Tips for CEOs and CFOs from 40 experienced commercial arbitrators.

THE TOP 10 ways to make ARBITRATION FASTER and more cost effective

American Arbitration Association
Dispute Resolution Services Worldwide
Forty experienced arbitrators from across the United States were asked what ten things they would tell CEOs and CFOs in order to maximize the benefits of commercial arbitration. The arbitrators represent a broad range of legal and business experience throughout the spectrum of commercial and governmental law. Experience as an arbitrator ranged from two years to forty years.

Arbitrators responding to the survey possessed wide experience in both business and law:

- Partners in large and small law firms
- General Counsel
- Executive Vice Presidents
- Corporate Secretaries in large and small companies, including family owned enterprises
- Law Professors
- Transaction Attorneys
- Litigation Attorneys
- Former Judges
- Legal Aid Attorneys
- Public Defenders
- US Attorneys
- State Attorneys
- International Law and Business
- State and Federal Agencies
- State Government Elected and Appointed Officials
The top 10 ways to make arbitration faster and more cost effective

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Many businesses believe, with good reason, that arbitration is quicker, cheaper, and more predictable than litigation.

But for arbitration to fulfill these expectations, companies and their counsel must evaluate their practices and take steps to ensure that arbitration does not become the functional equivalent of a trip to court. These “top ten tips,” gleaned from the experiences of seasoned AAA arbitrators, are a good starting point for the true stakeholders – the parties – to understand how to use the arbitration process to further their objectives.
1 Pay Attention to Your Arbitration Clause

Thoughtlessly inserting a boilerplate arbitration clause into your contract can turn a manageable dispute into a more time consuming, expensive and disruptive case. Companies and their transactional lawyers carefully evaluate the business terms in their contracts, but they often reflexively insert a boilerplate arbitration clause from other contracts or a form book. This oversight jeopardizes the inherent benefits of arbitration and could result in a more expensive, disruptive and inefficient proceeding. It is vital to give up-front consideration to the details of the procedures most suitable to any likely disputes under a contract and not simply hope for the best once hostilities have arisen. While an entire article could be written on clause drafting (a checklist of issues is included in the side bar), some key issues to address are:

- Case deadlines
- Discovery limits
- Arbitrator selection and qualifications
- Confidentiality

Courts have fixed rules of procedure regulating most aspects of a case. Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures. If you do not take advantage of this critical distinction, you may well be relegated to a more cumbersome and costly proceeding. As an arbitration administrator, the AAA has broad experience in these clause components, but you must include AAA in the clause to access its expertise.

2 Select Attorneys Experienced in Arbitration

While arbitration should be economical and efficient, less experienced attorneys often unnecessarily apply time-consuming litigation processes. While arbitration and litigation are both adversarial proceedings, there are important differences between the two and understanding those differences is critical to the cost-effective presentation of a case. Lawyers unfamiliar with the arbitration process tend to treat arbitration as though it were a court proceeding, resulting in requests (or even stipulations) for extensive discovery, evidentiary skirmishes and unnecessary motion practice. Critically, since arbitration should not be burdened with full blown litigation discovery, you should hire a lawyer unafraid to try a case without having deposed every conceivable witness or unearthed every document. And, it is totally appropriate to ask prospective counsel how many arbitrations they have actually tried to conclusion! Make sure counsel understands your business objectives and is prepared to take the straightest path towards the fulfillment of those objectives.

Checklist for Arbitration Clauses:

- Number and qualifications of arbitrators
- Hearing locale
- Time (case duration) limits
- Discovery (including e-discovery) limits
- Attorney’s fees and arbitration costs (divide equally or prevailing party)
- Phased ADR regime (meet and confer, mediation, med/arb hybrid)
- Confidentiality (documents, testimony, award)
- Dispositive motions (summary judgment)
- Form of award (reasoned or standard)
- Interim or injunctive relief
- Governing law and rules

Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures.
3 Request and Enforce Budgets

Your arbitration decisions should be based on traditional cost-benefit or ROI analyses. How many important business projects are launched without a budget? Arbitration should be treated no differently. Companies should require their lawyers to prepare and regularly update a budget for the various phases of the case (i.e. claim/answer, discovery, witness preparation, experts, hearings, motions, and briefs), justify the line items and track billings against the budget. Alternative fee arrangements such as blended hourly rates, contingent fees or fixed fees should also be considered. Overall, and absent special circumstances (e.g. customer relations or precedential concerns), your arbitration decisions should be based on traditional cost-benefit or ROI analyses familiar to most businesses.

4 Choose the “Right” Arbitrator

Researching an arbitrator with the right expertise, temperament and background is an often overlooked yet essential step. Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences. Yet, it is surprising how little attention parties devote to the arbitrator selection process, and specifically to identifying an arbitrator with the substantive expertise, temperament and training to be receptive to the evidence. The first opportunity to narrow the field begins with the arbitration clause itself. Ask yourself: if there is a dispute under the contract, what will be the likely claim(s)? Do I want a lawyer to decide the claims, or an accountant, or an engineer? Once the demand is filed, and the case administrator has disseminated a list of arbitrator candidates (subject to any requirements specified in the arbitration clause), businesses should review the arbitrators’ biographies, search the internet and any public data bases, and, if appropriate, solicit feedback from those with experience with the arbitrator. In short, conduct due diligence as you would with any important business decision.

An entire seminar could be dedicated to arbitrator selection, but three additional points are worth noting. First, the AAA’s Enhanced Neutral Selection Process enables the parties to interview potential arbitrators or pose mutually agreeable written questions to ascertain whether the arbitrator has the proper experience and disposition. The process helps winnow the field to those arbitrators with the ability to exert requisite management skills and handle any unique issues in the case. Second, parties should vet carefully any clause which requires a three person panel and avoid whenever possible a tripartite panel comprised of two party-appointed arbitrators. The running costs of a panel case can be substantial and scheduling becomes more problematic. Third, if there are a flurry of claims under your standard form contract, analyze what is wrong and fix it. An arbitrator cannot be expected to provide relief from a bad agreement.

“Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences.”
Limit Discovery to What is Essential for the Arbitrator

Establish a strict discovery schedule focused on the exchange of necessary information. Discovery costs are often the largest part of any litigation budget. But this should not be the case in arbitration, especially if the arbitration clause specifies that discovery will be limited to reasonable procedures consistent with the contours of the dispute. Even if the clause is silent, it is in the parties’ mutual interests (and is the duty of the arbitrator) to develop a discovery schedule that is restricted to the exchange of information necessary (not merely desired) for the arbitrator to understand and fairly decide the case. Written discovery requests (interrogatories or requests for admissions) are rarely appropriate. Depositions of witnesses who will testify at the hearings should be avoided, or at least confined to the key decision maker(s). Document exchange is commonplace, but that practice must be given special attention in this age of electronically stored information (ESI). E-discovery has spawned its own cottage industry of consultants and experts, and budgets can easily be exhausted in endless fields of back-up tapes, metadata, .pst files, and TIFF images. Unless the parties can work out an ESI treaty on their own, the issue should be presented to the arbitrator at the preliminary hearing. Even before a case is actually filed, it is prudent to investigate the burden of producing ESI because it could influence the decision on whether to file in the first instance.

Participate in the Preliminary Hearing

Gauge the arbitrator, hear the other side’s position and have a say in developing the schedule. The preliminary conference is the first occasion for the parties to present their positions to the arbitrator and discuss a case schedule. This need not be a lawyers-only gathering. Clients have the right to be present at the preliminary hearing (most are conducted by conference call), and by participating you have the ability to gauge the arbitrator, hear the other side’s unfiltered position and react to the schedule being developed. The product of the conference is a case management or scheduling order which codifies the arrangements from initial discovery through issuance of the award. Be sure to review its terms. Thereafter, monitor any requests for continuances or extensions of the deadlines, as you would with any business project.

Limit Motion Practice

Potential motions must be scrutinized, as they are time-consuming and may not have any practical significance. Companies and their counsel should consider whether any potential motion truly “advances the ball.” Motions designed to restrict evidence at the hearings (so-called motions in limine) may be inappropriate because the formal rules of evidence do not apply in arbitration, and the arbitrator should rightfully consider evidence designed to further his or her understanding of the case. Similarly, arbitrators may be reluctant to grant dispositive (summary judgment) motions absent a stipulation by the parties because one of the few grounds for vacating an award under the Federal Arbitration Act is a refusal to hear material evidence. Consider suggesting to the arbitrator that any party wishing to file a motion first seek permission so the arbitrator can assess its potential effect on the case. At a minimum, have your attorneys explain the rationale for any motion, and evaluate its possible efficacy in comparison to the risks and costs.
8 Remain Open to Settlement

Keep an open mind and set aside emotions during the case as opportunities for settlement develop. Few lawsuits proceed as scripted, and arbitration is no different. Businesses need to be alert to case developments, and evaluate whether any new information affects the value of the case. Leave your emotions aside. Consider direct talks with the adverse party's management or the use of a mediator, and reassess the options throughout the proceeding. Indeed, many cases settle during or after the hearings. As arbitration administrator, the AAA usually attempts to include a voluntary mediation step during your arbitration and, when adopted, many cases are settled or partially settled prior to hearing. Even settling some of the disputes in a case can make the hearings less expensive and quicker.

9 Trust the Expertise of the Arbitrator

Arbitrators have specialized knowledge in your field and are more receptive to the facts of your case than to generalized pleas for fairness and equity. Attorneys who regularly represent clients in arbitration recognize the differences between a jury case and arbitration before someone knowledgeable about the industry or subject matter. Arbitrators want to understand how your case fits into a framework which they already have experienced. Present your claims in the clearest possible manner, with an eye towards demonstrating how the particular facts of your situation warrant relief. Focus on the key issues in dispute. Generalized pleas for fairness or equity are less likely to resonate with the arbitrator.

10 Present the Case Efficiently and Professionally

You play a critical role in completing the arbitration as efficiently and persuasively as possible. By the time the first witness is sworn, procedures should be in place to ensure that the hearings flow smoothly. Time limits should be considered. Exhibits books containing stipulated exhibits should be pre-marked, with copies available for all participants, including witnesses. Slides or demonstrative exhibits can be effective presentation tools, particularly for opening statements or complicated technical or damages matters. The parties should have discussed any witness sequencing issues, considered the use of video or web testimony and affidavits, and presented any witness disputes to the arbitrator for disposition. Do have a party representative at the hearings. Do not groan, scoff or chortle during an opponent's case or slump in your chair after an unfavorable ruling or testimony. When testifying, direct your comments to the arbitrator and avoid unnecessary sparring with counsel during cross-examination.

As the stakeholders with the greatest economic interest, the parties have the most to gain from an efficient, fair and expeditious resolution of their dispute. Businesses, in consultation with in-house and outside counsel, must assume ownership of the arbitration process to leverage the unique benefits of arbitration over court. With a customized arbitration clause and careful monitoring of the proceeding, the parties are uniquely situated to rein in costs and produce speedy outcomes. Attention to these ten tips will put the parties on the path towards better outcomes.

“Few lawsuits proceed as scripted, and arbitration is no different.”
Thirty steps to a better arbitration

BY JUDITH B. ITTIG AND MICHAEL J. BAYARD


1. ONE READING OF THE PLEDINGS IS NOT ENOUGH.

Reread the demand, answering statements and counter-demand. Then diagram them, including the names of the parties and their counsel, and the parties’ claims and defenses. When you have finished the diagram, ask yourself: “Can I describe in my own words (in less than one minute) who the parties are and the relief they are seeking?” We remember a case where an arbitrator continually mistook the subcontractor for the supplier and another where the arbitrator consistently referred to the subcontractor as the contractor. These mistakes undermined the authority of the arbitrator with all of the attorneys. It is
2 KEEP UP WITH YOUR DISCLOSURE OBLIGATIONS.

Review the disclosure statement you prepared for the parties before you were selected to serve as the arbitrator. Update your “conflicts check” to address any additional parties, new counsel, fact witnesses and experts, and, if necessary, update your disclosure statement. Our rule of thumb on conflict disclosure is “when in doubt, send it out.”

3 MAKE SURE YOU HAVE THE KEY DOCUMENTS AT HAND.

Make a list of the documents you think will be central to the case and then check to see if they have been provided. If not, bring that issue up at the first preliminary conference so that you may avoid potential serious problems. Case in point: The arbitrators’ early review of the three separate contracts at issue revealed an arbitrability question. A stipulation from the parties dispensed with the problem and waived a significant jurisdictional issue. A time-line is particularly helpful in fact-intensive construction disputes. A joint time-line will highlight any differences between the parties that could be important to the case.

4 CONFER WITH YOUR FELLOW ARBITRATORS.

If you are serving on a panel, convene an “arbitrators only” conference call to:

a. Introduce each other.

b. Discuss the role of the chair and the arbitral procedures. For example, will the chair resolve any discovery disputes that arise? During the hearing, will the chair speak for the panel in questioning counsel or witnesses? Will the chair make sure to call a break when other members of the panel have questions or comments?

c. Identify the issues to be discussed in the preliminary conference.

d. Explore ways to expedite the arbitration process.

5 PREPARE AGENDAS.

For high-dollar cases and complicated matters involving multiple parties and issues, there is likely to be more than one preliminary conference. It is helpful to prepare an agenda listing the points to be covered during each preliminary conference and send it to the parties approximately two weeks before the scheduled date. Then the parties have time to add any additional issues. In the cover memorandum for the first preliminary hearing, thank the parties and their counsel for the opportunity to work with them in the arbitration. Good public relations from the outset of the case can establish a rapport that may be needed when tough decisions arise.

6 USE PROVEN CHECKLISTS.

Use the AAA’s pre-hearing checklist for large complex cases (found in Rule L-1 of the Large Complex Case Procedures in the Commercial Arbitration Rules) or the more elaborate preliminary hearing checklist available from your AAA case manager to make sure you cover all the basics during the conference. Confirm the names (with correct spelling and pronunciation) of the parties’ counsel and their key representatives. Ask the parties’ counsel if any additional parties will be named or if any additional claims will be forthcoming. Sometimes the first preliminary conference can be intense, leaving important issues forgotten in the moment. By using a proven checklist you greatly decrease the chance you will overlook an important item.

7 SUGGEST USING INFORMAL PROCEDURES WHEN APPROPRIATE.

Using informal procedures can, in certain situations, expedite the process without a loss of fairness. For example, allow the parties to arrange a conference call with the panel chair so long as all parties are on the line; permit correspondence and briefs to be sent directly to the arbitrators so long as opposing counsel is copied; and agree to use e-mail or fax for prompt notice.

8 SET THE DATE FOR THE NEXT PRELIMINARY CONFERENCE.

Be sure to schedule the next preliminary conference before bringing the present conference to an end. Even in small cases, it is often helpful to have a status conference about a month after the first preliminary conference to make sure everyone is keeping to the schedule. The second preliminary hearing provides the perfect chair to resolve any discovery disputes or other outstanding pre-hearing issues. Also, setting the date well in advance shows the parties that you are conducting the arbitration in a business-like manner and that you will be checking on their progress on a date certain (i.e., the date of the next preliminary conference). This calendar marker prompts the parties to complete interim tasks in preparation for the arbitration.

9 REQUIRE EARLY IDENTIFICATION OF CLAIMS AND SPECIFICATION OF DAMAGES.

Establish the date for the identification of the parties’ claims and the specification of damages. Make it clear to all that no new claims will be allowed after that date without demonstrating good cause or unless all parties agree. Consider asking the attorneys to provide separate notebooks that detail the damages requested for every element of their claims, with citations to the supporting documents the parties plan to use. Claims of “surprise” can result in postponed hearings. By setting these dates and following up, you can better ensure that the hearings will commence as scheduled.

10 TIME-LINES ADD CONTEXT AND UNDERSTANDING TO THE CASE.

Create a time-line identifying all of the major events for the project or transaction, or ask the parties to prepare one as a joint exhibit, if possible. A time-line is particularly helpful in fact-intensive construction disputes. A joint time-line will highlight any differences between the parties that could be important to the case.

11 KEEP YOUR FELLOW ARBITRATORS INFORMED.

As the panel chair, you should keep the other arbitrators on the panel and the case manager informed about changes in the status of the case. You should copy all communications to the parties to your co-arbitrators and the case manager. They need to know what is happening so they can make informed decisions and add to your thinking when necessary. Also, you need to make sure your colleagues know every aspect of how the arbitration has progressed so that at the end the panel produces the best possible decision. Not only is it rude to ignore your fellow arbitra- tors and the case manager, it is also a disservice to the parties and yourself not to have the full attention and participation of the entire panel.

12 USE THE MEET-AND-CONFER PROCESS TO RESOLVE DISPUTES.

Direct the parties to “meet and confer” on disputed issues, such as depositions, document production, assertions of privilege, pre-hearing matters before allowing them to bring any of these issues before the panel for a decision. This sends the parties the message that they have
PRESENTATION METHODS FOR THE HEARINGS.
Suggest to the parties that they consider methods of presenting testimony that could expedite the proceedings, such as written witness statements and the use of damages notebooks. Encourage them to suggest methods for streamlining or altering the arbitration procedures to make the case presentation more efficient and effective. One of the trends in arbitration efficiency is conducting the evidentiary hearings with time limits imposed on the parties’ presentations. This is done only with the parties’ agreement.

PICTURES CAN BE WORTH A THOUSAND WORDS TO ARBITRATORS, TOO.
Photographs and videos can serve as excellent visual aids to understanding the dispute. If they are going to be used, ask the parties to put a date and locale description on each picture and video. Preview these visual aids to eliminate irrelevant or repetitious photos or sections of video so as not to unduly delay the proceedings. The use of visual evidence should be encouraged because even the most experienced arbitrators find that pictures or charts are valuable aids.

BE PROACTIVE.
Stay on top of the parties’ progress. Ask to be copied on the parties’ key correspondence so that you receive “early warning signals” of problems that might be brewing. Your goal is to have the parties prepared to arbitrate on the date set to begin the arbitration. If you sense they are falling behind schedule, set up another preliminary conference. You cannot expect that the parties themselves will make sure that the case is “on track.”

BE SERIOUS ABOUT DEADLINES.
Set a tone of urgency to keep the hearings on track. Respond to requests or formal motions immediately or as quickly as possible. Set short, but fair, time limits for the parties to act or respond to directives from the arbitrators. By so doing, you communicate to the parties that the arbitration will continue to proceed as planned. This message not only keeps the parties working hard on preparing for the hearings, it encourages them to work on settling the dispute because they know it is unlikely there will be a continuance of the hearings.

ENCOURAGE STREAMLINING WHENEVER POSSIBLE.
Encourage the parties to enter into agreements, such as stipulations of fact and law, and to file any motions that could expedite the hearings or narrow the issues to be arbitrated. These strategies can greatly decrease the time needed for the live hearings. It enables all parties to stay on top of the parties’ progress. Ask to be copied on the parties’ key correspondence so that you receive “early warning signals” of problems that might be brewing. Your goal is to have the parties prepared to arbitrate on the date set to begin the arbitration. If you sense they are falling behind schedule, set up another preliminary conference. You cannot expect that the parties themselves will make sure that the case is “on track.”

“Parties are less likely to have reason to complain about the length of the hearings if the arbitrators implemented time-saving techniques that the parties agreed to at the beginning of the arbitration.”

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28 WINDING UP THE HEARINGS.

At the end of the last evidentiary hearing day, write an order setting the briefing schedule for post-hearing briefs, if any, and the date for closing arguments, if they are to be held later. For purposes of later deliberations, it can be helpful to obtain from the parties a list of their most important exhibits. You can ask them to provide that list in their post-hearing briefs. If the case has multiple issues, ask the parties for a proposed form of award to make sure that no items of claim are omitted and find out the parties’ preferences for how the damages should be broken out. Our preference is to hear closing arguments after the post-hearing briefs. Any questions asked should not reveal the arbitrator’s leanings on the issues to be decided. At the end of the hearings on the merits, the parties and their counsel should have no idea how the arbitrators are going to rule on the case. The arbitrators’ questions and unspoken, non-verbal behavior should always be non-partisan and unquestionably fair.

Deliberations and Award

29 PREPARE A ROAD MAP FOR YOUR DELIBERATIONS.

One member of the panel should volunteer or be assigned to outline the issues that need to be decided. Before deliberating together, circulate the outline among the panel so each arbitrator can review it and add issues or make revisions. This road map of the issues and sub-issues, sometimes with the dollar demands for each item, can focus the deliberations and speed resolution.

30 WHEN YOUR DELIBERATIONS BOG DOWN.

If a panel is hearing the case, the arbitrators’ deliberations should be a free and open exchange of ideas and conclusions. If all members of the panel do not agree on every important point, the majority should ask the dissenting arbitrator to present his or her views (orally or in writing or both) and the majority should commit to listening to (or reading) those views with an open mind. If you are the sole arbitrator and you are having great difficulty reconciling the parties’ views on a point, don’t hesitate to ask them for further factual explanation or additional legal references, even if you have to reopen the proceedings and conduct another evidentiary hearing to obtain this information. Just be sure you leave yourself enough time to make your decision and submit the award to the AAA before the award is due.

We have the most confidence in our awards when the testimony clearly addressed the real issues in the case, we were able to listen and absorb the information presented and without distractions, and our deliberations followed a road map for analyzing the issues. These tips have helped us achieve these objectives and manage the arbitration process so that the time spent with the parties and their witnesses is valuable and we have learned the case from them so we can make a sound award.
The Dispute Resolution Clause:

If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. The parties further agree that any unresolved controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Claims shall be heard by a single arbitrator, unless the claim amount exceeds $2,500,000.00, in which case the dispute shall be heard by a panel of three arbitrators. The place of arbitration shall be New Orleans, Louisiana. The arbitration shall be governed by the laws of the State of Louisiana.

Depositions shall be limited to a maximum of 5 per party and shall be held within 60 days of the making of a request, unless the parties agree otherwise. Additional depositions may be scheduled only with the permission of the arbitrators, and for good cause shown. Each deposition shall be limited to a maximum of 8 hours duration, unless the parties agree otherwise. The award shall be made within 12 months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by the arbitrator for good cause shown, or by mutual agreement of the parties.

The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute. The award of the arbitrator(s) shall be accompanied by a reasoned opinion. Except as may be
required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties. The parties agree that failure or refusal of a party to pay its required share of the deposits for arbitrator compensation or administrative charges shall constitute a waiver by that party to present evidence or cross-examine witness. In such event, the other party shall be required to present evidence and legal argument as the arbitrator(s) may require for the making of an award. Such waiver shall not allow for a default judgment against the non-paying party in the absence of evidence presented as provided for above.

(This ADR clause was drafted using the free tool found at www.clausebuilder.org)
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Investor-State Dispute Settlement under the Trans-Pacific Partnership

By Ko-Yung Tung

I. INTRODUCTION

The United States is currently in the last stages of its negotiations with eleven other countries in the Pacific Rim region (namely Japan, Australia, Mexico, Canada, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei Darussalam) to conclude a regional trade and investment regime, popularly known as the Trans-Pacific Partnership ("TPP"). With the United States and Japan having the largest and the third largest economies of the world, the TPP would encompass approximately forty percent of global gross domestic product. The European Union, by contrast, accounts for only about sixteen of global GDP.

While the negotiations for the Trans-Pacific Partnership Agreement ("TPP Agreement") have been conducted in secrecy, a draft of its investment chapter recently was leaked by WikiLeaks. This article will briefly highlight some salient points of the investor-state dispute settlement ("ISDS") provisions in the leaked draft of the investment chapter of the TPP Agreement. Two important caveats are necessary at the outset—first, there is some dispute whether the WikiLeaks leaked version is authentic and whether it is a current draft as of the date on the version (purported to be January 20, 2015 draft); and second, what form the final ISDS of the TPP Agreement will take is still unknown, and even whether the TPP will come to fruition at all, given the politics of the United States, let alone those of the other eleven countries. For purposes of this article, the so-called January 20, 2015 draft will be referenced.

II. SOME NOTABLE PROVISIONS

The essential objective of any investment treaty is to protect foreign investments and foreign investors of a treaty signatory state in host treaty signatory states. As with other investment treaties, the core normative protections afforded by the TPP Agreement are (a) "national treatment," (b) "most-favored-nation treatment," (c) "minimum standard of treatment," and (d) compensation for expropriation. The ISDS provisions of the TPP Agreement allow an investor from a TPP member state to bring a binding arbitration proceeding against a host TPP member state if the host country has breached any of these normative protections.

The draft ISDS provisions of the leaked TPP Agreement reflect, in the main, the "state of the art" of ISDS law and practices. With over 3,000 separate and discrete investment treaties extant currently, it is no surprise that there are different wordings of similar provisions, varying interpretations of the same or similar provisions, and even conflicting rulings of the same or similar provisions by arbitral tribunals. To resolve many of these problems, the investment chapter of the TPP Agreement clarifies some of the definitions and introduces some of the best practices from previous investment treaties. To this extent, the investment provisions of the TPP Agreement may be regarded as the "state of the art."

The investment chapter (Chapter II) of the TPP Agreement is divided into two parts. Section A identifies what is protected and what are the protections. Section B provides for international arbitration to resolve any disputes between an investor of a state party against a host state party arising from a breach of those protections.

A. Standards of Investment Protection

1. An Expansive Definition of "Investment": Despite the fact that an "investment" is the core element of investment treaties, early treaties did not define what constituted an "investment" that was to be protected by the treaty. For example, the 1965 treaty establishing the International Centre for the Settlement of Investment Disputes ("ICSID Convention" or sometimes referred to as the "Washington Convention") merely states that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment...." The travaux preparatoires indicate that this omission of a definition was intentional to allow each arbitral tribunal the power to make its own determination whether there was a purported investment protected by the treaty. Similarly, early Bilateral Investment Treaties ("BIT") either failed to define what constitutes an "investment" for purposes of those treaties or provide a simple definition. This absence or brevity of a definition of a protected "investment" in many treaties has resulted in divergent and conflicting arbitral rulings, for example, whether an "investment" meant only "in the ground" assets such as a power plant but not a "paper" asset such as debt bonds issued by a company.
The TPP Agreement seeks to avoid ambiguity with an extensive definition of a covered investment by providing both normative elements as well as specific examples. While it defines “investment” broadly to mean “every asset that an investor owns or controls, directly or indirectly,” it is qualified by a normative criteria that an investment must have “the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Specific examples of investments are listed to avoid past conflicting rulings. These examples include financial instruments such as bonds, loans, futures, options and derivatives, as well as intangible assets such as intellectual property rights, licenses, and permits.

The extensive definition of investment in the TPP Agreement should go a long way to avoid ambiguities and conflicting arbitral rulings, and to provide influential authority to the interpretation of “investment” in other investment treaties.

2. A Clarified Scope of Most-Favored-Nation Treatment. The “most favored nation ("MFN") treatment” standard requires that a host state treat the investor or investment of another member state as favorably as any other investor or investment of another state, whether or not that other state is a member of the TPP Agreement. Generally the MFN treatment was accorded only to substantive norms. However, there have been diverging rulings by arbitral tribunals, as well as academic debate, as to whether the MFN treatment encompasses only substantive provisions, or whether it covers both substantive and procedural aspects, such as a prerequisite that the claimant first pursue domestic remedies before resorting to ISDS under the treaty.

The TPP Agreement makes clear that only substantive normative treatment is protected under its MFN clause. Specifically, in the definition of MFN, a new subparagraph has been added: “For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms such as those included in Section B [of Chapter II of the TPP Agreement].”

3. Clarification of the Definition of “Minimum Standard of Treatment”. The North American Free Trade Agreement ("NAFTA") and many other investment treaties require that a host state accord foreign investments a “minimum standard of treatment,” which NAFTA defines as “treatment in accordance with international law, including fair and equitable treatment and full protection and security.” There are disputes concerning what constitutes “international law”—whether it refers only to treaties and conventions or also to unwritten customary international law and practices. The TPP Agreement settles this dispute by expanding on the standard by referring to “applicable customary international law principles” and clarifying that the “fair and equitable treatment” and “full protection and security” standards are not in addition to “customary international law minimum standard of treatment of aliens” but are subsets of that minimum standard. An annex to the provision further adds “customary international law” generally and as specifically referenced in Article II.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens. This expansive definition of “international law” allows for an organic evolution of the scope of minimum protection.

4. A Balancing of Domestic Environmental, Health and Other Regulatory Objectives. Investment treaties have been attacked for allegedly prioritizing the protection of foreign investments and investors over the interests of the host country’s citizens. To buttress this claim, public health advocates and environmentalists often point to two widely publicized cases—the Philip Morris v. Australia case and the Methanex v. U.S. case.

In the Philip Morris case, Australia had enacted its Tobacco Plain Packaging Act requiring all tobacco sold in Australia to be packaged in plain packages bearing graphic health warnings. Philip Morris, a major U.S. tobacco producer, through its Hong Kong subsidiary, brought an investor-state arbitration proceeding against Australia contending that such Act violated the Australia-Hong Kong BIT. Australia and other critics of ISDS saw this as a challenge to Australia’s sovereignty over its public health. This case is still ongoing as of this writing.

In the Methanex case, the Governor of the State of California had issued an executive order calling for the phasing out of the gasoline additive methyl tertiary butyl ether (“MTBE”) based on public health concerns. Methanex Corporation, a Canadian
company with a facility in California, was the largest producer of methanol, an ingredient in MTBE. It brought an ICSID case against the U.S. alleging violations of foreign investment protection afforded by NAFTA. The ICSID tribunal ruled in favor of the U.S. under Article 1101(1) on the grounds that in adopting the ban California did not intend to harm foreign methanol producers. Nonetheless, this case has been raised by critics of ISDS as a possible example of a foreign investor having a superior position vis-à-vis a domestic citizen’s concerns.

In an attempt to address such criticism, the TPP Agreement specifically provides that “[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.” Further, Annex II-B on expropriation adds that “Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances.” Whether this provision will obviate this clash of interests will be tested in future arbitral cases. The provision on its face does not seem to resolve this conflict as the regulatory measure that is allowed must be “otherwise consistent with this Chapter,” which provides for the protection of foreign investments and investors. So, it would appear that the domestic regulatory measures may be interpreted as being subordinate to the other provision of the investment chapter.

Encouragement of Corporate Social Responsibility. Investment treaties have also faced criticisms in the areas of labor standards and social safety nets. Critics have maintained that trade and investment treaties have accelerated the “race to the bottom,” moving jobs to the cheapest labor markets with the least protections for workers. Article II.16 attempts to address this issue by stating that: “The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.” It remains to be seen whether the critics will be satisfied by this “voluntary” encouragement.

B. Salient Dispute Settlement Procedures

Section B of the investment chapter of the TPP Agreement spells out the procedures and standards for investor-state dispute settlement, including clarifications to prior ambiguities and conflicting rulings as well as innovations to address perceived inadequacies of the past practices.

1. Australia Opted Out. Perhaps the most glaring point is that Australia has opted out totally from the arbitrations provision. A footnote to Section B states “Section B does not apply to Australia or an investor of Australia. Notwithstanding any provision of this [TPP] Agreement, Australia does not consent to the submission of a claim to arbitration under this Section.” Intriguingly, this footnote is further noted “<<xx note: deletion of footnote is subject to certain conditions>>,” hinting that negotiations are still ongoing on whether or not Australia will sign up to the mandatory arbitration provisions.

While Australia has in the past entered into BITs that contain mandatory international arbitration, recently she has been reluctant. Perhaps its ongoing experience in the Philip Morris case described above has soured her on submitting investor-state investment disputes to international arbitration.

2. Imposition of a Cooling Off Period. The TPP Agreement imposes a mandatory six-month consultation and negotiation period prior to submission to international arbitration. This condition in the TPP Agreement may reflect the participation of many Asian state parties who are culturally reluctant to resolve disputes through litigation and prefer a conciliatory process for dealing with disputes. To buttress this preference, the TPP ISDS stipulates that if the applicable investment agreement (such as a build-own-transfer project contract for an airport) provides for alternate dispute settlement mechanism, the claimant must have pursued that mechanism for at least one year prior to filing for arbitration.

3. Expanded Allowance of Amicus Briefs. As early BITs and arbitral conventions have their origins in amity, commerce and navigation treaties and in commercial arbitration procedures, they have been silent on whether a tribunal may accept submissions by non-parties, such as amici curiae, as disputes under
amity, commerce and navigation treaties were dealt directly between the state parties whereas commercial arbitrations were private matters between the parties. However, in recognition that many investor-state arbitration proceedings involve public issues and other stakeholders, recent investment treaties, such as ICSID\(^{29}\) and the 2012 U.S. Model BIT,\(^{30}\) explicitly permit a tribunal, in its discretion, to accept amicus submissions. As the standards that a tribunal may apply or the considerations that a tribunal may consider in deciding whether or not to allow amicus submissions have not been clear and tribunals have differed on this point, the TPP Agreement sets the standards and procedures for amicus submissions.\(^{31}\)

First, the tribunal must consult with the parties about a potential amicus submission. Second, the submission must pertain to “a matter of fact or law within the scope of the dispute.” Third, the submission must be of assistance to the tribunal “in evaluating the submissions and arguments of the disputing parties,” and must not introduce any arguments or positions not proffered by the disputants. Fourth, the amicus entity must fully disclose its affiliations and sources of support. Fifth, the disputing parties shall be afforded the opportunity to respond to such amicus submissions. Lastly, “[t]he tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party” (italics added). Since an amicus submission is usually supporting one side of the dispute to the detriment of the other party, it will be interesting to see what a tribunal considers “unfair prejudice” to one of the parties.

4. Increased Transparency of Arbitral Proceedings. One of the vaunted virtues of arbitation over judicial litigation is anonymity and the non-public aspects of commercial arbitration. Most BITs and other investment treaties in the past have required the consent of both parties to allow any transparency to the proceedings. However, recognizing that investor-state arbitrations are fundamentally different from disputes between private parties as investor-state disputes often implicate public policy, the TPP Agreement, similar to the U.S. Model BIT, mandates public disclosure of notices, pleadings and awards, and provides for arbitration hearings to be open to the public.\(^{32}\) A party may, with the tribunal’s permission, nonetheless keep “protected information” from public disclosure. While increased transparency may mollify some of the critics of the past ISDS practice of non-disclosure, it may also increase criticisms as more people will be made aware of controversial ISDS cases.

5. Compulsory Consolidation of Related Cases. One of the criticisms lodged against ISDS arbitrations is that similar cases, sometimes with the very same parties, facts and issues, could result in different awards from different tribunals. This problem was highlighted in the Lauder cases.

The facts of the Lauder cases involved an investment that Ronald Lauder, a U.S. businessman, had in a Dutch company, CME Czech Republic BV (“CME”), which owned a Czech television channel, TV Nova. In the first case, Mr. Lauder himself brought an UNCITRAL arbitration proceeding against the Czech Republic alleging expropriation under the U.S.-Czech BIT. In the second case, CME, Mr. Lauder’s controlled company, brought a separate arbitration proceeding against the Czech Republic under the Dutch-Czech BIT for the same allegation. In the first Lauder case, the London tribunal essentially ruled in favor of the Czech Republic.\(^{33}\) Ten days later, the Stockholm tribunal found in favor of CME.\(^{34}\) The Czech Republic challenged the CME award in the Swedish appeals court, as that arbitration proceeding took place in Stockholm, pursuant to UNCITRAL rules. The Swedish court denied the appeal, noting that the parties were not technically identical and that the claims were brought under two different, though similar, BITs before two separate tribunals.

Normally consolidation of arbitral proceedings is not possible unless all the parties agree, or the applicable agreement provides for it. To its regret (one assumes), the Czech Republic had refused to consolidate the two cases. Fortunately, the TPP Agreement, like NAFTA, provides that “Where two or more claims have been submitted separately to arbitration...and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order....”\(^{35}\) At the request of a disputing party, the Secretary General of ICSID establishes a consolidation tribunal, which will decide whether consolidation requirements are met and that consolidation would further the “interest of fair and efficient resolution of the claims,” and if so found, take jurisdiction of the consolidated claims.

6. Possibility of an Appellate Body. One of the often-stated advantages of arbitration over judicial litigation is that an arbitral award is final, without recourse to appeal, hence resolution of a dispute is faster and more economical. On the other hand, the finality of an arbitral award, without the possibility
of an appeal, can be seen as a major shortcoming of arbitration vis-à-vis judicial litigation. The problems arising from parallel arbitral proceedings and inconsistent legal findings by different arbitral tribunals, as seen in the Lauder cases described above and the Argentine gas cases briefly summarized below, have given rise to calls for the creation of an appellate body, similar to the one afforded in trade disputes under the World Trade Organization.36

The Argentine gas cases involved four different American energy companies, but essentially the same claims under the U.S.-Argentina BIT of 1991 under ICSID, arising out of the same actions of the Argentine Republic.37 The claimants in those cases were CMS Transmission Co., LG&E Energy Corp., Enron Corp., and Sempra Energy International. Briefly, each of the American companies had invested in Argentina's gas companies when that industry was privatized. However, when the Argentine economy collapsed in 2001, the Argentine Government took certain economic measures, such as the delinking of the parity between the U.S. dollar and the Argentine peso, the imposition of exchange controls, and the denial of U.S.-based consumer price index adjustment provision in their gas supply agreements. The American investors all brought separate arbitrations under the 1991 U.S.-Argentina BIT, claiming that the measures taken by Argentina violated the "fair and equitable treatment" protection and were essentially tantamount to expropriation, among other claims. Argentina claimed that those measures were permitted under the "necessity" clause of the 1991 U.S.-Argentina BIT (the so-called "non-precluded measure" or "NPM"), which provided that "This Treaty shall not preclude . . . measures necessary for the maintenance of public order, . . . or the protection of its own essential security interests."38

The CMS, Enron and Sempra arbitral tribunals all ruled that Argentina's economic measures had violated the "fair and equitable" treatment guaranteed under the 1991 US-Argentina BIT and that the NPM was inapplicable. However, the LG&E case tribunal, while finding that the Argentine measures violated the "fair and equitable treatment" standard, held that it was not liable during the period of necessity as the NPM absolved Argentina during that period. Argentina submitted the other three awards for annulment proceedings as permitted by Article 52 of the ICSID Convention.39 The ad hoc annulment committee in the CMS case, while severely criticizing the analysis of the first tribunal, upheld the original award on the grounds that it was not an appellate body. The Sempra annulment committee, however, annulled the award on the basis of "manifest excess of power" for failing to identify and apply Article XI of the BIT.40 The Enron annulment committee annulled the original award also on the basis of "manifest excess of power" but for the award's failure to refer to Article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission.41 Without going into detailed analysis of each of the tribunal's findings and annulment proceedings, suffice it to say for this purpose that, in the four cases based on the same facts and the same BIT, each came out differently—some diametrically opposed, and some in nuanced, technical ways.42

With divergent arbitral decisions, it would be difficult for a sovereign state to devise public policies that would be uniform and assure that its measures do not breach its international obligations to foreign investors. If an appellate body for ISDS were available as some proponents have argued, the appellate body would have been able to review these four awards. A final ruling by such an appellate body would have been able to bring consistency to the results, thereby treating all similarly situated investors uniformly, providing a clear guidance for the respondent host state with respect to its economic measures, and furthering the development of investment treaty law.

While no such appellate body has been created, the TPP Agreement (as does the U.S. Model BIT) makes room for the establishment of an appellate body in the future by providing that:

"In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered...should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article II.23."43

Although this placeholder for an appellate body may be a nod towards some of the critics of TPP, for those who are proponents of establishing an appellate mechanism, it may be seen as regrettable that the
TPP member states did not take this opportunity to establish such a mechanism, given the high-stakes issues involving not only large sums of money but also important public policy issues.

III. CONCLUSION

The TPP is a bold and broad initiative by twelve Pacific Rim countries to establish a regime for more liberal trading and more protection for foreign investments and investors. The investment chapter of the TPP Agreement is the state of the art in the evolution of investment treaties. It remains to be seen whether the ISDS provisions of the TPP Agreement will live up to the goals and results vaunted by its supporters and avoid the various downsides predicted by its critics.

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Endnotes

1 China is not included as an original member of the TPP due to geo-political and economic reasons. J. Soble, Failure of Obama’s Trans-Pacific Trade Deal Could Hurt U.S. Influence in Asia, N.Y. Times, June 16, 2015.


9 TPPA, supra note 4, Art. II.1 “Investment.”

10 Id.


14 TPPA, supra note 4, Art. II.5.


16 Id., Chap. 11, Art. 1105.

17 TPPA, supra note 4, Art. II.6.

18 TPPA, supra note 4, Annex II-A.


22 While Philip Morris is a U.S. headquartered company, it used its Hong Kong affiliate as the claimant as the Australia-Hong Kong BIT provided for international arbitration, as there is no BIT between the U.S. and Australia.


24 TPPA, supra note 4, Art. II.15.

25 TPPA, supra note 4, Annex II-B Expropriation (3)(b).

26 TPPA, supra note 4, Art. II.16.

27 TPPA, supra note 4, Arts. II.17, II.18(1).

28 TPPA, supra note 4, Art. II.18(3).


31 TPPA, supra note 4, Art. II.22(3).

32 TPPA, supra note 4, Art. II.23.


35 TPPA, supra note 4, Art. II.27(1).


39 ICSID Convention Art. 52 provides that an award may be annulled if (1) the tribunal was not properly constituted; (2) the tribunal manifestly exceeded its powers; (3) there was a serious departure from fundamental rule of procedure; or (4) the award failed to state the reasons on which it was based. ICSID Convention, supra note 8.


41 ILC Articles on State Responsibility, Art. 25 provides:
   1. Necessity may not be invoked...unless the act (a) is the only way...to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest [of other States] or of the international community as a whole.
   2. In any case, necessity may not be invoked...if (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.

42 For opposing views on this controversy, see sources cited supra note 37.

43 TPPA, supra note 4, Art. II.22(10).