An Introduction to Arbitration and How to Use the Arbitration Process to Your Advantage

By Chad Johnson

Introduction

Most readers of this publication would agree that the jury system is the best form of civil justice. Yet, corporations have begun inserting arbitration provisions in every consumer contract imaginable. These litigants push for arbitration for a variety of reasons—alleged cost savings, confidentiality, and eliminating the so-called "runaway verdicts." The purpose of this article is to provide a bit of familiarity with arbitration process and give a few practice pointers on how to use arbitration to your advantage in the right consumer cases.

What is Arbitration?

Arbitration is an alternative dispute resolution process where the parties agree to have a third-party arbitrator or arbitrators decide the dispute rather than a judge or jury. Each party has an opportunity to present evidence to the arbitrator(s) in writing or through witnesses. Because arbitration is agreed-upon by the parties, there are different variations of arbitration including expedited, complex, mediation-arbitration, and many others.

What is the Expense of Arbitration?

One big difference between our courts and arbitration is the expense. In arbitration, you could be paying the hourly fees of your arbitrator plus some non-refundable administration fees to the arbitration service. Depending on the type of case and amount in controversy, the costs of arbitration can add up quickly to tens of thousands of dollars or more. Meanwhile, it only costs hundreds of dollars to file a complaint and jury demand in court. However, many practitioners have found that the administrative expense of arbitration is balanced out by the reduction of necessary attorney and expert work in arbitration, which depends on how you structure your case's arbitration process. Further, if you become familiar with the consumer rules of certain arbitration services, you may find that your case applies, and the corporate entity that drafted the arbitration provision will almost exclusively bear the costs of the arbitration.

Arbitration Advantage:
"Consumer" arbitration fees may be minimal. JAMS, AAA, and potentially other arbitration services reallocate the filing fees to permit the plaintiff to file "consumer" arbitrations with only a $200.00-$250.00 administrative filing fee to the consumer and all arbitrator fees to the non-consumer.[1]

Arbitration Advantage:
AAA and other arbitration services have "expedited" or "fast track" rulesets based on the amount claimed or if the parties otherwise stipulate to use the expedited rules. These rulesets lead to quicker hearings. For example, in AAA construction defect and commercial arbitrations, if the claimed amount is under $25,000.00, the dispute will be resolved by written submission alone, which can include expert reports and affidavits.[2] For claims of under $100,000.00 (exclusive of attorney fees and costs), AAA's Fast Track rules apply and the evidentiary hearing is to occur within 45 days of the preliminary hearing, which usually equates to about 90 days from filing the arbitration demand.[3]

What is the Arbitration Process?

The arbitration process is generally less formal than court litigation, and you can customize it for any particular case. You may have a default ruleset specified from a written arbitration agreement between the parties (*e.g.,* AAA Commercial Arbitration Rules), but that is not set in stone and can modified by the parties' later agreement. It varies from case to case, but most arbitrations follow a similar process: 1) arbitration demand, 2) arbitrator selection, 3) arbitration management order and preliminary hearing, 4) evidentiary hearing, and 5) post-hearing.

1. Arbitration Demand and Related Pleadings.

The arbitration process usually begins with an arbitration demand from the claiming party, now called the "claimant" in arbitration, served upon the defending party, now called the "respondent." An arbitration demand is sometimes a simple form provided by the particular arbitration service,

such as the American Arbitration Association ("AAA"), Judicial Arbitration and Mediation Services ("JAMS"), Judicial Arbiter Group ("JAG"), or another service. Service is perfected usually by email or certified mail to the defending party, their counsel, and the particular arbitration service. Accompany the arbitration demand with the agreement to arbitrate and any necessary filing fees. The respondent then has the option of providing an answering statement and affirmative defenses, but this is not always required, and no answering statement is usually considered a denial of all claims rather than an admission.[4]

2. Arbitrator Selection

After pleadings are closed, the parties then usually move forward with arbitrator selection if that has not already occurred. Most arbitrations proceed with one arbitrator, but many larger arbitrations use a panel of three arbitrators. Some arbitration clauses and arbitration service rulesets have processes on how to select an arbitrator or arbitrators. In practice, often the parties just provide a few names to the other side and come to an agreement on who to use. If the parties cannot agree upon an arbitrator, a party may apply to a court of competent jurisdiction to have one appointed.[5] One difference in selecting an arbitrator over a jury is that you now have the option to try the dispute over to a legal and subject matter expert. For dense legal or underlying subject matters, having a subject matter expert or multiple experts in different fields may streamline the presentation of evidence and argument. Some other considerations when selecting an arbitrator are the arbitrator's background, and the parties, experts, and witnesses that the arbitrator may know on a professional or social level, as such relations does not automatically disqualify the arbitrator.

Arbitration Advantage:
Speak to other practitioners regarding the particular arbitrators that you are considering. Many of us have found the landmines already and are happy to provide our input.

3. Arbitration Management Order and Preliminary Hearing.

While it may not seem like it, this is one of the most important stages to use the arbitration process to your advantage. An arbitration management order is essentially a slimmed down case management order from Colorado state courts.

Practitioners in arbitration should design and negotiate an arbitration management order to suit the needs of the case.

One of the best advantages for consumers and their counsel in arbitration cases is the curtailing of discovery and motions practice. Many attorneys that represent consumers both need very little discovery to prove their case and also feel that the opposing parties tend to seek disproportionate discovery and file excessive motions.

Of course, not every case is the right case to eliminate motions or discovery. Many practitioners that represent consumers are seeking to hold a business liable for Colorado Consumer Protection Act violations or other causes of action that may need discovery to prove certain elements of the claim. In commercial litigation, a motion for determination of question of law can resolve the case or assist the parties in settlement negotiations prior to the presentation of evidence. However, in the right cases, you can save significant resources by eliminating excessive discovery and motions. Eliminating the distraction of discovery and motions also causes the parties to think critically about case value much earlier and can lead to earlier settlement.

Your case may already have a default ruleset incorporated into the arbitration contract, which will form the basis of your arbitration management order. Many arbitration rulesets do not permit discovery or motions at all, or they provide for very little discovery in the spirit of arbitration. Many practitioners representing corporate entities wish to have expansive discovery and motions practice and will draft an arbitration management order that contradicts the agreed-upon ruleset and spirit of arbitration. However, when little to no discovery or motions is the default rule, most arbitrators will not permit expansive discovery or motions unless the parties stipulate it.

This stage of the case can also be an opportunity to ask the arbitrator to address other issues such as questions of law that could determine the case or assist in settlement negotiations far in advance of the evidentiary hearing. The preliminary hearing is usually a conference call and is generally similar to case management conferences held in Colorado courts in recent years. The arbitrator will try to resolve any disputes and then enter the arbitration management order.

Arbitration Advantage:

Some attorneys that represent corporate defendants find themselves unable to walk when you take away the crutches of discovery and motions practice. They will threaten, sometimes emptily, that their client or insurer will not settle unless they get certain discovery in the arbitration management order. You and your client need to decide early what discovery you wish to agree to, if any. Many practitioners find some limited discovery necessary for settlement in their cases, such as the exchange of expert reports and a limited document exchange.

4. Evidentiary Hearing

An arbitration evidentiary hearing is similar to a trial, but a lot less formal. They are usually held at a mutually agreed upon conference room, virtually via videoconference, or a hybrid of both. One of the greatest advantages of arbitration hearings versus trials is the flexibility. Unlike trials, which our overcrowded courts stack upon each other, arbitrators hold dates quite firmly. The hearings can also be held around the schedules of the parties, witnesses, and counsel by holding hearings on non-consecutive days, nights, or weekends. Cases in arbitration also get to the evidentiary hearings on average occur much quicker than trial due to the firmness of the dates and limited discovery and motions practice. The arbitrators usually render a final award within 14-30 days of the evidentiary hearing depending on the ruleset used, but the parties and arbitrator can agree to customize it to be shorter, especially if the parties agree to a simplified form of award.

Arbitration Advantage:

Even though you may be presenting in a conference room and no jury is present, you still should present your case with ample demonstrative aids and as much impactful human testimony you can elicit. Although your arbitrator may be interested in your case more than the average juror, unlike a juror, the arbitrator may have heard a similar case many times.

5. Post-Hearing Proceedings

Once a claimant receives a final arbitration award, there are limited ways it can be modified or vacated under the Colorado Uniform Arbitration Act ("CUAA") or Federal Arbitration Act ("FAA").[6] Under the CUAA, a party has only 20 days to file a motion to the arbitrator to clarify or fix a mathematical error or form error in a final award that does not affect the merits of the award.[7] Some arbitration practitioners and arbitrators utilize a process of interim awards before final awards to avoid the perceived harshness of this scenario, but many practitioners prefer the finality and avoidance of motions. The possibility of an interim award is something that you can address in your arbitration management order.

There are also extremely limited bases to seek judicial review of a final arbitration award. Once a claimant takes a final award, the claimant can apply to a court of competent jurisdiction to get the award confirmed into a judgment.[8] Whether brought by an independent motion or in response to a motion to confirm the award, a respondent can only seek limited judicial review under the CUAA. Section 224 only permits judicial modifications to an award to correct a math error, correct a form error, or to modify an award if the arbitrator decided a claim that was not actually submitted to arbitration.[9] Section 223 motions must be filed within 91 days of a final award and allow a court to vacate an award if the award was procured by corruption, a party was not notified of the evidentiary hearing, there was no agreement to arbitrate, and a few other extreme circumstances.[10] If the challenge is successful, a court may order a new evidentiary hearing and/or a new arbitrator as appropriate.[11] A court may award fees and costs to the prevailing party of a contested arbitration award.[12]

While it is important to know the possibility of these challenges to arbitration awards, in practice they are rare. Many times, the respondent may offer to pay an award immediately to avoid judgment being entered.

Arbitration Advantage:

Considering the minimal risk that the arbitrator or courts will modify or overturn a final arbitration award, speak with your clients to see if they prefer the faster and potentially larger settlement payment or if they prefer to make a public record of a judgment against the opposing party by confirming the award.

Conclusion

While many practitioners are understandably more comfortable with a jury deciding their clients' fates, arbitration can be the right solution for the right case. For certain cases, and especially until the courts catch up from the pandemic trial backlog, the attractiveness of getting a final decision in a faster time with less discovery is something that practitioners should explore with their clients. The challenge for practitioners is that many opposing parties will advocate for expansive discovery and motions practice and a hearing far in the future. Practitioners in arbitration need to use the process to their advantage by knowing the rules that apply to the arbitration and advocating firmly throughout the case. Otherwise, your arbitration may end up with the downsides of the litigation process and very little of the advantages. ▲▲▲

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Endnotes:

[1] JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness https://www.jamsadr.com/consumer-minimum-standards/. AAA Consumer Arbitration Rules https://www.adr.org/sites/ default/files/Consumer-Rules-Web.pdf.

[2] AAA Commercial Arbitration Rules, Rule E-6. https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf.

[3] AAA Construction Industry Arbitration Rules and Mediation Procedures, Rule F-1. https://www.adr.org/sites/default/files/Construction-Rules-Web.pdf.

[4] AAA Construction Industry Arbitration Rules and Mediation Procedures, Rule R-4.

[5] C.R.S. § 13-22-211.

[6] The FAA is generally similar to the CUAA, but some differences exist. Be sure to know which applies and become familiar with these brief sets of laws.

[7] C.R.S. § 13-22-220.

[8] C.R.S. § 13-22-222.

[9] C.R.S. § 13-22-224.

[10] C.R.S. § 13-22-223(1).

[11] C.R.S. § 13-22-223(3).

[12] C.R.S. § 13-22-225(3).