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Setting Arbitrators' Fees: An International Survey

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Setting Arbitrators' Fees: An International Survey

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ABSTRACT

This Article examines the compensation policies of international arbitrators. Specifically, the Article details the results of a survey of individuals who practice in the area of international arbitration.

Initially, the Article describes the different methods of calculating the fees of the arbitral tribunal, discussing the relative advantages and disadvantages of each method. The study concludes that most arbitrators calculate their fees using a time-based method, except when the arbitral institution requires that their fees be determined under the ad valorem method.

Next, the Article examines arbitrators' policies regarding cancellation and commitment fees. Survey results highlighted confusion about whether arbitrators were prohibited by a jurisdiction's laws or ethical rules. In addition, many commentators debate the propriety of such fees. The survey results reveal that most arbitrators do not charge cancellation or commitment fees. While practitioners in certain jurisdictions more routinely charge these fees,

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charging such fees is not widespread in continental Europe or the United States.

The Article then addresses the implications for U.S. arbitrators who are considering the adoption of cancellation and commitment fees. Although most arbitral institutions do not explicitly permit such fees, institutional guidelines are broad enough to allow for such fees. Furthermore, because arbitrators are not fiduciaries in the same manner as lawyers who are employed by clients, the policy behind the ban on nonrefundable special retainers would not be served by applying it to prohibit arbitrators from charging cancellation or commitment fees. Finally, the Article argues that none of the rules or codes governing the conduct of arbitrators in international arbitrations expressly prohibit the payment of cancellation or commitment fees. As a result, if such fees are reasonable, the Author contends that they should be permissible.

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I. INTRODUCTION

In international commercial arbitrations, the fees of the arbitral tribunal can be considerable.¹ For example, a dispute involving \$100 million and a panel of three arbitrators appointed under the Rules of the International Chamber of Commerce (ICC) could result in arbitrators' fees totaling \$780,000.² Despite the significant amounts involved, little is known about the process for

1. Walter G. Gans, *Saving Time and Money in Cross-Border Commercial Disputes*, in ADR & THE LAW 321, 324 (Am. Arbitration Ass'n, Fordham Int'l L.J. & Fordham Urb. L.J. eds., 1997); Andrew I. Okekeifere, *Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?*, 15 J. INT'L ARB. 81, 87 (1998).

2. W. LAURENCE CRAIG ET AL., INT'L CHAMBER OF COMMERCE, CRAIG, PARK & PAULSSON'S ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES WITH COMMENTARY app. B, at 223 (1998) (Illustrative Calculation of Administrative Expenses and Arbitrator's Fees).

remunerating arbitrators in international disputes. Indeed, there has been relatively scant commentary on the methods for determining the arbitrators' fees and the types of fees that they may charge, such as cancellation or commitment fees. Yet, these fees have been quite controversial and the subject of much debate in the international arbitral community.

In spring 2000, the author undertook a survey of arbitrators around the world to determine how they calculate their fees and what types of fees they charge. In particular, the survey sought to determine: (1) the methods that are used to determine the arbitrators' remuneration, (2) whether the practice of charging cancellation or commitment fees is widespread, and (3) the reasons that arbitrators cite for charging or not charging particular fees. The results were surprising.

What the survey found is that most arbitrators base their fees on the amount of work performed, except when an arbitral institution, such as the ICC, sets their fees based on a percentage of the amount in dispute. In addition, the survey revealed significant variations among jurisdictions on the question of whether arbitrators charge cancellation or commitment fees. For example, it is common practice to charge cancellation or commitment fees in the United Kingdom, while it is unusual to do so in other European countries and in the United States. In general, the survey respondents were often unsure about whether cancellation or commitment fees were prohibited by a jurisdiction's laws or ethical rules; and there was considerable debate among respondents over whether arbitrators should be allowed to charge these fees.

This Article examines arbitrators' fees. Section II describes the methods for determining the remuneration of an arbitral tribunal and the types of fees that arbitrators may charge, with particular emphasis on the practice of charging cancellation and commitment fees. Section III discusses the methodology of the survey and its results. Section IV focuses on its implications in the United States, and predicts that the charging of cancellation and commitment fees will become more prevalent in the United States.

II. OVERVIEW

Under some systems, it is common for individuals to serve as arbitrators on an unpaid basis.³ This practice is rare, however, in

3. THOMAS H. OEHMKE, *OEHMKE COMMERCIAL ARBITRATION* § 45:24 (rev. ed. Supp. 2000).

international commercial arbitrations.⁴ As a general rule, arbitrators in international arbitrations are entitled to be compensated for their work by the parties who appointed them, unless they waive their fees.⁵

The process for determining the fees of the arbitrators depends initially on whether the method of arbitration is institutional or ad hoc. In arbitrations conducted under the auspices of an arbitral institution, the governing body often fixes fees of the tribunal.⁶ By contrast, in ad hoc arbitrations, the parties negotiate directly with the arbitrators regarding their fees.⁷ While the type of arbitration may dictate the process used to set the arbitrators' fees, there are various methods available to calculate the fees. In addition, many arbitrators have recently begun charging cancellation or commitment fees.

4. See FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 625 (Emmanuel Gaillard & John Savage eds., 1999).

5. TIBOR VÁRADAY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 315 (1999); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1068 (2000) (noting that individuals today commonly work full-time as arbitrators in the United States and "charge hourly rates *per party* that exceed their potential hourly rates within their professions").

6. Francis Gurry, the Director of the World Intellectual Property Organization Arbitration Center, explains:

The determination of the fees payable to the arbitrators is one of the principal functions of the administering authority. The administering authority constitutes a buffer between the parties and the arbitrators, thereby avoiding the necessity for the parties to engage directly in negotiations with the arbitrators about fees with the consequent fear, expressed by some, of offending the arbitrators or putting them off-side.

The determination of the arbitrators' fees takes place after consultations between the administering authority and the arbitrators and between the administering authority and the parties. The consultations take place at the time of the appointment of the arbitrators.

Francis Gurry, *Fees & Costs*, 6 WORLD ARB. & MEDIATION REP. 227, 230 (1995).

7. It is generally accepted that the fees of the arbitrators should be agreed upon at the outset of the proceedings and that, to avoid any suggestion of impropriety, discussions concerning amounts to be paid to the arbitrators "should only take place in the presence of all the parties to the dispute, or their representatives." ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 239 (3d ed. 1999). See also *American Arbitration Association Codes: The Code of Ethics for Arbitrators in Commercial Disputes*, Canon VI, in ADR & THE LAW, *supra* note 1, at 557, 565 ("It is preferable that before the arbitrator finally accepts appointment the basis of payment be established and that all parties be informed thereof in writing.").

A. Methods of Calculating the Fees of the Arbitral Tribunal

In general, there are three methods of calculating the fees of arbitrators in international commercial arbitrations: (1) the ad valorem method; (2) the time-based method; and (3) the fixed fee method.

1. Ad Valorem Method

Under the ad valorem method, the fees of the arbitrators are based upon the amount in dispute. Typically, the arbitrators' fees represent a percentage of the total amount in dispute.⁸ This method is commonly used by arbitral institutions to assess both administrative fees and the fees of the arbitrators.⁹ The ad valorem method has the advantage of providing the parties with a reasonable degree of certainty in estimating the arbitrators' remuneration. Its main drawback, however, is that the fees may be fixed without reference to the actual amount of time that the arbitrators work on the case. As a result, the fees awarded may seem too high or too low.¹⁰

8. The amount in dispute typically consists of the sum of the petitioner's claims, the respondent's counterclaims and set-offs. Michael Bühler, *Costs in ICC Arbitration: A Practitioner's View*, 3 AM. REV. INT'L ARB. 116, 123 (1992). In administered arbitrations, if the amount of damages is unliquidated or not stipulated, the amount in dispute is estimated by the arbitral institution. *Id.* at 124.

9. Arbitral institutions that use an ad valorem method for assessing the fees of the arbitral tribunal include: the Arbitration Institute of the Stockholm Chamber of Commerce; the Chamber of Commerce and Industry of Geneva; the Chamber of National and International Arbitration of Milan; the ICC; International Arbitral Centre of the Federal Economic Chamber, Vienna; the World Intellectual Property Organization Arbitration Center; and the Zurich Chamber of Commerce. STOCKHOLM CHAMBER OF COMMERCE, RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (1999), available at http://www.chamber.se/arbitration/english/rules/scc_rules.html (last visited Sept. 25, 2000); CHAMBER OF COMMERCE & INDUS. OF GENEVA (CCIG), ARBITRATION RULES (1992), reprinted in 18 Y.B. COM. ARB. 195 (1993); CHAMBER OF NAT'L & INT'L ARBITRATION OF MILAN, MILAN CHAMBER OF COMMERCE, INTERNATIONAL ARBITRATION RULES, available at <http://www.mi.camcom.it/eng/arbitration.chamber/reging.htm> (last visited Sept. 25, 2000); INT'L CHAMBER OF COMMERCE, ARBITRATION RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE (1998), reprinted in 22 Y.B. COM. ARB. 345 (1997) [hereinafter INT'L CHAMBER OF COMMERCE]; FED. ECON. CHAMBER VIENNA, THE NEW RULES OF ARBITRATION AND CONCILIATION OF THE INTERNATIONAL ARBITRAL CENTRE OF THE FEDERAL ECONOMIC CHAMBER OF VIENNA (1991), reprinted in 18 Y.B. COM. ARB. 206 (1993); WORLD INTELLECTUAL PROP. ORG., WIPO ARBITRATION RULES (1994), reprinted in 20 Y.B. COM. ARB. 340 (1995); INT'L ARBITRATION RULES OF ZURICH CHAMBER OF COMMERCE (1989), reprinted in ARB. MATERIALS, Mar. 1989, at 215.

10. Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*, 4 ICC INT'L CT. ARB. BULL. 8, 11 (1993) ("The Court regularly receives complaints from arbitrators that their fees are too low and do not take sufficient

The ICC is an example of an arbitral institution that utilizes the ad valorem method but also permits some flexibility.¹¹ Under the ICC Rules, the International Court of Arbitration (ICC Court) fixes the arbitrators' fees according to a scale of costs and fees.¹² The scale provides a range of maximum and minimum arbitrators' fees that are calculated based on the amount in dispute. The ICC Court may fix the fees of the tribunal at any figure between the range established by the fee schedule, taking into account "the diligence of the arbitrator[s], the time spent, the rapidity of the proceedings, and the complexity of the dispute"¹³ To illustrate, under the ICC scale, a dispute involving \$1 million will result in each arbitrator receiving between \$11,250 and \$53,500, while a dispute involving \$100 million will result in each arbitrator receiving between \$61,750 and \$260,000.¹⁴ The ICC Rules also provide the ICC Court with the discretion to "fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case."¹⁵ In practice, however, the ICC Court rarely deviates from the scale.¹⁶

account of the number of hours devoted by them to a case. Occasionally . . . [the parties complain that the arbitrators' fees are too high.]; Jacques Werner, *Remuneration of Arbitrators by the International Chamber of Commerce*, J. INT'L ARB., Sept. 1988, at 135, 135 (stating that under the ICC system "in the large number of cases where the sum [involved in the dispute] is small or medium-sized, the arbitrators are underpaid" and noting that in one arbitration the ICC Court "allocated to an arbitrator, who had spent more than 200 hours on a case, fees of US \$10,000").

11. See generally W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 39-45, 353-57 (2d ed. 1990).

12. INT'L CHAMBER OF COMMERCE, *supra* note 9, arts. 30-31.

13. *Id.* app. III, art. 2(2). One commentator notes that when the case proceeds to a final award, the arbitrators' fees typically fall within the middle range established by the ICC fee scale. Bühler, *supra* note 8, at 129-30.

14. CRAIG ET AL., *supra* note 2, app. B at 223 (Illustrative Calculation of Administration Expenses and Arbitrator's Fees). The ICC Rules provide that "[w]here the parties have not agreed upon the number of arbitrators, the [ICC] Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators." INT'L CHAMBER OF COMMERCE, *supra* note 9, art. 8(2). Commentators note that "a rough rule of thumb used by the ICC is to opt in favour of a three-member tribunal if the amount in dispute is above a range of \$1.5-3.0 million." JAN PAULSSON ET AL., *THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR* 67 (2d rev. ed. 1999).

15. INT'L CHAMBER OF COMMERCE, *supra* note 9, art. 31(2).

16. Schwartz, *supra* note 10, at 10.

2. The Time-Based Method

Under the time-based method, the fees of the arbitrators are determined according to the amount of hours or days spent on the arbitration. They may also be determined by a combination method, where a daily rate is charged for hearing days and an hourly rate is charged for work performed outside of the hearings. The time-based method has the advantage of compensating the arbitrators based on the actual amount of work performed. Its main drawback is that it does not provide an incentive for efficiency.¹⁷

The time-based method is typically used in ad hoc arbitrations. It is also the system used by some arbitral institutions, such as the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). Under the LCIA Rules, the LCIA Court determines the costs of the arbitration, including the fees of the arbitrators, in accordance with its Schedule of Fees and Costs.¹⁸ The LCIA's Schedule of Fees and Costs provides:

The Tribunal's fees will be calculated by reference to work done by its members in connection with the arbitration and will be charged at rates appropriate to the particular circumstances of the case, including its complexity and the special qualifications of the arbitrators. The Tribunal shall agree in writing upon fee rates conforming to this Schedule of Fees and Costs prior to its appointment by the LCIA Court. The rates will be advised by the Registrar to the parties at the time of the appointment of the Tribunal, but may be reviewed annually if the duration of the arbitration requires.

The fee rates shall be within the following bands: £800 to £2,000 per normal working day and £100 to £250 per hour for periods less than or in addition to a normal working day.

However, in exceptional cases, the rates may be higher or lower, provided that, in such cases, (a) the fees of the Tribunal shall be fixed by the LCIA Court on the recommendation of the Registrar, following

17. Gurry, *supra* note 6, at 230. One commentator has noted:

The adoption of a rigid *per diem* system would tend to make . . . dynamic arbitrators [who manage to lead parties to defining, presenting, and arguing the cases rapidly] disappear, and bring out the plodders. To work properly, the system must reward efficiency—not create an incentive for arbitrators to make the game last longer. In international arbitration, the danger exists that if only one of three arbitrators decides he wants the proceedings to be prolonged, he will find ready means to do so.

CRAIG ET AL., *supra* note 11, at 40.

18. LONDON COURT OF INT'L ARBITRATION, THE LCIA RULES, art. 28.1 (1998), available at <http://www.lcia-arbitration.com/rulecost/english.html> (last modified May 18, 2000).

consultations with the arbitrator(s), and (b) the fees shall be agreed expressly by all parties.¹⁹

With regard to compensating the arbitrators, the AAA International Rules provide:

Arbitrators shall be compensated based upon their amount of service, taking into account their stated rate of compensation and the size and complexity of the case. The administrator shall arrange an appropriate daily or hourly rate, based on such considerations, with the parties and with each of the arbitrators as soon as practicable after the commencement of the arbitration. If the parties fail to agree on the terms of compensation, the administrator shall establish an appropriate rate and communicate it in writing to the parties.²⁰

In ad hoc arbitrations or where the institution does not fix the arbitrators' fees in accordance with a fee schedule, the arbitrators' rates vary depending on the status of the arbitrators, the importance and complexity of the matter, and the prevailing practice where they reside.²¹ For example, an arbitrator in South Africa indicated that he charges ZAR6000 (approximately \$840) per day for hearings or travel and ZAR600 (approximately \$84) per hour for other work performed in connection with the arbitration.²² By contrast, in the United States, arbitrators in ad hoc arbitrations typically charge between \$1,500 and \$4,000 per normal working day and between \$200 and \$450 per hour for preparatory work.²³ It should also be noted that in some

19. LONDON COURT OF INT'L ARBITRATION, SCHEDULE OF FEES AND COSTS, art. 4(a) (1998), available at <http://www.lcia-arbitration.com/rulecost/english.htm> (last modified May 18, 2000).

20. AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES, art. 32 (effective Sept. 1, 2000), available at <http://www.adr.org/rules/international/AAA175-0900.htm> (last visited Oct. 10, 2000). For a discussion of how arbitrators are compensated under the AAA's domestic arbitration rules, see OEHMKE, *supra* note 3, §§ 39:01-39:05.

The new Commercial Arbitration Scheme Rules of the Chartered Institute of Arbitrators uses a combination of the ad valorem and time-based methods to set the arbitrators' fees. 2 CHARTERED INST. OF ARBITRATORS, COMMERCIAL ARBITRATION SCHEME RULES, art. 9.2 (2000). Under these rules, if the total claim is (1) £100,000 or less, the arbitrators' fees are set at £70 per hour; (2) between £100,001 and £250,000, the arbitrators' fees are set at £95 per hour; and (3) in excess of £250,001, the arbitrators' fees are set at £120 per hour. *Id.*

21. REDFERN & HUNTER, *supra* note 7, at 241.

22. Charges for Fees and Recovery of Expenses of Arbitrator in South Africa (Mar. 2000) (on file with author).

23. REDFERN & HUNTER, *supra* note 7, at 241 n.73; Engagement Letter of Arbitrator in the United States (Apr. 2000) (on file with author) (stating that the arbitrator charges \$2,750 for hearing and travel days and \$325 per hour for other work). See also Margaret Wang, *Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce*, 16 ARB. INT'L 189, 196 n.17 (2000) (stating that "[i]n Australia, arbitrator's fees vary from AU\$100 to AU\$400 per hour").

countries, such as Germany and Austria, arbitrators' rates are usually based on the statutory attorneys' fee-scale.²⁴

3. The Fixed Fee Method

Under the fixed fee method, the compensation due to the arbitrators is set at a certain amount. This amount covers all work performed by the arbitrators in connection with the matter, including hearing days and time spent on travel for hearings. The advantage of this method is that the parties know their cost-exposure at the outset of the arbitration. Its disadvantage is that the remuneration may not necessarily correspond to the amount of time spent in connection with the arbitration.²⁵

The fixed fee method is less commonly used than the other two approaches and, where it has been employed, the cases tend to be of major importance and involve arbitrators of high international standing.²⁶ Perhaps one of the reasons why it has not been regularly employed is that fixing the amount of the arbitrators' fees at the outset tends to be a difficult task. Alan Redfern and Martin Hunter explain:

[I]t is difficult to know how the case will develop; whether or not it will settle before it reaches a hearing; and if it does not settle, how long the hearing itself is likely to take. The best that can be done, in such circumstances, is to make an intelligent assessment of the total number of days likely to be spent by the arbitrators on the case, assuming that it runs its full course, and then to multiply this total by an appropriate daily rate, so as to arrive at a figure for the fixed fee.²⁷

24. Letter from Arbitrator in Germany to John Y. Gotanda (Apr. 2000) (on file with author); Letter from Arbitrator in Austria to John Y. Gotanda (May 2000) (on file with author). See generally Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 321 (1999) (discussing attorney fee arrangements in European civil law countries).

25. With regard to fixed-fees, an arbitrator in Australia explained:

This appears to be attractive to commercial disputants in that they know with a degree of certainty the costs of the arbitral tribunal. This also means that I bear some of the risk in that my time estimates to conduct the matter may be insufficient but it also provides a strong incentive to drive matters on in a cost efficient manner.

In cases where I have agreed to a lump sum fee then that fee is ordinarily payable whether or not the arbitration proceeds to conclusion by award.

Letter from Arbitrator in Australia to John Y. Gotanda (Apr. 2000) (on file with author).

26. See REDFERN & HUNTER, *supra* note 7, at 241. But cf. Letter from Arbitrator in Australia to John Y. Gotanda (Apr. 2000) (on file with author) (stating that the respondent from Australia was "more and more accepting appointments as an arbitrator on a lump sum fee basis").

27. REDFERN & HUNTER, *supra* note 7, at 242.

B. Securing Payment, Cancellation and Commitment Fees

It is customary in both institutional and ad hoc arbitrations for parties to pay, in advance, a sum of money as security for the payment of the fees and expenses of the arbitral tribunal.²⁸ This deposit is to be applied against future fees and costs incurred during the course of proceedings. If the proceedings are prematurely terminated (because, for example, the parties settle their dispute), traditionally the arbitrators refund any unearned monies.²⁹ It also has become common practice for some arbitrators to require the parties to pay a certain amount if they book the arbitrators' time, but do not ultimately use it. These fees are commonly called cancellation or commitment fees.

1. Cancellation Fees

A cancellation fee is an amount that the parties agree to pay if a previously scheduled hearing is canceled or continued. The rationale for imposing such a fee is that the arbitrator must set aside particular days for the hearings, and, in the event of a last-minute cancellation or continuance, the arbitrator will be unable to schedule another income-producing activity in substitution for that period.³⁰

28. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 95 (1994); Schwartz, *supra* note 10, at 17. See also AM. ARBITRATION ASS'N, *supra* note 20, art. 33 (Deposit of Costs); INT'L CHAMBER OF COMMERCE, *supra* note 9, art. 30 (Advance to Cover the Costs of the Arbitration); LONDON COURT OF INT'L ARBITRATION, *supra* note 18, art. 24 (Deposits); UNITED NATIONS, COMMISSION ON INTERNATIONAL TRADE LAW, *ARBITRATION RULES* art. 41, U.N. Doc. A/CN.9/IX/CRP.1, amended by A/CN.9/SR.176, A/CN.9/SR.177 (1976), reprinted in 15 I.L.M. 701 (1976) (Deposit of Costs) [hereinafter UNCITRAL].

29. This is generally true even when the institution uses an ad valorem method to compensate the tribunal. Commentators state that, to avoid a windfall to the arbitrators if the case settles early, the overseeing institution should deviate from its fee schedule. CRAIG ET AL., *supra* note 11, at 40-41; Schwartz, *supra* note 10, at 11 n.17. In fact, a number of survey respondents noted that where the parties settled early, the arbitrators were not adequately compensated for the work performed by the arbitral institution. A fixed fee arrangement also may result in the arbitrators' receiving a windfall if the case settles early. However, commentators write that the arbitrators usually are not entitled to the full amount in such circumstances "[s]ince the fee must be taken to contemplate that the remuneration includes an element attributable to the reaching of a decision and the preparation of an award" MICHAEL J. MUSTILL & STEWART C. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 243 (2d ed. 1989). Interestingly, one respondent opined that fixed fees are rarely used, and he could recall only two cases involving such an arrangement, one of which "turned out quite badly for the tribunal because the case involved much more work than expected." Letter from Arbitrator in England to John Y. Gotanda (Apr. 2000) (on file with author).

30. REDFERN & HUNTER, *supra* note 7, at 239.

The amount of the cancellation fee varies depending on the arbitrators' practice, the number of days reserved for the hearing, and the date when the arbitrator is notified that the hearing is canceled or postponed. The AAA states that if a cancellation fee is charged, it is generally one-half of the arbitrator's daily rate.³¹ Where consecutive days of a hearing are postponed, the AAA encourages arbitrators to charge for the cancellation of only one day.³²

The following are examples of cancellation clauses used by arbitrators in ad hoc arbitrations. The first is from an arbitrator in the United States and the second is from an arbitrator in New Zealand:

Sample Clause 1: Cancellations or continuance of hearings less than thirty (30) days notice but more than seven (7) days prior to their having been scheduled will result in a fee of fifty percent (50%) of the time reserved by me, and if canceled within seven (7) days before such hearing, a fee of seventy-five percent (75%) of the time thus reserved to compensate for such time in which other work was not scheduled.³³

Sample Clause 2: In the event of cancellation or postponement less than 4 weeks before the start of the hearing, [a cancellation fee will result amounting to] 50% of the Tribunal's daily sitting rate multiplied by the number of days reserved and in the event of cancellation or postponement more than 4 weeks but less than 12 weeks before the start of the hearing, [a cancellation fee will result amounting to] 30% of the Tribunal's daily sitting rate multiplied by the number of days reserved.³⁴

2. Commitment Fees

In general, a commitment fee, also known as a booking fee, is an amount paid by the parties to the arbitral tribunal when the hearing dates are set. If the hearing takes place, the fee is credited against the amount owed to the tribunal. If the hearing does not take place, the tribunal keeps the fee.³⁵ Like

31. AM. ARBITRATION ASS'N, FACT SHEET: ARBITRATOR FEES AND EXPENSES IN INTERNATIONAL CASES (1999), available at <http://www.adr.org/rules/guides/990819aa.html> (last visited Sept. 25, 2000).

32. *Id.*

33. Engagement Letter of Arbitrator in the United States to John Y. Gotanda (Apr. 2000) (on file with author).

34. Attachment to Letter from Arbitrator in New Zealand to John Y. Gotanda (May 2000) (on file with author).

35. A commitment fee also may be defined more broadly to mean a fee paid to the tribunal at the outset so that "even if the arbitration does not take place [it] . . . provide[s] some recompense in case [the arbitrator] is unable to obtain other equally remunerative work in the time set aside for the arbitration." *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.*, 1 Lloyd's Rep. 524, 535 (C.A. 1990) (Stuart-Smith, L.J.), *appeal dismissed*, [1992] Q.B. 863. However, it is more commonly used in connection with the booking of hearing days, rather than as a fee simply

cancellation fees, the commitment fee is to compensate the arbitrators for lost employment.³⁶

The Chartered Institute of Arbitrators (Chartered Institute) advises arbitrators that they may wish to "protect themselves against the consequences of hearings or meetings being cancelled at relatively short notice" by charging "a non-returnable booking fee at a proportion of the full daily rate for the time set aside to be paid at the time the hearing is firmly fixed."³⁷ However, the Court of Appeal in England has stated that "if arbitrators wish to insist on the payment of a commitment fee, the proper time to do so is before appointment" and that once they accept appointment, "no term can be implied that entitles . . . [them] to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties."³⁸ In addition, if the agreement between the arbitrators and the parties is silent on the payment of a commitment fee, it would constitute misconduct for the arbitrators to insist on the payment of such fee as a condition to performing their services.³⁹

At least one arbitral institution's rules explicitly provides for the payment of a commitment fee. According to the Terms of the London Maritime Arbitrators Association:

- (a) For a hearing of up to ten days' duration there shall be payable to the tribunal a booking fee of £250 per person or such other sum as the Committee of the Association may from time to time decide, for each day reserved. The

to ensure the arbitrators' availability for the duration of the arbitration. *E.g.*, *K/S Norjarl*, 1 Lloyd's Rep. at 526-33.

36. In *K/S Norjarl*, Lord Justice Leggatt explained why a commitment fee was preferable to paying the arbitrators only for their actual damages in the event that the parties reserved hearing days but settled their dispute before the hearing:

I regard as impracticable . . . [the] suggestion that . . . clients might be prepared to reimburse the arbitrators for such actual loss as could be shown to have been incurred by reason of settlement before the end of the period reserved. Arbitrators cannot reasonably be invited to agree to such an amorphous arrangement. It would in any event provide a fruitful source of discord, which might involve proof of the amount of the arbitrators' actual earnings during the relevant period as well as the reasons why they had not availed themselves of particular opportunities of work.

Id. at 533.

37. CHARTERED INST. OF ARBITRATORS, GUIDELINES FOR ARBITRATORS AS TO HOW TO FORMULATE THEIR TERMS OF REMUNERATION: MATTERS TO BE COVERED § 2 (2000). The Chartered Institute is a professional body with over 9000 members in 84 countries whose object is "to promote and facilitate the determination of disputes by arbitration." Chartered Institute of Arbitrators, *Services*, at <http://www.arbitrators.org/Services/services.htm> (last visited Sept. 25, 2000).

38. *K/S Norjarl*, 1 Lloyd's Rep. at 531.

39. *Id.*

booking fee will be invoiced to the party asking for the hearing date to be fixed or to the parties in equal shares if both parties ask for the hearing date to be fixed as the case may be

- (b) For hearings over ten days duration the booking fee in [paragraph (a)] above shall for each day reserved be increased by 30% in the case of a hearing of up to 15 days and 60% in the case of a hearing up to 20 days and may, at the discretion of the tribunal, be subscribed in non-returnable instalment payments. For hearings in excess of 20 days the booking fee shall be at the rate for a hearing of 20 days plus such additional sum as may be agreed with the parties in the light of the length of the proposed hearing.
- (c) Where the case proceeds to an award, or is settled subsequent to the start of the hearing, appropriate credit will be given for the booking fee in calculating the amount to be paid in order to collect the award, or as the case may be, the amount payable to the tribunal upon settlement of the case.
- (d) Where, at the request of one or both parties, a hearing is adjourned or a hearing date vacated prior to or on or after the start date, then, unless non-returnable instalment or other payments have been agreed, the booking fee will be retained by the tribunal (i) in full if the date is adjourned or vacated less than three months before the start date or on or after that date, (ii) as to 50 per cent if the date is adjourned or vacated three months or more before the start date. . . .
- (e) Where, at the request of one or both of the parties, a hearing is adjourned or a hearing date is vacated and a new hearing date is fixed, a further booking fee will be payable in accordance with paragraphs (a) and (b) above.⁴⁰

While these rules provide an example of an explicit provision for the payment of a commitment fee, charging such fees often remains at the arbitrators' discretion, as seen in the results of the survey discussed below.

III. THE SURVEY

A. *The Scope of the Survey*

In March 2000, questionnaires were sent to 877 individuals in 72 countries who practice in the area of international arbitration, either as attorneys or arbitrators, or both.⁴¹ The questionnaires asked five questions:

40. LONDON MARITIME ARBITRATORS ASS'N, LMAA TERMS: FIRST SCHEDULE §§ B(1)(a)-(e) (1997), available at <http://www.lmaa.org.uk/default.html> (last visited Sept. 25, 2000).

41. The survey participants were drawn from the members of a prominent international arbitral organization.

1. In what country do you practice?
2. When serving as an arbitrator, how do you calculate your fees? (The survey specifically asked whether the respondent, when serving as an arbitrator, calculated his or her fees based on (a) a fixed fee, (b) the amount of worked performed, (3) a percentage of the amount in dispute, or (d) some other method.)
3. Do you charge cancellation or commitment fees?⁴²
4. How do you calculate any refund due to the parties? (The survey specifically asked whether the respondent (a) refunded to the parties all unearned fees, (b) refunded all unearned fees if settlement occurred at least one month before the scheduled arbitration hearing, or (c) refunded the unearned fees to the extent that the time that would have been spent preparing for the arbitration could be used for other matters.)
5. What is your reason for not charging cancellation or commitment fees? (The survey specifically asked whether (a) the practice was prohibited by local law, (b) the practice was prohibited by ethical rules, or (c) there was some other reason for not charging cancellation or commitment fees.)

Because mail surveys often do not lend themselves to extensive probing of the complexities of the subject matter, the questionnaire contained adequate space for the respondents to provide additional comments or other information.

In order to encourage responses, complete anonymity was promised.⁴³ In addition, included with the questionnaires were self-addressed envelopes to return the survey.⁴⁴

B. *The Survey Results*

1. *The Respondents*

A total of 262 individuals completed and returned the questionnaire. This amounts to a thirty percent response rate, which is statistically very good for this type of survey.⁴⁵

42. The survey used the term "non-refundable fees" to mean cancellation or commitment fees. The respondents understood "non-refundable fees" as being equivalent to cancellation or commitment fees.

43. To further encourage responses, respondents were also offered the results of the survey. If the respondents wished to receive a copy of the survey, they were asked to write their current address on the back of the return envelope. Upon receipt, the envelopes were separated from the completed surveys to preserve anonymity. It should be noted that a number of respondents included with the questionnaire signed letters explaining their positions on the issues raised by the survey.

44. A number of respondents faxed or e-mailed their responses.

45. THOMAS W. MANGIONE, *MAIL SURVEYS: IMPROVING THE QUALITY* 62 (1995) ("[I]t would be common to see response rates [for mail surveys] in the 20% range, and it would not be surprising to see them in the 5% range."); Jon A. Krosnick,

Table 1: Regional Breakdown of Respondents

<u>Region</u>	<u>% as Compared to All Respondents</u>
Europe	
Common Law Countries (U.K.)	25%
Civil Law Countries	29%
North America	
Canada	5%
United States	20%
Middle East	3%
Africa	7%
Oceania	5%
Asia	4%
Other	2%
Total	100%

2. Method for Calculating Arbitrators' Fees

Over two-thirds of the respondents indicated that, when serving as an arbitrator, they calculate their fees based on the amount of work performed. The remaining respondents were nearly equally divided over whether they calculate their remuneration based on a fixed fee, based on a percentage of the amount in dispute, or based on some other method.

Table 2: Basis for Calculating Arbitrators' Fees

<u>Method</u>	<u>% as Compared to All Respondents⁴⁶</u>
Based on the Amount of Work Performed	66%
Based on a Fixed Fee	10%
Based on a Percentage of the Amount in Dispute	10%
Other	12%

Survey Research, 50 ANN. REV. PSYCHOL. 537, 540 (1999) (stating that mail surveys of the outcome of state elections in Ohio over a fifteen year period had response rates of approximately twenty percent).

46. Two percent of the respondents did not answer this question.

It should be noted that a significant number of respondents (27%) indicated that they use more than one method to calculate their fees as an arbitrator. Many stated that when serving as an arbitrator in an arbitration administered under the auspices of an institution, they based their fees on the amount in dispute, but when serving as an arbitrator in an ad hoc arbitration, they based their fees on the amount of work performed.

3. Cancellation or Commitment Fees

The survey found that almost one-third of the respondents charge cancellation or commitment fees. The majority of those that do so practice in the United Kingdom.

Table 3: Regional Breakdown of Respondents Charging Cancellation or Commitment Fees

<u>Region</u>	<u>% as Compared to Respondents from Region</u>	<u>% as Compared to All Respondents</u>
Europe		
Common Law Countries	61%	15%
Civil Law Countries	14%	4%
North America		
Canada	39%	2%
United States	18%	3%
Middle East	38%	1%
Africa	26%	2%
Oceania	50%	2%
Asia	27%	1%
Total	-----	30%

Many respondents provided reasons for charging cancellation or commitment fees. One United States arbitrator explained:

Many of my cases require a week or more of hearing time. Often days of travel also are necessary. Once the time is reserved, it eliminates those dates for other work as a neutral. Since I often schedule matters 2 or 3 months in advance, I frequently lose other cases because of the parties' time constraints. I learned yesterday that a scheduled matter . . . will have to be moved. Unfortunately, I lost two cases because I was not available when contacted. That

continuance[, which was not covered by the arbitrator's current cancellation policy,] cost me over U.S. \$10,000.⁴⁷

A respondent located in Ireland similarly explained why, when serving as an arbitrator, it is necessary to charge such fees, "In many cases, one is appointed and nothing happens for a long time during which you would have refused to take other appointments. Then, the parties settle and you will [be left] with nothing for the time wasted."⁴⁸

Interestingly, a number of respondents, mainly located in the United States, indicated that, although they did not currently charge cancellation or commitment fees, they were considering doing so in the future. One respondent based in Switzerland noted that "as arbitrations become more complex, the practice of arbitrators charging [cancellation or commitment fees] is likely to spread."⁴⁹ Another respondent in Switzerland wrote:

[M]ost Swiss lawyers . . . charge for time actually spent, taking into consideration the amounts at stake and the result. It will be I think considered as improper to charge for time booked and not used, unless in exceptional circumstances

Personally, talking from experience (unfortunately experience of wasted time not of payment), I think there is very much to be said in favour of some sort of flat fee to compensate the arbitrator for time reserved and not used. There are an increasing number of arbitrations that are settled at a rather early stage, without too much involvement of the arbitrator, except possibly for a first meeting with counsel, but which had been taken into consideration by the arbitrator when organizing his calendar for the next coming months or years, thus prompting him to refuse other arbitrations in consideration of the existing ones. This was recently the case for me with two or three ICC arbitrations that I had accepted, but which settled after a few months, sometimes a few years of silence, but were still on the list. Once again, some sort of consideration should be given for some sort of compensation.⁵⁰

4. Calculating Any Refunds Due to Parties

Almost half of the respondents indicated that it is their practice to refund all unearned fees when, for example, a case settles. A small number of arbitrators indicated that they refund unearned fees if settlement occurs at least one month before the scheduled arbitration hearing or if the time that would have been

47. Letter from Arbitrator in the United States to John Y. Gotanda (2000) (on file with author).

48. Letter from Arbitrator in Ireland to John Y. Gotanda (2000) (on file with author).

49. Letter from Arbitrator in Switzerland to John Y. Gotanda (2000) (on file with author).

50. Letter from Arbitrator in Switzerland to John Y. Gotanda (2000) (on file with author).

spent preparing for the arbitration can be used on other fee-generating matters.

Table 4: Basis for Calculating Any Refunds Due to Parties

<u>Method</u>	<u>% as Compared to All Respondents⁵¹</u>
All Unearned Fees are Refunded	43%
Unearned Fees are Refunded to the Extent that the Time that Would Have Been Spent Preparing for the Arbitration Can Be Used for Other Matters	16%
All Unearned Fees are Refunded if Settlement Occurs at Least 1 Month Before the Scheduled Hearing	8%

5. Reasons for Not Charging Cancellation or Commitment Fees

As noted, the majority of the arbitrators surveyed do not charge cancellation or commitment fees. The reasons for not doing so vary. A small number of respondents indicated that such practice was prohibited by either local law or ethical rules. Most, however, provided some other rationale. Several respondents indicated that they felt it was morally wrong to charge for work not performed; that is, the charge would result in a windfall to the arbitrators. Others indicated that it was not common practice to charge cancellation or commitment fees in their jurisdictions. A few noted that to charge such fees would unduly complicate their bookkeeping. One respondent based in the United States wrote that the "practice [is] universally disliked by parties and can add considerably to the cost of the arbitration."⁵²

51. One-third of the respondents did not answer this question.

52. Letter from Arbitrator in the United States to John Y. Gotanda (2000) (on file with author).

**Table 5: Basis Cited for Not Charging
Cancellation or Commitment Fees**

<u>Rationale</u>	<u>% as Compared to All Respondents⁵³</u>
Practice Prohibited by Local Law	3%
Practice Prohibited by Ethical Rules	10%
Other Reasons	49%

There seems to be much confusion over whether local laws or ethical rules forbid the practice of charging cancellation or commitment fees. For example, one respondent from Nigeria indicated that the fees were prohibited by local law, while others from that country stated that it was acceptable to charge these fees. In addition, some respondents from Egypt and Saudi Arabia wrote that the ethical rules in their countries prohibited arbitrators from charging cancellation or commitment fees, while some of their colleagues thought it was appropriate to do so. Responses from respondents residing in civil law countries in Europe and from the United States noted similar confusion.

6. Survey Conclusions

Several conclusions can be drawn from the survey. First, the most commonly used method to determine arbitrators' fees is the time-based method, except when the arbitral institution calculates the tribunal's fees based on the ad valorem method. Second, while most arbitrators do not charge cancellation or commitment fees, the number of arbitrators that do charge such fees is substantial (30%). The practice of charging cancellation or commitment fees is most commonly employed in the United Kingdom. It also appears to be used regularly in Canada, the Middle East and Oceania. Currently, cancellation and commitment fees are not widely used in the European continent and the United States. Third, the charging of cancellation or commitment fees is likely to increase. A number of respondents, especially in the United States and the European continent, expressed an inclination to begin charging such fees. In addition, most jurisdictions do not appear to explicitly prohibit by law or ethical rules the charging of such fees. The practice of not charging such fees seems to be based more on personal preference or regional custom. Thus, arbitrators in many

53. Thirty-eight percent of the respondents did not answer this question.

jurisdictions appear to be free to adopt the practice of charging such fees if they so desire.

IV. IMPLICATIONS FOR ARBITRATORS LOCATED IN THE UNITED STATES HEARING TRANSNATIONAL DISPUTES

Arbitrators in the United States are especially likely to adopt the practice of charging cancellation or commitment fees. In addition to the survey's findings, several factors support this proposition. First, the rules or practices of the most widely used arbitral organizations allow for such fees to be charged in international arbitrations. Second, although it is far from clear, it appears that most ethical rules and local laws do not prohibit arbitrators from charging cancellation or commitment fees. Third, the charging of such fees is not likely to have a significant adverse impact on the costs of the arbitration or the ability of the parties to settle their dispute.

A. *Arbitral Rules Facilitate Charging Cancellation and Commitment Fees*

The rules of the most widely used arbitral institutions do not explicitly address whether arbitrators may charge cancellation or commitment fees.⁵⁴ However, the provisions of these rules addressing arbitrator compensation are, in most instances, broad enough to allow for the inclusion of such fees. Moreover, several institutions' guidelines for compensating arbitrators expressly allow for such fees.

The international arbitration rules of the AAA, the largest arbitral body in the United States, simply state that "[a]rbitrators shall be compensated based upon their amount of service, taking into account their stated rate of compensation and the size and complexity of the case."⁵⁵ The issue of cancellation and commitment fees, however, is addressed in the AAA's guide to arbitrators' fees and expenses. It provides:

[A]rbitrators may charge cancellation fees, provided same are indicated on their resume. An arbitrator's cancellation fee is generally one-half of his or her daily rate. Where consecutive days

54. INT'L CHAMBER OF COMMERCE, *supra* note 9, art. 31; AM. ARBITRATION ASS'N, *supra* note 20, art. 32; LONDON COURT OF INT'L ARBITRATION, *supra* note 18, art. 28.

55. AM. ARBITRATION ASS'N, *supra* note 20, art. 32.

of hearing are postponed, arbitrators are encouraged to charge for the cancellation of only one day.⁵⁶

Similarly, the LCIA Rules do not expressly address the payment of cancellation or commitment fees, but these fees are acknowledged in other guidelines. Article 28 of the LCIA Rules, which concerns the fees of the tribunal, states that the arbitrators' fees "shall be determined by the LCIA Court in accordance with the [LCIA] Schedule of Costs."⁵⁷ The LCIA schedule of costs provides that "[t]he Tribunal's fees may also include a charge for time reserved but not used as a result of late postponement or cancellation, provided that the basis for such charge shall be advised in writing to, and approved by, the LCIA Court."⁵⁸

The ad hoc arbitration rules set forth by the United Nations Commission on International Trade Law (UNCITRAL) also do not explicitly provide for or prohibit the payment of cancellation or commitment fees.⁵⁹ With respect to the remuneration of the tribunal, the UNCITRAL Rules provide that the arbitrators' fees "shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators, and any other relevant circumstances of the case."⁶⁰ This language is sufficiently broad to allow for the payment of cancellation or commitment fees.⁶¹

56. AM. ARBITRATION ASS'N, *supra* note 31 (answer to Question 7).

57. LONDON COURT OF INT'L ARBITRATION, *supra* note 18, art. 28.1.

58. LONDON COURT OF INT'L ARBITRATION, *supra* note 19, art. 4(c). Like the AAA and LCIA, the ICC Rules are broad enough to allow for the payment of cancellation or commitment fees. INT'L CHAMBER OF COMMERCE, *supra* note 9, art. 31(2) ("The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale . . . due to the exceptional circumstances of the case."). But unlike the AAA and LCIA, the Internal Rules of the International Court of Arbitration of the ICC do not explicitly address the payment of cancellation or commitment fees. INT'L CHAMBER OF COMMERCE, ARBITRATION COSTS AND FEES, app. III, art. 2(6) (Jan. 1998), available at http://www.iccwbo.org/court/english/arbitration/rules.asp#article_2_2 (last visited Sept. 25, 2000). They appear to be sufficiently comprehensive, however, to allow for the payment of cancellation fees: "[i]f an arbitration terminates before the rendering of a final Award, the Court shall fix the costs of the arbitration at its discretion, taking into account the stage attained by the arbitral proceedings and any other relevant circumstances." *Id.* It should be noted that survey respondents indicated that the ICC generally does not take the cancellation of a hearing into account in setting the arbitrators' fees in the event that the arbitration settles early.

59. UNCITRAL, *supra* note 28, art. 39.

60. *Id.* Article 39 of the UNCITRAL Rules further provides:

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

In short, the most widely used arbitral rules should not be a barrier to arbitrators to charging cancellation or commitment fees. Moreover, the largest arbitral body in the United States, the AAA, expressly allows for the payment of these fees. These factors are likely to facilitate their increased use by arbitrators in the United States.

B. Ethical Rules and Cancellation and Commitment Fees

A number of survey respondents were uncertain whether cancellation or commitment fees were prohibited by applicable ethical rules governing the conduct of lawyers. Some respondents believed that attorney ethics rules applied to lawyers serving as arbitrators, meaning that the provisions in those rules governing attorneys' fees would preclude the charging of cancellation or commitment fees. Others disagreed. This result is not surprising; jurisdictions and commentators are divided over whether attorney ethics rules apply to lawyers serving as arbitrators. Even if such rules do apply, however, it appears that they would not *per se* prohibit lawyers serving as arbitrators from charging cancellation or commitment fees.

1. Applicability of Ethical Rules Governing the Conduct of Lawyers Who Serve as Arbitrators

In the United States, all fifty states and the District of Columbia have adopted some form of regulation for lawyers. Most of these regulations are based on the American Bar

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultations with the appointing authority which may make any comment it deems appropriate to the arbitrators concerning fees.

Id.

61. In cases in which the UNCITRAL Rules are used with the AAA acting as the appointing authority and administrator, presumably the AAA would follow its general practice and allow the arbitrators to charge a cancellation fee. *See supra* text accompanying notes 31-32.

Association (ABA) Model Rules of Professional Conduct.⁶² Federal courts also have adopted rules regulating the conduct of lawyers practicing before those courts. These rules often incorporate the attorney ethics code of the state in which the federal court sits.⁶³

The Model Rules do not explicitly address whether their provisions apply to attorneys serving as arbitrators. There are two provisions, however, that may be relevant to the issue: Model Rules 2.2 and 5.7.⁶⁴

Model Rule 2.2 sets forth guidelines under which a lawyer may act as an intermediary between clients.⁶⁵ While Rule 2.2 is

62. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, 56-58 (1986); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479, 499 (2000). In 1970, the ABA promulgated the Model Code of Professional Responsibility. "Within a few years, every state had adopted the new Code in some form," the most notable exception being California. STEPHEN GILLERS & ROY D. SIMON, *Introduction to REGULATION OF LAWYERS: STATUTES AND STANDARDS* at xiii, xxiv (2000). In 1983, the ABA House of Delegates approved the Model Rules of Professional Conduct. *Id.* To date, "more than 40 states and the District of Columbia [have] adopted all or significant portions of the Model Rules, and several others [are] in the process of doing so." *Id.* The states that have not adopted the Model Rules include, among others, California, New York, Oregon, and Vermont. *Id.* at xxv. It should be noted, however, that New York has amended its attorney ethics code to include many provisions of the Model Rules. *Id.* California similarly has amended its Rules of Professional Conduct. *Id.* Also, effective March 18, 1999, California added Rule 1-710 to its Rules of Professional Conduct, which gives the state bar the authority to discipline California lawyers who violate California's Code of Judicial Ethics while serving as temporary judges, referees, or court-appointed arbitrators. CAL. R. CT. 1-710.

63. WOLFRAM, *supra* note 62, at 58.

64. MODEL RULES OF PROF'L CONDUCT R. 2.2 (1999), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 190 (2000); MODEL RULES OF PROF'L CONDUCT R. 5.7, *reprinted in* STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 326-27 (2000).

65. Model Rule 2.2 states:

(a) A lawyer may act as an intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer

silent on whether it applies to a lawyer acting as an arbitrator, the comment explicitly states that it does not.⁶⁶

The ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics Commission 2000), which was established to undertake a comprehensive study and evaluation of the Model Rules, has recommended that Model Rule 2.2 be deleted in its entirety.⁶⁷ The Commission believes that Model Rule 2.2 is deficient because it implies that a lawyer representing multiple clients as an intermediary is not fully subject to the conflicts of interest rules, particularly Model Rule 1.7.⁶⁸ The Commission has proposed that the ABA revise the rules and comments to address the conflicts of interest that lawyers face

satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

MODEL RULES OF PROF'L CONDUCT R. 2.2, *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 190 (2000).

66. MODEL RULES OF PROF'L CONDUCT R. 2.2 cmt. 2, *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 191 (2000). The comment provides:

The Rule does not apply to a lawyer acting as an arbitrator or mediator between or among parties who are not clients of the lawyers, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

Id. Cf. Mass. Bar Ass'n Op. 85-3 (1985), *reprinted in* AM. BAR ASS'N & BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 53 (1986) (setting forth the ethical guidelines under which a lawyer may act as a mediator between divorcing spouses); Or. State Bar Ethics Op. 488 (1983), *reprinted in* AM. BAR ASS'N & BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 62 (1984) (setting forth the ethical guidelines under which a lawyer may act as a mediator between divorcing spouses). See also Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 334 (1984) (discussing private divorce mediation); Glen Sato, Note, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 519 (1986) (noting other bar association opinions recognizing the mediation role of the lawyer); Alison Smiley, Note, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 223 (1993) (discussing state ethics opinions that interpret Model Rule 2.2).

67. Center for Professional Responsibility, *Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct* (May 24, 2000), available at <http://www.abanet.org/cpr/ethics2k.html> (last visited Sept. 25, 2000). See also Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, SYLLABUS, Winter 2000, at 19, 21 (noting the recommendation that Model Rule 2.2 be deleted).

68. Love, *supra* note 67, at 21.

when undertaking joint representations.⁶⁹ It also has proposed a new rule on lawyers serving as third party neutrals, which requires attorneys serving as neutrals to make clear to the parties the nature of their role as arbitrators or mediators.⁷⁰ It does not, however, attempt to apply all the attorney ethics rules to lawyers serving as third party neutrals.⁷¹ The Commission intends to submit its proposed recommendations to the ABA House of Delegates for adoption in the fall of 2000, and debate in that body is expected to begin in the summer of 2001.⁷²

Model Rule 5.7 addresses the conditions under which a lawyer may provide law-related services.⁷³ It states that an attorney is subject to the Model Rules if the law-related services are provided:

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.⁷⁴

Model Rule 5.7 defines law-related services as "service[s] that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."⁷⁵ The comment to this rule states that "[e]xamples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical or environmental counseling."⁷⁶ Arbitration is not included on the list, but this list appears to be illustrative as

69. *Id.*

70. *Id.* at 21, 23.

71. *Id.* at 23 (noting that the "Commission decided after consultation with various ADR groups not to attempt further to regulate lawyers who serve as third party neutrals . . .").

72. *Id.* at 19.

73. MODEL RULES OF PROF'L CONDUCT R. 5.7, *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 326-27 (2000). Model Rule 5.7 was not part of the original version of the Model Rules. The ABA first adopted Rule 5.7 in 1991 but repealed it a year later. *Id.* at 329-31. The current version of the rule was adopted by the ABA in 1994. *Id.* at 331.

74. MODEL RULES OF PROF'L CONDUCT R. 5.7(a), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 326-27 (2000).

75. MODEL RULES OF PROF'L CONDUCT R. 5.7(b), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 327 (2000).

76. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 8, *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 328-29 (2000).

opposed to exhaustive.⁷⁷ Indeed, North Dakota has determined that alternative dispute resolution (ADR) services are law-related services within the meaning of the rule.⁷⁸ Others that have adopted Model Rule 5.7, such as Indiana, Maine and Michigan, have not yet taken a position on the issue.⁷⁹

Commentators also are divided over whether lawyers serving as arbitrators, or performing other ADR services, are subject to attorney ethics rules. Those in favor of applying the attorney ethics rules to providers of ADR services, such as mediators and arbitrators, argue that lawyers engaged in such activities are providing law-related services within the meaning of Model Rule 5.7.⁸⁰ Others state that the Model Rules are inapplicable to those providing ADR services, noting that "[a] third party neutral is not a 'representative' of a party and thus is seemingly taken out of the lawyer rules"⁸¹ They also argue that applying attorney ethics codes to lawyers who provide ADR services, but not to non-lawyers who provide the same services, would unfairly set a higher standard of conduct on the lawyers.⁸²

77. GILLERS & SIMON, *supra* note 64, at 331-32 (citing Am. Bar Ass'n, Report of the Special House of Delegates Committee on Ancillary Business in Support of the 1994 Version of Rule 5.7, at 4 (1994)). See also Andrew M. Goldner, Note, *Minding Someone Else's Businesses: Pennsylvania Rule of Professional Conduct 5.7 Leads the Way*, 11 GEO. J. LEGAL ETHICS 767, 772 (1998).

78. N. D. RULES OF PROF'L CONDUCT R. 5.7 cmt. (1997) (stating that law-related services include ADR services). Virginia also has adopted Rules of Professional Conduct for lawyers that specifically address lawyers acting as third party neutrals. Virginia's Rules apply to mediators and arbitrators involved in non-binding arbitrations. VA. RULES OF PROF'L CONDUCT R. 2.10-2.11 (1999).

79. IND. RULES OF PROF'L CONDUCT R. 5.7 (1997); ME. CODE OF PROF'L RESPONSIBILITY R. 3.2(h) (2000); MASS. RULES OF PROF'L CONDUCT R. 5.7 (1998). Pennsylvania has adopted a version of Model Rule 5.7, which applies to non-legal services as opposed to law-related services. PA. RULES OF PROF'L CONDUCT R. 5.7 (1996). One commentator has argued that this provision is broader than Model Rule 5.7 and applies to attorneys providing services, such as mediation, in certain circumstances. Goldner, *supra* note 77, at 781.

80. Fiona Furlan et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound By Ethical Codes for Lawyers When Acting as Mediators?* 14 J. AM. ACAD. MATRIMONIAL L. 267, 293-99 (1997); Geoffrey C. Hazard, Jr., *When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, 12 ALTERNATIVES TO HIGH COST LITIG. 147, 147 (1994); Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74, 75 (1996); Joseph H. Paulk, *So You Want to Be a Mediator? Realistic Considerations for Attorneys Considering Becoming Mediators*, 35 TULSA L.J. 325, 327-328 (2000).

81. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 422 (1997); Sandra E. Purnell, Comment, *The Attorney As Mediator—Inherent Conflict Of Interest?*, 32 UCLA L. REV. 986, 1015 (1985).

82. Paulk, *supra* note 80, at 328. A related issue is whether arbitration is considered the practice of law and, if so, whether that would bar non-lawyers from serving as arbitrators. Cf. Kimberlee K. Kovach, *Mediation the Practice of Law? Not!*, NAT'L INST. DISP. RESOL. F., June 1997, at 37, 38. Joshua R. Schwartz, Note,

In view of the above discussion, it remains unsettled whether attorney ethics rules apply to arbitrators.⁸³ This conclusion supports the survey's finding that arbitrators are unsure of whether attorney ethics rules govern their conduct.

2. Analysis of Cancellation and Commitment Fees Under the Attorney Conduct Rules

If lawyers serving as arbitrators are subject to attorney ethics rules, it must be determined whether any of those rules prohibit them from charging cancellation or commitment fees.⁸⁴ A strong argument can be made that the ethics rules should permit these fees.

The relevant provision is Model Rule 1.5. It sets forth the rule that "[a] lawyer's fee shall be reasonable."⁸⁵ It also provides factors to consider in determining the reasonableness of the fee. These factors include, among others:

Laymen Cannot Lawyer, But Is Mediation the Practice of Law?, 20 CARDOZO L. REV. 1715, 1719 (1999). Some commentators, such as Professor Carrie Menkel-Meadow, argue that persons providing ADR services often are engaging in the practice of law. Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1915 (1997). Others disagree, contending that there is no representational attorney-client relationship and no practice of law when individuals serve as third party neutrals. Meyerson, *supra* note 80, at 75.

83. I do not mean to suggest that some specific provisions, such as Model Rule 8.4, would not apply to a lawyer serving as an arbitrator. See MODEL RULES OF PROF'L CONDUCT R. 8.4, reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 423 (2000). Rule 8.4 states that it would constitute professional misconduct for a lawyer to, among other things, engage in conduct involving dishonesty, fraud, deceit or misrepresentation. MODEL RULES OF PROF'L CONDUCT R. 8.4(c), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 423 (2000). It also has been applied to conduct not involving the practice of law. *E.g.*, *People v. Bennett*, 843 P.2d 1385, 1387 (Colo. 1993) (disciplining lawyer for conveying property with intent to hinder, delay or defraud creditors); *People v. Tucker*, 837 P.2d 1225, 1229 (Colo. 1992) (stating that the willful failure to pay court-ordered child support was prejudicial to the administration of justice and adversely reflects on the fitness to practice law).

84. In general, if a lawyer is licensed to practice in a jurisdiction, the governing disciplinary authority of that jurisdiction typically has the authority to discipline the lawyer for violations of its attorney ethics rules even though the acts complained of occurred outside the jurisdiction. MODEL RULES OF PROF'L CONDUCT R. 8.5(a), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 444 (2000). See also MODEL RULES OF PROF'L CONDUCT R. 8.5(b), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 444 (2000) (addressing the choice of law under Rule 8.5(a)).

85. MODEL RULES OF PROF'L CONDUCT R. 1.5, reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 48-49 (2000).

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.⁸⁶

Whether a cancellation or commitment fee is reasonable is likely to vary from case to case.⁸⁷ The purpose of these fees is to compensate the arbitrator for lost employment opportunities in the event that the parties cancel a hearing within a time period that may not permit the arbitrator to find substitute work. Because lost employment opportunities may be considered in setting a lawyer's fee, it appears that cancellation and commitment fees would not be *per se* prohibited by Model Rule 1.5.⁸⁸

86. *Id.* The Model Code's counterpart provision is DR 2-106(A), which states that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(A) (1983), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 486 (2000). In addition, DR 2-106(B) provides that a fee is "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 486 (2000). The factors of a reasonable fee contained in DR-106(B) are virtually identical to those listed in Model Rule 1.5(a). Compare MODEL RULES OF PROF'L CONDUCT R. 1.5(a), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 48-49 (2000) with MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(B) (1983), reprinted in STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 486-87 (2000).

87. Steven Lubet, *The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers*, 73 N.C. L. REV. 271, 274 (1994) (stating "there has always been a case-by-case rule against charging excessive fees").

88. It also should be noted that international commercial arbitrations typically involve sophisticated parties who are represented by experienced counsel and, in such circumstances, courts may be less willing to find an agreement providing for the payment of a cancellation or commitment fee unreasonable. Cf. *Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210, 215 (3d Cir. 1999) (quoting *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985), for the proposition that "courts should be reluctant to disturb . . . fee arrangements freely entered into by knowledgeable and competent parties"); *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979) (upholding a fee arrangement because the parties were sophisticated, the client desired a certain

It may also be argued that cancellation and commitment fees are akin to nonrefundable retainers and that the rules regulating the circumstances under which lawyers may charge nonrefundable retainers should apply to cancellation and commitment fees. To date, there have been no cases in the United States discussing the applicability of the rules on nonrefundable retainers to cancellation or commitment fees in international arbitrations. It appears, however, that the rules on nonrefundable retainers should not apply to arbitrators charging cancellation or commitment fees.

In general, there are two types of attorney retainers: general and special. A general retainer is an agreement between a lawyer and a client under which the client secures for a fee the lawyer's availability to provide legal services during a fixed time period.⁸⁹ A special retainer, which is also known as a specific retainer, is an agreement between a lawyer and a client under which the client pays the lawyer a fee for a particular service.⁹⁰ A subset of the special retainer is the nonrefundable special retainer, which is "a fee paid to a lawyer by a client in advance of services to be rendered and denominated by the lawyer as nonrefundable in the event that the client terminates the relationship, even if the work has not been done."⁹¹ Courts have ruled that general retainers (even though nonrefundable) are valid because the fees are earned when paid.⁹² By contrast, jurisdictions are divided over

caliber of attorney, and the client, after negotiations, had proposed the fee arrangement that it later challenged).

89. *Ryan*, 193 F.3d at 216; *In re Gray's Run Tech., Inc.*, 217 B.R. 48, 52-53 (Bankr. M.D. Pa. 1997); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Apland, 577 N.W.2d 50, 54 (Iowa 1998). See also STUART M. SPEISER, ATTORNEYS' FEES § 1:4 (1973) (General Retainers).

90. *Ryan*, 193 F.3d at 216; *Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., Inc.*, 20 F.Supp.2d 645, 650-51 (S.D.N.Y. 1998); *Wong v. Michael Kennedy P.C.*, 853 F.Supp. 73, 80-81 (E.D.N.Y. 1994). See also SPEISER, *supra* note 89, § 1:9 (Special Retainers).

91. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 19 (1995).

92. CAL. CODE CIV. P. § 1021 note (West 2000) (Federal Law) (stating that earned-on-receipt retainers are permissible); *Ryan*, 193 F.3d at 216-17 (upholding a \$1 million nonrefundable general retainer); *Iowa Supreme Court Bd.*, 577 N.W.2d at 54 (ruling that the attorney is permitted to keep a general retainer regardless of whether the attorney performed any services for the client in contrast to a special retainer, which is not earned when paid); *In re Scimeca*, 962 P.2d 1080, 1091-92 (Kan. 1998) (stating that a general retainer is a fee paid solely to commit the attorney to represent the client and not as a fee to be earned by future services). See also Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 6 (1993) (asserting that general retainers are earned when paid because the payment is made for the attorney's availability).

It should be noted that English courts consider commitment fees earned when paid. *E.g.*, *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.*, 1 Lloyd's Rep. 524, 532 (C.A. 1990) (Leggatt, L.J.). It is unclear whether United States courts would adopt

the validity of nonrefundable special retainers. Some courts have held it unethical for lawyers to charge nonrefundable special retainers because they violate public policy.⁹³ Other courts and state ethics committees have upheld the use of these retainers so long as they are reasonable.⁹⁴

The leading decision prohibiting attorneys from charging nonrefundable special retainers is *In re Cooperman*.⁹⁵ In that case, lawyer Edward Cooperman's fee agreement provided for his clients to pay at the outset a nonrefundable special retainer.⁹⁶ A disciplinary action was instituted against Cooperman after several former clients complained to the local grievance committee that Cooperman had refused to refund any portion of the retainers collected, even though the clients had discharged Cooperman prior to the completion of the matters for which he was hired.⁹⁷ The New York Supreme Court, Appellate Division held that the nonrefundable special retainer agreements were unethical, unconscionable and excessive, and the court suspended Cooperman for two years.⁹⁸ On appeal, the New York Court of Appeals affirmed, ruling that special nonrefundable retainers are

that view. If they do, the charging of commitment fees would be upheld under the general retainer rules, so long as they are reasonable.

93. *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994). See also *In re Nat'l Magazine Publ'g Co.*, 172 B.R. 237, 240 (Bankr. N.D. Ohio 1994); *Wong*, 853 F.Supp. at 79; *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 677 (Colo. 1995); *AFLAC, Inc. v. Williams*, 444 S.E.2d 314, 316 (Ga. 1994); *Brickman & Cunningham*, *supra* note 91, at 18-25; *Brickman & Cunningham*, *supra* note 92, at 23-25.

94. *Degraaf v. Fusco*, 660 A.2d 9, 12 (N.J. Super. Ct. App. Div. 1995); N.J. Supreme Court Advisory Committee on Professional Ethics, *Nonrefundable Retainers*, Op. 644 (1990), 1990 WL 441610; *Utah State Bar, Ethics Advisory Opinion Committee*, Op. 136 (1993), 1993 WL 755253; *Wisconsin Op. E-93-4: Nonrefundable Lawyer Fees*, [1995 Transfer Volume] *Nat'l Rep. Legal Ethics & Prof'l Resp.* (Univ. Pub. Am.).

95. 633 N.E.2d 1069 (N.Y. 1994).

96. *Id.* at 1070. The agreement stated in part:

For the MINIMAL FEE and NON-REFUNDABLE amount of Five Thousand (\$5,000.00) Dollars, I will act as your counsel This is the minimum fee no matter how much or how little work I do in this investigatory stage . . . and will remain the minimum fee and not refundable even if you decide prior to my completion of the investigation that you wish to discontinue the use of my services for any reason whatsoever.

Id.

97. *Id.* The disciplinary proceeding arose out of (1) a \$15,000 nonrefundable retainer to represent an individual in a criminal matter, (2) a \$5,000 nonrefundable retainer to represent an individual in connection with a probate proceeding, and (3) a \$10,000 "minimum fee" to represent an individual in a criminal matter. *Id.*

98. *Id.* at 1071.

per se unethical.⁹⁹ The Court of Appeals stated that clients have an "unqualified right to terminate the attorney-client relationship at any time," with or without cause, and that nonrefundable retainers inappropriately compromise the right to sever the fiduciary relationship because it imposes penalties on the client for discharging the lawyer.¹⁰⁰ The Court of Appeals explained:

Special nonrefundable retainer fee agreements diminish the core of the fiduciary relationship by substantially altering and economically chilling the client's unbridled prerogative to walk away from the lawyer. To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters. If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship—an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge.¹⁰¹

The Court of Appeals thus held that nonrefundable special retainers violate public policy and that it is ethically improper for attorneys to use them.¹⁰²

Unlike the New York Court of Appeals, the New Jersey Superior Court, Appellate Division has stated that nonrefundable retainers are not *per se* unethical.¹⁰³ The court ruled that such retainers are "subject to the overriding precept that any fee arrangement must be reasonable."¹⁰⁴ The court noted, however, that the "unused portion of even a nonrefundable retainer should be returned if the contravening events should render it unconscionable for the attorney to keep it."¹⁰⁵

Cancellation and commitment fees arguably are similar to nonrefundable special retainers in that they are paid to the arbitrators so that they will be available for a specific service;

99. *Id.* at 1071-74.

100. *Id.* at 1072.

101. *Id.* at 1072-73.

102. *Id.* at 1074. The Court of Appeals stated that its ruling did not apply to "[m]inimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services" *Id.*

103. *DeGraaf v. Fusco*, 660 A.2d 9, 12 (N.J. Super Ct. App. Div. 1995). There, plaintiff agreed to pay an attorney a \$15,000 retainer to represent her son in a criminal matter. *Id.* at 10. Plaintiff's son was never charged with any offense and plaintiff subsequently sought the return of all or part of the retainer. *Id.* at 11. When the attorney refused to refund any portion of the retainer, plaintiff instituted a suit to recover the fee. *Id.* The lower court entered judgment on a jury verdict of no cause of action. *Id.* The Superior Court, Appellate Division reversed, holding that the lower court made various errors in instructing the jury, including shifting the burden of proving that the amount charged was unreasonable to the plaintiff. *Id.* at 12.

104. *Id.* at 12.

105. *Id.*

namely the arbitration hearing.¹⁰⁶ Nevertheless, the prohibition on nonrefundable special retainers should not apply to cancellation and commitment fees. The prohibition on nonrefundable special retainers is based on the principle that these retainers violate public policy because they compromise the client's "unqualified right" to terminate the attorney-client relationship.¹⁰⁷ In international arbitrations, however, there is no attorney-client relationship between the arbitrator and the parties who employ them. Indeed, it is "a fundamental principle in mainstream international commercial arbitration that an arbitrator must be and remain impartial and independent."¹⁰⁸ Because arbitrators are not fiduciaries of clients in the same manner as the lawyers who are employed by clients to represent them, the policy behind the rule banning nonrefundable special retainers would not be served by applying it to prohibit arbitrators from charging cancellation or commitment fees.¹⁰⁹

3. Ethics Codes for Arbitrators

Many ethics codes drafted specifically to cover arbitrators offer little guidance on the propriety of cancellation and commitment fees. None of the codes forbid them. At least one

106. See *Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., Inc.*, 20 F.Supp.2d 645, 650 (S.D.N.Y. 1998). Cancellation and commitment fees also could be seen as a hybrid of the general and special retainer. Although such fees are for a specific service, i.e. the arbitration hearing, cancellation and commitment fees are paid for the arbitrator to be available generally on the hearing dates. Some courts and commentators have stated that hybrid retainers are governed by the special retainer rules. *Id.* at 653-54; *Brickman & Cunningham*, *supra* note 91, at 23.

107. *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994). See also *Brickman & Cunningham*, *supra* note 91, at 13.

108. *REDFERN & HUNTER*, *supra* note 7, at 210.

109. *Cf.* *Lubet*, *supra* note 87, at 288-90 (claiming that the nonrefundable retainer rule should not apply to ethics experts because (1) there is no fiduciary relationship between the expert and the parties who hire them; (2) the experts are unbiased; and (3) there is no possibility of overreaching because the client, who has separate independent counsel, does not rely on the arbitrator for legal advice).

It also might be argued that cancellation or commitment fees may in theory adversely impact the parties' ability to settle the dispute and, thus, they should be prohibited from a public policy standpoint much like the prohibition against nonrefundable special retainers. However, as explained more fully in Part IV.E, *infra*, cancellation and commitment fees are in reality likely to have little effect on the parties' ability to settle the dispute. In addition, even when the parties reach a settlement and thus cancel the hearing, the arbitrators' duties may not automatically be terminated. "In many cases . . . the parties will find it desirable or convenient for the terms of the settlement to be embodied in an award." *REDFERN & HUNTER*, *supra* note 7, at 384.

prominent code expressly permits cancellation fees and one set of guidelines indirectly permits them.

In the United States, there are very few state ethics codes for arbitrators.¹¹⁰ Furthermore, those that have been adopted typically apply to court-appointed arbitrators.¹¹¹ A number of private organizations, such as the American Bar Association (ABA) and the International Bar Association (IBA), have drafted codes of ethics for use in private arbitrations or as model codes that may be adopted by states. These codes either allow for the payment of cancellation or commitment fees or are otherwise silent on the payment of these fees.

In 1977, a joint committee of the ABA and the AAA prepared a Code of Ethics for Arbitrators in Commercial Disputes.¹¹² This code applies to all AAA arbitrators involved in commercial disputes and where "disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law."¹¹³ It was revised in 1999, by a special committee consisting of members from both organizations and CPR Institute for Dispute Resolution. The 1999 ABA Code of Ethics has not yet been approved by the ABA House of Delegates or the Board of Governors of the ABA.¹¹⁴ It has been adopted, however, by the AAA.

The 1977 Code of Ethics did not address the payment of cancellation or commitment fees. The provision on arbitrators' remuneration stated, among other things, that arbitrators should reach an agreement with the parties on fees prior to accepting

110. *E.g.*, FLA. R. CT. §§ 11.010-11.120 (West Supp. 2000); S.C. FAMILY CT. R. Canon I (Law. Co-op. 1998); N.C. R. CT., Canons of Ethics for Arbitrators (West 2000).

111. FLA. R. CT. §§ 11.010-11.120; S.C. FAMILY CT. R. Canon I. *See also* CAL. CODE JUD. ETHICS Canon 6D (West 2000) (stating that the Code applies to anyone who is a court-appointed arbitrator); OR. UNIFORM TRIAL CT. R. 13.090(3) (West 2000) ("Arbitrators will conduct themselves in the manner prescribed by the Code of Judicial Conduct.").

112. AM. ARBITRATION ASS'N & AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977), *reprinted in* THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION app. A-3 (rev. ed. Supp. 2000) [hereinafter 1977 CODE OF ETHICS].

113. *Id.* pmb1., *reprinted in* THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION app. A-3, at 1 (rev. ed. Supp. 2000). It should be noted that the AAA has promulgated a separate code for labor-management disputes. AM. ARBITRATION ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES (1985), *available at* <http://csep.iit.edu/codes/coe/aarba-b.htm> (last visited Sept. 25, 2000).

114. AM. ARBITRATION ASS'N & AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (Rev. 1999), *available at* <http://www.abanet.org/ftp/pub/dispute/arbdoc.txt> (last visited Sept. 25, 2000) [hereinafter 1999 CODE OF ETHICS].

appointment.¹¹⁵ This provision was revised in 1999 to specifically indicate that cancellation fees may be charged. The 1999 Code of Ethics states in pertinent part that "[i]t is preferable that, before the arbitrator finally accepts appointment, the terms and conditions of payment, including cancellation fees and compensation for study and preparation time, be established and that all parties be informed thereof in writing."¹¹⁶

115. 1977 CODE OF ETHICS, Canon VI(D), *reprinted in* THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION app. A-3 at 7-8 (rev. ed. Supp. 2000). Cannon VI(D) states:

In many types of arbitration it is customary practice for the arbitrators to serve without pay. However, in some types of cases it is customary for arbitrators to receive compensation for their services and reimbursement for their expenses. In cases in which any such payments are to be made, all persons who are requested to serve, or who are serving as arbitrators, should be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons should scrupulously avoid bargaining with parties over the amount of payments or engaging in any communications concerning payments which would create an appearance of coercion or other impropriety. In the absence of governing provisions in the agreement of the parties or in rules agreed to by the parties or in applicable law, certain practices, relating to payments[,] are generally recognized as being preferable in order to preserve the integrity and fairness of the arbitration process. These practices include the following:

1. It is preferable that before the arbitrator finally accepts appointment the basis of payment be established and that all parties be informed thereof in writing.
2. In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, the payments should be arranged by the institution to avoid the necessity for communication by the arbitrators directly with the parties concerning the subject.
3. In cases where no institution is available to assist in making arrangement for payments, it is preferable that any discussions with arbitrators concerning payments should take place in the presence of all parties.

Id.

116. 1999 CODE OF ETHICS, *supra* note 114, Canon VII(1). Canon VII provides in its entirety:

VII. AN ARBITRATOR'S ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES SHOULD BE FAIR AND CLEARLY DISCLOSED TO ALL PARTIES.

In some types of arbitration it is customary practice for the arbitrators to serve without pay. In other cases, however, arbitrators receive compensation for their services and reimbursement for their expenses. In making arrangements for such payments all persons who are requested to serve or who are serving as arbitrators should be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons should avoid any communications concerning the amount of or matters pertaining to such payments which

The Chartered Institute has promulgated a Code of Ethical Conduct (Institute's Ethical Code) and Guidelines of Good Practice for Arbitrators (Institute's Good Practice Guidelines).¹¹⁷ The Institute's Ethical Code sets forth ethical principles to which their members are required to adhere when conducting arbitrations. It does not explicitly address the charging of cancellation or commitment fees. With respect to the arbitrators' remuneration, the Institute's Ethical Code provides that the arbitrators' fees "must be reasonable taking into account all the circumstances of the case" and the basis of such fees must be disclosed to the parties.¹¹⁸ By contrast, the Institute's Good Practice Guidelines provides advice for arbitrators on being impartial, independent, competent, diligent and discreet. Unlike the Institute's Ethical Code, the Good Practice Guidelines explicitly addresses the payment of cancellation fees. It provides:

11.1 Cancellation charges are intended to compensate the arbitrator for any loss likely to be suffered as result of time set aside for a hearing not being required and for the inconvenience caused by cancellations. In fixing the amount of such charges the arbitrator should make full allowance for the possibility of mitigating his loss.

would create an appearance of coercion or other impropriety. In the absence of governing provisions in the agreement of the parties or in applicable rules or law, certain practices relating to payments are generally recognized as being preferable in order to preserve the integrity and fairness of the arbitration process. These practices include the following.

1. It is preferable that, before the arbitrator finally accepts appointment, the terms and conditions of payment, including cancellation fees and compensation for study and preparation time, be established and that all parties be informed thereof in writing.
2. In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, the payments should be arranged by the institution to avoid the necessity for communication by the arbitrators directly with the parties concerning the subject.
3. In cases where no institution has been engaged by the parties to administer the arbitration, it is preferable that any communication with arbitrators concerning payments take place in writing or in the presence of all parties.
4. Absent extraordinary circumstances, the arbitrator should not ask that his or her rate of compensation be increased during the pendency of the arbitration.

1999 CODE OF ETHICS, *supra* note 114, Canon VII.

117. CHARTERED INST. OF ARBITRATORS, CODE OF ETHICAL CONDUCT FOR ARBITRATORS (1999).

118. CHARTERED INST. OF ARBITRATORS, CODE OF ETHICAL CONDUCT FOR ARBITRATORS R.5 (1999).

11.2 Provision as to cancellation charges should, if possible, be agreed with the parties no later than the acceptance of the appointment.¹¹⁹

The IBA also has promulgated Ethics for International Arbitrators (IBA Ethics Rules).¹²⁰ The IBA Ethics Rules are not binding on arbitrators or on the parties to an arbitration unless they are adopted by agreement.¹²¹ With respect to the fees of the tribunal, the IBA Ethics Rules is silent on the payment of cancellation or commitment fees. It simply states that arbitrators shall not make any unilateral arrangements for fees and expenses.¹²²

One organization, the Commission on Ethics and Standards in ADR, has issued a Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral, which is designed to be adopted into the Model Rules of Professional Conduct.¹²³ The proposed rule would apply to a lawyer who acts in a neutral

119. CHARTERED INST. OF ARBITRATORS, GUIDELINES OF GOOD PRACTICE FOR ARBITRATORS, paras. 11.1-11.2 (1999). The Chamber of National and International Arbitration of Milan also has promulgated a set of ethics for arbitrators. CHAMBER OF NAT'L & INT'L ARBITRATION OF MILAN, CODE OF ETHICS FOR ARBITRATORS, available at <http://www.camera-arbitrale.com/eng/etic.htm> (last visited Sept. 25, 2000). With respect to the fees of the tribunal, the Milan Code of Ethics for Arbitrators states that "[t]he arbitrator is entitled to reimbursement of expenses and a fee as exclusively determined by the Chamber of Arbitration according to its Schedule of Fees, which is deemed to be approved by the arbitrator when accepting his mandate." *Id.* para. 11.

120. INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS (1987), reprinted in ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 638 (3d ed. 1999).

121. INT'L BAR ASS'N, ETHICS FOR INTERNATIONAL ARBITRATORS para. L-01, reprinted in ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 638 (3d ed. 1999). If parties wish to adopt its Ethics Rules, the IBA recommends the following clause be added to the arbitration clause or arbitration agreement: "The parties agree that the rules of Ethics for International Arbitrators established by the International Bar Association, in force at the date of the commencement of any arbitration under this clause, shall be applicable to the arbitrators appointed in respect of such arbitration." *Id.*

122. *Id.* para. L-08, reprinted in ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 640 (3d ed. 1999). It should be noted that the IBA Rules also require the arbitrators to "do their best to conduct the arbitration in such a manner that costs do not rise to an unreasonable proportion of the interests at stake." *Id.* para. L-09, reprinted in ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 640 (3d ed. 1999). As more fully explained in Part IV.E, *infra*, the charging of cancellation or commitment fees probably would not unreasonably increase the costs of the arbitration.

123. CPR-GEORGETOWN COMM'N ON ETHICS & STANDARDS IN ADR, PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT FOR THE LAWYER AS THIRD PARTY NEUTRAL (Draft for Comment, Apr. 1999), available at <http://www.cpradr.org/cpr-george.html> (last visited Sept. 25, 2000).

role, such as a mediator or arbitrator.¹²⁴ Although it contains a section discussing the fees of the third party neutral, it does not explicitly address the payment of cancellation or commitment fees. It requires, *inter alia*, that the basis, rate, and allocation of the third party neutral's fees be set forth in writing to all parties, unless he or she is serving in a no-fee or pro bono basis.¹²⁵

In short, none of the rules or codes governing the conduct of arbitrators in international arbitrations expressly prohibit the payment of cancellation or commitment fees. In addition, a few of these arbitral ethics codes, including the code of the most widely used arbitral body in the United States, expressly or implicitly allow for the payment of cancellation fees. Just as importantly, the codes and guidelines call for reasonable fee arrangements. Thus, as long as cancellation and commitment fees are part of a fairly negotiated agreement, they should be permissible.

C. *Applicability of Rules Concerning Liquidated Damages and Penalties to Cancellation and Commitment Fees*

Survey respondents were also uncertain whether cancellation or commitment fees were prohibited by local laws, the most relevant of which are laws regulating the payment of liquidated damages and penalties. To date, there are no statutes or cases in the United States directly addressing whether cancellation or commitment fees are permitted or prohibited under such laws. While the validity of particular agreements to pay cancellation or commitment fees under laws regulating liquidated damages and penalties would have to be determined on a case-by-case basis, it

124. *Id.* pmbl., available at <http://www.cpradr.org/cpr-george.html>.

125. *Id.* R. 4.5.5, available at <http://www.cpradr.org/cpr-george.html>. The rule provides:

(a) Before or within a reasonable time after being retained as a third party neutral, a lawyer should communicate to the parties, in writing, the basis or rate and allocation of the fee for service, unless the third party neutral is serving in a no-fee or pro bono capacity.

(b) A third party neutral who withdraws from a case should return any unearned fee to the parties.

(c) A third party neutral who charges a fee contingent on the settlement or other specific resolution of the matter should explain to the parties that such an arrangement gives the third party neutral a direct financial interest in settlement that may conflict with the parties' possible interest in terminating the proceedings without reaching settlement. The third party neutral should consider whether such a fee arrangement creates an appearance or actuality of partiality, inconsistent with the requirements of Rule 4.5.3.

Id.

appears that, as a general proposition, these fees would not be void *per se*.¹²⁶

In the United States, a contract clause stipulating the amount of damages to be paid in the event of a breach may be considered either as a liquidated damages clause or a penalty clause.¹²⁷ The distinction between the two is crucial. Courts typically enforce liquidated damages clauses on the grounds that they provide certainty as to the amount of recoverable damages and they save parties time and money by eliminating the need for litigation as a result of a breach of contract.¹²⁸ By contrast, courts have held penalty clauses invalid because they have an "in terrorem effect"; that is, they function to coerce a party into performing and punish that party for failing to perform.¹²⁹ The purpose of a penalty clause also is contrary to the compensation principle behind the awarding of contractual remedies because the stipulated sum exceeds the amount of damages that a court would have awarded to the nonbreaching party. As a result, a penalty clause places the non-breaching party in a far better position than it would have enjoyed had the contract been performed.¹³⁰

There exists no uniform approach to distinguish a liquidated damages clause from a penalty clause.¹³¹ To determine whether an amount specified in an agreement is a valid liquidated damages clause or an invalid penalty clause, jurisdictions

126. It is arguable that a commitment fee is earned when paid and thus the rules concerning liquidated damages and penalties would be inapplicable to such a fee. *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.*, 1 Lloyd's Rep. 524, 532 (Leggatt, L.J.). However, a commitment fee also may be construed as a deposit that one party must forfeit in the event of a breach and to which American courts would apply a liquidated damages analysis in evaluating its validity. Cf. 3 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 12.9(4) (2d ed. 1993).

127. Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 554-55 (1977).

128. *Leeber v. Deltona Corp.*, 546 A.2d 452, 455 (Me. 1988); DOBBS, *supra* note 126, §§ 12.9(1), 12.9(3). For a detailed discussion of liquidated damages, which is beyond the scope of this article, see 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 1054-74 (1964); DOBBS, *supra* note 126, §§ 12.9(1)-12.9(5); 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 781A (3d ed. 1961).

129. CORBIN, *supra* note 128, § 1058, at 340; Scott M. Tyler, Note, *No (Easy) Way Out: "Liquidating" Stipulated Damages for Contractor Delay in Public Construction Contracts*, 44 DUKE L.J. 357, 373 (1994).

130. Goetz & Scott, *supra* note 127, at 560-61. If the stipulated sum is deemed a penalty, the nonbreaching party may still recover his or her actual damages. *Mellor v. Budget Advisors, Inc.*, 415 F.2d 1218, 1222 (7th Cir. 1969); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 314 (N.Y. 1972); *City of Kinston v. Suddreth*, 146 S.E.2d 660, 662-63 (N.C. 1966).

131. Kenneth W. Clarkson et al., *Liquidated Damages v. Penalties: Sense or Nonsense*, WIS. L. REV. 351, 352-53 (1978).

typically have considered one or more of the following factors: (1) the intention of the parties; (2) the difficulty of ascertaining damages; and (3) the reasonableness of the stipulated sum.¹³²

1. Parties' Intent

A few courts have held that whether a clause calling for the payment of a fixed sum in the event of a breach is a liquidated damages clause or a penalty clause depends on the intent of the parties.¹³³ Where the purpose of the clause is to fix the amount to be paid in lieu of performance, it is more likely to be a liquidated damages provision. By contrast, where the purpose of the clause is to secure performance, it is more likely to be a penalty.¹³⁴ The intent of the parties is typically determined from the surrounding circumstances and whether the parties described the stipulated sum in question as "liquidated damages" or a "penalty."¹³⁵ It should be noted, however, that the intent of the parties is rarely the overriding factor today in determining whether a provision is a valid liquidated damages clause or an invalid penalty clause.¹³⁶

2. Difficulty in Ascertaining Damages

Some courts will uphold a provision as a liquidated damages clause only if the damages resulting are uncertain or difficult to ascertain.¹³⁷ Courts that employ this factor divide over the time

132. *E.g.*, *Honey Dew Assocs., Inc. v. M & K Food Corp.*, 81 F.Supp.2d 352, 357 (D. R.I. 2000); *Mechanical Air Eng'g Co. v. Totem Constr. Co.*, 801 P.2d 426, 429 (Ariz. Ct. App. 1989); *Kelly v. Marx*, 705 N.E.2d 1114, 1116 (Mass. 1999); *Baker v. International Record Syndicate, Inc.*, 812 S.W.2d 53, 55 (Tex. App. 1991).

133. *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 120 (1907); *Safeco Credit v. United States*, 44 Fed. Cl. 406, 413 (1999); *In re Graham Square, Inc.*, 126 F.3d 823, 831 (6th Cir. 1997); *Kirkland Distrib. Co. v. United States*, 276 F.2d 138, 144 (4th Cir. 1960); *Rohlin Constr. Co. v. City of Hinton*, 476 N.W.2d 78, 81 (Iowa 1991). *See also* William Kenneth Dix, Note, *The Use and Abuse of Liquidated Damages in Federal Defense Contracts: An Analysis*, 8 OKLA. CITY U. L. REV. 251, 255 (1983); 22 AM. JUR. 2D *Damages* §§ 694-97 (1988); Annotation, *Contractual Provision for Per Diem Payments for Delay in Performance as One for Liquidated Damages or Penalty*, 12 A.L.R. 4th 891, 900 (1982).

134. *Gitlin v. Schneider*, 247 N.Y.S.2d 779, 788 (N.Y. Sup. Ct. 1964); *Abramson v. Rashti*, 373 S.W.2d 699, 700 (Tex. Civ. App. 1963); DOBBS, *supra* note 126, § 12.9(2).

135. CORBIN, *supra* note 128, § 1058, at 339.

136. Comment, *Liquidated Damages and Penalties Under the Uniform Commercial Code and the Common Law: An Economic Analysis of Contract Damages*, 72 NW. U. L. REV. 1055, 1061-1063 (1978) (citing cases).

137. *Bruce Builders, Inc. v. Goodwin*, 317 So.2d 868, 869-70 (Fla. Dist. Ct. App. 1975); *Pacheco v. Scoblionko*, 532 A.2d 1036, 1038 (Me. 1987); *Dairy Farm Leasing Co. v. Hartley*, 395 A.2d 1135, 1137 (Me. 1978); *Walter Implement, Inc. v. Focht*, 730 P.2d 1340, 1343 (Wash. 1987). *See also* CAL. CIV. CODE § 1671(d)

when the damages must be difficult to estimate. Some courts have ruled that the stipulated damages must be difficult to estimate at the time that the contract was formed.¹³⁸ Other courts have held that the stipulated damages must be difficult to estimate at the time of trial.¹³⁹

3. Reasonableness of Stipulated Sum

The most important criterion used by courts to distinguish a liquidated damages clause from a penalty clause is that a provision fixing the amount of damages in the event of nonperformance will be considered a valid liquidated damages clause if the stipulated sum is reasonably related to the actual loss that the party would sustain in the event of a breach.¹⁴⁰ There are two points in time at which courts examine the reasonableness of the stipulated sum: (1) at the time of contracting (*ex ante*); or (2) at the time of breach (*ex post*).¹⁴¹ Most jurisdictions have adopted the *ex ante* view, requiring that the stipulated amount be reasonable in view of the damages

(West 1985) (permitting liquidated damages clauses in certain consumer transactions when "it would be impracticable or extremely difficult to fix the actual damage").

138. *Colonial at Lynnfield, Inc. v. Sloan*, 870 F.2d 761, 765 (1st Cir. 1989); *Hanlon Drydock & Shipbuilding Co. v. G.W. McNear, Inc.*, 70 Cal. App. 204, 213 (Cal. Dist. Ct. App. 1924); *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1369 (Utah 1993); CORBIN, *supra* note 128, § 1060, at 350; Clarkson et al., *supra* note 131, at 354.

139. *E.g.*, *Massey v. Love*, 478 P.2d 948, 950 (Okla. 1971). See also DOBBS, *supra* note 126, § 12.9(2), at 251.

140. Clarkson et al., *supra* note 131, at 356-57.

141. Under the *ex ante* test, the stipulated amount must be a reasonable forecast of the harm likely to result from a breach. By contrast, under the *ex post* test, the stipulated amount must be comparable to the actual damages resulting from the breach. Eric L. Talley, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195, 1200-01 (1994). The Restatement (Second) of Contracts states:

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages in unenforceable on grounds of public policy as a penalty.

RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981). See also Susan V. Ferris, Note, *Liquidated Damages Recovery Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 862 (1982); U.C.C. § 2-718(1) (1978) ("Damages for breach . . . may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm . . . the difficulties of proof of loss, and the inconvenience or non-feasibility of . . . obtaining an adequate remedy.").

foreseeable at the time of contracting.¹⁴² If there are no actual damages, however, some jurisdictions refuse to enforce a stipulated damages clause even when the fixed amount is reasonable under the ex ante test.¹⁴³

4. Applying the Factors

Jurisdictions also are divided over which factor or factors are to be used to distinguish liquidated damages clauses from penalty clauses.¹⁴⁴ For example, under California law, "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."¹⁴⁵ In New York, in order for a promise to pay a pre-estimated amount of damages in the event of a breach to be upheld as liquidated damages, the stipulated amount must bear "a reasonable proportion to the probable loss and the amount of actual loss [must be] incapable or difficult of precise estimation."¹⁴⁶ By contrast, Georgia courts require all three factors to be considered

142. *California & Hawaiian Sugar Co. v. Sun Ship, Inc.*, 794 F.2d 1433, 1438 (9th Cir. 1986), *cert. denied*, 484 U.S. 871 (1987); *Growney v. C M H Real Estate Co.*, 238 N.W.2d 240, 243 (Neb. 1976); *Koenings v. Joseph Schlitz Brewing Co.*, 377 N.W.2d 593, 599 (Wis. 1985); Phillip R. Kaplan, Note, *A Critique of the Penalty Limitation on Liquidated Damages*, 50 S. CAL. L. REV. 1055, 1063 (1977). *But see Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 220 A.2d 263, 268 (Conn. 1966) ("It is not the function of the court to determine by hindsight the reasonableness of the expectation of the parties at the time the contract was made"); *Skendzel v. Marshall*, 301 N.E.2d 641, 645 (Ind. 1973) (considering amount paid in relation to the total contract price and concluding that a forfeiture as liquidated damages was inequitable).

A stipulated sum to be paid in the event of a breach that passes the ex ante and ex post tests would be upheld, and conversely, a stipulated sum that fails both tests would be invalid. It is unlikely that a stipulated sum will fail the ex ante test but pass the ex post test. The greatest amount of confusion appears to surround those stipulated sums that pass the ex ante test but fail the ex post test. Traditionally, once a stipulated sum passes the ex ante test, actual damages were deemed irrelevant. One commentator writes that the current trend among courts is to invalidate a stipulated sum that fails the ex post test, regardless of if it were reasonable ex ante. Talley, *supra* note 141, at 1202-03.

143. *Colonial at Lynnfield, Inc.*, 870 F.2d at 765; *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 230 P.2d 629, 632 (Cal. 1951); *RESTATEMENT (SECOND) OF CONTRACTS* § 356 (1981).

144. DOBBS, *supra* note 126, §12.9(2), at 247-52; Comment, *supra* note 136, at 1060-69.

145. CAL. CIV. CODE § 1671(b) (West 1985).

146. *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 361 N.E.2d 1015, 1018 (N.Y. 1977). *See also* *Thanksgiving Tower Partners v. Anros Thanksgiving Partners*, 64 F.3d 227, 232 (5th Cir. 1995); *Pace Communications, Inc. v. Moonlight Design Inc.*, 31 F.3d 587, 593 (7th Cir. 1994); *Hyman v. Cohen*, 73 So.2d 393, 401 (Fla. 1954); *Kelly v. Marx*, 705 N.E.2d 1114, 1116 (Mass. 1999).

in determining whether a provision fixing a sum to be paid in the event of a breach constitutes a liquidated damages clause or a penalty clause.¹⁴⁷

Cancellation fees and non-refundable commitment fees appear to meet the three requirements necessary to be upheld as valid liquidated damages clauses.¹⁴⁸ First, the parties and the arbitrator intend the fees as compensation for time reserved but ultimately never used, and not as a penalty. The purpose of cancellation and commitment fees is not to punish the parties for settling or to dissuade them from doing so.¹⁴⁹ Rather, in imposing such fees, the parties intend to alleviate the financial loss to the arbitrators that arises from last minute cancellations of hearings that leave the arbitrators without the opportunity to secure comparably remunerative work.¹⁵⁰

Second, losses arising from missed employment opportunities are uncertain and are difficult to measure both at the time that the contract was formed and at the time of trial. At the time of contracting, it would be virtually impossible to calculate with any degree of certainty the damages that the arbitrator would sustain if the parties canceled the hearing. This is because the loss would depend on, *inter alia*, when the parties notified the arbitrator of the cancellation and what opportunities were available to the arbitrator to secure comparable work for the days that were set aside for the hearing. At the time of trial, calculating the damages sustained by the arbitrator may be somewhat easier, but doing so arguably would still be wrought

147. *AFLAC, Inc. v. Williams*, 444 S.E.2d 314, 317 (Ga. 1994) (stating that to determine whether a contract provision is enforceable as liquidated damages "[t]he injury must be difficult to estimate accurately, the parties must intend to provide damages instead of a penalty, and the sum must be a reasonable estimate of the probable loss"). See also *St. Jude Med., Inc. v. Medtronic, Inc.*, 536 N.W.2d 24, 28 (Minn. Ct. App. 1995) (requiring that the following three elements must be present in order to find a valid liquidated damages clause: (1) the parties must have intended to liquidate damages, (2) at the time of contracting, the stipulated amount was a reasonable estimate of actual damages, and (3) at the time of contracting, it was difficult to determine the actual amount of damages).

148. Cf. Jack L. Sammons, *Legal Ethics*, 46 *MERCER L. REV.* 305, 318 (1994). Sammons argues that an attorney should be able to collect a stipulated sum as an advance against a client's termination without cause if the contractual method for determining the amount bears some reasonable relationship to the actual damages. Sammons suggests that the other two requirements would be satisfied because (1) the loss to the attorney, i.e., the value of work foregone, would be difficult to measure, and (2) the sum would not be imposed as a penalty but rather as protection against projected losses.

149. See *infra* Part IV.E (noting that cancellation and commitment fees do not have a significantly adverse effect on the parties' ability to settle the case).

150. See *supra* notes 30, 36 and accompanying text.

with difficulties. As Lord Justice Leggatt explained in *K/S Norjarl A/S v. Hyundai Heavy Indus.*:

[It is] impracticable [to] suggest[] that . . . clients might be prepared to reimburse the arbitrators for such actual loss as could be shown to have been incurred by reason of settlement before the end of the period reserved. Arbitrators cannot reasonably be invited to agree to such an amorphous arrangement. It would in any event provide a fruitful source of discord, which might involve proof of the amount of the arbitrators' actual earning during the relevant period as well as the reasons why they had not availed themselves of particular opportunities of work.¹⁵¹

Third, while it is difficult to predict in the abstract whether a particular cancellation or commitment fee provision would be reasonably related to the actual loss sustained by the arbitrator in the event that a hearing was canceled, so long as the fee generally approximates the actual damages sustained by the arbitrator, it would satisfy the reasonableness test.¹⁵² In some jurisdictions, if the arbitrator is able to secure comparable alternate employment after the parties cancel, the arbitrator does not collect a cancellation or commitment fee, even if the amount of the fee is reasonable under the *ex ante* test.¹⁵³ Thus, while cancellation and commitment fees probably would not be considered *per se* invalid penalties,¹⁵⁴ whether a particular clause is enforceable as liquidated damages is generally determined on a case-by-case basis, and the result is unpredictable given the state of the law in this area.¹⁵⁵

D. *The Impact of Cancellation and Commitment Fees on the Cost of the Arbitration and Settlement*

Critics of cancellation and commitment fees argue that they increase the cost of arbitrations and hinder the parties' ability to settle the case.¹⁵⁶ It appears, however, that the payment of such

151. *K/S Norjarl A/S v. Hyundai Heavy Indus. Co.*, 1 Lloyd's Rep. 524, 533 (Leggatt, L.J.).

152. See *supra* text accompanying notes 140-43. In fact, cancellation and commitment fees typically do not exceed the daily hearing rate normally charged by arbitrators, and the amount of the fee is often based on a percentage of the fee for a daily hearing rate. See *supra* note 31 and accompanying text. Thus, the cancellation or commitment fee may be less than actual damages suffered by the arbitrators from the canceling of the hearing.

153. See *supra* note 143 and accompanying text.

154. Cf. *Union-Scioto Local Sch. Dist. Bd. of Educ. v. Unio Support Ass'n*, 603 N.E.2d 375, 377 (Ohio Ct. App. 1992) (stating that, although the validity of the arbitrator's cancellation fee was not at issue, "[i]t is not unreasonable, arbitrary or unconscionable to assess the arbitration cancellation fee to the party who was instrumental in obtaining such a cancellation").

155. Tyler, *supra* note 129, at 357-58; Comment, *supra* note 136, at 1061.

156. See *supra* Part III.B.5.

fees has little effect on either the cost of the arbitrations or the parties' ability to settle.

Charging cancellation and commitment fees appears to increase the overall cost of arbitrations because it requires the parties to pay a portion of hearing costs, regardless of whether the hearings actually take place. Without such fees, however, the last minute cancellation of hearings would often leave arbitrators with no compensation for time reserved and without the opportunity to secure comparable remunerative work.¹⁵⁷ To compensate for lost income resulting from cancellations, arbitrators are likely to adjust their billing rates to reflect the anticipated lost employment so that their expected profits would still be realized. Indeed, it is common practice for lawyers in the United States to consider lost employment opportunities in setting their hourly billing rates.¹⁵⁸ Accordingly, without the use of cancellation and commitment fees, the parties would generally pay higher rates for all services performed by the arbitrators. It is therefore unclear whether the use of cancellation and commitment fees actually increases the cost of arbitrations.

Cancellation and commitment fees also are unlikely to have a significant impact on the parties' ability to settle the dispute. In general, settlement can occur when the minimum amount that the claimant is willing to accept is lower than the maximum amount that the respondent is willing to pay.¹⁵⁹ The difference between these two dollar amounts is commonly referred to as the settlement range.¹⁶⁰ In theory, agreeing to any number within this range would place both the claimant and respondent in a better position than if they proceeded with the arbitration.¹⁶¹

157. See *supra* text accompanying notes 30, 36.

158. 2 LAW OFFICE ECONOMICS AND MANAGEMENT MANUAL § 24:01 (Paul S. Hoffman ed., 1986) (listing six considerations to be taken into account in determining the amount of a lawyer's fee: the "time he spent"; the "work he did"; the "skill he used"; the "difficulty of the question"; "[w]hether he lost other employment"; and "[w]hether his fee is certain, for a regular client, or is contingent on the result he obtains") (emphasis added); 1 MARY ANN ALTMAN & ROBERT I. WEIL, HOW TO MANAGE YOUR LAW OFFICE § 4.02[1] (1999) (noting that attorneys set their hourly billing rates at an amount that is equal to sum of their internal production costs plus their desired profits).

159. THOMAS J. MICELI, ECONOMICS OF THE LAW 157-58 (1997); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417 (1973).

160. See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 108 tbl. 12 (2d ed. 1989) (showing an example of how one may calculate the settlement range from the amount in dispute).

161. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 356 (2d ed. 1997). By agreeing to a settlement within the range, both parties save the costs of litigation and divide those savings in such a way that both are made better off. *Id.*

The minimum amount that the claimant will settle for is equal to the present value of claimant's estimate of the amount awarded by the tribunal if claimant wins at arbitration (A_c), multiplied by the claimant's estimate of the probability that the claimant will win at arbitration (P_c), minus the costs of the arbitration, including attorneys' fees (C_c), plus claimant's settlement costs (S_c).¹⁶² In other words, claimant's minimum offer would be equal to:

$$A_c P_c - C_c + S_c$$

The maximum amount that the respondent will offer to settle the dispute is equal to the present value of respondent's estimate of the amount awarded by the tribunal if respondent loses at arbitration (A_r), multiplied by the respondent's estimate of the probability that the respondent will lose at arbitration (P_r), plus the costs of the arbitration, including attorneys' fees (C_r), minus respondent's settlement costs (S_r). In other words, respondent's maximum offer would be equal to:

$$A_r P_r + C_r - S_r$$

The following examples illustrate the application of these principles. Assume that the stakes in the dispute are \$1 million to each side and each party believes that it has a fifty percent chance of winning.¹⁶³ In addition, assume that the cost of the arbitration to each party is \$200,000, and that this amount includes each party's legal costs and half of the costs and fees of the tribunal. Also assume that the parties are risk neutral.¹⁶⁴ If

162. Posner, *supra* note 159, at 418-19. See also Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 742-43 (1988); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 112-13 (1994).

163. In reality, both parties are unlikely to share the same belief about the probability of the claimant's success at trial. If the claimant is pessimistic about the probability of prevailing at trial (relative to the respondent's belief about the plaintiff's prevailing), then the settlement range will increase. If the claimant is optimistic about the probability of prevailing at trial (relative to the respondent's belief about the plaintiff's prevailing), then the settlement range will decrease or, possibly, disappear. POLINSKY, *supra* note 160, at 109-11.

164. Risk neutral parties compare the value of settlement to their expected values and select whichever promises more value; that is, neither party is biased towards litigation or settlement. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 170 (2000). In many disputes, however, the parties are risk averse. Risk averse parties are more likely to settle for two reasons. First, a risk averse claimant will value a suit at less than the expected value of a trial (in other words, the claimant will subtract a "risk

we ignore for the moment the costs of settlement, the claimant would be willing to accept anything above \$300,000 to settle the dispute,¹⁶⁵ while the respondent would be willing to settle the dispute for anything less than \$700,000.¹⁶⁶ Thus, the size of the settlement range is \$400,000.¹⁶⁷

Many disputes are settled prior to the tribunal reaching a final award because, among other things, settlements save the costs of arbitration.¹⁶⁸ As noted, however, there are costs associated with settlement.¹⁶⁹ These costs typically include lawyers' fees and the parties' time spent in negotiating the settlement.¹⁷⁰ Thus, if in the above example the settlement cost to each party is \$20,000, the claimant would now be willing to accept anything above \$320,000 to settle the dispute,¹⁷¹ while the respondent would be willing to settle the dispute for anything less \$680,000.¹⁷² The size of the settlement range is now \$360,000.¹⁷³

In the event of settlement, the payment of a commitment or cancellation fee arguably should be considered a settlement cost. This is because such fee would be paid by the parties as a direct result of settling the dispute. If so, this fee would, like other settlement costs, have the effect of reducing the likelihood of settlement. To illustrate, assume that each party also is required to pay half of a \$6,000 cancellation fee if they settled the dispute before the hearing date. The claimant, who was originally willing to accept anything more than \$320,000 to settle the dispute, would now only be willing to accept an amount greater than

premium" from the expected value to account for his aversion to the uncertainty of trial); therefore, the claimant's incentive to sue is reduced. Second, risk aversion creates an incentive for settlement because settling reduces the risk both parties face in proceeding to trial. POLINSKY, *supra* note 160, at 111-12.

165. $(\$1,000,000 \times 50\%) - 200,000 = \$300,000$.

166. $(\$1,000,000 \times 50\%) + 200,000 = \$700,000$.

167. $\$700,000 - \$300,000 = \$400,000$.

168. See POLINSKY, *supra* note 160, at 109. Another major reason for settling a dispute is to remove uncertainty about the outcome of the case if litigated. Posner, *supra* note 159, at 421.

169. It also should be noted, as Judge Posner points out, that:

the costs of litigation and of settlement are [not] mutually independent A change in the stakes will affect the amount of money that the parties spend on litigation and this in turn will alter the probabilities of a particular outcome. Settlement costs are probably a function of both litigation costs and stakes.

Posner, *supra* note 159, at 419.

170. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 238 (1982).

171. $((\$1,000,000 \times 50\%) - 200,000) + \$20,000 = \$320,000$.

172. $((\$1,000,000 \times 50\%) + 200,000) - \$20,000 = \$680,000$.

173. $\$680,000 - \$320,000 = \$360,000$.

\$323,000.¹⁷⁴ Conversely, if the respondent would have been willing to pay anything less than \$680,000 to settle the dispute, the cancellation fee would decrease the respondent's maximum offer to \$677,000.¹⁷⁵ Thus, the payment of the cancellation fee reduces the settlement range from \$360,000 to \$354,000.¹⁷⁶

Although the payment of cancellation and commitment fees theoretically increases the likelihood of the dispute being decided by the arbitral tribunal, the effect on settlement is probably minimal. The amount of such fees in relation to the costs that will be incurred by the parties if the matter is decided through arbitration is likely to be so small as to have no effect in reality on settlement.¹⁷⁷

Charging cancellation and commitment fees thus does not appear to substantially increase the cost of arbitrations. Without such fees, arbitrators may increase their rates to compensate for lost employment opportunities. Likewise, cancellation and commitment fees do not appear to hinder the parties' ability to settle. They do not significantly reduce the settlement range, and the fees are so low compared to the costs of proceeding with arbitration that, in most cases, settlement will remain an attractive alternative to arbitration.

V. CONCLUSION

The study of the fee practices of arbitrators in international arbitrations reveals a broad consensus on the methods for determining the fees of arbitrators. Most arbitrators calculate

174. $((\$1,000,000 \times 50\%) - 200,000) + \$23,000 = \$323,000$.

175. $((\$1,000,000 \times 50\%) + 200,000) - \$23,000 = \$677,000$.

176. $\$677,000 - \$323,000 = \$354,000$.

177. Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075 (1989) (noting that "trial costs are so much greater than settlement costs that many authors choose the simplifying assumption that settlement costs are nil"). Arguably, cancellation and commitment fees may even facilitate settlement because they fix hearing dates and, therefore, set a form of deadline for the parties to settle the dispute. To explain, although settlement can occur at any time in the legal process, bargaining often intensifies in the days preceding the start of trial. This is done in a last-minute attempt to avoid the expenses associated with resolving a dispute in a court of law. COOTER & ULEN, *supra* note 161, at 355. Of the estimated more than seventy percent of cases that are resolved prior to trial, a large percentage settle on the eve of trial or even after the trial has begun. Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 283 (1996). When parties resort to arbitration as an alternative to traditional litigation, the costs are still considerable, and the desire to resolve the conflict in the least expensive manner is still an overriding objective. Therefore, the likelihood of settlement before the arbitration hearing begins, but after the dates have already been booked, may be considerable.

their remuneration using the time-based method, except when the arbitral institution requires that their fees be determined under an *ad valorem* method. However, there appears to be little uniformity on the types of fees that may be charged. In particular, arbitrators are greatly divided over whether it is appropriate to charge cancellation or commitment fees. In the United States, cancellation and commitment fees currently are not widely used by arbitrators who hear transnational disputes. The author predicts, however, that in the coming years their use will increase because arbitral institutions are permitting the payment of cancellation and commitment fees, there appears to be little ethical or legal impediments to the use of cancellation and commitment fees, and these fees would not adversely affect in a significant way the arbitration or the resolution of the dispute.