Tips for CEOs and CFOs from
40 experienced commercial arbitrators.

THE TOP 10 ways to make ARBITRATION FASTER and more cost *effective*

AMERICAN ARBITRATION ASSOCIATION®

Forty experienced arbitrators from across the United States were asked what ten things they would tell CEOs and CFOs in order to maximize the benefits of commercial arbitration. The arbitrators represent a broad range of legal and business experience throughout the spectrum of commercial and governmental law. Experience as an arbitrator ranged from two years to forty years.

Arbitrators responding to the survey possessed wide experience in both business and law:

- Partners in large and small law firms
- General Counsel
- Executive Vice Presidents
- Corporate Secretaries in large and small companies, including family owned enterprises
- Law Professors
- Transaction Attorneys
- Litigation Attorneys
- Former Judges
- Legal Aid Attorneys
- Public Defenders
- US Attorneys
- State Attorneys
- International Law and Business
- State and Federal Agencies
- State Government Elected and Appointed Officials

The top 10 ways to make arbitration faster and more cost effective

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But for arbitration to fulfill these expectations, companies and their counsel must evaluate their practices and take steps to ensure that arbitration does not become the functional equivalent of a trip to court. These "top ten tips," gleaned from the experiences of seasoned AAA® arbitrators, are a good starting point for the true stakeholders – the parties – to understand how to use the arbitration process to further their objectives.

1 Pay Attention to Your Arbitration Clause

Thoughtlessly inserting a boilerplate arbitration clause into your contract can turn a manageable dispute into a more time consuming, expensive and disruptive case. Companies and their transactional lawyers carefully evaluate the business terms in their contracts, but they often reflexively insert a boilerplate arbitration clause from other contracts or a form book. This oversight jeopardizes the inherent benefits of arbitration and could result in a more expensive, disruptive and inefficient proceeding. It is vital to give up-front consideration to the details of the procedures most suitable to any likely disputes under a contract and not simply hope for the best once hostilities have arisen. While an entire article could be written on clause drafting (a checklist of issues is included in the side bar), some key issues to address are:

- Case deadlines
- Discovery limits
- Arbitrator selection and qualifications
- Confidentiality

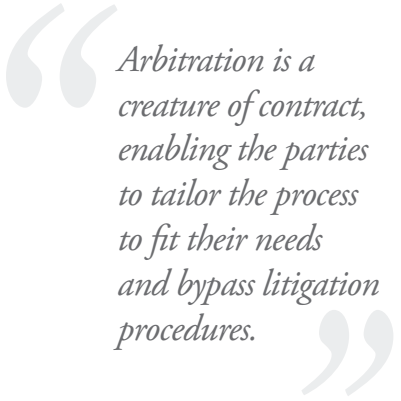
Courts have fixed rules of procedure regulating most aspects of a case. Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures. If you do not take advantage of this critical distinction, you may well be relegated to a more cumbersome and costly proceeding. As an arbitration administrator, the AAA has broad experience in these clause components, but you must include AAA in the clause to access its expertise.

2 Select Attorneys Experienced in Arbitration

While arbitration should be economical and efficient, less experienced attorneys often unnecessarily apply time-consuming litigation processes. While arbitration and litigation are both adversarial proceedings, there are important differences between the two and understanding those differences is critical to the cost- effective presentation of a case. Lawyers unfamiliar with the arbitration process tend to treat arbitration as though it were a court proceeding, resulting in requests (or even stipulations) for extensive discovery, evidentiary skirmishes and unnecessary motion practice. Critically, since arbitration should not be burdened with full blown litigation discovery, you should hire a lawyer unafraid to try a case without having deposed every conceivable witness or unearthed every document. And, it is totally appropriate to ask prospective counsel how many arbitrations they have actually tried to conclusion! Make sure counsel understands your business objectives and is prepared to take the straightest path towards the fulfillment of those objectives.

Checklist for Arbitration Clauses:

- Number and qualifications of arbitrators
- Hearing locale
- Time (case duration) limits
- Discovery (including e-discovery) limits
- Attorney's fees and arbitration costs (divide equally or prevailing party)
- Phased ADR regime (meet and confer, mediation, med/arb hybrid)
- Confidentiality (documents, testimony, award)
- Dispositive motions (summary judgment)
- Form of award (reasoned or standard)
- Interim or injunctive relief
- Governing law and rules



3 Request and Enforce Budgets

Your arbitration decisions should be based on traditional cost-benefit or ROI analyses. How many important business projects are launched without a budget? Arbitration should be treated no differently. Companies should require their lawyers to prepare and regularly update a budget for the various phases of the case (i.e. claim/answer, discovery, witness preparation, experts, hearings, motions, and briefs), justify the line items and track billings against the budget. Alternative fee arrangements such as blended hourly rates, contingent fees or fixed fees should also be considered. Overall, and absent special circumstances (e.g. customer relations or precedential concerns), your arbitration decisions should be based on traditional cost-benefit or ROI analyses familiar to most businesses.

4 Choose the "Right" Arbitrator

Researching an arbitrator with the right expertise, temperament and background is an often overlooked yet essential step. Every arbitration award is rendered by a human being, or panel of them, each with his or her own backgrounds and experiences. Yet, it is surprising how little attention parties devote to the arbitrator selection process, and specifically to identifying an arbitrator with the substantive expertise, temperament and training to be receptive to the evidence. The first opportunity to narrow the field begins with the arbitration clause itself. Ask yourself: if there is a dispute under the contract, what will be the likely claim(s)? Do I want a lawyer to decide the claims, or an accountant, or an engineer? Once the demand is filed, and the case administrator has disseminated a list of arbitrator candidates (subject to any requirements specified in the arbitration clause), businesses should review the arbitrators' biographies, search the internet and any public data bases, and, if appropriate, solicit feedback from those with experience with the arbitrator. In short, conduct due diligence as you would with any important business decision.

An entire seminar could be dedicated to arbitrator selection, but three additional points are worth noting. First, the AAA's Enhanced Neutral Selection Process enables the parties to interview potential arbitrators or pose mutually agreeable written questions to ascertain whether the arbitrator has the proper experience and disposition. The process helps winnow the field to those arbitrators with the ability to exert requisite management skills and handle any unique issues in the case. Second, parties should vet carefully any clause which requires a three person panel and avoid whenever possible a tripartite panel comprised of two party-appointed arbitrators. The running costs of a panel case can be substantial and scheduling becomes more problematic. Third, if there are a flurry of claims under your standard form contract, analyze what is wrong and fix it. An arbitrator cannot be expected to provide relief from a bad agreement.

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5 Limit Discovery to What is Essential for the Arbitrator

Establish a strict discovery schedule focused on the exchange of necessary information. Discovery costs are often the largest part of any litigation budget. But this should not be the case in arbitration, especially if the arbitration clause specifies that discovery will be limited to reasonable procedures consistent with the contours of the dispute. Even if the clause is silent, it is in the parties' mutual interests (and is the duty of the arbitrator) to develop a discovery schedule that is restricted to the exchange of information necessary (not merely desired) for the arbitrator to understand and fairly decide the case. Written discovery requests (interrogatories or requests for admissions) are rarely appropriate. Depositions of witnesses who will testify at the hearings should be avoided, or at least confined to the key decision maker(s). Document exchange is commonplace, but that practice must be given special attention in this age of electronically stored information (ESI). E-discovery has spawned its own cottage industry of consultants and experts, and budgets can easily be exhausted in endless fields of back-up tapes, metadata, .pst files, and TIFF images. Unless the parties can work out an ESI treaty on their own, the issue should be presented to the arbitrator at the preliminary hearing. Even before a case is actually filed, it is prudent to investigate the burden of producing ESI because it could influence the decision on whether to file in the first instance.

6 Participate in the Preliminary Hearing

Gauge the arbitrator, hear the other side's position and have a say in developing the schedule. The preliminary conference is the first occasion for the parties to present their positions to the arbitrator and discuss a case schedule. This need not be a lawyers-only gathering. Clients have the right to be present at the preliminary hearing (most are conducted by conference call), and by participating you have the ability to gauge the arbitrator, hear the other side's unfiltered position and react to the schedule being developed. The product of the conference is a case management or scheduling order which codifies the arrangements from initial discovery through issuance of the award. Be sure to review its terms. Thereafter, monitor any requests for continuances or extensions of the deadlines, as you would with any business project.

7 Limit Motion Practice

Potential motions must be scrutinized, as they are time-consuming and may not have any practical significance. Companies and their counsel should consider whether any potential motion truly "advances the ball." Motions designed to restrict evidence at the hearings (so-called motions in limine) may be inappropriate because the formal rules of evidence do not apply in arbitration, and the arbitrator should rightfully consider evidence designed to further his or her understanding of the case. Similarly, arbitrators may be reluctant to grant dispositive (summary judgment) motions absent a stipulation by the parties because one of the few grounds for vacating an award under the Federal Arbitration Act is a refusal to hear material evidence. Consider suggesting to the arbitrator that any party wishing to file a motion first seek permission so the arbitrator can assess its potential effect on the case. At a minimum, have your attorneys explain the rationale for any motion, and evaluate its possible efficacy in comparison to the risks and costs.

> *"Monitor any requests for continuances or extensions of the deadlines, as you would with any business project"*

8 Remain Open to Settlement

Keep an open mind and set aside emotions during the case as opportunities for settlement develop. Few lawsuits proceed as scripted, and arbitration is no different. Businesses need to be alert to case developments, and evaluate whether any new information affects the value of the case. Leave your emotions aside. Consider direct talks with the adverse party's management or the use of a mediator, and reassess the options throughout the proceeding. Indeed, many cases settle during or after the hearings. As arbitration administrator, the AAA usually attempts to include a voluntary mediation step during your arbitration and, when adopted, many cases are settled or partially settled prior to hearing. Even settling some of the disputes in a case can make the hearings less expensive and quicker.

9 Trust the Expertise of the Arbitrator

Arbitrators have specialized knowledge in your field and are more receptive to the facts of your case than to generalized pleas for fairness and equity. Attorneys who regularly represent clients in arbitration recognize the differences between a jury case and arbitration before someone knowledgeable about the industry or subject matter. Arbitrators want to understand how your case fits into a framework which they already have experienced. Present your claims in the clearest possible manner, with an eye towards demonstrating how the particular facts of your situation warrant relief. Focus on the key issues in dispute. Generalized pleas for fairness or equity are less likely to resonate with the arbitrator.

10 Present the Case Efficiently and Professionally

You play a critical role in completing the arbitration as efficiently and persuasively as possible. By the time the first witness is sworn, procedures should be in place to ensure that the hearings flow smoothly. Time limits should be considered. Exhibits books containing stipulated exhibits should be pre-marked, with copies available for all participants, including witnesses. Slides or demonstrative exhibits can be effective presentation tools, particularly for opening statements or complicated technical or damages matters. The parties should have discussed any witness sequencing issues, considered the use of video or web testimony and affidavits, and presented any witness disputes to the arbitrator for disposition. Do have a party representative at the hearings. Do not groan, scoff or chortle during an opponent's case or slump in your chair after an unfavorable ruling or testimony. When testifying, direct your comments to the arbitrator and avoid unnecessary sparring with counsel during cross-examination.

As the stakeholders with the greatest economic interest, the parties have the most to gain from an efficient, fair and expeditious resolution of their dispute. Businesses, in consultation with in-house and outside counsel, must assume ownership of the arbitration process to leverage the unique benefits of arbitration over court. With a customized arbitration clause and careful monitoring of the proceeding, the parties are uniquely situated to rein in costs and produce speedy outcomes. Attention to these ten tips will put the parties on the path towards better outcomes.

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