



Businesses and Law Firms: What *Not* to Believe about Arbitration

Business-to-business (B2B) arbitration is used by thousands of businesses in every industry to resolve their disputes economically and efficiently.

More parties and attorneys would opt for arbitration over litigation—and administered arbitration over *ad hoc*—if they were disabused of misconceptions about the arbitral process.

MYTH: The Arbitration Process Has Become as Lengthy and Expensive as Litigation.

Arbitration cases are resolved faster than litigation cases. The median length of a jury or bench trial in civil cases is 27.2 months, or over two years.⁽¹⁾ In comparison, the median time of filing to award for AAA®/ICDR® arbitration cases (excluding labor, Illinois accident claims, and no-fault) is 198 days, or well under seven months.⁽²⁾

An arbitration case can proceed to a hearing in considerably less time than an attorney can procure a court date. In fact, a 2015 AAA \$1 million+ case went from filing to award in just 35 days.⁽³⁾

It's a happy paradox that due to the flexibility of arbitration, parties and attorneys are enabled to lock in tight controls. They can build a dispute resolution clause to specify numerous issues, including amount of discovery, duration of arbitration proceedings, number of arbitrators, and issues to be addressed during the hearing. The management of these variables translates into faster times and lower costs.

In 2015, 56% of AAA B2B cases were resolved prior to going to award—and 44% of those cases were resolved so early that they incurred no arbitrator compensation.⁽⁴⁾

MYTH: Arbitrations Are Unpredictable with Inexperienced Panelists

Parties often have cases where industry expertise is key to the decision-making process. A case also may call for proficiency at interpreting complex contracts. Juries as a whole don't have these attributes. In addition, juries can be prone to influence by factors other than just the facts—for example, the personality of the trial lawyer or an inherent bias toward the smaller of the litigants.

However, **in arbitration, parties can minimize the unpredictability of the outcome of their cases** by selecting trained arbitrators with the specific skill set required, whose in-depth mastery of the subject matter allows them to grasp the nuances of the issues easily and accurately.

The AAA Roster of Arbitrators is comprised of recognized leaders in law, with expert panels dedicated to healthcare, employment, energy, intellectual property, and construction, among others, as well as a panel of former high-level judges. Stringent qualifications must be met, and ongoing training is required.

In litigation, parties have much less control over who makes the decision on their cases.



MYTH: Interim Injunctive Relief Is Available Only in Court, Not in Arbitration.

Parties sometimes need immediate relief to prevent critical injury to their business. **The arbitrator typically has the power to grant injunctive relief.** AAA rules further provide procedures to expedite this relief on an emergency basis.

MYTH: Litigation's Discovery and Appeal Are Not Accessible in Arbitration.

Discovery is allowable in arbitration. Parties can specify the amount and scope of permitted discovery in their arbitration agreement and also can limit it by agreement up to and including the preliminary hearing.

In the absence of a tailored provision for discovery by the parties, the rules governing the arbitration specify the amount and scope of discovery. Under the AAA Rules, arbitrators are authorized to direct a pre-hearing exchange of documents and determine the scope of and/or additional discovery relevant to the needs of the case.

Appeal is available for arbitration awards. Arbitration offers optional appeal within the arbitral process with both parties' agreement. Arbitration providers differ in their procedures. The AAA's *Optional Appellate Arbitration Rules* offer parties appeal on grounds that the underlying award is based on material and prejudicial errors of law and/or on determinations of fact that are clearly erroneous. A special Appellate Panel hears the appeal and aims for a completed process within three months, far shorter than the courts.

MYTH: Arbitrators Ignore the Law.

The arbitration clause usually contains a provision specifying the law that will govern the arbitration proceedings. The AAA Commercial Rules provide that an arbitrator "may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties."

Arbitrators thus are not compelled to adhere to the law; however, **arbitrators typically are attorneys or former judges, and as such are used to following the law as a matter of course.** Where arbitrators exceed their powers is grounds to vacate under the Federal Arbitration Act (FAA), and some jurisdictions allow arguments to vacate an arbitration award based on "manifest disregard of the law."

An arbitrator with in-depth industry expertise is likely to be knowledgeable of the applicable law.

MYTH: Arbitration Only Works for Domestic Cases, Not International Ones.

The facts dispute this claim. According to the biennial *Arbitration Scorecard 2015* survey of international arbitrations, **the number of billion-dollar international disputes remains at "an astonishingly high level,"** and rose 6% in 2013-2014 over 2011-2012. The publication states that:

Multinational corporations continue to use arbitration as their dispute resolution method of choice when cross-border deals go sour. Whether its case is grounded in a business contract or in a treaty that promises to protect foreign investment, an international claimant will commonly reject national courts in favor of a privatized system that outsources justice to one-off tribunals hand-picked by the parties.⁽⁵⁾



International arbitration awards are considered more easily enforceable than foreign court decisions because of the 1958 United Nations Convention for the Enforcement of Foreign Arbitral Awards (aka New York Convention), notwithstanding the recent Hague Convention on Choice of Court Agreements that seeks to do the same for foreign court decisions. There are presently 150+ countries signed on to the New York Convention.

Enforcement of an international arbitration award under the New York Convention may be greatly enhanced if the process was administered by a recognized arbitral institution such as the AAA/ICDR, and in accordance with well-established rules and procedures.

MYTH: Ad Hoc Arbitration Is Less Expensive than and Preferable to Administered.

Eliminating the third-party administrative organization can be penny wise and pound foolish. There are hidden costs in having the arbitrator and attorneys perform the duties of an administering organization.

Without a third-party administrator:

- Arbitrators handle the necessary administrative tasks, such as payment collection, at their prevailing—and much higher—rates.
- Industry arbitration rules may not be strictly adhered to and/or the process can stall in a party's attorney's office. Administrators allow parties to get back to business as quickly as possible.
- Any questions or issues must be addressed by the parties themselves. And in those situations, the parties' sole forum for recourse is the judicial system, with suits and potential countersuits.
- Confidential documents may not be as securely stored as compared with an arbitral organization with specific safeguards in place. The AAA's standards for technology protection are audited annually to check for vulnerabilities.

MYTH: Arbitrator Appointments and Awards are Biased in Favor of Larger Companies

This misperception of parties is two-fold:

- Concern that third-party administrators select arbitrators inclined to award in favor of larger companies to encourage these companies to continue to use their administrative services, and
- Concern that arbitrators will favor the larger company in hopes of repeat appointment.

The simple truth is this: **Arbitral organizations do not appoint the arbitrators; parties to arbitrations appoint their own arbitrators.**

It is incumbent upon the parties and their attorneys to do their due diligence to vet the arbitrators on the list supplied to them by the arbitral administrator and select the arbitrator(s) they feel to be most appropriate.

There are checks in place; for example, arbitrators on the AAA Roster are required to adhere to the *Code of Ethics for Arbitrators in Commercial Disputes* developed by the AAA and American Bar Association (ABA), which sets out standards of independence and impartiality as well as an imperative to disclose any conflicts of interest—or the appearance of such. Revisions to the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules in 2010 called for broadening of the arbitrator's disclosure and the Model Statements of Independence.



If a party feels that arbitrator misconduct, including evident partiality (usually based on nondisclosure), has occurred, the award may be reviewed in court. Relief is available under the FAA at the court's discretion.

In addition to the Code of Ethics preventing arbitrators from using self-interest as a factor in their decision making, a study analyzing judicial behavior of repeatedly appointed arbitrators to investment cases presented empirical evidence that "the arbitrators' incentive to maintain their reputations as experienced and unbiased experts may lead them to grant an award, uninfluenced by the purported need to satisfy the parties or any of them."⁽⁶⁾

MYTH: Arbitration is Not Suited to Large Cases

The following attributes of arbitration refute this fallacy.

Discovery control. Since the majority of litigation costs are accrued in discovery, arbitration, which limits discovery, is extremely well suited to large cases. Protracted discovery in litigation is such a recognized issue that the Federal Rules of Civil Procedure amended December 1, 2015 included a revised Rule 26(b)(1) to attempt to rein it in by stating that discovery "must be proportional to the needs of the case"—which still leaves the door open for far more allowable discovery than in arbitration.⁽⁷⁾

Large awards. Arbitration in general has secured enormous awards in the areas of international investments disputes, energy, securities, and sports. The AAA is no stranger to bet-the-company cases.

Rules for Large Cases. Rules designed especially to manage these cases provide a framework and specific conflict-management procedures to handle large disputes, with the flexibility to allow for party control.

The AAA *Procedures for Large Commercial Disputes* and AAA *Procedures for Large Construction Disputes* are revised regularly and amended to adapt to the current business environment.

Panels for Large Cases. Large cases are served well with arbitrators who not only have industry mastery but also are experts in dealing with cases of magnitude.

The AAA Roster of Panelists for Large Cases (including among others the AAA Panel of Large Commercial Cases and the AAA Construction Mega Projects Panel) is comprised of recognized leaders in specific industries, prominent attorneys, or retired judges, all with advanced skills in dispute management techniques and meeting additional requirements to those for appointment to the general Roster.

AAA Executive Overview. To add another layer of confidence to AAA large case arbitrations, these disputes are administered by experienced AAA executives. And to ensure that their large domestic cases receive the highest level of service delivery, the AAA created the *Administrative Review Council*, an executive-level body to review arbitrator challenges.

Footnotes

- (1) Federal Court Management Statistics, www.uscourts.gov
- (2) Based on the initial claims of 2,384 AAA/ICDR business contract cases awarded in 2015.
- (3) *Ibid.*
- (4) *op. cit.*
- (5) Focus Europe: 2015 Arbitration Scorecard, ALM Media Properties, LLC, July 2015
- (6) Daphna Kapeliuk, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators," *Cornell Law Review*, Vol. 96:47 (2010)
- (7) NYT Adam Liptak nytimes.com 2016/01/01