

Selecting And Removing Arbitrators: Balancing Procedural Flexibility And Fairness

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In many important respects, arbitration and litigation travel parallel paths. In both, a neutral party evaluates arguments and evidence and decides cases. Arbitration provides parties with the same substantive outcome – in other words, the same decision on the merits – that they would have received had they gone to court, but more quickly and less expensively. Recent outcome comparisons have shown that arbitration has been successful in terms of providing similar outcomes to court in much less time.¹

How are these efficiencies achieved? The obvious answer is rooted in the less formal and more flexible procedures available in arbitration. But this obvious answer may miss a more subtle reality: another major advantage of arbitration over court litigation lies in the expertise of the arbitrator.

The concept of an expert arbitrator has deep roots in the origins of arbitration as a mechanism to resolve disputes involving commerce. Factual questions about contractual performance obligations are resolved much more easily when the decision maker is familiar with the commercial context from which the dispute arose, and they are more often resolved in accordance with the original intent and expectations of the parties. Procedural efficiencies created by the arbitrator's experience are less apparent than the streamlined procedures encoded into the arbitration rules, but they may be just as important.

Impartiality, Expertise, And Selection

Arbitration is a voluntary enterprise. Parties benefit from the opportunity to define in advance the procedures that will decide their disputes, and also from the opportunity to participate more fully in the process once a dispute has arisen. Given the choice, parties are wise to seek out an arbitrator that is both impartial and expert. In contrast, “[c]ourts are ... not voluntary ... and the American people's traditional fear of government oppression has resulted in a judicial system in which impartiality is prized above expertise. Thus, people who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter.”² In other words, courts focus on equity over efficiency. The American judicial system is rightly praised for its ability to provide criminal and civil justice, and it is also rightly criticized for its significant and admitted inefficiencies.

Given these inherent differences between the arbitration and litigation models, it is no surprise that each handles the selection and potential removal of a decision-maker slightly differently. Neither can tolerate actual bias or even the appearance of bias, and both the codes of judicial conduct and the ethical rules governing arbitrators require disclosure and/or disqualification for actual or appar-



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ent conflicts of interest. Absent facts suggesting bias, court litigants are largely asked to accept the judge that has been assigned. Strategic efforts to influence judicial assignments are discouraged and labeled as “judge shopping.”³

Under the voluntary and participatory framework of arbitration, the dynamics of arbitrator selection are necessarily different. Typically, both parties contribute to the arbitrator selection effort, either by mutually selecting an arbitrator, by rejecting arbitrator candidates proposed by the arbitration administrator, or by “striking” potential arbitrators from a list. Armed with information about arbitrator qualifications, background, and experience, arbitrating parties are encouraged to engage in a limited amount of selection in order to jointly determine which arbitrator has the optimal combination of impartiality and expertise.

Administered Commercial And Consumer Arbitration Rules

Most often, parties elect arbitrator selection procedures by incorporating the arbitration rules of a major, independent arbitration administration organization into their agreements. Nearly all of these rules permit some latitude when selecting an arbitrator, beyond challenging a selected arbitrator for cause. However, discretion is not total, and the selection rules seek balance between the freedom to choose and the fairness of a joint selection process.

The National Arbitration Forum (FORUM) Code of Procedure empowers the parties to select their own arbitrator or arbitration panel. No judicial system allows parties this right. If parties cannot mutually agree, the FORUM then provides them arbitrator candidates.⁴

Under FORUM rules, each party has the right to “remove one Arbitrator candidate by filing a notice of removal ... within ten (10) days from the date of notice of Arbitrator selection.”⁵ This procedure applies regardless of the amount in dispute or whether a consumer is involved as a party. No justification or rationale is required, but only one removal without cause per party is permitted. After an initial peremptory strike, arbitrators may only be challenged for cause.⁶

Under the Commercial Arbitration Rules of the American Arbitration Association (AAA), parties disagreeing on the selection of an arbitrator are provided a

list of ten candidate arbitrators where each party may “strike names objected to” and “number the remaining names in order of preference.” The AAA then appoints an arbitrator, taking into consideration the “designated order of mutual preference.”⁷ However, AAA rules governing the arbitration of consumer disputes only permit causal challenges of arbitrator appointments.⁸

In arbitrations conducted by Judicial Arbitration and Mediation Services (JAMS), parties who disagree on the selection of an arbitrator are given a list of arbitrator candidates and may strike two of five in the case of a sole arbitrator, or three of ten in the case of a tripartite panel. The remaining candidates are ranked and JAMS appoints the arbitrator(s) with the highest composite rank.⁹ In contrast to the AAA, JAMS will not administer a consumer arbitration unless the consumer is provided a “reasonable opportunity to participate in the process of choosing the arbitrator(s).”¹⁰

Other Influential Arbitration Rules

The Arbitration Rules of both the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) permit “one peremptory challenge” per party and unlimited challenges for cause.¹¹ The Binding Arbitration Rules of the Better Business Bureau (BBB) provides parties a list of at least two potential arbitrators. Parties assign relative priorities to the listed candidates and the BBB selects based upon the provided rankings.¹²

Judicial Removal Without Cause

A limited right of removal without cause is clearly the standard procedure employed by the major arbitration administrators to balance party participation and impartiality. However, in the Federal Court system, there is no right to unilaterally remove a judge without cause, and the procedure and grounds to remove a judge for cause are limited.¹³ Unless federal judges recuse themselves, there is little opportunity for a party to remove them.

Several state court jurisdictions permit the removal of assigned judges without specific cause.¹⁴ Typically, removal is granted upon the filing of a motion supported by an affidavit stating the party's belief that the assigned judge will not grant the party “a fair or impartial trial.”¹⁵ Specific factual assertions are not required.

These regimes grant a very limited ability to litigants to select a judge based upon expertise and reputation. Where these rules are interpreted as to permit numerous challenges – for example where multiple representative plaintiffs in a putative class action each receive the opportunity to remove a judge – litigation strategy overwhelms fairness and the impartiality that is the hallmark of the American judiciary is lost.¹⁶

It is also important to compare arbitrators to jurors when examining removal rules, given that, unlike judges, both arbitrators and jurors are *always* charged with making findings of fact. All jurisdictions permit parties to strike one or more jurors without cause in addition to causal challenges.

Making Arbitrator Selection Work For The Parties

Judges and arbitrators are both traveling to the same destination, but the map used by each can be quite different. Unlike court litigants, arbitrating parties can choose – and even customize – the procedural rules to resolve disputes. Arbitrating parties may also be very interested in ensuring that the assigned arbitrator has sufficient expertise and experience to resolve a dispute in the most efficient manner possible.

Given these “fundamental differences between adjudication by arbitrators and adjudication by judges,”¹⁷ it makes sense to permit arbitrating parties significant ability to participate in arbitrator selection. Nearly all of the major sets of arbitration rules take this approach through the use of peremptory challenges or the ability to strike potential arbitrators from a provided list.

Arbitration provides parties with the same due process procedural rights available in court while offering a significant opportunity to select or remove an arbitrator – a feature not readily available in judicial proceedings. Parties and their counsel should take advantage of the arbitrator selection options provided by the arbitration rules governing their dispute. The potential benefits of arbitration will be realized by those parties who research potential arbitrators, decide upon the qualifications that are most important to successfully and efficiently resolving the dispute, and contribute to selecting an arbitrator on that basis.

¹ See, e.g., *Mark Fellows, The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 14 *Metropolitan Corp. Counsel* 32 (2006) (comparing consumer arbitration data available on the National Arbitration Forum's website (www.adrforum.com) with contract trials data published by the Bureau of Justice Statistics).

² *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

³ “Judge Shopping” has been defined by the National Center for State Courts as “an effort by a lawyer or litigant to influence a court's assignment of a case so that it will be directed to a particular judge or away from a particular judge.” David C. Steelman, *Judge Shopping*, Memorandum, (Jan. 31, 2003).

⁴ National Arbitration Forum Code of Procedure, Rule 21, available at www.adrforum.com/main.aspx?itemID=609.

⁵ *Id.*

⁶ *Id.*, Rule 23.

⁷ American Arbitration Association, *Commercial Arbitration Rules*, Rule R-11.

⁸ American Arbitration Association, *Supplementary Rules for Consumer-Related Disputes*, Rule C-4.

⁹ JAMS Comprehensive Arbitration Rules and Procedures, Rule 15 (The JAMS “Streamlined” rules prescribe a similar method).

¹⁰ See JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, Standard 4.

¹¹ National Association of Securities Dealers Arbitration Rules, Rule 10311. New York Stock Exchange Arbitration Rules, Rule 609.

¹² Better Business Bureau Binding Arbitration Rules, Rule 6.

¹³ 28 U.S.C. § 144, 455.

¹⁴ At least sixteen states permit limited judicial removal without cause. Alaska Stat. § 22.20.022 (2006); Cal. Civ. Proc. § 170.6; Idaho R. Civ. P. 40(d)(1); 735 Ill. Comp. Stat. 5/2-1001(3) (2006); Ind. R. Trial Proc. 76(B) (effective Jan. 1, 2007); Kan. Stat. Ann. § 20-311(d) (2006); Minn. Stat. § 542.16 (2005); Mont. Code Ann. § 3-1-804 (2005); Nev. S. Ct. R. 48.1; N.M. Stat. Ann. § 38-3-9 (2006); N.D. Cent. Code § 29-15-21 (2006); Or. Rev. Stat. § 14.260 (2006); 14.270, S.D. Codified Laws §§ 15-12-21-22, 24-27 (2006); Wash. Rev. Code Ann. § 3.34.110(2) (2006); Wisc. Stat. Ann. § 799.205 (2006); Wyo. R. Civ. P. 40.1(b)(1).

¹⁵ See, e.g., Cal. Civ. Proc. § 170.6.

¹⁶ For a recent example, see *Steve Gonzalez, Judge Shopping: Trial Challenged by Tillery Firm*, *Madison St. Clair Rec.*, Aug. 13, 2006, available at www.madisonrecord.com/news/newsview.asp?c=183815.

¹⁷ *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

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