

Revamping Arbitration to Better Serve Clients: An Interactive Discussion on Innovative Proposals

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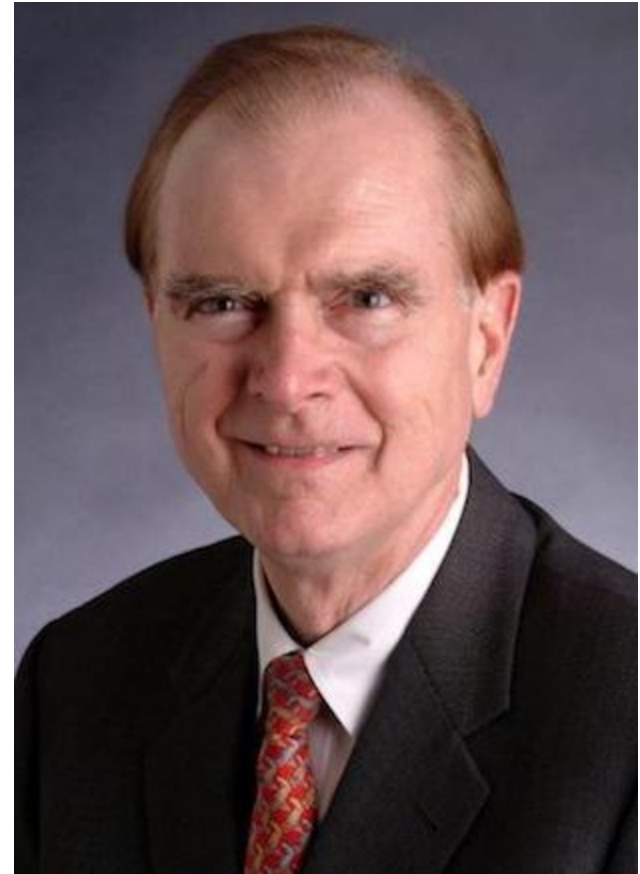
Sponsored by the DR Section's Arbitration Committee

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Introduction

- What innovative techniques can be used to address client-perceived deficiencies in the arbitration process?
- Can techniques used in international arbitration be adopted for domestic cases?
- What are the pros and cons of the proposed techniques?
- We will look at the pre-hearing, hearing, award and post-award phases.

Should Users and Providers Require Fixed Fees
for Arbitrators?

Fixed Fee Provisions for Arbitrators

PROS:

- Provides more certainty regarding the cost of the arbitration
- Incentivizes the arbitrator to manage the case more efficiently

CONS:

- Arbitrator does not have total control over events that increase fees

Fixed Fee Provisions: References

- **Fixed Fee Arrangement (AAA):** The parties and the selected arbitrator agree to a set overall fee for the case, divided into fee segments for the pre-hearing, hearing, and post-hearing phases of the arbitration. (<http://go.adr.org/AFA.html>)
- **Capped Fee Arrangement (AAA):** The parties and the selected arbitrator agree to a maximum fee for the entire process; the arbitrator's hourly rate is billed and paid until the cap is reached. (<http://go.adr.org/AFA.html>)
- **Provider Sets Fee:** The ICC sets a flat fee for arbitrators based on the case size, and subject to adjustment.

Should Diversity be Required in the Selection
of an Arbitral Panel?

Diversity of Arbitrators

PROS:

- Diverse arbitrators may have fresh viewpoints on issues
- Assurance to diverse parties of addressing implicit bias
- Provides training and increases the size of the pool of arbitrators

CONS:

- Potential conflict with other criteria for qualifications
- What about party choice?

Diversity of Arbitrators: References

- ABA Resolution No. 105 (August 2018):

“RESOLVED, That the American Bar Association urges providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities (‘diverse neutrals’) and to encourage the selection of diverse neutrals; and FURTHER RESOLVED, that the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.”

- AAA has 20% diversity goal for lists of potential arbitrators
 - Should providers be **required** to achieve a certain diversity standard for all cases?
- Alleged lack of panel diversity recently raised in trademark case by rap artist Jay Z. (Carter et al v Iconix Brand Group Inc et al, New York State Supreme Court, New York County, No. 655894/2018)

Should Mediation be Mandatory Prior to Arbitration – and Can It be With the Same Neutral?

Mandatory Mediation

PROS:

- Faster dispute resolution by combining two ADR processes
- Increases the likelihood of early settlement
- Prospect of arbitration with the same neutral incentivizes parties to settle in mediation

CONS:

- Confidential statements made to neutral in mediation could prejudice his/her analysis of merits during arbitration phase
- Imposing mediation on an unwilling party likely to be counterproductive

Mandatory Mediation: References

- Some AAA Rules require mediation before arbitration subject to a party's right to opt-out (AAA Commercial Rule R-9; Construction Rule R-10)
- But the mediator cannot serve as arbitrator unless parties and mediator expressly consent (*Id.*)

Should the Panel Chair Hear All Pre-Hearing Matters with Wings Limited to Evidentiary Hearings (“Streamlined Panels”)?

Streamlined Panels

PROS:

- Arbitrators' fees would be less costly
- Scheduling preliminary hearings and motions less cumbersome
- Some version of streamlining already in use

CONS:

- Parties who agreed to 3-person panel may not get benefit of their bargain
- Risk that Chair would be heavy-handed
- Dispositive motions should be heard by full panel

Streamlined Panels: References

- Some provider rules permit a single arbitrator on a panel to hear discovery matters in large complex cases. (See, e.g. AAA Commercial R-L-3 (e); AAA Construction R-L-4(h); JAMS R-7(b).
- AAA Streamlining Options For Large Complex Cases:
 - Option 1: During the arbitrator selection phase of the case, the entire panel is selected and appointed pursuant to the applicable rules or parties' agreement. Once the panel is in place, the chairperson is selected who then serves as the sole arbitrator to manage the preliminary and exchange of information stages of the case. The chairperson is also empowered to hear and decide any dispositive motions that may be filed.
 - Option 2: During the arbitrator selection phase of the case, the parties select and appoint a single arbitrator. That arbitrator manages the preliminary and exchange of information stages of the case as a sole arbitrator. The sole arbitrator is also empowered to hear and decide any dispositive motions that may be filed. At least 60 days in advance of the evidentiary hearings, the parties would work with the AAA to appoint the two remaining arbitrators. The original arbitrator would then serve in the role as the chairperson of the panel.

(http://go.adr.org/Streamlined_Panel_Option.html?_ga=2.92619741.110844693.1549498511-1788629216.1544571651)

- Should wings be limited to an advisory role?

Should Clients be Required to Attend the Preliminary Hearing?

Clients at Preliminary Hearing

PROS:

- Clients can understand and/or control lawyers' discovery requests
- Clients can influence selection of hearing dates
- It's their process

CONS:

- Clients uneducated in arbitration procedure could drag out and/or interfere with the preliminary hearing
- Lawyers more likely to posture

Clients at Preliminary Hearing: References

- AAA Rules encourage but do not require the parties to attend the preliminary hearing (Commercial Rule R-21; Construction Rule R-22)
- JAMS rules state that the “Preliminary Conference shall be conducted with the Parties or their counsel or representatives.” (JAMS R-16)

Should the Arbitrator be Allowed to Appoint
Independent Experts?

Independent Experts

PROS:

- Arbitrator-appointed expert is not beholden to any party
- Appointed expert can help the arbitrator understand complex technical issues

CONS:

- Parties' experts may be co-opted
- Appointed expert may unduly influence arbitrator

Independent Experts: References

- IBA Rules for Taking Evidence in International Arbitrations permit arbitrator to appoint expert “after consultation with the parties” (IBA Rules, Article 6).
- ICDR Rules, Article 25, are substantially the same.
- Domestic rules are silent.

Should There be Limits on the Length of the Award?

Limits on Award Length

PROS:

- Shorter awards likely reduce cost of arbitrator fees
- Limits motivate arbitrator to focus on key issues and write succinctly
- Proportionality to the size of the case should be a criterion for length of awards consistent with the goal of economy in arbitration

CONS:

- Artificial limit creates risk of vacatur if arbitrator misses key issue. (*conf. [W. Employers Ins. v. Jefferies & Co.](#), 958 F.2d 258, 260 (9th Cir.1992)* (award vacated because arbitrators failed to issue findings and conclusions))
- “One-size-fits-all” standard not feasible

Limits on Award Length: References

- Neither the FAA nor the UAA impose limits
- AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration limit “any award” to three pages (R-SR-18(a)) (Effective 6/15/2014)
- AAA Home Construction Rules limit awards in larger cases to five pages in length. (R-Arb-43(f)) (Effective 8/1/2018)
- JAMS Rules provide that “Unless the parties agree otherwise, the Award shall also contain a *concise* written statement of the reasons for the Award.” (emphasis added) (JAMS R-24(f))

Should the Merits of an Award be Subject to a Motion for Reconsideration or Appeal?

Reconsideration or Appeal of an Award

PROS:

- Provides more safeguards for the parties
- Limits the risk of a “rogue award”

CONS:

- Potential lack of jurisdiction due to *functus officio* doctrine
- More cost and delay before final resolution of the claims
- In conflict with concept of finality of arbitration

Reconsideration or Appeal of an Award: References

- AAA Rules do not permit the arbitrator to redetermine the merits of a claim already decided (AAA Commercial R-50)
- AAA has Optional Appellate Rules calling for independent appellate panel of three arbitrators. Grounds are: material and prejudicial error of law or clearly erroneous & prejudicial finding of fact.
- JAMS has an Optional Arbitration Appeal Procedure that the parties can agree to in writing at any time, but once agreed to, cannot unilaterally withdraw from. (JAMS R-34). It provides for three arbitrators and the “same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision.”

Should Parties' Evaluations be Provided to Arbitrators?

Should Arbitrators be Allowed to Request Their Own Evaluations From the Parties?

Arbitrator Evaluations

PROS:

- Arbitrators may improve skills after review of evaluations

CONS:

- One-sided process—only losing party would evaluate and criticize arbitrator - fairly or unfairly

Other Ideas?

Questions?