Counterclaim – FINRA

- 12303. Answering the Statement of Claim

  (b) The answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.
Step Two: Arbitrator Selection

- How many?
  - Contract
  - Agreement after Demand
  - Rules
- How selected?
  - Agreement
  - List

Arbitrator Selection – AAA

- R-12. Appointment from National Roster
- R-13. Direct Appointment by a Party
- R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties
- R-16. Number of Arbitrators
- R-17. Disclosure
- R-18. Disqualification of Arbitrator

Arbitrator Selection – FINRA

- One Arbitrator

In claims of up to $100,000, the parties receive one list of ten chair-qualified public arbitrators. Each separately represented party may strike up to four arbitrators on the list, leaving at least six arbitrator names remaining on each party’s list. Parties may rank the remaining arbitrators on each list.
Arbitrator Selection – FINRA

• Three Arbitrators
In claims in excess of $100,000, the parties receive three lists (one with ten chair-qualified public arbitrators; one with fifteen public arbitrators; and one with ten non-public arbitrators). Each separately represented party may strike up to four of the ten arbitrators on the chair-qualified list, up to six of the fifteen arbitrators on the public list, and up to ten of the ten arbitrators on the non-public list. All parties in investor cases have the option to select an all-public panel by striking all of the arbitrators on the non-public list. Parties may rank the remaining arbitrators on each list.

Arbitrator Selection – KUAA

• §417.070 Appointment of arbitrators by court
If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Arbitrator Selection – FAA

• 9 U.S.C.A. §5. Appointment of arbitrators or umpire
If in the agreement, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy,
Arbitrator Selection – FAA, cont.

• 9 U.S.C.A. §5. Appointment of arbitrators or umpire

then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Step Three:
Preliminary Scheduling Hearing

• Introduction of Participants
• Introduction to the Dispute
• Planning the Process
  – What are we going to do?
• Scheduling the Process
  – When are we going to do it?

Preliminary Hearing – AAA

• R-21. 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 attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.
Preliminary Hearing – AAA, cont.

(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. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

Preliminary Hearing – FINRA

• 12500. Initial Prehearing Conference

(c) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:
  • A statement that the parties accept the panel;

Preliminary Hearing – FINRA, cont.

• Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;
  • A minimum of four sets of mutually agreeable hearing dates;
  • A discovery schedule;
  • A list of all anticipated motions, with filing and response due dates; and
  • A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.
Step Four: Scheduling Order

The following three slides provide an example of a scheduling order for an AAA case:

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

ABC COMPANY  
Claimant  
No. 00-000-00000-00

v.  
Arbitrator:  

XYZ COMPANY  
John W. Hays  
Respondent

SCHEDULING ORDER

On Tuesday, January 2, 2018, a conference call was held with counsel for the parties, as well as the selected Arbitrator to discuss the case and set certain deadlines for this arbitration. After hearing the comments of counsel, the Arbitrator hereby enters the following Scheduling Order.

1. On or before Tuesday, March 6, 2018, counsel will exchange by e-mail all written requests for documents. Responses to the document requests will be made within thirty (30) days after the service date of the requests.

2. Prior to Tuesday, March 6, 2018, the parties may serve by e-mail up to fifteen (15) interrogatories to each of the other parties in this case. Answers to the interrogatories will be made within thirty (30) days after the service date of the interrogatories.

3. Claimant may depose one representative from each of the Respondent and the Respondent may depose one representative from the Claimant. The parties may also depose any experts who are identified as witnesses in this case. All other depositions may only be taken by agreement of all the parties.

4. To the extent that the Claimant wishes to call any expert witness at the time of the hearing, such expert witness, as well as the opinions of any such expert witness, shall be identified/disclosed to the Respondent, along with a brief summary of the expected testimony, on or before Tuesday, April 10, 2018. To the extent that any such expert has prepared a written report, the report shall also be provided.

5. Any subpoena requests shall be submitted directly to the Arbitrator, with a copy to opposing counsel. Subpoena requests to compel attendance at the hearing shall be submitted to the Arbitrator on or before Tuesday, April 17, 2018.

6. On Tuesday, April 24, 2018, counsel shall exchange a list of every exhibit they intend to use at the hearing. After that exchange, the Arbitrator expects counsel to work together to prepare a joint set of exhibit books for the hearing for use by the Arbitrator, counsel and all witnesses. The issue whether or not the joint exhibit book shall be delivered to the Arbitrator prior to the hearing will be discussed during the follow up conference call set out below.

7. On or before Tuesday, April 24, 2018, the parties shall disclose to each other a final witness list, and note if there are any individuals listed who were not on the initial disclosure.

8. On Tuesday, April 24, 2018, at 11:00 a.m. Eastern Time, counsel and the Arbitrator shall have a conference call in order to discuss any matters for the upcoming hearing. During that conference call, the parties shall advise the Arbitrator what type of award they want the Arbitrator to issue in this case.

9. By the end of business on Tuesday, April 24, 2018, counsel should send to each other, with a copy to the Arbitrator, a pre-hearing memorandum, no longer than 10 pages, briefly setting out the issues and their respective positions to be taken during the hearing.
10. The hearing in this matter will be held at the law offices of Jackson Kelly, PLLC, 175 E. Main Street, Lexington, Kentucky 40507. The hearing dates are Monday, May 7 and Tuesday, May 8, 2018. The hearing will commence at 9:00 a.m.

11. Counsel agrees that the Arbitrator will resolve any discovery disputes. It is expected that counsel will cooperate with each other and try to resolve any such dispute prior to contacting the Arbitrator. To the extent that there are substantive requests or motions by the parties that directly impact any of the claims, the Arbitrator will participate in any such discussions and decisions.

12. With regard to communication, the parties have agreed to the Accelerated Exchange Program so that any documents to be copied to the Arbitrator can be sent directly to the Arbitrator, either by email or mail. Any request for any other preliminary hearing should be directed via email to the Arbitrator.

13. The deadlines set forth in this Order shall not be amended or extended absent a showing of due cause; however, as agreed by the parties and the Arbitrator during the preliminary hearing, if Claimant wants to continue the hearing to allow for time to identify rebuttal experts, Claimant’s counsel shall contact AAA on or before Tuesday, February 27, 2018 to schedule another conference call.

14. The parties are expected to adhere timely to any requests from the Arbitrator, the Case Manager and the AAA.

This 3rd day of January, 2018

John W. Hays, Arbitrator

cc:
Counsel of Record
Jane Doe, Case Manager

Step Five: Discovery

- Documents
- Interrogatories and Admissions
- Depositions

Written Discovery – AAA

- R-22. 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:
Depositions – AAA

- Note: the AAA rules do not specifically mention discovery depositions.

Written Discovery – FINRA

- 12506. Document Production Lists

  (a) Applicability of Document Production Lists

  When the Director serves the statement of claim, the Director will notify parties of the location of the FINRA Discovery Guide and Document Production Lists on FINRA's Web site, but will provide a copy to the parties upon request. Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person.

Document Production Lists

- Available on FINRA's website

- List 1 requires production of twenty-two items by firms and associated persons.

  Example: Item 1: Account record information for the customer parties, documents concerning the customer parties' risk tolerance and agreements with the customer parties.
Documents Production List 2

- List 2 requires production of nineteen Items by the customer.
  
  Example: Item 1: Customer party federal income tax returns, limited to pages 1 and 2 of Form 1040; Schedules A, B, D and E; and the IRS worksheets related to these schedules, redacted to delete the customer parties’ Social Security numbers. Customer parties may redact information relating to medical and dental expenses and names of charities on Schedule A unless the information is related to allegations in the Statement of Claim.

Depositions – FINRA

- 12510. Depositions

Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:

  - To preserve the testimony of ill or dying witnesses;

Depositions – FINRA, cont.

- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;

- To expedite large or complex cases; and

- If the panel determines that extraordinary circumstances exist.
Discovery – KUAA

• KRS 417.110 Witnesses, subpoenas and depositions

(1) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

Discovery – KUAA, cont.

(2) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(3) All provisions of law compelling a person under subpoena to testify are applicable.

(4) Fees for attendance as a witness shall be the same as for a witness in the Circuit Court.

Discovery – FAA

• 9 U.S.C.A. §7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be
Discovery – FAA, cont.

signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court, if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Step Six: Motion Practice

• Discovery

• Dispositive

Motion Practice – AAA

• R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to 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, without limitation . . .
• R-33. Dispositive Motions
The arbitrator may allow the filing of and make rulings upon a dispositive motion 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.

Motion Practice – FINRA

• Rule 12503 provides the general requirements for motions.

• Rule 12504 provides specific requirements for motions to dismiss.

Step Seven: Prehearing Requirements

• Witness Lists

• Exhibits

• Stipulations

• Briefs
**Prehearing Requirements – AAA**

- R-22 authorizes the arbitrator to decide how the parties will exchange information prior to the hearing.

- Typically, the arbitrator identifies the prehearing requirements in the Scheduling Order.

**Prehearing Requirements – FINRA**

- Rule 12514 identifies the requirements for the prehearing exchange of documents and witness lists, and explained decision requests.

**Step Eight: Hearing**

- Location
- Time
- Openings and Closings
- Presentation of Evidence
- Court Reporter
- Closing the Hearing
Location, Location, Location

• Arbitrations governed by KUAA must be heard in Kentucky to be enforceable by a Kentucky court. Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009).

• Alley Cat does not apply to arbitrations governed by FAA. Ernst & Young, LLP v. Clark, 323 S.W.3d 682, (Ky. 2010).

Hearing – AAA

• R-24. Date, Time, and Place of Hearing
The arbitrator shall set the date, time, and place 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 ten calendar days in advance of the hearing date, unless otherwise agreed by the parties.

Hearing – FINRA

• 12600. Required Hearings

(a) Hearings will be held, unless:
• The arbitration is administered under Rule 12800 or Rule 12801;
• The parties agree otherwise in writing; or
• The arbitration has been settled, withdrawn or dismissed.
Hearing – FINRA, cont.

(b) The panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner.

(c) The Director will notify the parties of the time and place at least twenty days before the hearing begins, unless the parties agree to a shorter time.

Step Nine: Award

• Form

• Time

Award – AAA

• R-46. Form of Award
  (a) Any award shall be in writing and signed by a majority of the arbitrators. It 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.
Time of Award – AAA

• R-45. 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 thirty 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.

Award – FINRA

• Rule 12904 provides detailed requirements for issuing awards.

• Awards may contain the rationale underlying the award.

• "An explained decision is a fact-based award stating the general reason(s) for the arbitrators’ decision. Inclusion of legal authorities and damage calculations is not required."

Time of Award – FINRA

• Rule 12904(d) states: "The panel shall endeavor to render an award within 30 business days from the date the record is closed."
Step Ten: Post-Award

- Reconsideration
- Appeal

Post-Award – AAA

- R-50. Modification of Award
  Within twenty calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given ten calendar days to respond to the request. The arbitrator shall dispose of the request within twenty calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

Post-Award – FINRA

- Rule 12904(b) states: "Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal."

- Rule 12904(j) states: "All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction."
Questions

• Can an arbitrator conduct independent research on legal issues presented in the case or must the arbitrator just rely on the legal authorities cited by the parties?