

Making Arbitration Work: The Keys To Efficient Resolution Of Complex Civil Cases

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NATIONAL ARBITRATION FORUM

Not all arbitration is the same. A modern arbitration provider can anticipate and prevent concerns that arbitration is too expensive or too lengthy by providing 21st century arbitration procedures and rules that make arbitration affordable and efficient. The National Arbitration Forum (FORUM) administers modern arbitration that provides parties a fair and reasonable dispute resolution process that meets their legal needs while saving them time and money.

Sophisticated parties choose contractual arbitration because they understand the delays that are too often associated with litigating cases in jurisdictions with crowded court dockets. These parties also know that arbitration provides an alternative to the expense and hassle that can accompany aggressive discovery tactics in contentious court litigation.

However, a small flurry of recent commentaries report anecdotal concerns of corporate counsel about experiences with arbitration proceedings that took too long, became too expensive, or produced an undesired compromise (i.e., "split-the-baby") outcome.¹ It is important to note that empirical research continues to indicate that arbitration proceedings are of shorter average duration than court litigation, arbitration costs less, and that compromise awards are not a major cause for concern.²

Despite the empirical evidence, the recent anecdotal reports indicate that some arbitrations, especially some involving high-stakes civil and commercial matters, may take longer than is reasonably necessary and may cost too much. The solution to these difficulties is found in certain key provisions of the applicable arbitration rules, and this article encourages parties to compare competing rule sets and select rules that ensure efficient and affordable arbitration proceedings.

Blame The Rules, Not The People

Not surprisingly, arbitrators are most often named as the culprits when commentators describe instances of lengthy and costly arbitrations. Some point out that arbitrators lack an economic incentive to place time limits on the process. Others complain that arbitrators' concern for producing an enforceable award can discourage early dismissal of frivolous claims. Finally, arbitrators have been criticized for not placing appropriate limits on arbitral discovery.

However, corporate lawyers have also pointed the finger at themselves and their outside counsel. It is often very tempting for attorneys representing parties in arbitration to employ strategies and approaches that were honed in litigation. Corporate lawyers also point out that outside counsel often has an economic incentive to extend arbitration proceedings as long as possible. And it is certainly the case that advocates in high-stakes arbitration will place less emphasis on procedural efficiency than on exploring every possible avenue of potential benefit to the client's position.

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Finally, transactional attorneys are sometimes blamed for simply adopting generic "form" arbitration clauses that fail to impose specific contractual limits on arbitration procedures that could potentially lead to dispute resolution inefficiencies. Of course, this type of criticism unfairly benefits from perfect hindsight because contract drafters cannot predict the types of disputes that may arise in the future and are appropriately focused on the substance of the deal rather than on detailed procedural matters related to the resolution of hypothetical future disputes.

However convenient or satisfying it might be to place the blame for inefficient arbitration proceedings or compromise outcomes on the arbitrators or the lawyers, the real culprit is most often the arbitration rules that have been selected to govern the arbitration. And placing the focus on the rules, rather than the arbitrators or lawyers, illuminates a relatively small number of key rule features that can considerably reduce the risk that parties will have to tolerate an overly lengthy and expensive arbitration of even a high-stakes dispute.

Keys To Efficient Arbitration

Some commentators recommend that contract drafters should attempt to craft customized arbitration agreement language that would impose appropriate limits on the conduct of hypothetical future arbitration proceedings. A much more profitable investment of transactional attorney time would be to conduct a relatively thorough due diligence examination of available arbitration rules.

At minimum, arbitration rules need to provide due process to the parties and produce enforceable arbitration awards. Beyond these basics, counsel should determine whether a given set of arbitration rules is constructed in such a way that parties must operate under appropriate limits and arbitrators are granted sufficient powers to produce efficient and affordable arbitration proceedings. A relatively small number of key features should be the focus of this due diligence effort.

Reasonable Limits on Discovery

Experienced litigation counsel representing clients in high-stakes arbitration proceedings will implicitly approach arbitration discovery with all of the assumptions and expectations that they derived from high-stakes civil litigation. The problem emerges when the governing arbitra-

tion rules do not impose any meaningful parameters on the scope of arbitration discovery. When these two conditions meet, the result is arbitral discovery that is broader, lengthier, and more expensive than it reasonably needs to be.

When investigating and comparing arbitration discovery rules, counsel should confirm that the appropriate types and amounts of discovery are available for parties to reasonably establish their claims and defenses, but also that the rules set limits on the permitted scope of discovery. For example, the FORUM *Code of Procedure* strikes this balance by permitting parties to have access to traditional discovery methods such as document requests, interrogatories, and depositions, as well as requests for admissions and physical/mental examinations, while also requiring that

- The information sought is relevant and informative to the arbitrator,
- The cost is commensurate to the amount of the claim, and
- The production is reasonable and not unduly burdensome and expensive.³

In addition, parties seeking requests for admissions or physical/mental examinations must establish that the information sought is "essential to a fair hearing of the matter."

Clearly, parties need not draft discovery parameters from scratch into their arbitration provisions. The better approach is to invoke arbitration rules that impose reasonable limitations on discovery.

Awards Based Upon the Applicable Substantive Law

The question of which standards arbitrators should use to decide cases is thornier than most lawyers would assume and has broader implications than most lawyers would imagine. Many who implicitly believe that arbitrators use legal standards and rules to decide cases would be surprised to learn that well known sets of arbitration rules explicitly permit arbitrators to decide cases based upon the arbitrators' conception of what is "just and equitable" in place of the outcome that may be dictated by the applicable substantive law.⁴

The approach required by the FORUM *Code of Procedure* is entirely different. The FORUM's emphasis is on ensuring that parties receive the same substantive outcome in arbitration as they would have received had they brought the dispute to court. Accordingly, FORUM arbitrators must apply and follow the substantive rules of law that apply to each claim when rendering decisions.⁵

The fact that the FORUM's rules only permit arbitrators to issue decisions under the applicable law effectively eliminates concerns about split-the-baby arbitration awards. However, the follow-the-law approach also has important implications for the duration and cost of arbitration proceedings. To this end, consider the ability of an arbitrator who is constrained to follow the law in issuing awards to dismiss a claim relatively early in the arbitration process where that claim is clearly not supported by the law or is clearly subject to a complete legal defense. Such an arbitrator can confidently dismiss the claim and save the parties the time and expense of fully arguing the unmeritorious issue.

Under a "just and equitable" regime, however, the arbitrator cannot confidently

dismiss unsupported claims relatively early in the arbitration process because the standards of decision are not clear. This can lead to unnecessary delay and expense that undercuts arbitration's potential efficiencies.

Professional Administration and Reasonable Fees

Unadministered arbitration is plainly undesirable because it invites the parties to vigorously contest every procedural step in the arbitration process from arbitrator selection until the end of the case. When comparing arbitration administrators, parties should consider each provider's capacity and reputation for efficiently enforcing timelines and other requirements that are prescribed in the provider's rules.

Administrators should have professional and knowledgeable staff and appropriate technology to ensure that cases actually move through the process as defined by the rules. An administrator providing electronic filing and paperless case administration will provide efficiency advantages over one that must rely on physical delivery of documents for all communication steps among parties, administrators and arbitrators. These efficiencies can significantly reduce case duration and cost.

Finally, all fee structures and schedules are not the same. Parties are wise to calculate estimated arbitration costs using the fee schedules maintained by different administrators. These calculations should be based upon the characteristics of disputes that are most likely to arise (e.g., claim amount, case duration, etc.).

Conclusion

The recent anecdotal reports of overly long and over-expensive arbitrations of complex civil and commercial matters should not be interpreted as pointing to a systematic failing of arbitration. Nor should they be read as a broad indictment of the approaches taken by arbitrators or lawyers representing parties in arbitration. And these reports also do not mean that the adoption of generic form arbitration agreements is always a mistake.

Instead, these concerns should result in an increased appreciation of the role that arbitration rules have to play to ensure that parties have reasonable, but not unlimited, opportunities to present and defend arbitration claims, and that arbitrators are appropriately empowered to direct proceedings. By researching key elements of the rules that are invoked in arbitration agreements, parties can be confident that they are not electing a variety of arbitration that could potentially expose them to the same levels of delay and expense they were seeking to avoid by arbitrating instead of litigating their disputes.

¹ See, e.g., Mary Swanton, "System Slowdown: Can Arbitration Be Fixed?," *Inside Counsel*, May, 2007, at 50; Michael Orey, "Out of Court: Arbitration Aggravation," *Business Week*, Apr. 30, 2007, at 38.

² For a listing of empirical research on arbitration, see the Studies and Statistics section of the National Arbitration Forum website (<http://www.adrforum.com/main.aspx?itemID=1133&hideBar=False&navID=308&news=3>).

³ National Arbitration Forum Code of Procedure, Rule 24 (available at www.adrforum.com/users/naf/resources/20060501CodeOfProcedure072106.doc).

⁴ See American Arbitration Association, Commercial Arbitration Rules, Rule 43(a) (available at www.adr.org/sp.asp?id=22440); JAMS Comprehensive Arbitration Rules, Rule 24(c) (available at www.jamsadr.com/rules/comprehensive.asp).

⁵ National Arbitration Forum Code of Procedure, Rule 20.

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