

BAR BULLETIN

Making Arbitration Work: Best Practices

**By Hon. Sharon Armstrong (Ret.)
and Richard Chernick**

Commercial arbitration has become the dispute resolution process of choice for many businesses because the Federal Arbitration Act (FAA),¹ as interpreted by the U.S. Supreme Court, assures parties that they may define their preferred dispute process in a transactional document and be confident that courts will enforce those choices.² Moreover, institutional providers and arbitrators understand they are bound to honor parties' agreements in administering and managing arbitrations.³

We address below practice tips that highlight those choices that are likely to enhance the quality, economy and reliability of the arbitration process. Carefully drafting the arbitration clause, embracing limited and focused discovery, and adopting efficient hearing procedures will assure a successful arbitration. In particular, care should be taken to make the negotiation of the arbitration clause more than an afterthought.⁴

Carefully Define the Scope of the Agreement To Arbitrate

Most arbitration clauses utilize the "all disputes arising out of or relating to ..." formulation that courts regard as a standard broad-form clause, which encompasses not just contractual but also related tort and statutory claims. Use the wrong formulation ("claims arising out of ...") and you may lose the right to bring non-contractual claims.⁵

Similarly, be sure that all necessary parties to the likely arbitration are named in the clause (guarantors, third-party beneficiaries, corporate affiliates, etc.). Also consider a delegation clause so the arbitrator, rather than the court,

will interpret the parties' contractual intent to arbitrate.⁶

Identify the Institution and the Rules

If the clause is silent on this point, you may end up in a non-administered proceeding in which issues the institution would have easily addressed (such as compelling arbitration against a reluctant respondent or appointing arbitrators) instead require a court hearing.

Consider a Step ADR Clause

The arbitration clause can save costs by requiring negotiation or mediation in advance of arbitration. Include time limits so that the pre-arbitration process does not derail the efficiency of the arbitration itself. And avoid "good faith" negotiation requirements, which only engender fights over ancillary issues.

Use a Single Arbitrator

For all but the most complex cases, a single arbitrator is the best choice. If a panel is required, agree to delegate to the chair certain pre-hearing decisions, such as discovery disputes.

Specify the Governing Law

Unless you specify the governing law, the arbitrator will decide it for you. In contrast to state law requirements for choice of law, the law of arbitration does not prohibit choosing a law that is unrelated to the parties or the transaction (i.e., designating New York or Delaware substantive law where the transaction and the parties are all in Washington).

Parties are also free to substitute a state arbitration statute for the FAA, even where the transaction is "in commerce" (FAA § 2). But parties should avoid incorporating state or federal civil procedure rules in the arbitration clause because they will make the proceeding as cumbersome and expensive as court litigation. Instead, the clause should require

use of the institution's procedural rules.⁷

Specify the Venue

Parties in different jurisdictions often struggle with agreeing on the venue for the arbitration. It is better to compromise on this point in negotiating the clause than leave it to the decision of the arbitration provider after the dispute arises.

If a Washington and a New York party cannot agree on governing law or venue, one possible solution is to require the filing party to commence the arbitration in the responding party's state and to designate that state's law as the governing law.

Select the Right Arbitrator

Since the arbitrator's decision is binding, selecting the right arbitrator is critical. The arbitrator must be experienced, capable, fair, prompt in making decisions, and, if required by the nature of the case, have special expertise in the subject matter.

The arbitrator also must be a strong case manager with a demonstrated ability to supervise an efficient and economical process (the "managerial arbitrator").

Prepare for the Preliminary Scheduling Conference

The first scheduling conference, held shortly after the arbitrator's appointment, is the single best mechanism for creating a fair and efficient process. The arbitrator will provide a proposed scheduling order template or agenda in advance.

Confer with your client and with opposing counsel about the issues that will be discussed with the arbitrator: claims and defenses; the nature and timing of discovery, including requests for electronically stored information ("ESI"); the number of witnesses and the need

for experts; the need for dispositive motions; the manner in which motions will be handled; interim status conferences (including a final status conference a few weeks prior to the hearing); and the time and location of the hearing.

The scheduling order developed after the preliminary conference will shape the arbitration. Be sure it is designed to produce a fair and expeditious proceeding.

Consider having your client participate in the preliminary conference to hear the opponent's position, understand the timing and costs, contribute to developing the schedule, and assess the arbitrator.

Agree to Electronic Service

Serve all documents via email (although you may be asked to provide a courtesy hard copy for the arbitrator). Use the provider's electronic filing system in an appropriate case, for example when multiple parties anticipate extensive motion practice and case filings.⁸

Set the Hearing within 6 to 12 Months

With focused discovery and limited motions practice, even complex cases can be prepared within less time than is required by court cases. The longer a case is pending, the more expense there will be.

Embrace Lay-Down Discovery and Discovery Limitations

The goal of arbitration is to provide a just, speedy and cost-effective mechanism for resolving disputes. The reason some arbitrations fail to achieve that goal is that the parties and the arbitrator use court-mandated discovery devices — interrogatories, extensive requests for production, requests for admission, and excessive depositions.

Discovery in arbitration is proportional to the nature of the case and is limited to that reasonably necessary to achieve a fair resolution of the dispute.⁹ Your discovery plan should include:

- Early “lay-down” production of all relevant, non-privileged documents and witnesses on which each party will rely to support claims and defenses;
- Early identification of expert witness CVs and reports or opinions;
- Follow-up document discovery limited in timeframe, subject matter, and persons and entities to which the requests pertain, after consultation with

the arbitrator;

- Focused ESI discovery;
- Limited depositions, presumptively one per side (consider using CR 30(b)(6) depositions in corporate matters); and
- No interrogatories or requests for admission.

Cooperate To Set ESI Limitations

• Produce ESI only from sources used in the ordinary course of business (absent compelling need, no production from backup servers, tapes or other media).

• Production is made on the basis of generally available technology in a searchable format that is usable by the requesting party and convenient and economical for the producing party.

• Absent compelling need, no metadata are produced, except for header fields for email.

• The description of custodians is narrowly tailored.

Most importantly, the arbitrator may deny requests for ESI where the costs and burdens are disproportionate to the nature of the dispute and amount in controversy, or may shift costs. See also “Model Protocol for Discovery of Electronically Stored Information in Civil Litigation” (W.D. WA)¹⁰ and free publications of the Sedona Conference on e-discovery.¹¹

Limit Non-party

Out-of-State Discovery

The provider's rules typically authorize the arbitrator to issue subpoenas to third parties to appear or produce documents in accordance with applicable law.¹² Under amendments to the FRCP, Rule 45 now allows nationwide service of process; this applies to subpoenas issued in an arbitration (FAA § 7). Become familiar with case law relating to the power of arbitrators to issue subpoenas for documents before the hearing.¹³

The Washington Uniform Arbitration Act (WUAA), RCW ch. 7.04A, applies to arbitration agreements in Washington. RCW § 7.04A.170(1) grants the arbitrator authority to issue subpoenas, including subpoenas for depositions to non-parties in the same manner as in a civil action within the state.

If the non-party witness refuses to comply, the subpoena is enforceable by the court. Collateral discovery litigation is costly and slow, and should be avoided if possible.

Agree to an Expedited Procedure

for Handling Discovery Motions

Counsel should first confer regarding a discovery dispute. If they are unable to resolve the matter, most non-dispositive motions can be addressed by counsel and the arbitrator during a phone call and/or email exchange. The arbitrator, if available, can also handle by phone any deposition disputes as they arise.

Limit Dispositive Motions

Dispositive motions are time consuming and very expensive, and are rarely granted because of factual disputes. The parties should consult with the arbitrator before filing a dispositive motion.

Only if the motion is highly likely to succeed and has the potential to streamline or shorten discovery or the hearing should the motion be permitted. Typically, dispositive motions may be appropriate for limited legal issues such as the enforceability of a damages limitation clause or the applicability of a statute.

Limit AEO Designations in Protective Orders

The provider's rules may require only that the provider and the arbitrator maintain the confidentiality of the arbitration. Parties typically prepare a protective order that also requires parties and witnesses to treat confidentially information such as business and trade secrets, customer lists, sensitive financial information, employee personnel files and the like.

In some instances, the parties agree to designate extremely sensitive material as “Attorney's Eyes Only” to prevent disclosure to the opposing party or its experts, in the belief such disclosure will harm the producing party. Unfortunately, the AEO designation may be misused, with the result that the opponent cannot prepare his case. If you need to use an AEO designation, be sure to draft an extremely narrow and clear definition, and provide for prompt arbitrator review of disputed designations.

Know the Rules of Evidence

• Federal and state rules of evidence do not apply, except that the arbitrator is required to apply rules concerning privileges and work product, and evidence concerning settlement offers or mediation is not admissible.

• The arbitrator considers such

evidence as is relevant and material to the dispute, giving it such weight as is appropriate.

- Deposition transcripts are admitted as substantive evidence (even if the witness is available to testify) provided opposing parties had the opportunity to cross-examine.

- The arbitrator may admit affidavits or other recorded testimony, giving it such weight as he or she deems appropriate.

Use Hearing Time Efficiently

- Submit an appropriate case on the documents, without testimony.

- Hear the matter on consecutive full days; hold open an extra day at the end to assure the case can be completed.

- Submit testimony by deposition, or stipulated declarations and reports; submit direct testimony by declaration with the opportunity for live cross-examination.

- Have witnesses testify by video-conferencing or by telephone.

- Prepare a joint statement of evidence listing witnesses and exhibits; cooperate in organizing exhibits to limit duplication.

- If counsel and the arbitrator agree, provide digitized exhibits on a thumb drive in the appropriate case, keeping in mind the witness will likely require a hard-copy exhibit notebook for testimony.

- Before opening statements, review with the arbitrator each witness, the nature of the testimony, and the length of direct and cross; agree to call each witness only once; give at least 24 hours notice of the order of witnesses.

- Admit all exhibits to which there is no objection at the outset of the hearing; but if the exhibits are voluminous and most of them will not be used in the hearing, admit exhibits only as they are mentioned in testimony, with the opportunity to offer additional exhibits before closing.

- Limit objections to those that are

likely to be granted, e.g., privilege, relevance, cumulative testimony.

- Use a chess clock to monitor time.
- Keep in mind you are trying the case to an arbitrator, not a jury.

Specify the Form of Award

There are essentially three kinds of arbitration awards: a “bare” award (similar to a jury verdict); a reasoned award that provides an explanation for the decisions made; and findings of fact and conclusions of law.

The JAMS rules presume the arbitrator will issue a reasoned award (JAMS Comprehensive Rule 24(h)). The AAA Commercial Rules presume the opposite (AAA Commercial Arbitration Rules, Rule R-46(b)). But if your case (and client) requires only a bare award, advise the arbitrator.

You can also tell the arbitrator you prefer a “brief” reasoned award, to save drafting time. Findings and conclusions are rarely required and always generate unnecessary expense.

Yes, You Can Appeal

Both the FAA and the WUAA restrict the vacatur of arbitration awards to extreme circumstances, e.g., where there was no agreement to arbitrate, the award was procured by corruption, fraud or undue means, the arbitrator was prejudiced, the arbitrator refused to consider material evidence, or the arbitrator exceeded his or her powers.¹⁴

Arbitration providers, however, have established optional, internal appeal procedures to which the parties may agree.¹⁵ For example, if the parties agree in writing to invoke the JAMS appeal procedure, the arbitration record is submitted to a three-member panel of experienced neutrals who apply the standard of review available in the state’s first level court of appeal.

In Washington, the standard of review is that imposed in the Court of Appeals: issues of law are reviewed de novo,

factual determinations are reviewed for sufficiency of the evidence, and procedural rulings are reviewed for abuse of discretion. The panel issues the decision within 21 days. ■

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¹ 9 U.S.C. § 1 et seq.

² E.g., *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

³ E.g., *Brook v. Peak*, 294 F.3d 668 (5th Cir. 2002); *Parker v. McCaw*, 125 Cal. App. 4th 1494 (2005).

⁴ Forms of agreement are available online, such as JAMS’ “Clause Workbook” (<https://jamsadr.com/clauses>).

⁵ *Mediterranean Enterprises Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983); *Tracer Research Corp. v. Nat’l Environmental Services Co.*, 42 F.3d 1292 (9th Cir. 1994); *Simula, Inc. v. Autoliu, Inc.*, 175 F.3d 716 (9th Cir. 1999); *Rice v. Downs*, 247 Cal. App. 4th 1213 (2016).

⁶ *Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

⁷ See, e.g., JAMS’ comprehensive, employment, construction, and international arbitration rules, and special class action procedures, discovery protocols, and minimum standards of fairness in consumer and employment arbitrations (<https://www.jamsadr.com/adr-rules-procedures>). See also AAA arbitration rules at <https://www.adr.org/aaa/faces/rules>.

⁸ E.g., JAMS CaseAnywhere.

⁹ See JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (<https://www.jamsadr.com/arbitration-discovery-protocols>).

¹⁰ <http://www.wawd.uscourts.gov/sites/wawd/files/61412ModeleDiscoveryProtocol.pdf>

¹¹ <https://thesedonaconference.org>

¹² JAMS Comp. Arb. Rule 21, Rule 19(c).

¹³ E.g., *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577 (2nd Cir. 2005).

¹⁴ 9 U.S.C. § 10; RCW § 7.04A.230.

¹⁵ <https://www.jamsadr.com/appeal/>; see also AAA Optional Appellate Arbitration Rules (<https://www.adr.org/aaa/faces/rules>).