



How should the arbitrator respond if he or she believes that all or part of the discovery plan is excessive and the schedule unworkable? Is it appropriate to reject the parties' joint discovery plan and procedural schedule in whole or in part? Alternatively, must the arbitrator accept the plan and schedule in their entirety because arbitration is a creature of contract and the arbitrator has no authority to deviate from agreements of the parties?

### **Arbitrator Attitude Toward Case Management and Party Autonomy**

When I took my initial arbitrator training course from the American Arbitration Association (AAA) in the late 1980s, the trainer posed a hypothetical with similar facts. I recall that many classmates had very different views from mine about the proper role of the arbitrator. More than a few of them viewed the arbitrator as

assert, "There are no depositions in arbitration."

In the hypothetical presented above, the dictator would reject the parties' agreed discovery plan and hearing schedule, and order a hearing in 90 days, giving each party one day to present its case. In this way the dictator would achieve her brand of efficiency, cost control and "rough justice." The dictator has no regard for the autonomy of the parties and their role in structuring the arbitration process.

The third view expressed by some of my classmates, which I shared then and now, is that it is the arbitrator's responsibility to be an active manager who works *with* the parties to devise an efficient and fair process and schedule that are appropriate for the particular case, and then sees that the parties adhere to them.

Even as a new arbitrator, I recognized that the arbitrator's view of her role has great significance for the parties and the process. Given that arbi-

***Underlying the erroneous view of the arbitrator as a referee may be the fear of being "overturned" on appeal, or a lack of understanding of the broad authority granted to arbitrators under the AAA rules to actively manage the process.***

a "referee" whose objective was to enforce the discovery plan and schedule the parties had agreed upon. This view abdicated all case management responsibility unless the parties were unable to agree on them. As a result, arbitration proceedings became less efficient and more costly as discovery could be prolonged, motions could be filed at will, and counsel could present whatever evidence he or she wanted, regardless of whether the evidence was cumulative, repetitive, or irrelevant to the outcome.

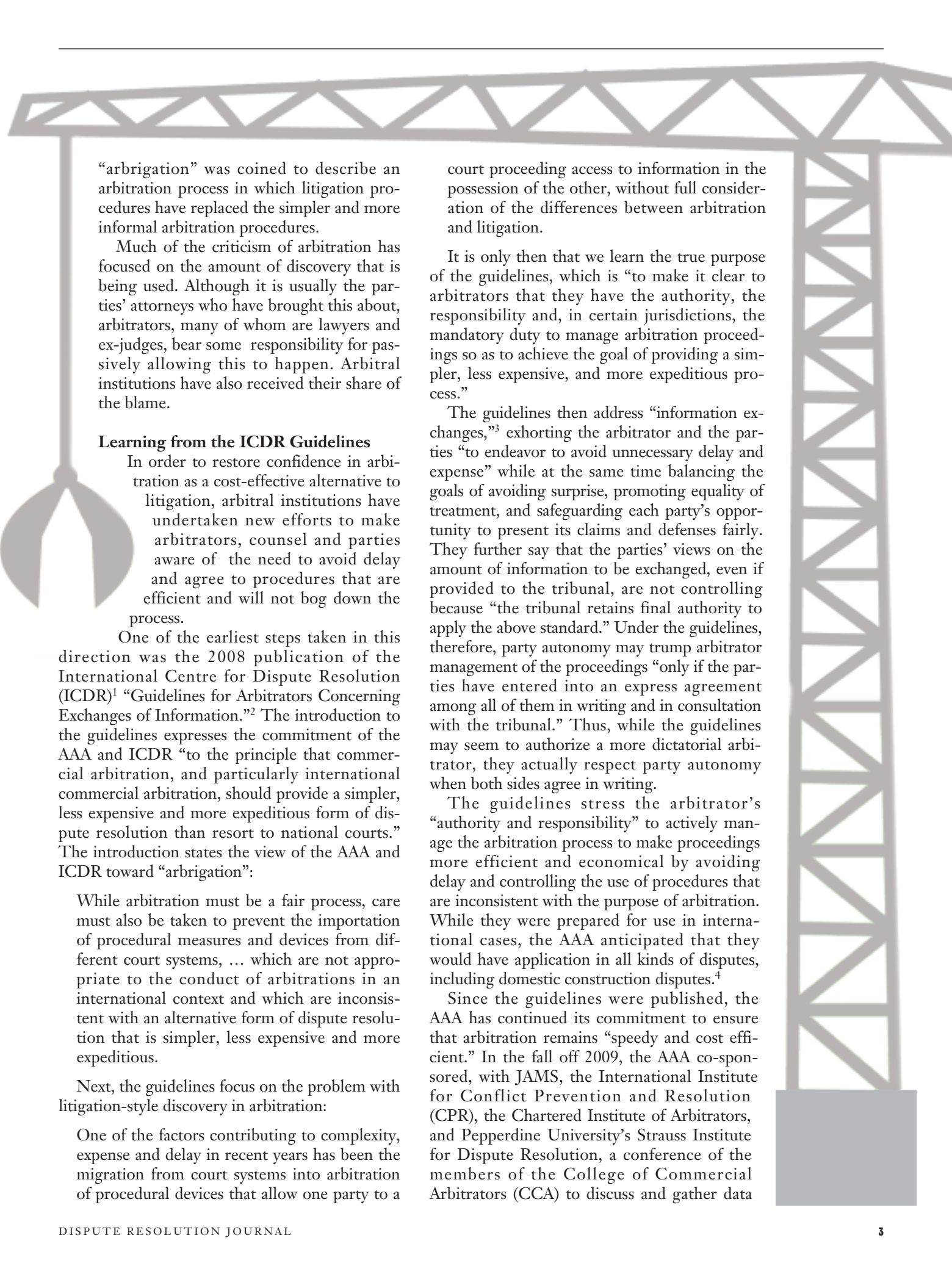
It seemed to me that the underlying foundation for this view was either the fear of being "overturned" on appeal, or a lack of understanding of the broad authority granted to arbitrators under the AAA rules, despite the fact that the AAA training program emphasized the arbitrator's authority to actively manage the process.

A second view cast the arbitrator as more or less a "dictator" whose role is to protect the efficiency and cost-effectiveness of the arbitration process, regardless of the parties' wishes. Under this view, the arbitrator dictates both the procedures and the schedule for the arbitration. If the parties want to take five depositions, the dictator would not allow it because of the time that the depositions would take. She might also baldly

trators today still hold different views of their role in arbitration, advocates and their clients should attempt to determine the arbitrator's philosophy when selecting an arbitrator for a case.

In my view then and now, the role of the arbitrator is neither that of a dictator nor a referee, but something in the middle. Arbitration was always intended to be different from litigation—free from its strictures and formality. It is supposed to be less expensive and more efficient while affording the parties a fair and impartial hearing on the issues submitted to arbitration. It is also supposed to be flexible, adaptable to the needs of the particular case, and not a "one size fits most" approach. How can arbitration achieve these objectives unless the arbitrator receives input from the parties and actively works with them to craft and schedule efficient pre-hearing and hearing procedures?

The past two decades, particularly the past 10 years, have seen a wave of discontent concerning arbitration. Many complaints have been aired contending that arbitration is no longer a cost-effective, efficient method of resolving disputes. Some commentators have described it as litigation except that the arbitrator is paid, not elected or appointed in a political process. The term



“arbrigation” was coined to describe an arbitration process in which litigation procedures have replaced the simpler and more informal arbitration procedures.

Much of the criticism of arbitration has focused on the amount of discovery that is being used. Although it is usually the parties’ attorneys who have brought this about, arbitrators, many of whom are lawyers and ex-judges, bear some responsibility for passively allowing this to happen. Arbitral institutions have also received their share of the blame.

### **Learning from the ICDR Guidelines**

In order to restore confidence in arbitration as a cost-effective alternative to litigation, arbitral institutions have undertaken new efforts to make arbitrators, counsel and parties aware of the need to avoid delay and agree to procedures that are efficient and will not bog down the process.

One of the earliest steps taken in this direction was the 2008 publication of the International Centre for Dispute Resolution (ICDR)<sup>1</sup> “Guidelines for Arbitrators Concerning Exchanges of Information.”<sup>2</sup> The introduction to the guidelines expresses the commitment of the AAA and ICDR “to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.” The introduction states the view of the AAA and ICDR toward “arbrigation”:

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, ... which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious.

Next, the guidelines focus on the problem with litigation-style discovery in arbitration:

One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a

court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

It is only then that we learn the true purpose of the guidelines, which is “to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”

The guidelines then address “information exchanges,”<sup>3</sup> exhorting the arbitrator and the parties “to endeavor to avoid unnecessary delay and expense” while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party’s opportunity to present its claims and defenses fairly. They further say that the parties’ views on the amount of information to be exchanged, even if provided to the tribunal, are not controlling because “the tribunal retains final authority to apply the above standard.” Under the guidelines, therefore, party autonomy may trump arbitrator management of the proceedings “only if the parties have entered into an express agreement among all of them in writing and in consultation with the tribunal.” Thus, while the guidelines may seem to authorize a more dictatorial arbitrator, they actually respect party autonomy when both sides agree in writing.

The guidelines stress the arbitrator’s “authority and responsibility” to actively manage the arbitration process to make proceedings more efficient and economical by avoiding delay and controlling the use of procedures that are inconsistent with the purpose of arbitration. While they were prepared for use in international cases, the AAA anticipated that they would have application in all kinds of disputes, including domestic construction disputes.<sup>4</sup>

Since the guidelines were published, the AAA has continued its commitment to ensure that arbitration remains “speedy and cost efficient.” In the fall of 2009, the AAA co-sponsored, with JAMS, the International Institute for Conflict Prevention and Resolution (CPR), the Chartered Institute of Arbitrators, and Pepperdine University’s Strauss Institute for Dispute Resolution, a conference of the members of the College of Commercial Arbitrators (CCA) to discuss and gather data

about the cost and delay in commercial arbitration. After analyzing the data collected from the conference, the CCA issued four protocols on saving time and money: one for users and in-house counsel, one for attorneys who serve as outside arbitration counsel, one for arbitrators, and one for arbitration providers. The protocols have excellent ideas that all participants in arbitration can employ when appropriate. Summaries of the protocols were published last year in the *Dispute Resolution Journal* in a handy pullout form that arbitrators and attorneys can and should easily use for reference.<sup>5</sup>

The key take-away from this discussion is that the arbitrator has the obligation to actively manage the arbitration process. She must use her knowledge, experience and training to work with the parties in the service of crafting appropriate

tion is fundamentally different from litigation in that it is intended to be more flexible and efficient and not subject to litigation's strictures. At this time or later in the preliminary hearing the arbitrator should also stress that, in arbitration, not every stone needs to be overturned in discovery in order to provide the parties with a fair and efficient hearing. And in keeping with the goal of conducting an efficient arbitration, it is essential to adhere to the date determined at this conference for commencing the hearing on the merits, absent extraordinary reasons. An arbitrator who makes clear during the initial hearing the importance of adhering to the schedule for the hearing on the merits (and reinforces that message at the periodic status conferences, which I also recommend) is less likely to receive a request that will jeopardize the hearing date.

## ***Knowledge, arbitration experience and training make up a significant part of the value added that arbitrators bring to the dispute resolution table.***

arbitration procedures for the case. It is these assets that make up a significant part of the value added that arbitrators bring to the dispute resolution table.

### **The Initial Preliminary Management Hearing: Setting the Right Tone**

The arbitrator's management of the arbitration process begins at the initial preliminary management hearing, which should be held shortly after the arbitrator is appointed. But before this hearing, which is generally conducted via a conference call, it is good practice for the arbitrator to provide an agenda outlining the topics to be addressed. I also recommend inviting each party's in-house counsel to participate in the preliminary hearing.

At the same time as the agenda is sent, many arbitrators request that counsel jointly prepare a proposed discovery plan and schedule for the "exchange of information and all other prehearing activities, as well as a list of potential hearing dates," and transmit it to the arbitrator no later than the day before the preliminary hearing conference.

Many tasks need to be accomplished at the initial preliminary hearing, the first of which should be to set the proper tone for a swift and economical proceeding. This tone can be set by reminding counsel (and the participating party representatives) at the outset of this hearing that arbitra-

### **"Right-Sizing" Discovery**

In my view, the biggest challenge facing arbitration at the preliminary management hearing is "right-sizing" discovery to the dispute. Far too often, lawyers will take unnecessary depositions and cull through all of the opponent's electronically stored information (ESI) in search of a "smoking gun" where the amount in controversy simply does not justify the costs incurred. Often, parties to arbitration will blame the arbitration process for high lawyer, arbitrator and expert fees, rather than the discovery decisions they or their counsel made, which significantly contributed to those costs.

Right-sizing discovery should mean that the type and amount of discovery matches the needs of the case—no more and no less. The arbitrator should exercise her management authority to ensure that discovery, if appropriate, is focused toward material disputed issues in the case, and that the scope of discovery accords with the size and complexity of the case.

Unnecessary discovery (whether a request for an exchange of all ESI under the party's control, or excessive depositions, or interrogatory requests) is a waste of the parties' time and money. So why do the attorneys seek it? In some cases, it is due to a lack of understanding on the part of litigators serving as arbitration counsel about how the arbitration process differs from litigation. In other cases, the desire for excessive dis-

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covery can be traced to overzealous attorneys who have doubts about the strength of their client's case, or lack confidence in the arbitration process, or the arbitrator selected for the case.

Whatever the cause, my advice to arbitrators is to use counsel's joint discovery plan as the starting point for these discovery discussions. Then, if the plan is overbroad, explain to the attorneys that their discovery requests not only exceed the bounds of what is appropriate in arbitration, they are disproportionate to the size and complexity of the case. The goal is to propose modifications to limit discovery to that which is relevant to a material issue in the arbitration. This may involve putting reasonable limitations on the amount of documents and ESI exchanged and the number and length of depositions.

Proportionality is also a concern, especially when it comes to ESI. Almost all information today is created and stored electronically. The costs involved in reviewing and retrieving ESI can be staggering. Ten years ago, the biggest contributor to the cost of arbitration was the amount of time allotted for depositions. Today, the costs involved with producing and reviewing ESI dwarfs the cost of any other method of discovery. This is not a concern in AAA fast-track construction cases because there generally is no discovery beyond an exchange of important documents. However, in regular track cases, parties have a tendency to request multiple depositions and production of all ESI related to the project. This is where active management by the arbitrator is essential.

In large, complex cases, the amount of discovery is likely to be greater and will routinely include an exchange of some amount of ESI. The arbitrator must actively manage the parameters of the ESI exchange with a keen understanding from the parties of the costs associated with the discovery that they have requested.

There are a number of principles and techniques that arbitrators could use to address an excessive discovery request, whether or not ESI is involved. The first is not to allow a fishing expedition for potential evidence. Requests for information, particularly ESI, must be carefully tailored to seek only information that is material to an important disputed issue in the case.

Second, the requesting party must be able to succinctly state why the discovery sought is necessary in this case. If it cannot provide a satisfactory explanation, discovery should not be allowed.

Another principle is to require, as per the ICDR guidelines, production of ESI in the most convenient form, which could include paper

copies of ESI in smaller cases. Again, the concept is to right-size discovery so that the type and amount of electronic information matches the needs of, and is proportional to, the case.

The arbitrator also needs to exercise managerial authority if the parties have requested depositions and/or interrogatories. A limited number of depositions may disclose useful information in appropriate cases, but depositions take employees away from their work and ultimately cost the company money. Arbitrators should inquire into the reasons for deposing each proposed deponent. If the information requested is central to the case but it could be obtained by means of a document exchange or from one deposition rather than three, then the need for some depositions can be eliminated.

Corporate designee depositions can be a useful way of obtaining central information from a corporate respondent without wasting unnecessary time and expense on a litany of potential fact witness depositions.

When interrogatories are requested, the arbitrator must find out why. Interrogatories were designed for litigation and until recently were a foreign practice in arbitration. Their use is and should be very rare. If the arbitrator decides to allow interrogatories, they should be very limited in number and seek only specific facts or further detail with respect to specific contentions of the party.

### **Selecting the Right Counsel and Arbitrator**

In my experience, parties who manage the arbitration process most efficiently recognize that arbitration is fundamentally different from litigation, so they don't try to litigate in the arbitration forum. First of all, they do not just toss a boilerplate arbitration clause in their contract. They use a well-tested arbitration clause (as opposed to a pathological clause) that they may have tailored to the needs of the transaction. In addition, they recognize the importance of selecting the right counsel to represent them in the arbitration.

Once a dispute arises, in-house counsel will interview lawyers from different firms to find one who has solid experience representing parties in arbitration and respects the company's goals for the arbitration. Both subject matter expertise and a detailed understanding of the arbitration forum are vital considerations in the selection of counsel.

Next, in-house counsel works with outside counsel in the arbitrator-appointment process. The goal is to appoint a highly qualified arbitrator who has subject matter expertise, arbitration process experience, a reputation for being an



active manager, and a temperament and style that are appropriate for the dispute.

Selecting the right arbitrator is absolutely critical to achieving an arbitration that will satisfy each party's goals for the arbitration. Parties and their counsel often fail to spend the time and effort necessary to ensure that they are selecting an arbitrator who is appropriate for the particular case to be arbitrated.

**In-House Counsel's Involvement Is Strongly Encouraged**

Arbitration proceedings are conducted more efficiently and economically when each party's in-house counsel is proactively involved in the case from day one, and participates in making strategic decisions before and during preliminary hearings, such as whether to file a particular motion, or how much and what kind of discovery to request, whether experts will be needed and if so, how expert evidence will be presented, among other things.<sup>6</sup> With the involvement of in-house counsel throughout the proceeding, the parties' attorneys are less likely to initiate strategies that would increase the cost and time of the arbitration.

**Closing Thoughts and Learning Points**

When properly managed, arbitration is the gold standard in binding dispute resolution. It is the most fair, flexible, efficient and cost-effective method available for resolving disputes. In order to achieve these objectives, arbitrators, counsel and the parties should keep the following 10 learning points in mind:

1. The role the arbitrator plays in arbitration should not be that of a dictator nor a referee. While respecting the principle of party autonomy, arbitrators have the authority and the obligation to be active managers of the arbitration process.
2. Arbitration is fundamentally different from litigation; procedures designed for the courtroom may not be appropriate for most arbitration cases.
3. One of the greatest benefits of arbitration is its flexibility to structure the arbitration process to meet the needs of the case. Arbitration is not a "one-size fits most" process.
4. When the procedures requested by the parties threaten the efficient and cost-effective reso-

lution of the matters to be decided in arbitration, arbitrators should intercede, using their arbitral management skills, for example by articulating the negative consequences of those procedures and offering better alternatives.

5. Unnecessary discovery is a waste of the parties' time and money.
6. The arbitrator has authority to proactively manage the arbitration process. The appropriate exercise of this authority is particularly important as it relates to the nature and extent of discovery, including the scope of electronic discovery and the number and length of depositions.
7. The arbitrator should employ the principle of proportionality when exercising her authority concerning discovery. When additional discovery is appropriate in the arbitrator's view because it is material to an important disputed issue in the case, the discovery request should be narrowly focused and not disproportionate to the amount in controversy.
8. Recognizing that arbitration is fundamentally different from litigation, both subject-matter expertise and a detailed understanding of the arbitration forum are vital considerations in the selection of counsel.
9. Arbitration proceedings are conducted more efficiently and economically when in-house counsel is proactively involved from the outset of the case.
10. Arbitration was intended to be different from litigation. It was intended to be free from litigation's strictures and formality, as well as less expensive, more efficient, and final and binding, while affording the parties a fair and impartial hearing on the issues submitted to arbitration. ■

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**ENDNOTES**

<sup>1</sup> The ICDR is the international division of the AAA.  
<sup>2</sup> The ICDR guidelines are available on the ICDR Web site at [www.ICDR.org](http://www.ICDR.org).  
<sup>3</sup> The guideline states: "The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy."  
<sup>4</sup> The guidelines can be adopted in an arbitration clause or separate agreement of the parties and the tribunal in other types of cases administered by the AAA, including construction cases.  
<sup>5</sup> Edna Sussman & Christi Underwood, "Time and Cost Solutions for Commercial Arbitration: Highlights from the College of Commercial Arbitrators' Four Protocols for Parties, Counsel, Arbitrators and Arbitral Institutions," 66(1) *Disp. Resol.* 7 22 (Feb.-April 2011).  
<sup>6</sup> Motion practice can add substantially to the cost and time it takes to complete an arbitration.