

MAKING ARBITRATION WORK: BEST PRACTICES

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INTRODUCTION:

Commercial arbitration has become the dispute resolution process of choice for many businesses because the Federal Arbitration Act (“FAA”)¹, as interpreted by the United States Supreme Court, assures parties that they may define their preferred dispute process in a predispute transactional document or submission agreement and be confident that courts will enforce those choices.² Moreover, institutional providers and arbitrators understand that 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

1. Carefully define the scope of the agreement to arbitrate (“arbitrability”).

Most arbitration causes utilize the “all disputes arising out of or relating to . . .” formulation that courts regard as a standard “broad form” clause, which is interpreted to encompass not just contractual but also related tort and statutory claims. Use the wrong formulation (claims arising under . . .) 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 or in related and connected agreements (guarantors, third party beneficiaries, corporate affiliates). Also, consider a delegation clause so the arbitrator rather than the court will interpret the parties’ contractual intent to arbitrate.⁶

¹9 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)

⁴Forms of agreement are available on line, 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. Environmental Services Co.*, 42 F.3d 1292 (9th Cir. 1994); *Simula, Inc. v. Autoliv, 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). See also JAMS Comprehensive Arbitration Rules and Procedures, Rule 11(b) (arbitrator determines jurisdictional issues); AAA Commercial Rule R-7(b) (same).



2. 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 that the institution would have easily addressed (such as compelling arbitration against a reluctant respondent or appointing arbitrators) instead requires a court hearing.

3. 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.

4. Use a single arbitrator unless there is a compelling reason to have a panel of three.

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.

Tripartite panels: clauses in larger commercial disputes frequently call for tripartite panels, usually formed by unilateral party appointment and appointment by the designated arbitrators of a chair.

- Know what the Code of Ethics for Arbitrators in Commercial Disputes (AAA-ABA) provides for permissible communications with your appointed arbitrator
- Tips on picking party arbitrators
- Tips on picking the chair

5. Specify the governing substantive law and the procedural 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 California). 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 Generally speaking, clause provisions override applicable rules and rules override procedural law provisions unless they are expressly non-waivable.

6. Specify the venue of the arbitration, or someone will choose it for you.

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 California 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 city and to designate that state's law as the governing law.

7. Select the right arbitrator.

Since the arbitrator's decision is binding and not reviewable for legal error, selecting the right arbitrator is critical. The arbitrator should 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").

- Panels – AAA, JAMS
- Finding arbitrators external to an Institution, *e.g.* the College of Commercial Arbitrators' website (ccaarbitration.com)
- Check references (ideally from both sides in the same case)
- Read disclosures carefully and research publicly available information

8. Prepare carefully 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

⁷ For example, JAMS has published rules for employment, construction, international and all other types of arbitration. It has also published special class action procedures, discovery protocols, and minimum standards that require consumer and employment arbitration clauses not be substantively unconscionable. See <https://www.jamsadr.com/adr-rules-procedures/>

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.

9. Agree to electronic service of documents.

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

10. Be prepared to set the hearing within six months, or twelve months at the latest.

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

11. Embrace lay-down discovery and discovery limitations; limit discovery to what is essential.

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 parties opt to use court-mandated discovery devices – interrogatories, requests for production, requests for admission, and excessive depositions.

Discovery in arbitration should be proportional to the nature of the case and limited to that reasonably necessary to achieve a fair resolution of the dispute.⁹

- Early “lay-down” production of all relevant, non-privileged documents and witnesses on which each party will rely to support claims and defenses (*e.g.*, JAMS Comprehensive Rules, Rule 17(a))
- identification of expert witness *c.v.* and report or opinions

⁸*E.g.*, JAMS CaseAnywhere.

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



- Follow-up document discovery limited in time frame, subject matter and persons and entities to which the requests pertain, after consultation with the arbitrator; focused ESI
- Limited depositions, presumptively 1 per side (consider using CR 30(b)(6) depositions in corporate matters)
- No interrogatories or requests for admission

12. If an ESI search is necessary, adopt the provider's suggested limitations and work cooperatively to refine the search.

- 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 shall be 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 is produced, except for header fields for email
- The description of custodians and devices 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 JAMS Discovery Protocols* and publications of the Sedona Conference on e-discovery.

13. Limit non-party out-of-state discovery, if possible.

The provider's rules typically authorize the arbitrator to issue subpoenas to third parties to appear or produce documents in accordance with applicable law.¹⁰ Under amendments to the FRCP, Rule 45 now allows nationwide service of process; this applies to subpoenas issued in an arbitration (FAA § 7).¹¹ Become familiar with case law relating to the power of arbitrators to issue subpoenas for documents before the hearing.¹²

The California Arbitration Act, Cal. Code Civ. Proc. § 1280 *et seq.*, governs arbitration agreements that do not affect interstate commerce and authorizes arbitrators to issue subpoenas, including subpoenas to secure documents from non-parties in the same manner as in a civil action within the state. *See also* Code Civ. Proc. § 1283 (depositions to preserve testimony of witnesses who cannot be

¹⁰ JAMS Comp. Arb. Rule 21, Rule 19(c).

¹¹ *See* Model Summons, prepared by the NY City Bar [included in materials]

¹² *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 (2d Cir. 2005).



compelled to attend the merits hearing in California in person). Discovery orders directed to third parties are reviewable by a California court.¹³

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.

14. 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.

In tripartite cases it is common for the chair, alone, to decide all but the most major discovery disputes

15. 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 be 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.

Note that some rules prohibit such motions (*e.g.*, JAMS Streamlined Rules) and others discourage them (*e.g.*, JAMS Discovery Protocols).¹⁴

16. Limit “Attorney’s-Eyes-Only” designations in protective orders.

The JAMS rules require only that JAMS 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 is often misused, with the result that the opponent cannot

¹³*Berglund v. Arthroscopic & Laser Surgery Center of San Diego L.P.*, 44 Cal. 4th 528 (2008).

¹⁴ See *Schlessinger v. Rosenfeld, Meyer & Sussman*, 40 Cal. App. 4th 1096 (1995).

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.

17. Know the Rules of Evidence for Arbitration.

- Federal and state rules of evidence do not apply, except that the arbitrator is required to apply rules concerning privileges and work product; 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 often 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 and give it such weight as he or she deems appropriate.

18. 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 exhibits on a thumb drive only, 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, authenticity, foundation
- Use a chess clock to monitor time
- Keep in mind you are trying the case to an arbitrator, not a jury

19. 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’ default is a bare award. AAA Commercial Arbitration Rules, Rule R-46(b). But if your case (and client) require 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.

20. Yes, you can appeal.

The FAA restricts the vacatur of arbitration awards to extreme circumstances: 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; the arbitrator exceeded his or her powers.¹⁵ In some circuits, manifest disregard of the law is still a permissible ground.

Note, however, in California the *Cable Connections* case permits enhanced review of arbitration awards for legal error by a California state court.¹⁶

Arbitration providers have established optional internal appeal procedures to which the parties may agree. For example, if the parties agree in writing to invoke the JAMS appeal procedure,¹⁷ 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 California, 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.

21. Not all contracts and disputes are 100% American.

International arbitration has rapidly become the preferred method of resolving cross-border commercial and investment disputes, including for small and medium-size enterprises that do business overseas or have significant foreign vendors, customers, or investors. Thus, international arbitration issues can arise in any corporate, real estate, finance, tax, intellectual property, or litigation practice.

¹⁵*Hall Street Associates v. Mattel, Inc.* 552 U.S. 576 (2008)

¹⁶*Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008)

¹⁷<https://www.jamsadr.com/appeal/>; see also AAA Optional Appeal Procedure



The international arbitration process generally tracks the domestic process, but there are important (and often quite unexpected) differences. The following are among the many distinctions and nuances to consider carefully:

- ***Take special care in drafting clauses.*** *Never* agree that the law of a foreign country governs the contract without seeking expert advice on the substance of that foreign law and how it might impact interpretation of the clause or determination of potential disputed issues. *Always* expressly select the language of the arbitration. *Never* agree that the contract is to be executed in two languages, both of which govern. *Never* agree to a particular seat of arbitration without seeking expert advice on that jurisdiction's procedural and public laws that relate to arbitrations and the subject matter of your contract.
- ***Choose institutional rules wisely,*** and always study the rules carefully at the start of any dispute brought to you. Although only a dozen or so are widely used, there are hundreds of purported international arbitration institutions. The rules can vary in material ways, and not understanding the differences can trip up even the most experienced lawyers.
- ***Do not expect or seek U.S.-style discovery.*** Depositions, interrogatories, and request for admissions are deeply disfavored in international arbitration and specifically prohibited in many bodies of rules. International arbitration usually involves initial exchanges of documents on which parties intend to rely in establishing their claims or defenses, often followed by an exchange of limited document requests.
- ***Understand that culture does matter,*** in that the fate of your client is in the hands of one or three arbitrators, likely from a country or countries other than yours. Understanding the legal background and advocacy culture of the arbitrator(s) will make you a more effective written and oral advocate. Perry Mason likely would not have won many, if any, of his cases before a Swiss arbitrator without dramatically altering his style and approach.

22. Work cooperatively with opposing counsel—it's always more efficient.

Remember, you get the process you deserve . . .

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