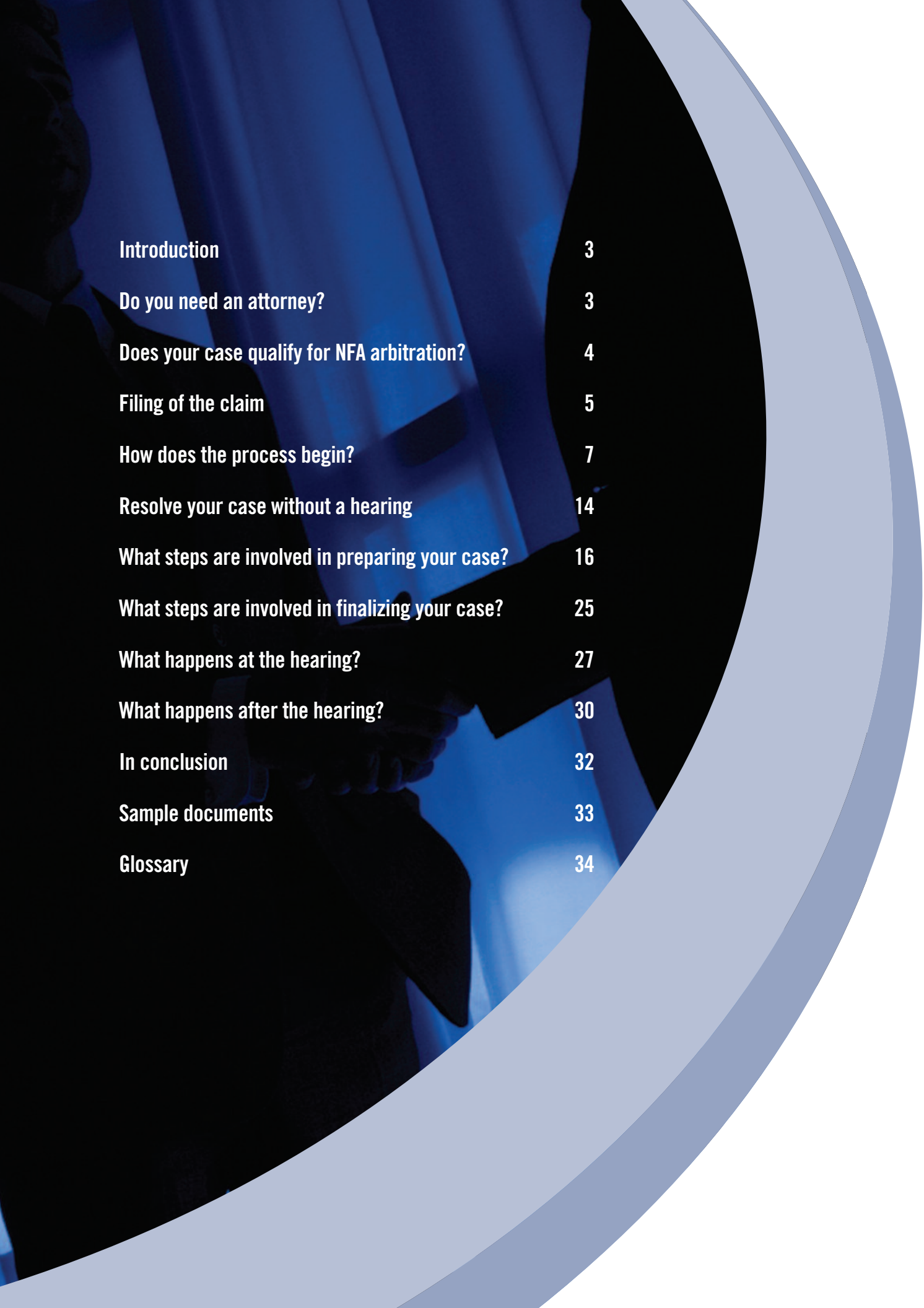
NFA Arbitration

Procedural Guide for Member Disputes

NFA
NATIONAL FUTURES ASSOCIATION®



Introduction

Since 1983 NFA has provided a successful arbitration program for the futures industry and its customers. As part of that program, disputes between and among Members and Associates were heard on a limited basis. However, in March 1992, NFA adopted a separate set of rules, which broadened the opportunities for Members and Associates to resolve their disputes with other Members and Associates. In 1999, NFA's Member arbitration program was further expanded through the adoption of a mandatory arbitration program for disputes between Members. NFA's Member arbitration program is the subject of this booklet.

Rules and procedures for arbitrating disputes between and among Members and Associates generally parallel those for arbitrating customer disputes at NFA, but there are some notable differences. The principal differences have to do with the availability of NFA arbitration, the composition of the arbitration panel, and whether there will be a summary proceeding or an oral hearing. Each of these and other differences are highlighted in the discussions that follow.

Whether you are the party who initiates the arbitration or the party who has had a claim filed against you, it is essential that you have an understanding of how NFA's arbitration program works. This guide will explain NFA's Member Arbitration program and provide you with the information you should consider in determining whether to file a claim at NFA (As explained on page 4, if you are an NFA Member, you may be required to file your claim at NFA).

Before reading this guide, you should review the glossary located on page 34 of this booklet. The glossary will explain various terms used throughout this guide and in routine communications with NFA's Arbitration Department.

Although this guide is intended to offer useful and practical information, NFA's Member Arbitration Rules officially govern Member-to-Member arbitration proceedings. If any information in this publication becomes outdated due to rule changes and/or is inconsistent with any provision in the Rules, the Rules are the final word. Accordingly, be sure you have a current copy of the Rules, including any changes that NFA may have recently made. You can find out whether you have a current copy of the Rules by calling NFA's Information Center at 800-621-3570 or visiting NFA's website at **www.nfa.futures.org**. Sections of NFA's Member Arbitration Rules are referred to throughout the guide as *"Rules Section xx."*

Do you need an attorney?

Rule Section 6

Whether you hire an attorney is entirely up to you.[1] You may want to consider such things as the complexity of the issues in dispute, the amount of money involved, whether the other party intends to be represented by an attorney, and your own skills as a communicator. Although arbitration hearings are informal, following certain procedures in presenting your case may give the arbitrators a clearer understanding of your claim.

While NFA staff will be glad to explain NFA procedures and serve as your go-between with the arbitrators, NFA cannot act as your attorney. It's your responsibility—and that of your attorney if you hire one—to prepare and present your case.

You can decide to hire an attorney—or, for that matter, to terminate the services of an attorney if you've previously hired one—at any point in the arbitration process. For example, you can file the case by yourself but hire an attorney to represent you at the hearing. Or you could hire an attorney to file the case and represent yourself at the hearing. You can also change your attorney at any time.

[1] The Rules do not limit representation to attorneys. For example, a corporation can be represented by a corporate officer even if that officer is not an attorney.

Once you have notified NFA that you have an attorney and have provided his name and address, NFA and the other parties will communicate (both orally and in writing) with your attorney rather than you. For that reason, make sure you notify us if you hire an attorney, change attorneys or decide to no longer be represented by an attorney.

One caveat: Don't wait until the last minute—such as shortly before a proceeding is scheduled—to hire an attorney. Arbitrators generally don't accept the argument that you've just hired an attorney as a valid reason for delaying a proceeding, even though the attorney may want more time to prepare for it.

If you have an attorney and he withdraws from the case, he is required to make a reasonable effort to notify you of his withdrawal in advance. If you plan to hire another attorney, do so promptly. Again, the arbitrators may not be inclined to grant a continuance of a scheduled hearing if you wait until the last moment to hire a new attorney.

Although you have the right to be represented by an attorney of your own choosing, the arbitrators have the right to exclude from the hearing any attorney who disrupts the hearing, uses tactics that serve no purpose other than to delay the hearing, or defies the arbitrators' authority. Since you are responsible for the conduct of your attorney, the arbitration panel is not required to postpone the hearing to give you time to hire a different attorney. The panel may do so, however, if it believes a postponement is necessary to give you a fair opportunity to present your case.

Does your case qualify for NFA arbitration?

Availability of NFA Arbitration

Rules Sections 2(a) and 2(b)

An initial step is to determine whether you are required to file your claim at NFA. If you are an NFA Member, FCM, IB, CPO or CTA and your dispute involves another NFA Member you are required to file your claim at NFA, unless one of the following exceptions applies:

- the parties, by valid and binding agreement, have committed themselves to resolving the dispute in a forum other than NFA;
- the parties to a dispute are all required by the rules of another self-regulatory organization (SRO) to submit the controversy to the settlement procedures of that self-regulatory organization;
- all parties to the dispute are members of a contract market that has jurisdiction over the dispute; or
- one of the parties in a claim between Members is a party to a dispute pending in another forum and files a cross-claim or third-party claim in that forum. The cross-claim or third-party claim must arise out of an act or transaction that is the subject of the claim pending in that forum.

If you are an NFA Associate or NFA Member filing a claim against an Associate, you may, but are not required to file your claim at NFA, unless:

- the parties, by valid and binding agreement, have committed themselves to resolving the dispute in a forum other than NFA;
- the parties to a dispute are all required by the rules of another self-regulatory organization (SRO) to submit the controversy to the settlement procedures of that self-regulatory organization; or
- all parties to the dispute are members of a contract market that has jurisdiction over the dispute.

Furthermore, subject to the exceptions which are discussed above, arbitration at NFA is mandatory for the respondent. That means as long as NFA has jurisdiction, the Member or Associate the claim is against is required to arbitrate at NFA once a claim is filed by another Member or Associate.[2]

[2] However, a Member or Associate the claim is against is not required to arbitrate at NFA if the claim is for declaratory relief (i.e., a request for a statement from the arbitrators as to a party's rights in a case with no monetary award). NFA will only hear a claim for declaratory relief if both parties agree (or have agreed) to arbitrate at NFA.

In order to determine if NFA can hear your claim, you should review any written agreement governing your relationship with the Member or Associate your claim involves and check to see if all parties to the dispute are members of a futures exchange that will hear the dispute. You should also find out whether you are required by the rules of another SRO to have your claim resolved there.

If you have the option to file your claim at NFA, there are a number of factors to consider in deciding whether NFA arbitration is the method of dispute resolution you wish to pursue. The attractiveness of using NFA arbitration to resolve Member-to-Member disputes stems in large measure from the same advantages that have contributed since 1983 to the popularity of NFA's customer arbitration program:

- Compared with the alternative of litigation, arbitration is usually faster and less expensive.
- Arbitrators who are familiar with the types of transactions and business relationships involved will hear the cases.
- Arbitration doesn't mean that the claimant has to know what the law is in order to successfully prove his claim. It is the Claimant's responsibility to prove he has incurred a monetary loss as a result of improper or unfair treatment and deserves to be compensated for all or some portion of the loss. However, the arbitrators can apply their own knowledge of the law and industry practices in evaluating the claim.
- Arbitration is less formal and has fewer procedural requirements than litigation. Thus, you may not need to employ an attorney. (See discussion of hiring an attorney on page 3.)

Against this however, you should weigh what may be drawbacks of arbitration. Once you have submitted your claim to arbitration, it is rarely possible to change your mind. Therefore, be sure you are willing to forego the somewhat broader rights to discovery that litigation can provide, the protection provided by formal rules of evidence and other procedural rights that may not exist in arbitration, the right to a jury, and the right to appeal the "rightness of the decision" (as opposed to the fairness of the proceeding).[3]

If you decide to pursue your claim through NFA arbitration (or you are required to submit your dispute to NFA arbitration), the next step is to resolve any other questions relating to whether NFA has authority to hear your case. The discussion that follows provides information and guidance in this area.

Filing of the claim

Rule Section 4

You must file your claim within two years from the date that you knew—or should have known—of the acts or transactions that form the basis for your claim. If the claim is not filed within the two-year period, NFA does not have jurisdiction over the dispute. (Section 4 of the Rules says that NFA must reject the claim if the claim form clearly shows that the claim was not filed within the two-year period.) Even if NFA accepts the claim, the respondent may argue to the arbitrators that some shorter statute of limitation applies.[4]

If the two-year period may be an issue in your case (for example, if the other party will probably contend that you didn't file the claim in time), you should consider whether you'll be able to convince the arbitrators that you did file on time. Consider also how you might be harmed, having wasted your time and money, if the arbitrators decide that NFA lacks jurisdiction.

In most cases where the timeliness of your filing is an issue, the focus will be on when you "knew or should have known" of the acts or transactions that are the basis for your claim. For example, if you are complaining about withheld commission payments, the day you knew is the date you discovered the commissions were withheld. However, if you don't check and keep track of the commissions owed, the arbitrators could decide that you should have known on the date you normally received the commissions. On the other hand, if you are complaining about unkept promises, the day you knew is probably the day you discovered the promises weren't being kept, not the day the promises were made.

[3] Grounds on which a court can review and vacate an arbitration award are very limited. A court cannot vacate an arbitration award just because it disagrees with the arbitrators' decision, but it can vacate an award if it determines the proceeding was conducted unfairly. See Section 10 of the United States Arbitration Act [9 U.S.C. Sec. 10 (1970)] for vacating an award.

[4] For example, a respondent may assert that a shorter time limit in the parties' written agreement applies.

NFA will reject the Demand if it clearly states that it was not filed within the two year period. However, disputes about when you knew or should have known are decided by the arbitrators, not NFA.

Jurisdiction over the parties

Rules Sections 1(a), 1(h), 2(a) and 2(b)

Once you have concluded that it is possible to have your dispute resolved through NFA arbitration and that you could file your claim by the required date, the next determination is whether NFA has jurisdiction over the parties your claim is against. In Member-to-Member arbitration, NFA can only hear disputes involving NFA Members and NFA Associates.[5]

The definition of "Member or Associate" includes firms and individuals who are NFA Members and Associates at the time the claim is filed. However, it also includes firms and individuals who were NFA Members or Associates at the time of the events involved in the dispute. Firms and individuals cannot escape jurisdiction by withdrawing their memberships in NFA. You can find out whether a particular person is or was an NFA Member or Associate by calling NFA's Information Center at 800-621-3570 or by visiting NFA's Web site **(www.nfa.futures.org)**.

Jurisdiction: a summary

As discussed in the preceding paragraphs, you must meet certain requirements in order for NFA to arbitrate your case. Initially, you must determine whether you are required to arbitrate at NFA or if it is an option that is available to you. If you will file your claim at NFA, you must do so within the two-year time limitation, and NFA must have jurisdiction over the parties you intend to make a claim against.

Assume at this point that you will file your case at NFA and that NFA has jurisdiction. The next section of this guide provides assistance in filing your claim.

[5] NFA may, in its discretion, hear claims where only one of the parties is an NFA Member or Associate. However, those claims require the consent of the party filing the claim, the party the claim is against and NFA.

How does the process begin?

If you were to file your case in a court of law, the first step would be to file a complaint. The people you filed against would then respond by filing an answer and possibly a claim against you or another party involving the same act or transaction. And, if any other claim was filed, the party the claim was against would then file an answer or reply to the claim. These documents are called "pleadings."

This section provides step-by-step help in meeting the requirements for initiating an arbitration case and filing pleadings at NFA.

In most cases where the timeliness of your filing is an issue, the focus will be on when you "knew or should have known" of the acts or transactions that are the basis for your claim. For example, if you are complaining about withheld commission payments, the day you knew is the date you discovered the commissions were withheld. However, if you don't check and keep track of the commissions owed, the arbitrators could decide that you should have known on the date you normally received the commissions. On the other hand, if you are complaining about unkept promises, the day you knew is probably the day you discovered the promises weren't being kept, not the day the promises were made.

Notice of intent

Rules Sections 5(a) and (b)

Before you file a Claim for Arbitration (which we'll discuss next), you may or may not want to file what is called a Notice of Intent. Upon receiving this Notice, NFA will send you a copy of the Rules, a blank Claim form and information about NFA's arbitration program.

Whether to file a Notice of Intent is up to you. While it doesn't obligate you to subsequently file a Claim , you probably should submit a Notice of Intent if you are approaching the two-year time limit for making a claim. The reason for this is the Notice of Intent temporarily tolls (or stops) the two-year time limit and provides a little extra time to file your Claim . However, since the Notice of Intent is effective upon receipt, NFA must receive it within the two-year limitation period in order to stop the time limit from running out.

If you decide to file a Notice of Intent, no special form is required. It can be by letter, phone call, or in person at NFA's offices. But be certain you specifically identify it as a Notice of Intent so NFA knows it's not simply a request for information. You must provide us with your name and address and, if you are representing someone else, you must tell us who you are representing and provide us with that person's name and address. If a corporation will file the claim, we need the name of the corporation, not just the name of a corporate officer. You must also tell us who the claim is against. The Notice of Intent will not apply to any person you don't identify.[6] Finally, since NFA must receive the Notice of Intent before the two-year period expires, you must tell us when you first knew that a dispute existed.

There's an important deadline to be aware of. A Notice of Intent will stop the two-year limit on filing a Claim for 35 days (with no extension of time allowed). If you do not mail or hand-deliver a Claim to NFA within 35 days after the date of NFA's letter confirming that we have received your Notice of Intent, NFA will dismiss the Intent. If you are within the two-year limitation period, however, you may still file a Claim or a new Notice of Intent. The point is that simply filing an Intent (with no subsequent Claim) will not postpone indefinitely the date the two-year limitation expires.

[6] NFA does not notify the party the claim is against that a Notice of Intent was filed. If, however, you expect someone might file a claim against you and you haven't heard from NFA within two years, don't assume you are necessarily home free. The other party may have filed an Intent, temporarily stopping the two-year limit from running out. You can call NFA and ask if an Intent was filed against you.

If you decide not to file a separate Notice of Intent (perhaps because the two-year limit is not approaching), you can obtain arbitration information by writing or phoning NFA. NFA will send you a copy of the Rules, a blank Claim form and information about NFA's arbitration program.[7]

If you request arbitration information, NFA does not require you to tell us who you might be considering a claim against, whether you are representing someone else, or any information other than the name and address to which NFA should mail the requested material.

The Claim

Rules Section 5(c)

When you are ready to make your claim, you will need to complete and mail or deliver to NFA the Claim for Arbitration form that you received. The Claim accomplishes two things. It describes your claim and it provides NFA with the information we need to perform our administrative role in the arbitration proceeding. To answer questions that are commonly asked about the Claim form, and to help you avoid mistakes in filling it out, the next few pages discuss some of the questions on the form in the order that they appear. (A sample Claim form is reproduced on page 33.)

Part I of the Claim form is self-explanatory. It asks for information that will help us contact you and your attorney (if you have one).

Part II asks for information that describes your claim and helps us determine whether NFA has jurisdiction over the dispute and the people you are filing against. It is extremely important that you complete Part II as accurately as possible.

Be specific about who you are making a claim against. Separately identify each person you are filing against (called a "respondent") in Question 1 of Part II. For example, if your claim is against both Mr. ABC and XYZ Corp., you should list each of them as respondents. If you simply listed Mr. ABC of XYZ Corp., NFA will assume the claim is against Mr. ABC but not XYZ Corp. Be certain also that you list each person you are filing against wherever it is asked for on the form. You cannot recover money from anyone you do not name in Question 1 of Part II.

Note: When NFA notifies you that we have served your Claim , the notice will list the respondents. If any person that you want to file a claim against is not individually and specifically listed, you should notify NFA immediately.

Question 2 asks if there is a contract governing your relationship with the respondent. The purpose of this question is to help NFA ascertain whether it has jurisdiction over the dispute. As previously mentioned, NFA's jurisdiction is limited to circumstances where Members and Associates have not agreed or are not required to resolve their dispute through some other forum. In order to make this determination, NFA needs to review any written agreement that governs the parties' relationship. If a written agreement exists, attach a copy to the Claim.

Question 3 asks for the dates of the acts or transactions that are the subject of your dispute.

In answering Question 4, indicate the date you first suspected that something was wrong. (It is not enough to simply refer to the attachments—you must provide the specific month, day and year.) If this date is more than two years prior to NFA's receipt of your Claim (and if there's no pending Notice of Intent), NFA will reject your claim for lack of jurisdiction. It is not to your advantage to lie about the date simply to get NFA to accept the claim initially. Nor is it to your advantage to file for arbitration if, during the course of the proceeding, the arbitrators are likely to determine that you should have known something was wrong more than two years before the date you said you first knew. If that were to occur, the arbitrators would dismiss your claim for lack of jurisdiction and you will have spent your time and money for nothing.

[7] You may also obtain a copy of the Rules, a blank Claim form and information about NFA's arbitration program through NFA's Web site (www.nfa.futures.org).

Note: Beyond the waste of time and money, if the arbitrators determine a party has filed a frivolous claim or made a claim in bad faith, that party is subject to sanctions (including having to reimburse the other party, arbitrators, and witnesses for their expenses and attorney's fees).

Question 5a asks for the claim amount. The claim must be stated in dollars and cents. If you are asking for punitive damages or treble damages, you must specify these damages and include them on this line. You must also provide a statutory basis for your treble damage request. Question 5b asks you to explain how you calculated the claim amount.[8]

Questions 6a through 6c help you calculate the amount of filing and hearing fees that you owe NFA. In calculating the fees, include any treble damages and punitive damages in the amount of your claim. For example, if you are asking for $15,000 in losses and for treble damages under a statute, you must base the filing and hearing fees on a $45,000 claim. If you are asking for punitive damages, you must ask for a specific amount and include that amount in your claim. Furthermore, additional filing and hearing fees are due to NFA if the Claim includes a request for emergency relief. See discussion on page 21.

You must send a check or a money order for the required filing and hearing fees with the Claim.[9] If you file the Claim online, you can also make arrangements to submit your payment electronically. If you do not include the correct amount of filing and hearing fees, NFA will return the Claim and request that you correct the deficiency. Unless the deficiency is corrected within 20 days, NFA will reject the claim (and any fees you have paid to NFA may be forfeited).

If you are requesting attorney's fees, indicate this in your answer to Question 7. The arbitrators, however, will not order the respondent to compensate you for attorney's fees just because you win the case. For the arbitrators to grant attorney's fees, the fees must be specifically authorized by a statute (which the arbitrators decide applies to your claim), or authorized by a contract, or the arbitrators must determine that the respondents acted in bad faith during the arbitration. Furthermore, if there is a basis for attorney's fees, you must request them as part of the arbitration proceeding or they are waived. (See Section 12 of the Rules.)

Now we arrive at the crux of the Claim —your description of what happened. In answering Question 8, describe your case as clearly and in as much detail as possible. You must also explain why you have named each respondent listed in Question 1 in Part II. While NFA will accept anything that provides a general idea of what the dispute is about, you are encouraged to provide more because it will help everyone. NFA is better able to anticipate problems that might arise, the respondents obtain a better understanding of what your complaint involves, and you benefit because a more detailed claim will likely evoke more detailed answers from the respondents, giving you a better idea of how they intend to respond to your claim. Besides, the more information you provide initially, the less you may be called on to add during the discovery stage.

As mentioned earlier, one important advantage of arbitration is that you do not have to know what the law is in order to successfully prove your claim. It is, however, your responsibility to prove that you have incurred a monetary loss and deserve to be compensated for all or some portion of the loss. If you believe that a particular rule was broken or law violated, say so and describe how you think it was broken or violated.

[8] If the dispute does not involve a monetary claim (i.e., injunctive relief), you should state so in answer to Question 6a. You should then explain the relief you are requesting in answer to Question 6b.

[9] If the dispute does not involve a monetary claim, NFA will require a $750 filing fee and a $125 hearing fee, though NFA or the arbitrator may require additional fees (e.g., based on the complexity of the claim) later on.

Part III of the Claim form deals with administrative issues. The answers to these questions help NFA select an arbitration panel and help you focus on the witnesses and documents you need to present in your case.

If your claim is more than $25,000 , be certain you answer Question 1 of Part III and indicate where you would prefer NFA to hold the hearing. You should indicate both a first and second choice, and both should be large cities in the continental U.S. How NFA selects a hearing site is discussed on page 20.

If your claim is for more than $25, 000 , you also need to answer Question 2 of Part III concerning witness information. Although other witnesses can be added later, you should list the names, addresses and employers of all the witnesses you currently know about. NFA discloses these names to potential arbitrators to help them determine if a possible conflict of interest exists. Including all known witnesses on the Claim form can help avoid unnecessary delays if an arbitrator has a conflict of interest with a witness not initially identified.

At the time the Claim is filed, you do not have to know all of the documents you may use to support your claim. Again, though, list as many as possible in answer to Question 3, and attach copies if you have them. This listing can help you identify what additional documents you will need to obtain from the respondent during the discovery process. (See pages 16-19 for a discussion of discovery.)

Part IV must be signed by you. Your attorney may not sign it for you.

The person who has the legal right to file the case must sign the Claim . Usually, that's the person who lost money. If it is a corporation, a corporate officer who is authorized to sign contracts should sign the Claim . If it's a partnership, a general partner should sign. Each owner of the joint account must sign a Claim involving a joint account.[10] If the person who lost money is deceased or incompetent, the Claim should be signed by the person who has the legal right to collect debts for him or her—usually a court-appointed executor, administrator or guardian.[11] If a Claim is not signed, or is not signed by the proper person, or if any modifications have been made to the language in Part IV, NFA will notify the person filing the case that we consider the Claim deficient. If the deficiency is not corrected within 20 days, NFA will reject the Claim (and any fees you have paid to NFA may be forfeited).

You must provide NFA with the original and a specific number of copies of your Claim and the exhibits you include with it. If the claim is $100,000 or less, you must send NFA the original set and four copies. If the claim amount is more than $100,000.01, you must send the original set and eight copies.

In general, separate Claims must be filed even though two or more persons may have a similar or even identical claim against the same respondent. For example, two APs having claims against an FCM for withheld commissions would be required to file separate claims. They cannot file a joint claim even if the APs are making the same kinds of allegations against the firm. If separate claims are improperly filed as a single claim, NFA will notify you that the Claim is deficient and give you 20 days to file new, separate Claims.[12]

If information is missing from a Claim , or if it is not clear what you are saying, NFA will return the Claim and request clarification. This could occur, for example, if you haven't indicated your preference for the hearing locations. If NFA does not receive your reply to our request for clarification within 20 days of the request, NFA will send the Claim to the respondent as it is. NFA will not reject your claim just because you didn't respond to a request for clarification; however, it's to your advantage to respond. We would not ask you to clarify something if we didn't believe it would make the arbitration go more smoothly.

[10] If the Claim involves a joint account and both account owners do not sign the demand, NFA will reject the case.

[11] An executor, administrator or guardian must provide NFA with a copy of the court order making the appointment.

[12] If you do not file the claims separately within that time, NFA will reject the entire case. When or after filing the separate Claims, you can ask NFA to consolidate the cases (hear them together), but NFA makes the final decision about consolidating cases. (See discussion on page 20.)

The Answer

Rules Sections 5(d), 5(e), 5(l) and 7(f)

Once NFA has determined that there are no deficiencies, NFA will send the Claim to all of the respondents that you want to file against. In most cases, the respondents have no choice other than to arbitrate at NFA—their membership in NFA requires it.

If you are the respondent rather than the claimant in an arbitration case, your Answer to the claimant's Claim should be mailed or hand-delivered to NFA and to the other parties no later than either 20 or 45 days after NFA mailed you the claimant's Claim If the claim amount is $50,000 or less, your answer is due within 20 days. If the claim amount exceeds $50,000, the Answer must be served on NFA within 45 days. NFA will accept an Answer after either of these deadlines, but arbitrators have the option of giving it less consideration than if it had been received on time. Therefore, as a respondent, it's to your advantage to file your Answer on time.

The Answer should specifically deny any statements in the Claim that you believe are untrue. Any allegation in the Claim that is not denied in the Answer is admitted. If a statement isn't denied, the arbitrators will assume it is true. However, even if you admit that you did what the Claim alleged you did, you can offer reasons as to why you still believe the claimant isn't entitled to any money. You should explain these reasons—called "affirmative defenses"—in your Answer.[13] Or you could include affirmative defenses in your Answer even if you deny the claimant's allegations, in case the arbitrators decide that the allegations are true.

A respondent's Answer may include a "motion to dismiss" (i.e., a request that the arbitrators dismiss the claimant's Claim). If you decide to file a motion to dismiss, it must be filed no later than the Answer due date. NFA will not accept a motion to dismiss that requests the arbitrators to dismiss the claim because the claimant failed to state a claim. NFA will accept motions to dismiss on other grounds such as the claimant did not file his claim within NFA's two-year time limit. Although NFA staff determines whether to accept a motion to dismiss, the arbitrators determine whether to grant or deny the motion.

If you believe that a particular issue requires a ruling from the panel early in the arbitration process, you may make a written request for a preliminary hearing. (See page 22.)

The Answer may include a request for attorney's fees, costs, and expenses. If you include a request for attorney's fees, you must provide a statutory or contractual basis for the request. Attorney's fees related to the arbitration that are not requested in the proceeding are waived – you will not be able to seek them in a separate proceeding fees, you must request them as part of the arbitration proceeding or they are waived. (See Section 12.)

Finally, if the claim is greater than $25,000 , the Answer should indicate your first and second choices of cities for holding the hearing.[14] It should also include the name, address, and employer of any intended witnesses plus copies of exhibits.

[13] In general, there are two types of affirmative defenses. The first challenges jurisdiction—such as that the claim wasn't filed within the two-year limitation period. The second type argues that some act or omission makes it unfair for the claimant to be granted an award. For example, in a claim for wrongful termination of a guarantee agreement, the guarantor claims that the introducing broker breached the agreement.

[14] An arbitrator will decide claims between $25,000.01 and $50,000 based on the parties' written submissions unless a party requests an oral hearing within 30 days after the last pleading is due. Therefore, you should list where you would prefer NFA to hold the oral hearing in case one is necessary.

Other Claims

Rules Sections 1(h), 1(v), 2(c), 5(f) and 5(h)

NFA will accept a claim against another party that is asserted in a respondent's Answer as long as the claim involves the same act or transaction that is the subject of the original claim. You are required to assert the claim if the other parties meet the requirements for mandatory arbitration under Section 2(a) of the Rules and you must include the claim in your Answer. (See discussion on page 11.) Otherwise, you probably don't have to file your claim in connection with the original claim. If a claim is filed, the party the claim is against will have to allow the arbitrators to decide the other claim when they decide the original claim.

One type of claim that you may always include in your Answer is a counterclaim or a claim filed by a respondent against the claimant. For example, if an Associate who was formerly employed by an FCM files a claim against his ex-employer for withheld commissions, the ex-employer may counterclaim for an unpaid deficit in a customer's account that the Associate handled.

A respondent may also file a cross claim against any other respondent named in the same case. A respondent may also file a third party claim against a person who is not a party to the original action but is or may be liable for all or part of the claimant's claim.

Requests for attorney's fees, expenses, interest, and costs can be—but don't have to be—included as part of the claim itself. The requests can be made as part of the claim or in a separate section of the Answer, which is often called a "prayer for relief." However, if attorney's fees and costs are part of the counterclaim, cross-claim or third-party claim, you have to include them in calculating the filing and hearing fees.

A counterclaim, cross-claim or third-party claim should contain most of the information that a Claim contains. In this regard, you can be guided by the discussion of Claims on pages 8-10.

Finally, you must pay the required filing and hearing fees when you file a claim with your Answer. See Section 11 of the Rules for the fee schedule.

Answers and replies to other claims

Rules Sections 5(g), 5(i), 5(j) and 5(l)

Once NFA has determined that there are no deficiencies, NFA will serve the claim to all the respondents named in your claim. If a counterclaim or a cross-claim is filed against you, you have 35 days to mail or hand-deliver your Reply to NFA. The 35 days start when NFA mails you a copy of the counterclaim or cross-claim, not when the respondent mails it to you. Otherwise, you could be replying to an incomplete claim or to one that NFA is going to reject.

If a third-party claim is filed against you, and the aggregate claim amount is less than $50,000, you will have 20 days to mail or hand-deliver your Answer to NFA. If the aggregate claim amount exceeds $50,000, you will have 45 days to submit your answer. As is the case with a counterclaim or cross-claim, the timeline starts when NFA mails you a copy of the third-party claim.

If you file your Answer or Reply late, NFA will still accept it but, as with a late Answer to a Claim, the arbitrators may not give it as much consideration. Also, as with an Answer to a Claim, any statement in a counterclaim, cross-claim or third-party claim that is not denied in the Answer or Reply is considered admitted and the arbitrators will assume it is true. You should also describe any affirmative defenses (see page 11) in your Answer or Reply.

Amended claims

Rules Section 5(k)

Once a party has filed a claim, certain types of changes can be made to it by filing an amended claim. For example, as a claimant, you could file an amended claim to include additional allegations or parties, or to increase the amount of your original claim. You cannot, however, include anything in the amended claim that you could not have included in the original claim. You cannot, for instance, amend a Claim for Arbitration to add a new claimant with a separate dispute since someone with a separate dispute couldn't have been included in the original Claim.

An amendment that increases the claim amount must be accompanied by a check for the additional arbitration fees, if there are any.

NFA will determine what constitutes an amended claim. Just because you may call it an amended claim doesn't make it one, and we might decide that a filing is an amended claim even if you call it something else. A document that simply provides new information or uses different terminology to describe an allegation made in the first claim is not an amended claim. On the other hand, a document that adds allegations that require a different defense or an entirely different type of evidence is an amended claim.

NFA will accept amended claims (provided it has jurisdiction over any new claims or respondents) at any time prior to the appointment of arbitrators. Once NFA appoints arbitrators, they will decide whether to accept your amended claim.

If you amend your claim to add new parties or totally new matters, you must do so within two years of the time you knew or should have known of the new party or the new matter. NFA will generally reject amended claims adding new parties or involving totally new matters if the two-year limitation period has already passed. For example, if you amend your claim to add issues involving transactions in a different account, you have filed a claim involving a totally new matter, and NFA will reject it if you did not file it within the two-year limit.

Amended claims slow down the arbitration process because the Respondents have 45 days to file an Answer or 35 days to file a Reply to the amended claim and a new discovery period (see pages 16-19) starts for documents and written information based on new claims or new respondents. Therefore, it is to your benefit to make the original claim as complete as possible.

Service of process

Rules Section 15(b)

Finally, as a party to the arbitration (or as a party's representative), you should keep the following points in mind as the case moves through the arbitration process. NFA's arbitration rules require that all pleadings, documents and correspondence served on NFA must also be served on every other party (or representative) at the same time they are served on NFA. You should clearly indicate on the document that the other party was served. You should also ensure that you use the same method of service (e.g., overnight mail, first class mail, e-mail, facsimile) for NFA and all other parties. For example, if you serve a letter on NFA by overnight mail, you should also serve the other party by overnight mail.

At this point, the pleadings stage is complete. The claimant has filed a Claim and the respondent has provided an Answer. Any other claims, Answers and Replies to the claims, and any amended claims have also been filed. In sum, you have told the respondents, in writing, why you think they owe you money, and they have told you why they think they don't.

Resolve your case without a hearing

Withdrawal

Rules Section 10(j)

After the pleading stage is complete and you have a better understanding of the respondent's position, you may conclude your claim is not worth pursuing. Once the respondent has filed an Answer, however, you must obtain their consent to withdraw. (If no Answer has been filed, a claim can be withdrawn without the consent of the other party or parties.)

If you decide you want to withdraw your claim, you may send NFA a written, signed request to withdraw. The request should state whether the withdrawal is with or without prejudice.[15] NFA will send the request to the other party for its signature and consent (if its consent is necessary).

Alternatively, you may contact the other party directly and provide NFA with a withdrawal agreement signed by both parties. If the withdrawal agreement does not say whether the withdrawal is with or without prejudice, NFA will assume it is without prejudice.

If you have made a claim against more than one party, it is possible to withdraw your claim against some but not all of the parties. NFA will consider the claim withdrawn against only those parties indicated in the withdrawal agreement and only if those parties have consented to the withdrawal (i.e., those parties who have signed the withdrawal agreement). NFA will not consider a claim withdrawn against any party who has not signed (consented to) a withdrawal agreement (if its consent is required).

Settlement

Rules Sections 10(g), 10(h), 10(i) and 11(b)

In general, one-half of NFA's arbitration cases closed each year are settled prior to a hearing. There are a number of possible advantages to settling your dispute and these advantages are most fully realized by settling as early in the arbitration process as possible.

Advantages may include:

- saving the time and money (such as legal and travel expenses) associated with preparing for and attending a hearing;
- reaching an agreement that is more mutually satisfactory than the decision the arbitrators may reach; and
- preserving an existing business relationship, since settling the claim early may keep the parties on good terms with each other.

NFA encourages parties to explore the possibility of settlement. Although parties may settle a dispute at any time a settlement reached early in the arbitration process provides greater advantage, including NFA's, (staff time) and the arbitrators. Furthermore, NFA will issue a partial hearing fee refund to the claimant if the case is settled at least 15 days before first hearing date.

NFA prefers that the parties notify NFA of a settlement—in writing signed by both parties. If there is oral rather than written notification of a settlement, or if NFA is notified by only one of the parties, NFA will send a letter to the parties indicating that we have been notified of a settlement and that NFA will terminate the arbitration proceeding and close the matter unless one of the parties notifies NFA within 20 days that a settlement has not been reached.

The 20 days gives a party time to tell NFA the information we have is wrong—the case is not settled. If you've agreed to the terms of the settlement but simply haven't signed a release or received a check, the case is settled and NFA will close it.

If a settlement agreement does not include all of the parties, NFA will not terminate the case against the remaining parties. However, if you wish, you can elect to withdraw your claim against the remaining parties, with their consent.

[15] If a request to withdraw is without prejudice, you can re-file your claim later. Withdrawal with prejudice means that you cannot later re-file your claim.

When settling a claim against some but not all parties, the settlement notice you provide to NFA should indicate the amount of the settlement or payment. If you don't disclose this information, the arbitration panel may require that you disclose it at the time of the hearing against the remaining parties. (Even if you have settled with all parties, NFA encourages you to indicate the amount of the settlement so this information is available, confidentially, for statistical purposes.)

If you decide settling your dispute is a possibility, you may want to contact NFA to request a settlement form. The use of the form, however, is optional.

The parties may also agree to ask the arbitrators (whose consent is also required) to issue a consent award containing the terms of the settlement agreement. A consent award carries the same validity as an arbitration award. In other words, NFA may suspend a Member or Associate for failing to comply with a consent award and you may go to court to enforce it. (See page 32.) Members and Associates, however, are required to comply with a settlement agreement and NFA will suspend a Member or Associate who fails to do so.

Mediation

Rules Section 14

Mediation has become an increasingly successful and popular means of settling disputes and NFA offers mediation to parties involved in an arbitration proceeding.[16]

In mediation, parties submit their dispute to a neutral party—the mediator—who works with them to reach a mutually agreeable settlement. A mediator listens objectively to the parties and may suggest ways of settling the dispute that they have not considered on their own. The mediator's role is to get the parties talking, to help them understand what they really want, and to evaluate how likely they are to get it from an arbitration panel. The mediator does not resolve the dispute for the parties or impose a settlement amount.

[16] If you are interested in exploring mediation before an arbitration claim is filed at NFA, you may contact NFA's Arbitration Department to obtain information about mediation services that may be able to assist you. A list of mediation services is also available in the Arbitration/Mediation section of NFA's Web site.

If you are unable to reach a settlement through mediation, you can proceed with arbitration. Moreover, if the mediation is unsuccessful, all discussions during mediation are confidential and cannot be used during the arbitration hearing.

Shortly after the pleadings stage is completed, NFA will contact you and the other parties about mediation. If both parties agree, the dispute will be mediated, otherwise, your arbitration case will proceed to a hearing.

If settlement is achieved through mediation, you should provide NFA with the same notification that's required when a settlement is reached by any other method. (See page 14.)

The mediation process does not slow down the processing of your case. Your case will proceed along the same time line regardless of whether your dispute is mediated.

What steps are involved in preparing your case?

To allow you time and to assist you in gathering all of the documents and other information needed to prepare your case, the arbitration timetable provides for a pre-hearing discovery stage. While you and the other party are engaged in discovery, NFA will begin selecting an arbitration panel (and a hearing site if an oral hearing is required). In addition, the arbitrators may make certain pre-hearing decisions and, in extraordinary circumstances, issue interim orders on emergency requests or conduct preliminary hearings. These topics are also discussed in this section.

Discovery

Rules Section 7(a)

Preparing for the hearing involves acquiring, studying, and organizing all the records, documents, and other information that you believe will be necessary and useful in presenting your case. Much of this is likely to be material you already have. Other material, however, may be available only from the party you have filed a claim against, or from non-parties who may have knowledge or records pertaining to the dispute. The purpose of discovery is to enable you to obtain important material and information from others and to learn as much as you are entitled to about how the other party plans to defend against your claim or present their claim against you.

Under NFA discovery rules, you have the right to request and obtain any information that is reasonable for preparing and presenting your case and the parties that possess this information are required to provide it—voluntarily, cooperatively, and on a timely basis. Of course, that works both ways. Respondents' rights to discovery are the same as claimants' rights. As a claimant, you are required to respond to reasonable and necessary information requests from the party you are making a claim against.

You need to understand five things to make the best use of your discovery rights:

1. What types of information you are entitled to obtain through discovery;
2. How to request the information you need;
3. The timetable for making and responding to requests;
4. What you should do if you feel that you are unable (or shouldn't be required) to provide information the other party has requested; and;
5. What recourse is available to you if the other party fails to voluntarily or satisfactorily respond to your requests.

What can be requested

Rules Sections 10(g), 10(h), 10(i) and 11(b)

Discovery rules apply to "documents and written information," but this is liberally construed. It can include such things as tape recordings (e.g., that may have been made of your conversations with the respondent) and written interrogatories (a list of questions that you want the respondent to answer). It does not, however, include depositions (information obtained through face-to-face questioning of the other party under oath and with a court reporter present). The parties may mutually agree to depositions, and depositions or parts of depositions can be offered as evidence at the hearing, but the panel cannot order discovery depositions.[17]

To avoid common discovery disputes, NFA rules require the parties to automatically exchange routine documents. Using a list of documents approved by NFA's Board of Directors, NFA will identify the standard documents that are generally relevant to the particular causes of action alleged in the case. For example, in a compensation dispute between an AP and his former employer, NFA may order the parties to produce documents showing the employee's salary history (including bonuses, commissions and commission payouts) and all contracts and written agreements between the parties. NFA will not, however, require you to produce or exchange any documents or information that are not in your possession or control.

The parties may ask for other documents and information besides the ones identified by NFA staff as long as the documents and information are related to the case. You might, for example, ask for copies of trade confirmations or time-stamped order slips relevant to disputed trades or commissions. In submitting interrogatories, the respondent could ask you to provide any information pertinent to the dispute or the business relationship under which the dispute arose.

Discovery might also include what is called a Request for Admissions—a request that the other party admit, in writing, to some particular event or action. For example, "do you admit that I talked to you about such-and-such on such-and-such a date?" Such an admission, if made, can eliminate having to prove or dwell on the event or action at the time of the hearing.

Neither party should request information that is repetitive or irrelevant to the issue in dispute or that would impose an unreasonable burden on the other party to produce. Nor should requests be in the nature of "fishing expeditions" or serve no purpose other than to delay the arbitration process.

How to obtain information

At the time NFA accepts the Claim and serves it on the respondent, we will identify the standard documents for the parties to exchange. The parties should make all requests and responses for other documents and information to each other directly. There is no need to file your discovery requests with NFA or to provide NFA with copies of material obtained or provided during discovery. (As we'll discuss on pages 16-18, the parties will need to provide NFA with certain information later in the process.)

The discovery timetable

There is a specific timetable spelled out in the Member Arbitration Rules for making and responding to requests for information. This timetable and its applicable deadlines should be taken very seriously. Requests and responses that are not timely can result in the arbitration panel imposing sanctions on the late party. Even if the arbitrators don't impose sanctions, however, they have wide leeway to take into account that one party was timely and cooperative and the other was not. It's obviously in your best interest to be the party that is timely and cooperative.

Although discovery can begin at any time after the Claim is filed, the Rules impose specific due dates for discovery requests and responses.

Under the automatic exchange procedure, NFA will notify the parties at the time we accept the Claim and serve it on the respondent that they must automatically exchange the standard documents with each other no later than 15 days after the last pleading is due.

[17] The panel may, however, order an evidence deposition if the party requesting the deposition establishes the need for one.

Example: Assume the claimant filed a Claim and that the respondent's Answer was due May 15. The parties have until May 30 (15 days after the due date for the Answer) to exchange the standard documents identified by NFA.

You may ask for other documents and information within 30 days after the last pleading is due.[18]

Example: Assume you are a claimant, that you've filed your Claim and that the respondent's Answer was due July 1. Even if the Answer was received by you on, say, June 15, you still have until July 31 (30 days after the due date for the Answer) to make a discovery request.

If a counterclaim, cross-claim or third-party claim is filed, the discovery due dates will be extended. NFA will inform you of the new deadlines.

Example: Assume that rather than being the claimant, you are the respondent. You've received the claimant's Claim and you filed an Answer and a counterclaim. The final pleading in this case will be the claimant's Reply to your counterclaim. Your deadline for making a discovery request is 30 days after the due date for receiving the Reply. If the due date for the Reply was October 1, you have until October 31 to make a discovery request even if the Reply was not received by the October 1 due date.

Similar rules apply to responses. If you have received a discovery request, you must respond within 30 days of the other party's deadline for having filed the request.[19]

Example: The other party's deadline for making a request was January 15, but they actually made the request prior to that date. You nevertheless have until February 14 to respond.

Objections to a request

Under the rules requiring cooperation between the parties, the best response to a request for information is to provide the information requested, and to do so by the deadline. There may be situations, however, in which the information is unavailable to you or, even if available, you feel you shouldn't be required to provide it. In this case, you have the right to file an objection.

The objection should be made directly to the other party, not to NFA, and it should be in writing and be specific as to the reasons for your objection.

For example, you may believe that furnishing the requested information would violate attorney-client confidentiality, or that the information being requested is irrelevant to the dispute.

Note: The deadline for making an objection is the same as for a response. That is, the objection must be served on the other party no later than the date the response was due.

Your recourse if the other party fails to respond

If the deadline for providing the documents and information passes and you do not receive a response, or you believe the response is incomplete, or if the response was an objection, you can file a written request with NFA asking the arbitrators to compel the other party to provide you with the documents and information. Obviously, a request to compel should not be filed until after the deadline for a response has passed.

Your written request should identify the documents and information you requested and clearly state why you consider them relevant and necessary. If the other party has objected to your request, you should include a copy of the objection and explain why you feel the objection is not valid.

You must also include a written certification with any request to compel. The certification must state that you made a good faith effort to resolve the discovery dispute through either a telephone conference or an in-person meeting with the other party or its representative. You should send a copy of the request to compel and the certification to the other party at the same time you send them to NFA.

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[18] You may also ask for documents from the list approved by NFA's Board of Directors that NFA staff has not identified for automatic exchange if you believe those documents are relevant to the claim or defense.

[19] Although a party is not required to respond to a late discovery request, he should do so if the documents are relevant and the lateness is not prejudicial. Failure to respond to a late request is not grounds for sanctions but may be the subject of a request (by the other party to the arbitrators) to compel a response. The lateness of the request will, of course, be one of the factors the panel considers.

As with most other aspects of discovery, there is an applicable deadline. You must serve a request to compel on NFA no later than 10 days after the discovery response was due. If you are going to file a request to compel, you must file it by the deadline or you may be waiving your right to do so. NFA will not accept a late request unless you explain in writing why it was late.

Example: If a response to your request for discovery was due by August 1 and you didn't receive the requested information by that date, your request to compel must be served on NFA no later than August 11.

After receiving a request to compel, the opposing party may file a response with NFA no later than 10 days after the request to compel was served.

NFA will send the request to compel, the certification, and any response to the request to the arbitrators for consideration. However, NFA will return any request to compel, certification, or response that is incomplete. Therefore, it is in your best interest to file a complete submission.

Furthermore, with the consent of the other panel members, one or more of the arbitrators may schedule a discovery conference with the parties, in person or by telephone, to decide any outstanding discovery issues. Discovery conferences, however, are not necessary in every case. The panel will only hold a discovery conference if there is a good reason for doing so. For example, a discovery conference may be appropriate where the parties are not cooperating with each other in exchanging documents and information and both sides have filed voluminous requests to compel.

If the panel orders the production of documents, it will specify the documents and information to be produced, and set a deadline for complying with the order.

Pre-hearing Motion Fees

Rules Section 7(f)

If you file a motion more than 80 days after the last pleading is due in a case involving one arbitrator, NFA will assess a $125 motion fee. Likewise, in a case involving three arbitrators, NFA will assess a motion fee of $425 for all motions filed more than 100 days after the last pleading is due. These dates will be identified for you by NFA when the claim is served. The fee is used to compensate arbitrators for their time spent reviewing these motions and is separate from the fees required for a preliminary hearing or postponement request.

Sanctions

Rules Section 7(d)

Arbitration panels take a dim view of parties who fail to meet their obligation to cooperate voluntarily during discovery. A party who does not cooperate with reasonable discovery requests, comply with a discovery order, exchange documents in a timely manner, or cooperate with the other parties in preparing a timely hearing plan (see discussion on pages 26-27) may be subject to sanctions by the panel—up to and including the rendering of an award by default against the non-cooperating party.

While it is entirely up to the arbitrators whether or not to sanction a party for failing to cooperate, if you feel the other party's lack of cooperation during discovery deprives you of information that's essential to present your case effectively, you can ask the arbitrators for sanctions. If the failure to cooperate is highly prejudicial (makes it very hard for you to present your case) or flagrant and in bad faith, you can request a preliminary hearing solely on the issue of sanctions. The arbitrators, however, probably won't hold a preliminary hearing unless the sanction they would impose would terminate the entire proceeding or a major portion of the proceeding. Otherwise, if the arbitrators determine sanctions are appropriate, they normally impose them during or following the arbitration hearing. (For more about preliminary hearings, see pages 22-23.)

Beyond sanctions, any NFA Member or Associate who does not cooperate throughout the proceeding or comply with an order of the panel is subject to disciplinary action by NFA's Business Conduct Committee. These actions can be as severe as loss of membership, which is tantamount to expulsion from the futures industry.

Requests for information from non-parties

Rules Section 9(d)

The discussion to this point has focused on discovery by and from persons who are parties to the dispute, but that's not always the case. In preparing your case, you may find that you have a need for documents or other written information that can be obtained only from non-parties. If so, your first step should be to contact those persons directly, explain your need, and request that they provide the desired information. Should that fail, your next step will depend on whether the unresponsive party is an NFA Member or Associate.

If the non-party is an NFA Member or Associate, you may ask the panel to order the Member or Associate to produce the requested documents or attend the hearing. In your request, you should indicate the information you have requested, why you need it and the efforts you have made to obtain the information.

If the non-party is not an NFA Member or Associate or otherwise subject to NFA jurisdiction, you can ask the panel to issue a subpoena requiring the person to produce documents or testify at the hearing.[20] The panel's subpoena can be enforced by the courts, if necessary.

However, subpoenas for testimony are normally enforceable only within a limited geographical area. If that person's testimony is necessary to your case, you can ask that the hearing be scheduled for a location where the subpoena is enforceable.

NFA will notify the non-party of your request. The non-party has the opportunity to tell the arbitrators, in writing, why they should not order or subpoena the documents or testimony (e.g., because the information is irrelevant).

Consolidation

Rules Section 5(m)

A party may ask NFA to consolidate two or more Claims involving common questions of fact or arising from the same acts or transactions. NFA may order consolidation in the interests of providing a fair, equitable and expeditious proceeding. In addition to deciding requests for consolidation, NFA also decides whether to condition consolidation on the consent of the other party.

Selecting a hearing site

Rules Section 9(b)

Before selecting arbitrators, NFA must select the hearing site. Although the location of the hearing is entirely within NFA discretion, NFA will consider the preferences of parties included in a timely filed pleading.

If the parties have a written agreement that stipulates a hearing site and arbitrators are available in that area, NFA will usually select that site. Absent a written agreement, NFA will weigh all relevant factors. Where all considerations are relatively equal, NFA will defer to the site choice of the party filing the claim.

Selecting arbitrators

Rules Section 3

Next comes selecting the arbitration panel. The size of the panel (one person or three) will depend on the size of your claim, plus any other claim. If the total claim amount is $100,000 or less, there will be only one arbitrator. There will also only be one arbitrator for claims between $50,000.01 and $100,000, unless all parties ask NFA to appoint two additional arbitrators. For cases above $100,000, NFA automatically appoints three arbitrators.

[20] Although the law in certain states allows attorneys to subpoena non-parties directly, NFA requires that the parties ask the arbitrators to issue a subpoena.

All arbitrators in Member-to-Member cases will be Member arbitrators. That is, someone who is an NFA Member or Associate or employed by a Member; was a Member or Associate or was employed by a Member within the past three years; is a lawyer, accountant, consultant or similar person who does a significant amount of work for NFA Members or Associates or has other significant ties to NFA Members or Associates.

NFA will screen potential arbitrators for possible conflicts of interest. NFA will tell them the names of all parties to the case, the party's representatives, and any witnesses that have been disclosed. NFA will not appoint a potential arbitrator who feels he has a conflict of interest. Moreover, the arbitrator is required to disclose any facts and circumstances that might give even an appearance of partiality. If the appearance of possible partiality is strong, NFA will not ask that person to serve. Otherwise, NFA will appoint the arbitrator and inform the parties of the disclosure.

NFA will notify you when we have selected the panel and will tell you the arbitrators' names, addresses, current business affiliations, and recent employment history. If after reviewing the information you know of any circumstances that might possibly create an appearance of bias or partiality, you are required to disclose the relationship to NFA. For example, if you previously worked at the firm where one of the arbitrators is currently employed, disclose the information to NFA.

NFA's rules also require each party to disclose to NFA any circumstances likely to affect an arbitrator's impartiality. Any party who fails to disclose that information will waive the right to object to the arbitrator based on those circumstances.

There are no preemptory challenges (challenges you don't have to give a reason for) in NFA arbitration proceedings, but each party has the right to challenge any arbitrator for cause. Make your objection to NFA in writing and provide details of the basis for the objection. The fact that you may be professionally acquainted with the arbitrators and nothing more, is not grounds for a challenge, but a current or recent adversarial relationship may be. NFA decides all objections to arbitrators.

After NFA appoints the arbitrators, you should not contact them about the case. See Section 3(f) of the Rules. Instead, you should communicate with the NFA staff person assigned to your case.

Pre-hearing requests

Parties to a dispute or their legal counsel frequently ask the arbitrators to make certain decisions or take certain actions prior to a hearing. In most cases, the panel does not address or resolve any of the issues in the dispute until the time of the hearing. There are, however, occasional exceptions, such as holding a hearing on a request for emergency relief or granting a request for a preliminary hearing. The following paragraphs briefly describe and discuss some of the pre-hearing requests that the parties may ask the panel to consider.

Emergency relief

When NFA expanded the Member arbitration program to require mandatory arbitration for disputes between Members, Members lost their ability to seek emergency relief in court against the Member. As a result, NFA adopted expedited procedures for obtaining the types of emergency relief available in a court proceeding (e.g., temporary restraining orders and preliminary injunctions).

A motion for emergency relief may be filed with a Claim or at any time after the Claim is filed. For example, if an FCM Member files a claim alleging another Member firm is raiding its employees, the Member filing the claim may want an interim order for relief until the arbitration case is decided. If you are the party filing the motion, you should include a statement explaining why emergency relief is needed and indicate the party or parties against whom the relief is sought. When you file the motion, you must also pay a non-refundable $500 filing fee and a $150 hearing fee, and you must serve a copy of the motion on the other party. If the request for emergency relief is filed against you, you may serve a written response to the motion on NFA and the other party at or before the hearing.

NFA will appoint one arbitrator to decide a request for emergency relief, unless NFA or the arbitrator believes three arbitrators should decide the request. This could be the case if a request is particularly complicated. NFA will select the arbitrator (or arbitrators) from special pools of highly qualified Member arbitrators that we have established in several geographic locations (e.g., Chicago, New York).

NFA will hold a hearing on the motion no later than five business days after we receive the motion. Any interim order issued by the arbitrator will remain in effect until NFA serves the final award, unless the arbitrator decides to modify the order.[21]

Based on the circumstances in a particular case, the arbitrator may decide to expedite the regular hearing by setting deadlines for filing pleadings, conducting discovery, preparing the hearing plan, and scheduling the hearing that are shorter than the deadlines established under the rules. NFA will notify the parties if that happens.

Preliminary hearings

Rules Section 9(a)

Under the Rules, the arbitrators may schedule a preliminary hearing on its own motion or after receiving a request from one of the parties. If you are making a request for a preliminary hearing, you will need to present a strong argument as to why the arbitrators need to make some particular determination prior to the regular hearing. Furthermore, NFA may require you to deposit a hearing fee before we will process your request for a preliminary hearing.

One basis for a preliminary hearing is to decide whether a claim is a proper subject for NFA arbitration under Section 8 of the Rules. For example, a respondent may assert that witnesses or documents essential to a fair and final decision are unavailable or that some parties to the dispute are not subject to NFA's jurisdiction. The party making this argument and requesting a preliminary hearing will need to show that:

- the unavailable person is actually necessary;
- NFA does not have jurisdiction to order the unavailable person's appearance; and
- all reasonable efforts—including a change in hearing site and a subpoena, if applicable—have been made to secure the person's appearance at the hearing.

[21] The Rules also allow NFA to suspend any Member or Associate who fails to comply with an interim order. See discussion on page 32.

A preliminary hearing is not appropriate in every case where NFA jurisdiction is challenged. For example, in many cases involving the two-year limitation period, when the claimant knew or should have known is a factual question that can only be decided by presenting the very same evidence that would be presented at a regular hearing. If so, holding a preliminary hearing could waste time rather than save it.

In extremely rare instances, a preliminary hearing might be authorized to consider whether sanctions should be imposed against a party that is uncooperative in the discovery process. The panel is likely to grant a preliminary hearing on sanctions only if the uncooperative conduct is so serious that the panel might terminate the entire proceeding or declare that some major issue in the dispute has been established or rebutted.

A preliminary hearing can be conducted orally, by phone, or by written submissions. A party can ask for a particular method of hearing, but the panel makes the final decision.

Motions to dismiss

Rules Section 7(f)

As explained on page 11, NFA's rules prohibit motions to dismiss for failing to state a claim. This restriction also applies to any motion that staff determines is really a motion to dismiss for failing to state a claim, even if the party filing it calls it something different.

The parties may file motions to dismiss on other grounds, but the parties must include the motion in a timely Answer or Reply. For example, a respondent may ask the arbitrators to consider whether to dismiss a claim because it was not filed within NFA's two-year time limit or because it is barred by the doctrine of res judicata.

Motions for summary judgment

Rules Section 7(f)

The parties may raise motions for summary judgment at any time. In a motion for summary judgment, the opposing parties agree on the facts in the dispute but do not agree how the law applies to those facts. The arbitrators may decide this type of motion at a preliminary hearing or at the regular hearing on the merits.

Default judgment

A claimant may ask the panel to issue a judgment by default if a respondent fails to file an Answer. Although the information in your Claim is undisputed and the panel can accept your version of the facts as true, this does not necessarily mean that the respondent acted wrongfully or that your losses resulted from the respondent's actions. The arbitrators will still look at the information provided by you to see if you deserve to be compensated. They probably won't rule on your motion, until the time of the regular hearing.

Failure to prosecute or defend

Rules Section 9(c)

The panel may also consider, on its own or at the written request of any party, whether a party has failed to prosecute or defend the proceeding and therefore has waived its right to an oral hearing. For example, if a respondent fails to file an Answer or a claimant fails to continue to pursue an action but does not withdraw his claim, the arbitrators may find that the non-participating party has failed to prosecute or defend and a hearing is not necessary to decide the matter. The participating party can still request an oral hearing if the party has a right to one. Otherwise, the panel will decide the case based on the parties' written submissions.

Amended claims

Rules Section 5(k)

As previously discussed on pages 20-21, once NFA appoints an arbitration panel, a party can only file a new or different claim (including counterclaims, cross-claims and third-party claims) with the panel's consent. In considering a request to amend a claim, the panel will look to see if there are sound and compelling reasons for permitting it, along with bona fide reasons from the requesting party for not having included the information in the original claim. The panel may refuse to allow the amendment if the arbitrators feel it would unreasonably delay the hearing or impair the ability of the respondent to effectively prepare a defense.

If the panel accepts the amended claim, the respondents will have 45 days to file an Answer or 35 days to file a Reply to the amended claim and a new discovery period (see pages 16-19) starts for documents and written information based on new claims or new respondents.

Telephonic testimony

If you or your witnesses would like to testify by telephone—rather than in person—at the time of the hearing, you'll need to request permission from the panel in advance of the hearing. If the witness is someone whose credibility is important to the case, the panel will normally deny the request. Otherwise, the panel will consider such things as the nature of the testimony, the hardship to you if the request isn't granted, and the hardship to the other parties if the request is granted.

If you have a request to allow telephonic testimony, submit it early so there's still time to make other arrangements for testimony if the request is denied.

Depositions

NFA arbitrators have the authority to order evidence depositions for good cause shown. NFA believes that evidence depositions are appropriate in limited circumstances, such as where a witness cannot attend the hearing because they are too ill, or cannot otherwise be required to attend the hearing (e.g., a person who resides in a foreign country). NFA arbitrators, however, do not have the authority to order discovery depositions. If the parties mutually and voluntarily agree to pre-hearing depositions, they may present written transcripts of depositions at the hearing.

Continuances (postponements)

Rules Sections 9(b), 9(e) and 11(c)

NFA will notify you at least 45 days before the first scheduled hearing of the date, time and place of the hearing (or summary proceeding). In the case of oral hearings, NFA will contact the parties by phone or mail before a date is scheduled in an effort to avoid scheduling conflicts and, hopefully, requests for continuances. If you are unavailable on any of the proposed dates, you must tell NFA why you are not available and provide supporting documentation. If you do not tell NFA why you are unavailable or provide supporting documentation, we will consider the dates open and schedule the hearing.

Once the hearing date has been set, either party has the right to ask the panel to grant a continuance, but the panel is under no obligation to approve the request—even if it's the first continuance requested. If you find it necessary to ask for a continuance, put the request in writing and be specific about the reasons for the request and the length of the continuance you're seeking. The panel's decision will be based on the reasonableness of the request.

Your request must be accompanied by a $300 postponement fee. Furthermore, the cost of each additional postponement request by a party goes up—$500 for the second request and $1,000 for each request thereafter. The graduated fee schedule is designed to discourage unnecessary requests for continuances and contribute to the orderly resolution of disputes. If the panel does not grant the request, the fee is refunded to the party who paid it.

You must pay the postponement fee before NFA will pass your request on to the arbitrators. However, you can ask the arbitrators to waive the fee. If the panel decides there is good reason to waive the fee, you'll get a refund. It could be waived, for example, if the events making the continuance necessary couldn't have been reasonably foreseen or avoided and if the request was made promptly after these events became known. Moreover, if you can show the continuance was necessary because of the other party was uncooperative, the panel could decide to assess the fee against the other party instead of you. The panel can also assess expenses incurred by the parties and their witnesses because of the continuance, including reasonable attorney's fees.

Bottom Line: Avoid requests for continuances wherever possible and, if not avoidable, make the request as early as possible.

If the panel agrees to a continuance, it will decide on the new hearing date or the period during which the hearing should be rescheduled. The panel doesn't have to provide a new 45-day notice, and the rescheduled hearing could be as soon as the next day.

What steps are involved in finalizing your case?

Once the date of the hearing arrives or the summary proceeding begins, you and the other party will naturally want it to proceed smoothly, effectively, and without any unnecessary delays. This can best be accomplished if there are no "surprises" at the hearing (or during the summary). An arbitration hearing is not a stage for a TV courtroom drama. The arbitrators will not applaud dramatic new allegations, unexpected witnesses, and previously undisclosed evidence. Indeed, they may not allow them.

To prevent such occurrences—and to avoid arguing issues that aren't in dispute—NFA arbitration procedure requires both parties to exchange documents and, for oral hearings, to jointly prepare and agree on a written hearing plan before the hearing. It's important, as a party, that you understand these requirements.

Specifically what's required and when it's required depends, in part, on whether there is to be a summary proceeding or an oral hearing.[22]

A summary proceeding is where the parties present their cases to the panel entirely in writing. The panel will make its determination on the basis of the written submissions. Summary proceedings are generally held when the total amount of the claims is less than $50,000, except that an oral hearing will be held if the claim amount exceeds $25,000 and one of the parties requests an oral hearing.

Provided credibility is not an issue, a summary proceeding (in lieu of an oral hearing) can also be scheduled if the parties agree to it and if the panel agrees. Whether the panel for the summary proceeding will consist of one arbitrator or three will depend on whether the total amount of the claims is more than $50,000.

All other arbitration cases are resolved through oral hearings. That is, all of the parties (with their representatives, if any) personally appear at the hearing and present their cases and defenses to the panel (consisting of one arbitrator if the total amount is $50,000 or less, or three if it's more than $100,000).

Requirements for pre-hearing exchange of documents and preparing a hearing plan (for oral hearings) are summarized on the following pages.

[22] See footnote 14, page 11. In some situations, the panel may order an oral hearing even if the parties do not have a right to one. This could be the case if the panel feels that one or both parties credibility is an issue and the panel can't determine credibility from written submissions. Even then, however, the panel will likely require an oral hearing only if it believes the total amount of the claims justify the cost if travel by the parties.

Documents to be introduced into evidence

Rules Section 7(b)

The Member Arbitration Rules require each party to provide the other with copies of documents that will be introduced into evidence at the hearing at least 10 days before the scheduled hearing date. You must also provide copies to NFA at that time (two copies of each document if there's to be one arbitrator and four copies if there are to be three arbitrators). You should mark each exhibit with an exhibit number (e.g., Exhibit 1, Exhibit 2), include your exhibits in a binder, and index them numerically. You should also coordinate with the other parties to submit joint exhibits together in one binder and you should include documents that the parties cannot agree to in a separate binder. The arbitrators will receive copies of your exhibits in advance of the hearing.

Arbitrators arrive at a fair and equitable decision based on the information provided by the parties. Some cases involve issues relevant to the dispute about which the arbitrators may not be knowledgeable. Therefore, it is the parties' responsibility to see that the arbitrators are educated on these issues. This information must also be served on the other party and NFA at least 10 days before the hearing.

If the proceeding is a summary, you should submit all documents that are part of your case, including reasonably foreseeable rebuttal evidence. This information must be served on NFA and the other party at least 15 days before the summary starts.

If there's additional rebuttal evidence, such as evidence you didn't know would be needed until you saw the other party's documents, you can submit this information to NFA and the other party as late as five days prior to the beginning of the summary proceeding. The arbitrator will receive copies of the parties' evidence in advance of the summary proceeding.

If your hearing will be oral, the only documents you need to provide to the other party (and to NFA) are those that pertain to your direct case. Rebuttal evidence can be disclosed for the first time at the hearing.

Note: Direct evidence is evidence that helps prove your case or show that your version of the facts is true. Rebuttal evidence, usually presented after the other party has presented his version of the facts, helps prove that the other party's version of the facts is not true.

Hearing plan

Rules Sections 7(c) and (d)

For oral hearings, the parties are responsible for developing a "hearing plan." A hearing plan is not needed for a summary proceeding.

The hearing plan should include the following information:

- the names of the parties to the dispute;
- a one or two-line statement of the claims and defenses involved;
- a brief summary of the case from each party's point of view;
- a statement of facts the parties have agreed to, which do not need to be argued or proven at the hearing;
- a statement of the disputed issues that will be argued at the hearing;
- a list of the witnesses each party intends to call plus a brief description of their testimony; and;
- a list of the exhibits each party intends to introduce.

A sample hearing plan outline is included on page 33.

You should match the numbering of exhibits in the hearing plan with the way the exhibits are indexed and included in the binder (see discussion on page 29). You should also coordinate with the other parties and list joint exhibits on the hearing plan under the section called "Joint Exhibits." For documents the parties cannot agree to, you should list them on the hearing plan separately for each party (e.g., Claimant's Exhibits, Respondent's Exhibits).

Parties are responsible for preparing the hearing plan. If one of the parties is unrepresented or is uncooperative in preparing the plan, the NFA staff person assigned to the case will act as a facilitator.

The parties must send or deliver a typed copy of the agreed-to hearing plan to NFA at least 30 days before the scheduled hearing date.[23] It doesn't have to be signed by the parties or their representatives at that time, but it must be final and have been agreed to. Signing can occur anytime prior to the hearing.

NFA will keep the arbitrators informed of the parties' progress in preparing the hearing plan. If the parties are not meeting their hearing plan requirements, the arbitrators may conduct a conference call with the parties to complete or modify the plan.

Failure to cooperate in preparing a hearing plan (or failure to exchange documents in a timely manner) can result in sanctions by the panel (including taking certain facts as established, prohibiting the presentation of certain evidence, or striking designated claims or defenses). Therefore, as in all other aspects of arbitration, voluntary cooperation is in everyone's best interest.

What happens at the hearing?

Procedure for summary proceedings

Rules Section 9(i)

As previously described, summary proceedings involve a decision by the arbitration panel based solely on the parties' written submissions and are generally conducted in lieu of an oral hearing when the sum of the claims is $50,000 or less. The panel usually consists of one arbitrator.

If you are a party to a summary proceeding and have provided, on a timely basis, the documents you want the arbitrator to consider, nothing further is required of you at this point. The arbitrator has 10 days to review the information the parties have submitted and another 30 days to reach a decision. This 10-day review period could be extended, however, if the arbitrator determines more information is needed from either party. If so, you will be notified.

Although no further documents are generally accepted from either party once the 10-day review period begins, exceptions are possible. If you have additional documents you want the arbitrator to consider, you should send the documents to NFA and ask the arbitrator, in writing, to include them in the record. You should explain why you feel they're important to your case and why you did not submit them earlier. The other party will have the opportunity to respond to your request. The arbitrator will then decide whether to consider them.

Procedure for oral hearings

Rules Section 9(d)

In oral hearings, the arbitrators, particularly the chairperson of the panel, have broad discretion to conduct the hearing in whatever manner they determine will give the parties the opportunity to fully and fairly present their cases. You should keep in mind throughout the hearing that it is the arbitrators—not the parties and not their representatives—who are in charge of the hearing. If you are represented, your representative's conduct and cooperation is your responsibility. Your case could ultimately be jeopardized if that person's conduct is deemed "contumacious."[24]

[23] If some but not all of the parties are represented, NFA will ask a party's representative to prepare his client's portion of the hearing plan. The NFA staff person will then combine it with the unrepresented party's portion of the plan. In this case, a represented party may need to submit his part of the plan to NFA sooner.

[24] Contumacious is defined as "contemptuous of authority or disobedient."

Notwithstanding the arbitrators' broad discretion, hearings usually follow a standard procedure. The following will give you a general idea of what to expect.

At the outset, the chairperson of the panel (or the arbitrator if it's a one-person panel) will introduce himself or herself and the other arbitrators (if it's a three-person panel), state the purpose of the hearing, and explain the planned sequence of the hearing. Following that, the chairperson will swear in all parties and witnesses, and the entire hearing will be conducted under oath. The common hearing procedure is as follows:

1. brief opening statement by the claimant or his representative;[25]
2. brief opening statement by the respondent or his representative; [25]
3. claimant's case, including witnesses, exhibits, and cross-examination by respondent;
4. respondent's defense, including witnesses, exhibits, and cross-examination by claimant;
5. repetition of steps 3 and 4 if necessary to present new evidence (not simply to rehear testimony previously heard), counterclaims, cross-claims, and third-party claims until the parties have presented all relevant evidence;
6. closing statement by respondent;
7. closing statement by claimant; and
8. closing of the hearing by the chairperson.

The chairperson will ask the parties to affirm that they have no further proof to offer or additional witnesses to be heard. However, the panel, not the parties, will decide if the parties have had an adequate opportunity to be heard and can close the hearing even if you don't think you had enough time to present your case.

Although an arbitration hearing is much less formal than court hearings, there are certain procedures that are normally followed. Here is further background that can help you better anticipate and plan for the hearing.

NFA's role

Although the panel is fully in charge of the hearing, an experienced NFA staff person is generally present throughout, primarily to provide procedural advice and guidance to the panel as requested. You may also want to make inquiries of the staff person, but those inquiries should deal solely with procedural matters. The staff person cannot offer any opinions—to the parties or to the arbitrators—concerning the merits of either party's arguments (i.e., who should win the case), nor can the staff person be asked to testify as a witness.

Witnesses

Rules Section 7(d)

Members of the panel may wish to question the witnesses. These questions will usually, but not always, be deferred until the parties have had an opportunity to question the witness.

As mentioned, you should avoid bringing witnesses to the hearing who were not listed in the hearing plan, and the panel has discretion to not allow the witness to testify. There's a strong possibility, too, that the other party may object to allowing surprise witnesses. The panel has the discretion to determine what, if any, testimony to permit from a surprise witness, and what weight to give to the testimony of this witness.

[25] Since both parties have already summarized their cases in the hearing plan, the statement should be very brief or, at the suggestion of the arbitrators and with the consent of the parties, these statements can be waived unless the parties wish to include additional information.

Affidavits

Rules Section 9(d)(6)

An affidavit is a sworn statement offered in writing rather than in person. Arbitrators have the authority to accept affidavits in place of testimony where a person may be unavailable to appear as a witness or if their appearance would be unreasonably burdensome or expensive. However, the other party has the right to argue that the arbitrators should not accept an affidavit into evidence. In making their decision, the arbitrators will take into account that an affidavit doesn't allow the other party an opportunity for cross-examination. For this reason, even if allowed, the arbitrators may give an affidavit less weight than direct testimony.

Exhibits

Rules Section 8(d)

When you offer a document as evidence, the panel will give the other party the opportunity, to object to its introduction. The arbitrators may uphold an objection for a number of reasons including you didn't list the document on the hearing plan and you can provide no good reason for not including it; the document is irrelevant or repetitive; or it provides information the other party requested but was denied prior to the hearing. The panel generally will not allow documents that you didn't list on the hearing plan. If one is offered, however, the panel will give the other party reasonable time to examine it and object to the panel accepting it.

In presenting your case, it's not necessary to distribute copies of documents that you previously submitted to NFA. You can simply refer to the document by its pre-assigned exhibit number. You are also not required to use (that is, ask to have included in the hearing record) every document that was previously submitted. Whenever you do want a document to be included in the record, however, you should tell the panel.

Objections

The panel has wide latitude to consider whatever evidence and hear whatever testimony the panel believes may be useful in arriving at a fair decision. Too many objections slow down the hearing and tell the arbitrators that you are trying to run the hearing rather than letting them run it. In order to avoid too many objections, you should only object to evidence that is privileged, doesn't have much to do with the issues in the case but will hurt your case anyway, is repetitive, was obtained illegally, or was not listed in the hearing plan. You should also consider saving your arguments about why an exhibit or testimony shouldn't be believed until you make your closing statement.

Length of hearing

Rules Section 11(a)

The arbitrators determine how long a hearing session will continue and if additional days are required. Don't expect a hearing to be stopped at 5:00 P.M. for your convenience.

Furthermore, depending on the size of the claim and the complexity of the issues, an NFA arbitration hearing may last one day or several days, sometimes spanning several months. If a case requires more than four hearing days, the hearing fees collected by NFA will double for the fifth day and each day thereafter. However, the panel may decide to keep the fees at the standard amount if the number of hearing days is due to case complexity rather than a party's tactics or a representative's presentation style.

Briefs

If the panel decides it needs additional information or clarification of legal or technical matters, it can ask the parties to submit briefs (additional written statements) on the issue. The panel will indicate when and in what form the briefs and the information needed should be submitted. The panel could also ask for additional documents.

As a party, you can request that the panel accept post-hearing briefs. However, if the panel does not believe post-hearing briefs would be helpful, they may deny your request.

At the close of the hearing

Following the chairperson's statement closing the hearing, all parties will be asked to leave the hearing room together. The hearing is over. The panel will not determine who wins or the amount of any award during the hearing, and you should not seek to engage in any further discussions with the panel.

What happens after the hearing?

The arbitrators' decision

Members of the panel normally meet immediately after the hearing to discuss the case and the evidence presented. At this meeting, they may or may not make a decision about who wins. That may not be possible if, for example, the issues are particularly complex, if panel members feel they need more time to consider the evidence, or if the parties are to provide additional information, such as briefs or additional documents.

The arbitrators are required to make their decision within 30 days after "the record is closed." Unless the panel asks the parties to provide post-hearing briefs or additional documents, the record is closed when the hearing is concluded. If the panel has requested briefs or additional documents, the record closes when the additional material is received or when the deadline set for its submission has passed, whichever is earlier.[26]

The award

Rules Sections 10(a), 10(b) and 12

Once the arbitrators have notified NFA of their decision (in writing, signed by at least a majority of the arbitrators), NFA will promptly notify you (and the other party).

The notification will be essentially a statement of what issues were decided and the result (i.e., "who gets what"). The award will provide enough detail for the parties to understand their obligations. If, on the merits of the case, the arbitrators determine that no relief should be made, the notification will usually state "the claim has been dismissed."

[26] If a case is particularly complicated, or if extra time is needed to obtain additional information, the parties can be asked to agree to an extension of the 30 days.

Arbitration panels do not explain how they arrived at their decisions or provide reasons for their awards. Rather, the award will represent their best effort to do decide the case fairly. In addition to the evidence presented by the parties, the panel will consider such things as the credibility of the witnesses and the cooperativeness of the parties before and during the hearing.

Unless other arrangements are agreed to by the parties, an award must usually be paid within 30 days.

Under certain circumstances, an award may include an assessment of other costs such as expenses of the parties and their witnesses and attorney's fees. These could be assessed if, for example, one party has incurred expenses due to a postponement requested by the other party, or if the panel determines a party's claim was frivolous or made in bad faith, or if either party engaged in willful acts of bad faith during the arbitration. Attorney's fees can also be assessed if the claim was based on a statute that specifically authorizes an assessment of attorney's fees or if a contract between the parties authorizes them.

Requests for modification

Rules Section 10(c)

The ruling of the arbitration panel is final, and neither the decision nor the award itself is open to reconsideration or modification. Under certain circumstances, however, an award can be modified to correct technical or clerical errors. A request for modification must be received by NFA in writing within 20 days after the date NFA served the award.

The decision to (or not to) modify an award is made by the panel. However, before a request is forwarded to the panel, NFA staff will review any modification request filed by the parties to see if it meets the standards under Section 10(c) of the Rules. Those standards are listed below:

- There was an evident material miscalculation of figures, or an evident material mistake in the description of any person, thing or property referred to in the award (e.g., the panel meant to award $20,000 on a $30,000 claim but added an extra zero by mistake and awarded $200,000).
- The arbitrators awarded on a matter not submitted to them (e.g., the arbitrators awarded punitive damages when they were not asked for).
- The award is imperfect in matter of form not affecting the merits of the controversy (e.g., the wrong case number is on the award form).

NFA will not forward a modification request to the panel unless it is based on one of the grounds listed above.

Appeal

Rules Sections 10(d) and 10(e)

An arbitration award cannot be appealed either to NFA or to the panel. In a word, it is final! It is also a well-established principle that courts will not review an arbitration award on its merits. Said another way, the courts will not second guess the decision of the arbitrators on such matters as whether the correct party won or the amount of an award.

A party may seek to vacate an award in court based on limited grounds having to do with the fairness of the arbitration process. A party seeking to vacate an award has the burden of proving:

- the award was obtained by corruption, fraud or other undue means; or
- an arbitrator was obviously not impartial or any arbitrator engaged in misconduct which prejudiced (unfairly limited) the rights of any party; or
- the arbitrators were guilty of misconduct in refusing to postpone the hearing when there was good reason to do so, or refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced;[27] or
- the arbitrators decided issues they didn't have any right to decide, did not decide issues they should have decided, or issued an award that is unclear.

Any Member or Associate who wants to stay enforcement of the Award while their motion to vacate is pending, must post a bond with NFA equal to 150% of the Award.

Enforcing awards and interim orders

Rules Sections 10(f) and 10(g)

NFA Members and Associates are required to comply with arbitration awards within 30 days.[28] Failure to do so can result in suspension of membership. If, as a party granted an award, the other side does not comply with the award by the required date, notify NFA (using the form provided by NFA when you were notified of the award).[29] Although NFA may suspend a Member or Associate for failing to pay an arbitration award, the suspension does not guarantee compliance, and NFA cannot force a party to comply. Non-compliance with an arbitration award, however, is no different than non-compliance with an award obtained through a lawsuit. You may have to go to court to enforce the award. Judgment on any arbitration award can be entered in any court that has jurisdiction.

Members and Associates are also required to comply with any interim order issued in connection with a request for emergency relief. (See page 21). Failure to do so can result in suspension of membership. If, as a party granted an interim order, the other side does not comply with the order, notify NFA immediately.

In conclusion

As you have undoubtedly concluded from this guide, arbitration is not a formula for "instant relief." Although it generally involves significantly less time from start to finish than its alternatives, particularly litigation, it nevertheless requires time and effort on your part. And although it is less costly than the litigation alternative, it still involves some expense.

It should also be clear that, once you have exercised the right to have your dispute resolved through arbitration, you thereby assume the obligations that arbitration entails. The principal obligation is to participate and cooperate fully and on a timely basis throughout the arbitration process. And, of course, you have a continuing obligation to act in good faith throughout the proceeding.

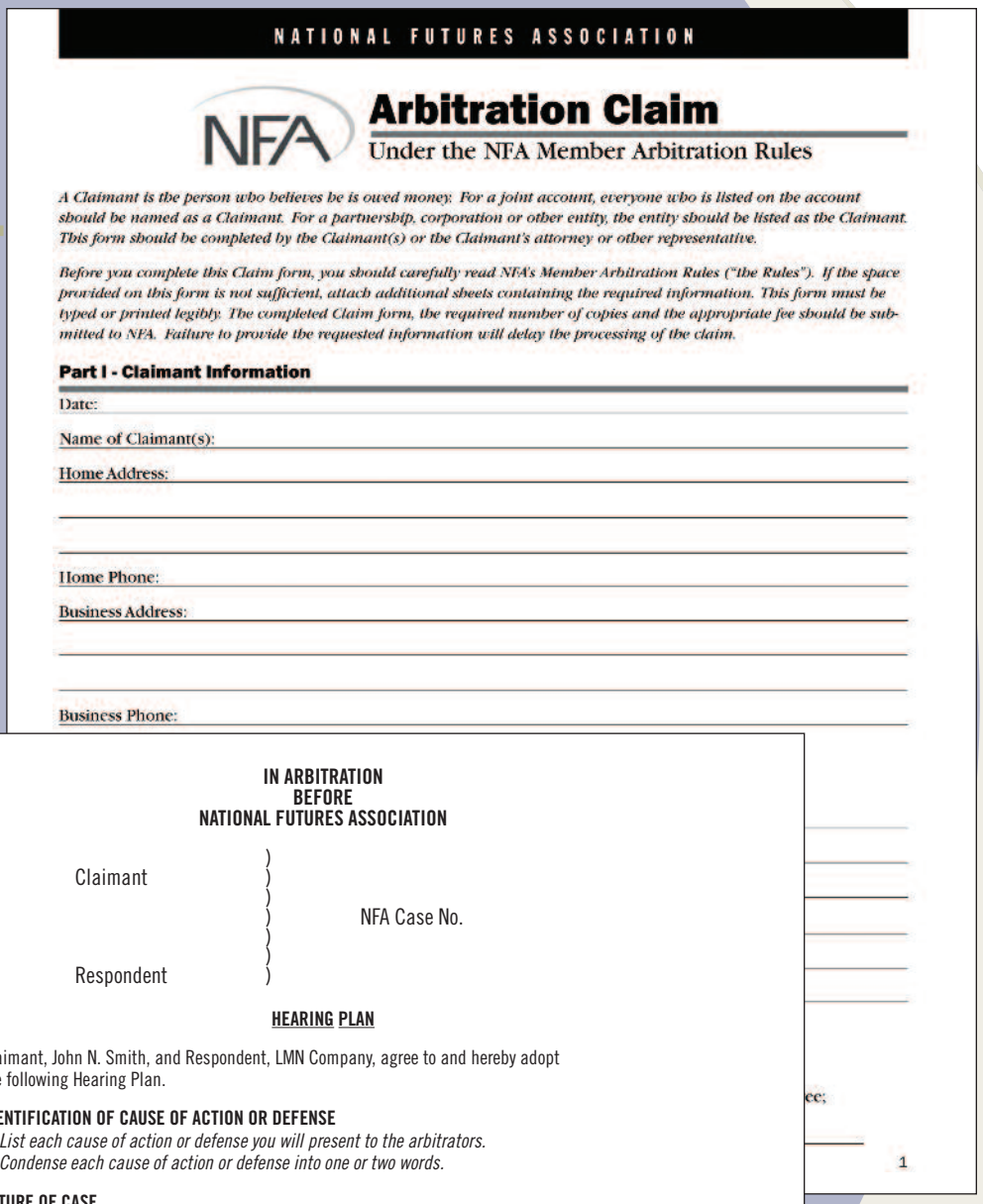
You should now have a better understanding of how arbitration works, what would be required of you, and its advantages as a means of dispute resolution. If you are a party to an NFA arbitration claim, NFA and its arbitration staff will make every appropriate effort to guide and assist you. Meanwhile, if you have questions about arbitration procedures that were not answered in this guide, please contact NFA's Information Center at 800-621-3570. ■

[27] An award will not be overturned just because a postponement was not granted or evidence was not admitted; the arbitrators' conduct must have been unreasonable.

[28] Unless a request for modification is pending at NFA; or an application to vacate, modify or correct the award is pending in a court of competent jurisdiction; or the award itself provides for a different payment schedule.

[29] The Rules also allow NFA to suspend a firm that guaranteed an IB during the relevant time if the firm fails to pay an award (or settlement agreement) after being notified that its IB has failed to do so.

Arbitration Claim sample form
(6 page document)



NATIONAL FUTURES ASSOCIATION

NFA **Arbitration Claim**

Under the NFA Member Arbitration Rules

A Claimant is the person who believes he is owed money. For a joint account, everyone who is listed on the account should be named as a Claimant. For a partnership, corporation or other entity, the entity should be listed as the Claimant. This form should be completed by the Claimant(s) or the Claimant's attorney or other representative.

Before you complete this Claim form, you should carefully read NFA's Member Arbitration Rules ("the Rules"). If the space provided on this form is not sufficient, attach additional sheets containing the required information. This form must be typed or printed legibly. The completed Claim form, the required number of copies and the appropriate fee should be submitted to NFA. Failure to provide the requested information will delay the processing of the claim.

Part I - Claimant Information

Date:

Name of Claimant(s):

Home Address:

Home Phone:

Business Address:

Business Phone:

'Hearing Plan' sample outline

IN ARBITRATION
BEFORE
NATIONAL FUTURES ASSOCIATION

John N. Smith	Claimant	
v.		NFA Case No.
LMN Company	Respondent	

HEARING PLAN

Claimant, John N. Smith, and Respondent, LMN Company, agree to and hereby adopt the following Hearing Plan.

I. IDENTIFICATION OF CAUSE OF ACTION OR DEFENSE
- *List each cause of action or defense you will present to the arbitrators.*
- *Condense each cause of action or defense into one or two words.*

II. NATURE OF CASE
A. Claimant's Version
B. Respondent's Version
- *Provide a short description of your case.*

III. AGREED FACTS
- *List each fact that the parties agree on.*

IV. ISSUES IN DISPUTE
- *This section of the hearing plan summarizes the essential factual and legal issues you will ask the arbitrators to decide. This section needs to be more specific than Section 1. You should not, however, list every detail the parties disagree on.*

V. WITNESSES
A. Claimant's Witnesses
B. Respondent's Witnesses
- *Name every witness you expect to call, including the name of the witness' current employer and a brief summary of the witness' testimony.*

VI. EXHIBITS
A. Joint Exhibits
B. Claimant's Exhibits
C. Respondent's Exhibits
- *List all documents you may offer into evidence. Include your exhibits in a binder and index them numerically, matching them to the numbering in the hearing plan.*
- *Coordinate with the other parties to submit joint exhibits together in one binder and list them on a hearing plan under the section called "Joint Exhibits."*
- *Include documents that the parties cannot agree to in a separate binder for each party and list them on the hearing plan separately (e.g., Claimant's Exhibits, Respondent's Exhibits).*

John N. Smith, Claimant — Date

Glossary

Answer
The respondent's written response to an arbitration Claim or third-party claim.

Arbitrator
A person chosen to decide disputes between parties.

Associate
An individual who is currently a registered associated person of an NFA Member or who was a registered associated person of an NFA Member at the time of the events involved in the dispute.

Award
The written decision of the arbitrators.

Claim
A request for money from another party.

Claimant
A person who files an arbitration Claim.

Contract Market
A U.S. futures exchange.

Counterclaim
A respondent's claim against a claimant.

Cross-claim
A respondent's claim against another respondent.

Demand
A claim filed by a claimant against a respondent on the form provided by NFA.

Member
A firm or individual who is currently a Member of NFA or who was a Member of NFA at the time of the events involved in the dispute. At some places in this guide the term Member is used to include Associates.

NFA
National Futures Association, a self-regulatory organization developed to maintain the integrity of the futures industry and to protect the public through effective and efficient self-regulation. NFA is the organization that runs the arbitration program discussed in this guide.

Notice of Intent
The notice by a claimant to NFA that he intends to file a Claim at NFA.

Panel
The arbitrators (one or three) appointed by NFA to hear and decide a particular dispute.

Party
A claimant or respondent.

Pleadings
The Claim, Answers and any other claims, and Replies.

Reply
A claimant's written response to a counterclaim or a cross-claim.

Respondent
A person a claim is made against.

Self-regulatory organization
A contract market, registered national securities exchange or registered national futures or securities association.

Serve
To mail or hand-deliver a document to a party or NFA. The date a document is mailed or hand-delivered is the date the document is served.

Third-party claim
A claim against a person who was not a party to the original claim, but who is or may be liable for all or part of the claimant's claim.

National Futures Association
Arbitration Department

300 South Riverside Plaza, Suite 1800
Chicago, Illinois 60606-6615

800-621-3570

www.nfa.futures.org