Mastering Arbitration: Navigating the Dispute Resolution Journey

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When legal disputes between business associates arise, parties have several options for resolution. The most common are mediation, traditional court litigation, and arbitration. While each of these aims to resolve disagreements, they differ in significant ways in their approach, process, and outcomes. How lawyers and their clients approach each option will lead to different outcomes - regardless of who prevails.

The goals of arbitration are simple: provide a private, cheaper, faster, flexible, and more efficient dispute resolution process. To do that, attorneys need to know the rules and procedures and how to avoid common pitfalls.

Knowing the Rules and Procedures

Most arbitrations start with the filing of the arbitration demand. However, pre-filing, the parties and/or their lawyers should attempt negotiations or mediation to try to resolve the dispute. **Tip: incorporate this negotiation/mediation step into your dispute resolution clause and provide timelines for completion of this step before moving to arbitration.**

When a party files their demand for arbitration with an arbitral institution like the American Arbitration Association (AAA®), they must include a copy of the contract or arbitration agreement naming the AAA with the demand. They also must pay a filing fee and give notice of the filing to the other party. The next major milestone in the process is the selection of the arbitrator. There are many ways in which an arbitrator is appointed to a case. First, we look at the arbitration clause to see if it provides fora specific process for arbitrator appointment. If not, then if the parties are arbitrating under a set of AAA rules, they will receive a list of arbitrators with their resumes for striking and ranking. **Tips: in evaluating arbitrator candidates, be strategic and consider the following:**

- **Avoid limiting your arbitrator selection to litigators –** often parties may look to 'commercial litigators' as the ideal arbitrator. However, effective arbitrators know the difference between arbitration and litigation; they understand the goals of arbitration and may work with the parties on achieving the goals of quicker and less expensive resolution.

- **Consider experts** – once you know the specific issues involved in the case, think about if the ideal arbitrator is an expert in the field or a "generalist". If you are going to need someone with specialized knowledge, select an expert who will understand the intricacies of the subject matter and can provide a well-reasoned decision. Having an arbitrator who understands your industry or your claims will save time and certainly make the arbitration more efficient. Ultimately, it will help you and your client be more comfortable with their decision.

- **Consider interviewing potential arbitrators** - the AAA has an enhanced arbitrator selection process for large, complex matters that can include agreed-upon arbitrator candidate interviews. Interviewing arbitrators will help you understand not only the arbitrator's background and experience but also their communication style and responsiveness, so that you may be able to better gauge their decisiveness and comfort with making tough decisions.

- **Consider diversity** – diversity enhances the decision-making process by bringing different perspectives, experiences, and backgrounds to the table. If your client has a commitment to diversity, honor that by choosing a candidate who may be different from those you have considered in the past or the "usual suspects" your firm and colleagues select.

- **Consider the number of arbitrators carefully** - if your arbitration clause is silent, consider a single arbitrator or a streamlined panel for cost savings. Based on AAA data, three arbitrators cost five times as much as a single arbitrator and a case with a panel of three arbitrators takes longer to resolve. Also, arbitrators should be neutral. Under the AAA rules, party-appointed arbitrators are neutral unless parties agree otherwise in writing. Think about how non-neutral arbitrators – essentially, another advocate for your client – will affect the case in terms of cost, speed, and efficiency.

- **Do your due diligence** – research potential arbitrators; look for testimonials, reviews, or endorsements from people *outside of your firm* who can provide insight as to this arbitrator's decision-making.

After the arbitrator or arbitrators are appointed, the pre-hearing stage begins usually with the initial preliminary hearing. This is when the parties, counsel, and the arbitrator first meet. Lawyers should meet and confer before this initial hearing to come up with a mutually agreeable case schedule or at least as much of a schedule that they can agree on. The arbitrator may provide a template scheduling order, and the AAA rules provide thorough checklists that will help start the conversation. Keep the rules in mind when preparing the case schedule and do not forget about their limitations. Be sure, however, to discuss with your client any variation from the rules in terms of how such changes may that will affect the cost and timeline of the case. Lawyers also may need to explain to the arbitrator why certain scheduling decisions were made (*i.e.*, requests for documents, depositions, etc.). As arbitration is a party-driven process, many arbitrators ultimately will follow the parties' agreement. Lawyers should be prepared for the initial preliminary hearing with a summary of their case and be ready to discuss any items of disagreement. Often arbitrators use this hearing to get a sense of what the case is about (after reviewing the filings) as well as to gauge the level of cooperation between the lawyers. **Tip: this is your opportunity to create an efficient roadmap of the case; do not squander it by turning the case into an adversarial private litigation.**

The period between that initial preliminary hearing and the final hearing is generally when parties start incurring costs. As the parties exchange documents and information, discovery disputes may arise and motion practice might begin. As the arbitrator will bill the

parties for their time involved in resolving any discovery disputes or motions, the parties will pay for not only their lawyers' time, but the arbitrator's as well. **Tip: meet and confer often; try to resolve disputes before engaging the arbitrator, and remember that this process is less formal than court. If a dispute cannot be resolved, the arbitrator is there to help. The arbitrator's availability is more flexible than that of a judge. Engaging the arbitrator is also easier, as a simple email request for a call often will suffice.**

The final evidentiary hearing can be in-person, by phone, virtual, or a hybrid of these options. In addition, the AAA has a 'documents-only' process where briefs are submitted, along with exhibits, affidavits, etc., and the arbitrator renders the award based on those submissions. During an evidentiary hearing, lawyers should consider ways to streamline the process: joint exhibits, stipulations, witness statements in lieu of direct examination (with witnesses available for cross-examination), deposition transcripts (if any) in lieu of live testimony, expert reports, and, if a witness cannot attend in person, allowing them to appear by video or phone. **Tip: forgo pre-hearing or post-hearing briefs -- often you do not need both, as the information is likely to be repetitive. If the arbitrator will render a reasoned award, ask the arbitrator permission to submit draft awards instead of post-hearing briefs. This will save some time and money.**

When the hearings are closed, the award time clock starts. Under the AAA's Commercial Rules, the award is due to the parties within 30 days of the close of the hearing. If it is an expedited case, the award will be due within 14 days of the close of the hearing. Lawyers should remind their clients that awards are final and binding, with limited court review. While this is a benefit of arbitration, it can also be a downside. The AAA has Optional Appellate Arbitration Rules that allow for a panel of arbitrators to review the award under a standard of review akin to an appellate court's. Parties must either incorporate those rules in their ADR clause or agree to them before the award is issued. While there also is a short timeframe within which a party can request modification of the award for limited reasons (*i.e.*, typos, calculation errors), parties should be prepared for the finality that the award will bring.

Common Pitfalls

Tip: do not treat arbitration like litigation. Trying to fit traditional litigation into arbitration will cause the process to fail. Federal or state Rules of Civil Procedure and Rules of Evidence should not even be in the conversation.

Another benefit of arbitration is the customization of the process. As mentioned above, timelines, scope of discovery, and presentation of evidence can be and should be tailored to the case and unique nuances of the issues at hand. Lawyers are used to filing motions at the first sign of an impasse in communication. In an arbitration, this should be limited. Arbitration encourages discussion, conferrals, and agreement.

Tip: be collaborative; combativeness will cost your clients money. Regular motion practice is discouraged and in certain circumstances (*i.e.*, dispositive motions), lawyers have to demonstrate a likelihood of success, efficiency, and cost savings in order for the arbitrator to allow the motion to be filed in the first instance.

Tip: know your rules. Not knowing the rules of the arbitration institution is a common pitfall often seen in advocates unfamiliar with arbitration. There are different rule sets that vary by industry, such as the AAA's Construction, Healthcare, Employment, and Consumer Arbitration Rules. Understanding how the rules and procedures can affect the case is key to mastering the arbitration process.

Arbitrators are not judges, and there are no juries in arbitration. 'Zealous' advocacy may not get lawyers very far. **Tip: If the arbitrator is an industry expert, skip the teaching moments and focus on the facts of your case.** Remember that, in most cases, arbitrators charge by the hour, so every email sent, and every motion filed will cost the clients time, money, and resources.

Tip: you can always settle the case. Mediation is available at every point during the process. Cases have settled during the final hearing, after the hearing was held, and even after the award is issued[1]. Leaving the door open, having informal conversations (between the lawyers or the clients themselves), and engaging in mediation (whether at the beginning or later in the information exchange process), are options that can result in an amicable resolution that will save your clients time, money and potentially the business relationship.

Mastering arbitration requires a comprehensive understanding of the dispute resolution process, a strategic approach to navigating the intricacies of arbitration, and an appreciation for the benefits it offers over traditional litigation. Arbitration presents a less formal, often faster, and private method of resolving disputes, with the added advantage of being cost-effective. By adhering to best practices, parties can effectively navigate the arbitration journey and achieve fair and equitable outcomes.

[1] The typical example is when a case is bifurcated and an interim award is issued on liability but the amount of damages and/or attorneys' fees is still to be determined. Parties may settle the damages and/or attorneys' fees portion of the case.