

## ARBITRATION GUIDELINES

FranArb, Inc., doing business as Franchise Arbitration and Mediation Services ("FAM"), is an arbitration and mediation referral service specializing in the resolution of disputes between franchisors and franchisees. FAM's address is 3501 Jamboree Road, Suite 6000, Newport Beach, California 92660-2960. FAM's telephone number is (949) 854-0374 and its fax number is (949) 856-3245. FAM's website is [www.franarb.com](http://www.franarb.com) and e-mail address is [info@franarb.com](mailto:info@franarb.com).

The following arbitration guidelines ("Guidelines") provide a standardized, suggested method for processing arbitrations referred by FAM. Any questions concerning these Guidelines should be directed to FAM.

By accepting a matter referred to the arbitrator by FAM, a selected arbitrator agrees to conduct the arbitration in accordance with these Guidelines, which should be modified only (i) to comply with specific terms set forth in the arbitration clause of the Franchise Agreement between the parties in dispute or (ii) as otherwise agreed by all parties in dispute to the arbitration or (iii) as required by order of a court having jurisdiction over the dispute.

In most instances, arbitrations will be undertaken between franchisors and franchisees pursuant to an arbitration clause contained in the Franchise Agreement between the parties. The arbitrator must carefully review this clause to determine if there are special arrangements or agreements between the parties concerning the arbitration. If the arbitration clause does not provide for arbitration before FAM or arbitrators referred by FAM, or if there is no arbitration clause in the Franchise Agreement, but the parties nevertheless wish to arbitrate the dispute before a FAM-referred arbitrator, an appropriate Submission Agreement must be completed and signed by the parties (this form may be downloaded in an Adobe PDF fill-in format at <http://www.franarb.com/forms.aspx>) and forwarded to FAM by mail or overnight courier.

### 1. Selection of Arbitrator

1.1 When the matter has been properly referred to FAM for resolution, inquiry will be made of all FAM recommended arbitrators (these are typically litigation attorneys with substantial franchise law experience) that are located within the general vicinity of the site designated for the arbitration to determine their availability and eligibility (conflicts check). Nominated arbitrators who receive an availability and eligibility inquiry, must carefully review the nature of the matter and the identity of the parties in order to determine that there are no conflicts of interest.

1.2 Any person selected or to be selected as an arbitrator must notify FAM before selection and the parties in dispute after selection (i) of any circumstance likely to cause justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives, (ii) if the arbitrator has acted as an arbitrator, any prior arbitration involving one of the disputed parties or (iii) if an immediate family member of the arbitrator has a relationship with a party in dispute, counsel for a disputed party or a material witness, and if so the nature of the relationship. These disclosure obligations must remain in effect throughout the arbitration. If FAM receives any such information from the arbitrator or another source, FAM will communicate the information to the parties in dispute and, if FAM deems it appropriate to do so, to the arbitrator and others. The arbitrator must be and remain independent of the parties in dispute during the course of the arbitration proceedings.

1.3 The names of potential arbitrators who are contacted by FAM, and who indicate they (i) are eligible to serve as a FAM-referred arbitrator in the particular matter and (ii) agree to have their names referred, will be included in a list of three eligible and nominated arbitrators provided by FAM to the parties in dispute. Each party in dispute will rank the names in order of preference (and a party in dispute may peremptorily challenge **one** nominee by lining through the nominated arbitrator's name). No nominee ranked as a third choice or peremptorily challenged by a party in dispute will be eligible to serve as an arbitrator for the arbitration in respect of which they have been nominated. A party in dispute may challenge more than one nominee only by providing written evidence that the nominee has a conflict in interest.

1.4 If the Franchise Agreement calls for a panel of three arbitrators, a list of nine eligible and nominated arbitrators will be provided by FAM to the parties in dispute. Each party in dispute will rank the names in order of preference, and a party in dispute may peremptorily challenge **up to three** of the nine nominees by lining through their names. No nominee ranked as a seventh, eighth or ninth choice or peremptorily challenged by a party in dispute will be eligible to serve as an arbitrator for the arbitration in respect of which they have been nominated. A party in dispute may challenge more than three nominees only by providing written evidence that the nominee has a conflict in interest.

## **2. Post Selection Preliminary Procedures**

2.1 The arbitrator selected for the matter based on the responses of the parties in dispute will be promptly notified by FAM of his or her selection and will be forwarded all information then in the possession of FAM respecting the dispute, including a copy of the Demand for Arbitration (or Submission Agreement), and related correspondence between the parties in dispute. Concurrently, the parties in dispute will be notified of the arbitrator's selection.

2.2 After selection of the arbitrator, any requests of the parties in dispute for alternate dispute resolution mechanisms other than binding arbitration, mediation or supervised settlement discussions will be subject to the arbitrator's discretion unless a dispute resolution clause between the disputants authorizes one or both disputant to undertake such other procedures.

2.3 Within ten business days after the arbitrator's notification he or she has been selected, the arbitrator must contact the parties (this may be done by telephone conference call) to arrange for the hearing and to make other initial inquiries concerning the proceedings. (FAM recommends that notice of the scheduling of any hearing be neither less than seven nor more than 60 days prior to the hearing and notice be sent by reliable overnight courier within 30 days of the arbitrator's appointment as arbitrator.)

2.4 In its preliminary meeting with the parties in dispute and their counsel, the arbitrator must discuss with the parties and determine answers to the following:

(i) Will there be expert consultants or adversarial experts?

(ii) Will discovery be allowed, and if so what will the scope of discovery be? (If discovery is not permitted in the Franchise Agreement or other written agreement between the parties, or otherwise agreed to by the parties in dispute at the preliminary hearing, neither party in dispute should be allowed to conduct discovery.)

(iii) Should there be depositions to preserve testimony if a witness is not available or appropriate?

(iv) Will there be a formal recording of the proceedings by a court reporter or is an interpreter needed? (These will be additional expenses to be paid for by the party requesting the service, or shared by the parties in dispute if they agree to do so.)

(v) Will individuals with unilateral authority to settle the dispute be present at the hearing?

2.5 After the preliminary inquiry as to the foregoing matters is completed by the arbitrator, the arbitrator will set or confirm a hearing time and place and obtain time estimates from each party. The arbitrator will also set a deadline for the submission of briefs.

2.6 After these preliminary matters are completed and prior to the initial hearing, the arbitrator will review all documents jointly submitted by the parties. Absent extraordinary situations, preliminary preparation and coordination should not exceed three hours of the arbitrator's time.

2.7 Unless a court of competent jurisdiction rules otherwise, FAM does not recommend the arbitrator determine the validity of a demand to arbitrate or the enforceability of arbitration, if waiver questions are involved. These matters should be referred to an appropriate court.

### **3. Fee Agreements with Parties in dispute**

3.1 The parties should be notified at this time that each will have to pay  $\frac{1}{2}$  of the fees and costs incurred. FAM recommends that before the arbitrator conducts the initial arbitration hearing, the arbitrator have the parties in dispute sign a retainer agreement. Then, the arbitrator will collect a retainer ( $\frac{1}{2}$  from each disputant) equal to the number of hours anticipated for the proceedings, plus two hours for preparation and two hours for deliberation (however, the amount of and collection procedures respecting the retainer is in the arbitrator's sole discretion.)

3.2 FAM arbitrators will charge the parties in dispute their normal hourly rate, in hourly increments (nearest .10 or .25 hour) that they normally bill, plus costs.

3.3 For coordinating the arbitration and arbitrator referral, FAM charges a one-time non-refundable processing fee of (i) \$950.00 for a single arbitrator proceeding (these constitute the majority of FAM arbitrations), or (ii) \$1,900.00 for a multiple arbitrator proceeding (some agreements require more than one arbitrator if the amount in controversy exceeds a certain sum).

### **4. Notice to Respondents**

4.1 The Claimant must forward to the Respondents (this may be done by a process server or overnight courier) a copy of the Demand for Arbitration, and provide evidence to the arbitrator that the Respondents have received the Demand for Arbitration (or that every reasonable effort has been made to notify the Respondents about the Demand for Arbitration).

4.2 Respondents will have ten business days in which to file any counterclaims or responsive pleadings.

### **5. Location of Binding Arbitration**

5.1 The time and location of the arbitration hearing is in the arbitrator's discretion, subject to approval of the disputants, although the arbitrator should use conference room facilities and his or her law office as the location of the arbitration hearing.

5.2 If the location of the arbitrator's conference facilities causes a conflict with geographic references in the arbitration clause, and the parties are unwilling to waive the geographic reference in order that the arbitrator's conference facilities can be used, the arbitrator must make alternative arrangements with the disputants (for example renting an executive office or hotel room).

## **6. Conduct of the Proceedings**

6.1 As described in section 2 of these Guidelines, the arbitrator initially conducts a preliminary hearing (may be done by telephone conference call) where he or she provides an explanation to the disputants of the procedures to be followed, including the order of witnesses. At this preliminary hearing, the arbitrator will discuss scheduling procedures including advice to the parties that upon mutual agreement, the proceedings can be suspended any time for the parties to engage in mediation or other supervised settlement negotiations, without prejudice to the arbitration proceedings, which can always be reconvened.

6.2 At least five business days before the hearing commences, each party in dispute must (i) submit a summary of its arguments (or brief) in support of its claim or response and declarations of persons having knowledge of facts relevant to the dispute and (ii) exchange copies with the other parties in dispute of all exhibits it intends to submit at the hearing. At the request of a party in dispute or in the discretion of the arbitrator, consistent with the expedited nature of the proceedings, the arbitrator will determine matters involving the production of documents and other information and the identification of witnesses to be called (all witnesses should be relevant to the actual matter in dispute). Any person making a declaration must be available to be cross-examined by the other parties in dispute.

6.3 Once these preliminary matters are concluded, the arbitrator will proceed within as short a time as possible to initiate and complete the proceedings. First, Claimant will present evidence to support its claims. Then, the Respondent may present evidence to support its defense against the claims of Claimant. Then, the Respondent may present evidence to support its counterclaims. Then, the Claimant may present evidence to support its defense against the counterclaims of Respondent.

6.4 Witnesses for each party will also be required to answer questions from the arbitrator and the adverse party. It is in the arbitrator's discretion whether any person giving testimony to be considered in rendering the decision must make an oath or affirmation. Although witnesses are not required to give testimony under oath except on the request of a party, it is good practice to suggest this.

6.5 Any party in dispute may be represented by counsel or other authorized representative, provided the name and address of said counsel or representative is provided to the arbitrator and the other parties at least five business days before the date set for the hearing at which that person is to appear.

**6.6 In the interests of expediency and to permit the FAM arbitrator to focus on the actual matters in dispute, the binding arbitration WILL BE LIMITED to the actual claims and counterclaims made by the parties in dispute unless good cause exists in the opinion of the arbitrator for considering additional claims or issues in order for the arbitrator in his or her reasonable discretion to properly render a decision and make an award.**

6.7 Amendment of claims and counterclaims after the arbitrator has been selected are permitted, in the arbitrator's discretion, only after opposing parties are granted a reasonable period of time (should be not less than ten business days) to respond and the arbitrator considers any response in opposition.

6.8 Each day of arbitration proceedings should commence at 9:30 a.m. and conclude at 4:30 p.m., subject to the agreement of the parties in dispute and the arbitrator to provide for different hours.

6.9 During the course of the arbitration, the arbitrator will have considerable discretion in controlling the nature of the proceedings, including any continuance or bifurcation of the proceedings. However, the arbitrator should be careful about reconvening sessions after considerable periods of time have elapsed, especially if no formal record of the proceedings is being made.

6.10 A written record of the proceedings should be maintained by the arbitrator (or a reporter, if employed by the disputants), included in which should be (i) a list of all parties, representatives and witnesses presented, (ii) the date and location of the hearing, and (iii) a summary of testimony.

6.11 If a party in dispute desires a stenographic record of the proceedings, it should make arrangements directly with a stenographer and notify the other parties of these arrangements at least three days in advance of the hearing. If both parties in dispute agree to share the cost of the stenographer, the record will be deemed the official record of the proceedings and made available to the arbitrator and all parties in dispute. If only the party in dispute requesting stenographic services pays the applicable costs, it will be in its sole discretion whether to share the stenographic record with the arbitrator or the other parties in dispute.

6.12 After considering all of the evidence at the hearing, and specifically inquiring of all parties whether they have any further evidence to offer, it will be in the arbitrator's discretion to determine when the proceedings are closed.

6.13 The parties in dispute may agree to shorten or lengthen the time limits set forth in these Guidelines. In his or her reasonable discretion, the arbitrator may extend any time limit which has been shortened by agreement of the parties in dispute if the arbitrator decides that it is necessary to do so in order for the arbitrator to fulfill his or her responsibilities in accordance with these Guidelines.

6.14 A party in dispute which proceeds with the arbitration without raising a timely objection to (i) a failure to comply with any provision of these Guidelines, (ii) any other rules applicable to the proceedings, or (iii) any decision of the arbitrator, is deemed to have waived its right to make such objection. For purposes of this section 6.14, "timely" means immediately in response to testimony or other evidence offered during the course of the hearing or not later than two business days with respect to other matters.

6.15 The arbitrator may vary this procedure in his or her reasonable discretion, provided that the parties are treated in an equitable manner and that each party has the right to be heard and be given a fair opportunity to present its case.

## **7. Award When a Party in Dispute is Not Present**

7.1 If a party in dispute fails to respond to a Demand for Arbitration or other written communication from the arbitrator respecting an arbitration proceeding, or fails to appear at the arbitration without obtaining an appropriate postponement of appearance, the arbitration proceeding may proceed anyway provided that the party in dispute that is present will be responsible for paying all of the arbitrator's fees, subject to possible reimbursement of these fees in the ensuing award. In such circumstances, the arbitrator will require the party in dispute that is present to submit evidence necessary for the arbitrator to be able to make an award. At the conclusion of the presentation by the party in dispute that is present, the arbitrator may make an award in favor of the Claimant or the Respondent. No award may be made solely by reason of the failure of a party in dispute or its representative to respond to a Demand for Arbitration or be present at an arbitration hearing.

## **8. Scope of Permitted Evidence**

8.1 The Claimant and Respondent must only offer evidence that is **relevant and material** to the dispute. Conformity to the rules of evidence of the state or court having jurisdiction over the location where the arbitration is being conducted is recommended. However, the arbitrator will determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant or impermissible under federal or state law.

8.2 The arbitrator is bound to apply any applicable (i) franchise laws or regulations, including laws or regulations respecting termination or non-renewal of a franchise agreement, (ii) statutes of limitation, and (iii) principles of legal privilege (such as attorney-client communications), in determining the admissibility of evidence provided by the Claimant or Respondent.

8.3 The arbitrator or other person authorized by law to *subpoena* witnesses or documents may do so upon the request of any party or independently. Either party in dispute may object to the relevance to the matter in dispute of witnesses and documents requested by the other party in dispute, and after giving the other party in dispute an opportunity to respond, the arbitrator must sustain the objection or overrule it.

8.4 The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but will give such evidence only such weight as the arbitrator deems it is entitled to, after considering any objection made to its admission.

8.5 Any physical evidence submitted for consideration should be labeled and appropriate arrangements for the custody of the items should be made. In the case of documents, the parties in dispute should stipulate to the use of copies for further private deliberation by the arbitrator, rather than originals.

8.6 If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence must be filed with the arbitrator, and all parties must be afforded an opportunity to examine and respond within ten business days to such documents or other evidence.

## **9. Disqualification and Replacement of Arbitrator**

9.1 Every FAM arbitrator must be impartial and independent and must perform his or her duties with diligence and in good faith, and is subject to disqualification as determined by a court of competent jurisdiction and replacement in the arbitration proceedings by FAM for:

- (i) Partiality or lack of independence,
- (ii) Inability or refusal to perform his or her duties with diligence and in good faith, and
- (iii) Any grounds for disqualification provided by applicable law.

9.2 An arbitrator must be replaced upon (i) his or her death or incapacity to continue, (ii) his or her resignation as arbitrator, (iii) upon the finding by a court of competent jurisdiction that the arbitrator is biased or has a financial or personal interest in the result of the arbitration, or (iv) upon the request of all of the parties in dispute.

9.3 If an arbitrator is replaced, FAM will nominate potential successor arbitrators for selection based on input of the disputing parties, in accordance with section 1 of these Guidelines.

## 10. The Arbitration Award

10.1 The arbitrator should send his or her final invoice for the arbitrator's hourly services and costs as soon as the arbitrator has prepared the written decision (this should be not later than 20 business days after conclusion of the arbitration). After receipt of final payment from the parties in dispute for the arbitrator's services, a written award, signed by the arbitrator, should be sent to the parties in dispute by reliable overnight courier. No decision or summary will be released to the parties in dispute until all fees for the arbitrator's services and related costs have been paid in full.

10.2 The arbitrator must advise the parties in dispute that anything beyond a summary written decision will be provided only if the parties agree to the estimated length of the arbitrator's time to do so. A copy of the award must be sent to FAM for its records.

**10.3 The arbitrator must consider and apply as appropriate applicable franchise laws or regulations (including those respecting termination or non-renewal) and statutes of limitation to each claim and counterclaim made by the Claimant or Respondent in determining the award.**

10.4 With the exception of procedural matters specifically addressed in the arbitration clause or other submission agreement, and subject to limitations imposed by applicable state law, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the Franchise Agreement. The arbitrator will be able to award a wide range of remedies in addition to monetary damages, with costs and attorneys fees where appropriate. The arbitrator may be empowered to award specific performance and certain prospective relief such as injunction (subject to confirmation by a court of competent jurisdiction in the form of a judgment), interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, and the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

10.5 The award may also include attorneys' fees if all parties have requested such an award, or it is authorized by the Franchise Agreement or otherwise under the law of the state where the arbitration is being conducted.

10.6 If the parties settle their dispute during the course of the arbitration proceedings and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including arbitrator fees and expenses.

10.7 Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, or computational errors in the award. The arbitrator must give the other parties ten days to respond to this request, and if no objections are received, the arbitrator must make the appropriate corrections. However, the arbitrator is not thereby empowered to reconsider the merits of any claim already decided.

10.8 By submitting the dispute to resolution by arbitration conducted under these Guidelines before the arbitrator nominated by FAM and selected by input from the parties in dispute, said parties in dispute are deemed to have consented (i) that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction and (ii) neither the arbitrator nor FAM are or will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these Guidelines.