

ARE YOU SAVVY ABOUT ARBITRATION?

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Using arbitration to resolve disputes has spread rapidly in the last few decades. The underfunding of courts and judicial docket congestion have pushed more cases from court into arbitration. With these cases come lawyers whose main background is in courtroom work. Some of the skills that play well in court do so in arbitration too. But arbitration rules offer lawyers opportunities that court rules of procedure and evidence do not. Proactive planning with the other side and careful attention to how to use arbitration's informality can pay major dividends. Savvy arbitration lawyers know how to navigate arbitration rules and practices. This article discusses how to best do so.

The traditional benefits of arbitration are lower cost, quick resolution, avoiding juries (in cases not well suited to juries), confidentiality, and finality (no or extremely limited appeal). It was once common to discuss arbitration as if these benefits came at the cost of law-based outcomes. As the U.S. Supreme Court suggested in 1953: "Congress has afforded participants ... an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration *if the parties are willing to accept less certainty of legally correct adjustment.*" (*Wilko v. Swann* (1953) 346 U.S. 427, 438 [emphasis added].) During the misguided 30-year-long era thereafter, the court even denied arbitrators the right to decide important federal statutory disputes because it did not trust arbitrators' ability to do so accurately. The court has repented

of this criticism, and arbitration never warranted it.

In fact, sophisticated parties and smart lawyers know that arbitration, when used properly, often can bring a more fine-tuned justice than court litigation. Arbitration lets parties pick decision-makers with backgrounds best matched to the industry, technologies, and practices involved in a dispute. Parties have more say in the skill, wisdom, and collegiality of arbitrators than of judges. And parties normally have more input and can craft schedules customized to their dispute in a way often not possible in court.

This article discusses how to secure these benefits in six major areas of arbitration: (1) selecting arbitrators; (2) setting the overall schedule, including the hearing date; (3) controlling discovery; (4) pleading and briefing, including pre-hearing briefs; (5) making the hearing work best; and (6) getting the biggest boost from post-hearing briefs.

STAGE 1: SELECTING ARBITRATORS: NO PLACE TO SKIMP ON TIME OR MONEY.

It is hard to overstate the importance of investing time and care in selecting arbitrators. Cases can be won or lost in this first step.

A common arbitration clause lets each side pick one arbitrator, and those two, while still consulting with their appointing

party, then pick the chair. Lawyers and clients often feel this process has broken down if it takes a few weeks and does not yield an agreed chair. Each major provider has a default process for picking a chair if the parties cannot agree. But smart parties know that spending a few weeks or even a month or two to find the right chair is time, and money, well spent. What impatient parties forget is how much they gain when they find a smart, fair, and neutral chair with knowledge in the area and good management skills. A good chair can shave many months and dollars off an arbitration going forward.

Experienced lawyers sometimes will try to agree on all three arbitrators, thus letting both sides select the entire panel. It is certainly harder to reach agreement on three arbitrators than just one. But if both sides feel their claims are valid and just want good arbitrators to decide a dispute fairly, it should not be that hard to agree jointly on all three arbitrators, particularly when the parties value their ongoing relationship. Such fully consensual panels are the best assurance of neutral, independent decisions.

Parties and counsel who understand decision-making dynamics will not try to appoint partisan arbitrators. A generation or two ago, one style of litigating in arbitration was to pick an arbitrator who would function like another lawyer. Some lawyers thought this was zealous representation. These appointees essentially argued the case to the chair. The chair could not trust such wing arbitrators, so the chair became the sole decision-maker. The parties lost the benefit of having three arbitrators striving for the right answers. Today most arbitrators, even if they are party-appointed, are neutral and independent, as required by the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, under which arbitrators must give notice if they read the agreement to require them “not to serve as neutrals.” In practice, the non-neutral arbitrator has become an endangered species, sometimes still discussed but almost never seen.

Added characteristics of a good chair. A good panel chair will have the same characteristics of any good arbitrator, as well as other skills. Chairs manage the arbitration. They run the initial pre-hearing conference, normally handle discovery disputes alone and control who writes what parts of the award (assuming the chair is in the majority).

Chairs particularly need effective case management skills. They need to control disruptive counsel and

witnesses. They must do so while providing not just the appearance of but genuine fundamental fairness and impartiality. Good chairs are used to stimulating discussion among all arbitrators, even quiet arbitrators, and do not prematurely terminate debate. In contrast, chairs who bully wing-arbitrators may drive the other arbitrators away by announcing the chair’s decision and expecting the wing-arbitrators to supinely follow. The proverbial “bad chair” is a former trial judge who never learned to act collegially. Self-centered chairs skew outcomes and make arbitrations less predictable. They should be scrupulously avoided.

One early-stage tip: Negotiate a confidentiality agreement — always. Parties should be thinking about confidentiality and discussing it with their opponents at the same time they are selecting arbitrators. Strong confidentiality is one of arbitration’s traditional benefits. Arbitrating parties do not have to battle press requests for public access to the dispute. But many lawyers do not realize that arbitrations are not automatically confidential. And not all arbitration rules bind the parties to treat documents and other evidence as confidential.

AAA Commercial Rule 45(a), for instance, binds only “[t]he AAA and the arbitrator” to maintain “all matters relating to the arbitration or the award.” JAMS Comprehensive Arbitration Rule 26(a) requires only “JAMS and the Arbitrator” to “maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing.” This language does not expressly bind the parties or expressly include evidence produced in discovery. Only the International Institute of Conflict Prevention & Resolution’s confidentiality provisions are stronger. Its Non-Administered Arbitration rule 18 and corresponding Administered rule 20 cover “the parties, the arbitrators and CPR” and extend to “the proceedings, any related discovery and the decisions of the Tribunal.”

Wise counsel will reach agreement with each other binding the parties, witnesses, and arbitrators to confidentiality; expressly define the covered items; decide if they need a “highly confidential” or “eyes only” restriction; provide a process including notice to each other for handling third-party requests for information about their arbitration; and require post-dispute destruction of information produced in discovery by a set date.

A second early-stage tip: Preserve jurisdictional challenges by raising them immediately. Arbitration is an informal process. Yet it is a mistake to think that means that parties can take their time to bring up jurisdictional challenges, be they over persons, issues, or a related proceeding. Arbitration rules require challenges to jurisdiction at the outset, or they are waived.

STAGE 2: SETTING THE SCHEDULE: PARTIES SHOULD PROVIDE SIGNIFICANT INPUT ON THE HEARING'S LENGTH, DATE, AND TIME ALLOCATIONS.

Arbitration rules encourage managerial arbitrators. They envision arbitrators who set a relatively short schedule and do so promptly, limit the number and scope of discovery techniques, and fix a binding, firm, and prompt hearing date right at the start. Provider rules stress prompt dispositions at lower cost. The Introduction to the JAMS Arbitration Discovery Protocols, for instance, tells its arbitrators to “[be] sufficiently assertive to ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court.” Rule 11 of CPR’s Non-Administered and Administered Arbitration Rules tells its arbitrators to consider, when ruling on discovery, not just the needs of the parties, but also “the desirability of making discovery expeditious and cost-effective.” Rule R-23 of the AAA Commercial Arbitration Rules requires AAA arbitrators to oversee all “exchange of information” with the goal of “achieving an efficient and economical resolution of the dispute.” Specific limits are then woven into these broader principles. Other rules overflow with similar language. Smart lawyers wanting fast, low-cost discovery exploit this kind of language.

Arbitration rules leave more room for party input than court rules. Why? Because if the parties agree on deadlines and other limits on preparation, most arbitrators will feel they must implement the agreed-upon limits. After all, arbitration is a creation of the parties. In contrast, too many judges set the pace of litigation without similar input.

Parties who want short discovery periods with more limits on the scope of investigation than in court, and a quicker trial, should push their lawyers to talk to the other side and agree on a proposed schedule that embodies these goals. They should submit it to the arbitrators *before* the initial pre-hearing conference. Arbitrators’ powers are limited by the parties’

instructions. The arbitrators ultimately will enforce almost any schedule the parties have agreed upon.

Moreover, if a party wants a short schedule but the other side disagrees, the party still will benefit from trying to reach agreement with its opponent. If the other side is going to claim it needs a long time to prepare, knowing why will help the party seeking expedition prepare to win the panel over to its side.

All this preparation must be completed before the initial pre-hearing conference because the hearing date and schedule leading up to it almost always are set at that conference. The initial pre-hearing conference is the best opportunity, often the sole one, to influence the schedule. Some arbitrators ask parties to discuss schedules and try to agree on them before that conference; others don’t. Even when the arbitrators seek input, counsel are remiss if they do not submit a written proposal containing their desired hearing date, discovery timetables, and scope of discovery at least a week before the initial pre-hearing conference. This gives arbitrators ample time to study the proposal and discuss it with each other. Such diligence will never put lawyers in a bad light before any arbitrator.

The hearing date is particularly important. The date must be early enough so that all necessary discovery can be done and it will save time compared to court litigation, and reasonable enough so that neither side has to ask for an extension.

One strength of arbitration is that arbitrators can set firm hearing dates right away. The arbitrators reserve their time and are paid to do so. Good arbitrators treat the hearing date as set in stone unless a true hardship, such as illness, requires delay.

Although arbitration stresses speed and limits discovery, that does not mean parties whose large cases end up in arbitration are in trouble. However, it does mean that a party needing expansive discovery must very consciously plan to demonstrate why its case is an exception (the one that proves the rule) to ordinarily quick arbitration discovery. A good start is agreeing on discovery with the other side. In big cases, both sides are likely to want more discovery than normal in arbitration. Whether or not the other side agrees, the party seeking broader, more court-like discovery must prepare to explain that, while arbitration usually limits discovery, restrictive discovery would be fundamentally unfair in this large case, given the stakes, the complexity,

and any other factors that justify more investigation and disclosure.

STAGE 3: PREHEARING PREPARATION (AKA DISCOVERY): SMART LAWYERS NARROW DISCOVERY REQUESTS.

A frequent criticism of arbitration is that as it has become more popular, it has let its informality harden by adopting some of the bad habits of court-run discovery. Critics say that arbitration lets parties seek too much information, gives them too much time to get it, and doesn't push hard enough to get to hearing quickly. Yet when cases proceed slowly, often it is the fault of the parties and their counsel. They have not used arbitration's rules and practices aggressively enough. They have not tried hard enough to plan a quick route to the hearing and sold it to the arbitrators.

It is one thing to urge parties to craft, agree on, and demand quick pre-hearing periods and a prompt hearing; it is another to translate that into reality. Parties who advocate tight schedules and early hearings start with a presumption in their favor when they approach the first pre-hearing conference. The rules of every major arbitration provider stress efficiency, speed, and finality as critical goals. Our legal culture expects arbitrations to have these virtues too. The benefits of arbitration "include lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," (Stolt-Nielsen, S.A. v. Animal Fees Int'l Corp. (2010) 559 U.S. 662, 685). Everywhere one looks, one finds consensus on these aspects of arbitration. The JAMS Arbitration Discovery Protocol, in its introduction, promises that its arbitrators are "experienced, trained and highly qualified" to handle arbitration "much less expensively and in much less time than if it had been litigated in court." The AAA's Discovery Best Practices for construction defines the goal of arbitration as "a speedy, cost effective and final means of resolving disputes." Rule 11 of CPR's Administered and Non-Administered Arbitration Rules requires its arbitrators to make discovery "expeditious and cost effective." To make these goals a reality, though, parties and their counsel must advocate for specific limits on the different discovery techniques to achieve speed and efficiency.

Document requests. General efficiency is accomplished by specific measures. Lawyers who understand how to use arbitration know to avoid the vast congestion of

document dumps and broad search terms by requesting narrow, specific categories of documents. They invest time at the front end to generate precise search terms for electronic files. They know that searching through an overbroad production is a waste of the requester's time, not just the producing party's. They take to heart the caution in section 1(a) of CPR's Protocol on Documents and Witnesses that "arbitration is not the place for an approach of 'leave no stone unturned.'" They prepare requests in the spirit of JAMS' Discovery Protocol, which limits requests to documents "directly relevant to significant issues in the case or to the case's outcome."

Interrogatories and requests for admission. Arbitrators rarely permit requests for admission or interrogatories. Occasionally, they may permit a factual interrogatory on a matter really in one party's control and not readily discoverable through a document request or at the deposition of a major witness. If a party files broad interrogatories and is unfortunate enough that its opponent answers them rather than object, it is predictable that (1) the answers will be argumentative and not useful, and (2) the process is more likely to add time to, not subtract time from, preparing for the hearing.

Depositions. The easiest thing to do, but one of the sloppiest, is to notice depositions of a bunch of opposing party employees and start asking questions to see if anything helpful is unearthed. The right way to think about depositions in arbitration is the way JAMS Comprehensive Arbitration rule 17(b) does. It permits one deposition by right, and others only by permission. Expect most arbitrators to impose, as section 2(c) of CPR's Protocol recommends, "strict limits on the number and length of any depositions allowed." Complex commercial arbitrations merit and usually get more depositions, but it is good discipline for lawyers to consider further depositions as a privilege, not as a right, and to allocate them accordingly. Arbitrators also increasingly expect expert reports to have enough detail that the expert need not be deposed, just examined at the hearing.

Efficient discovery means no boilerplate requests. It means very deliberately avoiding discovery squabbles. Good arbitrators will refuse to decide who is at fault in a discovery dispute anyway because they know blame usually is irrelevant. They focus on what each side needs for a fair hearing. Don't waste their time.

Lawyers who use arbitration effectively write narrow, tailored document requests; work hard to refine the most specific effective search terms; rarely file interrogatories; avoid requests for admission; and take only the depositions they really need. Some even remember the joy of trial by partial ambush. They happily forego depositions of certain key witnesses and experts as long as the other side promises to bring them to trial.

STAGE 4: SETTING AND RE-SETTING THE FRAMEWORK IN THE DEMAND AND AGAIN IN THE PRE-HEARING BRIEF.

Lawyers too often make the mistake of thinking that because they've chosen arbitrators with experience handling commercial cases, they do not need to brief the facts and law for their claims, defenses, and remedies in detail. Moreover, they sometimes spend little time making sure their briefs are clear, persuasive, and written in plain English.

It is a mistake to omit *any* technique that helps make a complex record simpler. Are there a lot of events? Attach a timeline to the demand or pre-hearing brief. Many witnesses? Supply a cast of characters. Lots of technical terms? Help the arbitrators with a glossary, sometimes even if this is their area of expertise. Complex data? Organize it in charts, graphs, regression analyses (and scatter plots displaying the tested relationships), tables — anything that simplifies it. Present damage models that involve multiple steps, and draw evidence from different parts of the record graphically. Make sure to use displays the arbitrators can use in deliberations. Don't be afraid to use multi-page handouts: Make it easy to find the data underlying damages and any other remedies.

The demand and answer are the pleadings upon which the arbitration will be tried. They are also the arbitrators' introduction to the dispute. Like a good brief, the pleadings need a theme that runs throughout the case, the core facts, and an explanation of each claim, counterclaim, defense, and remedy. Requests for injunctive relief must have enough detail that the arbitrators know what to order. The pleadings must allege the key facts even when arbitrators are chosen because they are expert in that field. Pleadings should be easy for a non-lawyer to understand and be persuaded that the party ought to win on first reading.

The pre-hearing briefs need more. First, parties need to indicate if they have dropped any claims or defenses, or refined the remedies they seek, as well as anything else discovery has led them to change. Second, these briefs must contain any key new evidence uncovered after the first conference.

Pre-hearing briefs should cite the elements of each issue requiring a decision and facts the proponent expects to be included in the final award. It is rare that all elements of every claim, defense, and remedy are in issue. Tell the arbitrators what is in dispute and what is not. Narrow the arbitrators' task.

The pre-hearing brief should remind the arbitrators of applicable law, any burden of proof different from the normal preponderance standard, and appropriate rules of construction under applicable law, including particularly on extrinsic evidence.

STAGE 5: THE HEARING: ENJOY THE LACK OF OBJECTIONS, AND FIT THE PRESENTATION TO THE ARBITRATORS' BACKGROUND AND EXPERIENCE.

Arbitration hearings should be shorter and smoother than courtroom trials. Why? Because the rules of evidence do not apply, although arbitrators can and sometimes do consider them on issues of the weight to be given to evidence. None of the major provider rules prohibit applying the rules of evidence, but parties' general understanding is that one benefit of arbitration is being free of the raft of objections and the interruptions they cause in American trials. If arbitrators announce that they intend to apply rules of evidence, a party that disagrees should argue that that arbitrators do not have jurisdiction to jettison this ordinary arbitration benefit. Parties opposing this unusual strict use of "court" rules will easily find cases describing the rules of evidence as inherently inapplicable to arbitration.

The delays caused by objections and sending the jury out while they are argued do not exist in arbitration. Yes, even hearsay evidence is likely to be heard, and business records with dubious foundations may come in. But counsel are free to point out the weaknesses of bad evidence, and arbitrators usually disregard dubious proof. What lawyers and arbitrators should avoid is the delay of fighting over admissibility.

It is the rare arbitration in which any time must be devoted to admitting exhibits. Most arbitrators expect parties to agree to admitting all or at least the vast majority of exhibits at the beginning. They also expect parties to identify the rare exhibits that could pose a question — generally documents with disputed claims of privilege — and resolve any disputes before the hearing.

The same advice that applies to pleadings — use every tool of simplification and persuasion you can — applies to hearings as well. Use timelines, casts of characters, glossaries, tables of key contract terms, the clearest visual displays of quantitative data, and outlines of the steps in complex damage models — anything that helps arbitrators understand and retain information.

Every complex arbitration, like every complex commercial case in court, comes with its own language, history, and details. Even the smartest arbitrators face the challenge of organizing and mastering this information. Successful lawyers know it is just as important in arbitration as in trial to give the arbitrators every learning tool they can.

Lawyers should also remember that even if every arbitrator has a background in the disputed area, arbitrators, like everybody, learn in different ways. Some may learn by reading and seeing, some by hearing the evidence described. Make sure the presentation gives arbitrators multiple ways to learn.

STAGE 6: POST-HEARING: BEST PRACTICES FOR POST-HEARING BRIEFS AND ATTORNEYS' FEES.

Post-hearing briefs let parties tell the arbitrators what they think they have proven and drop claims they cannot prove. Most often, dropping claims signals realism, not weakness. Arbitrators appreciate professionalism.

The post-hearing brief should provide a roadmap of a party's road to victory. Whether for the claimant or respondent, a good brief addresses the elements of both sides' claims and defenses, shows which elements remain in dispute, and gives the arbitrators an easy path to finding for the briefing party. Consider submitting a revised timeline, with transcript citations, showing why you should prevail. Smart lawyers will anticipate their opponent's best arguments and explain why they are not significant. Employ short displays, charts, and tables

displaying evidence on complex matters like damages. Make sure the arbitrators can follow the steps of damage models and easily find their inputs in the record. Consider doing the same on other complex factual or legal issues. Use graphics for any issue that is difficult to comprehend without seeing it on paper.

Many arbitrators like to ascertain the amount of any attorneys' fees and costs to be awarded after issuing an interim award on liability and determining the prevailing party. Alternatively, the parties may agree to submit their fees and costs information as part of their post-hearing briefs. This could allow the arbitrators to issue a final award, including the amounts of attorneys' fees and costs awarded, within 30 days of receiving post-hearing briefs.

THE OCCASIONAL STAGE 7: CHALLENGING THE AWARD.

In most cases, once an award issues, both sides accept it even if the losing party is very unhappy. The award quickly becomes final. But what happens if a losing party is so unhappy, and believes the award is so wrong, that it challenges it? The statutory framework in which arbitration rests permits vacatur, but only on very limited grounds.

There are four statutory grounds for vacatur in the Federal Arbitration Act (FAA) and parallel state statutes: (1) arbitrators exceeding their powers or imperfectly executing awards; (2) evident partiality; (3) arbitrator misconduct or corruption, including refusing postponements or evidence in a way that causes fundamental unfairness; and (4) awards procured by fraud, corruption, or "undue means." There are two "implied" common-law grounds: manifest disregard of the law and violating public policy. Jurisdictions disagree on whether manifest disregard still exists in disputes under the FAA and many state acts; a tiny handful of jurisdictions purport to not even recognize public policy vacatur.

The point of arbitration is to substitute the arbitrators acting under arbitration rules for judges acting under court rules to decide all questions of fact and law. Thus, courts cannot review the merits of the arbitrators' decisions and vacate awards merely because they find the arbitrators wrong. Pure merits decisions are *all* for the arbitrators with one exception: when the decision

concerns their powers (or, on very rare occasions, violates dominant public policies).

Not only do arbitrators get near-absolute deference on the merits, but courts generally defer to arbitrators on questions of pure fact, procedure, evidence, remedies, and doing equity, areas where most arbitration rules and the common law give arbitrators very broad powers.

In general, the odds of successfully vacating an award are extremely poor. Even the strongest challenge succeeds less than one time in five.

Based on our separate studies, the most frequent ground for moving to vacate is that the arbitrators exceeded their powers. And our work showed that “exceeded powers” easily was the most successful basis for challenge. Yet fewer than 20% of challenges succeeded.

Awards that exceed powers are those that either take an action that the parties’ contract or applicable law clearly prohibits — like awarding fees when the contract prohibits them or is silent and applicable law imposes the American rule that each side bears its own fees — or fail to take a required action, such as failing to provide reasons in a supposedly reasoned award. If the contract is ambiguous and requires interpretation, and the award indicates that the arbitrators tried to interpret it, courts will not vacate the award even if they strongly disagree with the interpretation, not even when the error involves arbitral powers.

It is a widespread belief that arbitrators can always fall back on equity even in disregard of the law. Prudent lawyers, however, should not expect this principle to extend to awards that plainly violate clear limits the contract or law imposes on the arbitrators’ power. Such awards are among the few vulnerable to exceeded-powers challenges.

Public policy challenges were the second-most-successful ground of vacatur. These challenges rarely appear, however, in ordinary commercial litigation. They involve dominant public policies and awards that violate them, usually on extreme facts, like reinstating a violent employee or a manager who blatantly discriminated against employees.

Evident partiality awards tend to involve bias or failures to disclose that are so obvious they are almost impossible to believe. Fortunately, such behavior is rare. The strict disclosure standards governing California arbitrators, standards that require broad disclosure, should make violations less likely here than in many other states.

Losing parties rarely file misconduct and corruption vacatur and, if filed, those challenges almost never succeed. And, puzzlingly, “manifest disregard” is the second-most-frequent ground for seeking vacatur, yet its intentional-disregard-of-law requirement is so hard to prove that it is far and away the least successful. It is a long shot that can discredit other challenges when brought together with them.

This brief review of vacatur should help parties determine where to focus a motion to vacate an arbitration award.

Arbitration offers parties an opportunity for more certainty in scheduling; decision-makers skilled in the craft, trade, or products involved; guaranteed reasons; and a quick and relatively inexpensive trip from filing to a final decision. Those virtues will be assured, however, only if parties and their counsel participate actively in planning the arbitration, confine their pre-hearing investigation, inform the arbitrators of their desires, and provide arbitrators a clear basis for siding with them.

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