1-1-2004

Arbitration Advocacy: From Clause to Hearing, 28 Am. J. Trial Advoc. 101 (2004)

Celeste M. Hammond
John Marshall Law School, hammondc@uic.edu

Jeffrey J. Mayer

Arbitration Advocacy: From Clause to Hearing

Celeste Hammond[†]
Jeffrey J. Mayer[††]

Abstract

This Article provides an overview of the key differences between arbitration and litigation, a look at the past and present state of the law governing arbitration, techniques for drafting arbitration clauses, and effective advocacy at arbitration hearings.

Introduction

This article and the related presentation reflects the authors' collective belief that practitioners often fail to effectively use arbitration because (1) attorneys have inadequate information about the arbitration process, and (2) attorneys fail to consider the entire arbitration process, from drafting the clause to participation in the hearing, as one continuous and related opportunity for advocacy.[1] Both authors are well aware that many practitioners are unhappy with arbitration even though it is a regular part of the commercial law practice. From these separate experiences, the authors have reached a similar conclusion: attorneys' frustration with arbitration can be relieved and systematically cured. Moreover, the authors believe that, though arbitration is not always appropriate, it is a disservice

---

[†] J.D. (1968), University of Chicago Law School. Professor Hammond a professor and the Director for the Center for Real Estate Law at John Marshall Law School.

[††] A.B. (1982), Duke University; J.D. (1986), Washington University School of Law. Mr. Mayer is a partner in the Chicago, Illinois law firm of Freeborn & Peters LLP.

[1] Both authors have long studied arbitration. Professor Hammond has written and spoken widely on arbitration, served as an arbitrator, and prior to beginning her academic career, handled a variety of matters in and out of court. *See* Celeste Hammond, *The (Pre) (As) sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589 (2003). She teaches Arbitration in Real Estate Transactions in the LL.M. Real Estate Law Program at John Marshall Law School. Mr. Mayer is active in his firm both in carrying matters through the ADR process and drafting arbitration clauses. He has also published and spoken widely on arbitration. *See* Jeffrey Mayer, *Recent Mexican Arbitration Reform: The Continued Influence of the Publicistas*, 47 U. MIAMI L. REV. 913 (1993). He has handled a wide variety of real estate and other matters in court as well as through arbitration and mediation.

to the client to simply refuse to consider Alternative Dispute Resolution options while negotiating a contract or attempting to settle a dispute.

The authors divide this Article into four sections. Section I addresses the differences between arbitration and litigation. Section II looks at the current state of arbitration law in the country. Section III offers ideas and techniques for drafting arbitration clauses. Finally, Section IV addresses hearing techniques and their relationships to drafting issues.

I. Understanding and Appreciating the Differences Between Arbitration and Litigation

In available case law and practical guides, arbitration is often portrayed, simply, as an "alternate" forum–perhaps a little cheaper and more informal than litigation, but nonetheless a variant of the familiar process. With a judge as an arbitrator and the application of the federal rules of evidence, arbitration may appear to be nothing more than a bench trial conducted in a law firm conference room.[2]

Arbitration, however, has distinctive characteristics. These characteristics not only require a change in advocacy style, but also provide additional opportunities for advocacy on behalf of a client. Among these other differences are the following:

1. Arbitration is governed by an active, and perhaps undisciplined, decision-maker whose decision is not subject to meaningful review.
2. The rules of arbitration may be changed before and during the arbitration. This contrasts with litigators in a federal court proceeding who have limited ability to negotiate among themselves to direct the court as to the manner of how a trial should proceed.[3]

---

[2] Today in America, arbitration is undergoing an unprecedented surge in availability, acceptance, and institutionalization, far more than any form of dispute resolution. It is in many respects the "rock star" of ADR considering the revenue it generates, the attention it receives in the journals, and the almost carte blanche approval it garners from the courts. All lawyers, and especially those in the real estate forum, must have a working knowledge of the impact that arbitration could have on their clients.

[3] Rules 16 and 26 of the Federal Rules of Civil Procedure direct the parties to meet and confer regarding certain timing and discovery issues, but those discussions are dictated by the court. FED. R. CIV. P. 16, 26.

3. In arbitration, the parties may have limited or even no discovery. Even if the parties agree to a discovery process, they may have limited ability to obtain third-party documents and testimony. Courts may quash arbitrator's subpoenas or conclude that the subpoena is outside the arbitrator's jurisdiction.[4]
4. During the arbitration hearing, parties can rehabilitate failing witnesses with hearsay or other "garbage" testimony because of the relaxed rules of evidence.
5. An arbitrator is also different from a judge. Serving as an arbitrator is the greatest job in the world; not only are all the parties nice to an arbitrator, but the arbitrator is paid first and immediately. The arbitrator devotes extensive–and perhaps exclusive–attention to the matter before her. Thus, practicing attorneys serving as arbitrators have limited incentive to bring arbitration proceedings to a close, while judges are encouraged to clear their docket. The arbitrator often has collegial peer relationships with the advocates. The arbitrator is not likely building on a prior body of opinions as a judge does. (An exception may be found in certain sports-related arbitrations, such as salary and discipline disputes.) The arbitrator also has a different skill set than a judge. For example, an arbitrator, while familiar with the rules of evidence, may not be experienced at ruling quickly on evidentiary issues.

Arbitration, in fact, has a radically different history than litigation and is a relatively recent phenomenon. Historically, arbitration was a very useful dispute resolution mechanism for local commercial groups. Merchants and tradesmen utilized arbitration to settle their business disputes among themselves. The disputing parties would explain their positions to a fellow merchant or group of merchants and abide by their oral ruling over the dispute. The oral ruling of these merchant arbitrators was in no sense legally binding upon the disputants, but the fear of local ostracism guaranteed compliance. Thus, arbitration was historically born via the need to settle disputes informally and quickly without the corresponding expensive and protracted litigation process.

---

[4] *See, e.g.*, 9 U.S.C. § 7 (1994) (outlining venue issues regarding subpoena power); 28 U.S.C. § 1782 (1996) (requiring that courts assist with international proceedings which some courts have refused to apply to international arbitration proceedings).

There were times, however, when one of the disputants would resist arbitration despite a previously-negotiated arbitration contract. This compelled the other party to enter the court system and attempt asserting their rights under the arbitration contract. In so doing, the parties would pray that the court issue an order compelling arbitration. British and American courts were not receptive to motions such as these. Rather, the courts rejected commercial efforts to assert rights under an arbitration contract, because the courts felt that they were being ousted from their rightful jurisdiction in these disputes.

To remedy this judicial hostility toward arbitration, the United States Congress passed the Federal Arbitration Act of 1925 (FAA).[5] The goal of this legislation was to place arbitration contracts on the same footing with all other legitimate contracts. Subsequent to this new federal legislation, various states passed similar laws substantiating the enforceability of arbitration contracts. Today, courts on both the federal and state level have embraced a strong preference for binding arbitration and enforce arbitration contracts almost universally. In so doing, the courts are accomplishing the goals of the FAA and the various state acts by placing arbitration contracts on the same footing as all other contracts. Furthermore, the courts are also systematically clearing their dockets of numerous commercial disputes. Thus, it appears that arbitration, once a thorn in the side of the court's jurisdiction, has now become a darling to these same courts.[6]

Today, arbitration is a private dispute resolution procedure agreed to by the parties involved. It is almost always binding in nature, and designed pursuant to a contract. Arbitration, unlike negotiation and mediation, retains many of the qualities used in traditional litigation. A typical arbitration will hold arguments, accept briefs, and have the option for discovery, while a third party, quite similar to a judge, renders a binding decision. As noted above, however, unlike litigation, the arbitrator's decision is not subject to any meaningful judicial review for errors in law

---

[5] 9 U.S.C. §§ 1-16 (1994).

[6] The civil law countries have taken a different route to achieve the same result. *See, e.g*, Mayer, *supra* note 1, at 913 (describing civil law view of arbitration commencing with merchant courts functioning as an adjunct to judicial proceedings under judicial supervision).

or fact. Some parties to arbitration have successfully contracted for an expanded judicial review of the arbitrator's decision, but the circuits are currently split on whether such action is permissible.[7] This superficial resemblance to judicial proceedings is misleading.

Arbitration is currently at its peak as an alternative form of dispute resolution.[8] Students and future practitioners would be wise to keep a finger on its pulse and be wary of the implications to their practices and what this will mean for their clients.

II. The Law of Arbitration: Key Concepts

A. Common Law

The common law did not provide for binding arbitration in the United States. As alluded to above, courts were hostile to the proposition of losing their jurisdiction to alternative decision-making bodies. This judicial hostility eventually acquiesced into a growing acceptance of private dispute resolution. Thus, various state and federal statutes, and even international treaties, were enacted and ratified to govern arbitration proceedings. However, these statutes and treaties are not enforceable without the consent of the specific parties involved. The statutes exist as a mechanism to govern arbitration proceedings in the event that parties decide to contract and consent for private adjudication in lieu of traditional litigation.

The statutory schemes modifying the common law focus on this idea of consent as being a condition precedent to arbitration. Therefore, as long as parties consent to arbitration of their dispute, they will be bound to the decision of the arbitration. Correspondingly, this decision is given the full weight of any judicial decision. Some commentators would argue

---

[7] *See generally* Anthony J. Longo, Comment, *Agreeing to Disagree: A Balanced Solution to Whether Parties May Contract for Expanded Judicial Review Beyond the FAA*, 36 J. MARSHALL L. REV. 1005 (2003).

[8] *E.g.*, *In re* Application of R D Mgmt. Corp., 766 N.Y.S.2d 304, 196 Misc. 2d 579 (Sup. Ct. 2003) (stating that investments in real estate affect interstate commerce and are subject to the FAA in state court and that arbitration is regularly employed to resolve real estate disputes).

that an arbitrator's decision is given even more weight than a judicial decision, because overturning or vacating the arbitrator's decision is difficult, whereas judges are overturned daily.[9]

An arbitrator's award is difficult to vacate because the statutes governing arbitration proceedings limit the legitimate alternatives that a defeated party can assert as a basis for reversal. Consent to arbitration is merely consent to a decision, and not necessarily consent to a "correct" decision.

Courts have acknowledged this in many recent decisions. For example, in *Merrill Lynch v. Jaros*,[10] appellants appealed the district court judgment sustaining the arbitration panel's award by stating that there was a disregard of the laws governing the timeliness of appellee client's claims. The Sixth Circuit affirmed the district court's judgment by confirming that the award was not palpably faulty.[11] The court stated that interpretation of law by arbitrators is not subject to judicial review for errors in interpretation.[12] State courts have also generally acknowledged that arbitrators are above the law when making binding decisions upon the parties. In *Moncharsch v. Heily & Blasé*, the Supreme Court of California noted that "[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action."[13] This judicial acknowledgment of the arbitrator's relative freedom when rendering a decision is hardly an emerging trend. The United States Supreme Court articulated this fifty years earlier in *Wilko v. Swan*.[14]

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators *without* judicial instruction on the law. As their award may be made *without explanation* of their reasons and without a complete record

---

[9] Furthermore, as explained below, an arbitrator may have greater powers than a judge. *See infra* notes 20-25 and accompanying text.

[10] 70 F.3d 418 (6th Cir. 1995).

[11] *Jaros*, 70 F.3d at 420.

[12] *Id.* at 422.

[13] 832 P.2d 899, 904, 10 Cal. Rptr. 2d 183, 188 (1994).

[14] 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953).

> of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," *cannot be examined.*[15]

Thus, consider the arbitration process with fair warning in that the arbitrator is armed with the ability to selectively follow the law without the caution inherent in possible reversal. With this in mind, the authors now turn to the specific statutory schemes that govern arbitration proceedings.[16]

B. Federal Arbitration Act

The FAA applies to proceedings involving interstate commerce. The scope of the FAA has not been heavily litigated.[17] For example, in real estate and construction matters, it is currently an open issue as to whether a local project is covered by the FAA if the project involves material and labor that crosses state lines. Even if subsequent court decisions impose a restrictive reading of the definition of commerce, most significant arbitration proceedings will be governed by the FAA.[18]

As a general matter, the FAA provides the parties autonomy to fashion their agreements and arbitration with less judicial intervention than analogous state laws.[19] The FAA, in contrast to more restrictive state law frameworks, places virtually no limits on the parties' freedom to agree on the rules of the arbitral process, which gives attorneys for the parties opportunities for advocacy. Significantly, the FAA does not provide for independent federal jurisdiction. As such, the meaning of the FAA is developed in both state and federal courts.

---

[15] *Wilko*, 346 U.S. at 435-36 (emphasis added); *see also* Lackman v. Lorg & Foster Real Estate, Inc., 266 Va. 20, 26, 580 S.E.2d 818, 822 (2003) (confirming that Virginia law will not set aside an arbitration award for reasons of equity).

[16] This Article does not address issues relating to international arbitration.

[17] *But see* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

[18] *E.g.*, *In re* Application of R.D. Mgmt. Corp., 766 N.Y.S.2d 304, 196 Misc. 2d 579 (Sup. Ct. 2003) (finding that investments in real estate affect interstate commerce, invokes the FAA in state court, and allows the arbitrator to determine the scope of his own jurisdiction).

[19] 9 U.S.C. §§ 1-16 (1994).

C. Standard of Review

Commercial arbitration awards under the FAA are not subject to a statutorily mandated review for errors of law. Rather, the FAA maintains only four limited grounds for vacatur that a party can pursue in a federal district court, if dissatisfied with the arbitrator's decision. In other words, the losing party at arbitration can use the FAA to ask a federal district court to vacate the arbitration award, but that party will succeed only if one of the four FAA listed grounds were violated.[20] Briefly these four grounds are (1) arbitrator corruption, fraud or undue means; (2) evident partiality or corruption; (3) misconduct or misbehavior; and (4) misuse of power.[21] These four grounds are very narrow and are solely focused on the arbitrator's behavior. At the same time, however, if the FAA was intended to encourage parties to exercise their freedom to contract for arbitration rather than litigation, then those same contractually liberated parties should be free to agree on everything affecting their arbitration, including a standard of judicial review that makes them comfortable and keeps them out of litigation.

Whether parties can contractually demand that a federal district court review the arbitration award for grounds not mentioned in the FAA has split the federal circuit courts of appeal. Some circuits, such as the Third and Fifth Circuits, allow such a demand.[22] Others, such as the Seventh, Eighth and Tenth Circuits, do not allow such a supplementation of the FAA.[23]

---

[20] *Id.* § 10.

[21] *Id.*

[22] *See* Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001) (holding "that parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own"); Gateway Techs., Inc. v. MCI Tel. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (holding that, because the parties by their contract agreed to expand judicial review, the contract's provision supplemented the FAA's default standard of review).

[23] *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 933 (10th Cir. 2001) (refusing to uphold contractual modifications of judicial review standard); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 998 (8th Cir. 1998) (holding that arbitrator's award cannot be overturned due to error of law); Chicago Typographical Union No. 16 v.

Commentators have argued that allowing parties to contract for an expanded scope of judicial review is either per se permissible or per se impermissible. Those who encourage the contractual expansion of judicial review do so in the name of freedom of contract, while those who oppose the contractual expansion argue that parties may not abuse the federal judiciary by creating jurisdiction by contract. One recent commentator has argued that taking an all or nothing approach to this issue is potentially crippling to federal arbitration.[24] He instead advocates a presumption in favor of freedom to contract for expanded judicial review that shifts the burden to the party opposing the expansion to cite a contractual or policy defense to the arbitration expansion clause. The author insists that such a burden remains high, especially if the parties specifically bargained for the expansion clause and have relied upon it.

D. Federal Preemption

The relationship between these federal law principles and state law is largely governed by the Supreme Court holding in *Doctor's Assocs. v. Casarotto*.[25] In holding that the FAA preempted a Montana arbitration statute, the United States Supreme Court employed broad preemption language to guide later federal courts considering similar issues.[26]

In *Doctor's Assocs.*, the petitioner, a corporation that was a national franchiser of a restaurant chain, entered into a franchise agreement with respondent franchisee.[27] The agreement permitted the respondent to open a restaurant in Montana.[28] The franchise agreement stated that all contract

---

Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (holding that parties may not contract for judicial review of an arbitrator's award).

[24] Longo, *supra* note 7, at 1025-26. However, a form of judicial review may be obtained by carefully circumscribing the arbitrator's jurisdiction and asking a court to rule that the arbitrator exceeded her jurisdiction. Although a court will not review the merits of an award, a court will inquire as to whether the arbitrator exceeded her jurisdiction. Thus, if an arbitrator is not empowered to issue an award in excess of one million dollars, a court can set aside a larger award.

[25] 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).

[26] *Doctors Assocs.*, 517 U.S. at 688.

[27] *Id.* at 683.

[28] *Id.*

controversies would be settled by arbitration.[29] The respondent subsequently filed suit against petitioner and its agent in Montana state court "alleging state-law contract and tort claims relating to the franchise agreement."[30] The petitioner successfully moved the trial court to stay the litigation pending arbitration.[31] That judgment was reversed by the Montana Supreme Court upon its finding unenforceable the agreement's arbitration clause because the arbitration clause did not appear in underlined, capital letters on the first page of the agreement, as required by Montana law.[32] The judgment for the petitioner was reversed and remanded based on the court's holding that Montana's first-page notice requirement, which specifically governed only contracts subject to arbitration, conflicted with section two of the FAA and was therefore displaced by the FAA.[33]

Another example of the FAA preempting state statutes governing arbitration is *Saturn Distribution Corp. v. Williams*.[34] In *Williams*, a car manufacturer sought declaratory and injunctive relief against the Commissioner of the Virginia Department of Motor Vehicles in order to challenge provisions of the Virginia Motor Vehicle Dealer Licensing Act.[35] The appellee automobile dealers association intervened as a defendant, and the trial court granted appellee's motion for summary judgment. The appellant argued that section 46.1-550.5:27 of the Licensing Act, which prohibited the formation of a non-negotiated agreement between a car dealership and a manufacturer that compels arbitration of claims arising out of the dealership agreement, was preempted by the FAA.[36] The court reversed the trial court's decision and granted the appellant summary judgment. The court held that section 46.1-550.5:27 *did conflict* with the FAA and *was preempted* by the Supremacy Clause.[37] The court found

---

[29] *Id.*

[30] *Id.*

[31] *Id.*; *see* 9 U.S.C. § 3 (2000).

[32] *Doctors Assocs.*, 517 U.S. at 684.

[33] *Id.* at 687.

[34] 905 F.2d 719, 727 (4th Cir. 1990), *cert. denied*, 498 U.S. 983 (2001).

[35] *Williams*, 905 F.2d at 721.

[36] *Id.*; *see* 9 U.S.C. § 2 (1947).

[37] *Williams*, 905 F.2d at 722; *see* U.S. CONST. art. VI.

that the proposed arbitration provisions in the appellant's dealership agreement were enforceable in Virginia, and that the appellee commissioner was enjoined from prohibiting the use of the arbitration provision in contracts between appellant and its dealers.[38]

If *Doctors Associates* is read broadly, virtually any state law limiting arbitration clauses is, and should, be preempted. For whatever reason, litigators have rarely made such arguments, or if they have, courts have not ruled upon them. Accordingly, there exists a substantial body of state laws that, in fact, may no longer be good law. The authors believe that this is an area that is likely to be contested heavily in the years to come. For example, Alabama state courts have acquired a renegade reputation for departing from a firmly established Supreme Court holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[39] In *Prima Paint*, the Court found that a fraud-in-the-inducement challenge to a contract that contained an arbitration clause should be decided by an arbitrator, not by a court.[40] Alabama state courts, however, follow the reasoning of other courts that limit the holding in *Prima Paint* to "voidable" contracts–a contract where a party is induced through fraud or a contract where a party is an infant. Where a party challenges the very existence of a contract, that dispute must be decided by a court.[41] Such a restrictive posture in comparison with the established federal precedent is common among states like Alabama.

This is a dispute that will not be settled in the near future. Because the FAA does not provide independent federal jurisdiction, state courts will regularly address these issues. The United States Supreme Court is not likely to intervene again. As such, the law in this area will continue to be inconsistent.

---

[38] *Williams*, 905 F.2d at 722.

[39] 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). *Prima Paint* is a lynchpin in arbitration law. All attorneys dealing with arbitration should read and understand *Prima Paint*. *Prima Paint* prevents parties from avoiding arbitration by invoking fraud or other tort claims. Absent *Prima Paint*, arbitration is essentially worthless, as a trial on the validity of the contract would regularly occur prior to arbitration, and very few litigants would fight for the right to have a second proceeding.

[40] *Prima Paint*, 388 U.S. at 403-04.

[41] Shearson Lehman Bros., Inc. v. Crisp, 646 So. 2d 613, 616 (Ala. 1994).

E. Agreement to Arbitrate Disputes Arising out of Statutes

Under the FAA, broad agreements to arbitrate may encompass disputes arising from statutory schemes. For example, the FAA has been held to apply to statutory age discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*[42] Although section one of the FAA provides that the Act does not apply to a contract of employment of any class of workers engaged in foreign or interstate commerce, the Supreme Court held that this was not applicable to an arbitration clause in a securities application.[43] "Having made a bargain to arbitrate," the petitioner was held to it unless he showed proof that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[44] The Court held that claims under the Age Discrimination Employment Act (ADEA) were subject to resolution by actions of the Equal Employment Opportunity Commission aside from judicial resolution, and therefore, found that Congress did not intend to make the resolution of ADEA claims solely an issue for judicial review.[45] The petitioner failed to prove that the ADEA specifically precluded arbitration of ADEA claims, and therefore, the decision that the petitioner's claim was subject to arbitration was affirmed.

The Fifth Circuit followed *Gilmer* in *Miller v. Public Storage Management, Inc.*, holding that the FAA encompassed a statutory disability claim.[46] The appellant, a former employee, signed and initialed each page of an arbitration agreement presented by the appellee employer, which required any dispute arising over employment termination to be resolved by binding arbitration.[47] When the appellant was later terminated after not returning to work following a medical leave, she filed an action

---

[42] 500 U.S. 20, 26-27, 111 S. Ct. 1647, 1652, 114 L. Ed. 2d 26 (1991).

[43] *Gilmer*, 500 U.S. at 25 n.2.

[44] *Id.* at 26.

[45] *Id.* at 27-29; *see* 29 U.S.C. § 621 (2001) (Congressional Statement of Findings and Purpose).

[46] 121 F.3d 215 (5th Cir. 1997).

[47] *Miller*, 121 F.3d at 216-17.

against appellee under the Americans with Disabilities Act (ADA)[48] and Texas law.[49] The trial court dismissed the appellant's claims and compelled arbitration pursuant to the agreement signed by appellant.[50] The appellant challenged that ruling and the court affirmed. The court dismissed the appellant's claims that she was not subject to the FAA,[51] and held that the exclusions therein applied only to employees particularly engaged in interstate commerce.[52] The court found that the ADA advocated the use of alternative dispute resolution and held that the FAA preempted any conflicting state anti-arbitration law. Thus, the agreement signed by appellant was enforceable under the FAA.[53]

F. Contractual Language Needed to Invoke Arbitration

There has been much discussion about how statutes and cases give effect to arbitration clauses in contracts. But what must be contained in such a clause to invoke arbitration? The language must propose to finally end a dispute. For example, in *PaineWebber Inc. v. Chase Manhattan Private Bank*, the following language was held insufficient to bind the parties to arbitration, even in light of strong federal policy favoring arbitration: "to the appropriate arbitrator or court in the United States."[54] The court explained its reasoning:

> Importantly, the Referral Agreement does not state that any dispute shall be submitted "either" to arbitration or the courts, as PaineWebber insists. Rather, it states that disputes between PaineWebber and Chase-Switzerland shall be submitted "to the appropriate arbitrator or court in the United States." How then, we ask rhetorically, can this provision be deemed a bind-

---

[48] *Id.* at 217; *see* 42 U.S.C. §§ 12101-12213 (1990); *see* TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996).

[49] TEX. LAB. CODE ANN. §§ 451.001-.003 (Vernon 1996); *Miller*, 121 F.3d at 217.

[50] *Miller*, 121 F.3d at 217.

[51] 9 U.S.C. §§ 1-14 (1947).

[52] *Miller*, 121 F.3d at 218.

[53] *Id.*

[54] 260 F.3d 453, 462-63 (5th Cir. 2001).

ing agreement to arbitrate any and all disputes (which precludes by its very terms any court resolution) when it identifies "court" and "arbitration" as equals in that very provision? Significantly, there is no mention of a specific geographic location for arbitration, no selection of an arbitral forum such as the NYSE or the NASD, and no language requiring arbitration. The dispute resolution clause in the Referral Agreement, then, simply leaves too many critical elements unaddressed to support PaineWebber's contention that the Referral Agreement, standing alone, amounts to a binding arbitration agreement between the parties.[55]

G. Procedural Fairness Is Not Required for Enforceable Arbitration Clauses

Arbitration clauses do not have to be fair,[56] but extreme deviations from customary language or procedure may allow a reluctant litigator to challenge the clause. For example, in the "Steak House Cases," the Sixth and Seventh Circuits held arbitration agreements to be illusory and unenforceable when one side was able to alter the rules of arbitration with unfettered discretion.[57] Because one-sided or overreaching provisions may be stricken by a court, they invite litigation.

H. Duty to Arbitrate Compared With Jurisdiction

Whether the parties have a duty to arbitrate is an issue for the court. For example, in *American Fuel Corp. v. Utah Energy Dev. Co.*, the respondent individual was co-founder of respondent energy company.[58] The petitioner fuel corporation hired respondent individual as a consultant

---

[55] *PaineWebber*, 260 F.3d at 462-63.

[56] *See* Montez v. Prudential Sec., Inc., 260 F.3d 980 (8th Cir. 2001) (finding the fact that an arbitrator had done significant business with former employer's law firm and attorney was insufficient to prove evident impartiality). As noted below, this allows a party to a contract to insist on a one-sided clause.

[57] Penn v. Ryan's Family Steak Houses, 269 F.3d 753, 759 (7th Cir. 2001); Floss v. Ryan's Family Steak Houses, 211 F.3d 306, 315-16 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001).

[58] 122 F.3d 130, 132 (2d Cir. 1997).

for its corporation.[59] The respondent individual was terminated for alleged solicitation of projects for his own company, and the respondents filed suit alleging breach of the agreement.[60] The district court found that the employment agreement bound the respondent individual "to arbitrate his claims because all the claims were 'related' to that agreement" and that such agreement compelled the same from respondent company because it was the alter ego of respondent individual.[61] The respondent energy company appealed the alter ego status.[62] The Second Circuit reversed and vacated the stay on the litigation with respect to respondent energy company's claims, finding that its claims of breach involved petitioner fuel corporation's agreement with them and that the petitioner failed to show that the lawsuit constituted the kind of fraudulent or wrongful conduct that called for piercing the corporate veil.[63] The court concluded that the respondent energy company was not bound to arbitrate.[64]

The duty to arbitrate, discussed above, is a distinct concept from jurisdiction. A jurisdictional inquiry, however, overlaps with the duty to arbitrate an issue. The issue of whether a party has a duty to arbitrate and whether the arbitrator has jurisdiction to decide the issue sometimes appears to be the same inquiry with a different label.[65]

I. Consent

Despite its central role in the arbitration framework, few cases or commentators have analyzed the nature and scope of arbitration consent. Even sophisticated commercial agreements to arbitrate may be devoid

---

[59] *Am. Fuel Corp.*, 122 F.3d at 132.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 134.

[65] For example, what would a court do if an arbitrator was, according to the arbitration clause, "without jurisdiction" to issue a legally erroneous award? Would a court consider a challenge to an award under such a clause a jurisdictional issue that was a matter for the court to decide, or a review on the merits that was unreviewable? No court has decided.

of knowing consent due to the unfamiliarity of the parties' attorneys with the realities and consequences of arbitration. This unfamiliarity translates into a client without cogent legal advice to knowingly consent to arbitration in lieu of traditional litigation.

Consent can create a super tribunal of sorts.[66] For example, the United States Supreme Court has held that, if contracting parties consent to include claims for punitive damages "within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."[67] Thus, in a real sense, an arbitrator can award greater remedies than a court.

The practical significance lies in the fact that courts often override consensual provisions in the name of public policy. Non-competition clauses, excessive liquidated damage provisions, and disclaimers of express warranties are all routinely struck down by courts even if they were voluntarily entered into. If the parties ask an arbitrator to construe the contract, however, and the parties can agree to relief beyond the relief available from a court, the arbitrator may well enforce the contract language. Although this may seem far-fetched, it has already occurred.

Recently, for example, the United States Court of Appeals for the Seventh Circuit refused to consider overturning an award that provided for relief that arguably violated antitrust laws. In *Baxter International, Inc. v. Abbott Labs*, the Seventh Circuit refused to examine an arbitration award that arguably created an arrangement that violates an antitrust award.[68] Judge Ripple, dissenting from a decision to deny a petition for re-hearing *en banc*, wrote that Baxter's submission that the opinion holds that the "[a]rbitrators have the unreviewable authority to decide for themselves whether they are commanding the parties to violate the law" has "strength." Further, "the role of the courts to interpret and uphold the law should not be dismissed casually."[69] Thus, the Seventh Circuit held that

---

[66] *See* Jeffrey J. Mayer & Theodore W. Seitz, *Recognizing and Understanding Consent Issues in Arbitration*, 79 MICH. B.J. 504, 505 (2000).

[67] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 52, 115 S. Ct. 1212, 1214, 131 L. Ed. 2d 76 (1995).

[68] 315 F.3d 829, 832 (7th Cir.), *reh'g en banc denied*, 325 F.3d 954, *cert. denied*, 540 U.S. 963 (2003).

[69] *Baxter Int'l*,, 325 F.3d at 955 (Ripple, J., dissenting).

an arbitrator has the power to issue an award beyond the capabilities of a federal court.[70]

III. Choices in Drafting Arbitration Clauses: Advocacy at the Negotiation Stage

A. Arbitration Clauses Can and Should Be Shaped to the Particular Dispute

Arbitration law thus provides parties tremendous flexibility in designing dispute resolution procedure. At the same time, if the parties fail to provide the arbitrator or arbitrators sufficient guidance, arbitration law and related procedures could produce a long, expensive procedure, along with a result that is unacceptable and perhaps unlawful. The authors therefore urge attorneys to avoid viewing the decision to submit a dispute to arbitration as a choice between full-blown litigation and a general arbitration clause. The FAA permits the parties to design their own procedure. Different types of contract relationships may suggest different types of dispute resolution strategies.

For example, where no jury is possible, where an injunction or other equitable remedy is the likely goal, or where there is a need for extensive discovery, litigation may be a better approach than arbitration. In other situations, arbitration is rarely appropriate. That is, it would be foolhardy in many cases to submit trademark validity to an arbitrator. The value of a mark and the extensive body of case law guiding courts in resolution of trademark disputes suggest that a court is a better option. Given the available trademark case law, losing the right to appeal by directing the trademark dispute to arbitration is a significant procedural sacrifice. In other situations, such as a technical contract dispute, the authors strongly urge consideration of a carefully drafted arbitration clause. In such a case, factual analysis, rather than the legal doctrine, will control. An arbitrator knowledgeable in the technical area at issue will be a better and more efficient decision-maker than a court or a jury. Furthermore, as such a

---

[70] *Id.*

technical case would turn on factual issues that are unlikely to be addressed by the appellate court, the loss of appellate review is less important.

The authors do not wish to be dogmatic on these points. It is certainly fair to say that reasonable attorneys may disagree on desirability of arbitration in different circumstances. It is important, however, to have some philosophy for drafting arbitration clauses. In many cases, little or no thought is given to drafting. As one California court complained, "we spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time drafting them. Increasingly, we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the 'remedy' is worse than the disease."[71]

B. Economy Versus Fairness

Consider two of the most commonly perceived concerns arising from the distinctions between litigation and arbitration: absence of discovery and the quality of the decision-maker. Each of these concerns may be addressed easily.

Parties are free to provide for discovery in arbitration. Under the FAA, this tribunal has plenary power over discovery, including the right to order pre-hearing discovery even without specific provision for discovery.[72] Furthermore, parties may provide for the professional qualifications of the arbitrator, or for more than one person to serve as arbitrators in the dispute. In a real estate construction dispute, for example, the parties may require that the arbitrator be a licensed architect, builder, real estate attorney, or some combination of the above.

The parties may control the manner and presentation of evidence through contract. In construction disputes, an arbitration clause may provide that the parties and the tribunal may rely upon site visits and available technical information such as plans and drawings. Indeed, the authors note that even a brief inquiry reveals over twenty-five issues that could be considered for each proposed arbitration clause.

---

[71] Nat'l Union Fire Ins. Co. v. Nationwide Ins. Co., 69 Call. App. 4th 709, 716, 82 Cal. Rptr. 2d 16, 19 (Ct. App. 1999).

[72] *See* Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988).

Drafting Issue Checklist

- Should the parties agree to allow or, by contrast, eliminate discovery?
- Should the parties limit the time from filing of the demand until the hearing in order to obtain an expedited hearing?
- What rules of confidentiality should apply?
- Should written submissions be permitted? Written submissions are often very expensive.
- Should the parties relax the rules of evidence for the arbitration?
- Should the parties use one arbitrator or three or even more?
- Should there be a written decision and, if so, should there be findings of fact and conclusions of law and/or reasoning for the award? (Some foreign courts will not enforce an award without reasoning.)
- Should the parties select the venue for the arbitration, defer to the arbitration panel, or use a variation, such as one that requires the party commencing the arbitration to proceed in the opponent's venue?[73]
- Whether the parties should select an arbitrator in advance and identify that individual in the agreement?
- Should the parties require the arbitrators to have specific technical expertise?
- Should the parties adopt the rules of an arbitral institution, such as the American Arbitration Association (AAA), the National Arbitration Forum, International Chamber of Commerce, or Judicial Arbitration and Mediation Services (JAMS)? If so, should any of those rules be modified?
- What substantive and procedural rules should apply to experts? If the arbitrator is an expert, should the parties be allowed to present experts at all?
- Should the arbitrator be required to make an on-site visit to evaluate the property or material at issue?
- Should the parties include a provision permitting the arbitrator to enter a default? Under the AAA rules, for example, default is sometimes difficult to obtain.

---

[73] For example, if one party was in Los Angeles and the other in Alberta, the arbitration would proceed in Los Angeles if the Canadian party presented the arbitration petition.

- Should the arbitration clause be self-executing, or do the parties have to seek court intervention to enforce its provisions?
- Should a company use different procedures for different claims?
- Do you want transcripts?
- Should the parties instruct the arbitrator as to who has the burden of proof?
- Do the parties want the arbitrator to be a former judge and invoke the Federal Rules of Civil Procedure, simulating federal court procedures?
- Do the parties want to define a standard of review? Is such a clause permissible in your district?
- Do you want to expressly limit the jurisdiction, carving out small claims cases, runaway awards, or injunctive relief?
- Do you want to empower the arbitration to limit cumulative or duplicate evidence?[74]
- Should there be a time limit in which the arbitrator is expected to make rulings and render awards?
- Should the parties end the case with closing arguments, closing briefs, or both?
- Do you wish to provide for mandatory settlement discussions? If so, do you wish to do so before the proceeding begins, after the evidence is presented, or at some other time? If settlement meetings are mandatory, should the clause require the attendance of specific party representatives?
- For employment disputes, did you meet requisite due process standards?

---

[74] Arbitrators often err on the side of admissibility when making evidentiary decisions, which in turn, increases the length of the hearing. The FAA and the rules governing arbitrations encourage the admission of evidence, even if irrelevant. The FAA provides that awards may be set aside for failure to consider evidence. 9 U.S.C. § 10 (2000). For example, section 31 of the AAA Commercial Arbitration Rules states, "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. . . . Conformity to legal rules of evidence shall not be necessary." M. RB. ASS'N AAA COMMERCIAL DISPUTE RESOLUTION PROCEDURES RULE 3931 (1996). But this rule can be circumscribed and the hearings expedited through drafting or stipulation of the parties. Such is a suggested course of action should the parties desire a quicker, more streamlined arbitration proceeding.

C. Sample Arbitration Clauses

Consideration of these multiple factors in different situations leads to radically different clauses. A starting point for any serious drafting of clauses often requires express adoption of the FAA. Once the parties determine that they wish to proceed to binding arbitration for the resolution of disputes, either exclusively or within certain guidelines, they should adopt the FAA as the choice of law. This results in a clearer outcome, because there has been more attention by the courts to this regime. To explicitly adopt the FAA, the phrase to use is as follows:

> *"that notwithstanding anything to the contrary in the agreement, enforcement of this arbitration clause, matters of arbitration procedure, and enforcement of any resulting award shall be governed by the Federal Arbitration Act, applicable international treaties, and implementing national or domestic law."*

The parties often consider selecting an arbitration provider and providing for the use of it and its rules in their arbitration clause. An arbitration provider is often a private company, despite such official sounding names as the American Arbitration Association (AAA). There are potential advantages to using such a clause: the clauses are brief, they have been construed by both arbitrators and courts, and such clauses incorporate all the institutional rules of the provider, making express drafting of provisions for discovery and the like unnecessary. These clauses, however, are merely a starting point; if used carelessly, they may have unpleasant surprises. The National Arbitration Forum recommends the following broad-standard arbitration clause for business disputes:

> *The Parties agree that any claim or dispute between them or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may*

be obtained and claims may be filed at any office of the National Arbitration Forum, www.arbitration-forum.com, or at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.[75]

This broad clause does not, however, reveal a significant component of the Forum's procedure. Under the Forum rules, "legal decisions should be decided according to established legal principles."[76] According to the Forum's website, "Forum's arbitrators take an oath promising to render legal decisions according to the law, rather than undefined 'fairness.'"[77] Other organizations encourage their arbitrators to act as a court of equity. As such, if business people are looking for an equitable "merchants court," the National Arbitration Forum is not the right forum, and the casual use of such a clause will not serve the parties well. Furthermore, on the drafting issues identified above, the rules of institutional providers are often of no help. For example, the AAA does not set time limits or areas of required expertise for a dispute, and thus the use of a general clause does not change the need to look closely at specific needs. Using these principles, the authors present four sample clauses. For each of the sample clauses below, we have identified the key concepts driving the outcome.[78]

Sample Clause I

Distribution of Funds in Escrow Account: Addressing Rate Business Issues through Arbitration

Any dispute that may arise relating to the distribution of funds in the escrow account, including payment from that account as described above, shall be submitted to binding arbitration before the American Arbitration

---

[75] NAT'L ARBITRATION FORUM, DRAFTING MEDIATION AND ARBITRATION CLAUSES: A PRACTICAL GUIDE WITH SAMPLE PROVISIONS 7 (2003), *available at* http://www.arb-forum.com/articles/whitepapers/clz903.pdf.

[76] NAT'L ARBITRATION FORUM, DRAFTING ARBITRATION CLAUSES 2 (2003), *available at* http://www.arb-forum.com/articles/docs/sc0503.doc.

[77] *Id.*

[78] The authors intend to discuss these clauses in greater detail during the upcoming conference.

Association before a single arbitrator. The arbitration is to be conducted in [location] in accordance with the expedited commercial arbitration rules, as existing as of the time the arbitration is commenced, of the American Arbitration Association. Judgment upon the arbitration award may be entered by any court of competent jurisdiction. The arbitrator will be entitled to apportion the costs of the arbitration proceedings and to award any party its attorney fees on such grounds as he or she deems just. *The arbitrator will not have authority to award punitive or exemplary damages, but shall have the authority to provide for injunctive relief and to direct the payment of funds held in escrow. The parties do not desire a written opinion.* Notwithstanding anything to the contrary in this Agreement, enforcement of this dispute resolution clause, matters of arbitration procedure, and enforcement of arbitration awards shall be governed by the Federal Arbitration Act.

•KEY POINTS:

1. Language directs and limits the arbitrator to the simple matter before her; the language thus controls costs.
2. The parties have no reason to pay an arbitrator for a written opinion or the other trappings of litigation.
3. The clause limits the arbitrator's jurisdiction, thereby ensuring court review is available if the arbitrator disobeys instructions.[79] By contrast, if the limitations were contractual between the parties, the arbitrator would be effectively free to disobey those instructions.

Sample Clause II

Professional Engagement

Professional Firm and Client agree that all disputes arising out of or relating to this Agreement will be resolved by three arbitrators of the [ARBITRAL INSTITUTION such as AAA or JAMS] at a location convenient to the parties, the final decision on location to be decided by the [ARBITRAL INSTITUTION] following consultation with the parties. The parties agree to permit three depositions per side and such additional

[79] *See* Longo, *supra* note 7 and accompanying text.

discovery as the arbitrator shall determine. However, absent exceptional good cause, the arbitrators will not permit third party discovery depositions or interrogatories. All three arbitrators shall have substantial experience in [PROFESSIONAL FIELD SUCH AS ARCHITECTURE]. *The parties desire a written opinion.* Notwithstanding anything to the contrary in this Agreement, enforcement of this dispute resolution clause, matters of arbitration procedure, and enforcement of arbitration awards shall be governed by the Federal Arbitration Act. [The professional should consider if there are any ethical limitations on the right to establish an arbitration procedure.]

•KEY POINT:

With a complex dispute being a real possibility, the parties are ensuring appropriate expertise and requiring the arbitrator to provide reasoning supporting what may be a complex decision.

Sample Clause III

Settlement Agreement with a "Short Fuse" Arbitration Provision

By way of introduction, this clause was successfully used to resolve a significant development dispute in the Southwest. A developer had sold land and made a commitment to Mr. Mayer's client to meet a development timetable regarding the construction of infrastructure, such as the pipes for water and cables for electricity. Absent water, the purchaser (a developer-builder) could not obtain a building permit, much less begin construction. The seller thereafter breached its obligation to provide water and electricity. At the same time, the landowner continued to develop infrastructure on nearby land that it owned. The seller refused to compensate Mr. Mayer's client for these delays, raising various, weak defenses. Shortly after Mr. Mayer's client filed a complaint regarding the breach of the development schedule, the parties reached a settlement in principle involving a cash payment compensating his client for the delay and setting a revised schedule for providing water and electricity. The open drafting question for the settlement document was: what happened if the seller failed to adhere to the new schedule? Mr. Mayer's client was not excited about a new complaint if and when the development schedule was breached again or, even worse, a series of lawsuits over the next several

years. The answer was this "short fuse" clause and a per-day liquidated damages provision. The seller proceeded to breach the new schedule. Given the clause, terms, and timetable in the arbitration clause, the seller simply wrote millions of dollars in checks to Mr. Mayer's client, because the clause prevented the seller from stopping an examination of its failures.

Settlement Agreement with a "Short Fuse" Arbitration Provision

The parties agree that all disputes arising out of or relating to this Settlement Agreement shall be resolved in binding arbitration before the American Arbitration Association (AAA) by a single arbitrator under the expedited procedures of the AAA Commercial Arbitration Rules. The locale for the arbitration shall be [LOCATION]. The arbitrator may award costs and attorneys fees to the prevailing party in any arbitration and shall seek to implement the parties' intent expressed in the settlement agreement to bind [PARTY] to the revised development schedule. *The arbitrator will accordingly hold an informal pre-hearing within thirty (30) days of the due date of the answer to the arbitration demand with the final hearing being held within sixty (60) days following the pre-hearing. The parties desire a written opinion within thirty (30) days following the hearing. The parties agree that no discovery depositions will be taken of the parties, but the parties will exchange documents, pursuant to reasonable written requests.* The arbitrator shall visit the site. The arbitrator's failure to adhere to the time limits in this clause will not divest him or her of jurisdiction. Notwithstanding anything to the contrary in this Agreement, enforcement of this dispute resolution clause, matters of arbitration procedure, and enforcement of arbitration awards shall be governed by the Federal Arbitration Act. The provisions of this Section are intended to benefit and bind certain third party non-signatories and will continue in full force and effect subsequent to and notwithstanding the expiration or termination of this Agreement.

Sample Clause IV

Construction Disputes

This sample clause is used in construction contracts by a builder concentrating on building extreme luxury homes worth three million

dollars or more. In order to ensure that the customer is not discouraged by the complexity of the clause, the "Terms and Conditions" are included in a separate "Appendix A."

Construction Disputes
Arbitration

A. The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to "JAMS," (a national organization employing retired judges and others), or its successor for final and binding arbitration.
B. Either party may initiate arbitration at any time by filing a written demand for arbitration with JAMS, with a copy to the other party.
C. A party withholding performance at the time of commencement of arbitration must provide a specific itemized statement of those reasons for withholding performance within ten days of the selection of the arbitrator. Any matter not listed as a reason for non-performance that was known or should have been known at the time of selection of the arbitrator is waived if not contained in the itemized statement. The arbitrator will not have the authority to extend the ten-day deadline for submission of the itemized statement absent extraordinary good cause, such as illness or other pressing personal matter. The arbitration will be conducted under the then current JAMS Comprehensive Arbitration Rules and the Arbitration Terms and Conditions attached as "Appendix A."

. . . .

Appendix A
Arbitration Terms and Conditions

(1) Any arbitration arising out of or relating to this Agreement will be conducted in accordance with the provisions of JAMS' Comprehensive Arbitration Rules and Procedures in effect at the time of filing of the demand for arbitration. The parties agree that Contractor's directors, officers, employees, shareholders, owners, members, advisors, and sister, parent, and subsidiary entities (the "Related Parties") are third party beneficiaries of the arbitration provisions of this Agreement and will be entitled to invoke this arbitration clause

in any dispute arising out of or relating to this Agreement. All references to parties in Article ____ or this "Appendix A" shall also be considered a reference to the Related Parties. The parties will cooperate with JAMS and with one another in selecting an arbitrator from JAMS' panel of neutrals, and in scheduling the arbitration proceedings. The parties covenant that they will participate in the arbitration in good faith and subject to express fee-shifting provisions in this Agreement, including provisions in "Appendix A," and that they will share equally in JAMS' costs.

(2) The parties have a strong interest in the efficient and economical resolution of any dispute arising out of or relating to this Agreement. Accordingly, notwithstanding any provision to the contrary in this Agreement or in applicable JAMS' rules, the parties provide for the following procedures in connection with disputes submitted to arbitration:

- First, the arbitrator has the express authority to exclude cumulative or duplicative evidence.
- Second, the parties do not require a transcript but do request a written decision setting forth the reasons for the arbitrator's decision.
- Third, in the event that the dispute concerns matters that collectively will result in an award of $50,000.00 or less (an "Expedited Matter") the parties agree to certain abbreviated procedures. In an Expedited Matter, the arbitrator will not permit any discovery and, further, will have the option of deciding the matter following a hearing or instead solely upon written submissions, argument of counsel, and a visit to the site as the arbitrator decides in his or her discretion. In order to conserve expenses, the arbitrator is authorized to conduct hearings in Expedited Matters by telephone. For any such Expedited Matter, the arbitrator will hold a hearing, if he or she concludes one is appropriate, within thirty days following his or her selection and issue a ruling within ninety days following his or her selection.
- Finally, for all disputes in which in excess of $50,000 is at issue (a "Substantial Dispute"), the arbitrator will accept such live relevant testimony as proffered by the parties but, absent extraordinary good cause, will not hold a hearing of more than four days.

In Substantial Disputes, the arbitrator will permit reasonable party and third party discovery, including depositions, and, among other matters, inquiry into any itemized statement of reasons supporting a withholding of performance. In Substantial Disputes, the arbitrator will hold a hearing within ninety days of his or her selection and issue a ruling within 150 days of his or her selection.

- In the event that the parties are in dispute over whether a matter is properly considered an Expedited Matter or Substantial Matter, the arbitrator shall decide. The arbitrator will not lose jurisdiction over the matters submitted to arbitration if he or she fails to meet the deadlines specified in these Arbitration Terms and Conditions.

(3) The exclusive venue for all arbitration proceedings shall be in [APPLICABLE FORUM] with the site of the arbitration chosen by the arbitrator in his or her discretion. The exclusive venue for all judicial proceedings relating to this Agreement shall be the state and federal courts serving [FORUM]. However, the arbitration provisions of this Agreement including this "Appendix A," the enforcement of any third party subpoena issued by an arbitrator, or the confirmation, enforcement, or collection of an arbitration award may proceed outside of the state and federal courts serving ____ County if the person or property at issue is outside the jurisdiction of such county.

(4) Time periods relevant to an arbitration proceeding shall be calculated as provided in the Federal Rules of Civil Procedure.

•KEY POINTS:

Under this clause, the complaining party must "put up or shut up" by identifying defects or other breaches at the time they are refusing to perform. The clause differentiates between different size disputes so that minor disputes can be addressed in small claims court while major, multi-million dollar disputes have the benefit of discovery and other legal procedures appropriate for a significant dispute.

IV. Advocacy at an Arbitration Hearing

Much of the negative lore regarding arbitration arises from disagreeable and, even disastrous, arbitration hearings. Certainly, a portion of the grumbling is due to the fact that a case loser rarely praises the decision-

maker, and virtually every case that proceeds through hearing to decision has a perceived winner and loser. An additional cause of the dissatisfaction is parties' failure, as noted above, to understand and prepare for the dispute by anticipating likely disputes and drafting an appropriate clause. However, in significant part, dissatisfaction arises from failure to fully and properly advocate your position at the hearing. Unless constrained by specific limits in a clause, arbitration effectively has no rules, given that the standard rules provide discretion to the arbitrator and little guidance to the parties. As such standard, advocacy techniques are often ineffective.

The apparent lawlessness of arbitration is exacerbated, according to many attorneys of which the percentage is unclear, because their colleagues act less than ethically during arbitration. It is difficult to test this proposition empirically, but for both theoretical and practical reasons, attorneys do at least sometimes play fast and loose in arbitration. Theoretically, it is unclear what rules govern, and ethical rules are perhaps pre-empted by the FAA pursuant to *Doctors Assocs. v. Casarotto*.[80] Practically, an arbitrator has limited ability to punish recalcitrant parties. An arbitrator does not have contempt power and is likely unwilling to enter a default based upon individual incidents. An arbitrator, unlike a judge, may also be unwilling to issue a harsh denunciation of unethical behavior.

Given this environment, a successful advocate must (1) control the rules and (2) use effective forensic techniques appropriate to the forum.

A. Controlling the Rules

Given that the arbitrator works at the direction of the parties, the parties can alter or refine the rules during the course of the arbitration. Ideally, the control of the arbitration is partially codified in the arbitration clause. Certainly, part of the control process is an openness, a real willingness, to negotiate procedure with your adversary during the dispute. However, techniques exist to drive certainty even without your opponents' consent. For example, Mr. Mayer typically files and serves

[80] 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).

a pre-conference memorandum on the very first day the arbitrator contacts the parties (and well before the first formal meeting). This memorandum should not be argumentative and should contain, among other matters, the following:

- A straightforward factual presentation that, while designed to present your client's case in a favorable light, is not argumentative or lengthy and, as such, is useful to inform the arbitrator of the central issues in the case;
- A proposed paper discovery schedule;
- Proposed stipulations, such as the right to exclude cumulative evidence or present summary material;
- An identification of likely issues;
- A desired timing for an award; and
- A proposed statement of agreed and disputed facts.

Although this type of memorandum is not required by arbitration rules, it is not prohibited. As long as it is not argumentative, it is virtually always used by the arbitrator as a checklist and guide for procedural decision-making. Most importantly, it forces the other side to wrestle with these issues before the arbitration becomes so heated that agreement is difficult, if not impossible. The pre-conference memorandum is particularly effective as the adversary almost never files one, believing that the first telephone conference will be an informal chat.[81] Using such an approach, open areas of the arbitration may be resolved early and efficiently.

B. Forensic Techniques

Additionally, advocates in arbitration should adjust their techniques for questioning witnesses and presenting evidence. While a full discussion of arbitration hearing techniques are beyond the scope of this article, we would like to provide a sampling of the challenges and potential responses. Even attorneys who will never go near a hearing room must

[81] Mr. Mayer usually forces the other side to say, "I didn't know I had to file one." At that point, his case having been presented, he simply notes that the other side is free to file their own memorandum.

understand these hearing issues, because it will inform and improve their drafting efforts.

For example, in full-blown civil litigation the trial usually reflects a distillation of existing information. Trial lawyers usually do not ask questions if they do not know the answer. Lawyers who do not know the answers to questions in a federal court trial may not have taken full advantage of the discovery process. In arbitration, however, you may have to ask questions that are dangerous, because the questioner may not know the answers to the questions. Such blind cross-examination, however, is often a necessary part of arbitration.

To begin with, if you do not ask an obvious question, an active decision-maker will ask and develop such dangerous testimony without your participation. By contrast, a judge or jury is unlikely to step in and fill in the gaps in your questioning. Further, if you do not ask an obvious question, you highlight the dangerous testimony; the arbitrator flatters himself or herself at developing the apparent smoking gun. Moreover, you may fail to meet your burden of proof if you are questioning a witness necessary to prove your case. What should you do?

C. Definition Questions

The authors believe "definition" questions are helpful. By asking the witness to define various terms, the questioner can box in the witness without risking the disclosure of negative information. When the critical questions are asked, the questioner can impeach a damaging answer by using the definitions against the witness.

Example: Automotive Die Case. The defendant claimed payment was not due to a plaintiff die manufacturer because the automotive dies were defective. The plaintiff claimed that the dies met industry standards. During discovery, despite repeated motions and interrogatories, the defendant was unable to obtain specifics of the plaintiff's position on the so-called industry standards that applied to the dies. At the hearing, the examination of the key witness began by seeking the witness's definitions of all possible terms related to industry standards. As the answers came in, the questioner could compare the answers to the defects in the dies to the defined industry standards. Knowing that once he asked about the defects, he could impeach the

witness against the standards already established. The questioner only asked about those defects that contradicted the testimony provided by the witness. At the same time, the definition questions did not risk the disclosure of negative information, as the definition of a standard is not inherently damaging.

D. Branching Questions

Similarly, in blind cross-examination, what we call "branching" questions is also useful. Branching questions force a witness to take one of two or three positions, any one of which may be useful to the questioner. The examiner must be persistent and not allow the witness to refuse to take a position.

E. Boring Questions

During arbitration, do not rule out deliberately "boring" questions that may allow the probing of dangerous areas while nobody may be paying attention, as in late in the day. If the boring questions reveal damaging information, even if people are listening, the emotional impact is lessened, because the information is not extracted as part of what the examiner, herself, has set up as a critical confrontation. If the boring questions elicit helpful testimony, it can always be packaged later as part of closing arguments and briefs.

F. Withholding Information

Arbitration also may involve "withholding" information from your adversary. Without interrogatories or a disclosure obligation, do you have any obligation to fully explain your theories to your adversary? It depends. Sandbagging is a part of every arbitration Mr. Mayer has been involved in. As a result, Mr. Mayer also holds back information unless required by agreement or the rules. Such withholding is, in Mr. Mayer's view, a legitimate strategic tactic absent an order or dishonesty, such as denying that you have such information.

Conclusion

It is critical to master the interplay between an arbitration clause and the hearing, itself. Litigation counsel should participate in and understand the drafting process, while transaction counsel should understand advocacy challenges at a hearing.

Most disputes settle. As such, the allocation of risk drives settlement decisions. Thus, the outcome of the dispute subject to the arbitration clause turns on the risk and cost created by the applicable arbitration procedure. Making the arbitration rules and understanding arbitration law allows counsel to place increased risk on the other party, which will help in determining a favorable settlement. Further, in the event that the case does proceed to hearing, counsel's client will be positioned to aggressively present their case.