



Procedural Guide for **NFA Arbitrators**



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Introduction

NFA's Arbitration Program

Prior to a Hearing

Selecting Arbitrators

Requests for Pre-Hearing Decisions

Other Pre-Hearing Matters

The Summary Proceeding

The Hearing

After the Hearing

Conclusion

Index

3	Introduction
4	NFA's Arbitration Program
5	Prior to a Hearing
7	Selecting Arbitrators
8	Requests for Pre-Hearing Decisions
12	Other Pre-Hearing Matters
13	The Summary Proceeding
13	The Hearing
16	After the Hearing
18	Conclusion
19	Index

Introduction

Arbitration is a popular dispute resolution alternative to time-consuming and costly litigation. The pressures of an overburdened and backlogged court system have led legislatures and courts alike to provide arbitration panels with powers that are similar to those of the courts themselves, including the powers:

- to subpoena the appearance of witnesses and the production of documents;
- to hear testimony, arguments and counter-arguments;
- to weigh evidence; and
- to make awards that are enforceable in a court of law.

In other words, an arbitrator's authority is essentially the same as the authority of a judge.

While an arbitrator's powers are similar to a judge's, arbitration procedures are markedly different. Because the purpose of arbitration is to make resolving disputes easier, faster and less expensive for the parties involved, the procedures are less formal. For example, formal rules of evidence (governing what evidence is admissible and what isn't) don't apply to arbitration. Arbitrators may and, in fact, should consider any evidence they believe may be relevant to the dispute. When a hearing is necessary, arbitrators have considerable flexibility in conducting the hearing. Another difference is that arbitration panels and the parties are not required to know the law. On the other hand, arbitrators are not free to ignore the law if they know it. An arbitrator is responsible to determine — all things considered — whether a party to the dispute has incurred a monetary loss because of improper or unfair treatment by one or more of the respondents, and if so, whether the party deserves to be compensated for all or some portion of the loss.

Unlike many courts of law, commercial arbitrators do not have to give reasons for their decisions. There are three reasons for this. The first is that, in contrast to court decisions, the outcome of an arbitration proceeding is not used to establish a precedent. Second, preparing a statement of reasons that is consistent with the reasoning and composition style of each arbitrator increases the time it takes to issue an award. Third, the absence of stated reasons reduces the likelihood that a party will try to challenge the award, which would delay and increase the cost of arriving at a final resolution of the dispute. (See page 5 for a discussion of the possible — and limited — grounds on which an arbitration award may be overturned by a court.)

■ Serving as an Arbitrator

Members of an arbitration panel are not expected to possess technical expertise in the various issues that may be brought before the panel. In fact, in cases where the customer in an arbitration proceeding requests a non-Member panel, the chairperson and at least one other arbitrator will be persons who have no connection with an NFA Member firm and may have no previous knowledge whatsoever of futures industry practices and procedures. Like judges or jurors — who frequently have no prior knowledge or experience in the specific subject

matter of a lawsuit — the necessary skills to serve effectively as an arbitrator are integrity, impartiality and sound judgment. That is, the commitment and ability to hear evidence and arrive at a fair and equitable decision based on the information the parties to the dispute make available.

Although NFA arbitrators are not required to possess technical expertise on the subject of the dispute, there are certain requirements an arbitrator must meet before NFA will allow you to serve on a panel. First, all arbitrators are required to complete an arbitrator training program at least once every three years. You may satisfy this requirement by participating in NFA's Arbitrator Training Web Seminar, which can be accessed at the Dispute Resolution homepage on NFA's website (<http://www.nfa.futures.org/dispute/indexDispute.asp>), or by attending a training seminar offered by another forum (e.g., NASD or AAA) and provide NFA with proof of attendance at the training seminar.

NFA arbitrators are also required to make certain disclosures regarding regulatory actions. The Arbitrator Profile includes a list of questions addressing these disclosures. The purpose of these disclosure is to identify matters that may disqualify an arbitrator from serving on an arbitration panel. Arbitrators are required to update these disclosures every time they serve on a case, but not more than once a year. However, if you know of a change, you must inform us.

NFA compensates you for serving on a panel and reimburses you for any expenses you incur as a result of attending the hearing, such as cab fares or parking. NFA pays each arbitrator \$125 for conducting a summary proceeding, \$200 for a half-day (four hours or less) oral hearing, \$400 for a full-day oral hearing, and \$125 for deciding motions filed after a certain date. The chairperson of an arbitration panel receives an additional \$50 honorarium for deciding these motions and a \$75 honorarium for attending an oral hearing. NFA also compensates arbitrators in the same manner for participating in a discovery pre-hearing conference or preliminary hearing. NFA does not provide additional compensation for reviewing the parties' pleadings or other submissions.

■ NFA's Role in the Arbitration Process

From the time you agree to serve as an arbitrator in a particular dispute through the completion of the hearing, NFA's arbitration and legal staff will work closely with you.

While NFA staff members cannot and will not advise you in making substantive decisions that are within your power as an arbitrator, they can and will provide assistance and advice in numerous other ways. For example, the NFA case administrator will assure that all information and documents provided to NFA by the parties to the dispute are provided to you on a timely basis. The case administrator will also answer questions you may have concerning procedures or rules (such as requests for postponing the hearing or issuing subpoenas). In cooperation with the parties and/or their counsel, the case administrator will develop a written hearing plan (when one is required) to facilitate the expeditious conduct of the hearing. NFA staff will also make all physical arrangements for the hearing.

It is not, however, NFA's responsibility to educate the arbitrators on technical and legal matters that they might not be knowledgeable about. That burden rests with the parties. Information that you feel would be helpful or necessary in arriving at your decision may be requested (through NFA staff) from the parties. Likewise, staff does not have the authority to discipline parties who fail to cooperate or comply with NFA's arbitration rules. The case administrator cannot, for example, impose sanctions against a party who refuses to cooperate in discovery or fails to file the hearing plan on time. That obligation rests with you. As an arbitrator, you may be required to take appropriate action when needed to ensure that the parties and their counsel follow NFA's arbitration rules.

Of course, NFA staff will be available to assist you every step of the way.

■ This Guide

The purpose of this guide is to supplement other literature you have received concerning arbitration in general and the NFA arbitration program in particular.¹ This guide contains helpful information about the arbitration process and how it is designed to work. This guide may also serve as a useful reference for you when you are serving as an arbitrator. Sections of NFA's Code of Arbitration and Member Arbitration Rules are referred to throughout the guide as "Section XX."

NFA sincerely appreciates your willingness to devote your time and skills to serve as an arbitrator. We pledge to do our utmost to assure that it will be a worthwhile and satisfying experience.

NFA's Arbitration Program

Futures trading, by its nature, is done in a highly competitive and frequently volatile market environment. Moreover, because of the leverage inherent in futures products, a relatively small price change can produce rapid and significant profits or losses for individual market participants.

To protect the integrity of the markets as well as firms and persons who participate in the markets, NFA has adopted and — through its monitoring, auditing and other compliance activities — enforces extensive rules that govern the business and financial conduct of NFA Members, their employees, and NFA Associates. Nonetheless, in the futures industry as in any industry, occasional disagreements are bound to arise between Members and their customers or between Members and Associates. In many instances, the parties cannot resolve these disagreements on their own.

For instance, a customer may contend that his account has been "churned" (excessively traded by the other party to generate commissions), or there may be allegations that a broker made unauthorized trades. Other possible claims might involve charges of breach of contract or fiduciary duty, mismanagement or negligence, misrepresentation, failure to disclose risks, or mishandling of funds. NFA's

arbitration program is designed to provide an economical, expeditious and equitable means of resolving these disputes. For a non-Member, such as a customer, who has a grievance against an NFA Member firm or someone associated with that firm, the decision to use NFA's arbitration forum is entirely voluntary (unless there was a prior agreement to submit disputes to NFA arbitration). Alternatives to NFA arbitration include litigation, the Commodity Futures Trading Commission (CFTC) reparations program (where the usual procedures more closely resemble those of a formal court of law), arbitration programs offered by the exchanges, or any other arbitration forum mutually agreed to by the parties involved.

Arbitration can also be used to resolve disputes between and among Members and Associates. For example, a broker may have a compensation dispute with his former employer, or an introducing broker may allege that a futures commission merchant improperly terminated a guarantee agreement.

■ Mandatory Arbitration

Code and Rules Section 2

While NFA arbitration is generally voluntary for a customer wishing to make a claim against a Member or person associated with the Member, it is generally mandatory for the Member or Associate the claim is against. These firms and individuals are contractually obligated (by virtue of their membership in NFA) to agree to arbitration when requested by a customer unless:

- more than two years have elapsed since the party making the claim knew of (or should have known of) the act or transaction that is the subject of the dispute; or
- the dispute solely involves cash market transactions that are not part of or directly connected with a futures transaction.

For cases between and among Members and Associates, arbitration is also generally mandatory for the Member or Associate the claim is against, although there are exceptions.

■ NFA's Arbitration Panel

Code Section 4; Rules Section 3

Panels classified as either "Member" or "non-Member" will decide NFA arbitration cases. The type of panel appointed by NFA depends on whether the dispute involves a customer or is between Members. For customer cases, the customer has the option of choosing either a Member panel or a non-Member panel. Member panels decide cases between and among Members and Associates.

Member panels consist of individuals who are NFA Members or who are associated with NFA Members. This provides parties with the opportunity to have the dispute resolved by individuals who are knowledgeable about futures trading practices and procedures. A non-Member panel consists of a chairperson and at least one other individual who are not NFA Members or associated with NFA Members. (If the customer requests a non-Member panel in a claim requiring a single arbitrator, that arbitrator will not be an NFA Member or associated with an NFA Member.)

In determining whether a person is "associated" with an NFA Member, NFA looks primarily at whether the individual (1) performs a significant amount of work for NFA Members or Associates or (2) was a Member or employee of a Member within the past three years. If a person meets either condition, NFA will classify the individual as a Member arbitrator.

The total size of the claim (including any counterclaim, cross-claim or third-party claim) determines whether a dispute is decided by a single arbitrator or by a panel of three arbitrators, and whether an oral hearing is required.

For cases involving customers, if the total amount of the entire claim is \$5,000 or less, one arbitrator will decide the dispute based solely on the parties' written submissions. In other words, there will be no oral hearing. (Note: Under certain circumstances, NFA or the arbitrator can order an oral hearing. See discussion of summary proceedings on page 13.)

A single arbitrator will also decide claims between \$5,000 and \$25,000 based on the parties' written submissions unless NFA receives a request for an oral hearing from a party within 30 days after the last pleading (e.g., Answer, Reply) is due. A party may also request that NFA appoint three arbitrators if the aggregate claim amount exceeds \$25,000 but is not more than \$50,000. Claims over \$50,000 require a three-person arbitration panel and usually involve an oral hearing.

For Member cases, a single arbitrator will decide claims of \$10,000 or less based solely on the parties' written submissions. One arbitrator will also decide claims of more than \$10,000 but less than \$50,000 based on the parties' written submissions unless a party to the dispute requests an oral hearing within 30 days after the last pleading is due. A party may also request that NFA appoint three arbitrators if the aggregate claim amount exceeds \$50,000 but is not more than \$100,000. NFA will usually hold an oral hearing before three arbitrators if the claim totals more than \$100,000.

At the time you are asked to serve as an arbitrator, NFA's arbitrator coordinator will inform you of the total claim amount, whether the case requires a hearing or a summary proceeding, whether you will be the only arbitrator or a member of the panel and, in a customer case, whether a Member or non-Member panel was requested. NFA will also select one of the arbitrators to serve as the chairperson.

■ Review by the Courts

An arbitration panel's award cannot be appealed to NFA or to any NFA officer. It is also a well-established principle that courts will not review an arbitration award on its merits. In other words, the courts will not second-guess the decision of arbitrators on such matters as whether the correct party prevailed or the amount of an award. In the eyes of the court, an arbitration award carries a strong presumption of validity.

The law does provide, however, for court review on limited grounds having to do with the fairness of the arbitration process, with the challenging party having the burden to prove that:

- 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;² 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.

Some courts will also vacate an award if the arbitrators know what the law is but intentionally choose not to apply it.

Prior to a Hearing

The events preceding a hearing are in large part procedural: filing required forms and documents, selecting arbitrators, exchanging information, preparing a hearing plan, scheduling the hearing, and the arbitrators becoming familiar with the substance of the dispute and related documents. These preliminaries serve to facilitate a fair, economical and expeditious hearing — which is, of course, in the interest of the arbitrators as well as the parties to the dispute. The next several pages address procedural matters and some of the issues which may arise from the time arbitration is initiated by a claimant up to — but not including — the hearing itself. Subsequent sections discuss what happens during and after the hearing.

■ Arbitration Claim

Code Sections 6(a), (b) and (c); Rules Sections 5(a), (b) and (c)

The arbitration process usually begins when a party submits an Arbitration Claim to NFA, or if the two-year time limit for making a claim is approaching, files a Notice of Intent to Arbitrate (Notice). The Notice stops the two-year time limit to give the claimant a little extra time to file a claim.

The claim form requests information for NFA to determine whether the requirements for arbitration are met. Other information includes the amount of damages requested and the basis for the claim (what happened, when it happened and, in the claimant's judgment, what went wrong, who is to blame and why). The claimant will also indicate whether he or she will be represented by counsel (and, if so, who) and whether he or she will bring witnesses to the hearing. In addition, the claimant may provide documents to support the claim. The claimant must pay the required arbitration fees at the time the claim is filed. Finally, if the claimant is a customer, he or she will indicate on the claim form the preferred panel type (i.e., Member or non-Member).

¹ National Futures Association Code of Arbitration and Member Arbitration Rules; NFA Arbitration: Resolving Customer Disputes; NFA Arbitration: Resolving Member Disputes; Legal and Procedural Issues for NFA Arbitrators, and Code of Ethics for Arbitrators in Commercial Disputes (prepared by the American Arbitration Association).

² 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.

■ The Answer

Code Section 6(e); Rules Section 5(e)

After NFA makes sure that the claim is complete and the arbitration fees are paid, NFA sends the claim to the firm or person the claim is against (known as the “respondent”).

Depending on the size of the claim, the respondent has either 20 or 45 days to file an Answer. The respondent must also provide the claimant with a copy of the Answer. Any allegation in the claim that is not denied in the Answer is admitted.

The respondent’s failure to submit an Answer on a timely basis — within the 20 or 45 day period — will not delay the hearing. Arbitrators have broad discretion at the time of the hearing in deciding what, if any, consideration to give to an Answer that was not submitted on a timely basis. In making this decision, arbitrators should consider how a late Answer might affect the claimant’s ability to effectively prepare and present his case.

■ Counterclaim, Cross-Claim, Third-Party Claim

Code Sections 6(f) through 6(j); Rules Sections 5(f) through 5(j)

If a respondent wishes to assert a claim against another party involving the same act or transaction as the original claim, the respondent should include that claim in the Answer and submit the Answer within the required time period.

One type of claim that a respondent may file is a counter-claim against the claimant requesting, for example, payment of a deficit in the customer’s account. The respondent may also file a claim against any other respondent named in the same case, which is known as a cross-claim. A respondent may also bring into the arbitration a person who is not a party to the original action, but who is or may be liable for all or part of the claimant’s claim. This type of claim is called a third-party claim.

For counterclaims and cross-claims, if the aggregate claim amount does not exceed \$25,000, the party the claim is filed against has 10 days to submit a Reply. If the aggregate claim amount exceeds \$25,000, the party the claim is filed against has 35 days to submit a Reply. The respondent in a third-party claim has 20 days to submit an Answer if the aggregate claim amount does not exceed \$25,000, and 45 days to submit an Answer for an aggregate claim amount that exceeds \$25,000. The Reply to a counterclaim or cross-claim and the Answer to a third-party claim should be sent to NFA with a copy to the party asserting the claim. Any allegation that is not denied in the Reply or Answer is admitted.

■ Amended Claims

Code Section 6(k); Rules Section 5(k)

Once a party has filed a claim, certain changes can be made to it by filing an amended claim. NFA will determine whether a filing is an amendment and will accept amended claims (including counter-claims, cross-claims and third-party claims) at any time before the

arbitrators are appointed. Once arbitrators are appointed, the arbitrators decide whether a party can amend its claim. (Also see discussion of amended claims, page 11.) If a claim is amended, the respondents have 20-45 days (depending on claim size) to file an Answer or Reply to the amended claim and the time for discovery is extended. The arbitrators cannot shorten the time to file an Answer or Reply without the consent of the respondent the amended claim is against. The consent of all parties is needed if the arbitrators want to shorten the discovery timetable for an amended claim.

■ Exchanging Documents and Written Information

Code Section 8(a); Rules Section 7(a)

The parties may want to obtain documents or other written information, including interrogatories, from other parties prior to the hearing. If the documents and information requested are material and relevant to the dispute, the parties are required to exchange the information without resorting to subpoenas or an order from the panel. NFA rules impose deadlines for requesting and exchanging documents and information.

- The deadline for automatically exchanging certain documents is not later than 15 days after the last pleading is due.
- The deadline for requesting other documents and written information is not later than 30 days after the last pleading is due.
- The deadline for providing the requested documents and written information (or for submitting a written objection to the request) is not later than 30 days after the deadline for filing the request.

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. However, the parties are not required to produce or exchange any documents or information that are not in their possession or control. Furthermore, the parties may ask for documents on the list that NFA did not identify for automatic exchange if they believe those documents are also relevant to the claim or defense.

A party may ask the arbitrators to extend the discovery deadlines. A party may also ask the panel to find that one or more of the standard documents identified by NFA should not be covered by the automatic exchange rule. While these decisions are the arbitrators’ to make, you should act sparingly in granting these requests.

If any party fails to respond fully and completely to a reasonable request for documents, the requesting party may file — through NFA — a motion asking the panel to compel production of the documents. (See discussion of requests to compel production of documents on page 8.)

Selecting Arbitrators

Your first contact with NFA concerning service as an arbitrator in a particular case will be a phone call from the NFA Arbitrator Coordinator. The Coordinator will identify the parties, their counsel or representatives, and witnesses; explain the general nature of the dispute; and indicate approximately when NFA will hold the hearing or summary proceeding.

You should not be deterred from serving as an arbitrator because you lack an in-depth knowledge of the specific issues involved in the dispute. It is, after all, the parties’ responsibility to provide — in understandable fashion — the detailed or technical information the arbitrators need to reach an informed decision. NFA will not ask you to serve as an arbitrator unless your experience and credentials indicate that you are able to hear and consider the evidence and arrive at a just award.

If you agree to serve, NFA will provide you with the claimant’s Arbitration Claim, the respondent’s Answer and, if the Answer includes a counterclaim, cross-claim or third-party claim, any responses to those claims.

■ Impartiality and Disclosure

Code Sections 4(b) and (c); Rules Sections 3(b) and (c)

Successful arbitration requires that the parties — claimants and respondents — have total confidence that they will receive a fair and impartial hearing. Therefore, upon receiving information about the case from NFA, you must review the names and business affiliations of the parties to the dispute, the persons serving as the parties’ counsel or representatives, and the witnesses.

If you have (or have ever had) any financial, business, professional, family or social relationships with the parties, their representatives, or witnesses, you must disclose this information to NFA.

If the relationship has been substantial or if you have a strong bias in favor of or against one of the parties, their representatives, or witnesses, you should decline to serve as an arbitrator in the case.

If you feel that, notwithstanding the relationship, you can be impartial, you should disclose information about the relationship to NFA. Even if the relationship, contact or acquaintance has been casual, seemingly insignificant or not recent, you should disclose the information to NFA. A challenge to an arbitrator’s impartiality on the basis of undisclosed information can result in delays. Also, as noted earlier, an arbitrator’s partiality is one basis for possible court review of an arbitration award. (Also, see discussion of impartiality on pages 14.)

The fact that you may have met, known or had a business relationship or connection with someone doesn’t necessarily indicate partiality, or even give rise to an appearance of partiality. If you feel the circumstances would in no way jeopardize a fair hearing and equitable award, you should say so when you disclose this information to NFA.

NFA will determine whether the disclosure disqualifies you from serving. We may also inform the parties and their counsel about the information provided in your disclosure. NFA will consider any objections from the parties, but NFA — not the parties to the dispute — will make the final decision as to whether you should remain an arbitrator.

NFA will also ask you to sign an oath stating that you will faithfully and fairly decide the case.

■ Communicating with the Parties

Code Section 4(f); Rules Section 3(f)

To avoid an appearance of impropriety, members of an arbitration panel should refrain from having “ex parte” communications with (and from entering into any relationship with) parties to the dispute or their counsel. If you receive a communication from one of the parties, you should promptly inform the NFA case administrator assigned to the case. If there is information you wish to communicate or obtain from either party, this should likewise be done through the case administrator. Not only is this one of the ways in which NFA staff can assist you, but it also serves to assure that all parties and their counsel are currently and fully informed.

■ Communicating with the other Arbitrators

Code Section 4(f); Rules Section 3(f)

Members of the arbitration panel are permitted — and, in fact, encouraged — to confer with one another prior to the hearing regarding issues, documents, scheduling, procedural matters and the like. For obvious reasons, discussions should not involve the merits of either party’s case or what the ultimate resolution of the dispute might be. Arbitrators may also communicate with each other during the course of the hearing itself.

However, those conversations should preferably be off the record and outside the presence of the parties, their counsel, and witnesses.



■ Independent Investigation

Arbitrators should not conduct any independent investigation into the facts of the dispute or into the merits of either party's arguments. Rather, the arbitrator's role is to make a decision based on the information provided by the parties. When you conduct your own investigation, there is no way for the parties to respond to the information you collected. They also don't have the chance to tell you why you should or shouldn't consider the information or to supply you with other information that might supplement or contradict the information you gathered. Because of this, the courts have held in certain circumstances that an arbitrator's independent investigation may be grounds for invalidating an award.

This does not mean, however, that you cannot seek to familiarize yourself, prior to the hearing, with the general issues that are the subject of the dispute or that may be brought up during the course of the hearing if you feel this would be useful. Nor does the independent investigation rule mean that you cannot ask the parties to provide you with documents or other information that you believe would be helpful or necessary in arriving at an equitable decision. As previously mentioned, however, such requests should be made through NFA.

To further assist you, NFA has prepared a brochure, *Legal and Procedural Issues for NFA Arbitrators*. This brochure is intended as an educational reference. This information is not, however, intended to substitute for parties' own legal research and analysis.

Requests for Pre-Hearing Decisions

Parties to a dispute or their legal counsel frequently ask the arbitration panel to make certain decisions or take certain actions prior to a hearing. Examples of these types of requests are: a request that the panel order the production of documents that have not been provided voluntarily; a request that the panel issue a subpoena; a request to postpone the hearing; or a request for a preliminary hearing. These and other types of pre-hearing requests are initially filed with the NFA case administrator who, in turn, will forward them to the arbitration panel. Unless the panel directs otherwise, pre-hearing requests are generally decided based on the parties' written submissions.

What, if any, action arbitrators should take in response to a given request should, of course, be determined on the basis of the request and the circumstances. The most useful guideline is that all parties to an arbitration proceeding are entitled to a full and fair hearing. The arbitrators should grant reasonable requests where the action requested is (or may be) necessary for the requesting party to prepare and present its case.

Although pre-hearing requests, like those having to do with producing documents and issuing subpoenas, are generally granted when they appear reasonable, a request that is initially denied can still be granted at the time of the hearing. This could be the case if, for instance, a party renews its request and can show at the hearing that certain documents it has been denied are necessary for the effective presentation of its arguments. (Unless, however, the documents were the subject of a late request to compel. See discussion in the next column.)

With a three-person arbitration panel, the arbitrators should confer with each other before making any pre-hearing decision. The decision should be in writing and signed, either separately or together, by the majority, or by the chairperson on behalf of the panel.

In the alternative, one or more of the arbitrators, with the consent of the other panel members, may act on behalf of the panel to decide certain pre-hearing motions from the parties. Again, the decision should be in writing and signed by the arbitrator or arbitrators acting on behalf of the panel.

However, the full panel must consider certain pre-hearing requests. Those requests include motions to postpone the hearing, impose sanctions, dismiss a party, or dismiss all or any portion of a claim.

The following paragraphs briefly describe and discuss some of the pre-hearing requests the parties may ask an arbitration panel to consider.

■ Requests to Compel Production of Documents

Code Section 8(a); Rules Section 7(a)

A party who is unable to obtain voluntary production of documents and written information (including interrogatories) that it considers necessary to present its case may file, through NFA, a request asking the arbitration panel to issue an order compelling the other party to produce the requested materials.

- The deadline to file a request to compel the production of documents is within 10 days of the date on which the documents were due to be provided.
- The deadline to file a written response to the request is within 10 days of the date the request to compel was received.

The party making a request to compel should identify the documents and information that were requested and explain why they are considered relevant and necessary. Furthermore, the requesting party must include a written certification with the request to compel. The certification must state that the requesting party 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. The party should send the request to compel and certification to NFA with a copy to the other parties.

If a party is going to file a request to compel, the party must file the request by the deadline or it may be waiving its right to do so. NFA will not accept a late request unless the party explains in writing why it was late. If the party provides the explanation, NFA will send the request on to you, but you should not grant it unless the party has a good reason for filing it late. This is true even if the documents and information the party is asking for are material and relevant to the dispute.

When deciding requests to compel, the panel should grant the request if the information is essential to the requesting party in preparing its case. However, the panel may decline to compel production of the documents if, for example, it considers the requested information to be repetitive, irrelevant, or an unreasonable burden to produce.

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.

If the panel decides to hold a discovery conference, the chairperson of the panel (or the sole arbitrator in a one-arbitrator case) should contact the NFA case administrator, who will arrange the conference. Discovery conferences, however, are not necessary in every case. The panel should 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 should specify the documents and information to be produced, and set a deadline for complying with the order. It is generally not enough for the panel to simply issue an order encouraging the parties to work the discovery dispute out on their own.



■ Sanctions for Failure to Comply

Code Section 8(d); Rules Section 7(d)

If a party fails to comply with the panel's order compelling production of documents, the panel has broad authority to take sanctions against the non-complying party. The available sanctions are the following:

- The panel can "establish as a fact" the allegation being asserted by the party making the request. For example, if a party claims a particular trade was made on a particular date and requests documents that it would expect to verify this, and if the other party does not produce the documents, the panel can assume the trade was made on that date.
- The panel can prohibit a non-responsive party from offering testimony or evidence concerning the subject matter of the requested documents.
- The panel can strike out portions — or all — of the non-responsive party's pleadings.

- The panel can postpone all further proceedings until the non-responsive party complies with the request for documents.
- The panel can dismiss the action or proceeding, or any part thereof.
- The panel can render an award by default against the non-responsive party.

The panel should tailor the sanction to the violation. For example, failing to provide discovery on a secondary issue should not result in a default judgment against the non-responsive party but may be grounds for deciding the secondary issue against that party.

At the regular hearing or through a preliminary hearing, the panel has considerable discretion to take whatever action it deems appropriate against a non-complying or uncooperative party, up to and including rendering an award by default against a non-responsive party.

■ Dismissal without Prejudice

Code Section 6(n); Rules Section 8

In rare instances, a party may file a claim that may not be a proper subject for NFA arbitration. 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. Or, as another example, there may be a situation where an Arbitration Claim would result in duplicative arbitration proceedings. In these situations, the arbitrators may be asked to determine whether a case is appropriate for NFA arbitration.

The arbitrators are authorized to dismiss any claim without prejudice if the arbitrators determine that the claim is not a proper subject for NFA arbitration. However, this authority should only be used in extraordinary circumstances. It is not intended to be used to dismiss a claim merely because the claim may be frivolous or unfounded. If one of the parties is a customer, the arbitrators must also be aware of NFA's statutory obligation to provide a forum for customers who have a futures-related dispute with an NFA Member.

■ Failure to Prosecute or Defend

Code and Rules Section 9(c)

During the course of the arbitration process, there may be situations where, for example, a respondent files an Answer but then stops participating in the case or a claimant fails to continue to pursue an action but does not withdraw the arbitration claim. In both cases, the result could be a hearing where only one party shows up and presents his case to the arbitrators. In these situations, the "participating" party may go to great expense to appear and bring witnesses to the hearing, while your time as the arbitrator is wasted on a one-sided and often unnecessary hearing.

To avoid these results, NFA's rules allow the arbitrators to find, at the written request of any party or on its own motion, that a party has failed to prosecute or defend the arbitration proceeding and therefore has waived his right to an oral hearing. 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.

■ Preliminary Hearing

Code and Rules Section 9(a)

The panel may schedule a preliminary hearing on its own motion or after receiving a written request from one of the parties. A preliminary hearing may be scheduled with the parties to be physically present, by telephone conference, or by written submissions. The method for holding a preliminary hearing is up to the panel.

Requests for a preliminary hearing should be approved sparingly and only for good reason. A useful test is to determine:

1. would the preliminary hearing potentially eliminate the need for or narrow the scope of a full hearing? and
2. could the preliminary hearing be conducted without having to address or resolve the facts that are the substance of the dispute?

You should generally deny a request for preliminary hearing unless you can answer "yes" to both questions.

Questions concerning jurisdiction may in some — but not all — instances be the basis for scheduling a preliminary hearing. For example, one party may contend that NFA lacks jurisdiction over some non-party who is needed as a witness, and therefore the claim is not a proper subject for NFA arbitration. The opposing party may believe that the witness is unnecessary. This could possibly be resolved through a preliminary hearing. But the hearing should be granted only if the party alleging lack of jurisdiction has made every reasonable effort to make the non-party available (including a request to change the hearing site and issue a subpoena, if applicable). (Also, see discussion of dismissal without prejudice on page 9.)

Or, as another example, one party may request a preliminary hearing on the grounds that the other party has been so uncooperative that the issuance of an award, a dismissal, or a narrowing of the scope of the dispute is warranted. A preliminary hearing could be held to address this issue.

In some other instance — such as a request for a preliminary hearing to determine when the claimant knew or should have known that a claim existed — the question of when the claimant knew or should have known may be so intertwined with the substance of the dispute that a preliminary hearing would be inappropriate.

As mentioned but worth repeating, it is within the panel's discretion whether to grant a preliminary hearing.

■ Postponements (Continuances)

Code and Rules Section 9(e)

Arbitrators have the power to grant postponement requests (continuing the hearing date). The panel should generally accommodate a postponement request if the request is reasonable in light of the circumstances, or if there are compelling reasons for the delay, and if the interests of justice would be served. However, the fact that both parties agree to the continuance is not itself a compelling reason. If there are

questions about the appropriateness of a continuance, NFA staff is available for guidance. The final decision, though, rests with members of the arbitration panel. Tactics that serve no purpose other than to delay the hearing are not sufficient reason for a continuance. Arbitrators may also apply a more restrictive interpretation of the phrase "interests of justice" if the same party makes repeated requests for continuances.

■ Postponement Fee

Code and Rules Section 11(c)

A request to continue the hearing must be accompanied by the payment of a \$250 postponement fee (\$300 in a Member-to-Member case). 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, NFA refunds the fee to the party who paid it.

If the party who paid the fee can demonstrate to the panel that another party actually caused the postponement, the panel should assess the fee against the party causing the postponement. Alternatively, at its discretion, the panel may waive the fee. This should be done only if the party asking for the postponement could not have reasonably foreseen the events that caused the postponement and if the party promptly made the continuance request. NFA does not charge a postponement fee if the postponement is due to an arbitrator being unable to serve or if the hearing extends beyond its expected time.

In addition to the postponement fee, arbitrators may assess reasonable and necessary expenses actually incurred by the parties and their witnesses (including attorneys' fees) as a result of the postponement.

■ Subpoenas and Orders to Non-Parties

Code and Rules Section 9(d)(7)

In instances where non-parties decline to cooperate voluntarily, any party to the arbitration may ask the arbitrators to issue an order for the production of documents or appearance of witnesses. The request must be made through NFA. Furthermore, a party may ask the panel to issue a subpoena if the non-party is not an NFA Member or Associate or otherwise subject to NFA's authority.

The party asking for an order or a subpoena must support its request by explaining why the documents or witnesses are necessary, describing the efforts it has made to achieve voluntary cooperation, and including a copy of any subpoena it is asking the arbitrators to issue. NFA will also give the non-party the opportunity to tell the panel why the arbitrators should not order it to produce the requested documents or attend the hearing. NFA will forward any response from the non-party to the arbitrators for consideration.

NFA can take strong disciplinary action (including loss of membership) against any Member or Associate who fails to comply with an order issued by an arbitration panel.

■ Telephonic Testimony

A party may ask the arbitrators to allow a witness or a party to testify at the hearing by telephone. In deciding whether to grant the request, the arbitrators should consider the nature of the testimony, whether the credibility of the witness is an issue, the hardship to the party if the request is not granted, and the hardship to the other parties if the request is granted.

■ Depositions

Parties may mutually and voluntarily agree to pre-hearing depositions. NFA arbitrators may also order evidence depositions if the party making the request demonstrates that the depositions are needed. For example, an evidence deposition may be appropriate in limited circumstances such as where a witness cannot attend the hearing because he is too ill, or cannot otherwise be required to attend the hearing (e.g., a person who resides in a foreign country). Arbitrators, however, cannot order other types of depositions, including discovery depositions.

■ Motions to Dismiss

Code Section 8(e)(1); Rules Section 7(f)(1)

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.

NFA allows the parties to file a motion 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. (For motions based on lack of jurisdiction, see discussion of preliminary hearings, page 10.) The full panel must consider any motion to dismiss.

■ Motions for Summary Judgment

Code Section 8(e)(1); Rules Section 7(f)(1)

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 full arbitration panel must consider this type of motion since a party or a claim could be dismissed with prejudice if summary judgment is granted.

■ Default Judgment

A claimant may ask the panel to issue a judgment by default if a respondent fails to file an Answer. Since the claimant's information is undisputed, the panel can accept the claimant's version of the facts as true. However, this does not necessarily mean that the respondent acted wrongfully or that the claimant's losses resulted from the respondent's actions. You should still look at the information provided by the claimant to see if he deserves to be compensated.

■ Amended Claims

Code Section 6(k); Rules Section 5(k)

Once NFA appoints an arbitration panel, a party may file a new or different claim (including counterclaims, cross-claims and third-party claims) only with the panel's consent. You should accept an amended claim only if you determine that 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. You may refuse to allow the amendment if you feel it would unreasonably delay the hearing or impair the ability of the respondent to effectively prepare a defense. (See discussion of amended claims, page 6.)

■ Motions for Emergency Relief

Rules Section 7(e)(1)

Section 7(e) of the Member Rules give Members and Associates the ability to obtain emergency relief in arbitration to deal with issues associated with the dispute when those issues need immediate attention. For example, if a Member firm 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. The interim order would remain in effect until NFA serves the final award, unless the arbitrator decides to modify the order.

One arbitrator will decide a request for emergency relief, unless NFA or the arbitrator believes three arbitrators should decide the request. The arbitrator will also have the authority to expedite a hearing on the merits by setting deadlines for filing pleadings, conducting discovery, preparing the hearing plan, and scheduling the hearings that are shorter than the deadlines established in the Arbitration Rules.

The standards for deciding a request for emergency relief are similar to those a court uses in granting preliminary injunctions. The requirements generally involve a four-part analysis where the requesting party must demonstrate:

- a reasonable likelihood of success on the merits, and
- no adequate remedy and irreparable harm if emergency relief is denied.

If the requesting party clears these hurdles, the arbitrator will then consider:

- the irreparable harm the other party will suffer if the relief is granted balanced against the irreparable harm the requesting party will suffer if the request is denied, and
- the public interest (i.e., the effect that granting or denying the request will have on non-parties).

Other Pre-Hearing Matters

Scheduling the Hearing

Code and Rules Section 9(b)

NFA determines the time and place of the hearing, accommodating, to the extent possible, the preferences of all parties and members of the arbitration panel. NFA will give notice of when and where the hearing will be held at least 45 days prior to the hearing date.

The Hearing Plan

Code Section 8(c); Rules Section 7(c)

In any case requiring an oral hearing, NFA will provide the arbitrators with a written hearing plan approximately ten days before the hearing begins. The hearing plan is an important tool that is unique to NFA arbitration. The purpose of the plan is to provide a road map to help the hearing run smoothly and efficiently. The parties and/or their counsel in conjunction with NFA staff prepare the hearing plan. (Parties and their counsel are required to cooperate with NFA staff in preparing the plan.) Arbitrators have both the authority and the responsibility to assure that the parties follow the hearing plan. This means that you may have to occasionally remind the parties, by interrupting their presentations if necessary, to adhere to the plan.

The hearing plan includes the following information:

- the names of the parties to the dispute;
- the nature of the case, including a summary of each claim, Answer and Reply;
- the facts the parties have agreed to, which do not need to be — and should not be allowed to be — argued or proven at the hearing;
- the disputed issues that will be argued at the hearing;
- witnesses who will be present to testify; and
- exhibits that will be presented.

The NFA case administrator will keep the arbitrators informed of the progress of the hearing plan preparation. If you feel that the parties are not meeting their hearing plan requirements, NFA staff can assist the arbitrators in conducting a conference with the parties to complete or modify the plan.

Settlement by the Parties

Code and Rules Sections 10(h) and (i)

Just as lawsuits are sometimes settled out of court, parties to an arbitration proceeding may mutually agree to settle their differences prior to a hearing. And, indeed, they are encouraged to do so. In the event that a case is settled, the parties should promptly notify NFA. NFA will notify the members of the arbitration panel. NFA will also notify you when some but not all parties to the dispute reach a settlement.

It is not an arbitrator's role to serve as a mediator or conciliator. Arbitrators should not become involved in any discussions pertaining to the substance of a settlement between the parties. However, at the request or with the consent of the parties to the settlement, the arbitrators may issue a consent award containing the terms of the settlement.

Mediation

Code and Rules Section 14

To encourage and facilitate settlements, NFA has incorporated mediation into the early stages of the arbitration process. In mediation, the parties voluntarily submit their dispute to a neutral person — the mediator — who works with them to reach a mutually agreeable settlement. If one of the parties doesn't agree to mediate or if the parties are unable to reach a settlement, the case will proceed to a hearing or summary proceeding.

Neither the parties nor the arbitrators may call the mediator as a witness. Furthermore, any statements or offers made during a mediation session are confidential and are not admissible for any purpose in the hearing or summary. However, if the parties disagree on whether they verbally agreed to settle a case, the arbitrators may be asked to determine whether an enforceable settlement was reached. In that situation, you may consider any statements or offers made during mediation that help you determine whether the parties did reach a settlement.



Withdrawal by an Arbitrator

Code Section 4(e); Rules Section 3(e)

You should promptly notify the NFA arbitrator coordinator if you become ineligible or otherwise unable to serve on an arbitration panel. Unless the parties request otherwise, NFA will name a replacement. Although emergencies and unforeseeable events do occur, every reasonable effort should be made to avoid withdrawals that would delay and add to the expense of resolving the dispute.

The Role of the Panel Chairperson

The chairperson is a full member of the panel. The chairperson has an equal voice and vote in all deliberations and decisions that require the full panel's involvement. The chairperson is usually, but not always, the one who acts on behalf of the panel for any matters that do not require the full panel's involvement.

The chairperson is also responsible for conducting the hearing. In addition to swearing in the witnesses, he or she will ensure that the hearing proceeds in an orderly manner and that each party is given a fair opportunity to present its case. NFA will provide the chairperson with a script for opening and closing the hearing.

NFA will also provide the chairperson with a handbook that explains the chairperson's role and responsibilities. (See additional references to the chairperson's responsibilities in the section discussing the hearing, pages 13-16.)

Finally, the chairperson oversees the panel's deliberations, ensures that the panel makes a decision within 30 days after the record has closed, communicates the decision to NFA, and reviews the final award for accuracy and completeness.

The Oath

Code and Rules Section 9(d)(5)

Arbitration proceedings are conducted under oath. The chairperson will swear in parties and witnesses at the start of the hearing.

Pre-Hearing Meeting

Shortly before the hearing, NFA staff and any members of the arbitration panel who wish to do so may meet informally to discuss any last minute procedural matters that remain unanswered.

The Summary Proceeding

As mentioned previously, a single arbitrator will resolve disputes involving claims totaling \$25,000 or less (\$50,000 in a Member case) solely through written submissions. This is known as a summary proceeding and involves no oral hearing.

There are exceptions, though. A party may request an oral hearing if the claim amount exceeds \$5,000 (\$10,000 in a Member case). In addition, you may schedule an oral hearing if you determine that credibility is a central issue in the case, you cannot determine credibility from the written submissions, and the expense of an oral hearing is justified (taking into account the location of the parties and the amount of the claims). You may also want to call for an oral hearing if, after reviewing the parties' written submissions, you can only obtain the information you need to decide the case by questioning the parties in person. Again, you should consider the expense of an oral hearing in reaching this decision.

For claims involving more than \$25,000 (\$50,000 in Member cases), NFA will hold an oral hearing unless all the parties and the panel agree to a summary proceeding. In cases where credibility is involved, a summary proceeding may not be appropriate.

Procedure for a Summary Proceeding

As an arbitrator in a summary proceeding, you will have a 10-day period to consider the parties' written submissions and arrive at a determination. NFA will give the parties at least 45 days notice of the date that the summary proceeding will begin. The parties should provide NFA with whatever documentary evidence they want you to consider at least 15 days before the start of the summary. They are to submit rebuttal evidence to NFA at least five days before the summary starts. As the arbitrator, you may — but are not required to — consider evidence that was not submitted on a timely basis.

To ensure that you carefully consider all the evidence, including rebuttal evidence, you should not make your decision until the end of the 10-day summary review period.

As you review the written submissions, you may determine that additional information is needed from some or all of the parties. In this case, you should make a request through NFA for the party (or parties) to provide the needed information in writing within a reasonable time. This may or may not extend the proceeding beyond the initially scheduled 10 days. Keep in mind, though, that you should not conduct any independent investigation into the facts of the dispute or into the merits of either party's arguments. Instead, you should make your decision based on the information provided by the parties. (See discussion of independent investigation, page 8.)

Finally, an arbitrator in a summary proceeding has the same powers to impose sanctions against uncooperative parties as the arbitrators in an oral hearing. (See discussion of sanctions, page 9.)

The Hearing

The members of the arbitration panel conduct arbitration hearings, period! Not the parties, not their counsel, and not NFA staff. (See NFA's Role at the Hearing, page 14). The arbitrators can and should use the hearing plan to help manage the hearing.

As indicated in the introduction to this guide, the authority vested in arbitrators by courts and legislatures is considerable. It encompasses both hearing procedures and substantive matters: granting or denying motions, approving or overruling objections, and admitting or refusing to admit exhibits and testimony. Because the conduct of an arbitration hearing can be much less formal — and therefore more flexible — than a court of law, arbitrators have wide latitude to consider whatever evidence and hear whatever testimony they believe may be useful in arriving at an equitable resolution of the dispute. A number of issues that may arise during the hearing, and that would require your decision, are briefly discussed in the paragraphs that follow.

■ Opening the Hearing

The chairperson of the arbitration panel (or the arbitrator in the case of a one-person panel) will be provided with a script for opening the hearing. This opening statement enables the chairperson to identify him or herself, state the purpose of the hearing, explain the sequence the hearing will follow, and swear in the parties and their witnesses.

■ Hearing Procedure

A hearing doesn't have to follow any definite format. Arbitrators may exercise their discretion so long as all parties have a fair opportunity to present their cases. However, the common procedure goes as follows:

1. Brief opening statement by claimant (or representative);³
2. Brief opening statement by respondent (or representative);³
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 reheat 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.

■ Impartial Conduct

Arbitrators must maintain impartiality throughout the hearing. This includes the avoidance of any actions or statements that might give even the appearance of partiality. For example, arbitrators should refrain from commenting, either favorably or unfavorably, on either party's arguments, the merits of exhibits, or the testimony of witnesses. Arbitrators should not use an argumentative tone when asking questions. There should be no conversations with a party and/or its representative, either in or out of the hearing room, unless the other party has the opportunity to be present. Parties and their representatives should never be addressed on a first-name basis; the purpose, again, being to prevent any appearance of partiality.

In rare situations, you may realize during the hearing that you have had a relationship with a party, counsel or witness that you didn't recall when NFA asked you to serve as an arbitrator. If that happens, you should immediately inform the NFA staff person present at the hearing, who will make it known to the parties. If there are no objections, the hearing may proceed. If one of the parties objects to your participation, the NFA staff person will determine whether the objection is valid. If the objection is not valid, the hearing will

proceed. If the objection is valid (or you decide to recuse yourself), the parties will have the opportunity to mutually agree to continue the hearing with only two panel members.

If the parties do not agree to go forward without a full panel, NFA will appoint a replacement arbitrator. If that occurs, the newly-formed panel will determine whether all or part of any prior hearing sessions should be repeated. In making this decision, the arbitrators should consider the following factors:

- the length of the prior hearing sessions;
- the expense to the parties if the case is re-heard;
- the degree the case relies on documentary evidence;
- whether credibility of witnesses is a major factor; and
- the wishes of the new arbitrator.

A partial hearing is also an option for the panel to consider.

■ NFA's Role at the Hearing

One or more NFA staff members knowledgeable in arbitration procedures is generally present throughout the hearing to offer guidance and advice as necessary to members of the arbitration panel. On occasion, NFA staff may respond to questions by the parties concerning procedural matters.

Should issues arise or questions occur to you during the course of the hearing, you should "go off the record" for the purpose of asking questions of NFA staff. Or, if you wish, the panel can briefly adjourn the hearing in order to confer with NFA staff outside the hearing room. NFA staff cannot, of course, offer any opinions or respond to any questions concerning the merits of either party's arguments or the resolution of the dispute.

■ Conduct of Parties

Parties to the dispute, their counsel, and their witnesses are expected to participate in the hearing in an orderly and decorous manner. The chairperson of the panel has the responsibility and the authority to assure that appropriate standards of conduct are observed while still preserving the informal atmosphere of the proceeding.

Additionally, many parties in NFA arbitration — customers and Members alike — appear pro se, that is, without an attorney or other representative, and may not be skilled in presenting their claims or defenses. To ensure that you have all the information you need to reach a decision, you may have to ask questions during the hearing to fill in any gaps left by a pro se party. You may also have to be more patient with pro se parties in addressing procedural and legal issues.

■ Witnesses

The claimant and respondents should list in the hearing plan all witnesses they will call, including a brief description of each witness's background and the substance of what each will say.



The panel may reject a document as evidence if, for example, the party offering the document failed to list it on the hearing plan and has no adequate explanation for not including it. The panel may also reject a document if it was requested by the other party during discovery but was not exchanged prior to the hearing.

The panel may also reject a document as evidence if it is irrelevant or repetitive. However, you always have the option of accepting the document as evidence and subsequently giving its contents (and any objections to its introduction) such weight as you deem appropriate during your deliberations.

■ Surprise/Prejudice

To the extent possible, every effort should be made to avoid surprises — unexpected events that could be prejudicial to the other party — during the hearing. For example: the parties have announced they will be unrepresented and one party appears with an attorney. If the unrepresented party objects, the panel must rule on whether the unrepresented party will be prejudiced by proceeding with the hearing or whether it should be postponed to give him time to hire an attorney.

Other examples: the introduction of surprise witnesses or exhibits, or a change in or addition to the claimant's Arbitration Claim. Faced with these or similar circumstances, the panel has a number of alternatives. After listening to objections, it can proceed with the hearing and take the issue into consideration during its deliberations, or it can request that additional information be provided. (See discussion of briefs, page 16.) The panel may decline to hear surprise witnesses or to accept unexpected documents. Or, if absolutely necessary in the interest of a fair and equitable hearing, the panel can adjourn the hearing. (See discussion of adjournments, page 16.) In these circumstances, the panel may wish to briefly recess in order to confer with NFA staff.

■ Party's Representative

Code Section 7(a); Rules Section 6(a)

Because the purpose of a hearing is to resolve a dispute, heated discussions between opposing counsel or other representatives may occur. The panel has the responsibility and authority to assure that these discussions do not "overheat" or become disruptive to the process of an orderly hearing. Attorneys and other representatives are expected to be mindful that it is the arbitrators, not they, who are conducting the hearing. If circumstances require, the panel should not hesitate to remind them of this.

Should reasonable and appropriate reminders fail to achieve the desired effect, the panel has the authority to bar a "contumacious" representative from the hearing (contumacious being defined as "contemptuous of authority or disobedient").

Should this extreme action become necessary, the party represented by the barred representative may ask the panel to postpone the hearing so the party may obtain new counsel. In considering this request, the panel should take into account what responsibility, if any, the party shared in the representative's unacceptable conduct.

³ If the parties have summarized their cases in the hearing plan, these statements should be very short or, at the suggestion of the arbitrators and the option of the parties, may be waived unless the parties wish to include additional information.

■ Adjournments

Code and Rules Section 9(e)

If a party asks the arbitrators to adjourn a hearing in progress, the best guidance for responding is provided by the language in NFA's arbitration rules. Section 9 states: "Extensions of time or postponements of the hearing may be granted by the panel when the interests of justice so require, but a hearing in progress shall not be adjourned or interrupted except in compelling circumstances."

■ Motions for Directed Verdict

Code Section 8(e)(1); Rules Section 7(f)(1)

After the claimant has presented his case, the respondent may ask the panel to render a decision dismissing the claim (or "directing a verdict" in its favor) on the grounds that the claimant did not prove his case. NFA's rules give the arbitrators the authority to grant this type of motion if the panel deems it appropriate.

■ Extended Hearing Sessions

Code and Rules Section 11(a)

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 you believe that additional information is needed in order to make a just decision, or if you would like clarification of legal or technical matters, you may ask the parties to submit briefs on the issue. Similarly, you can request additional documents. These requests may be made before, during, or after the hearing. A word of caution, though. Since disputes in arbitration must be resolved solely on the basis of the information presented, arbitrators should not attempt to independently research factual matters. This could subject the arbitration award to attack. (See discussion of independent investigation, page 8).

In addition, you may agree to accept post-hearing briefs at the request of any party or its counsel. You should not grant this request, however, if it appears that its sole purpose is to delay deliberations or to introduce new issues.

If the arbitrators order or allow the parties to file briefs, the panel should set deadlines for filing them. The panel can also set page limits.

■ Closing the Hearing

A hearing is closed after the witnesses have been heard, documents have been offered and closing statements have been made. The hearing script NFA provides to the chairperson of the panel

contains suggested language for officially closing the hearing. After closing statements are completed, the panel should ask the parties and their counsel to leave the hearing room together. The panel should not announce during the hearing which party prevailed or the amount of an award, if any.

After the Hearing

Members of the arbitration panel generally meet immediately after the hearing to discuss the case and the evidence presented. It may or may not be possible at this time to determine who prevailed and the amount of a monetary award, if any. For example, an immediate determination may not be possible or practical if the issues are particularly complex, if panel members require additional time to consider the evidence, or if the parties will provide additional information in post-hearing briefs.

If no decision is made immediately following the hearing, panel members should arrive at their decision by meeting together or by teleconference.

The panel must notify NFA of its decision within 30 days after the record is closed. The record closes when the hearing is concluded unless the panel has decided to accept additional documents or written briefs from the parties. In this case, the record does not close until NFA receives the documents or briefs or until the deadline set by the panel for their submission has passed, whichever is earlier.

In a complicated case, or if extra time is needed to obtain additional information, the panel may ask the parties to waive the 30-day requirement.

■ The Award

Code and Rules Section 10(a)

In making the award, you should consider the testimony, the credibility of the witnesses, and the documentary evidence. You should then decide whether the respondent's conduct was wrongful and whether the claimant was damaged as a result of that conduct. A majority decision is all that is required.

As discussed on page 3, the award of an arbitration panel does not contain reasons, or any explanation whatsoever, of how or why the panel arrived at its decision. However, the award does contain a summary of the issues that were presented to and decided by the panel. If necessary, the arbitrators should modify the summary to accurately reflect which issues they decided.

The flexibility that applies to arriving at an award does not, however, extend to the preparation and presentation of the award. This must be done in a manner that is careful not to subject the award to attack. The award must be specific and definite in terms of what it orders the parties to do, it must resolve the entire claim (including any counter-claims, cross-claims, third-party claims and jurisdictional issues), and it must not address issues outside the arbitrator's scope of authority.

■ Amount of the Award

Code and Rules Sections 10(b) and 12

The award may grant or deny any of the monetary relief requested, plus interest and filing fees. Awards should take into account both the request of the claimant and any claims made by the respondents. (Note: In Member cases, the panel is not limited to awarding monetary relief only.)

Under certain circumstances, the award may include an assessment of other costs and fees.

- If the panel determines that any party's claim or defense was frivolous or was made in bad faith or that the party engaged in willful acts of bad faith during the arbitration, the panel may assess against that party reasonable expenses of the arbitrators, parties and witnesses, including attorney's fees.
- The panel may assess against the party who caused a postponement (usually but not always the party that requested it) reasonable expenses of the parties and their witnesses, including attorney's fees. (See Postponement Fee, page 10.)
- The panel may award attorney's fees if authorized by a contract between the parties or a statute that was the basis for the claimant's successful cause of action.

■ The Award Form

NFA staff will prepare the award form and send it to the panel members for their signatures. The forms should be delivered to NFA, who will forward the award to the parties.

An award is final when the arbitrators have made their decision. The award is to state the result and should not include reasons for the decision.

■ Requests for Modification

Code and Rules Section 10(c)

Either party may — within 20 days of the date of service by NFA — request that the award be modified to correct a clerical or technical error. The panel should grant the request if:

- 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).
- The arbitrators have awarded upon a matter not submitted to them.
- The award is imperfect in matter of form not affecting the merits of the controversy (e.g., the case is captioned incorrectly).

NFA staff will review any modification request filed by the parties. NFA will not send a modification request to the panel if it asks the arbitrators to reconsider the merits of the case rather than correct a clerical or technical error.

■ Review by a Court

As discussed in the introduction, a party cannot appeal an arbitration award to NFA or to a court for review on its merits. The limited grounds on which a court may agree to review an arbitration award are described on page 5.

■ Enforcement

Code and Rules Section 10(g)

NFA Members and persons associated with Members are required by NFA Rules to fully comply with any award made by an arbitration panel. Failure to comply may result in suspension of membership privileges. However, NFA will not suspend a Member or Associate if the Member or Associate has a pending application to vacate, modify or correct the award and in most situations has posted a bond with NFA equal to 150% of the amount of the award against the Member or Associate.

Arbitration awards are also enforceable in court. Judgment on an award may be entered in any court of competent jurisdiction.

■ Referral to NFA's Compliance Department

An arbitration panel may refer a case or certain issues arising out of a case to NFA's Compliance Department for investigation if it feels the Member or Associate's conduct warrants it. If the panel would like a matter referred, please notify the Case Administrator assigned to the case.

■ Confidentiality

Arbitrators must respect the confidentiality of the arbitration process. The identity of the parties, the nature of the evidence, and the details of the arbitrators' deliberations should be discussed only as required in the performance of your arbitrator duties.

■ Immunity from Liability

Arbitrators are generally immune from liability for their actions in arriving at an arbitration award. The courts recognize that the very nature of arbitration requires an arbitrator to exercise independent judgment. Accordingly, courts provide arbitrators with immunity from legal action by the losing party. In the unlikely event that an arbitrator is sued, NFA should be promptly notified. NFA will provide representation or pay legal expenses.

Conclusion

If you have not previously served as an arbitrator — or, more specifically, as a member of an NFA arbitration panel — we hope that this manual has provided a useful preview of what to expect. If you have served before, it should be a helpful resource.

We believe you will discover that serving as an arbitrator is an interesting, informative, and professionally rewarding experience. A high percentage of those who have served as NFA arbitrators concur with this conclusion. Certainly, all other benefits aside, you will have performed an important and constructive service. The success of any industry requires that its participants are assured of fair and equitable treatment, and arbitration helps to provide that assurance.

By no means will all the issues discussed in this manual arise in any given arbitration proceeding, or perhaps in the course of half a dozen proceedings. On the other hand, a booklet of this length obviously cannot cover or fully treat all of the issues which might arise. If you have any additional questions, please contact NFA's Arbitration Department.

We appreciate your help and welcome the opportunity to provide ours.



Index

Affidavits	15	Impartiality	7, 14
Adjournments	16	Mediation	12
Answer	6	Motions	
Arbitration		(see <i>Requests for Pre-Hearing Decisions</i>)	
mandatory	4	National Futures Association	
panel	4	arbitration program	4
Arbitration Claim	5	pre-hearing meeting	13
Arbitrator		role in the process	3
immunity from liability	17	role at the hearing	14
independent investigation	8	Postponements	10
selecting	7	fee	10
serving as	3	Representative, party's	15
withdrawal by	12	Requests for Pre-Hearing	
Award	16	Decisions	8
amount of	17	amended claims	6, 11
enforcement	17	compel production	
form	17	of documents	8
requests for modification	17	default judgment	11
review by courts	5, 17	depositions	11
Briefs	16	dismissal without prejudice	9
Chairperson, role of	13	failure to prosecute or defend	9
Claims		motions to dismiss	11
amended	5, 11	motions for summary judgment	11
counterclaim	6	postponements	10
cross-claim	6	preliminary hearing	10
third-party	6	sanctions for failure to comply	9
Communicating		subpoenas	10
with the parties	7	telephonic testimony	11
with other arbitrators	7	Settlement	12
Confidentiality	17	Summary Proceeding	13
Continuances (see <i>Postponements</i>)		Witnesses	14
Default judgment	11		
Depositions	11		
Directed Verdict, motions for	16		
Disclosure	7		
(see also <i>Impartiality</i>)			
Exchanging Documents			
and Written Information	6		
requests to compel	8		
Exhibits	15		
surprise/prejudice	15		
Hearing			
closing	16		
conduct of parties	14		
extended sessions	16		
oath	13		
opening	14		
plan	12		
procedure	14		
scheduling	12		

National Futures Association
Arbitration Department

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

800-621-3570

www.nfa.futures.org

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