NEW YORK STATE BAR ASSOCIATION

ADR Insights:

From the Q&A Section of the NYSBA Resolution Roundtable Blog

(August 3, 2015 to February 21, 2017)

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In August 2015, Resolution Roundtable, the blog site for the Dispute Resolution Section of NYSBA, began posting weekly questions to seek feedback and insights on various alternative dispute resolution (ADR) topics. Traffic to the blog site thereafter greatly increased by ADR users, providers and panelists, with varied responses depending on the topic. Topics included arbitrator selection, disclosures , depositions, ethics, ADR legislation and third-party funding.

Due to the popularity of the site and to promote academic discourse, the Dispute Resolution Section decided to publish this compilation of all questions and responses, with attribution, from August 3, 2015 to February 21, 2017.

Abigail Pessen, Chair, Dispute Resolution Section
Jeffrey T. Zaino, Chair, Resolution Roundtable Committee

August 3, 2015: Arbitrator Disclosures - What are your thoughts?

When an arbitrator is conducting a conflict check, should his or her conflicts database include arbitration counsel and their law firms, expert witnesses and other professionals? How extensive should the disclosures be? *Please post your thoughts/comments below.*

I doubt that most law firms keep this information in their databases, so it is not realistic to expect this type of disclosure as a matter of routine. If the arbitrator remembers having any previous cases or arbitrations involving counsel, that should be disclosed.

Posted by Kim Landsman | August 3, 2015 10:59 AM

Your question is two-fold. First you ask whether disclosure should be made of those involved in the arbitration case or with counsel or experts engaged by a party. A relationship with the law firms, experts or other professionals engaged by a party could give rise to a finding of bias that would vacate an arbitration award. Clearly the arbitrator should not be the one to determine whether bias exists based on the relationship, and thus disclosure of the relationship and its nature should be made to the parties.

Secondly, the extent of the disclosure should be sufficient so that the parties can reasonably exercise their rights to consent or object to the appointment. For example, in most cases, it would be sufficient to disclose that ten years ago, the arbitrator represented adverse parties in a litigation where arbitration counsel represented the other side. On the other hand, if one side or the other had sought sanctions against the lawyer, then greater disclosure would obviously be required. In short, the disclosure should always be tailored to the need to inform the parties sufficiently to allow them to make an informed decision to consent or object.

Posted by Charles L. Rosenzweig | August 3, 2015 11:03 AM

I think that at a minimum there should be full disclosure of interactions and relationships with arbitration counsel and their law firms . The disclosure up front will go a long way to avoiding problems regarding these relationships at a later date.

Posted by Ronald Kreismann | August 3, 2015 11:14 AM

At the time of appointment I disclose prior interactions with firms and counsel involved in the arbitration. Information as to experts is not usually available at that stage, and I do not keep records of experts who have testified before me. At such point as experts were identified, I would make a disclosure if I recalled having had prior interaction with the expert.

Posted by George A. Davidson | August 3, 2015 12:20 PM

At the time of appointment, I search my records for the names of law firms, lawyers, parties and disclosed witnesses. Experts are not usually identified at that stage. When experts are identified, I search the expert's name and firm (if any) at that time.

Posted by Steven Skulnik | August 3, 2015 2:21 PM

Minimally, the conflict check should include disclosure of previous involvement with counsel, their firms (if recalled), parties involved in the case, and their witnesses, including expert witnesses. In addition, if the arbitrator is aware of an immediate family member having had a relationship with one of the aforementioned parties, that relationship should be disclosed.

Posted by William Aiken | August 3, 2015 2:47 PM

My situation now that I am in my own practice, limited to mediation and arbitration is simple. It is disclose parties and counsel who have used my services if they suggest me again. It is not so simple thinking back to when I was with a large law firm. In that instance I thought it necessary to divulge firms and clients I worked with, but also large institutional clients of the firm's which I had not worked with, if they proposed me as a neutral, as well as disclosing the circumstances (e.g. they used the firm, but I had not done work with them) if I knew of the relationship.

Posted by Paul S. McDonough | August 3, 2015 3:18 PM

I am an arbitrator involved with construction-related matters. I am a sole-practitioner active as both an engineer and an attorney. Therefore, my disclosure search at the time of appointment ends up covering two (2) different professional groups. At the conclusion of each arbitration I find it helpful to list all witnesses, experts, parties, attorneys, and law firms that were involved. This list is the first place I go to when a new matter is sent to me.

Posted by Richard Raab | August 3, 2015 4:26 PM

My database includes the names of all counsel and witnesses who appear in the cases I handle. Disclosures can be as simple as a statement that current arbitration counsel has appeared in a prior case, or can be more complex depending on the nature/extent of my prior contact.

Posted by Stephen F. Ruffino | August 4, 2015 5:45 PM

For years, my practice has been limited to serving as a neutral. My disclosure search at the start of an arbitration includes whether I have served as an arbitrator or mediator in a case in which arbitration counsel (either the firm or the individuals) have appeared as advocates. At the start of the disclosure process, experts have generally not been identified. When they are, I disclose any cases in which I have served as a neutral where any of the experts testified. I do not keep records on this, so any such disclosure is based on my recollection.

Posted by John Wilkinson | August 5, 2015 6:49 PM

There is a big difference between (a) expecting an arbitrator who is a member of a law firm to know about and disclose his or her past relationships with the members of the law firms representing the parties in the arbitration and (b) expecting him to know about and disclose those of each of his partners with the members of the law firms representing the parties. To require the latter degree of disclosure is unrealistic; compliance will often fall short however sincere the attempt. Accordingly, the imposition of such a requirement on arbitrators is likely to result not in more sunlight, but in more excuses by unsuccessful parties to upend the arbitration whenever some relationship was not disclosed.

Posted by John F. Grubin | August 6, 2015 7:43 PM

As firms are more and more having their personnel serve as neutrals it should be required that they maintain a database including all of that information such that a "no cost, no burden" search can be made in connection with proposed ADR matters.

Posted by Jonathan Honig | August 10, 2015 6:58 PM

August 24, 2015: Your Longest Arbitration Case - What are your thoughts?

Either as an advocate or arbitrator, what has been your longest arbitration case? Why did it take so long? *Please post your comments/thoughts below.*

My longest arbitration went on for close to a year with about two and a half weeks of hearing days. It went so long primarily because the parties had multiple adjournments and discovery difficulties. In addition, they could have been more focused in their presentations. The panel of arbitrators tried to mitigate delays but the contentious nature of the advocates made it difficult, as they brought multiple motions. We did bifurcate the case to deal with culpability before damages. In fact, the damages portion of the case went much faster than the culpability section. The first portion of the hearings also had a number of emotional witnesses who needed guidance through their testimony process.

Posted by Kyle-Beth Hilfer | August 24, 2015 10:15 AM

My longest arbitration resulted from two major factors: 1. A three-arbitrator panel. Coordinating the schedules of the three, for any hearings, became difficult. Eventually, the three agreed to appoint the "presiding" arbitrator to hear all matters of discovery and scheduling, which helped quite a bit. 2. A failure to create an accurate estimate of time for evidentiary hearings, and a failure to include a specific time limit for each side's case. When the expected time allotted for hearings elapsed, the claimant had not concluded its case, and was granted additional time. Then, because of the three-arbitrator format, it was difficult to find mutually agreeable dates for the continued arbitration. Many months were lost, in the process, and (meanwhile) the claimant asked for additional discovery, which was granted, and the schedule further elongated.

Posted by steven c. bennett | August 24, 2015 11:24 AM

I helped a former partner on an arbitration that consumed almost a year. The construction dispute was garden variety between an owner and a contractor. Damages totaled around $1.2 million (claims and counterclaims).

After a lengthy discovery period, the hearing itself spanned almost 10 weeks (off and on, mostly on) and then following the hearing, the case was extensively briefed.

The reasons the arbitration took so long and cost so much include:

(1) Permissive arbitrator. Opposing counsel's practice is to "fully" and "heavily" litigate each case. The arbitrator let him. The arbitrator, although experienced and fair, allowed each and every discovery request (voluminous discovery), each and every de-

lay request, permitted witness testimony at the hearing to drag on for days, and then allowed an extensive briefing cycle.

(3) Court reporter. Having a court reporter seemed like a good idea at the time. But with a court reporter -- rather than simply presenting their cases to the arbitrator -- the parties instead got caught up in creating an extensive transcript record. The desire to create a complete transcript record may have increased the hearing duration by as much as 40%. In addition, in preparing the post-hearing briefs, each party and its attorneys had to reveiw/capture approximately 30 days of hearing transcripts.

(4) Attorneys fees. The contract allowed the winning party to recover its attorneys fees. With the stakes thus increased (attorneys fees being so extensive), both parties rationalized that going the extra mile was worth it.

One last point. The cost and duration of the arbitration hearing could have been significantly reduced without detracting from the dispute process. This could have been done by limiting each side to (e.g.) two hearing days and 1/2 day of rebuttal. A limitation of this nature would have forced each party to focus their arbitration efforts.

Posted by Dave Anderson | August 24, 2015 12:21 PM

I presided over a patent licensing case which ran almost two years. In that case claimant patent owner changed attorneys three times, the third to a lawyer with whom the claimant knew from a media report that I had a potential conflict. The AAA got involved and determined that I would not be disqualified as a result. Arbitrators must realize that often a case gets sidetracked due to tactics by counsel and parties. Even following ethical guidelines we really must stay focused on issues and not parties, and not allow distractions to impact our neutrality.

Posted by Sid Bluming | August 24, 2015 2:03 PM

My longest case was my first as an arbitrator. It dragged on principally because counsel for one of the parties was a poor organizer and wasted much time retrieving documents he wished to use with a witness. The pauses between questions seemed interminable. Efforts to accelerate his pace were unavailing. Confronted with a like circumstance now, I would set a reasonable time limit for the completion of the examination.

Posted by Gerald Harris | August 24, 2015 2:07 PM

My longest arbitration took 3-4 months including discovery disputes, approximately 5 hearing dates in a matter that could have been heard in at least one fewer day if the parties had not kept raising issues in attempts to "slant" the case, e.g., proposing late-breaking witnesses, proposing that one of these witnesses be heard by Skype and fighting over whether late-breaking documents could be submitted. The arbitration also included a post-hearing damages challenge that bordered on frivolous. I balanced my desire to cut-off presentation of collateral matters with the desire to not create a basis for challenging the eventual award. In subsequent arbitrations I have allotted less time for extraneous issues.

Posted by Stanley Chinitz | August 24, 2015 4:42 PM

My longest arbitration extended well over a year longer than anticipated. Counsel for the Plaintiff surprisingly did everything in his power to stall the proceedings, which included going to court twice to get the Hearing postponed [denied each time]. He even went so far as to advise his client [the Plaintiff] to boycott the Hearing - which in fact did occur. It did not help that the Plaintiff was this Counsel's brother. The Hearing was eventually held with only the Respondents in attendance and an Award was rendered.

Posted by Rich Raab | August 25, 2015 3:24 PM

September 1, 2015: Ethical Dilemmas _ What are your thoughts?

What challenging ethical dilemmas have you encountered in an arbitration or mediation as an arbitrator/mediator or advocate? *Please post your comments below.*

If you are appointed a non-neutral party arbitrator and midway through the proceedings, after the right to "ex-parte" conversations has ended, you come to the conclusion that the facts, law and arguments presented by the party who appointed you are completely without merit, how would you handle that?

Posted by Jeff Zaino | September 1, 2015 2:07 PM

You should not judge things "mid-way" through the proceedings. That said, as a neutral, you must remain as such and when the time comes, make the appropriate decision consistent with the facts, law and arguments presented.

Posted by peter altieri | September 1, 2015 3:07 PM

September 14, 2015: Dissenting Arbitration Opinions – What are your thoughts?

How often do you see dissenting opinions in arbitration cases? Is it a good or bad thing for the process? Please post comments below.

The issuance of a dissenting opinion in an arbitral proceeding has never come up once in 35 years of serving as a neutral. I would dissent if I did not agree with the majority and would expect co-arbitrator to do so as well. The danger in seeking a majority is the possibility of unfair compromise for the sake of unanimity, which may be something the panel wishes to achieve but that creates the potential to negatively impact the integrity of the Tribunal's award.

Posted by Stephen S. Strick | September 14, 2015 10:17 AM

I have been involved numerous arbitrations over a 40 year period, some of which involve dissents which is a reasonable option for a process that is neutral. The dissent has been expressed by treating the award as a majority award, or a one line dissent with the name of the dissenter, and finally if the dissenting arbitrator feels strongly and wants to explain for the record why he or she considers the decision is wrong , a written dissent may be appropriate and I have seen it in done in several arbitrations.

Posted by donald decarlo | September 14, 2015 11:04 AM

Dissenting opinions are uncommon. I have seen only two. But in both cases, the dissenting opinion was helpful.

In the first case, the defendant subcontractor (among its other claims) sought to recover from the prime for owner-caused delay. Under New York case law, unless contractually agreed, a prime is not liable to its subcontractor for owner-caused delay. The prime moved for summary judgment on the owner-caused delay portion of the claim. The panel denied summary judgment because two members were hesitant to dismiss a large delay claim without hearing the evidence. The dissenting opinion, however, stated the issue clearly -- which eventually led to the parties settling the entire dispute.

In the second case, the key issue was contractual notice. The owner had actual timely knowledge of the prime's claim. The prime also gave contemporaneous written notice, but late and not in the format prescribed by contract. The 3-member panel found for the prime. The dissenting panel member bitterly took the panel to task for not strictly interpreting the contract to deny the claim. The presence of a dissenting opinion made it clear how close the notice decision was, and, perhaps more importantly, that both the prime's and the owner's positions on this key issue were fully considered by the arbitration panel.

Posted by Dave Anderson | September 14, 2015 11:07 AM

The prospect of a dissenting opinion has never arisen in any of the three-member panels on which I have served. I believe such an opinion is generally not helpful to the arbitral process and should be disfavored unless the conscientiously held view of a panel member cannot be aligned with the majority view and to sign on would offend the dissenting member's strong conviction that a different outcome is mandated by the evidence.
Judge Gerald Harris

Posted by Gerald Harris | September 14, 2015 11:16 AM

I have sat on panels in which dissents were issued (both by me and by others), as well as on panels in which partial concurrences/dissents were issued. Some of these were quite vigorous. I would much prefer to see an award with a dissent attached than a unanimous award that was achieved by a give and take on issues or damages figures (otherwise known as horse trading). The latter is fairly common in my experience. In my opinion, the pressure to achieve unanimity in this way is unseemly. I'm not saying that the arbitrators should not debate the issues and attempt to convince one another of the correctness of a particular position, something which is entirely different than the horse trading that sometimes occurs.

Posted by Joanne Barak | September 14, 2015 11:51 AM

I believe that dissents should be extremely rare for all the reasons expressed in C. Mark Baker & Lucy Greenwood, Dissent - But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances, 7 No. 1 Disp. Resol. Int'l 31 (2013).

Posted by Steven Skulnik | September 14, 2015 12:03 PM

Dissenting opinions should be discouraged, if possible, in arbitration proceedings as they may tend to perpetuate further litigation between the parties. This, in turn, undermines the finality and cost-effectiveness of the arbitration proceeding.

Posted by Melvia B. Green | September 14, 2015 12:08 PM

In the years that I have been actively arbitrating since leaving the federal bench nine years ago, I have not authored or experienced a dissenting opinion.
I think that they should be discouraged. More often than not they are egoistic exercises or plays to get new business from the side benefiting from the dissent. That having been said I haven't seen a vacatur because of a dissent.

In my opinion a dissent should be a rare event. And if needed, a footnote or statement that the dissenting arbitrator does not join the majority should suffice.

The purpose of arbitration is to bring closure to the dispute, not perpetuate it. The facts are seldom so clear or the law so determinate that reaching a consensus isn't the better course to take.

Posted by Hon. William G. Bassler | September 15, 2015 10:51 AM

The one-line dissent serves the purpose of telling the parties that the arguments presented a close question and the losing party's position was not unreasonable. Even expositions of a legal difference have their place. I have, however, been faced with impassioned lengthy dissents (one by a non-neutral arbitrator) questioning all aspects of the decision and even the motivation of the majority. It begged me, as the impartial neutral, to change my mind and enter the award for the respondent. I thought that to be bad form in that it cheapened the arbitration process, giving the award the appearance of a whim rather than a considered decision. As a former appellate judge, I am used to dissents,, but I suggest that they be sparingly used in arbitrations.

Posted by Judge William A. Dreier | September 15, 2015 11:52 AM

I learned from another arbitrator a useful practice when faced with impasse. We took a break in our deliberations. We exchanged outlines on the issue on which the arbitrators were divided. The outline listed the evidence by bullet point: the exhibit numbers and transcript references relevant to the critical fact determinations. Not just the supporting evidence for a point of view, but all the evidence on point.

The break allowed us time to consider/analyze the outline information of the other arbitrators and ensure that ALL the evidence was being weighed. This facilitated dissecting of the underlying evidence for differing points of view. Then we reconvened by conference call. This approach contributed to really good critical thinking, focussed the deliberations, reduced arguing and we were able to overcome the impasse.

Posted by Alice D. Sullivan | September 15, 2015 12:59 PM

In situations where there are two party appointed arbitrators and the two appoint an umpire, dissents are very common. Inherently the party appointed arbitrator, absent unusual circumstances, is going to favor the appointing party; that is why they are there. There is nothing wrong with a dissenting opinion in such circumstances and if there is an appellate process built into the arbitration agreement the dissenting opinion becomes very important to the appellant.

We should not frown upon well reasoned dissents.

Posted by Mark Bunim | September 17, 2015 9:39 AM

September 28, 2015: Arbitrator Training - What are your thoughts?

What type of continuing education/training should all arbitrators take? Please post your comments below.

First, all arbitrators need to periodically refocus on why parties elect to arbitrate in the first place. Parties arbitrate to obtain "timely", "cost efficient" resolution of disputes, by a subject matter expert. A continual focus on core values -- timeliness and cost efficiency -- is needed to ensure that arbitration delivers the promised value.

Second, all arbitrators should be informed of recent issues/problems/lessons learned springing out of arbitration. Arbitration is a growing discipline. How can we can we better meet the parties' needs?

Posted by Dave Anderson | September 28, 2015 12:26 PM

For the non-lawyers on the Arbitration Panel, it might be helpful to have a session to discuss the handling of evidence at the hearing, the definition of hearsay, and other areas that the lawyers are very familiar with, but not necessarily the rest of us.
Carl

Posted by carl goldman | September 28, 2015 1:25 PM

In my view, one of the keys to a successful arbitration requires the arbitrator to understand the parties' goals in selecting arbitration and at the first conference give the parties the opportunity in particular to comment on the parties' expectations as to timely.

Posted by PAUL J. Bschorr | September 28, 2015 2:09 PM

October 5, 2015: Independent Legal Research by an Arbitrator - What are your thoughts?

Should an arbitrator conduct independent legal research? If so, when? *Please provide your thoughts/ comments.*

An arbitrator certainly may. But if the research is consequential to the arbitrator's decision, the parties should be given the opportunity to comment on it prior to issuance of the award. This concern is not applicable to the simple insertion of citations that reinforce a conclusion compelled by authorities already cited by the parties.

Posted by Robert L. Arrington | October 5, 2015 11:02 AM

Only by agreement of Parties. Any legal research should be disclosed to all Parties.

Posted by Ruben Hernandez | October 5, 2015 11:05 AM

Perhaps my views are influenced by 25 years' experience on the Bench, 15 as an appellate judge, but I strongly favor independent research by the arbitrator. Where an arbitrator is obligated to decide the matter in accordance with the law of a particular jurisdiction, I posit that the arbitrator must check on the parties' legal positions to be sure they have not overlooked a case or statute that may govern or influence the result. I also feel strongly that the arbitrator is under a duty to inform the attorneys (or parties if pro se) of the results of any independent research and request comments, clearly noting that the independent legal conclusions are only tentative, and that the input of counsel could show that the arbitrator's tentative independent conclusions may have been in error. Such notice and an opportunity to be heard is essential.

Posted by Judge William A. Dreier | October 5, 2015 11:09 AM

Yes in limited situations. Possible examples, when the law cited does not clearly support the parties' legal positions, a party ask for relief other than simple damages but does not fully show the legal or equitable support for said relief. The more difficult issue is when neither party addresses an issue that the arbitrator deems highly relevant to his/her decision. Doing the research without informing the parties raises several issues. To minimize the problems with the arbitrator doing the research if the question arises before the final briefs are in and the hearing is closed the arbitrator can ask the party whether the perceived issue is pertinent to the resolution of the matter and if so to to address the issue.

Posted by Eric Wiechmann | October 5, 2015 11:11 AM

Yes, on strictly legal issues and then in only two instances. First, to review the cases to make sure the rulings are consistent with the affirmations made by the litigants. Second, when you believe the advocates have not provided the correct law or conflicting statements of the law. I am reticent to conduct independent research when I believe the law as stated by the parties is incorrect or been overruled. We should not disturb the record. By conducting research under any other circumstance we become advocates .

Posted by scott link | October 5, 2015 11:12 AM

Often counsel will cite case law in support of their contentions. I believe it is necessary and appropriate for arbitrators to read the cited cases in their entirety and not merely rely on counsels' brief description of their holdings.

Posted by Gerald Harris | October 5, 2015 11:12 AM

Absolutely. It is often the case that some aspect of a matter is dependent upon legal precedent. Even if, under all of the circumstances, an arbitrator intends may only be generally bound by existing law or if the law is unclear, knowing what precedent is out there may be extremely helpful in reaching a just result. Moreover, although some parties are represented by extremely competent counsel who can be depended upon to provide clear guidance as to applicable legal issues, not every party is so represented. In the absence of appropriate assistance from counsel, I would hate to be in a situation where the result of the arbitration becomes too dependent upon the competence of counsel. Accordingly, if I am not confident that the parties have given me appropriate guidance as to potentially controlling legal principles, I will certainly conduct my own research. When I conduct such research may be dependent upon whether there are motions or other issues that I must decide prior to the final hearing or simply going to enter a final award.

Posted by Stanley Eleff | October 5, 2015 11:13 AM

Arbitrators are not judges nor uninformed jurors.

An arbitrator should conduct any type of research (not only legal) necessary for him to understand the facts or issues at hand and not depend only on the information provided by party representatives.

Posted by Jose W. Cartagena | October 5, 2015 11:13 AM

First, much depends on the context, including the language of the parties' agreement providing for arbitration and the terms of the submission. Secondly, I believe that there is no reason why the arbitrator should not conduct his or her own research on matters such as the arbitrator's own professional responsibilities, procedural matters, and possibly jurisdiction. However, if the arbitrator believes that additional research is warranted on matters of substance, including liability, I think the better practice would be for him to so inform the parties' representatives and solicit their consent before conducting his own research, and if they object, he should afford them the opportunity to submit supplemental briefs on the subjects he is concerned about.

In the judicial system, a judge always retain the right to conduct his own legal research, but an arbitrator's power stems from the parties as a matter of contract. Perhaps the best practice is for the arbitrator to bring this issue up at the opening of the hearing that.

Posted by Philip J. Moss | October 5, 2015 11:15 AM

Not being an attorney, I would never conduct independent legal research, not do I have an opinion on the matter.
However, as a business analyst and evaluator, I believe I have not only the right but the obligation to do my own calculations on valuing a business, just as the tax courts do even when faced with expert opinions on the matter at hand. So much of the conclusions are derived from reasoned judgments that no one expert can have all the answers.
My calculations(after all testimony has been presented) can serve the arbitration panel if presented in the right way, that is, as my judgment, subject to the scrutiny of my fellow panelists.
Carl A. Goldman

Posted by carl goldman | October 5, 2015 11:18 AM

Paul Marrow's thoughtful article on this subject provides several reasons to conclude that, if at all possible, an arbitrator should not conduct independent legal research, and that an arbitrator should not undertake such research without first obtaining permission of the parties. See "Should An Arbitrator Conduct Independent Legal Research? If Not, Why Not?" published in the NYSBA Journal, May 2013.

Posted by Eli R. Mattioli | October 5, 2015 11:24 AM

I have written extensively on this topic. And I have conducted a webinar for the AAA and taught a program on this for the AAA.

The AAA policy is not to do such research. Ditto for FINRA. Most litigators prefer to know exactly what an arbitrator is lookingat and that is why they oppose. Keep in mind, arbitrators aren't judges. Judges have a first obligation to the law. Arbitrators have a first obligation to the parties via the arbitration clause. And if the clause is silent, implying that the parties meant to include indepedent legal research is a stretch.

For those who want to read the arguements in detail, go to www.ssrn.con/abstract=2261305. The article is there for free.

This issue is far more complex than appears on the surphase. I urge all to reserve decision until you have read the article and considered the many sub-issues that are involved.

Posted by Paul Marrow | October 5, 2015 11:26 AM

Arbitrators have a duty to be familiar with the law, and to this end, ongoing, generalized legal research is a prerequisite. Clearly, when both sides are advancing mistaken views of the law, an arbitrator should decide the case on controlling law as would any judge. I recently had a case (albeit mediation) where both sides were advancing incorrect methods of calculating the correct hourly rate in an FLSA case. I simply advised both sides to look at a particular regulation and to reassess their respective damage calculation.

Posted by Patrick (Mike) McKenna | October 5, 2015 11:27 AM

to supplement my comment, it is, of course, a given that I read the cases and authority presented by the parties. I understood the question presented to ask whether the arbitrator should search for or pursue legal arguments not raised by either of the parties.

Posted by janet spencer | October 5, 2015 11:27 AM

In many cases involving New York contract law, as an example, I bring to the case independent research that reflects years of experience. We all filter legal arguments by what we know about an area of the law.

In a recent case, the briefs submitted on an issue of New York contract law did not seem to offer the correct answer. By using a treatise on N.Y. contract law, I quickly found the correct answer, which was expressed by a recent Second Circuit case which neither side had cited. I promptly informed the parties of the citation and invited them to comment on that case in the course of completing the briefing.

I recognize that there are nuances to the issue, but I don't think that an arbitrator should issue an award which rests on an incorrect legal principle simply because the parties did not provide an accurate presentation of the law.

Because of the currency of this issue, I make it part of my initial conference or part of a call setting up a briefing schedule to tell the parties that the issue of independent research is one that is debated among arbitrators and that I am one who holds the view that an arbitrator can do independent research as long as the arbitrator shares the results of that research if it is going to affect the outcome.

Posted by Michael Oberman | October 5, 2015 11:40 AM

Arbitrators must read the case law when a point of law is disputed and must ensure that that the case law presented by the parties is good law. Should the arbitrator find legal arguments that should have been presented by the parties, but was not, best practice is to solicit comments from the parties.

Where I disagree with Paul Marrow is that an award where the arbitrator correctly applied the law is at risk of vacatur because the arbitrator, not the winning party, found the correct law. That would not make any sense.

Posted by Steven Skulnik | October 5, 2015 11:47 AM

Interesting comments on both sides of the issue, though the posts against it appear to be grounded in more solid premises. Some of the pro comments indicate that arbitrators should read cited cases (indeed, and that is why counsel are asked to provide copies), and on need to found the decision on legal issues on independent analysis (I think not - the parties are paying for our time and should agree upon what we do; moreover, the argument of "manifest disregard" had met its Waterloo). I agree with the position that the decision is grounded less on the law (which, of course is not ignored) and more on the appropriate fairness and good justice principal. That said, to each her/his own and if an arbitrator feels uncomfortable with what's been briefed, she or he will do what is need to feel comfortable. Either get permission from the parties, or don't charge for the time.

Posted by Sid Bluming | October 5, 2015 11:49 AM

Arbitrators should not do independent research - if there is a legal issue raised by one of the parties that needs to be researched the parties should be ordered to research and brief the issue - If the Arbitrator does the research (especially after the hearing is closed and the award is being written) the parties may not have the opportunity to respond to the conclusion the arbitrator reached which is obviously unfair. Research is designed to justify a specific conclusion - that's for the parties to do.

If an arbitrator knows of a case that has not been mentioned by the parties (that does not raise a new issue, claim or defense) it is appropriate to ask the parties to comment on it.

Our job is to decide cases on the facts and law presented to us by the parties - we are neutrals, we should not help either side - remember, everyone is entitled to hire an incompetent lawyer.

Posted by Richard DeWitt | October 5, 2015 12:00 PM

Arbitration is no less an adversary proceeding than is litigation, and is therefore equally dependent upon the parties having competent counsel to argue and brief their cases. Arbitrators are selected based upon their perceived experience and expertise, including, particularly when a lawyer is selected, legal expertise and the ability to identify and apply relevant legal principles to the facts established in the hearings. Nevertheless, we don't know it all. Counsel's briefs are almost always helpful in helping an arbitrator focus on the relevant issues. The arbitrator is bound to read the cases and arguments and counterarguments made and to decide based on the record and briefs before him. However, if the briefs fail to address a point which the arbitrator, based on his experience, believes to be critical to the rendition of a fair decision, he can and should check himself through his own research, but is bound to give notice to all parties of his doubts and his questions, and of his research findings, and give them an opportunity to fully argue and brief the points of concern to him. Even there, the risk exists that hearings may have to be continued or re-opened to address such questions. For the arbitrator to routinely go beyond that narrow strait of possible inquiry, and to independently take on the burdens of counsel and/or an appellate court, is inherently unfair

to the parties and in my view subverts the arbitral process itself. If the parties desired to bring into play the entire judicial process, including appellate level review of every conceivable legal argument and case, they they would not agree to arbitration. Even in that setting--litigation-- judges, and particularly appellate courts --are highly reluctant to raise arguments and points not raised by the parties and their sometimes unequally gifted counsel, themselves. We as arbitrators should go no further in attempting to level perceived unequal playing fields than doing our job --which is to make sure that every party has a full and fair opportunity to present his case, that no unfair surprises put a party at any material disadvantage, and to render decisions based on the facts and law as presented, argued and briefed by the parties.

Posted by Sayward Mazur | October 5, 2015 12:30 PM

I agree that an arbitrator should not be stopped from doing legal research in order to arrive and a fair and legally correct result. However, I also believe the arbitrator must - in all fairness - share the results of his/her legal research with the lawyers/parties and give them a fair opportunity to comment on the arbitrator's research results.
In 1998, I wrote a law review article on a related issue: Whether a trial judge who is faced with a question of the validity of a scientific or technological theory, should be permitted to do ex parte research in a library or via the internet in order to learn enough to form a more reliable conclusion about the validity of the asserted theory at issue.
See: Marlow, George D. From Black Robes to Whits Lab Coats: The Ethical Implications of A Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision Making Process, 72 St. John's L.Rev.291, June 1998.
It seems to me that the reasoning behind the conclusion in that law review article - which is similar to my above stated oonclusion herein - furthers the goal of a fair and accurate outcome.

Posted by George D. Marlow | October 5, 2015 12:46 PM

Although there are some situations where the parties, for various reasons, may choose to rely solely on an arbitrator's specialized expertise, most commercial agreements contain a provision calling for the application of the substantive law of a particular jurisdiction and it is the duty of the arbitrator to apply that law to the best of his or her ability. This means that where, as frequently happens, the parties' submissions or arguments disagree on the law, the arbitrator needs to independently review the authorities and determine which of them is correct. It also means that, where the arbitrator believes that one or both of the parties may have missed an issue, he or she should bring it to the parties' attention and give them an opportunity to respond, but ultimately try to resolve the matter consistent with the law.

Although the parties may be free to hire incompetent counsel, they rarely if ever do so intentionally. In any case, I believe that an arbitrator is, to the extent possible, obligated to try to resolve the case in accordance with the terms of the parties' agreement and not on the basis of the quality of their counsel's presentation.

Posted by George Graff | October 5, 2015 12:56 PM

For those of you who sanction indepedent legal research, consider this: Why is everyone assuming that the parties want an arbitrator to apply law? There is an alternative, i.e., doing what the arbitrator feels is reasonable. Is this a red herring? Well, the rules of the Commercial rules of the AAA do not mention the arbitrator having to apply law. So if the underlying contract doesn't specify a law to be applied and if the parties simply incorporate the AAA Commerical rules, there is no statement by the parties that they want law applied. And maybe that is exactly what the parties want. So who is the arbitrator to now tell them that he/she wants them to brief the law? Same thing for when parties jointly make a mistake in the law to be applied. Suppose both parties agree the UCC controls their contract. The arbitrator sees both sides are wrong and that the commercial law of Malta really controls. By applying the UCC, the arbitrator is doing what the parties want - the arbitrator's role being to decide which side's application of the UCC is correct. The parties are telling the arbitrator they don't care if the law of Malta controls. They want the UCC. And what is wrong with that? Who is injured? No one. Who will know what the law the arbitrator applied? Only the parties, the arbitrator and the case manager.

Remember, an arbitrators first duty is to the parties. If they want something that isn't illegal or against public policy, the arbitrator has a duty to do what they want. The same isn't true with respect to a judge.

Again, there is a lot more to this than meets the eye. I urge all to read the article, read the references in the article and then decide.

Posted by Paul Marrow | October 5, 2015 1:17 PM

I have yet to see an arbitration brief that does not cite cases and/or statutes. I have yet to see an arbitration clause that says for the arbitrator to research or not research the law. I have seen many arbitration clauses that asks the arbitrator to follow specified law. As I am a retired judge, I assume that I was picked by the parties in part because I have experience dealing with the law. To me, this adds up to looking at the authorities cited to see if they are cited correctly, seeing if the cases cited still are good law and, when needed, doing my own research if counsel's explanations do not seem persuasive. Given the silence of

counsel and arbitration clauses on the subject, I have not felt the need to ask permission of the parties to look at the law.

Posted by Philip M. Saeta | October 5, 2015 1:47 PM

So far as legal research is concerned, our obligation as arbitrators is to get it right, and if that means hitting the books to a reasonable extent we should do it. By the same token if we are going to be guided by an authority no party had cited we should provide the opportunity to comment or rebut. This can be done discretely, perhaps by asking that they consider ... if they have not already done so.

Factual research is another matter. On the one hand we are selected for our general knowledge of business and industry practices, and sometimes for our special knowledge of the business practices at issue. If we think the parties are getting it wrong we should not remain silent. On the other hand we can't disregard the evidence. Nor may we go out and conduct our own investigation. Again we can ask the parties to address the areas of our concern, or call our own witnesses. Perhaps -- and this would be an extreme case -- we can conclude that the evidence before us is inherently improbable.

Posted by Robert A. Holtzman | October 5, 2015 2:59 PM

Arbitration is a creature of contract. The agreement dictates everything, both procedurally and substantively. Most commonly, the contract specifies a particular state law and designates arbitration rules to be applied. Additionally, due process requires the parties have the opportunity to confront all fact and law that the arbitrator may rely upon in the decision. Finally, the arbitrator should always conduct herself or himself in a manner that avoids even the appearance of impropriety. However, if through the normal adversarial process it becomes apparent to all that the advocates did not disclose all relevant law or facts, the arbitrator may upon notice to the parties present such law or facts, giving the parties a reasonable opportunity to rebut the same.

Posted by David Elia | October 5, 2015 7:28 PM

I agree with the majority that arbitrators may do independent legal research. However, when I find it necessary to do that to reach a legally correct result, I do not charge for my research time. Even when the contract incorporates the AAA commercial arbitration rules, I believe that most parties prefer arbitrators to decide based on the relevant facts and law rather than based on their subjective notions of justice and equity that may be contrary to the law or the terms of the contract.

Posted by Stephen A. Hochman | October 6, 2015 8:39 AM

Best not to make a practice of this. There is always another case to be found & YOUR legal research is also subject to human error.

Posted by David Blair | October 6, 2015 10:31 AM

As a postscript to my prior comment, we should be mindful of canon 1. A of the code of ethics for arbitrators in commercial disputes, which states in part that "an arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved." The process of arbitration is not well served when arbitrators disregard the applicable law and decide disputes based on their own subjective notions of what is fair and equitable. Most parties prefer arbitrators who will decide their dispute based on predictable rules of law, similar to what a judge is required to do. Mediators, on the other hand, should not try to level the playing field when one party has less competent counsel than the other. If a mediator is aware of a case that helps the weaker party, to advise that party of the existence of that case would be inconsistent with the ethical duty of mediators to be impartial and not to favor one party over the other, including the weaker one, assuming that both parties are represented by counsel. The situation may be different if only one party is represented by counsel and the other is pro se.

the weaker one.

Posted by Stephen A. Hochman | October 6, 2015 12:40 PM

I think it is important for the parties to have control over what is presented to me and to know what I am considering. Therefore, I would not conduct independent legal research. However, if I had concerns that the parties were not taking into account a particular material legal issue or misstating the law I might suggest that they consider the issue and/or re- evaluate the law. I would phrase my concern as a question to which both parties could then respond.

Posted by Lisa D. Taylor | October 6, 2015 4:05 PM

I agree with David Blair. The attorneys should provide everything needed to make a determination. If not, the method to correct this is to ask for briefing or additional information. That way all parties are privy to the concerns of the arbitrator(s) and

are all given an opportunity to address those concerns. I consider independent research (other than reading a case cited by counsel but not actually provided)akin to an ex parte communication.

Posted by Victoria Platzer | October 7, 2015 6:39 AM

One consideration is that the arbitrator must present a perfect picture of impartiality. This can be compromised if an arbitrator conjures up a completely new argument that could be dispositive of the case in favor of one of the parties. It can look like the arbitrator is almost representing the party which is favored by the new argument. So too, counsel may have had very good reason for not presenting the argument in question. I will interject new theories on rare occasions, but only in truly compelling circumstances and on clear notice to all concerned. In my view, the best approach in the vast majority of instances is to decide the case based on materials and authorities furnished by counsel.

Posted by John Wilkinson | October 7, 2015 3:08 PM

I think that, as a general rule admitting of few exceptions, the arbitrator should decide the matter based on the legal arguments and authorities presented by the parties. Of course, one should read the case law and other authorities cited by the parties. One might also read a case or two referenced in the authorities the parties have cited. But if the parties' submissions leave significant legal issues unanswered, then one should ask the parties to brief those issues, not do independent research.

Generally speaking, the parties want to define the legal and factual issues presented -- often for strategic reasons that the decision-maker has no knowledge or appreciation of. The parties generally are not looking for a legal scholar. If you must do significant independent legal research, then you should ask the parties first.

Posted by Mitchell Marinello | October 12, 2015 11:51 AM

November 2, 2015: Articles on Arbitration, What Are Your Thoughts?

We welcome your thoughts/comments on the two articles from the New York Times:

Part I - Beware of the Fine Print, Arbitration Everywhere, Stacking the Deck of Justice (11-1-15)

Part II - Beware of the Fine Print, Arbitration, 'Privatization of the Justice System' (11-2-15)

The articles are particularly ridiculous.

The New York Times continues its trend of conducting "investigations," which really merely amount to recounting publicly available documents and statistics that most lawyers have been well aware of for years. In part two, the paper reports that while there are awards in claimants' favor and there are some honest arbitrators, but we interviewed a handful of disgruntled claimants and report on their side of the story.

That is not to say that there are were and are reasons to disagree with the Concepcion holding. This adds little to the debate.

Posted by Steven Skulnik | November 2, 2015 11:21 AM

A very strong and detailed response to the Times needs to come from the arbitration community. These articles are filled with misleading statements, outright lies and are completely biased . It is an outrage that the NY Times is publishing such a one-sided anti-arbitration position. This is not news, but rather slander!

Posted by Mark Bunim | November 2, 2015 11:30 AM

The article states a political conclusion and relies on extrapolating specific instances to the entire arbitration community. I certainly haven't seen many instances where arbitrators have not acted according to the code of ethics -- all the arbitral entities I work with emphasize going beyond basic requirements to leave no doubt about being both neutral and impartial. As to such specifics, I suspect that if the Times would do a similar article about forum shopping -- they would find similar results.

Posted by Paul G, Huck | November 2, 2015 12:22 PM

It is troubling that the New York Times would run so one-sided a review of the arbitration process. The articles simply pay lip service to the well known advantages of the process and while they purport to be based on an examination of a substantial number of records and interviews they are patently anecdotal and seem intended to paint a picture of an out of control system that is wholly biased and results regularly in grave injustice. It almost borders on a defamation of arbitrators as a class and is grossly unfair to the vast number of arbitrators who work diligently to achieve just results.

Posted by Gerald Harris | November 2, 2015 12:46 PM

The articles seem to be more of an advocacy piece of the type that would be written by attorneys who would like to use class actions to obtain large fees even though their clients get almost nothing.

It would be a good thing to get the real story out there about how effective and efficient arbitration can be and how it benefits individuals as well as large companies.

I was insulted by the suggestion that an arbitrator would be as biased as one of the examples suggested.

Posted by Henry Parr | November 2, 2015 1:30 PM

It is relatively easy to find unhappy arbitral litigants who, because they lost, view the process and system as unfair. I'm sure almost all of the same criticisms could be applied to the court process other than the right to a jury and the right to appeal. I for one do not know how often arbitrators get "repeat business," but if they do, that is something that must be examined. As these articles show, perceived unfairness amounts to actual unfairness. When you consider that fewer than 3% of cases go to trial, the inferred and stated conclusions by the NYT are inapt. Anecdotal reporting at its worst. That being said, we must make even more of an effort to provide a quick and less expensive alternative to litigation. AAA must make a strong and quick rebuttal.

Posted by Jim Purcell | November 2, 2015 1:39 PM

I have read both articles. What the articles do not reflect is the excellent quality of so many arbitrators whom perform their duties with neutrality and excellence. As well, from my experience, AAA's mission is to provide quality services to attorneys and litigants alike.

I agree, however, that the Federal Arbitration Act and its position as it relates to Class Actions may need some revision. Perhaps, the recent publicity will result in some changes. However, to be fair, the article failed to highlight the positive aspects of arbitration: to wit, a disposition at less cost, a speedier disposition and the overall satisfaction of attorneys and litigants.

Judge Linda Feinberg (Ret.)

Posted by Jeff Zaino | November 2, 2015 2:07 PM

The AAA should organize a broad group to compel Congress to abolish the limitation of Arbitration to a single party.

Posted by \Norman Hinerfeld | November 2, 2015 2:36 PM

I agree with the prior commentators that the NYT articles focus on worst cases and give short shrift to what can be a virtuous process. No doubt there will always be disgruntled users and bad actors. But the arbitration community as a whole is also at fault.

The articles raise legitimate concerns regarding arbitration provisions in consumer and employment form agreements. The arbitration community embraces those provisions despite the fact the provisions are embodied in non-negotiated agreements. Merely looking to whether the provisions are "fair" does not resolve the criticism that they are imposed on parties. If consumers and employees were given the option to chose arbitration at the time they initiated their claims, the integrity of the process would be improved.

Likewise, the arbitration community as a whole tolerates second-rate arbitral providers and neutrals who have lax regard for the integrity of the process. Little is done to remove them from the system. We do not speak out against poor performers let alone have systems in place to certify providers or evaluate performance.

The NYT criticism is harsh but it is not totally unfounded. There are problems with consumer and employment arbitration that reflect poorly on all of us. Steps must be taken to legitimize and improve the process.

Posted by Gary L. Benton | November 2, 2015 2:44 PM

I agree with Mr. Benton. I did not find the NY Times articles to be alarmist, biased, or slanted. I think they raise significant questions in a multi-faceted area.
The class action is one thing, and I think good minds can disagree on the issues they present.
What is more compelling as a question was the issue raised in today's article, questioning the propriety of enforcing arbitration and waiver agreements signed in order to obtain health care or as a condition of employment. Contracts of adhesion have never been favored and in the health care setting I find them troubling.
Also legitimate was the observation about relaxed attitudes during arbitration, in which an arbitrator may engage in chit-chat

(or lunch) with one side. The appearance of impropriety, we all know, is everything.
Nancy Arnold

Posted by Nancy Arnold | November 2, 2015 3:25 PM

The article is filled with inacuracies and assumptions based on biased sources. Studies show that very few people can afford the high cost of litigation in the courts. Arbitration provides an efficient, fair, cost effective and expeditious means for resolution of disputes. The assumption that the court system is the best way is wrong. Litigation in the courts is slow moving, usually taking years. It is very expensive for legal fees and the strong propensity for lengthy, expensive and often wasteful discovery through disquisitions. Very few people are satisfied with the operation o the court system. In my many years of experience in the arbitral process i can verify that arbitrators serving wiht me have of the highest quality from the the standpoints of ethics ,impariality, profesionism and legal ability.

Posted by Francis J. Pavetti | November 2, 2015 3:42 PM

I agree with previous contributors who say the Times article raises valid criticisms particularly with regard to claims brought by consumers who are forced into arbitration pursuant to clauses in a contract of adhesion. In these cases, the consumer had no reasonable opportunity to bargain over this provision … assuming they even understood its meaning or consequences. Nonetheless, I disagree with the Times' assertion that arbitration of these cases is less desirable because it offers less protection for consumers than traditional courts. I think the sheer numbers of small claims cases handled by the courts makes it much more difficult for claimants to get a full hearing of their claims. Furthermore, most arbitrators, who are also attorneys, are keenly aware of their ethical responsibility to go the extra mile to ensure that the pro se litigant has a fair chance to tell their story. Admittedly, there are arbitrators who fail to protect the ADR process when they act in their own best interests, and the Time's largely anecdotal stories are deeply troubling. But the article naively presumes that all outcomes in the courts are fair and unbiased. They are not. Judges often favor counsel with whom they've enjoyed long standing relationships. The notion that a 3-arbitrator panel will resolve all the ills is no more realistic that the hypothesis that a right to judicial appeal makes the dispute resolution process fairer. Both are, for most litigants, prohibitively expensive.

Posted by Denise Presley | November 2, 2015 4:44 PM

My hope is that the good people connected with the American Arbiration Association will write a rebuttal to the inaccurate and biased reporting of the NY Times. I honestly couldn't believe what I was reading for most of the article. The lengths that the AAA have gone to ensure that non-biased neutrals sit as arbitrators is extraordinary. Shame on any arbitrator who sits and decides any case based on what business may come their way in the future, these individuals must be weeded out of the panels they are on. Doing the right thing is always the way to go based on the burden of proof, found facts and the law. I implore the AAA and other organizations to partly clean house of these individuals.

Posted by Stacey Cushner | November 2, 2015 6:13 PM

Yes the articles were biased. And that shouldn't be a surprise. They were a plant. The Bureau of Consumer Protection has just released new regs and is seeking public comments. This was a plant by the consumer friendly groups and by the trial lawyers intended to whip up comments against arbitration.

Part 2 is nothing more than a list of complaints by people who lost an arbitration and are bitter about it. What is striking is that if these people really believed that the arbitrator was biased or prjudiced, why didn't they seeks to vacate using the tool that is intended for that purpose, i.e. 9 USC 10(a)(1-4)? And why didn't the NYT even mention that this was available for those who feel aggrieved based on bias and prejudice?

This isn't the first effort to pin back the wings of arbitration and it will not be the last. Al Frankten and Elizabeth Warren together with Ralph Nader and the current occupant of the White House have been after arbitration for years and they have had a hard fight on their hands.

In the end, the law of arbitration, i.e. the FAA is out of date and that has led to the Supreme Court having it's way to the exclusion of the Congress and that is the root of the problem. Some have noted above that there are valid arguments to be made against class action constraints and they have a rational argument that should be heard and addressed by the Congress. But Congress has side stepped the whole controversy by kicking it over the the Bureau and the SEC. In the end, the rules will come out and they will favor the consumer. And the day after they are adopted and imposed, the Chamber etc. will sue and the issues will be in the courts for years there after. What a shame. But given what Washington is these days, who is real surprised?

I agree with some one above who said that the arbitration community needs to speak out. And the sooner the better. Our individual letters to the NYTimes, even if printed, will mean nothing.

Posted by Paul Marrow | November 2, 2015 7:01 PM

How about an effort to split the arbitration statutes, so some cover "consumer" and "employment" arbitrations while the others cover only "business disputes" That would go a long way to solving the problems the commercial arbitrators and parties are having.

Posted by Bernard Kamine | November 2, 2015 7:22 PM

The NYT series deserves a Letter to the Editor.

Although I think the authors in this series may have some valid points, to me, it sounded like a hit piece against arbitration and ADR in general.

At times, the arbitration process may have flaws but that doesn't mean that the entire practice is flawed. Neutrals at JAMS, AAA, CPR and elsewhere have to conduct their practice under a variety of ethical codes including the ethical code of the organization in which they conduct the arbitration. Neutrality of the arbitrator is line one of any of those codes or rules. The same goes for ADR on any panel such as those in court annexed ADR.

What really bothered me about the piece was the claim that justice has been privatized and people who sign agreements where disputes are decided by arbitration are "deprived their day in court."

Yes, arbitration is a confidential process and one waives their right to appeal, but to think that people are always better off in court, is absurd. Some may be, but a civil action is often far more time-consuming, expensive and is no more calculated to end in a just result than arbitration. Notably, the same types of relationships between attorneys and judges, mentioned in parts 1 and 2 of the series, can exist in court. Because attorneys and neutrals know each other doesn't mean arbitration is unfair any more than it does in civil litigation. Further, many arbitrators are retired judges. I don't see that mentioned nor do I see any data or information about litigant's experience of the court system - which win or lose - isn't so positive. Arbitration (and other ADR) is a valuable and better process for many.

Adam Halper

Posted by Adam J. Halper | November 4, 2015 9:31 AM

It's true that the AAA and other organizations try to enforce strict ethical rules to make sure their arbitrators conduct hearings in a fair and impartial way. But there are two problems that arise in employment and consumer arbitrations: 1) the arbitration process is not always governed by the rules of the AAA or other similar organizations; and 2) the pre-dispute waiver of class actions means that many legitimate small claim consumer or employment cases simply cannot be pursued because it costs more to just pay the filing fees (let alone a lawyer) than an individual claim is worth. That is exactly what happened in the Concepcion case. It means that there is no recourse for harmed individuals.

Since the FAA was never intended to cover individual employment or consumer contracts involving contracts of adhesion (despite a Supreme Court majority's contrary position), it's easy to fix things by amending the FAA.

Posted by Lise Gelernter | November 4, 2015 10:28 AM

I agree with @Bernard Kamine. While the NYT articles may be slanted, we are talking about them and they raise very important consumer issues. Business to business arbitration is more likely to be the result of equal powers in the negotiations process. Business to consumer is unbalanced and sometimes unconscionable. Coming from the healthcare perspective, when a patient signs an admission agreement for a skilled nursing facility, he/she signs a 12 to 15 page legal document with no opportunity for attorney review. So, perhaps the answer is bifurcating arbitration rules, terms and conditions to ensure fairness and to mitigate the perceptions of unfairness.

Posted by Joan Hogarth | November 4, 2015 11:23 AM

In litigation we often encountered plaintiffs' counsel using "anecdotal" evidence not peer reviewed studies to reach too broad conclusions. The reports fail to provide any context as to why arbitration developed to relieve high costs and delays of lawsuits. The down sides of class actions are not acknowledged. Of course adult competent parties to all contracts are expected to read them before signing. To the extent we have a problem with contracts of adhesion, that is a matter of public policy for the legislature, not for the arbitrators. As for ethics, I simply disagree with the Times
conclusions. In my experience, arbitrators struggle in almost every case to follow appropriate conflict and other ethics requirements.

Posted by Will Sparks | November 4, 2015 8:08 PM

November 9, 2015: Independent Experts Advising Arbitrators – What are your thoughts?

Have you had an arbitration case where an independent expert was appointed to advise the arbitrator(s)? If so, did it provide sufficient benefit to outweigh the expense? *Kindly provide your thoughts/ comments below.*

I totally disagree with Arbitrators having independent experts. We are to decide the cases bases upon the facts and evidence presented. If the parties think we need assistance, they will provide expert witness testimony to us.

As an Arbitrator I am Judge and Jury. No Judge would go get independent expert assistance nor is a Jury allowed to do so.

Bad idea!!!

Posted by Robert L. Cowles | November 9, 2015 10:38 AM

I am an AAA Commercial Panelist. I have been involved in high dollar arbitrations on financial issues.

I think the Arbitrator having an independent consultant is a wise idea. For example, to review and critique expert reports from a neutral position, is a great asset for the Arbitrator to have. A recent arbitration had me, another CPA and an experienced lawyer in accounting malpractice as the panel. We, the CPAs, effectively functioned at a level as reviewers of the expert reports at a very granular level which helped all of us. Just my thoughts...

J. Allen Kosowsky,CPA/ABV, CFE, CVA, CFF

Posted by J. Allen Kosowsky,CPA | November 9, 2015 10:42 AM

We are hired as arbitrators to decide cases. This raises a fundamental issue regarding presentation of the dispute. If parties did not select effective experts it is not for the neutral to hire his own. It raises too many other potential questions for me.

Posted by Roger B. Jacobs | November 9, 2015 10:47 AM

An absolute prohibition is not a wise rule. If an arbitrator consults with an independent expert, the arbitrator should disclose that and make that expert available to describe what s/he advised about, and be available and subject to cross-examination. Sometimes arbitrators need help in understanding non-contested, technical issues, methods or practices. Sometimes even these can be subject to dispute.--Eli.

Posted by Eli Uncyk | November 9, 2015 10:49 AM

While I am not adverse to the use of an independent expert, I would prefer that such expert stays with a full explanation of the issues involved without rendering an opinion on the issues. I appreciate such assistance to help me understand particularly technical issues, but, would not like an opinion that would truly impact my thinking on a particular matter. Atbitrators are hired to hear the evidence and make the decision -- that should not be transferred to an independent expert to reach an opinion.

Additionally, avoiding such a decision is why there are specialized tribunals. For example: I'm quite comfortable with the insurance and financial implications relating to construction and maratime disputes -- but a fellow arbitrator who is an engineer or mariner helps with understanding the business and techcical issues impacting the financial and insurance issues.

Posted by Paul G, Huck | November 9, 2015 10:54 AM

I have performed a myriad of Arbitration cases and have yet to be asked to entertain an independent expert. It is my judgement that expert witnesses are permissible. The Arbitrator should be qualified to resolve the matter; otherwise, he is not qualified to be hearing the issue.

Posted by Samuel H. Chorches, Esq. | November 9, 2015 10:57 AM

The parties have the burden of proving their respective cases and can use their own independent experts.
The arbitrator's job is to understand the parties' positions, as presented to the panel.
In very very rare instances involving high damage claims and complex science or technology issues, I can see the possible need for a third independent voice, but that would be the exception, not the rule, and the parties should be advised of the reason for such exceptional need.

Posted by A Frecon | November 9, 2015 11:12 AM

The independent expert proposal is not a good idea. Arbitration must be fair and must be efficient, expeditious and cost effective. If the parties have not sufficiently explained their positions. the panel should advise them of the need for more specificity and clarity. An nonindependent expert would impose an additional expense on the parties. However, consistent with the consensual requirement for arbitration, if the parties wantto share the cost of hiring a so-called independent expert they should be allowed to present the selected persons testimony. That is as far as it should go.

Posted by Francis J. Pavetti | November 9, 2015 11:31 AM

I thought the reason we were selected as Arbitrators is because we are supposed to have expertise to some extent in the nature of the subject matter in dispute. Certainly expert testimony in some cases is warranted but should be considered only by the arbitrator and within the normal state or federal rules for the introduction of such testimony in a case. The bigger question is what does the question posed say about the vetting process for people suggested to the parties for being selected as arbitrators in a case???????

Posted by Jay S. Siegel | November 9, 2015 11:41 AM

Presumably, arbitrators are selected in part because of their subject matter expertise. Nevertheless, in some rare instances, I can see the arbitrator and parties conferring on the use of an independent expert. If an independent expert is considered, then the following would seem appropriate as a guideline:
1)all parties to the arbitration should consent;
2)the independent expert should be subject to the same disclosure requirements and disqualification procedure as the arbitrators;
3)the role of the of the independent expert should be clearly defined and agreed upon by the parties.
4) the manner in which the expert is to communicate with the arbitrator should be disclosed.
5) such additional protocols that may be appropriate to guarantee transparency of the process should be required.

Posted by John Fleming | November 9, 2015 11:50 AM

The arbitrator as an instrument for the fulfillment of the parties contractual intent has been vetted and entrusted by the parties to resolve a dispute which threatens that intent if in the arbitrator's sound discretion an independent expert would be of value, there is no barrier to the use of the independent expert (unless barred by the arbitration agreement) provided proper protocols are followed (notice, disclosure, transparency and procedural safeguards.

Posted by Reginald A. Holmes | November 9, 2015 12:21 PM

The role of the tribunal-appointed expert is to assist and advise the tribunal in relation to specific issues. The expert is not entitled to usurp the tribunal's decision-making role. The parties are given the opportunity to comment on any advice which the expert gives to the tribunal. The tribunal is not bound to accept the conclusions of the tribunal-appointed expert.

There are situations in which a tribunal-appointed expert can perform a valuable role in the arbitration. He may, for example, be able to act, in effect, as a facilitator between the parties and their experts, identifying the decisive issues and seeking to maximize areas of agreement.

Posted by Steven Skulnik | November 9, 2015 12:58 PM

Independent experts could be useful in cases where the parties do not produce the evidence needed for factual clarity. In those cases I agree with Jay Siegel's 5 guidelines previously listed.

Posted by Robert E. Barras | November 9, 2015 1:20 PM

I believe independent experts can help an arbitrator understand complicated fact issues if the expert witnesses' testimony is carefully managed. [FRCP 26(2)(b) provides a guide.] But I agree with those that caution against allowing the parties to present expert testimony without such guidance. If one party's expert is highly credentialed, well informed and persuasive- while the other party's expert is not, valuable hearing time is wasted and let's face it one of the parties may be unfairly disadvantaged. Ideally, an arbitrator would be able to obtain the opinion of an unbiased expert whose sole function is to assist the arbitrator in understanding the evidence.

Posted by Denise Presley | November 9, 2015 3:19 PM

I had one situation in 23 years where a panel I sat on required an expert to advise the panel. The case involved vicarious punitive damages in three different states. The Panel had a problem deciding the issue without first understanding the ramifications of the various laws and their impact on the case. An expert in this case was useful. I would not say that this practice should be the norm but there are situation where an arbitrator finds himself lacking a certain knowledge and has to make an informed decision. In this instance I believe that the use of an expert was reasonable and justified,

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Posted by Nasri H Barakat | November 9, 2015 7:53 PM

I haven't yet been confronted with the suggestion in the context of an actual case.

My understanding of our role is to rule on the basis of the record constructed by the parties through their counsel. If as an arbitrator I don't understand an element that could be central to the case because counsel have not called a witness able to offer a clear explanation, I think the proper approach is to so inform counsel and offer them the opportunity to call an expert to testify regarding what is unclear to me. This gives the opportunity to each party to challenge any aspect of the explanation offered by the experts called so that what goes on the record is an explanation that takes both parties' views into account. Neither party can allege prejudice on the part of the arbitrator because they have all had the chance to get their views on the matter heard.

Posted by Stephen D Kramer | November 10, 2015 8:38 PM

I have not experienced an independent expert and would not use one given the inherent problems. But I respond due to Mr. Zaino's prompts. First, even arbitrations are adversarial and the claimant has the burden of proof. So the claimant loses if it does not prove its case, either because it did not use experts or because its experts were not convincing. Next, any substantial intervention by the arbitrator aids one party or the other. If the expert clarifies the case for the claimant it is at the expense of the respondent. The reverse occurs if the expert debunks the claimant's case. The allocation of the (usually expensive) expert's cost will be a problem for any paying party. Also, any expert will be open to challenges on neutrality. The prior work of most experts is documented in reports and transcripts. Any attorney could build a tangential case from this history, either meritoriously or out of context, against the expert and to challenge the arbitrator's award. Last, the case that involves the proverbial rocket science that requires an expert is rare. So I conclude that the problems outweigh the value.

Posted by Federico C. Alvarez | November 12, 2015 8:41 PM

I was counsel in a number of cases in which the Tribunal retained an independent damages expert. The outcomes were highly uneven and depended on the method of selection of the independent expert and whether the expert was truly independent or nominated by one of the co-arbitrators and partial to one of the parties.

Posted by Tom Sikora | November 15, 2015 4:13 PM

It is basically the lawyers' job to make sure the experts are understandable. Both as a judge an as an arbitrator, I have rarely used an "independent" expert. It is only if the parties agree and urge such an expert that I would consider it.
When I was in charge of a 7,000 case asbestos personal injury program decades ago, I was trying lots of things to manage the caseload. I tried a "court appointed" expert once. He lasted one case, and then the defense bar outbid the court for his services.
A more significant question is how much Internet research an arbitrator (and judge, for that matter)to understand the incomprehensible language used in an expert report.

Posted by Richard B Klein | November 25, 2015 11:15 AM

November 9, 2015: "Hot-tubbing" in Arbitration - What are your thoughts?

Should concurrent expert evidence (colloquially known as "hot-tubbing"), the method wherein a Tribunal questions competing experts concurrently, be utilized more in arbitration? What are the benefits? What are the drawbacks? *Kindly provide your thoughts/comments below.*

I have done this once and it was successful (to me), but it won't work without
cooperation and buy-in from counsel. Ask counsel to consider this approach during preliminary hearing.

Posted by David Blair | November 19, 2015 1:48 PM

I have found it to be very useful in some (but not all) cases - it generally results in the experts narrowing their differences. Generally, the lawyers do not like it since they feel they lose control over the presentation of their case - which to an extent they do.

Posted by Richard DeWitt | November 19, 2015 1:51 PM

With the right protocols, hot tubbing can be an enormous boon. It can clarify the reason for expert choice of methodology, narrow the areas of dispute between the experts and make sure the experts are not just ships passing in the night.

Posted by Laura Kaster | November 19, 2015 1:53 PM

I spent most of my career as an advocate. From the perspective of an advocate, joint conferencing presents a difficult challenge and a significant loss of control. Traditional direct and cross-examination allows counsel to focus the tribunal on the important expert issues and their commercial consequences. Joint conferencing tends to place a premium on the expert witness who is (1) more experienced as a witness-advocate and (2) more clearly understands the commercial consequences to the nuances in the expert evidence. This means that, from counsel's perspective, it would be important to know that joint conference will take place before engaging the expert selection process. I would not do joint conferencing without agreement of counsel.

As an arbitrator, I don't think joint conferencing, at its best, is much better than the arbitrator's ability to ask questions as part of the traditional direct/cross-examination process. If the tribunal is looking to isolate the specific technical issues in dispute in complex matters, It is far more effective, I think, to have the experts prepare a joint report setting forth a list of those disputes and each expert's position on them. At that point, cross-examination by the advocates and questioning by the tribunal should be very well focused.

Posted by Jeff Dasteel | November 19, 2015 2:19 PM

In my experience witness conferencing has only been suggested by the arbitrator or panel not by counsel. As an arbitrator I personally find it useful to be able get to the root of complex (e.g. technical)issues, or narrow differences,by by being able to question each expert in the presence of the other.

Posted by Walter G. Gans | November 19, 2015 2:58 PM

To take it to an extreme, I once had 14 experts in the hot tub at the same time. It was the idea of the parties (not me), and I was sure it would soon get totally out of control. As it turned out, the parties were restrained and terrific, as were the experts, and it broke the logjam--many of the issues settled the next day, and the whole thing settled within a month. John Wilkinson

Posted by John Wilkinson | November 19, 2015 5:13 PM

There has to be a time and a place. Depends on the dynamics of the dispute, the lawyers, and how professional the experts are. Maybe one can have them after both experts have presented their findings.

Posted by Jose W. Cartagena | November 20, 2015 10:58 AM

I recently chaired an arbitration with complex damages issues, where the two damages experts were asked to testify back-to-back and then, seated together, were asked questions back-to-back by the panel. It was the panel's idea, in order to narrow the differences between two expert reports that were not speaking to each other. In my view, it was a successful experiment because it allowed the panel to ask the same questions, virtually simultaneously, to the two experts, and thus really narrow the issues that were in dispute.

Posted by David M. Brodsky | November 21, 2015 6:19 AM

It has to be with acceptance of Counsel. It has to be known from the start. It will diminish the slant experts put on their presentations, and present more balanced reports.

Posted by Allen Thompson | November 21, 2015 8:51 PM

November 22, 2015: Controlling Arbitration Costs – What are your thoughts?

What are the best ways to control the cost of arbitration without compromising the fairness of the process? Please provide your thoughts/comments below.

I would recommend that during the Preliminary Hearing that the parties be strongly encouraged to have one document demand each and that there be no more than one deposition for each side. If more are crucial 9i.e. an expert deposition) they should be limited as much as possible. Depositions should be one day, maximum, of 7 hours.

Posted by Mark Bunim | November 23, 2015 9:24 AM

In my view, it all starts with the arbitration clause in the parties' contract. Negotiating and drafting that clause is the first opportunity the parties have to take affirmative steps to build in cost controls and avoid uncertainty and ambiguity that can itself spawn costly litigation.

Another important guideline is that the parties/stakeholders should understand what they hope to get out of arbitration, and remain actively involved to ensure that counsel does not create a runaway arbitration, i.e. litigation by another name.

These are two concepts; obviously, there are many other ways to control costs.

Posted by Dani Schwartz | November 23, 2015 9:52 AM

Set strict limits on Exhibits

Posted by \Norman Hinerfeld | November 23, 2015 9:56 AM

Many of the issues that drive the costs of arbitration higher are well-outlined in the College of Commercial Arbitrators protocols on expeditious and Cost Effective Arbitration. The general thrust of their comments is that all players -- inside counsel, outside counsel and the arbitrator -- need to step up and ensure that the structure of an arbitration does not turn into "litigation-lite." I would in particular highlight the important role of inside counsel, effectively the client in these situations. Their efforts should start early, at the drafting stage of commercial agreements where appropriate dispute resolution clauses -- imposing a strict timeline for the full length of an arbitration, for example -- can set the rules and the tone. They also need to stay involved in an arbitration once it starts, attending the preliminary conference and making sure that they give clear guidelines to outside counsel on what they are prepared to pay for in terms of discovery and other processes. All this requires that inside counsel have a keen understanding of the full dispute resolution continuum.

Posted by Jeffrey T. Zaino | November 23, 2015 10:01 AM

Get the parties to agree to as many things as possible with the economies of arbitration in mind. Press them on minimizing discovery, motions and briefing, all expensive exercises. Except in unusual cases I find very little utility in opening and closing arguments. A final brief instead is most efficient. Where credibility is not at issue, having the case on written submissions and oral argument is more efficient than witnesses testifying at hearings.

Posted by Peter Altieri | November 23, 2015 10:15 AM

I can't improve on the previous comments, except to add that dispositive motions are seldom successful in arbitration, and frequently serve no purpose that could not be accomplished by pre-hearing briefing. The AAA Rules take a practical approach, requiring the parties to "requisition" a dispositive motion. But I see any number of arbitration agreements that provide for them, without specifying any standards by which the arbitrator is to gauge them. Yet if the Agreement expressly allows them, the Arbitrator can't ignore the Agreement. Drafting would be better served by omitting such provisions and defaulting to the AAA rules.

Posted by Robert L. Arrington | November 23, 2015 10:38 AM

I would just add that the chair and the panel really need to prepare for the preliminary conference to make it as effective as possible. As a preliminary step I send a very detailed agenda and require counsel to meet and confer (in person or telephonically) and submit a joint response.
This allows the Panel to focus on immediate procedural issues and fine tune the document exchange and discovery if necessary.

Posted by William G. Bassler | November 23, 2015 10:54 AM

It seems to me that the root cause of the escalating cost of arbitration is that the parties and their counsel fundamentally do not want to give up the ability to conduct full discovery. Outside counsel wants to do the best job possible, which includes a thorough investigation of the facts through discovery. They also don't mind earning the fees that are generated. Inside counsel sometimes are criticized for what is perceived as a bad result. The best way to deflect the criticism is to show the corporate executives that they did everything possible to avoid any bad result. This includes a thorough investigation of the facts through discovery. Besides, it is just the corporation's money.

The solution is to somehow get the corporate management on board, including providing incentives to inside counsel to keep the costs under control, and not being critical of either in house or outside counsel for failing to fully investigate the case with more discovery. It takes both sides to do this most effectively, which rarely seems to be the case.

In my experience it is not unusual for both parties to agree on extensive discovery. It is difficult for an Arbitrator to not allow it. In fact, the parties can easily do whatever discovery they agree to without even informing the Arbitrator.

While keeping the cost down is an admirable goal, in the final analysis the parties and their counsel must share this goal.

Richard Anonymous

Posted by Jeffrey T. Zaino | November 23, 2015 10:58 AM

In my view, the key to controlling arbitration cost is to affirm at the preliminary conference each party's desire to minimize its arbitration costs.

Once each party commits to controlling costs, address the cost drivers: (1) length of arbitration process, (2) discovery, and (3) duration and nature of the hearing. Work with the parties "upfront" to limit each.

Start by jointly: (1) identifying the issues, (2) committing to an agressive, but fair, arbitration schedule, (3) limiting discovery to the essentials, and (4) agreeing to a truncated hearing process. Put the parties' agreement in writing and send to each party. Really stress that staying on schedule and cooperating are essential to preventing runaway arbitration costs.

Posted by Dave Anderson | November 23, 2015 11:07 AM

I suggest the key is a collaborative approach with counsel for the parties to develop a fair and efficient process. For more on this, please see the following article: Overcoming the Arbitration Paradox: Toward a More Collaborative Approach to Commercial Arbitration. ACResolution Magazine, Winter 2015.
http://www.acresolution-digital.org/acresolutionmag

Posted by Lisa Renee Pomerantz | November 23, 2015 11:52 AM

I cannot improve on the comments already filed. All excellent.
It starts with the arbitration clause and discovery.
If and when the arbitration clause does not address discovery, nor clarifies/simplifies the process, it can be helpful to discuss the case during the prelim hearing to get a sense of the parties' expectations and try to convince counsel to limit discovery to its essential elements (re documents or depostions - they should be the exception – and witnesses). Asking them why they need this and that or why they think that 10 witnesses are needed, may lead to "simplifications/reductions".
During the hearing, the panel can control repetitive testimony but that is about it.
Arbitrators should limit their questions to essential ones and should not require briefs from counsel on this or that issue, unless counsel suggests it.
The biggest challenge during hearings is when arbitrators behave like judges or counsel and "cross examine" witnesses in the name of "clarification".
That is, most of the time, a total waste of time and should not be tolerated.
It is the "parties' process" and there is little arbitrators can do to "save costs" if/when they do not care.
"panels of 3 arbitrators" are often misguided (in the majority of cases). They add little or no value in the end.
Most panels nowadays are composed of lawyers working with lawyers, as lawyers; add retired judges to the mix and good luck!
That is not what arbitration was meant to be, originally.
Granted, lawyers brought tremendous clarification and order to the process but, in the meantime, they brought complexities and costs.

Anonymous

Posted by Jeffrey T. Zaino | November 23, 2015 5:37 PM

Consider using the Nassau County Bar Association Arbitration Panel, or using its Rules (recently revised and user-friendly). The administration fee is $500 and the arbitrators' fee is fixed at $300 per hour. For more information, please contact dtsiopelas@nassaubar.org or call Demi at 516-747-4070.

Posted by Elizabeth Donlon | November 23, 2015 5:50 PM

My colleagues have made some excellent suggestions to improve efficiency and thereby cut costs of what has become a burdensome and expensive process, often lasting years. I agree with the comment that the domination of the process by lawyers has added to the duration of the process as well as to its expense.

I, too, am a practicing attorney and probably have added to costs and delays during cases I have handled. But as a non-litigator I have seen some practices that are not necessarily in tune with the rules and the articulated goals of arbitration as a process different from courtroom litigation.

The fundamental problem insofar as the arbitrators are responsible for delays and cost is that the requirement of impartiality tugs at we arbitrators more than do the objectives of efficiency and cost-consciousness. Counsel to a party never complains that the arbitrators are delaying the process or running up a tab. But transcripts are replete with comments directed to the arbitrators such as "you aren't being fair" and "my opponent was allowed to question on that issue, and I am entitled to the same scope of examination". Most arbitrators, especially litigators who have spent half of a career on appeals, are sensitive to these remarks and will often allow broad examinations to avoid the possibility that our deliberations could be worthless because the award will be set aside if we aren't liberal with counsel. And the leniency with counsel when it comes to discovery (going back to a time when that process was not part of the international rules at all) is the preferred approach since the panel members would have asked for the same opportunity if the roles were reversed.

Something has to be done to educate all of the participants in an arbitration to acknowledge that the process is not just litigation in a conference room. All of the best efforts will be for naught if the parties and the arbitrators conduct the proceeding with the fear of being seen as favoring one or the other of the parties as the dominant elephant in the room.

A couple of suggestions from my particular perspective on the process:

Since I have been arbitrating I no longer draft an arbitration clause that sets forth a strict time schedule. It is virtually impossible to respect. Things come up. And for a panel of three arbitrators and two or more counsel to be able to schedule the time and date of a telephonic preliminary hearing within 30 days - or within 120 days, for that matter - is a pipe dream. If I specify the duration of the proceeding and each of its stages as the draftsman of the arbitration clause, I am inviting a breach of contract for which some poor arbitrator will have to obtain waivers after the further delay of argument.

A corollary of the preceding paragraph is to limit the use of three-arbitrator panels to those cases where the advantages of a larger tribunal outweigh the inconvenience. I draft my clauses so that any arbitration where the matter in controversy is less than ($250,000) will be before a single arbitrator. A dispute involving a greater amount will be heard before a panel of three.

Finally, for discovery, litigators like depositions, so the rules have finally been changed to allow their use sparingly. The best way I have found to keep a lid on the number of depositions is to try to avoid allowing a deposition of any witness who will be examined at hearing, limiting their use to non-party witnesses outside of the jurisdiction or to witnesses who will not be able to appear for reasons of illness or other legitimate obligations that prevent them from testifying at the hearing.

The formula I use for documentary discovery is to give each party (30 days)to produce any document that they might introduce into evidence or otherwise use at the hearing. Production is simultaneous. I then allow a second round of (30 days) for the parties to request any other documents that would be discoverable in a courtroom trial and an additional (30 days) to produce them. No document can be used or introduced at hearing that has not been produced by the party seeking to use it during either of the rounds of document production.

The foregoing suggestions usually will shorten the proceeding and result in a materially less expensive process to the extent they can be applied.

Posted by Stephen Kramer | November 23, 2015 9:36 PM

There are a number of effective ways to control the cost of arbitration. I have covered some ideas in an article in the Spring 2015 issue of The Business Lawyer (E. Norman Veasey and Grover C. Brown, "An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions," 70 Bus. Law 407 (2015)), and a speech to be published in the December issue of Business Law Today (E. Norman Veasey, "The Conundrum of the Arbitration vs. Litigation Decision," Business Law Today, Dec. ___, 2015, at ___). If anyone would like a copy of those articles, please send me an email

(eveasey@gfmlaw.com) and I will be happy to send a copy. The short version of those ideas is as follows: (1) concentrate on the state-of-the-art contract provisions to guide the procedure; (2) appoint arbitrators who are competent and experienced; (3) ensure that the arbitrators assert efficiency and discipline in the process, starting with the preliminary hearing, which is the crucial event to commence the process; (4) consider some new ideas that are set forth in the above cited articles, including (a) the employment by analogy of the concepts of the newly-amended Rule 26(b)(1) and (c)(1)(B) of the Federal Rules of Civil Procedure or (b) setting forth in the ADR contract the use of the new Delaware Rapid Arbitration Act (DRAA), both of which are referred to in the above-cited articles. Beyond the foregoing, I would adopt the comments of others previously filed in this blog.

Posted by E. Norman Veasey | November 24, 2015 3:31 PM

In my experience, the comment from "Anonymous" that:

It is the "parties' process" and there is little arbitrators can do to "save costs" if/when they do not care.

I have found that to be true.

I think I had much more power as a judge to move things along as I do as an arbitrator. Particularly because I only had to run in a "retention" election every ten years and it was generally safe.

Here we don't want to turn off the attorneys to the American Arbitration Association in general and to us as arbitrators in particular.

Once getting a handle on the case, sometimes in can be efficient to bifurcate the case to dispose of some of the legal issues involved. Once there is a ruling on one part of the case, it can lead to settlement and at least eliminate the need for discovery on some issues that would turn out to be unnecessary.

I note that sometimes the American Arbitration Association reminds the parties that AAA offers mediation as well and the case may be appropriate for it.

Perhaps AAA could give arbitrators a better "package" to urge mediation in the appropriate case and also offer AAA training for mediators. Many AAA arbitrators have had at least the 40 hour training course in mediation and mediate outside AAA as well as arbitratin.

Posted by Richard B Klein | November 25, 2015 11:36 AM

All good comments.

A couple of things I've tried that have focused the parties and panel more tightly, thus increasing efficiency and reducing costs:

Ask (require) the parties to provide a joint statement of uncontested facts. This can reduce hearing time, and when the parties know they have to provide such a statement, there's potential to reduce the scope of discovery as well.

Ask the parties to provide a joint statement of issues to be decided. Since framing the issues can be problematic for a joint statement, I've also permitted each party to add (but not substitute) a "Claimant's Statement of Issues to be Decided" and a "Respondent's Statement of Issues to be Decided".

Posted by Micalyn S. Harris | November 25, 2015 6:41 PM

I wanted to construct a quick message so as to express gratitude to you for all the remarkable instructions you are sharing at this website. My time-consuming internet research has at the end of the day been rewarded with incredibly good information to share with my family. I 'd state that that most of us site visitors actually are extremely lucky to dwell in a wonderful network with so many marvellous people with beneficial suggestions. I feel very blessed to have seen the webpage and look forward to tons of more fun minutes reading here. Thanks once again for a lot of things.

Posted by Nike Air Max 97 hyperfuse 'navy' | March 14, 2016 2:16 PM

December 1, 2015: Arbitrators Serving as Consultants - What are your thoughts?

Should an arbitrator serve as an arbitration consultant to a party that was previously before her/him in an unrelated arbitration matter? If yes, how soon after the previous case would you deem this to be acceptable? Please provide your thoughts/comments below.

As an ADR consultant, the "don't do it" part of my brain is firing away on this one. The concern I have is the appearance that there was a quid pro quo for my service as arbitrator, as in "How interesting! Friedman rendered an award in their favor, and now they have retained him as a consultant?

On ethical quandaries, I teach my students at Fordham Law as follows: 1) consult applicable ethical codes and guides; 2) if in doubt, don't do it; 3) if STILL in doubt, imagine your conduct is the subject of a story in the news, and your kids/priest/minister/rabbi/imam/ or worse - your Mom, call and ask why you did it.

So, let's look at he Code of Ethics for Commercial Arbitrators. Canon I(C) says: "After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional,or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which
might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest."

Summing up: I wouldn't do it. My Mom still scares me!

Posted by George Friedman | December 1, 2015 9:34 AM

I probably wouldn't do it if a year hasn't gone by. I don't know what constitutes a a reasonable period of time but at least a year passes "the smell test" I think. The year at least satisfies my concern about the " appearance of impartiality".

After a year I would lay it out to the parties.It's their call.

Posted by Judge William G. Bassler | December 1, 2015 10:13 AM

As my mentor, Bill Eldredge, advised over 40 years ago, "If you have to ask, 'should I do something,' the answer is, 'no.'"

Posted by John Dewey Watson | December 1, 2015 10:15 AM

"Consulting" is getting paid privately by a past or future arbitration party. The concept is poisonous to neutrality. It's a no brainier. Don't!

Posted by David Blair | December 1, 2015 11:58 AM

I agree with the group and in particular the points of George Friedman. In general, arbitrators have to preserve neutrality and the appearance of impartiality at practically all costs.

Posted by Dani Schwartz | December 1, 2015 4:15 PM

Though I have served as an Arbitration consultant I have not and would not provide that service to a party or attorney that has appeared before me in an arbitration.

Posted by Richard DeWitt | December 1, 2015 5:50 PM

I simply would not do it. It does not, in my view, pass the "smell" test. Whether true or not, the opposing party who lost in the initial arbitration is likely to make reputation damaging comments that I would prefer to avoid.
David H. Pfeffer

Posted by David H Pfeffer | December 2, 2015 4:04 PM

December 7, 2015: Arbitrators Discussing Mediation - What are your thoughts?

Do arbitrators have any role in mentioning mediation as an option to the parties? *Please provide your thoughts/comment below.*

It depends on the facts;the type of case and the provider of the services. Some encourage Arbitrators to routinely mention the availability for mediation to be provided prior to arbitration.

Arbitrators should usually determine if resolution is possible between the parties. When the parties have a long standing relationship it might also be appropriate in some circumstances to encourage mediation.

I do not think there is a general protocol that fits each situation.

I look forward to other comments

Posted by Roger B. Jacobs | December 7, 2015 12:55 PM

I think mediation is a worthwhile venue for 'face to face' communication about the case. The arbitrator will have a feel for which cases would benefit from mediation and should broach the subject with the litigants. This should be a discretionary tool to use to save money and resolve a case expeditiously. thanks, Scott

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Posted by scott link | December 7, 2015 1:04 PM

We can mention mediation early & approvingly as an available process, but without urging or direction or implication of any kind.

Posted by David Blair | December 7, 2015 1:12 PM

The American Institute of Architects (AIA) construction contracts usually provide for mediation prior to arbitration. Having been involved in mediation, both as an architect (party) and as a mediator each only once, I feel that mediation first is a sensible idea, i.e., not binding, and where parties can get a better understanding of the issues of both sides. Should mediation fail, an arbitration award might have a better chance of being most equitable.

Having said that, I would like to see details of an arbitration dispute before deciding to recommend mediation first.

Posted by Robert E. Barras | December 7, 2015 1:21 PM

Attempts to settle are always in best interests of the clients although it is not always possible. Sometimes the clients want a decision and that is the job of an arbitrator. In AAA arbitrations, arbitrators can mention availability of mediation in pre-trial orders and can prompt the case managers to offer it to the parties. If the parties wish the arbitrator to serve as the mediator, appropriate agreements to do so can be done with supervision of AAA case manager.

Posted by Ruth Raisfeld | December 7, 2015 1:22 PM

Mediation can be useful before and during arbitration. Arbitrators should, if they feel it appropriate, suggest mediation with some other adr professional.

Posted by Jose W. Cartagena | December 7, 2015 1:25 PM

Under AAA Commercial Rule 9, we are obligated to discuss mediation and I always raise it during the Preliminary Hearing phase. In non-AAA cases, I would certainly raise the question with the parties during the Preliminary Hearing as to whether or not they tried mediation first, and if they considered going to mediation now, if they had not. In many instances the parties have either tried mediating the dispute before the arbitration got under way or they have made a reasoned judgment that mediation was not possible given the nature of the dispute or the hostility of the parties.

Posted by Mark Bunim | December 7, 2015 1:34 PM

I agree that an arbitrator may broach mediation in the appropriate case. Unless one is in a state that recognizes a hybrid or the ability of an arbitrator to do both, and not operating under Rules that prohibit doing both, I suggest an arbitrator needs to refrain from discussing information to be exchanged pre-mediation or discussing any other specific aspect of the mediation.

Posted by james eyler | December 7, 2015 1:40 PM

Obviously the issue will vary from case to case and depend on the arbitrators "feel" for the case and the parties.

But, I believe that the arbitrator should suggest mediation at the initial conference as this may lead to a resolution of the issue and saving of time and expense. The arbitrator should not participate in the mediation.

Posted by George Abrahams | December 7, 2015 1:55 PM

As said above, it depends on the case and totality of circumstances. Many cases are mediated before an arbitration under employment protocols, and many agreements require only arbitration. I have adjourned two arbitrations for mediations or settlement discussions during the arbitration proceedings when something unexpected is said by a witness, or a witness appears who may not have been expected by the other side. As with many cases, once a hearing actually begins, or is about to commence, the reality of the situation and fact the matter will actually be decided make parties understand that it may be beneficial to settle and take the risk of an adverse decision off the table.

Posted by Ed Stern | December 7, 2015 2:10 PM

I have no problem advising the parties of the availability of mediation, but do not go further with that.

Posted by Michael O. Renda | December 7, 2015 2:28 PM

I routinely suggest that the parties consider mediation, telling them that it it is better if they can agree on a resolution rather than have one imposed upon them. I will not mediate a matter I am arbitrating, I want the parties to be free to discuss their weaknesses with the mediator. This may not happen if the mediator will then arbitrate. It is frequently successful.

Posted by Paul McDonough | December 7, 2015 6:12 PM

In AAA arbitrations the parties are offered mediation by the case manager and under the rules must affirmatively op-out if they do not want to participate in mediation. Furthermore, generally parties in AAA large commercial arbitrations are represented by sophisticated counsel who do not need the arbitrator to advise them about mediation.

As Arbitrators the parties hire us to decide their case. The arbitrator in AAA cases suggesting that they participate in mediation is unnecessary for the reasons set forth above.

Moreover,the Arbitrator runs the risk of sending a message to the parties that you may have already made a decision about the case before hearing both sides if you do it during or after claimant puts on its case. Once Respondent has put on its case there is no significant savings or benefit for the parties in mediation and we should do our job and decide the case.

Posted by Richard DeWitt | December 8, 2015 1:35 AM

Yes, of coursel concur with R. Jacobs:
Very often cases are not really about the presenting problem or even about a point of law. These cases most often, in my experience, involve a family, or closely held relationship, that has gone awry. These cases need to get to what really matters and that will not be resolved through arbitration's zero sum outcome. In order to settle the issues the parties may be best served by mediation.

While doing my graduate work I did research on the hybrid process of Med-Arb. Seeing the logistic hurdles to that process, I proposed and conducted some Arb-Meds. That is, first the case is arbitrated and the decision is sealed. Then the case is mediated (possibly by the same professionals). If the mediation is unsuccessful the arbitrated settlement is opened. This provides the parties with both incentive to settle, confidentiality of information that they have through mediation, and a certain decision at the end of the day. Win/win.

Posted by terri colby barr | January 20, 2016 5:50 PM

December 14, 2015: Arbitrators Discussing Substantive Case Issues – What are your thoughts?

How much should arbitrators in a three person Tribunal discuss amongst themselves any of the substantive issues in the case prior to the close of testimony? Please provide your comments/thoughts below.

I don't think there is any harm done in on-going deliberation, so long as the entire panel understands no final decision can be made until all the evidence is in.

Posted by Robert L. Arrington | December 14, 2015 11:04 AM

Why not? Arbitrators are not judges or uninformed jurors. At this stage, nevertheless, they should make it clear to the others that they will not make up their minds until the hearings are over.

Posted by Jose W. Cartagena | December 14, 2015 11:32 AM

Good grief! A good panel knows that decision-making is an on-going fluid process. It begins at the outset of a case and continues throughout.
Of course, there is early & continuous discussion of substantive issues.
This testing of ideas always is subject to what happens next. It's a great strength of a panel vs. a sole arbitrator to exchange ideas, impressions, initial credibility judgments - and then throw it out & start over with the next witness.

Posted by David Blair | December 14, 2015 11:48 AM

Unlike jurors, who are forbidden to discuss a case prior to the close of evidence, arbitrators have a responsibility for insuring the development of a full record that will enable the Panel to reach a just result. In furtherance of that goal it is often necessary for the Panel to discuss aspects of the presentation that individual members feel require additional exploration or supplementation. What should be avoided is any discussion as to the ultimate resolution on the merits which must await the completion of the parties' presentation.

Posted by Gerald Harris | December 14, 2015 12:13 PM

I think it is essential for all arbitrators to keep an open mind throughout the evidentiary hearing and not to come to conclusions prematurely. However, I do think it is perfectly appropriate for the arbitrators to identify factual issues on which they would like more evidence or legal issues they would like the parties to comment on or brief.

Posted by Lisa Renee Pomerantz | December 14, 2015 12:14 PM

I believe that it is important that the arbitrators discuss the case and the testimony and evidence as the hearing progresses - otherwise -especially in long multi day hearings - the early testimony and evidence from the Claimant will not be as fresh in their memory as the Respondent's testimony and evidence.

Discussing the case as it develops also helps build consensus among the Tribunal members. Obviously, no final decision should be made until the deliberations.

Posted by Richard DeWitt | December 14, 2015 1:10 PM

I think it's a matter of style. Some arbitrators are more talkative than others. The only limitation should be against taking positions on ultimate issues in the case until after all evidence and argument has been submitted.

Posted by Steven Skulnik | December 14, 2015 2:52 PM

As a sitting judge and now has a private judge/arbitrator, at my preliminary hearing her speak with counsel about the fact that it it's 90% of all matters settle before trial/arbitration and suggest that it was probably in your clients best interest to discuss attempting to mediate the case once a sufficient information is obtained so that counsel and the parties (and the mediator) can properly evaluate the matter and bring it to resolution. I also mention my cancellation policy of which they are already aware and suggested that the calendar that date and she just attempt to settle the case before that cancellation dates takes effect. I of course indicate that AAA has a superb neutrals and that they can assist counsel in arranging a mediation via AAA.

Judge Larry Crispo

Posted by Larry Crispo | December 15, 2015 1:42 PM

January 11, 2016: Arbitrator Authority - What are your thoughts?

If in the course of an arbitration hearing the evidence shows that there is an open and shut statutory defense to the claim which would warrant dismissal, but the Respondent has completely ignored it, should the arbitrator raise the issue? Please provide your thoughts/comments below.

The arbitrator should raise the issue for briefing by the parties.

Posted by Paul Cottrell | January 11, 2016 3:01 PM

As an experienced litigator, I ask myself what a Judge would do. The arbitrator should raise the issue without indicating what he thinks the significance is, and ask both parties to brief it.

Posted by Charles Shaffer | January 11, 2016 3:17 PM

Generally yes. Although the arbitrator should normally allow counsel to try the case, a dispositive statute should not be ignored. I as an arbitrator raise it as an issue that the parties might want to consider, and let respondent's counsel follow up by pleading it and have it briefed.

Posted by James W. Constable | January 11, 2016 3:20 PM

It seems to me that an arbitrator deciding that the case is open and shut and thus should be dismissed out of hand, is the height of arrogance and an abuse of the arbitration system. Bring it up for discussion perhaps, but what if you did dismiss it and later learned that you were wrong in your analysis?

Posted by Raoul Drapeau | January 11, 2016 3:20 PM

No. It is up to the parties to raise issues and defenses. It is not the arbitrator's duty to decide issues not raised by the parties.

Posted by Anonymous | January 11, 2016 3:25 PM

I agree with Paul Cottrell that the arbitrator should raise the issue for briefing by the parties.

Posted by Judy Weintraub | January 11, 2016 3:31 PM

I would raise the issue to protect the credibility of the arbitration process. So, for example, if a thirty-five year old claimant made a federal ADEA claim, I would ask both counsel to review the statutory requirements and provide comments if they deemed it appropriate. If respondent then made the defense, the claim would fall. If respondent still failed (refused) to make the statutory defense, I would note that in the award and opine that respondent had waived the minimum age element in the ADEA, in effect voluntarily submitting to an age discrimination claim, but more on a contractual rather than statutory basis. BTW, I see this as different from guiding a party's strategy decisions.

Posted by Stephen F. Ruffino | January 11, 2016 3:37 PM

I agree with Paul Cottrell. I recognize the argument that the arbitrator should not meddle with the parties' presentation of their cases, but the question posits a situation where ignoring the issue may lead to a wrong and unjust result. On the other hand, the arbitrator should not base a decision on a ground that has not been raised in the case without providing the parties with an opportunity to address it. There is too much risk that the arbitrator may have overlooked a reason that the apparent statutory defense is actually inapplicable.

Posted by Bill Ewing | January 11, 2016 3:38 PM

Putting aside the instinctive question of whether anything has ever been open and shut, I do not believe the arbitrator's role is to raise a defense for the Respondent. Defenses are generally waivable, as are claims. Now perhaps there might be a circumstance where the relief sought under the claim might make the arbitrator more wary to use his or her power if it would appear to be so obviously wrong-headed. I don't know.

Posted by Nancy Arnold | January 11, 2016 3:43 PM

This happens all the time. Arbitrators ask the parties to brief certain issues and to address statutes or case law identified by the arbitrators. It is good for the process and helps achieve the right result.

Of course, if the statute is dispositive and the arbitrator raises it and the parties brief it, then the arbitrator should not ignore it or fail to give it effect. That would present the textbook example of "manifest disregard of the law."

Posted by Steven Skulnik | January 11, 2016 3:49 PM

I agree that the arbitrator should ask for the parties' positions on the issue, although one could argue that that amounts to trying the respondent's case for him. The problem, I guess, is that if you don't raise it, and possibly depending on what the defense is (eg, failure to satisfy an essential element of a statutory claim vs. failure to raise an affirmative limitations defense provided in the statute) you may end up with a decision to the effect that respondent violated the statute when in fact he didn't. Best course appears to be to solicit the parties' views -- I don't think the "integrity of the arbitration process" suffers because the arbitrator raises relevant issues instead of penalizing a party for lawyering oversight.

Posted by Tim Russell | January 11, 2016 4:07 PM

FAA Section 10 (a)(2) and (4) speak to this issue. The question is whether by doing this the arbitrator has shown partiality and if not that, has the arbitrator exceeded authority.

In this example, the arbitrator would be bringing up an issue the Respondent has either ignored or not spotted. Either way, by bringing the isue up, the arbitrator is clearly doing for the Respondent's lawyer what he/she has failed to do on his/her own. It seems to me that in doing so the arbitrator would be taking sides in violation of both 2 and 4 of Section 10.

Of course we don't know in this case what the arbitratioon clause says. In theory the clause could provide the arbitrator has the power to identify issues of law a party may have missed. But I've never seen such a clause and doubt anyone else has.

Practicing lawyers identify legal issues and move accordingly on behalf of a client. If a lawyer fails to spot an issue, the client can hold the lawyer accountable. The lawyer client relationship is unique.

An arbitrator is charged with making a ruling on the issues placed before the arbitrator by the parties. This too is a relationship that is unique.

In the scenario the arbitrator has moved from the role of the party charged with deciding the outcome of a dispute to the counseling of a party about how to proceed. Unless the arbitration clause allows for this, there is no authority for any arbitraor's acting unilaterally.

Some may say that unless the arbitrator proceeds by pointing out the issue, the arbitrator will be left to decide issuing an award that is possibly flawed legally. Neither the FAA or the CPLR mandate that an arbitrator is required to police a proceeding and correct the mistakes of lawyers who are representing the parties. The arbitrators first obligation is to do what the parties are asking him/her to do. A judges first obligation is to the law. Arbitrators aren't judges.

If the arbibtrator fails to point out the potential for a motion to dismiss, is the arbitrator facing a suit on the grounds that he/she manifestly disregarded the law? The threshhold question needed for an answer is how did the arbitrator come to learn about the law involved? If the arbitrator learned from a party, there would be no issue. So it must be that the arbitrator learned of the law either from the arbitrators experience or from independent legal research.

Thus,the real issue here is independent research by an arbitrator. We have been over this in an earlier debate.

The answer is the arbitrator should keep his/her mouth shut and make the ruling the parties are asking for.

Posted by Paul Bennett Marrow | January 11, 2016 4:16 PM

Neither an arbitrator nor judge should do the job of the attorney for either of the parties. Affirmative defenses may be waived, and failing to raise an affirmative defense waives it.

Posted by Eli Uncyk | January 11, 2016 4:21 PM

My comment is that if the defense is waivable, the arbitrator should not raise it sua sponte.

Anonymous

Posted by Jeffrey T. Zaino | January 11, 2016 5:34 PM

The arbitrator's jurisdiction is limited to the issues submitted by the parties for decision. See the arbitration clause.

Posted by David Blair | January 11, 2016 7:00 PM

The responses are not encouraging, the views expressed so scattered, many not sufficiently rigorous even to stay within the confines of the hypothetical--the problem as presented is that there is "an open and shut" statutory defense. The issue thus is what is the role of the arbitrator in a situation where counsel for the respondent is not sufficiently competent or prepared to adequately represent the party in the matter. The principal obligation of the arbitrator is always to get the result right and the skill required is to accomplish that objective operating within the confines of the roles assigned--lawyers doing the lawyering and the arbitrator acting as a neutral to sort it out and render the decision. But there is an art involved and when a case presents an anomaly such as encompassed in the hypothetical it is the burden of the arbitrator to apply the law properly and to do so with the least offense to the lawyers in the case.

Anonymous

Posted by Jeffrey T. Zaino | January 12, 2016 11:25 AM

I think it is entirely wrong to say, "The arbitrators first obligation is to do what the parties are asking him/her to do. A judges first obligation is to the law. Arbitrators aren't judges."

Arbitrators are private judges. They derive their authority from the agreement of the parties, but awards carry their great enforcement weight because arbitrators are expected to follow the law as much as judges are, not to disregard it.

The evidence can only be what is presented by the parties, as much in arbitration as in court. But the law is the law, whether presented by counsel or not. If the evidence clearly requires dismissal under the law, it cannot be "manifestly disregarded," dismissal must be the result.

That said, of course the issue should be raised for briefing. The award of dismissal cannot come out of the blue.

Posted by Robert M. Gippin | January 12, 2016 2:08 PM

I agree with Paul Marrow's analysis--most affirmative defenses are waiveable. The one exception I can think of is whether there is proper jurisdiction of the claim. Courts This issue can be raised by the trial or appellate court on its own and ask the parties to brief the issue.

Posted by Harry Haynsworth | January 12, 2016 4:12 PM

Often, in arbitrations, the pleadings, especially the responsive pleadings are loosely drafted. If the arbitrator has, by past experience or independent research, decided that there is an issue of law which will affect the arbitrator's ruling that neither party has raised, the arbitrator should notify the parties that the issue of law is one the arbitrator is considering and give the parties an opportunity to address it before the arbitrator rules on the basis of that issue of law.

Posted by Melvyn W. Wiesman | January 12, 2016 6:50 PM

This is a great discussion. Thanks again, Jeff.

A few years ago, I sat on a case in which a defense was identified, but the lawyer for the party who would have benefited from it expressly stated that he was not raising it. The panel had him state on the record that the panel was not to consider that defense. Of course the other side was thrilled and said that it agreed that the defense did not apply. (Under settled law, the defense, if had been asserted, would have changed the outcome.)

The reasoned award stated that the panel did not consider the defense because the parties agreed that we should not and we respected the agreement of the parties. The award cited to ECOR Sols., Inc. v. Malcolm Pirnie, Inc., No. 02-CV-1103(GTE/DRH), 2009 WL 2424553, at *3 (N.D.N.Y. Jan. 21, 2009) report and recommendation adopted, No. 02-CV-1103 (NAM/DRH), 2009 WL 2424552 (N.D.N.Y. Aug. 5, 2009) ("Since arbitration is entirely a creature of contract," parties cannot be forced to arbitrate and the rules governing arbitration, its location, the law the arbitrators will apply, indeed, even which disputes are subject to arbitration, are determined entirely by the agreement between the parties.").

ECOR Sols. was not directly on point and to this day I know of no case that is.

Posted by Steven Skulnik | January 13, 2016 12:39 PM

If the evidence submitted to the arbitrator establishes an "open and shut statutory defense to the claim", then the issue has been presented to the arbitrator for consideration. The parties' obligation in the arbitration is to put forth evidence to support their claims or defenses,R-32(a), and the arbitrator's determination must be based on the evidence presented. R-34. If the Respondent has "completely ignored" the issue, then logically, the premise of the question is that the issue was presented in the Claimant's own evidence. (I realize this situation may not have been intended.) The question then would become whether the arbitrator should be asking the Claimant at this juncture if he/she should be considering a dismissal to spare the parties any further expense. Whether that question should be asked must depend on the circumstance of the case. The AAA Commercial rules for stating a claim, R-4(e)(iv), do not require a party to state (i.e., "plead")theories of liability or recovery, although a respondent or the arbitrator may ask for them. The lack of a stated defense, as would be required in a court action, (which the question may have intended to imply) is not a grounds for preventing the respondent from receiving the benefit of the defense that the evidence establishes. The arbitrator's duty is to the parties themselves, whether or not they are represented by attorneys(effectively or not).

Posted by Stephen W. Armstrong | January 13, 2016 1:34 PM

If both parties are represented by counsel, I would not raise the issue. Both parties and counsels see the subject evidence and respondent chooses not to request leave to file a motion etc. Respondent's counsel may know of some reason why respondent wants to waive the statutory defense and prevail on the merits (findings of facts) of his case and not win by a dismissal. For example, the parties may have litigation between them pending in some other forum in which litigtion the statutory defense does not exist. On the other hand, if respondent is pro se and without counsel, then I would likely raise the issue.

Posted by Edward Dreyfus | January 14, 2016 2:41 PM

I concur with Arbitrator Edward Dreyfus. When parties are represented by counsel arbitrators should not try the case for them. It is presumptuous to meddle, and will most likely give an appearance of partiality. When a pro se party is involved the analysis more complex, as attorneys and courts have recognized.

Posted by Pat Westerkamp | January 18, 2016 12:32 PM

Probably as parties about issue and request it be addressed during post hearing briefs.

Posted by Michael Renda | January 18, 2016 1:44 PM

I think to conduct a fair hearing requires the arbitrator to recognize absolute defenses that become apparent and follow the law. Good case management might have identified the defense early in the case, and there is the potential use of dispositive motions now expected in accord with latest arbitration rules of AAA and other forums. I think early conferencing about the case might (should) have uncovered the absolute defense that is implied (and was not being waived), and it sounds like the use of dispositive motion practice in a case like this would have produced a desired result: to shorten and streamline the case, save money and follow the law.

Posted by Ronald H. Kisner | January 19, 2016 10:23 AM

To me it depends on whether or not this is an affirmative defense. In Colorado, affirmative defenses are waived if not asserted. In this instance, to bring a defense to Respondent's attention would made the arbitrator an advocate for Respondent and no longer a neutral.
However, a statute that precludes a claim for some policy reason, i.e., victims cannot sue a baseball team for injuries from errant balls, is different. An arbitrator here should readily rule that Claimant could not overcome the statute to prevail on a case, regardless of Respondent's input.

Posted by Federico C. Alvarez | January 20, 2016 4:27 PM

The question states that "evidence shows" so the issue has somehow been placed before the arbitrator.
If the evidence has already been placed before the arbitrator, either the arbitrator thinks what's in evidence is determinative or failure to cite it indicates waiver. If the former and the point cannot be waived, in fairness to both parties, the arbitrator needs to get help - either by doing his or her own research or asking the parties to do it.
If it can be waived, and the arbitrator can reasonably conclude that failure to follow-up constitutes a waiver and is comfortable allowing the case to go forward on that basis, nothing need be said.
I like the idea of having it addressed in post-hearing briefs, but if the evidence came in on day 1 and the hearings are expected to continue for another 10-15 days, the parties would like to reduce their costs if the award is going to be determined by day 1 evidence. As an arbitrator, I have an obligation to both the parties and the process, and I want to be fair. If I think the statute precludes the claim and cannot be waived, I think I need to find out more so my decision, especially if it's a reasoned award, doesn't "come out of the blue". Asking for clarification of the evidence in a way that indicates the issue is open but relevant seems only fair to the parties.

Posted by Micalyn S. Harris | February 2, 2016 4:40 PM

January 20, 2016: Party-Appointed Neutral Arbitrators: What are your thoughts?

What should an arbitrator do when he or she has a reason to believe that a party-appointed neutral arbitrator is not being neutral? Please provide your thoughts/comments below.

first, in private, very politely have a conversation with the arbitrator advising he or she of the importance of the oath and the appearance of propriety is the back bone of AAA. If this does not resolve the problem, inform the arbitrator that you must report the inappropriate conduct to the AAA so that the sanctity of the arbitration is preserved. thanks, Scott

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Posted by scott link | January 20, 2016 2:54 PM

Unless i felt it was tainting the rest of the panel, I don't think I would do anything. I have always questioned how neutral a party appointed neutral arbitrator really is. I felt that this arbitrator was overstepping, I would have a conversation amongst all of the arbitrtators and express my concerns.

Posted by Ken Eisner | January 20, 2016 2:55 PM

In my experience party appointed arbitrators have not made any pretense of being neutral.

Posted by Charles A. Shaffer | January 20, 2016 3:01 PM

Since the change in the rules regarding neutral / non-neutral party appointed arbitrators many years ago this has been less of a problem than it was. As Chair when the wings are both party appointed I always have an initial discussion with them regarding neutrality and impartiality. If it is apparent that one of the Arbitrators is not neutral it goes to the weight I give to their opinion in the final decision. Not sure what is gained by reporting such concerns to the Case Manager - it is a very subjective observation that can not be readily resolved by the Case Manager and would most likely be denied by the Arbitrator.- And this generally occurs with non-AAA arbitrators on a tribunal who are not concerned with their position on the AAA panel

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Posted by Richard DeWitt | January 20, 2016 3:38 PM

In my experience with party-appointed arbitrators, I believe it is essential that all arbitrators convene before the first session and reach agreement on the rules of behavior and ethics. If there is a subsequent issue, it should be addressed in the context of that agreement and not in the context of some vague notion of appropriate behavior.

Posted by John Graham | January 20, 2016 3:43 PM

In my experience, in most instances, parties do not appoint arbitrators who they believe will act in a neutral fashion once appointed. A party appointed arbitrator will usually be loyal to the appointing party to the extent that the facts of the case and/or the governing law allow. That is why the umpire's selection is such a key factor where the wings are not blindly appointed.

Posted by Mark Bunim | January 20, 2016 3:52 PM

Recently had this unpleasant experience with an AAA-appointed arbitrator, who was evidently close to the law firm representing one of the parties. We ultimately agreed on the bottom line in the award, i.e.,denying the claim, but I included separate comments in the award. Very awkward experience. Question back to you - does AAA still get feedback, after the fact, from the parties AND the arbitrators by way of evaluating the experience?

Posted by Charles Molineaux | January 20, 2016 4:23 PM

I agree, that having a discussion about the relative roles of the party arbitrators and the chair before evidence is presented is helpful. Unless a party arbitrator refuses to consider all of the evidence in the case, because of his/her biases, I would simply give less weight to the opinions of that arbitrator. And, unless the process is tainted, so as to deny a fair result, I would not report anything to the AAA. The process accommodates honest differences of opinion and should be honored.

Posted by Burton Katz | January 20, 2016 4:28 PM

At the very early stages the party appointed members of the panel should discuss the extent to which the party appointed arbitrators should discuss the extent to which they should communicate with the party who appointed him or her,both before and after the chair is appointed, and the need for neutrality . In my experience AAA and ICDR arbitrators will abide by the rules, if it is clear that is what is expected. However, if I suspect that the other party appointee is not neutral, I will press him or her to justify the positions taken so that it will either become clear that he or she is biased or that he or she simply agrees with the appointing party.

Posted by George Graff | January 20, 2016 4:31 PM

I guess I look at this issue a bit differently. If a panelist is designated as an Article X arbitrator which allows the arbitrator to shed the mantle of Neutrality, I personally decline the assignment. I have no interest in engaging in panel discussions knowing the substance of those discussions may well find their way to the party who appointed them. I have been approached as well to be a party appointed neutral and I make it clear that I will be neutral and if that is not acceptable, I decline the appointment.

Posted by Stanley Sklar | January 20, 2016 4:41 PM

First, it is a wonderful idea to have a discussion prior to the start of the arbitration.Next, I may not be the chair...and if I am not the issue of neutrality and/or impartiality is more of a concern because the outcome could be skewed.

There is also an underlying ethics issue.

I don't want to be the one who must counterbalance or over-correct the tilt of the table during the arbitration only the give the other party fuel for fodder that I was not impartial in my dealings.

I would certainly want to go on record with the case manager and register my concerns in real time. If there is any ethics (or even best practice) complaints around the arbitration we should be covered. At the end of the day, we cannot necessarily change others but to suffer the consequences of of another's wrongdoing would be adding insult to injury.

Posted by terri colby barr | January 20, 2016 5:34 PM

I agree there is not much we can do with vague notions of bias. However, if a co-panelist is not abiding by The Code of Ethics for Arbitrators in Commercial Disputes, corrective action my be necessary or appropriate. It will depend on the facts and circumstances.

Posted by Steven Skulnik | January 20, 2016 6:06 PM

I have always thought that the idea of a party-appointed arbitrator subverts the goal of having a panel composed of neutrals. If a party appoints you, how could you expect to be neutral? If I served with an arbitrator who acted in a way that was clearly biased, I wonder whether taking that person aside for a talk would help. It might even be counter-productive since the person might "go dark" and his/her views might be hidden from view.
On the idea of giving less weight to their opinion in preparing an award, I don't see how that principle which can be helpful in evaluating evidence, would apply to a fellow arbitrator.

Posted by Raoul Drapeau | January 20, 2016 6:21 PM

I have not had any problem with party appointed arbitrators. While they have generally made sure the party appointed them is getting a fair shake, I have not found them to be biased when it came to decision time.
At the first opportunity when I am chair I make sure that everyone understands the ground rules or neutrality and impartiality.
I am not sure that I would say anything if I felt an arbitrator was over reaching,relying rather on the pressure of the discussions with the other arbitrator to influence him or her.
My biggest problem with co arbitrators is having them fall asleep during hearings.
Judge Bassler

Posted by Hon William G. Bassler | January 20, 2016 7:07 PM

Designated arbitrators are often contacted and interviewed by their respective designating parties, and only then proceed to serve as "neutrals" per agreement and/or under the Commercial Rules because the parties have not agreed otherwise. Under these circumstances, a certain degree of "predisposition" is often to be expected, this as opposed to "bias." The ABA/AAA Code of Ethics appears comfortable with a distinction between "predisposition" and "bias," at least where designated arbitrators serving purely as such are concerned. A post-appointment agreement for designated arbitrators to serve as neutrals may not alter that approach all that much--instead, it cuts off communications between designating party and the arbitrator once the initial designation has been made. If that limitation is observed, and if required disclosure (applicable to neutrals as well) is made, it seems to me that disqualification is, and should be, limited to very extreme situations which are unlikely to occur.

Posted by Nick Weiskopf | January 21, 2016 10:13 AM

Experience teaches many of us to diminish an expectation of pure neutrality on the part of a party-appointed Arbitrator.

Query whether Arbitrators must disclose any previous dealings in any capacity with the appointing party.

Needless to say, the delegation to reliable, neutral judges in a large society is foundational of justice. To this, rather than persons, should the Arbitrator cleave.

Posted by Alan Sacks | January 21, 2016 2:12 PM

January 27, 2016: Dealing with the Press During an Arbitration - What are your thoughts?

What, if anything can an arbitrator do if he or she sees information in the press regarding an ongoing hearing? Please provide your thoughts/comments below.

During the Preliminary Hearing an arbitrator should raise the subject of a Confidentiality Agreement/Order and the consequences of not having one. If the parties reject the concept, there is little an arbitrator can do, since arbitrations are not inherently
"confidential". If the parties do sign a Confidentiality Agreement and there is an article in the press, then the arbitrator must consider penalizing the party that leaked the story [assuming the arbitrator can find out].

Posted by Mark Bunim | January 27, 2016 3:50 PM

this is an interesting subject. As the fact finder , the arbitrator is to only consider the evidence presented by the testimony presented during the hearing . All fact finders have personal experiences or prior cases that they swear to set aside to be impartial. The article is just another source to be disregarded. Tangentially, the arbitrator should discuss the fact of the publication with the litigants, the parties , and the witnesses to insure they are not speaking with the press or are influenced by the publication.

Posted by scott link | January 27, 2016 3:52 PM

I do not think that an arbitrator can do much about seeing information in the press about an ongoing arbitration unless he or she is presented with evidence that one of the parties was responsible for leaking the information to the press in which case the arbitrator may have the authority to impose sanctions against the responsible party if the applicable rules governing the arbitration give the authority to the arbitrator to impose sanctions on a party for its misconduct. But as an arbitrator I would look very carefully at the question of whether I have the authority to impose sanctions before I would do so.

Posted by Jack Rephan | January 27, 2016 3:56 PM

First, the Arbitrator should immediately cease reading once he or she realizes the article is about the arbitration. There is always the general issue about the anonymity of an Arbitration, as not being a public forum, and that may need to be addressed. I would alert all counsel to the article, assure them that you have not read it, only noted that it was about the arbitration. If privacy is an issue, the Arbitrator may need to call a hearing to address how the information made its way into the public domain and to inquire of counsel if the release of the information in the article (which the Arbitrator will NOT have read) in any way impacts the hearing, and if so, what corrections, if any, can be made.

Posted by Michael Orfield | January 27, 2016 3:59 PM

There is a lot of misunderstanding regarding this issue. Unless there is a confidentiality agreement or order in place - the arbitrator generally can do nothing.

Unlike meditations (in most states) - arbitration proceedings are private but not necessarily confidential - It would seem that unless there is some restriction in place there is nothing preventing a party from holding a press conference regarding the case each day after the hearings should they choose to do so.

However, I believe an arbitrator can condition the exchange of information on the receiving party maintaining the information confidential.

Posted by Richard DeWitt | January 27, 2016 4:06 PM

If the issue is whether the arbitrator has been exposed to extra- hearing evidence, the short answer is to stop reading and make disclosure to counsel. If the concern is that a presumptively confidential proceeding has become public, the arbitrator should request that counsel and the parties refrain from airing the issues in the press unless both sides are in favor of such disclosure.

Posted by Gerald Harris | January 27, 2016 5:35 PM

Arbitrators are not an uninformed jury nor judges that need to heed a record. Publicity may affect a jury but should not affect an arbitrator's animus. The arbitrator bases the award on whatever is presented to him at the hearings and his knowledge and experience. Parties that litigate before the press make a poor choice of forum.

Posted by Jose C Ortiz | January 27, 2016 8:06 PM

I know of no reason to believe the arbitrator has any authority over what is disclosed outside of the hearing, but should the arbitrator know the press released potential evidence in the case, all parties, their counsel and the case manager should be informed of the potential dangers of public disclosures.

Posted by Robert E. Barras | January 28, 2016 9:53 AM

I agree with Mr. Dewitt's comment that there is little an arbitrator can do if parties do not enter a confidentiality agreement -- except possibly conditioning any exchange of documents on an arbitrator's imposed confidentiality order. But even here enforcing such an order is problematic.

Posted by Paul j bschorr | January 28, 2016 12:46 PM

Ignore it. The arbitrator should consider making a record that (s)he saw media coverage and ceased to view/read it upon realizing that it regarded the matter at hand, and that the decisions in the case will be premised on the evidence. If a confidentiality agreement exists in the case, enforceable by the arbitrator, then it is up to the aggrieved party to determine whether it seeks to enforce the agreement.

Posted by Federico C. Alvarez | February 2, 2016 1:32 PM

February 2, 2016: Third Party Funding in Arbitration - What are your thoughts?

Should a party disclose if receiving third party funding in arbitration? If yes, what should be disclosed? Please provide your thoughts/comments below.

No - I do not believe it is relevant to the determination of the case.

Posted by Richard DeWitt | February 2, 2016 12:30 PM

I don't think that is relevant information for the arbitration process unless it is from a source that may have a bearing on the disclosures of the arbitrators.

Posted by scott link | February 2, 2016 12:32 PM

It has nothing to do with the merits and is irrelevant. A party should not have to disclose.

Posted by James B. Brown, Esq. | February 2, 2016 12:38 PM

The funder should be identified in some way as having an interest in the case because that may create a conflict for the arbitrator. Suppose the entity funding the case is a client of the arbitrator, or a party whom the arbitrator is suing. Etc.

Posted by William Ewing | February 2, 2016 1:20 PM

I concur that it is best that financial details should not be disclosed to the arbitrator unless necessary. However, the party receiving this support should include the name of the benefactor in the checklist for conflicts.

Posted by Federico C. Alvarez | February 2, 2016 1:25 PM

No. A thousand times no. First, you do not want to waive or open the door to any privilege/work product issues. Second, such information would not likely be discoverable (work product and/or common interest doctrine), so why disclose it? Third, unless you have a strategic or tactical advantage to gain, why give away this information?

You are welcome to contact me directly with any further questions.

Posted by Mark Evangelista | February 2, 2016 1:28 PM

It may be relevant only in this sense. As happened in one of my matters, the person providing the funding was called as a fact witness by the party he was funding. Obviously, this was.relevant in assessing his credibility.

Posted by Gerald Harris | February 2, 2016 1:52 PM

Many parties in arbitration are insured for the costs of the arbitration. That is technically "third party funding." I have not seen disclosure of this fact nor should there be.

Posted by Mark Bunim | February 2, 2016 2:14 PM

If the arbitrator does not know of the existence or identity of a third party providing funds to one party or the other, then it can't be considered a conflict of interest. However, if the fact is disclosed, then there could be a conflict.

Posted by Raoul Drapeau | February 2, 2016 3:54 PM

In general, I agree with those who maintain that the source of funding is not relevant to the merits of the case and ought not be disclosed.

While the conflict point has surface appeal, it is hard to see how the source of funding would be a source of bias if the arbitrator(s) are not aware of it. Of course, if an arbitrator is otherwise aware of it, and it creates a potential conflict the arbitrator should disclose it.

On the other point, I agree that a relationship between a witness and a party that has a financial interest in the litigation is a proper subject for cross-examination the witness if counsel has a good faith basis for believing such a relationship exists. However, that is not a basis for a general rule requiring the disclosure of financial support to the panel.

Posted by George Graff | February 2, 2016 4:05 PM

February 9, 2016: Appellate Arbitration Rules - What are your thoughts?

The AAA, JAMS, and CPR offer appellate arbitration rules and procedures. Is an appellate process useful in arbitration? Please provide your thoughts/comments below.

The courts do not provide any meaningful review of arbitral awards. Moreover, courts sanction parties (or their counsel) who undermine arbitral finality by attempting to revisit the merits of a dispute during enforcement proceedings.

Opting in to an arbitral appellate procedure, on the other hand, allows contracting parties to proceed with greater confidence in:

•Adopting single-arbitrator arbitration for a dispute involving significant risk.

•Agreeing to arbitrate a potential bet-the-company dispute that otherwise would be litigated because the party seeks to preserve appellate rights and remedies not available in court.

Given the scheduling challenges associated with three-arbitrator hearings, a single-arbitrator hearing followed by a single-arbitrator appellate review should provide sufficient reassurance in most cases, cost less and take less time than a three-arbitrator hearing without an appeal. Where the amount in dispute is expected to be extraordinarily large, parties may want the additional comfort of a three-arbitrator appellate panel.

Appellate rules, however, are not appropriate for every type of case and also require significant party knowledge and involvement. For example, additional party effort is recommended in the drafting of the arbitration clauses involving appellate rules and in the arbitrator selection process both for the underlying arbitration and the arbitral appeal.

In all cases, where appellate review is chosen, the parties should be satisfied that the standard of review provided in the appellate rules make sense for the nature of the dispute that may arise, and that the nature and level of experience of the provider's appellate panelists add value to the appellate process.

Posted by Steven Skulnik | February 9, 2016 4:20 PM

In the rare instances where parties want the extra layer of an appellate review, the appellate rules should be a good thing. But I suspect and hope that 99% of the time parties to arbitrations value finality so much that they do not wish to include the possibility of appellate review.

Posted by Henry Parr | February 9, 2016 4:21 PM

This is a useful procedure in my opinion, assuming that the parties voluntarily opt from it. A set of rules or procedures is essential to avoid fights or confusion later. Very important to spell out that this is an appellate review and no a de novo adjudication.

The downside, of course is delay, but the upside is building in review short of going to court.

Posted by George Friedman | February 9, 2016 4:22 PM

It depends on the consumer. For some users, it will be important. For others, it will not because they will view it as making the process too expensive.

Posted by Robert L. Arrington | February 9, 2016 4:26 PM

I have served as the Chair of an appellate arbitration panel. The rules worked very well and allowed us to provide appellate review to the parties efficiently and economically. We were also able to work with Counsel to facilitate an appellate process that both comported with rules and met the parties' needs and expectations, as expressed to us by Counsel. To top it off, I thoroughly enjoyed the work.

Posted by Deborah Hankinson | February 9, 2016 4:28 PM

I am curious as to whether many parties have agreed to permit appeals. My personal belief is that most parties who choose arbitration will not want it. However, I see no harm in making it available to those few who do.

Posted by George Graff | February 9, 2016 4:52 PM

While I was an appellate judge for 20 plus yeas , I doubt that the value of having an appellate level in arbitrations practice will enhance value and think it will likely add delay and increase costs for the parties.

Posted by Sid Eagles | February 9, 2016 5:28 PM

No. If the parties have picked the right arbitrator and the lawyers, if any, have done their job properly, the parties should be able to acknowledge that the award was reasonable. What factual criteria can an appelate panel have to be able to evaluate the award properly?

Posted by Jose C Ortiz | February 9, 2016 9:04 PM

Some questions for Robert L.Arrington: what were the parties' needs and expectations for review? Was there a reasoned award that included findings of fact and conclusions of law? If so, was the appeal to clarify the award which the arbitrator(s) could not, for some reason, do? Presumably if there was fraud or bias, that would have been a reason to invalidate the award. Without breaching any confidentiality obligations, can and would you provide more details?

I agree with George Graff - an appellate arbitration will increase costs for the parties and entail at least some delay. Usually arbitration is chosen to minimize costs and delay. I struggle to envision a situation, other than one party's or maybe both parties' unhappiness with the award where an appeal would add value, and if both parties were unhappy, why would they think an appeal would improve the situation?

Posted by Micalyn S. Harris | February 9, 2016 11:12 PM

As a neutral with AAA, an architect, and arbitrator for over 10 years involving construction disputes, I enjoyed reading the comments made by fellow arbitrators, but appellate arbitration has never been mentioned in any of the cases in which I have been involved. I hope the rules keep the process inexpensive, less time consuming and equitable.

Posted by Robert E. Barras | February 10, 2016 9:57 AM

I view the Appellate Rules as an option available to the parties. My mantra has been "are you seeking vindication or finality?" Vindication will increase the cost of the proceeding but I guess it is the clients decision since it is their pocket book that would pay for vindication, assuming they are successful.

Posted by Stanley Sklar | February 10, 2016 10:00 AM

On another point - Will the appellate panel review the award from the legal point of view? What if the arbitrator did not have to and did not follow the law? What if the arbitrator is an engineer, an accountant, or a businessman? This thing about appellate review only serves to convert an arbitration into a court-like proceeding; something that should be avoided.

Posted by Jose C Ortiz | February 10, 2016 10:14 AM

In response to Micalyn Harris, the appellate rules require that the initial award contain reasons so that the appellate tribunal will understand the motivation for the award. An appeal allows for review of errors of law that is not available in a judicial challenge.

Posted by Steven Skulnik | February 10, 2016 10:33 AM

Certainly a layer of appellate review will in many cases add delay and expense to arbitration. But if the parties' interests, at least prospectively, are in having the ultimate award be "right" -- in reasonable conformity with the law and facts -- they should be allowed to trade a little expedition and economy for enhanced assurance of correctness. It does seem that allowing appellate review of factual findings, even under the "clearly erroneous" principle (as the AAA appellate rules provide), may in some cases invite what amounts to de novo factfinding, albeit on a paper record. But, again, if that's what the parties want, why shouldn't they have it? Overall, the availability of appellate arbitration should enhance confidence in the arbitration process, especially among well-healed corporate disputants who have or anticipate big-ticket or legally complex disputes.

Posted by Tim Russell | February 10, 2016 12:36 PM

Thanks to all for the follow-ups to my question to Mr. Arrington and Mr. Ortiz's response. I'm troubled by the reference to "errors of law (not amenable to) judicial challenge." There's long been discussion about decisions made in "manifest disregard of the law" and requirements about the applicable law having been articulated to the panel. "Errors of law" seems a much lower standard than "manifest disregard" and seems to omit a requirement that the applicable law be presented to the panel. The lower standard really does appear to give the losing party two bites of the apple.
If the parties have, by contract and agreement, decided they want an appellate review and have indicated scope and relevant standards of review either specifically or by reference to applicable rules, unless there are other problems, parties are entitled to have their contract enforced, whether or not, in the view of others, the value of the appellate review is nil.
If parties are asking for appellate review, a key question is whether we, as arbitrators, are comfortable that the current rules provide sufficient guidance as to the appropriate standards for review. I gather Mr. Arrington was. Others' experience?

Posted by Micalyn S. Harris | February 10, 2016 3:47 PM

Having experienced an arbitrator that totally disregarded applicable law resulting in devastating financial consequences, I am a firm believer in an appellate review process in limited circumstances. It certainly is not for 95% of arbitration proceedings, but where the potential consequences can mean the survival of one of the parties, there should be an opportunity for limited review. Certainly it must be by agreement of the parties, and can be limited to certain dollar thresholds with review of the application of law only, not a re-determination of facts. Lastly, the makeup of an appellate panel (I support three member panel) should include two attorneys experienced in the field of law that is the subject of the appeal.

Posted by Tarrant Lomax | February 10, 2016 5:59 PM

I echo Terry Lomax's thoughts and his experience. This could be very attractive for very big dollar arbitrations or for bet-the-company arbitrations. It also could be attractive in case where the contract provided for a sole arbitrator but the parties, after the arbitration has been filed, have second thoughts about the chosen arbitrator.

Posted by Joe McManus | February 11, 2016 4:41 PM

The appellate process may provide an outlet for those parties that dislike an award and wish to finance a second opinion. However, any party that anticipates an appeal will need a court reporter for all hearings or be faced with the inability to perfect an appellate record. I think that the AAA appellate rules are sound.

My experience has been that lawyers new to arbitration are very unhappy when they lose a case and learn of the limited appeal available for arbitration awards. Their dismay will not be ameliorated since they will likely not have negotiated an appellate clause. But the AAA is to be commended for providing the option.

Posted by Federico C. Alvarez | February 23, 2016 1:35 PM

February 16, 2016: Proposed Legislation in New York to Amend State Arbitration Statute - What are your thoughts?

In an article published in the New York Law Journal dated February 8, 2016 (Proposed Legislation Undermines Business to Business Arbitration), Neal Eiseman wrote about proposed legislation in the New York State Legislature to amend New York's Arbitration Statute, CPLR §7500:

(i) to require the New York State Attorney General to become involved in all arbitrations; (ii) to require an arbitrator's award to include findings of fact and conclusions of law; and (iii) to add a new statutory ground permitting the courts to vacate arbitration awards when the arbitrator evidences a "manifest disregard of the law."

Please provide your thoughts/comments below about the proposed legislation.

I am not comfortable with such a broad phrase as "manifest disregard of the law". Every attorney who strongly disagreed with my reasoning and conclusion could claim the same. What evidence does a reviewing court use to analyze such a test? I agree some review process is warranted, but only if constitutional rights are violated, privileges ignored, or if the decision was one that no reasonable arbitrator could make under the facts and circumstances of the case.

Posted by Michael Orfield | February 16, 2016 1:39 PM

The proposed legislation should be limited to consumer arbitrations in order to ensure that unsophisticated litigants are provided due process and fairness.

To the extent the proposed legislation applies to business to business arbitrations, it represents an impermissible governmental intrusion in contractual agreements negotiated ate arms length.

Posted by PERRY DEAN FREEDMAN | February 16, 2016 1:39 PM

The proposed legislation flies in the face of the very meaning and intent of arbitration. I can imagine a scenario where the wealthy loser drags out the result to force a settlement on the poorer loser who needs the money.
Arbitration awards are supposed to be final. The parties who agree to arbitration know this and buy into it.
Arbitration is supposed to be a quick process and parties to an arbitration have a right to expect this.
I can accept a change when it comes to consumer decisions because the contracts are usually of the adhesion type.
Having said that, the law is not broken and there is no need to fix it.

Posted by Barbara A. Res | February 16, 2016 2:10 PM

As a commercial and construction arbitrator for 35 years, I think this legislation would the number of person who would want to be arbitrators and reduce one beneficial reason for arbitration - privacy. I agree with a prior comment that any governmental action which would impact contractual agreements would be wrong. Since I don't generally do consumer arbitration, I have no comment on the effect of that area of arbitration.

Posted by David Grow | February 16, 2016 2:17 PM

A mandate for arbitrators of all commercial disputes in New York to include findings of fact and law in their awards would greatly increase the overall cost and complexity of the average New York business arbitration and remove the legal right, and the reasonable discretion, of business people to make their own intelligent decisions to arbitrate without such requirements. The proposed legislation, if passed into law, would negate fundamental rights provided under the AAA Rules, including the very sensible right of parties to commonly utilize Standard Awards. In sum, if it ain't broke, don't fix it.

Posted by Jonathan T.K. Cohen | February 16, 2016 2:34 PM

I am a AAA arbitrator. If New York passes "manifest disregard of the law" other states will follow their lead, and totally upend the purpose of arbitration, which is to give a finite end , and provide an efficient and less costly end to the conflict, absent a procedural mistake of the arbitrator. That would be a major blow to arbitration as a method of conflict resolution.

There is little chance of a decision in a consumer arbitration case, having an issue of law. The issue is whether the conflict should be covered by an arbitration agreement.

I would strongly oppose this legislation. It will have a ripple effect across the country. If two businesses don't want arbitration, then don't enter into the contract.

Posted by marietta shipley | February 16, 2016 2:56 PM

It defeats the purpose of arbitration, that is, a final resolution of the dispute.

Posted by Mike Renda | February 16, 2016 5:44 PM

i)-is typical government overreach. It could only be justified in consumer matters.

(ii)-I have no problem with this except it is unnecessary and over burdensome. Most Arbitrations are simple. If the parties think this is needed, all they have to do is ask.

(iii)- This is fine and is found in many arbitration statutes.

- Anonymous

Posted by Jeff Zaino | February 16, 2016 6:45 PM

Requiring the NYS Attorney General to become involved in all arbitrations at a minimum will involve delay and would be burdensome to both the Attorney General and the parties.

Requiring an arbitrator to include findings of fact and conclusions of law will involve delaying the decision and additional costs. Where parties want findings of fact and conclusions of law, they can so provide.

Permitting the courts to vacate an arbitration award "when the arbitrator evidences a manifest disregard of the law" will, again, eliminate finality, possibly eliminate privacy, increase costs and potentially delay the final decision. It will make arbitration more like litigation – more expensive and time-consuming. It is likely to defeat major advantages of arbitration, as listed in comments above. It will raise questions about the enforceability of arbitration agreements in accordance with their terms. It may also raise questions regarding the priority of the Federal Arbitration Act and obligations under the New York Convention and other international conventions relating to cross-border arrangements for arbitration. Even in consumer matters, it is not clear that requiring parties to go to court would improve the consumers' situation.

Requiring arbitration has been linked with banning participation in class actions. If the real problem is consumer contracts that prohibit class actions, the proposed legislation, while making arbitration more expensive, difficult and time-consuming, will not solve the problem.

Posted by Micalyn S. Harris | February 17, 2016 12:27 AM

The proposals appear intended to gut the arbitration process by making it protracted, very expensive and yielding only an unreliable result. I would oppose it in its entirety, although the legislative activity is best left to those who reside there.

Posted by Federico C. Alvarez | February 23, 2016 1:05 PM

February 22, 2016: Preliminary Hearings - What are your thoughts?

Should an arbitration preliminary hearing allow for parties' presentations of substantive arguments? *Please provide your thoughts/comments below.*

I have participated in many preliminary hearings where the parties make substantive arguments. The only benefit is to lay the foundation for discussion of discovery needs by each side, which is one of the main purposes of the hearing. Other than opening the door to such a discussion, I do not find that a merits discussion is time worthy during the preliminary hearing.

Posted by Mark Bunim | February 23, 2016 9:28 AM

I think a brief statement of position is valuable. Actual argument is not helpful at that stage, although if a party wants to file a dispositive motion early in the case, it can be helpful if that party tells the arbitrator why.

Posted by Robert L. Arrington | February 23, 2016 9:37 AM

I support the idea of substantive statements during preliminary conferences because they help inform the arbitrators as to the major issues at hand.

Posted by Susan Richmond | February 23, 2016 10:15 AM

I do ask the parties to discuss the merits of their claims during a preliminary hearing. I do not necessarily invite substantive "arguments," but rather discussion. Often all I have at the preliminary hearing is a bare bones demand and, seomtimes, no written response, so a merits discussion is of great benefits. It does set the backdrop for discovery issues later and can help identify whether there is a gateway issue that may be dispositive of the matter or narrow the issues.

Posted by Jessica Block | February 23, 2016 10:16 AM

This could be an effective way to accelerate a focus on and a narrowing of the issues. However, a process would have to be in place to put both parties on a level playing field. Among other things, a party wishing to argue a substantive issue at the preliminary hearing would have to notify the AAA and the other party of the issue that it wishes to raise, the AAA would have to notify the arbitrator, and the arbitrator would have to establish a briefing schedule. There's no point hearing oral argument in a vacuum. The downside, of course, is that the preliminary hearing would be delayed and the parties would incur additional costs. On the other hand, an order can be issued on a dispositive issue, thereby saving both parties the time and cost that otherwise would have been spent in arbitrating the issue. Even if the issue is not dispositive or the arbitrator determines that an order would be premature or otherwise ill-advised, both parties and the arbitrator would have a better understanding of the parties' respective positions and that ultimately could narrow the focus of the arbitration on areas that are truly in dispute. That, in turn, would ultimately result in cost-savings to both parties.

Posted by Anonymous | February 23, 2016 10:22 AM

For me, the preliminary hearing is an opportunity to get an overview of the case from all sides, then fashion an order that will assist the parties in discovery, motions, the time leading up to the hearing, and the hearing itself. By substantive arguments I am assuming you mean arguments that would lead to some kind of decision by the arbitrator at the preliminary hearing. To the extent that I can make a decision on a issue, and both parties agree to discuss the issue and have me make a decision, I will do so. That said, it is far more likely that the parties will bring an issue to my attention, and I will set an early law and motion hearing date.

Posted by Michael Orfield | February 23, 2016 10:23 AM

I endorse summary presentations of the substantive arguments at the initial conference. This helps the arbitrator start thinking about the discovery needs in the case and what the key issues will be.

Posted by John Shope | February 23, 2016 10:35 AM

Since leaving the federal bench in 2006 I have conducted numerous preliminary conferences as chair and participated in many as a wing arbitrator.

Never have the parties made substantive arguments.
I read the pleadings and send out a detailed agenda which I ask counsel to jointly respond to before the preliminary hearing.
We focus on the agenda and the schedule for document exchange and discovery schedule.
To the extent merits issues come up at all they are part of the discussion as to what discovery is needed.

Posted by Judge Bassler | February 23, 2016 10:44 AM

I think the purpose of an arbitration preliminary hearing is to assist the parties and the arbitrator(s) in managing the case to arrive at a fair and efficient resolution of the dispute. So yes, allowing the parties to present brief oral arguments of the substantial issues can help frame reasonable discovery, determine what (if any) motions/briefs would be helpful, and proper scheduling of the evidentiary hearings. Although, it would require parties to come prepared for the preliminary hearing, and in my experience most are.

Posted by Denise Presley | February 23, 2016 11:02 AM

Well, it depends. If I need clarification of the basic issues, I would ask for that in writing in the form of a more complete statement of claims and responses/counterclaims. I do not typically ask for oral presentation at the preliminary hearing. I think it can be counterproductive to the business at hand, which is setting the tone and moving the matter along expeditiously. I believe there is enough to accomplish at the preliminary hearing without adding to it merit-presentations

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Posted by Jim Purcell | February 23, 2016 11:21 AM

My experience, in over 100 commercial cases mediated, is that in a mediation opening statements are often (usually) counterproductive. The claimant/plaintiff always wants them, but expecially if there is a degree of emotion in the case, it tends to inflame the situation. In my more than 80 commercial arbitrations, it's 50-50 whether it's a positive step. It does frame the factual/legal setting. It's one more issue for the good litigator to deal with.

Posted by Jim Rhodes | February 23, 2016 11:30 AM

For my own benefit, I permit minimal discussion of substantive issues of the case. I cut off extensive arguments of issues to be decided after the hearing. I do however benefit from some minimal knowledge as to what issues will be involved in the case for purposes of discovery and preparation as well as scheduling.

Posted by James E. Rafferty | February 23, 2016 11:32 AM

As others have said, in different ways, covering substantive arguments during a preliminary hearing has many benefits. It also gives the parties the opportunity to narrow issues, stipulate to facts and explore settlement possibilities.

Posted by Eli Uncyk | February 23, 2016 11:37 AM

In my view, discussion of the merits at a preliminary hearing, as distinguished from "argument," is helpful for the limited purpose of setting the schedule, particularly in matters in which it is appropriate to identify threshold issues.

Posted by Judge James Eyler (Ret) | February 23, 2016 11:41 AM

I usually ask counsel to describe in a "nutshell " the basis for the claim or defense and the basis for the amounts being sought. I caution that I am not inviting full-scale argument and that counsel will have that opportunity at an appropriate time. This brief overview enables me to better deal with discovery and scheduling issues.

Posted by Judge Gerald Harris | February 23, 2016 12:28 PM

The parties need to confirm the claims or issues on which they have disputes, so this could be characterized as a substantive discussion. This discussion helps determine the length of the hearing, and whether dispositive motions may be of value. Otherwise, any party can deflect any substantive argument by claiming that discovery or research needs to be had. So argument will have little value.

Posted by Federico C. Alvarez | February 23, 2016 12:59 PM

It is not my practice to entertain presentations of substantive arguments at the preliminary hearing. But it is helpful to invite at that time a cogent identification of the merits issues – whether factual or legal. That identification may inform the procedural framework and scheduling of the course of the entire arbitration, including discovery, scope, and timing.

Posted by Chief Justice Norman Veasey | February 23, 2016 1:43 PM

Unless they are necessary for the resolution of an issue needed to be attended to during the preliminary teleconference, whatever can be said during a telephone conference would be better said in simultaneous written prehearing statements.

If the arbitrator needs, at this early stage, an illustration of what the case is about, he can ask for more definitive statements of claims and defenses.

Lawyers always feel compelled to respond to the other party's arguments and can easily disrupt the true purpose of the preliminary teleconference; planning the course of the arbitration.

Posted by Jose W. Cartagena | February 23, 2016 2:34 PM

The earlier the merits can be fleshed out, the more effective the tribunal can be in managing the process. The preliminary hearing is often the first opportunity for the tribunal to learn what the essence of the dispute is. Hearing from counsel is crucial.

Posted by Steven Skulnik | February 23, 2016 5:06 PM

I don't recall any substantive arguments in over 45 preliminary hearings I have handled. Almost always the parties have already filed a detailed statement of claim and an answering statement with defenses and a counterclaim, if applicable. I will however remain flexible in scheduling the final hearing and discovery deadlines, and if a discussion of the issues helps scheduling,then of course a discussion of the issues should be done.

Posted by Jim Bowdish | February 26, 2016 9:25 AM

Substantive arguments, no. But there is nothing wrong with the parties presenting a summary of their cases. The attorneys want to "educate" the Arbitrators, and we should be willing and happy to be educated. The better we understand the positions of each of the parties, the better position we will be in to discuss scheduling and discovery issues, and to assess whether a substantive motion should even be contemplated. This is not the time for briefs or arguments, but it is an opportunity to gain as much understanding as possible of the pivotal issues in the case.

Posted by Richard Dunlap | February 29, 2016 11:50 PM

March 14, 2016: Motion for Reconsideration - What are your thoughts?

What are your thoughts about an ADR clause that allows any party to file a motion for reconsideration after the arbitrator delivers a written opinion setting forth findings of facts and conclusions of law with rationale? Compare/contrast against institutional appellate procedures. Please provide your comments/thoughts below.

If the parties agree to it, I guess it is OK but this is largely a waste of time and money

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Posted by Paul Peter Nicolai | March 14, 2016 1:50 PM

My main reservation is making sure the arbitrator is not functus officio while reconsidering.

Otherwise, I've no problem with it so long as the parties realize they are trading increased expenses for the ability to have post-award review.

Posted by Robert L. Arrington | March 14, 2016 1:52 PM

I think that it make sense although there is a different standard for review in arbitration from that for reconsideration in most court rules.

Posted by Sheryl Mintz Goski | March 14, 2016 1:57 PM

Largely a waste of time; particularly when we're trying to have a speedier resolution of disputes. Now if there's something obviously wrong, of course. Clear error. But not to reargue.

Posted by Jim Purcell | March 14, 2016 1:58 PM

Generally, I think motions for reconsideration are a waste of time and resources. However, I'd be very interested to see some empirical data on the number of cases where outcomes were changed as a result of these motions.

Posted by Denise Presley | March 14, 2016 1:59 PM

This clause would clearly be at odds with institutional rules. Rule R-50 of the Commercial Arbitration Rules and Mediation Procedures for the American Arbitration Association, for example, limits post-award applications to the arbitrator(s) to correct "clerical, typographical, or computational errors in the award." The arbitrator(s) may not redetermine the merits of any claim already decided.

That said, because arbitration is the "parties' process," the ADR clause posited would trump the procedural rules. Whether a clause like this would produce better awards remains to be seen.

Posted by Steven Skulnik | March 14, 2016 2:05 PM

Interesting. I did a two part series in Alternatives by CPR last year on arbitration appeals.
My concern is that we are often trying to justify arbitration as a more efficient and cost effective process but we keep expanding it to parallel court litigation.

It might also matter if it is single arbitrator or a panel as well as context. As a general proposition it does not sound positive to me.

Posted by roger jacobs | March 14, 2016 2:06 PM

Where the award is a formal findings of fact and conclusions of law, it is not a bad idea so long as the time frames for the motion, opposition and decision are short and established. However, it does go against arbitration as an expeditious method of resolution since it would continue to delay confirmation of an award.

That said, I have found that motions for reconsideration - pointing out deficiencies or errors in the ruling - only serve to allow the court/arbitrator to correct those deficiencies and further solidify the original decision. Rarely, if ever, does the "court" reverse itself.

The only time that it seems to work in favor of the losing party is at the appellate level when there is en banc review of a three-judge decision. Occasionally, the en banc panel will reverse the three-judge panel.

Just my two cents worth.

Posted by Tarrant Lomax | March 14, 2016 2:18 PM

I see no great harm if there is a very limited time window (e.g. 10 days), and a significant potential benefit in cases involving a single arbitrator, who conceivably can simply miss something.

However, since such motions should rarely be granted, and can cause undue delay and expense to the prevailing party, I suggest that the arbitrator advise the parties that the prevailing party need not respond to such a motion unless it is requested to do so.

Posted by George Graff | March 14, 2016 2:22 PM

I have no opposition to deciding a motion for reconsideration. As you know, the standard to prevail is difficult to meet. The movant is required to state with specificity the basis on which the application is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

When there are multiple and complex procedural and substantive legal issues before the arbitrator, on occasion revisiting an issue may be prudent.

Posted by Linda Feinberg | March 14, 2016 2:23 PM

Terrific concept. Of course it means that almost every major arbitration will have additional motion practice, but arbitrators can miss something relevant, and it can be made much faster and cheaper than such a motion (and certainly a subsequent appeal) in litigation. It also provides a good opportunity for mediation.

Posted by Richard Lutringer | March 14, 2016 2:30 PM

I think it is safer to use the procedure of a tentative award, giving the parties a chance to comment before issuance of the final award. That way they have an opportunity to point out clerical errors, issues you may have missed and need to decide, etc.
The courts use this process and I have used it successfully and smoothly in arbitration.
I have done it without an ADR clause allowing it. This is a topic that we discuss at the preliminary conference, and do if there is agreement. The tentative decision procedure is then incorporated in the scheduling order.

Posted by Suzanne Nusbaum | March 14, 2016 2:36 PM

As a non-attorney I would have to refer such a motion to the case manager regarding a single arbitrator case.

Posted by Robert E. Barras | March 14, 2016 2:45 PM

As a federal judge I found motions to reconsider a total waste of time. My law clerk and I devoted substantial time to get it right the first time.
Of course arbitration doesn't have the safety valve (usually) of an appeal process.

Nevertheless, With arbitration's theme being efficiency and expedition,I feel even stronger that reconsideration motions have no place in arbitration.

That having been said, I recognize that arbitration is a matter of contract and respect the parties' autonomy to provide for the procedure.

Judge Bassler.

Posted by Hon William G. Bassler | March 14, 2016 3:25 PM

My thought is that a motion for reconsideration is a waste of time provided that the ruling or award is based on a correct reading of the law and governed by the facts.

Posted by Joseph Cox | March 14, 2016 3:26 PM

Depending to some extent on what's already included in a contractual arbitration clause, I tell the parties that the arbitration belongs to them, and whatever they agree on in the way of procedures (subject to such things as FAA limits on judicial review) will generally be OK. If a provision for reconsideration is agreed to, or a provision for appellate review, then fine -- it may be that in some cases the availability of such mechanisms enhances their confidence in the process and the result, despite (or because of)the extra layer of time and expense. I don't think that arbitrators have any responsibility to maximize efficiency or simplicity, to minimize expense, or to impose any particular "model" of arbitration procedure where the parties both want something different.

Posted by Tim Russell | March 14, 2016 3:51 PM

I think that motions for reconsideration are generally a waste of time. Substantial errors of law can be address by the parties at the time the successful party seeks to confirm the arbitration decision. The process is already bogged down with discovery requests and requests for adjournment. I think the current system generally works well and it wouldn't make sense to make arbitration another parallel court system.

Posted by David Grow | March 14, 2016 5:27 PM

I think that motions for reconsideration are a waste of time. If there is a clerical error the rules already provide a way to correct that. However, I do am intrigued by the idea of a tentative award. I am not sure how that would work. Would the hearing remain open ? Would the time to make the award be extended? Would a tentative award just be something in the discretion of the arbitrator or a usual practice?

Norm Rosen

Posted by Norman Rosen | March 14, 2016 5:37 PM

March 20, 2016: Not following the arbitration agreement - What are your thoughts?

When parties have a detailed and specific arbitration agreement, under what circumstances, if any, can the arbitrator deviate from that agreement? Please post your thoughts/comments below.

Follow the agreement unless the parties agree to a change.

Posted by James W. Durham | March 21, 2016 10:03 AM

My take is "not very often if at all." The Arbitrator is a creation of the parties' arbitration agreement, and an Arbitrator who ignores or disregards the arbitration agreement runs the risk of the award being vacated for "exceeding authority." In my opinion, the better practice is to decline serving in the first place.

This situation is different from a stipulated or consent award that an Arbitrator believes is unfair. In such instances, the Code of Ethics permits the Arbitrator to refuse to sign it. Canon V(D) states: "In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement."

Posted by George Friedman | March 21, 2016 10:04 AM

The only way is for the parties to agree to modify the arbitration agreement. This requires the actual sign-off of the parties as well as counsel.

Posted by Robert L. Arrington | March 21, 2016 10:08 AM

Robert has said it perfectly.

Posted by Jim Reiman | March 21, 2016 10:16 AM

I have seen arbitration provisions that are so one-sided that their enforcement would make any award vulnerable to vacatur under the FAA. In those circumstances, I have facilitated a discussion with counsel explaining my concern about the provision and obtained consent to waive the offending provision. However, for example, where only one side is entitled to discovery, I

do think that the arbitrator granting discovery to the other side to ensure a fair proceeding would be unlikely to be challengeable under the FAA.

Posted by Lisa Renee Pomerantz | March 21, 2016 10:36 AM

I had this issue come up recently in a case where I was one of the arbitrators. The arbitration agreement was very specific in stating that any award must be based upon the law of the state named in the arbitration agreement. The panel thus had to consider whether any award might be subject to vacatur based upon a manifest disregard of the law if state law were not applied as required. In this regard, you might take a look at my recent article on whether manifest disregard has survived the Supreme Court decision in Hall Street Associated v. Mattel as a ground for vacating an award under the FAA. It may be found on my firm's website at www.pendercoward.com.

Posted by Jack Rephan | March 21, 2016 10:43 AM

The arbitrator's authority is created by the parties' contract. The first thing the arbitrator does is determine the plain meaning of the parties' contract. Any questions about the meaning of the parties' arbitration contract should be addressed at the beginning of the arbitration process. Any changes to the parties' arbitration contract should be agreed in writing by the parties.

Posted by John Allen Chalk | March 21, 2016 10:45 AM

If the agreement as written presents issues that I think might hinder the efficiency of the process or otherwise unnecessarily complicate things, I would encourage the parties to discuss those provisions and try to reach agreement to modify the agreement. In some situations, I might suggest specific changes, depending upon the particular provisions that have caused me to be concerned. Because arbitration is a creature of contract, if the parties choose not to agree upon any changes, I would follow the agreement as written.

Posted by Stanley Eleff | March 21, 2016 10:54 AM

Under no circumstance should an arbitrator stray beyond the bounds of the parties' agreement.

Posted by Anonymous | March 21, 2016 11:01 AM

Arbitrators have both explicit and implicit power to pass on their own jurisdiction. If one of the parties asserts that enforcement of an arbitral provision (or a part thereof) would be unconscionable (or otherwise illegal),an arbitrator should rule on that challenge, much as a court would if the challenge were properly before it. The arbitrator's determination would, in my view, be within the scope of arbitral authority, and hence reviewable only on a "manifest disregard" basis.

Posted by Nicholas R. Weiskopf | March 21, 2016 11:02 AM

Sounds like we are in violent agreement. You don't vary from the agreement without the written agreement of all parties. Arbitration itself is based on consensual agreement. Pretty fundamental.

Posted by Jim Purcell | March 21, 2016 11:16 AM

One of the benefits of choosing arbitration over litigation is that the parties can specify how they want to settle their disputes. Arbitration is a creature of contract, as it is often said, and deviating from the agreement in the contract should not be encouraged or allowed. However, so often we see arbitration clauses that were carelessly drafted (such as those simply copied from another contract) especially with parties that are not familiar with the process. In those instances, we should encourage the Arbitrator to bring those issues to the parties and solicit their agreement to change those problematic provisions. This would indeed be beneficial to the process - not a unilateral change by the Arbitrator without the parties agreement.

Posted by Mia Levi | March 21, 2016 11:26 AM

There is no "one size fits all" answer to this question, and the arbitrator must look first to which law governs the arbitration, and then to the nature of the proposed deviation. For example, if New York law governs (which conforms to that of many other jurisdictions), then the question is whether the deviation falls within or without the jurisdiction-conferring language of the agreement to arbitrate. The rule of thumb as I understand it is that if the very arbitration clause itself contains or incorporates rules or restrictions on the arbitrator's conduct of the arbitration or the award, any material deviation, not consented to or waived by all parties, may imperil the award. But if the rule or restriction is to be found elsewhere in the agreement it then goes to mere procedure or performance aspects of the agreement, which can entail considerations such as waiver, estoppel, breach, materiality, etc., respecting which an arbitrator has far greater leeway to "construe" without fear of impugning his or her award. See, e.g., Ostberg v Litric 2011 NY Slip Op 00283 (App Div 1st Dept)(failure to submit a dispute with time limited in contract is mere procedural requirement and does not go to arbitral jurisdiction or efficacy of award).

Posted by Woody Mazur | March 21, 2016 2:55 PM

I think Mia stated it correctly in my judgment. I would not want to deviate at all as a matter of first principles; if there was something patently wrong or unfair with the contract such that an award or even the proceedings may not withstand judicial scutiny, I would get both counsel and parties together to discuss the issue and that they may be wasting $.

Posted by Richard Levin | March 22, 2016 10:20 AM

March 28, 2016: Right to Challenge a Party Appointed Arbitrator

What are your thought?

Does a party have the right to challenge a party appointed arbitrator for conflicts? What should be the standards, if any, for removal? Are the standards different than those for challenging arbitrators appointed by an arbitral institution? Please provide your thoughts/comments below.

Under the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee consisting of special committees of the American Arbitration Association and the American Bar Association, the standards are the same in most cases. Party-appointed arbitrators must observe all of the disclosure obligations required of arbitrators appointed by other methods unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

Party-appointed neutral arbitrators may be challenged or required to withdraw based on conflict of interest on the same basis as any other neutral arbitrator. Party-appointed arbitrators serving as a non-neutrals (principally in reinsurance disputes), however, are generally not subject to challenge only by the party that did not appoint them.

Posted by Steven Skulnik | March 28, 2016 4:33 PM

I believe there is some case law on this question.

Anyway, my understanding is that a party has no right to challenge the other side's party-appointed arbitrator unless that arbitrator is violating (or has violated) the limited ethical standards applicable to a party-appointed arbitrator.

Posted by Peter Collisson | March 28, 2016 4:55 PM

Certainly the standards are different. A personal relationship between a party and an arbitrator would be the basis for a challenge; not so if the arbitrator is party-appointed. I believe there would be a basis for challenge if the party-appointed arbitrator had previously stood in a relationship of trust with the non-appointing party such as having acted as his attorney.

Posted by Judge Gerald Harris | March 28, 2016 5:11 PM

All arbitrators are required to be independent, and either party should be free to challenge any member of the panel on independence grounds.

Posted by George Davidson | March 28, 2016 5:25 PM

All arbitrators, including party appointed ones, should be neutral and for removal or conflicts purposes should be judged by the same standards. Arbitrator partiality is cause for award challenge.

Posted by Jose W Cartagena | March 28, 2016 5:39 PM

In the first place, I don't like the idea of party-appointed arbitrators, since the chance of their being not neutral is high to begin with. If one party discovers something previously undisclosed about the other party's appointed arbitrator that they think would get in the way of her being fair, then they should at least get it out in the open. But if it was the association that made the appointment with the assumption based on disclosed background that the person would be neutral and later it became clear that that assumption was challenged, then while it may not be possible within the rules to disqualify the arbitrator, at the very least the issue should be put on the record.

Posted by Raoul Drapeau | March 28, 2016 6:34 PM

For starters, AAA Commercial Rule, 18 (b), states:

"The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence."

Otherwise, Rule 18 makes it clear that "any arbitrator" is subject to disqualification by reason of lack of impartiality or lack of independence.

And so it should be. For the sake of the process as well as the sake of the parties in any individual case, the process must demand impartiality and independence of all arbitrators unless the parties have expressly agreed to waive it in the case of party-appointees.

One question of possible interest to our bloggers is when any such objection must be raised or possibly be deemed waived. If the indicia of partiality and lack of independence are clearly apparent from the disclosures (e.g.,a revelation that the party-appointed arbitrator is the largest shareholder in the respondent company) then the objection very arguably cannot await the adverse award and still be timely -- it will likely be held to have been waived, to the possible exclusion of a claim of actual fraud or misconduct on the part of the arbitrator; conversely, if the evidence of lack of impartiality and independence comes out only after the hearings commence, then it is a trickier path to determine timeliness as well as the proper procedural remedy, as it becomes more arguable--though not certain-- that the objection can or must await the award and is limited to a motion to vacate.

One personal experience:

Long ago, I was an adversary in an out of town matter before three neutral arbitrators, one of whom, at the first hearing, walked in and virtually embraced my local adversary, and spoke of their many mutual friends and interests in front of me and the other two panelists. During hearing number one he made several comments that were unfriendly to my client's position and, though not the chair, took an active and unbalanced role in the questioning of the first one or two witnesses. The record also showed he more or less cowed the other panelists.

Before the next scheduled hearing, I moved in state court to dismiss not only the hostile arbitrator, but the entire panel on the ground that the demonstration of bias was evident, and that his potential influence on the rest of the panel was sufficient to infect the entire proceeding. The court was convinced that to await an award, and a motion to vacate, might be futile and would be wasteful. it granted the relief requested and vacated the panel.

The case settled shortly thereafter.

Even though we never reached the question of whether holding fire would have constituted a waiver, I have held the view ever since that objections based on arbitrator partiality or lack of independence should be lodged as soon as practicable. What is "as soon as practicable," however, I acknowledge may present the advocate with some slippery slopes to negotiate, and can in some cases be fraught with competing concerns, including the possible creation of ill will in the 'other' arbitrators, by making what they may think is an ill-founded attack on a brother or sister panelist, or risking a court ruling of prematurity that could imperil what might have ultimately been a good motion to vacate an award.

No one said life's easy. Just interesting. And I'd be interested to hear from others on the subject.

Posted by Woody Mazur | March 28, 2016 7:45 PM

I agree with Raoul's skepticism as to party-appointed arbitrators who frequently morph into second-tier advocates for their appointers. (Recently saw this in a case in which I served as chair.) The AAA could probably do a better job of instilling confidence in its users as to the QUALITY and NEUTRALITY of its panel of arbitrators.

Posted by Charles Molineaux | March 28, 2016 8:40 PM

Under the AAA/ABA Code of Ethics for Arbitrators in Commercial Cases adopted in 1977 the party-appointed or party-nominated arbitrator is supposed to be neutral, even though chosen and paid for by a party, unless the parties agree in their arbitration agreement to go under Canon X and employ non-neutral party appointed arbitrators. Many counsels still don't understand this neutrality requirement and when they call on you to serve may want to share their hopes and concerns in a non-neutral way. You have to ask from the beginning am I to be a Canon X arbitrator or a neutral arbitrator, and you are likely to find out that counsel doesn't know, he will have to check. You should assume until further notice that you have to be and remain neutral. In an AAA arbitration arbitrator qualification and disqualification are determined and administered by the AAA under its rules, in an ad hoc arbitration if under New York arbitration law(chosen by the parties in their agreement)neutrality is required if the arbitrator is appointed as a neutral,and there is authority for the New York court to disqualify and remove the non-neutral arbitrator but this would be rare. Even rarer for a court to remove the arbitrator where the FAA applies (interstate commerce-related arbitration where the parties have not designated any state arbitration law as applicable). Under the FAA,where you are not under the Rules of any provider,such as AAA, counsel may have to wait for issuance of the award to attack it on grounds of bias or lack of impartiality. It is best if parties have written their arbitration clause so that it is clear that

(1)AAA rules apply and (2)the AAA is authorized to administer the arbitration, else there may be doubt as to how to challenge the biased arbitrator, whether in court or before the AAA. For a case of doubt, see Nachmani v. By Design, 74 AD3d 478 (1st Dep't 2010).

Posted by William J.T. Brown | March 28, 2016 8:40 PM

If parties have agreed to the procedure of each side choosing one arbitrator, and the chosen arbitrators selecting a third, the AAA Code of Ethics for Commercial Arbitrators calls the party-selected arbitrators "Canon X arbitrators." These arbitrators "may be predisposed towards the party who appointed them..." but must follow most of the other standards and guidelines applicable to neutrals. If parties choose this method, they should specifically refer to Canon X of the AAA Code, which can be found at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased.

Posted by Eli Uncyk | March 28, 2016 9:39 PM

April 10, 2016: Do depositions have a place in arbitration? What are your thoughts?

Do depositions have a place in arbitration? If the contract is silent with respect to depositions, should the arbitrator allow depositions over one party's objection? Please provide your comments/thoughts below?

As always, it depends on the case. In an employment case, there usually is cause for a limited number of depositions in order to assure procedural due process. In a commercial B@B case, most likely not. In an ICDR case, most often there is not deposition discovery. But under the Rules, the Arbitrator can, and must, use his or her discretion in tailoring the level of information exchange to fit the situation.

Posted by William H, Lemons | April 11, 2016 9:31 AM

Depositions should not be allowed when the contract is silent on depositions, and especially where a party objects. Depositions make the arbitration process more expensive, which is already un-affordable for many individuals with meritorious claims.

Posted by Denise Presley | April 11, 2016 9:32 AM

Yes, but only where necessary and then only in moderation. I do not favor a blanket rule against depositions in arbitration, because some cases are complex enough that a few days of depositions will help streamline the arbitration hearings. And it must be kept in mind that if the parties forgo depositions, and thereby have to use the arbitration hearing to probe a witness, the cost of doing so is greater than if done by deposition, because the parties are then incurring the additional cost of one or more arbitrators watching as this probing occurs. That said, even if depositions are appropriate for an arbitration, the number should be kept to a minimum, so that undue cost is not wasted there. If the parties want depositions, I like to limit the number to two each, with the caveat that, if after those depositions are conducted either party can seek permission to conduct another deposition on good cause shown. It's good to have the parties conduct the initial two each, before deciding if additional depositions are warranted. Usually the parties get the depositions "out of their system" with two each, and by that time, they also will have focused the need for any additional depositions. I have used this process often, and everyone seems to like it.

Posted by Rick Lowe | April 11, 2016 9:35 AM

It depends on the nature of the case. If the AAA Employment Rules apply, or if it is a large, complex commercial case, then the Arbitrator(s) must permit reasonable depositions in the first instance, and should in their discretion in the second. Otherwise, the Arbitrator should not allow depositions except to preserve testimony or other good cause shown.

Posted by Robert L. Arrington | April 11, 2016 9:43 AM

I am in favor of limited depositions in arbitration proceedings. I believe they can save hearing time and sharpen the issues when properly managed. I usually limit depositions to experts; those witnesses who are out of town; or any witness where the lawyers can convince me that our hearing time will be shortened if I allow the deposition. I also usually place time limitations on the deposition (e.g. 7 hours of deposition time).

Posted by Anonymously | April 11, 2016 9:43 AM

As a general approach depositions should be disfavored, especially in smaller arbitrations. However, if not expressly precluded by the agreement, the stakes warrant expanded discovery and the requesting party makes a compelling showing for the need, depositions which are strictly limited as to number and duration should be allowed so long as they do not unduly delay the proceeding. See Rule L-3(f).

Posted by Judge Gerald Harris | April 11, 2016 10:09 AM

Over the years some parties have avoided arbitration because the costs are in some instances equal to or exceed going to court. Any method to reduce the cost, without limiting the parties' ability to make presentations, should be avoided.

Depositions are extremely expensive. Unless there is a substantial showing of need, such as a witness who is not subject to subpoena, depositions should be avoided. Besides, you can adjust if the parties need to cross examine a witness after direct is complete.

Posted by Anonymously | April 11, 2016 10:18 AM

Unfortunately, many lawyers have not learned the art of examining a witness. This becomes painfully obvious in hearings on the merits, with some lawyers literally deposing the witness at the hearing. In the right case, limited depositions (both in number and in time)can actually save time and money, if managed correctly.

Posted by Rick Flake | April 11, 2016 10:35 AM

I agree with the posted comments supporting limited depositions in appropriate cases. I have been urging the use of witness declarations in most cases, but in some heavy commercial cases especially, a §30(b)(6) type deposition can make the entity's position more understandable to all, and in a employment case, a Claimant's deposition often is an occasion for the settlement of the case. Also, expert depositions often will condense the issues to be arbitrated and when combined with a prehearing "hot tub" of the experts, can also foster settlements.

It is sometimes difficult to convince attorneys that the time and expense of depositions works against their clients' interests, and some jointly insist on depositions. In these cases I ask for a joint statement to this effect and permit the depositions, with an understanding that the clients be informed that practice is over my objections. (It is their case, not mine.)

Posted by Judge William A. Dreier | April 11, 2016 10:57 AM

I believe that permitting in the appropriate case limited depositions (2 each party plus any expert witness - limited to 4hr is generally what I permit) can streamline the final hearing by reducing unnecessary cross examination of key witnesses and facilitate the exchange of information process.

Posted by Richard DeWitt | April 11, 2016 11:10 AM

I have allowed the parties to conduct one deposition each where necessary. A party's objection has no bearing on whether to permit use of this device aside from the merits of the objection. In proper circumstances I would allow the parties to conduct more, bearing in mind the goals of speed and economy that animate the arbitration process. The Commercial Rules do not bar depositions over objection.

Posted by Stanley Chinitz | April 11, 2016 11:11 AM

When conducting case management conferences, I am leery of deposition requests that: A) may delay the hearings; B) touch tangential witnesses who are otherwise available to testify; C) are not justified by express, cogent reasons; D) name too many deponents; and/or E) are disproportionate to the value of the case.

On a related topic, I am constantly surprised by counsel's limited use of deposition transcripts to impeach witnesses.

Posted by Patrick Westerkamp | April 11, 2016 12:45 PM

Over the objections of one of the parties, no, unless the party wanting to take the deposition demonstrates a very, very, clear need for the deposition. Certainly not for somebody who has had a part in the performance of the contract and who everybody knows what he did or not do. Also after the arbitrator warns the parties of the added expense and time delay in getting to the hearings.

Posted by Jose W. Cartagena | April 11, 2016 12:57 PM

I think a lot depends on the size of the case, whether the agreement mentions depositions or not, the apparent importance of the deposition, and reluctance of the other side to have that person deposed.
For really big cases with a lot at stake, both parties may have already addressed the matter. If not, I would want to keep the number of depositions to a handful.
If one side wants to depose a witness, say an employee of a company, and the executives of that firm don't want it to happen, then that would want me even more to have the person deposed.

Posted by Raoul Drapeau | April 11, 2016 1:55 PM

I agree depositions depend on the nature of the case. I usually limit both the number and the length. It requires a strong showing of need for me to approve depositions, but they can be very helpful in theright case.

Posted by Norman Rosen | April 11, 2016 7:25 PM

At the preliminary conference in commercial cases, I note to counsel that my general working assumption is that parties to the typical arbitration agreement agreed (consistent with principles of efficiency in dispute resolution) to forego the discovery vehicles of litigation (except to the extent provided by AAA Rules)and that no depositions will be permitted unless (a) all parties agree to the deposition; or (b) there are some compelling factors where the interests of justice would be served by the deposition (e.g., material witness too ill to travel to hearing).

Posted by Eric H Holtzman | April 11, 2016 9:25 PM

I believe depositions are important for expert witnesses, who usually have submitted their own reports on the matter at hand. Such reports need to be examined carefully, and this can be done most efficiently outside the hearing itself. This is also the least expensive way to elicit the expert's reasoning as compared to testimony at the hearing.

Posted by carl A. Goldman | April 12, 2016 1:05 PM

In a domestic case, for good cause shown. In an international case, probably never.

Posted by Steven Skulnik | April 12, 2016 9:36 PM

Except for one of the commentators, the opinions of the other respondents seem to incorporate the premise that the parties must be restrained in their zeal to conduct depositions, and that they must be saved from their own folly and their clients saved from their overzealous lawyers. I have tried cases for 45 years (and am now sitting by court order as a referee in New York with the "powers of the supreme court") and am still of the old-fashioned view that responsible lawyers ought to be given a great deal of freedom to chart their own course. If they all want to take depositions, and I don't sense any obvious abuse, I think it would be presumptuous, although permissible, for me as an arbitrator to refuse to authorize depositions. In my view, the arbitration process should, to the extent possible, accommodate the needs of the parties as represented by counsel. Unless I am convinced there is abuse, I hesitate to assume the role of the monitor of their relationship with their clients..

Posted by Mark C. Zauderer | April 14, 2016 3:42 PM

I believe strongly that depositions are an extremely helpful discovery tool. Certainly the number and duration are subject to discussion but the attorneys should be allowed the opportunity to have this option available. The objecting party must have a compelling reason for their objection. If it is a monetary concern, the requesting party may be asked to bare the cost.

Posted by scott link | April 25, 2016 11:02 AM

April 17, 2016: What does an arbitrator do when a contract is silent on arbitration costs? What are your thoughts?

When the contract is silent about costs, should the arbitrator treat attorneys' fees differently than other arbitration costs (e.g. arbitrator compensation, institutional fees)? *Please provide your comments/ thoughts below.*

The applicable lex arbitri may contain provisions that affect costs. The UNCITRAL Model Law and the laws of France, Switzerland, and the Federal Arbitration Act are silent on cost allocation. The English Arbitration Act 1996, on the other hand, contains relatively detailed provisions relating to the costs of arbitration, which apply unless the parties have agreed otherwise.

In New York, attorneys' fees are generally not recoverable in contract disputes unless authorized by agreement between the parties or by statute. Hooper Assocs., Ltd. v. AGS Computers, Inc., 548 N.E.2d 903, 904 (N.Y. 1989). Attorneys' fees are generally viewed as a "contract right," not an award of damages. Fairfield Lease Corp. v. Marsi Dress Corp., 303 N.Y.S.2d 179, 182 (N.Y. Civ. Ct. 1969). Moreover, Section 7513 of the New York Civil Practice and Law Rules states that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, NOT INCLUDING ATTORNEYS' FEES, incurred in the conduct of the arbitration, shall be paid as provided in the award" (emphasis added).

However, the Second Circuit has held that attorneys' fees can be allocated under the FAA, even where the parties choose New York as the seat of the arbitration, so long as the arbitration agreement at least implicitly encompasses that right (see PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996)). Moreover, the AAA Commercial Rules provide that the "award

of the arbitrator(s) may include … an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." AAA Commercial Rule R-47(d)(ii).

I hope this is helpful.

Posted by Steven Skulnik | April 17, 2016 9:31 PM

Generally attorney fees in court litigation are not allowed unless provided be statute or other contractual agreement. I would apply the same rules to an arbitration award where the arbitration agreement or controlling documents are silent on attorney fees.

Posted by Jim Durham | April 18, 2016 9:47 AM

Under AAA R-47(d) the arbitrator may apportion attorneys fees if all parties have requested such an award. Thus, if both sides have requested fees be awarded to the prevailing party, I think the arbitrator is free to engage in fee shifting unless the arbitration agreement prohibits it (i.e. it states that each side shall bear their own fees and costs).

Posted by Mark Bunim | April 18, 2016 9:51 AM

The Rules may also provide for attorneys fees.
I like to add to the arbitration clause that the "substantially" prevailing party is entitled to attorneys fees. I also provide that an an offer of settlement that is not accepted will be considered in determining "prevailing party". Offers of settlement by the claimant or respondent can be modeled on the British "Calderbank" line of cases.

Posted by Joe McManus | April 18, 2016 10:17 AM

In most of the cases I've handled, the arbitration agreement is silent on the matter of how attorneys fees should be allocated. In that case, I would simply write in the award that each side should bear their own attorney expenses. If on the other hand, the case is obviously frivolous, I'm inclined to require the loser to pay the other party's fees.

Posted by Raoul Drapeau | April 18, 2016 10:27 AM

Follow applicable law.

Posted by Paul Peter Nicolai | April 18, 2016 10:39 AM

I don't think there is a need to treat attorney's fees differently than other assessable costs. Assuming a non-AAA arbitration and absent a prohibition, normally arbitrators can grant that other relief as they deem equitable and if the other costs are to be assessed, there should be no need to treat attorney's fees differently.

Posted by Jose W Cartagena | April 18, 2016 10:59 AM

I would simply add that, under a significant number of discrimination, consumer and other statutes, award of attorney fees to a prevailing claimant is mandatory. If an arbitrator is so advised by the claimant representative, a failure to award attorney fees would probably constitute "manifest disregard."

Posted by Nicholas R. Weiskopf | April 18, 2016 12:39 PM

In Virginia, the rule normally followed in both the federal courts and the state courts,is that, absent a contract provision or a statute allowing an award of attorneys' fees, an arbitrator has no power to award attorneys' fees.

Posted by Jack Rephan | April 18, 2016 12:56 PM

Absent agreement by the parties, or a request by both parties to do so, I do not award attorney's fees. I can imagine a case so frivolous that I might want to award attorney's fees but I have never had such a case and I am not sure I have the power to do so.

Norm Rosen

Posted by Norman Rosen | April 18, 2016 6:35 PM

April 25, 2016: Responsibilities of the arbitrator in the event of a default. What are your thoughts?

What are the responsibilities of the arbitrator in the event of a default? How far should an arbitrator go to ensure due process and to protect the award? *Please post your comments/thoughts below.*

1. Make sure the defaulting party has every reasonable opportunity to cure the default.
2. Make sure the non-defaulting party proves its case to the Arbitrator's satisfaction.
3. Avoid becoming an advocate for the defaulting party.

Posted by Robert L. Arrington | April 25, 2016 10:53 AM

The responsibilities of an arbitrator event the default is to follow the requirements of the arbitration rules the proceeding is being conducted pursuant to. Most times, this means that notices must continue to be sent to a defaulting party and that the evidentiary hearing is conducted in the absence of the party but without any amendment to the burdens of proof and requirements necessary to support the award.

Posted by Paul Peter Nicolai | April 25, 2016 11:25 AM

It has been my practice to try to preserve the arbitration process, regardless of a default, or more usually, a failure of the Respondent to make payment of assessed fees.

First we must be sure that due process has been met, with ample notice, disclosures and opportunity to be heard. I usually strike affirmative claims, but permit all defenses. But in some cases, where there is real inability to pay or apparent blatant unfairness, I have even permitted affirmative claims.

(Recently, there was a case where the Respondent had fought questionable motions in Federal court and these costs had prevented the retention of a new attorney and payment of my estimated fees. I permitted the pro se party to present all claims, with my fees to abide the event.)

If this due process has been satisfied, I try to proceed in accordance with Commercial Rules 57 and 58, but if this fails, I will work for half pay, assessing the defaulting party in the Award.

When the defaulting party prevails, the fees can be taken from the damages, if there are any. But when there are none, I chalk it up the correct result on the merits, but a party having gotten away with gaming the system at my expense. Such cases are few and far between, and I can absorb the loss.

Posted by Judge William A. Dreier | April 25, 2016 11:25 AM

I think it depends on the reason for the default. If it's by Claimant, but due to some inaction by counsel, the demand for arbitration should be dismissed without prejudice. If the default is due to noncooperation by a party the arbitrator should require the non-defaulting party and the tribunal to provide written notice(s) to the defaulting party to ensure that they are provided every reasonable opportunity to participate in the process, and warning of the consequences of failing to cooperate- specifically, notice that the case will proceed without them. Then, the non-defaulting party should be permitted to present the case (or defend the demand). The arbitrator has an obligation to make a reasonable effort to test the veracity of the evidence being presented, but may draw adverse inferences as customarily provided for in applicable procedural rules. Any award on the merits of the pleadings and arguments presented, sans one party's participation, should be carefully reasoned and all attempts to afford the defaulting party every reasonable opportunity to oppose a potentially adverse award should be documented.

Posted by Denise Presley | April 25, 2016 11:49 AM

It's interesting that we go so out of our way to insure the "safety" of the defaulting party. Were this a court proceeding, judgment would be entered against the defaulting party with a hearing on damages if that were not clear. While we want to protect the integrity of the process, we don't want to go overboard protecting a party which chose arbitration but then defaulted.

Obviously, if this is a counsel issue, that's a different matter.

All that being said, I agree that I'd do all I could to ensure that the defaulting party has notice, etc., and then conduct any needed hearing on damages or other remedies that are not apparent.

Posted by Jim Purcell | April 25, 2016 12:33 PM

By default I assume you mean a party does not participate in the Arbitration.

The Rules are fairly clear on this issue:

R-31. Arbitration in the Absence of a Party or Representative
Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

This is a significant difference between Arbitration and litigation - in Arbitration the Claimant still must prove their case. The standards for meeting the burden of proof and the Award should be the same as if the Respondent had been present-

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Posted by Richard DeWitt | April 25, 2016 2:31 PM

I agree with what has been said.
I make sure that there has been notice.
And then double check that.
I conduct a hearing. Recently I had a default with a foreign party and the Panel had a full evidentiary hearing knowing that our award would be scrutinized by the foreign enforcing court.
I once had a default hearing and awarded against the non defaulting party !
Judge Bassler

Posted by Hon William G. Bassler | April 26, 2016 3:49 PM

May 9, 2016: Expert Reports – What are your thoughts?

With a highly technical case, how should an arbitrator handle expert reports from the parties that state completely different things? How should the reports be reconciled? *Please provide your comments/ thoughts below.*

I am assuming that the experts will testify as opposed to simply submitting written reports. If so, I would ask for rebuttal reports from each, and inform counsel I want each expert to explain why his/her report is different. I would also consider an "expert hot tub" in which the two experts were allowed to debate their views before the arbitrator, subject to cross examination. If there is going to be no live testimony, I'd have to make do with written rebuttal reports.

Posted by Robert L. Arrington | May 10, 2016 8:59 AM

Joint testimony by the experts with questioning by the panel as well as the parties.

Posted by Paul Peter Nicolai | May 10, 2016 9:03 AM

Mr. Arrington's advice is spot on ... another approach might be to have the parties mutually agree on 5 -7 experts from which list the arbitrator would randomly select one who would review the testimony (written reports and/or transcripts from the hearing) and provide an independent opinion. Obviously the parties would pay for the opinion but I suspect it would be more cost effective than paying for an experts duel.

Posted by Denise Presley | May 10, 2016 10:00 AM

You'd need live testimony. I doubt the litigators would agree on one expert. Too little control over their case. I personally like having both experts briefly supplement their written reports in each other's presence. I suppose they'd have to be cross examined by counsel, but I love to let the experts discuss their differences in front of the panel to see if they can come to agreement or better clarify the issues. The key is to move the case along, and some expert cross examination can be deadly boring and overlong.

Posted by Jim Purcell | May 10, 2016 11:31 AM

I really enjoy the broad arbitration process, from the relaxation of the evidence code, to the handling of experts. With different expert analysis, and especially irreconcilable expert analysis, the hot tub idea is great. I would divide the issues formally, alert each expert of my organizational scheme, then bring both into the room and begin with the Claimant's expert on issue 1, get the counter opinion from Respondent's expert, ask a aeries of questions myself to each, then ask Claimant's counsel to ques-

tion one or both, followed by Respondent's attorney asking questions of one or both. I would take a last set of questions for myself and then back to the attorneys for any 'clarification' questions.You could use just the first three parts (me + the two attorneys), but I like the wrap up additional step. I would never impose this procedure, would get agreement, and with none, go the traditional route.

Posted by Michael Orfield | May 10, 2016 12:49 PM

Mr. Arrington's statement is spot on, except that I do not believe in a debate among experts before the panel.
Their opinions and rebuttal opinions plus their testimony should be enough for the panel to consider. More is a waste of time.
Carl A. Goldman

Posted by Carl A. Goldman | May 10, 2016 1:11 PM

There are many things about our system that are debatable, but rarely have I seen an adequate substitute for cross examination.

Posted by Judge James Eyler (Ret) | May 10, 2016 2:50 PM

As a AAA neutral, an architect and an expert in construction areas, I know that experts come from varied areas, including insurance, overtime vs. delays and other non-construction and health related issues in building systems. In any of those areas I typically do not find opposing expert reports. In any event I too agree with Mr. Arrington's opinion on rebuttal reports.

Posted by Robert E. Barras | May 10, 2016 3:47 PM

I agree with the proposal of a rebuttal report from both experts. I always ask for them when the expert testimony is central to the case. However, I do not recommend cross examination of the experts by the opposing party 's counsel as they will have communicated their position in the rebuttal report, whether they assisted in writing the report or merely made their positions known to their expert as the rebuttal was being written. Getting them to testify again will not add anything.

Instead, after the rebuttal reports have been submitted, I suggest that the arbitrators have the opportunity to examine the expert witnesses. The arbitrators' approach is generally very different from that of the parties' counsel, who have accepted certain assumptions about the expert reports as the basis of their case. The arbitrators, having no preconceived notions about the case they are hearing, tend to see inconsistencies, omissions or outright mistakes, often overlooked by counsel, that they would like the experts to explain away. There are different advantages to an examination of the experts separately or simultaneously. This should be a choice for the panel.

Posted by Stephen D Kramer | May 10, 2016 4:58 PM

I agree with the concept of arbitrator questions as long as they are posed for the purpose of obtaining a fuller understanding of the case. However, it is important that the arbitrator refrain from questions which assist one or the other party in the presentation of its case. Sometimes that requires walking a fine line.

Posted by Hazel Willacy | May 15, 2016 7:17 PM

May 16, 2016: Latest New York Times article on arbitration - What are your thoughts?

What are your thoughts/comments on the latest New York Times article on arbitration? Please see the following link: http://www.nytimes.com/2016/05/15/business/dealbook/start-ups-embrace-arbitration-to-settle-workplace-disputes.html?_r=0
Kindly provide your comments/thoughts below.

Typical of NY Times articles on this subject, the stories always end with the plaintiff not being able to go to court. The articles never discuss what happens if the plaintiff goes to arbitration. The Times appears to be of the view that arbitrators cannot enforce the law. They also are of the view that class actions are great -- though they have no data other than anecdotal stories to support that thesis. Just another article in the Times biased campaign.

Posted by Mitchell Marinello | May 16, 2016 9:57 AM

As was said in the movie, Poltergeist, "They're Ba-ack!"

Once again, the Times mounts an attack on arbitration that's long on anecdote and short on data. While stories from one side can be both entertaining and compelling, to quote my old Statistics 101 prof from college, "Anecdote doesn't constitute

data." Where is the proof that arbitration is bad for consumers/employees or that class actions benefit these parties (and, no, citing the Times' interminable "investigation" from last Fall that was also long on stories and short on data doesn't count)?

Mind you, my personal view is that consumers/employees should have a choice on whether to participate in a class action, as has been the rule at FINRA for many years, and as the Department of Labor's new fiduciary standard rule provides, and as the CFPB has recently proposed, but broadside attacks on the arbitration process not based on data is not appropriate.

Posted by George Friedman | May 16, 2016 10:13 AM

Over the course of the last year, the NY Times has been on a crusade to debase and demean arbitration. All of its anti- arbitration articles have been written by the same reporter, Jessica Silver-Greenberg. Perhaps she had a case before a Panel and lost, so this is her way of "getting back"? Clearly these articles are more of a tirade than a factual analysis; and should be recognized as such. When the reporter states,
"[A]rbitration, by its very nature, is a secretive process that is often lopsided in favor of the employer," which we as arbitrators know is clearly false, there can be no doubt that this is not a reporting piece but rather a reporter's own effort to spin her cause. Shame on the NY Times for departing from good journalism standards and allowing the biases of a reporter to be published on the news pages (as opposed to as an editorial).

Posted by Mark Bunim | May 16, 2016 10:39 AM

I think this is, unfortunately, a commonly held view. In Massachusetts, there is legislation to limit arbitration in the consumer sphere and I know California has pushed legislation to limit arbitration in employment, where I mostly arbitrate. This article made me think that there needs to be a countervailing view expressed, and wonder what public relations strategy we, as AAA arbitrators and the AAA itself can implement to demonstrate, statistically or otherwise, that employees (and other litigants) fare just as well (if not better) in arbitration. Are there "satisfied customers" and counsel who would come forward without compromising confidentiality? Is there a pitch that can be made to the NYT or other publications for an in-depth perspective?

Posted by Jessica Block | May 16, 2016 11:34 AM

The trend for many years has been for courts to recognize the value and advantages of arbitration and to pay greater deference to agreements to use an arbitral forum in lieu of litigation. This trend reversed a long held prejudice against arbitration by courts jealous and protective of their own jurisdiction. The New York Times seems to resent this turnabout and, for reasons about which we can only speculate, appears to be urging a return to the bad old days.

Posted by Judge Gerald Harris | May 16, 2016 1:30 PM

I became convinced that ADR was the way to go after representing an individual in the second trial of an age discrimination case. It was Murphy v. American Home Products and because of a series of appeals between the first and second trial, which I did, took ten years.
This was an age discrimination case. To wait ten years for a resolution made no sense. It was then that I started to look for a better option for my clients and found mediation and arbitration provided that. Now I am a full time neutral.

Posted by Paul McDonough | May 16, 2016 1:31 PM

The basic problem really is the fairness in the decision to select arbitration as the forum for settling disputes. Generally, an agreement should be enforced and this is particularly true when negotiated by parties with independent representation, but that is not the case with most employment agreements. The question is whether a non-negotiated agreement should be treated similarly. The bargaining positions are not usually equal when someone applies for the job, but if the agreement is clear, understandable, and explains what arbitration is and how it operates, it should be enforced with respect to big employers and small. Some courts go further and require express waivers of class actions or all court actions, or of the right to jury trial. But if the agreement is clear and objectively understandable to the person executing the agreement, and explains what arbitration is and how it operates, in my personal view it should generally be enforced.

Certainly there is a perception by some that because the employer has chosen the forum and the rules, and in essence, supports the arbitrating agency (and pays filing fees in employment cases), it is favored. But I truly believe most arbitrators, selected by the parties (at least where represented), are not partial in any way and undermines some of the concerns expressed by the Times and other articles. It would be helpful if there is a way to prove that is so, but unfortunately I know of no empirical evidence.

It would be helpful if the NY Times and media generally were educated as to how arbitrators are selected and how they become qualified to arbitrate (get on rosters). Moreover, the arbitration community should develop how much more quickly and inexpensively the dispute is generally resolved, which benefits the employee as well as the employer.

Finally, it seems to me that there may be a need to address the one concern about arbitration that I have difficulty answering. In many employment disputes, counsel fees can be recovered by a prevailing employee under a fee shifting statute, and that benefit results in employees being able to obtain counsel when representation is otherwise unavailable. That "evens the playing field" in the minds of many. I believe loss of that benefit should be addressed as a matter of policy. I would like to see if others are concerned about this subject and how they respond.

Posted by Edwin H. Stern | May 16, 2016 1:35 PM

June 6, 2016: Reasoned Award – What are your thoughts?

Where one party wants a reasoned award and the other party does not, does an arbitrator have an ethical and moral duty to provide a reasoned award? Please provide your thoughts/comments below.

At times there is a difference between ethics and morals where the two do not necessarily go hand in hand.In order to avoid this situation the Arbitrator should advise the parties prior to the arbitration as to the nature of the decision. With that being said, it a decision is reasoned, it leaves the decision open to interpetation by others and possibly overturned. Neverthelss, I would say the answer is no.

Posted by Anonymous | June 7, 2016 9:41 AM

My approach is to favor providing a reasoned award. Too many people mistakenly believe that the results of an arbitration are "arbitrary" or simply a compromise. By providing a "reasoned award" the parties will understand the "reasoning" underlying the decision, which hopefully will not appear "arbitrary."

Posted by Howard G. Goldberg | June 7, 2016 9:43 AM

Reasoned awards allow parties disappointed with the result to appreciate that their evidence and arguments were considered and why the parties did not prevail. They also keep the arbitrators honest. As U.S. Circuit Judge Richard Posner has noted, "[r]easoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react" (Richard A. Posner, Judges' Writing Styles (And Do They Matter?), 62 U. CHI. L. REV. 1421, 1447-48 (1995)).

The notion that reasoned awards are more vulnerable to judicial scrutiny is just that. I'm aware of no evidence to support it.

So, I would write a reasoned award if asked. The amount of reasoning should be somewhat proportional to the amount in controversy. It would not make sense to bill the parties a large sum for providing reasoning in a small dispute.

Posted by Steven Skulnik | June 7, 2016 9:48 AM

Arbitration is a matter of contract. Thus, resolution of any dispute as to the form of award would depend first on the terms of the arbitration agreement and the rules and laws it incorporates.

Posted by Henry Parr | June 7, 2016 9:50 AM

No. The Rules allow the arbitrator to determine the form of award if the parties cannot agree. The parties have agreed to follow the Rules. The arbitrator is required to follow the Rules. If the arbitrator wants to provide a reasoned award even though one party does not want the additional expense, she/he should write one but morally and ethically should not charge for the extra time required.

Posted by John Dewey Watson | June 7, 2016 10:18 AM

First, this is something the parties should agree upon. Arbitration is (or should be) a creation of the parties. If, however, the parties cannot agree on reasoned vs. non-reasoned award, the arbitrator should write a reasoned award and charge that time to the party who wanted the reasoned award.

Posted by Marvin Schuldiner | June 7, 2016 10:20 AM

I think, except in the simplest of cases- and frankly few are, arbitrators should issue a reasoned award. Not just to satisfy ethical or moral duties, but to discourage challenges to the award because the arbitrator didn't explain how (s)he viewed the case. However, if one party wants findings of fact and conclusions of law, I think that party should assume the additional costs associated with such an award.

Posted by Denise Presley | June 7, 2016 10:25 AM

Rule R 46 (B) sets forth the rules regarding the type of award to be issued. It provides: The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

I do not believe the Arbitrator has a moral or ethical duty to provide a reasoned award outside the provisions of the Rule.

Having said that I advise the parties that my standard award sets forth the reasons for my determination - though it may not meet the formal requirements of a true reasoned award. If a party is insistent on a reasoned award and has not complied with the Rule I often offer to provide a Reasoned Award but require the requesting party pay the additional cost of preparing a reasoned award - which additional cost is not recoverable.

Posted by Richard DeWitt | June 7, 2016 10:55 AM

A party who does not want a reasoned award should not be forced to pay for one or have to deal with one. A party might have financial issues, or more likely does not want to have to explain a reasoned award to a client. This is arbitration, and it seems to me we should be able to accommodate both situations by first issuing a short decision, then providing a reasoned award to the party who wishes one, at their sole cost. I am unaware of any rules in place that prevent this kind of situation.

Posted by Michael Orfield | June 7, 2016 10:56 AM

Presuming the agreement to arbitrate is silent on the issue, I don't see any ethical or moral duty here. I'd try to compromise with a very short decision, and if the parties cannot agree, I'd probably to with the summary decision opting for the least expensive and quickest process.

Posted by Jim Purcell | June 7, 2016 11:05 AM

The arbitrator has to do whatever the parties have agreed to. Barring an agreement between the parties and assuming an ad-hoc arbitration, whatever the law says. Ethical an moral considerations do not really come into play here. I prefer reasoned awards (short explanations on the bases for my award) and I normally suggest to the parties that I render a reasoned award but, if one party objects, there is nothing I can do but do what the law says.

Posted by Jose W Cartagena | June 7, 2016 11:07 AM

If one party wants a reasoned award and the other party does not, I think that the arbitrator has to give consideration and thought to granting a reasoned award. I do not believe that it rises to an ethical or moral duty to do so. It has been my experience that reasoned award take much more time than a standard award and the cost is much higher. I explain that this reality to the party that is requesting th reasoned award and if I elect to enter a reasoned award, I add the following to Scheduling Order No. 1.

Award: At the preliminary hearing, Respondents requested the entry by the Panel of a reasoned award and the Claimants objected and requested entry of a standard award. No request as to a particular type of award had been submitted prior to that time. Therefore, at the conclusion of the taking of evidence on the merits of the case, the Panel shall make a determination whether or not entry of a reasoned award is appropriate. If the Panel determines that it is, the Panel shall segregate the incremental amount of cost for a reasoned award in excess of the cost of a standard award and assess and apportion such excess amount of costs to Respondents. Respondents may waive its request for a reasoned award at any time prior to the conclusion of the evidence.

Any comments to doing what I have done?

Posted by Michael S Wilk | June 7, 2016 11:13 AM

Arbitration is about consent. So unless the governing rules allow an arbitrator to issue an reasoned award as a matter of discretion, the arbitrator shouldn't do it. That said, would an arbitrator's action of this type made without the consent of both parties in a proceeding where the rules are silent be grounds for vacating the award? No. So where does this leave us? The issue is one of ethics without legal import.

Posted by Paul Marrow | June 7, 2016 11:16 AM

It's primarily a matter of cost. A reasoned award can increase the arbitrator's fee by $600 to $3000 or more. Since there is usually no appeal, you might offer to the one seeking the reasoned award that their side pay for the additional time. Perhaps they wish the reasoned award to help guide them in future conflicts, whereas the other party just wants a decision. It is different than a judicial award. The cost in that setting is in the attorney's argument or proposed findings of fact, but here the cost is the cost of the adjudicator, him or herself.

I see no moral or ethical duty that is necessary to follow.

Posted by Marietta Shipley | June 7, 2016 11:36 AM

If one party wants a reasoned award I believe it should be provided so long as the request is made within the time frame of the rules, or if the matter is complex and a detailed explanation would benefit the parties.

Posted by Mike Renda | June 7, 2016 12:04 PM

If one party wants a reasoned award and the other does not, then I look to the arbitration agreement to see if it sets forth a requirement. If not I conduct a phone conference to determine the true need for one and if a reasoned award will cause harm to a party. I also discuss the added cost. Based upon the conversation with the attorneys, I make a ruling on the request.

Posted by Anonymously | June 7, 2016 12:05 PM

This is a great question, and the answer is "it depends." Do I, as the arbitrator, feel that I need the transcript in order to unscramble difficult evidentiary issues? Are the stakes high enough to justify what is inevitably increased cost? Are the parties able to reach agreement on this issue if given more time to evaluate it? Is one party trying to "stick it to" the other by requesting an more expensive option? I strive hard to reach consensus on the issue by discussing the pros and cons with the attorneys and thus try to avoid the uncomfortable position of having to make the call. And I agree with the many comments that conclude that this is not a moral or ethical issue. But if I feel that having the transcript would be a very major plus in reaching a fair conclusion, I will lean toward a reasoned award but will consider having the party who requests it cover the transcript costs and possibly additional fees. Sometimes if a party hears that this could happen, they will withdraw the request.

Posted by Carol Heckman | June 7, 2016 12:40 PM

In a large complex case,a reasoned award can substantially increase the cost of the arbitration, especially if there is a panel of three arbitrators. And,since an arbitrator has the discretion to decide whether a reasoned award is appropriate in a given case if the parties cannot agree that a reasoned award should be issued, I do not see any legal or ethical issues involved with a decision either to make a reasoned award or make the normal form of award under the rules applicable to the arbitration. Also, because of the very limited grounds available for a vacating or amending an award, a reasoned award does not have the same importance that an opinion of a court has.

Posted by Jack Rephan | June 7, 2016 12:49 PM

During the preliminary hearing I advise the parties that I intend to issue a reasoned award. I believe that the parties are entitled to know what the arbitrator evaluated in making the final award. I have issued a reasoned award in every case i have handled. I have never experienced the factual situation advanced here. The additional cost is not significant (much less than the cost of the hearing). I believe that a standard award is less than satisfactory.

Posted by Anonymous | June 7, 2016 1:29 PM

In most of the cases I have arbitrated, the parties have not addressed the matter of giving a reasoned award.
I like to give a reasoned award for the reasons that other have stated - it gives the parties some understanding as to why I decided how I did. Yes, perhaps it does open the door to a challenge, but unless you have unreasonably excluded some key piece of evidence from consideration, they shouldn't have a leg to stand on.

Posted by Raoul Drapeau | June 7, 2016 2:24 PM

The standard form of award under AAA rules for decades has been one that sets forth no explanation or reason. I have always assumed that there is a justification for that choice other than the extra cost, especially since the standard form of opinion flies in the face of the majority of arbitral bodies who show a preference for a reasoned award.

I have often submitted a brief reasoned award where not required when I find that the rationale of the decision might not be evident to the parties. Many of us have heard cases in which the position of one or the other of the parties is completely off base in the opinion of the arbitrator(s). Nevertheless that party may have built a record that justifies a conclusion that is clear to the arbitrators but not visible to the party who has proved it due to such party's proximity to the case. The inability to step back from the argument often prevents the parties from seeing the obvious because they haven't been able to view the evidence from a broader perspective.

Still, I think twice before I write a short award that sets forth the reasons behind the decision of the arbitrator(s). Such an opinion can open up a whole new set of materials for the parties to argue, whether because they believe that I am wrong or because of their frustration over having missed the opportunity to cast what the arbitrator(s) saw in a more favorable light for

their client. I certainly don't want to open up a can of worms at this late stage of the proceeding.

I also find it problematic to limit distribution of a reasoned award to the party who requested and paid for it. One way or another, that reasoned award will get into the hands of the other party. The question becomes whether there is any real value in having one party pay for the reasoned opinion.

Despite the possibility of opening up a can of worms with it, I am beginning to think that the AAA should reconsider its standard form of award. A reasoned award need not be as lengthy as Black's Law Dictionary. There are ways to limit how much the arbitrator(s) need to set forth as a reason for the award, thereby keeping down the cost. The proper vehicle for an exegesis is an award that contains findings of fact and explanation of the law. I have less of a problem accepting that the party who wants such a document be required to pay for it.

Posted by Stephen D Kramer | June 7, 2016 6:44 PM

I prefer to give a reasoned award in most, if not all, cases. However, if one party objects, I guess the fair way to respect both side's request would be to write as short as it would take to give the parties some understanding of why the result is as it is, and charge the entire modest fee for the terse reasoned award to the party that demanded it.

Perhaps that would please neither side, but it seems the fairest way to respond - unless there is a provision in their agreement to arbitrate which would control the type of award an arbitrator should give.

Posted by Justice George D. Marlow (Ret.) | June 7, 2016 9:05 PM

We all know the classic children's story Goldilocks and the Three Bears, where the last of three approaches turns out to be "just right." The story line in my view carries over to FINRA's efforts to address explained arbitration awards. The Authority is contemplating its third attempt at explained awards and in my view like Goldilocks may have hit upon a "just right" approach. See why in my blog post:
http://www.sacarbitration.com/blog/explained-arbitration-awards-goldilocks-three-bears-third-try-just-right/

Posted by George Friedman | June 10, 2016 10:03 AM

June 12, 2016: Arbitration Precedent - What are your thoughts?

What is the role of the arbitration community, if any, to develop common law? Federal and State Appeals Court judges acknowledge that many interesting business disputes are going to arbitration. At the same time, some judges bemoan this because of the impact on the development of precedent. What is to be done systemically to solve the precedent problem? It should be noted that that the American Arbitration Association currently publishes all of its labor and employment awards, redacted, unless one party opts out. *Please provide your thoughts/comments below.*

In my opinion, disputes don't exist for the development of the common law; the law exists to resolve disputes. Therefore, respectfully, those who bemoan this (see Lord Chief Justice Thomas' 2016 Bailii Lecture: Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration -- http://www.bailii.org/bailii/lecture/04.pdf) are off base.

Most arbitrators and practitioners would, however, appreciate publication of more awards. In that regard, http://www.arbitratorintelligence.org/ is a welcome development.

Posted by Steven Skulnik | June 13, 2016 9:28 AM

I think more awards should be published. But I don't see a monumental problem to begin with. Plenty of cases are still being litigated.

Posted by Robert L. Arrington | June 13, 2016 9:30 AM

None. The arbitration community should strive to avoid the legalization of the process. Common sense should be the underlying factor in award rendering. That is why you get to choose arbitrators; you pick one with common sense. You don't want to disqualify good engineers, accountants, and business people who don't have legal training as arbitrators.

Posted by Jose W Cartagena | June 13, 2016 9:42 AM

None. The arbitration community should strive to avoid the legalization of the process. Common sense should be the underlying factor in award rendering. That is why you get to choose arbitrators; you pick one with common sense. You don't want to disqualify good engineers, accountants, and business people who don't have legal training as arbitrators.

Posted by Jose W Cartagena | June 13, 2016 9:42 AM

Since resolution of arbitrable disputes is very fact specific, and generally confidential, and given the fact that many arbitrators may not be lawyers, resort to precedent would be of limited value at best. To the extent that legal issues may need to be addressed as a preliminary matter, arbitrators can reference the well-reported case law already existing.

Posted by Judge Gerald Harris | June 13, 2016 10:08 AM

Perhaps the AAA should consider publishing commercial and construction awards redacted as well. This would have the advantage of exposing the benefits of arbitration to a broader population and also promote greater conscientiousness and better opinion writing on the part of arbitrators. Query whether the arbitrator's name is redacted. If not, this would also allow parties in other cases to more valuable information concerning potential arbitrators.

Posted by Lisa Renee Pomerantz | June 13, 2016 10:38 AM

"Precedent" is a square peg that doesn't belong in a round hole. The private, confidential nature of arbitration coupled with the inapplicability of "formal rules of evidence" means that arbitration was never designed to create precedent. Generally, arbitration is a statutory creation, not a common law creation (with minor exceptions for "common law arbitration" that still exists in Texas and possibly other states). As a statutory creation that empowers the parties to design and agree on the form of their respective arbitration process, including limitations on damages and other special provisions, precedent is not the goal of arbitration. Resolution - speedy, economical, efficient - is the goal of arbitration, as an alternative dispute resolution method not the development of precedent.

Posted by John Allen Chalk | June 13, 2016 10:50 AM

While I understand the position that there is no access to arbitration decisions for the purpose of developing precedent, I would be opposed to diminishing the privacy of an arbitration without the advance consent of the parties. If the decision could somehow be "anonymized" then my objection would be diminished but making the parties anonymous would also require redacting certain other information to insure complete anonymity and that would reduce the validity of the precedent in many instances.

Simply stated , I feel effecting the anonymity of the arbitration process at all is a mistake.

Posted by Robert K. Amron | June 13, 2016 11:32 AM

The routine publishing of redacted commercial awards would not compromise the private nature of arbitration so long as publication remained subject to party consent and opportunity to weigh in on the redacted version. In a jurisdiction like New York with a rich case law tradition, the risk of development of a parallel common law seems remote. A well-reasoned award might be considered persuasive by a court addressing an issue not fully addressed in court precedent, but there would ne nothing wrong with that. Routine publication of commercial awards would result in greater transparency and confidence in the process, would better inform arbitrator selection, and would be the death knell of the baby-splitting fallacy.

Posted by Richard Mattiaccio | June 13, 2016 11:51 AM

I agree wholeheartedly with John Chalk's view. One of the primary reasons parties choose arbitration is because of its confidentiality. Obviously, that is incompatible with precedent-making. Redacting parts of an award might make it difficult or even impossible to understand the issues and why the arbitrator(s) ruled as they did.
Maybe that makes the case for there being a kind of arbitration where the parties agree in advance that the award will be public. But that's called a trial.

Posted by Raoul Drapeau | June 13, 2016 11:55 AM

None!

Posted by Richard DeWitt | June 13, 2016 11:55 AM

I agree with the thrust of most of the responses. Common law or precedent fills the gaps where "the law" hasn't. That's the function of the judicial branch of government--not private arbitrators. Moreover, in my experience, arbitrations seldom involve cases where the law is that unsettled. It's usually fact-based.

Arbitrations are supposed to be confidential. That is one of their advantages. That must be respected. The last thing the arbitrator profession needs are advertisements touting arbitrators' decisions in huge cases.

Posted by Jim Purcell | June 20, 2016 10:11 AM

I agree with everyone that because confidentiality plays a significant role in arbitration it would be difficult to publish decisions. Nevertheless, I think it would help arbitrators facing a tough or complex issue to see how other arbitrators may have resolved the issue.

Posted by Fred M. Mester | June 20, 2016 10:13 AM

I do refer to the law in the state in which the arbitration is pending or the law of the jurisdiction mandated by the arbitration clause. I don't mind having my awards published. I am not sure we should bless these awards with precedential value as this creates another avenue to attempt to overturn awards. We can't teach common sense which is still the best tool for arbitrators.

Posted by scott link | June 20, 2016 10:39 AM

June 20, 2016: Issuing a separate opinion containing the reasoning - What are your thoughts?

When, if ever, should an arbitrator issue a standard award but with a separate opinion containing the reasoning? Please provide your thoughts/comments below.

I would not do that unless the parties wanted a reasoned award. I think it is too risky and wonder if the parties want to pay for it if gratuitously offered.

Posted by Allen KOSOWSKY | June 20, 2016 10:00 AM

I've heard of this approach as a means to maintain confidentiality in the event of post-award judicial proceedings. I would imagine, however, that the opinion containing the reasoning would eventually find its way into the court file, and I would be curious to hear if this strategy has ever been successful.

Posted by Steven Skulnik | June 20, 2016 10:03 AM

On the surface it would seem pointless. I can't envision a circumstance that would require such an approach, unless some particularly sensitive issue demands special confidentiality and needs to be less public than the award itself. I am interested in hearing from others who may have dealt with this issue.

Posted by Judge Gerald Harris | June 20, 2016 10:17 AM

I really don't see the point of separate awards. The parties decide what form the award will take at the preliminary hearing and their agreement should be adhered to in all respects.

Posted by william b. flynn | June 20, 2016 10:24 AM

Good morning:
I don't see the point of it other than marketing yourself at the parties' expense.

Posted by Hon William G. Bassler | June 20, 2016 10:30 AM

Since review of arbitrators' awards is very limited (e.g., miscalculations) arbitrators' opinions or explanations give parties greater opportunity to try to set aside the award. Even a badly reasoned opinion or explanation will not likely be sufficient to set aside the award (with exceptions, of course), it is better not to give parties the opportunity to try to prologue a procedure which was intended to bring a speedy and final resolution. Several years ago, when I was an AAA arbitrator, I rendered a determination and wrote an "explanation" (which I thought the parties were entitled to, in order for them to fashion their future transactions) the AAA case manager advised me that the the "explanation" would not be included in the award. I don't know whether that was or is AAA policy.---Eli.

Posted by Eli Uncyk | June 20, 2016 10:38 AM

I can't see how this is at all a good idea. If the parties want a 1-line "standard" award, that's what they should receive. If they want a "reasoned" award, that's what they should receive. This decision is set up to be made at or shortly after the first preliminary conference. Once it's made, unless the parties change their minds and jointly ask (or one party moves for it for good reason), I don't see any good that can come of issuing a reasoned award when it's not called for.

Posted by Walter McDonough | June 20, 2016 10:40 AM

I recently decided a case where two skillful and well-prepared lawyers did a good job, both during the hearing and in post-trial memos, arguing some very close factual and legal issues; and the clients on both sides were respectful and earnest and just seemed to have a valid difference of opinion about their respective business intentions and the meaning of their agreement. I issued a standard award in which I awarded 100% of the claimant's demand. But I wanted very much to be able to "explain" why I came out as I did and even toyed with the idea of some kind of "supplement" to the award. I simply thought as a matter of decency, both sides had a right to know. In the end, I decided this would be contrary to AAA practice and abandoned the idea. But I felt frustrated by my inability to let the parties know why I came out as I did. I assume other arbitrators may feel the same way in certain cases. Perhaps the AAA should think about formalizing some kind of "off the record" procedure to deal with this issue?

Posted by Harvey Benjamin | June 20, 2016 11:10 AM

Unless all parties to the dispute request a reasoned award, I would be concerned that the award could be compromised in post award judicial proceedings.

Posted by Vincent J. Poppiti | June 20, 2016 11:14 AM

I see no reason for supplementary support or explanation of the grounds, especially where the award is, by contract or agreement, a non-remained award. I try to make certain that I've set forth accurately each of the claims and each of the defenses, so that both parties know I've considered all that they've argued, but that section is not evaluative. To add more explanation is to invite more trouble post-award.

Posted by David M. Brodsky | June 20, 2016 12:00 PM

My Standard Awards always set forth the reasoning behind my decisions - though not to the extent of a Reasoned Award - do not see any reason or value to having a separate opinion with the reasoning.

Posted by Richard DeWitt | June 20, 2016 12:51 PM

The answer to this question is never. In my opinion if the parties don't ask for a reasoned award then don't create one. If the prevailing party is seeking to defend the standard award, the existence of an unrequested reasoned award that could possibly impact the enforceability of the requested standard award places the arbitrator directly into the parties dispute, the total effect of which is unknown.

Posted by Judge Dwight Jefferson | June 20, 2016 1:37 PM

I agree with William Flynn. If the parties want a reasoned award, separated from the award or not, then so be it. If they don't care, or don't want one, then why bother writing one? However, I always write up a reasoning for my own benefit, since it helps me in coming to a decision and then determining the award.

Posted by Raoul Drapeau | June 20, 2016 2:24 PM

I would not issue a standard award with a separate opinion with reasons. I would only do what the parties have designated. Arbitration is a creature of contract and I would abide by their desires as articulated in their contract.

Posted by Sheryl Mintz Goski | June 20, 2016 2:24 PM

I generally agree with the comments already posted, and believe that there should rarely be a reasoned opinion filed separate from, or independent of, the award except perhaps when there is a discussion of trade secrets or other confidential fact finding that may warrant sealing during proceedings relating to confirmation or vacation of the award. In any event, I believe the parties should be invited to address the procedure before
before utilizing separate filings.

In addition to the above, I can envision the occasional need for an expeditious award (particularly when injunctive relief is requested---such as when a restrictive covenant is subject to arbitration and the employee is about to start new employment)--when time does not permit detailed fact finding that can follow when a reasoned opinion is requested. Again, I would invite the parties' position as filing a separate award and supporting opinion before deciding to do so.

Edwin H. Stern

Posted by Edwin H. Stern | June 20, 2016 6:46 PM

July 14, 2016: Limitations on issues to be briefed - What are your thoughts?

Should an arbitrator put strict limitations on issues to be briefed? Please provide your thoughts/comments below.

No, the limitations should be designed around the issues to be clarified and the limitaions on page length, etc. is of no value if the issue is not clearly evaluated.

Thus, arbitrary limits are of no use as I see it.

If the brief is long and develops issues in the case, it may save time in the long run.

Posted by Allen KOSOWSKY | July 14, 2016 12:15 PM

I believe briefing is best limited to law issues. Factual "briefing" is really just argument. I prefer specific and full recitation of claims and defenses (which helps focus discover by the way) and briefing only on issues of law on which I need some direction.

Posted by Rick Flake | July 14, 2016 12:27 PM

An arbitrator should address the issues being presented, and should allow the parties to brief them in their own manner. However, I have given suggested outlines for parties to cover in their briefs (in addition to their own presentations), such as: 1. Identifying undisputed facts; 2. Identifying disputed facts and each party's position and prospective evidence on the disputed facts; 3. Identifying undisputed issues of law; identifying disputed issues of law and each party's positions, with legal authority. At the end of the mediation, i may ask for closing summations, in writing. I will outline what I would like to see, in addition to what the parties may want to say, after I have heard the entire case.
---Eli Uncyk.

Posted by Eli Uncyk | July 14, 2016 12:42 PM

As an a practicing architect and AA neutral I especially like the comments of Eli Uncyk on the matter of briefs.

Posted by Robert E. Barras | July 14, 2016 1:01 PM

There is no single answer to this question. What the arbitrator should do should be tailored to the particular case. Some cases do not require extensive briefing. In other cases, extensive briefing is helpful or even essential. Page limitations are fine, if tailored to the issues to be covered. The arbitrator should be realistic, and expect the same of the parties.

Posted by Robert L. Arrington | July 14, 2016 1:05 PM

When the parties' attorneys cannot agree on a point of law that affects evidence production or even the hearing itself, I find that briefs can be very helpful. But I prefer to keep them short and sweet, because verbose ones with voluminous citations cost their client money and don't often give better guidance to the arbitrator(s) than a short one.

Posted by Raoul Drapeau | July 14, 2016 1:13 PM

Arbitrators can, and should, ask for briefing on issues they consider relevant to the dispute. Precluding parties from briefing any issue that remains disputed in the case would not, in most cases, make any sense.

Posted by Steven Skulnik | July 14, 2016 2:06 PM

I believe it is a service to counsel to identify those issues which the arbitrator feels a need to have briefed; it spares them the task of expending unnecessary time and effort and enables them to better focus their briefs on areas most likely to dictate the result.

Posted by Judge Gerald Harris | July 14, 2016 3:24 PM

Not so sure about "strict limits". But, I believe the arbitrator in certain cases assists the parties by indicating "this or these are the issues I'd like you to address in your brief" or "while I will not preclude it, I don't think it's necessary for you spend your time on this or these issues as the presentation suffices for my purposes".

Marty Scheinman

Posted by Martin Scheinman | July 14, 2016 3:30 PM

I think page limitations are appropriate. And saying I don't need briefing on such and such an issue.
But what is to be gained by denying a party the opportunity to brief an issue it thinks needs to be briefed.
And don't you risk vacatur on the grounds of arbitrary and capricious if it turns out to be an IMPORTANT issue ?

Posted by Hon William G. Bassler | July 14, 2016 3:54 PM

I only have the parties brief the legal issues I request be briefed - which of course sets a limit.

Posted by Richard DeWitt | July 14, 2016 4:15 PM

My experience is still somewhat limited in arbitrations which have been tried to completion. But prior experience in other respects can impact on my decisions at this point.

As with everything else, the answer to the question concerning page limitations depends on the circumstances. If there are pre-hearing briefs, I generally impose no page limitation, or no short page limitations. The discussion may result in identification of issues, or some applicable legal theory, that might not otherwise have been expressly noted.

An evaluation of those briefs may impact on whether a page limitation is required on subsequent briefs. In final submissions, I often request findings of fact and conclusions of law, or at least that specific issues be addressed in addition to what the parties may develop.

In any event, I usually ask counsel to give their point of view on these questions before deciding how to handle the matter.

Posted by Edwin H. Stern | July 14, 2016 4:47 PM

I agree that briefing is best limited to issues of law. I usually ask the parties to brief specific questions, and rarely see a need to impose other restrictions. To the extent a party cites applicable state and federal statutes and/or persuasive case law to support the facts (stipulated or in dispute) I'm fine with that.

Posted by Denise Presley | July 14, 2016 5:02 PM

Aside from the situation in which the arbitrator seeks some specific direction from the parties and thus asks counsel to brief a certain point, I think the parties should be permitted to brief the case in the fashion they think most effective. The process continues to belong to the parties and the judgment of the lawyers as to what is most effective in presenting their positions should generally be respected. All forms of dispute resolution whether litigation or arbitration involve some form of creativity and arbitrators should not stifle counsel's instincts in the interest of some personal preference or theoretical goal of efficiency.

Posted by Bernard Chanin | July 15, 2016 11:51 AM

July 26, 2016: Arbitrator Providing Guidance to the Parties - What are your thoughts?

When is it appropriate for an arbitrator to offer guidance to the parties on proper procedural issues such as the issuance of subpoenas? Please provide your thoughts/comments below.

Parties often ask arbitrators to sign subpoenas directed at witnesses or documents outside of the arbitrator's territorial jurisdiction. Arbitrators should at least think about whether that is proper before signing the subpoena.

Posted by Steven Skulnik | July 26, 2016 11:16 AM

I am not clear on this question. But, I believe we need to protect neutrality and if both parties are involved in the discussion and agree on subpoenas, then the advice would be technical. As i am not a lawyer that would fall into the lawyer's hands or the AAA Manager.

Posted by Allen KOSOWSKY | July 26, 2016 11:16 AM

I think there is no harm in the arbitrator educating the parties as to the differences between arbitration and Federal Court litigation (for example) on the issuance of subpoenas or other procedural issues. I have found that parties welcome such an analysis and it is a good part of proper case management.

Posted by Mark Bunim | July 26, 2016 11:17 AM

I think it is fine to do so, so long as it is done with disclosure to the opposing party or parties and so long as it is clear that the arbitrator's guidance is available to all parties.

Posted by Robert L. Arrington | July 26, 2016 11:18 AM

I agree with Robert. There is nothing wrong with accommodating a party as long as they both know about it and they both have the opportunity for the same accommodation. I also agree that, particularly with first timers, a preliminary talk about the procedural differences between litigation and arbitration is very useful.

Posted by Stephen L. Tatum | July 26, 2016 11:31 AM

To accommodate the real need for guidance to the obligation to remain neutral, I give the parties a brief summary of my understanding of the law at the outset of the preliminary hearing before learning which parties are contemplating subpoenas. I often refer the parties to the annotated Citibar Model Federal Arbitration Subpoena and to the New York State Bar's Arbitration Primer for Litigators.

Posted by George A. Davidson | July 26, 2016 11:57 AM

This one just requires a little common sense. If it's procedural and not contested, and as long as it's with disclosure to all parties, sure.

Posted by Jim Purcell | July 26, 2016 12:11 PM

In agreement with the above posts. In fact, I believe arbitrators should discuss these procedures with both parties present.

Posted by Kyle-Beth Hilfer | July 26, 2016 12:23 PM

I agree with all who say yes, and Steven's comment is especially well taken. An arbitrator has an obligation, I think, to ensure that (s)he is signing an enforceable order and sometimes that requires taking a look at the civil procedure of the jurisdiction in which the subpoena will be served to follow proper form.

Posted by Denise Presley | July 26, 2016 12:37 PM

Yes - with regard to purely basic procedural matters so long as you are communicating with all parties - with regard to issues like subpoenas or court reporters I refer them to the rules. On issues that are more complicated such as serving international subpoenas etc I advise the parties that they need to research the issue themselves.

Posted by Richard DeWitt | July 26, 2016 1:23 PM

This has to be done with care and balance, bearing in mind that 1) many parties (and their lawyers) come in to arbitration without an appreciation of its differences from litigation,
2) both parties' representatives have to be present for any "guidance",
3) the guidance should only be such as will facilitate the expeditious search for truth and unearth relevant facts, i.e., not expand the process into a "fishing expedition."

Posted by Charles Molineaux | July 26, 2016 1:34 PM

I see no problem with providing advice and direction on many procedural issues, such as issuance of subpoenas or other procedural issues that lead to the fairness of the arbitration process. It is important that this never be done ex parte. However, procedural advice that will result in undue favor to one side over the other would cause me not to provide it in the first place.

Posted by Andrew Brown | July 26, 2016 2:03 PM

I also agree with Mr. Arrington.

Posted by Donald F Frei | July 26, 2016 3:53 PM

I think that it is almost necessary to advise the parties once anyone raises the issue of subpoenas that the arbitrator issues them, but that any enforcement needs to occur in a court with jurisdiction over the person subpoenaed. The arbitrator(s) should also suggest strongly that subpoenas be initiated promptly. Otherwise, the need to await any enforcement action in court may end up delaying the hearing.

Posted by Federico C. Alvarez | July 26, 2016 4:53 PM

Often, the arbitration agreement specifies the rules under which the arbitration will be conducted. The arbitrator ought to advise the parties to cite those rules for the arbitrator's authority to issue a subpoena, or take other procedural steps. The arbitrator may rule on the interpretation of the governing rules. In the absence of rules, the arbitrator should ask for legal authority permitting the arbitrator to take a particular action or refrain from taking action. The terms of the arbitration agreement circumscribes the arbitrator's power and role, and incorporates the rules or law under which the arbitration is conducted. These are for the parties to cite and the arbitrator to rule upon. Advice is not within the arbitrator's scope of retention.

Posted by Eli Uncyk | July 26, 2016 5:26 PM

Since some states have statutes with specific disclosure requirements,it is important to research state law carefully when a subpoena is requested. If the subpoena request is not in compliance with the statute, reference to the statutory deficiencies as the basis for non-issuance is appropriate. Although that ruling has the effect of giving guidance, by following that approach, the arbitrator is simply discharging his/her responsibility to make decisions on the issues that arise. However, if the requesting party has not copied the opposing party on its request, both to avoid ex parte communication and/or to comply with statutory requirements, the arbitrator's ruling should also be sent to the opposing party.

Posted by Hazel Willacy | July 27, 2016 11:28 AM

In my experience, it is the attorneys who have not participated in an arbitration before who bring up the issue of numerous subpoenas, depositions and the like that they want to conduct. A little education of the newbie goes a long way on this issue. Getting involved in expensive matters like that does not result in a process that is less expensive for their client than a court proceeding.

Posted by Raoul Drapeau | July 28, 2016 8:27 PM

July 31, 2016: Limits on Arbitrator's Remedial Powers - What are your thoughts?

Arbitrators may relief that a court may not. What limits should there be on the arbitrator's remedial powers? Please provide your thoughts/comments below.

Arbitrators have the latitude and the power to fashion remedial orders that direct counsel to meet and confer, and agree on a course of action that preserves the parties' rights to own the process, and move it forward..

Posted by Jim Rhodes | July 31, 2016 8:31 PM

Arbitration is a creature of contract. As such, our first "stop" will be the contract(s) involved in any particular matter. If the Parties have contracted for a process governed by the laws, procedural and/or substantive, of a particular jurisdiction I believe the Arbitrator's powers are limited accordingly. There may be some "wriggle room" in the laws, particularly case law, of varying jurisdictions as to the scope of arbitral remedial powers as compared to the jurisdiction's judicial remedial powers. If the governing contract is silent on governing law the Arbitrator may have more remedial flexibility.

I suggest opening the issue for discussion with Counsel and, in certain cases, with sophisticated Parties. The caricature of a "loose-cannon" arbitrator has become one of the criticisms of arbitration, but in some circles such "flexibility" is considered an advantage. I believe it is incumbent on the Arbitrator to determine the wishes of the Parties and, if necessary, seek their expectations in written form, even to the point of amending the contract to eliminate later criticism.

My background is nearly three decades on a state trial bench, so my thoughts are naturally colored by that experience. It has been my experience that Parties who have selected a former judge for their arbitrator are likely to be looking for a process that is more court-like. On the other hand, if the Parties have chosen an arbitrator who has not been a judge their expectations may not be as clear and, thus, in need of discussion.

It may be advisable to have the actual Parties themselves be part of this discussion in some cases. All too often the drafters of the contracts are scriveners rather than adjudicators. It is generally in the drafting process that the expectations of speed and economy are most likely going to be injected into the mix of expectations. While we rely on the terms of the contract to govern the process, once a matter gets into the hands of litigators they have their own expectations, and they live and work in a more litigation-based environment, sometimes seeming to be working independent of contract specifications that are not part of their sense of priorities (hence motions, discovery, etc.). Particularly in cases of "high value" I submit it is incumbent on us to make sure everyone is "on the same page" regarding their expectations on what their arbitration experience will be.

Finally, I further submit that we need to calm the Parties with a reality-based sense of repose that they will not experience an arbitrator "going rouge", deciding a case on a nebulous sense of fairness rather than that the contract specifies and/or what the Parties have a right to expect.

Posted by Lawrence C. Root | July 31, 2016 9:02 PM

AAA Commercial Rule 47(a) states that "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract."

In New York, for example, even apart from the AAA Commercial rules:

"absent provision in the arbitration clause itself, an arbitrator . . .may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties."

Silverman v. Benmor Coats, Inc., 461 N.E.2d 1261, 1266 (N.Y. 1984). See also Sperry Int'l Trade, Inc. v. Gov't of Israel, 689 F.2d 301, 306 (2d Cir. 1982) ("Under New York law arbitrators have power to fashion relief that a court might not properly grant.") There is "a powerful presumption that the arbitral body acted within its powers" (Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 976 (2d Cir. 1974).)

Therefore, assuming a general and broad arbitration clause, the arbitrator's power is plenary (Advanced Aerofoil Techs., AG v. Todaro, 2014 WL 1512118, at *3 (S.D.N.Y. Apr. 16, 2014), aff'd, 588 F. App'x 51 (2d Cir. 2014)) and the arbitrator can impose any remedy that is just and equitable.

Parties wishing to constrain the arbitrator's remedial powers should expressly state any limitation in the arbitration clause.

Finally, an interesting case before the Second Circuit (PDV Sweeny, Inc. v. ConocoPhillips Co.) will test whether the arbitrator's powers are constrained by public policy.

Posted by Steven Skulnik | August 1, 2016 8:18 AM

I agree with the caution recommend by Lawrence Root. A number of business arbitration users are shying away from arbitration based upon a number of factors, but lack of predictability about the process and the outcome are two of the most important. On the other hand, it is the responsibility of users, when and if they have the opportunity, to ensure that clauses are drafted with the process and outcome they have in mind, something also alluded to by Mr. Root and Steve Skulnik. Two of my current arbitrations are based upon clauses that require that I follow the law and place other clear limitations on my remedial power. The agreement of the parties is the key.

Posted by Conna Weiner | August 1, 2016 10:08 AM

Agreement of the parties is key to deciding remedies available to the arbitrator. If the agreement is silent, then the rules empower the arbitrator to do equity under the AAA rules, as Jim Rhodes points out above. That being said, as an arbitrator, I exercise caution in awarding equitable relief, always taking guidance from the parties in terms of what they believe is appropriate and needed. While, of course, one side will argue against such equitable relief, I usually limit myself to relief that at least one party has requested. I also do not take my authority to grant equitable relief as latitude to "split the baby." Despite that popular myth about arbitration, an arbitrator's remedial powers are not a substitute for the arbitrator thoughtfully considering the rights and obligations of the parties. Instead, broad remedial powers are appropriate only when necessary for effectuating the intent of the parties under their contractual relationship.

Posted by Kyle-Beth Hilfer | August 3, 2016 11:30 AM

Even though arbitrators in New York have broad authority to fashion a remedy that does justice, I would hesitate to alter the parties' contractual rights. Sometimes a party makes a bad deal ... and must live with the consequences. The only time I would consider applying discretion in the remedy is when a party or counsel has egregiously abused the process (before or during arbitration) to gain an unfair advantage.

In contracts I draft, where I want to limit an arbitrator's authority, I use the following text: "The arbitrators are not authorized to ... award any damages, remedy or relief that is not expressly authorized by this Agreement, ... or apply any inherent equitable powers to fashion an order or award that is in any way inconsistent with the express provisions of this Agreement ...."

Posted by Stephen F. Ruffino | August 3, 2016 2:38 PM

I agree with the prior comments. The contract frequently limits remedies and prohibits departing from what a court could do. Even if it does not, being too free wheeling in my opinion jeopardizes the Award. Some agreements specifically allow the arbitrator to act ex aequo et bono. Others exist so that interests, rather than claims can be arbitrated. But most parties do not agree to arbitration with the expectation an arbitrator can help them, or hurt them, more than a court could. And most contracts don't really say that.

Posted by Robert L. Arrington | August 3, 2016 3:52 PM

August 7, 2016: Preliminary Hearing - What are your thoughts?

Should an arbitration preliminary hearing be held telephonically or in-person? Please provide your thoughts/comments below.

Telephonic preliminary hearings are sufficient. I have found this format sufficient to conduct the necessary business. It is efficient and the participants for the most part know what the preliminary hearing entails and as such are usually well prepared.

The telephonic format is usually only an hour in length at most and if in person preliminary hearings were held - it could be onerous upon the participants if they have to travel some distance for such a short matter.

Posted by Kleon C. Andreadis | August 7, 2016 3:15 PM

As usual, it depends. On the logistics, the amount in controversy, and your sense of whether the parties can work out most of the logistics on their own. A large, hotly contested case usually should have the preliminary hearing in person. There's something about getting the measure of each other, and also as the arbitrator setting the tone. I always prefer in person, but the case or the parties might need to cut costs.

Posted by Jim Purcell | August 7, 2016 4:12 PM

Generally, I've held these telephonically. Saves everyone time and clients money. If the contract calls for an in-person preliminary hearing, or both parties request it, I'd hold one.

With prior communication asking counsels to query their clients so in-person hearings can be scheduled at the initial telephonic conference, scheduling and other preliminary matters can be handled by 'phone. Prehearing motions,if definitive, may require an in-person hearing but usually, these too can be handled on the first day of hearings prior to opening statements.

Posted by Micalyn S. Harris | August 7, 2016 4:22 PM

In most cases, the preliminary hearing can be handled telephonically. Any necessary documents can be sent ahead. If there is a reason to do it in person, that can be communicated to the administrator.

Posted by Paul McDonough | August 7, 2016 4:27 PM

I've done both; in-person and by telephone. In my experience, in-person preliminary conferences are more effective. Usually, there are travel expenses involved, and so there is some urgency to make effective use of everyone's time. As a result, there seems to be less foot dragging & avoidable delays by the attorneys.

Posted by Raoul Drapeau | August 7, 2016 4:33 PM

I always request that counsel confer in advance of the preliminary hearing and attempt to agree to the fullest, possible extent on scheduling and discovery issues. I have always found that a telephonic conference suffices to resolve items that were not agreed upon. The costs of an inperson conference, including,potentially the rental of a hearing room, generally outweigh any advantage which might be gained by a face to face meeting.

Posted by Judge Gerald Harris | August 7, 2016 6:10 PM

Person to person is bestand one could probably get more done in an in-person preliminary conference but in most cases it is not practicable, so one does the best one can.

Posted by J W Cartagena | August 7, 2016 6:27 PM

Initial telephonic to save scheduling difficulties. Invite the parties, though.

Posted by Allen kosowsky | August 7, 2016 7:42 PM

In-person preliminary hearings are desirable, but frequently impractical. Time and distance are too great. Making the arbitrator or their counsel travel long distances at the parties' expense can't be justified.

Posted by Robert L. Arrington | August 8, 2016 7:00 AM

An arbitration Preliminary Hearing is the second most important event in the arbitration proceeding (next to the hearing itself) yet it is most frequently conducted via teleconference among parties and arbitrators who are strangers to each other, and have

scant knowledge about the other side's case or the personalities of the other side. The parties have chosen three arbitrators whom they barely know and the arbitrators, most likely do not know each other. Avoiding an in-person Preliminary Hearing (usually upon the grounds that it is more "cost-effective this way") makes little sense and can be counter-productive.
At the Preliminary Hearing, which usually lasts one to three hours, the parties will be constructing the "constitution" for the arbitration (the Case Management Order "CMO"). This document, which I have seen run as long as twenty pages in length, is the complete set of ground rules that everyone has agreed to abide by for conducting the arbitration. It sets forth, for example : rules for adding parties and/ or claims; which State's law governs; if mediation is going to take place while simultaneously proceeding with arbitration; confidentiality agreements; protocols and dates for discovery; how discovery disputes are handled; dates for submission of motions; how experts will be dealt with in terms of report dates and depositions; interim status call conference dates; dates and methods of submitting pre-hearing witness lists, documents to the panel, pre-hearing briefs; firm dates and location of the hearing; whether the hearing will be transcribed ; types and length of post-hearing submissions and the form of award. It also may discuss finality vs. arbitral appeal. Once the CMO is issued by the Panel, it is in almost all instances adhered to from beginning to end. Clearly the Preliminary Hearing is a very important event.
It is also important for the parties to get to know one another on a personal level. Each side (counsel and yes, clients) need to be able to read the body-language of the other side as that would be crucial in making a decision as to whether to try and settle the dispute (via mediation or otherwise) or whether to fight to the bitter end. Just as important is the opportunity for the arbitrators (assuming three) to get to know one another and develop a rapport since they are going to be working together on this matter over the coming months. Remember, in ninety percent of the cases (or more) the arbitrators do not know each other and have never been part of a panel with each other. Of greatest import is the opportunity for counsel for each side to meet the arbitrators whom they have selected to adjudicate the matter, and in the overwhelming percentage of cases, have never met. Once the participants have met, face to face, there is a different "ease" in working together and overcoming differences.
As alluded to above, clients should definitely be encouraged to attend the Preliminary Hearing. It is their money that is at stake in the arbitration and they certainly should have an input as to all matters, especially as to the scope of discovery, which they will wind up paying for. Principals also need to be able to make their own individual assessment as to the personalities of the other side and of the panel members.
It is indeed astounding that this crucial event and introductory meeting is usually done by telephone where so much of the inter-personal judging opportunity is lost. Even if parties/counsel are in different locations, if they are going to spend thousands of dollars on an arbitration, isn't it worth the extra few dollars to all sit in one room for half a day and gain the insights and understand the dynamics of this new group of people? Especially considering that the event will generate one of the most important documents in the case (the CMO), the time and effort should be spent to get together, in person, to come up with a comprehensive working agreement that everyone can live with and will be their case-agenda going forward. A law firm partner will spend hours travelling to meet a potential new client in different city, for lunch. Doesn't it make sense to go the distance to meet an adversary and the adjudicatory panel, in an early key arbitration event, when there is significant money at stake in the case and strategic decisions to be made?

Posted by Mark Bunim | August 8, 2016 9:42 AM

I agree with those who've commented that a phone conference should be enough, except perhaps in unusual cases involving an unwieldy number of parties or highly complex preliminary issues (as distinguished from complex ultimate issues).

Posted by Andrew Gerber | August 8, 2016 11:27 AM

The telephone preliminary hearing is generally the most efficient approach except in special situations involving extremely complex cases.

Posted by Richard DeWitt | August 8, 2016 9:32 PM

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In most cases, the preliminary hearing can be handled telephonically. Any necessary documents can be sent ahead. If there is a reason to do it in person, that can be communicated to the administrator.

Posted by Paul McDonough | August 7, 2016 4:27 PM

I've done both; in-person and by telephone. In my experience, in-person preliminary conferences are more effective. Usually, there are travel expenses involved, and so there is some urgency to make effective use of everyone's time. As a result, there seems to be less foot dragging & avoidable delays by the attorneys.

Posted by Raoul Drapeau | August 7, 2016 4:33 PM

I always request that counsel confer in advance of the preliminary hearing and attempt to agree to the fullest, possible extent on scheduling and discovery issues. I have always found that a telephonic conference suffices to resolve items that were not agreed upon. The costs of an inperson conference, including,potentially the rental of a hearing room, generally outweigh any advantage which might be gained by a face to face meeting.

Posted by Judge Gerald Harris | August 7, 2016 6:10 PM

Person to person is bestand one could probably get more done in an in-person preliminary conference but in most cases it is not practicable, so one does the best one can.

Posted by J W Cartagena | August 7, 2016 6:27 PM

Initial telephonic to save scheduling difficulties. Invite the parties, though.

Posted by Allen kosowsky | August 7, 2016 7:42 PM

In-person preliminary hearings are desirable, but frequently impractical. Time and distance are too great. Making the arbitrator or their counsel travel long distances at the parties' expense can't be justified.

Posted by Robert L. Arrington | August 8, 2016 7:00 AM

An arbitration Preliminary Hearing is the second most important event in the arbitration proceeding (next to the hearing itself) yet it is most frequently conducted via teleconference among parties and arbitrators who are strangers to each other, and have scant knowledge about the other side's case or the personalities of the other side. The parties have chosen three arbitrators whom they barely know and the arbitrators, most likely do not know each other. Avoiding an in-person Preliminary Hearing (usually upon the grounds that it is more "cost-effective this way") makes little sense and can be counter-productive.
At the Preliminary Hearing, which usually lasts one to three hours, the parties will be constructing the "constitution" for the arbitration (the Case Management Order "CMO"). This document, which I have seen run as long as twenty pages in length, is the complete set of ground rules that everyone has agreed to abide by for conducting the arbitration. It sets forth, for example : rules for adding parties and/ or claims; which State's law governs; if mediation is going to take place while simultaneously proceeding with arbitration; confidentiality agreements; protocols and dates for discovery; how discovery disputes are handled; dates for submission of motions; how experts will be dealt with in terms of report dates and depositions; interim status call conference dates; dates and methods of submitting pre-hearing witness lists, documents to the panel, pre-hearing briefs; firm dates and location of the hearing; whether the hearing will be transcribed ; types and length of post-hearing submissions and the form of award. It also may discuss finality vs. arbitral appeal. Once the CMO is issued by the Panel, it is in almost all instances adhered to from beginning to end. Clearly the Preliminary Hearing is a very important event.

It is also important for the parties to get to know one another on a personal level. Each side (counsel and yes, clients) need to be able to read the body-language of the other side as that would be crucial in making a decision as to whether to try and settle the dispute (via mediation or otherwise) or whether to fight to the bitter end. Just as important is the opportunity for the arbitrators (assuming three) to get to know one another and develop a rapport since they are going to be working together on this matter over the coming months. Remember, in ninety percent of the cases (or more) the arbitrators do not know each other and have never been part of a panel with each other. Of greatest import is the opportunity for counsel for each side to meet the arbitrators whom they have selected to adjudicate the matter, and in the overwhelming percentage of cases, have never met. Once the participants have met, face to face, there is a different "ease" in working together and overcoming differences.

As alluded to above, clients should definitely be encouraged to attend the Preliminary Hearing. It is their money that is at stake in the arbitration and they certainly should have an input as to all matters, especially as to the scope of discovery, which they will wind up paying for. Principals also need to be able to make their own individual assessment as to the personalities of the other side and of the panel members.

It is indeed astounding that this crucial event and introductory meeting is usually done by telephone where so much of the inter-personal judging opportunity is lost. Even if parties/counsel are in different locations, if they are going to spend thousands of dollars on an arbitration, isn't it worth the extra few dollars to all sit in one room for half a day and gain the insights and understand the dynamics of this new group of people? Especially considering that the event will generate one of the most important documents in the case (the CMO), the time and effort should be spent to get together, in person, to come up with a comprehensive working agreement that everyone can live with and will be their case-agenda going forward. A law firm partner will spend hours travelling to meet a potential new client in different city, for lunch. Doesn't it make sense to go the distance to meet an adversary and the adjudicatory panel, in an early key arbitration event, when there is significant money at stake in the case and strategic decisions to be made?

Posted by Mark Bunim | August 8, 2016 9:42 AM

I agree with those who've commented that a phone conference should be enough, except perhaps in unusual cases involving an unwieldy number of parties or highly complex preliminary issues (as distinguished from complex ultimate issues).

Posted by Andrew Gerber | August 8, 2016 11:27 AM

The telephone preliminary hearing is generally the most efficient approach except in special situations involving extremely complex cases.

Posted by Richard DeWitt | August 8, 2016 9:32 PM

August 23, 2016: AAA Commercial Rules - What are your thoughts?

If you could add a new rule to the AAA Commercial Rules, what would it be? Please provide your thoughts/comments below.

I don't think I'd change anything.

Posted by Robert L. Arrington | August 23, 2016 9:34 AM

I've seen too many arbitrations slowed down and costed up by too much federal court-style discovery. Something that tightens this up. E.g., a presumption of 2 depositions of 8 hours each, and no interrogatories.

Posted by Jim Purcell | August 23, 2016 10:06 AM

Two thoughts:

The AAA Rules are silent on the arbitrator's authority to issue protective orders, although AAA arbitrators routinely issue protective orders on request and demonstrated justifiable need. To avoid doubt, a rule stating that the arbitrator may issue orders to protect the confidentiality of trade secrets and other sensitive information disclosed in discovery should be considered. Along these lines, the AAA only requires the arbitrators to maintain confidentiality (Code of Ethics for Arbitrators in Commercial Disputes Canon VI). The arbitration rules of several other institutions also impose confidentiality on the parties for the hearing and award.

Regarding requests to correct the award, the only corrections permitted are for clerical, typographical or computational errors (AAA Rule 50). Other institutions have rules permitting an arbitrator to "clarify" (meaning, interpret) the award or make an additional award as to claims presented but not determined in the award. That is also worth consideration in my view.

Posted by Steven Skulnik | August 23, 2016 10:10 AM

1) Rule R 22 B i and iii should be revised to include documents in a parties position, custody and "control" since the word control was apparently inadvertently left out of the original draft

2) Rule 33 should be rewritten - it is ambiguous/ confusing - how does the arbitrator know if a motion is likely to succeed prior to it being filed

3) there should be a rule clarifying joinder of parties -

Posted by Richard DeWitt | August 23, 2016 1:40 PM

AAA Consumer Arbitration Rules # R-24 states:

The arbitrator may consider a party's request to file a written motion (except for Dispositive Motions— see R-33) only after the parties and the arbitrator conduct a conference call to attempt to resolve the issue that gives rise to the proposed motion. Only after the parties and the arbitrator hold the call may the arbitrator consider a party's request to file a written motion. The arbitrator has the sole discretion to allow or deny the filing of a written motion and his or her decision is final.

This would be a good addition to the Commercial Rules (as well)to address non- dispositive motions.

Posted by Mark Bunim | August 23, 2016 2:26 PM

R-33 should be rewritten to give the arbitrator the total discretion to allow dispositive motions. The "likely to succeed" standard says to the parties that the arbitrator has already made a decision of the issue(s) in question. This would allow the arbitrator more "process management" discretion than the current language without implying that the arbitrator is already predisposed by having concluded that a dispositive motion is "likely to succeed."

R-22 and R-23, along with L-3, give the arbitrator the power needed to control discovery.

Posted by John Allen Chalk | August 23, 2016 6:21 PM

September 13, 2016: Arbitrator/Mediator Chambers - What are your thoughts?

Is it beneficial to the ADR Community for Institutional ADR Providers to offer arbitrators and mediators the use of Chambers (separate legal facilities/office space) for private, lease-based use? Please provide your thoughts/comments below.

It can be helpful, but is frequently impractical due to the location of the hearing.

Posted by Robert L. Arrington | September 13, 2016 9:31 AM

I believe that It would be nice to have such an option. It would be nice to offer perhaps situations similar to virtual offices (offering a certain number of hours/month, office services, etc.)

Posted by Cheryl H Agris | September 13, 2016 9:46 AM

My experience is that, particularly in the Association's case, providing conference/office "Chambers" was not cost-effective and drained scarce resources that could have been used elsewhere. At the same time, "neutral" premises are helpful. I agree that fostering "virtual" facilities such as Regis should be explored.

Posted by William H, Lemons | September 13, 2016 11:33 AM

I like the idea, and would use the AAA Chicago office if the service were available. I work from home and do not maintain a commercial office (although I have rights at Regus and other commercial short-term office companies). I suspect that I am not alone in this practice given the trend for many to retire from their firms to avoid conflicts. The economics of a commercial office make no sense for me or many full time ADR professionals, and the ability of panelists to use for a reasonable fee an ADR provider's office as a virtual office would be a great benefit and potentially a competitive advantage for the provider. Indeed, I write this note from a coffee shop in the Loop as I'm between meetings.

Posted by Anonymous | September 13, 2016 12:12 PM

I like it. AS with the anonymous commenter, I work from home and do not have a conference room, nor would I expect parties to travel to me. If an AAA conference room were available, it helps with neutrality concerns. I've used AAA conference rooms in the past for mediations and it worked well.

Posted by Jim Purcell | September 13, 2016 12:43 PM

While as stated above this would be of great convenience to many neutrals it would have to be structured in a way that there would be no appearance of lack of independence of the arbitrators/mediators. They should not be viewed as somehow employed by or have more than then present financial connection with the providers.

Posted by Eric Wiechmann | September 13, 2016 2:04 PM

I am very much in favor of the suggestion particularly if it took the form of (i) a mailing address, (ii) a phone number and the ability to use an office or conference room on an as needed basis. I would certainly be a customer of the ADR Provider that did it and I think they would have a lot of others too.

Posted by Anonymous | September 13, 2016 2:07 PM

I have used AAA facilities on prior occasions and found them to be useful. I have also conducted arbitrations at the offices of counsel for one of the parties, which are usually available and generally offered at no charge. I have not felt that such a site provided the party at whose counsel's offices we were meeting any meaningful advantage or that the opposing party was at any meaningful disadvantage from being on the other side's turf. I have also conducted or participated in arbitrations at my or another arbitrator's offices. Finally, I have conducted arbitrations at "neutral" sites (such as conference rooms at an airport hotel). Of these alternatives, I believe that the least beneficial is the "neutral" site, because such facilities often lack needed supplies or services (such as the ability to print or copy documents). The availability of space at providers' offices (including both the ADR entity and court reporters' offices) is less preferable than the other sites because of the associated cost, but for arbitrators who work from home or otherwise do not have facilities at which they are able to conduct hearings, the availability of such sites is helpful.

Posted by Stanley Eleff | September 13, 2016 2:20 PM

In almost all of the cases in which I have been an advocate for one of the parties, or have served as an arbitrator or mediator, counsel for the parties have made their conference rooms available with any cost for the arbitration hearing or the mediation. Therefore, I really see no need for an ADR provider to provide any facility for an arbitration or mediation.

Posted by Jack Rephan | September 13, 2016 5:24 PM

Not sure the "Chambers" idea as described is wise. AAA and its panels' neutrals need to maintain some distance and independence. The arbitral institution needs to maintain good relationships with all the stakeholders in an arbitration or mediation. It is one thing to encourage better trained neutrals but another to have the neutral be affiliated with the arbitral institution in some way other than panel memberships.

Posted by John Allen Chalk | September 13, 2016 5:46 PM

This would be a useful option for any neutral working from home.

Posted by Richard Brewster | September 14, 2016 6:24 AM

I also work from home. I usually hold hearings at counsels' offices, but also at the AAA offices in Somerset NJ and Manhattan. I do not think that there is any advantage to the party at whose counsel's office the hearing is held. However, if the parties wish, the AAA facilities are available. However, because I practice in the New York metropolitan area where AAA offices are available to me my experience may be different than that of others who do not have nearby AAA offices.

Norman H. Rosen

Posted by Norman H Rosen | September 14, 2016 10:45 AM

If Institutional ADR Providers means the Organizations (like AAA), I think it is a good idea. If it means the ADR Practitioner (the Arbitrator), then I think it is not a very good idea. The subtle negative implication is not very good. If the Parties agree to use either of their facilities, it is very good. As long as the Parties agree on facilities, location, and cost "sharing" it should not be considered by the Arbitrators as part of any award; as long as they live up to the agreement.

Posted by Allen J Thompson | September 14, 2016 7:16 PM

My friends at JAMS seem to love it. I am told that not only do they have space and individual conference rooms available for the JAMS attorneys, but also the attorneys, their clients and witnesses. They also have staff employees who seem to act as administrative assistants for the mediation and arbitration attorneys handling the work, including making appointments, assigning open dates, times and answering telephone calls and emails. I assume, however, that all of this fine service is available only in those cities where JAMS have offices to accommodate their members. It seems to work well, and the JAMS attorneys brag about how convenient it is for them.

Posted by Robert Echols | October 6, 2016 8:11 PM

September 21, 2016: Dispositive Motions - What are your thoughts?

In what percentage of your arbitrations do you find that dispositive motions are granted and to what extent do you find that AAA Commercial Rule 33 is helpful in allowing the Arbitrator to deny the filing of a dispositive motion, from a cost-efficiency perspective, where it is unlikely that such a motion will be granted? Please provide your thoughts/comments below.

Rule 33 and its Employment Tribunal analog, Rule 27, have been very helpful in focusing the parties and the arbitrator on what motions will significantly narrow the issues or dispose of the case entirely. In each instance, I ask the parties to draft a letter, to which the other party may respond, identifying the issues to be briefed through a dispositive motion, and the reasons why the motion would serve to narrow the case or dispose of the case and to consider the cost of motion practice against the costs of a hearing. Recently, after such a letter exchange, during a case management call, claims were dismissed voluntarily and the parties and I weighed the costs of briefing against simply holding the hearing. When I do allow the motions after this analysis, they usually do dispose of the case or of a gateway issue. I do not permit dispositive motion where it seems clear that the cost will be the same or more than a hearing with post-hearing submissions or where it would not dispose of a significant portion of the case.

Posted by Jessica Block | September 21, 2016 5:25 PM

I have a comment as an aside. I have before me a dispositive motion that if granted will eliminate a five-day evidentiary hearing. Therefore, as the arbitrator who stands to make 16,000–20,000 dollars for a 4-5 day arbitration, I am the same person who is asked to rule whether the case will end with the granting of a dispositive motion. I am wondering if it would be a better practice to assign a dispositive motion to a separate arbitrator agreed to by the parties. I appreciate that this might take time in finding the second neutral, but perhaps that could be something done after the Preliminary Hearing where the parties ask for the opportunity to file motions toward the end of the arbitration process. Apparently the process has been working just fine as is, it is just an issue that has been planted in my mind regarding the appearance of impropriety.

Posted by Michael Orfield | September 21, 2016 5:34 PM

Agreed. I have for many years even before the last two sets of commercial rules made a part of my scheduling order that no dispositive motion could be filed without the prior filing of a one page letter describing the motion sought to be filed and the reason. Other parties were always given an opportunity to make a one page reply. Generally, we would then have a conference call.

In at least 50% of the times in the conference call we would discuss the motion on a hypothetical basis with the net result that no motion was ever filed. Most of the other cases ended up with some slimmed down partially dispositive motion being filed and some slimmed down dispositive result happening.

The net result of all this was a major saving of time and expense either because the dispositive motions were not going to go anywhere or because the effect of the dispositive motion occurred in a way which minimized the time and expense of achieving the result.

Posted by Paul Peter Nicolai | September 21, 2016 5:41 PM

I agree with Jessica that Rule 33 is helpful and I agree with her approach.

Rule 33 accommodates user preference for summary disposition, establishes dispositive motion practice as an appropriate process, and sets the right balance in having the Arbitrator consider cost-efficiency.

Like most, I have rarely considered or granted dispositive motions in the past but I believe we will increasingly see meritorious motions being allowed and granted, leading to a more efficient arbitral process.

Gary

Posted by Gary Benton | September 21, 2016 5:50 PM

I don't think fully dispositive notions are granted very often. Partially dispositive motions fare better. The AAA Rules are very helpful. The Arbitrator should spend some time in the preliminary hearing/case management conference addressing this issue, and cover it in the Scheduling Order. There is one important caveat here: The agreement to arbitrate should ALWAYS be consulted. It will trump the Rules, and the Arbitrator and the parties must adhere to it.

Posted by Robert L. Arrington | September 21, 2016 6:52 PM

I find dispositive motions most useful in large complex cases with multiple issues because it gives the tribunal the opportunity to narrow the issues and shorten the hearing. Even if not granted, the legal memoranda become the foundation for prehearing briefs which parties frequently want to file. I discourage counsel from filing dispositive motions in smaller cases and never in cases under the expedited rules.

Posted by Anonymous | September 21, 2016 9:35 PM

I have found that dispositive motions are most useful when they address issues of arbitrability and jurisdiction. Even then, unless they are susceptible of documentary proof, it is usually necessary to defer to a hearing to resolve fact-driven disputes. In the latter circumstance I will attempt to determine the issue as early in the hearing as possible.

Posted by Judge Gerald Harris | September 21, 2016 11:07 PM

In my experience, dispositive motions are seldom worthwhile unless both lawyers agree that the claim turns on a legal issue and want to have the issue decided without a trial to save their clients money or there are some limited factual issues and the parties are willing to work together to design a process to take sufficient testimony to decide the issue. However, this requires good lawyers looking out for their client's best interests. If one parties wants to prevent a dispositive motion, they can almost always raise enough factual issues to force a trial.

I handle mostly construction cases, where the dispositive motion rule is a little different. I have not denied a party the right to submit a dispositive motion, although I have successfully discouraged them from doing it. My personal feeling is that if they don't file it as a dispositive motion, it will end up in their prehearing brief.

Posted by Adrian Bastianelli | September 22, 2016 7:21 AM

I agree that Rule 33 is very helpful. In my 15 years of experience as an arbitrator I have never granted or seen a dispositive motion granted by a panel on which I served. In a pending case permission to file a motion for summary judgment was denied with leave to request permission again after completion of depositions.

Norman Rosen

Posted by Norman H Rosen | September 22, 2016 9:54 AM

Rule 33 and Rule 27 (Employment) too often increase time and costs beyond any benefit that might result. The difficulty primarily lies with applying a dispositive motion rule in the context of a preliminary showing that the issues may be narrowed. Even if a motion is granted in this circumstance, the remaining issues still require parties to prepare for and present their cases at hearing.

Moreover, my experience has been that some Respondents use the rules to either delay the hearings and/or to increase Claimant's expenses.

Pat Westerkamp

Posted by Pat Westerkamp | September 22, 2016 1:28 PM

September 26, 2016: California Senate Bill 1078 - What are your thoughts?

Last night Governor Brown vetoed California Senate Bill 1078, see the following link: **1078**. The bill prohibits a California arbitrator from accepting an offer of employment in a future case involving a party or lawyer in a pending arbitration, without prior written consent. The bill also adds prohibitions and disclosure requirements relating to certain solicitations made by private arbitration companies.What are your thoughts on this bill and should it have been vetoed? Please provide your thoughts/comments below.

The veto was appropriate. California arbitrators are already the most closely regulated in the nation. Governor Brown was right not to add another layer of regulation.

Posted by Robert L. Arrington | September 26, 2016 9:10 AM

First of all I am an architect, neutral member, and occasionally involved in construction disputes. My opinion is that I agree with the veto of Governor Brown. This is strictly an ethical matter and laws have a tendency to overshadow ethics and morals. If disclosure does not happen initially in a case, litigation or cause a judge to vacate an award. I am anxious to hear some of the comments otherwise.

Posted by Robert E. Barras | September 26, 2016 9:45 AM

I'm more troubled about the what has been going on behind the scenes than by what the bill contained. Brown, in his message accompanying the return of the Bill to the state senate, noted it addresses problems that don't even exist:

"Arbitrators in California are already subject to stringent disclosure requirements under existing state law and Judicial Council standards. I am reluctant to add additional disclosure rules and further prohibitions without evidence of a problem. Further, the existing Judicial Council procedure for amending arbitrator ethics standards is a deliberative and public process that can more appropriately consider additional requirements."

The anti-arbitration forces are hard at work, at least in California, doing anything and everything they can to undermine arbitration. In this case there was a concerted effort by arbitrators to fight back and they prevailed. Brown refused to accept hype as grounds for confirming the Bill. Let's hope other governors are as level headed as Brown was.

Paul Marrow

Posted by Paul Marrow | September 26, 2016 9:48 AM

Six months after the award the arbitrator should be free to accept employment unless there were communications during the arbitration in which event the arbitrator should be disqualified.

Anonymously

Posted by Anonymously | September 26, 2016 10:08 AM

The law is problematic due to limited pools of qualified arbitrators within the various areas where there are consumer arbitrations. The corollary would be making the same requirement for judges in Landlord Tenant court as they will generally have ongoing cases with a couple of landlords. Since they would never limit a judge in a consumer court in such a manner -- they should not limit an arbitrator in a similar circumstances.

Posted by Paul G, Huck | September 26, 2016 10:17 AM

I see no downside to the legislation embodying a principle everyone should follow with or without controlling legislation. In New Jersey, by case law, judges were prohibited from discussing future employment involving attorneys before them, and a judgment was vacated and the matter had to be retried because the judge had discussed employment with an attorney in a case before him between the time he decided the matter and the date on which he entered judgment. The principle was subsequently embodied into the Code of Judicial Conduct. Whether it affected many judges or not was not the point. It provided codification for easy reference to an established principles of ethics. I see no reason why the same should not apply to arbitrators if for no other reason than to advise parties and their counsel that such conduct is prohibited whether or not it results in undue influence. But not having read the entire veto message (beyond what is quoted above) there may be something I am missing.

Ed Stern

Posted by Edwin H. Stern | September 26, 2016 11:14 AM

The veto message is significant because the Governor 1) stated that arbitrators in California are already subject to the most stringent disclosure requirements in the United States and 2) suggested that any tweaking of these requirements be done by the Judicial Council, not the Legislature. However, I doubt if the Legislature will get the message and it will continue to try to kill consumer arbitration in California.

Posted by Paul Dubow | September 26, 2016 12:45 PM

I agree with Gov. Brown's sentiment that this seems to be a solution in search of a problem. If these kinds of actions are necessary, then the codes of ethics that we all have to subscribe to must be meaningless. Surely there are remedies already in place for those who take a job soon after rendering a decision in a case, leaving a taste of quid-pro-quo.

Posted by Raoul Drapeau | September 27, 2016 7:01 AM

October 1, 2016: New York Times Arbitration Article - What are your thoughts?

What are your thoughts on the most recent front page article on arbitration appearing in the New York Times? Please see the following link: NYT. *Kindly provide your thoughts/comments below.*

The NY Times article failed to recognize that many nursing home claims, as with employment and other consumer claims, will be too small to allow claimants to obtain contingent fee lawyers for court litigation. Arbitration, with all of the existing due process protocols now in place, has been a low-cost, efficient, and economical way to get small consumer claims heard that would never be litigated. The declining number of lawsuits filed in U.S. courts - both federal and state - are not the result of more arbitrations but increasing costliness of litigation. The NY Times article also fails to recognize the difference between consumer and other forms of dispute, especially business and commercial disputes. The access to justice issue is being exacerbated, not lessened, by these generalized, non-specific, and stereotypical attacks on arbitration.

Posted by John Allen Chalk | October 1, 2016 11:31 AM

As we all know, arbitration can be a quicker, less-expensive and private way to resolve disputes. However, the process can be abused when instead of two companies being the parties, it is a consumer vs a company. This is particularly a problem when in the case of nursing homes, the patient or their family are in great stress and want admission to the facility quickly.
It seems to me that it isn't the arbitration process that is fault, but rather the conditions under which it takes place. What if the arbitration agreement stated that the result of these cases was not private, but like most court cases, was public. That way, it seems to me that the nursing home would be under some pressure to argue their case more equitably.

Posted by Raoul Drapeau | October 1, 2016 11:56 AM

Construction related contracts, both design and agreements, where public funds are involved, have stricken arbitration and mediation from availability. It appears that tax payers have little say in the use of their hard earned money once it gets in the hands of government. This is the abolition of a basic freedom.

Posted by Robert E. Barras | October 1, 2016 12:08 PM

I wonder if the AAA maintains statistics that would counter the widely held view, promoted by the times, that arbitration favors business interests against consumers in the nursing home and other industries. It is my strong belief that the contrary is true, but it would be helpful if data are available to support that position. If so, a few letters to the editor or articles in the Times and other influential media might help stem the current legislative and regulatory attacks on the arbitration process.

Posted by George Graff | October 1, 2016 12:42 PM

This is the natural regulatory response to abusive use of a legitimate means of resolving disputes. Nursing Homes should not be permitted to require use of ADR. The conditions under which elderly or frail are admitted to NHs are not conducive to a knowing waiver.

That being said, NHs should nonetheless, make mediation/arbitration available, particularly for smaller claims, with clear and understandable language that relatives of the elderly and frail can understand.

It's sad that abusive use gives the ADR process a bad name.

Posted by Jim Purcell | October 1, 2016 1:20 PM

The comments above are accurate in observing that the Times overlooks the difference between peer/peer arbitration (good) and adhesive business/consumer arbitration (problematic). An important reason for the difference is that the system allows businesses in consumer cases to select arbitrators for their reliability in issuing business-friendly decisions. If the arbitration community wants to avoid further compromise of the reputation of the institution, it should take an initiative in seeking reform of that feature. And it should convince its business constituents, who have the essential political muscle, that it is in their long-term interest to support the initiative.

Posted by andrew gerber | October 1, 2016 8:05 PM

Arbitration often favors the business because 1)in many smaller claims the consumer is not represented; 2) the paperwork that the consumer signs often favors the company and 3) when represented the consumer's attorney does not understand the language, standards or procedures of the industry involved. Most of these are contract actions, not physical injuries. The courts are over-crowded, the delays are legion and most cases are going to be settled in any event. Even with $100,000 in damages, is it smarter to wait for a jury down the road or take an arbitrator and get it over quickly. Credit card and student loan cases and even cases with your wi-fi carrier are not complex. Why make them time consuming and why take up courtroom time?

Posted by Irwin Stein | October 1, 2016 11:32 PM

First - The availability of arbitration and mediation in any long term care facility is important to the self determination of the residents and their families. However, the use of these vehicles should be a voluntary choice for the consumer. Any time arbitration or mediation is 'required' the consumer is giving up the right to be heard in court, if they choose. The outcomes of these processes might well be kept confidential if the agreement is made to do so. And, that may well be why some consumers might choose one of these paths. But, all of this better serves everyone when treated as a choice.

I have noted that when faced with signing a contract with a requirement for arbitration or mediation consumers feel no recourse - especially when in an urgent situation as in moving quickly from the hospital to a nursing facility.

Secondarily - as a nursing home consultant and the co-author of a book regarding investigations of incidents, accidents and abuse in nursing homes, I understand the importance for information regarding these occurrences to be available. This serves both the industry and the consumer. However, note that all nursing home survey results are published on the Centers for Medicare and Medicaid Services (CMS) website. Neglect and abuse are those of the highest degree. So, this kind of information is available.

Posted by Niki Rowe | October 2, 2016 3:35 PM

The Times is being fed information from someone with an axe to grind and is printing it uncritically. That's a shame.

Posted by Robert L. Arrington | October 2, 2016 4:10 PM

The NY Times article sheds light on the ADR process in nursing homes. The article failed to recognise the disparity between business and commercial disputes.
Arbitration favours both businesses and consumers. However, the article seems to emphasise arbitration as advantageous to businesses, to the detriment of consumers in the nursing home.

Posted by Ijeoma Ononogbu | October 2, 2016 5:11 PM

As with many opinion pieces, the NYT article is partly right and partly wrong. The question is, "How will AAA--and the arbitration profession--address the legitimate concerns raised by the Times, and others?" Can we afford to wait?

Pat Westerkamp

Posted by Patrick Westerkamp | October 3, 2016 11:39 AM

The problem being addressed in many of these settings is the use of mandatory pre-dispute arbitration clauses. Clauses are not negotiated and are "boiler plate", so they don't address any substantive matters in a forthright and meaningful way. But clauses dealing with adjudicating rights need to be completely fair and understood. One solution for the industry and contract writer to is to spell out the availability of ADR but make the ADR optional, not mandatory, to be decided when the dispute arises.

Posted by ronald kisner | October 3, 2016 12:52 PM

It is an effort to avoid liitgaiton. The two parties meet with a mediator, sometimes two, a counselor and a lawyer. You each disclose financial and physical assets that you had shared and try to reach a mutually agreeable division of those assets. Custody can also be worked out in mediation. It is basically, a negotiation to split everything a couple has shared.

Posted by Haber | December 10, 2016 3:34 AM

October 9, 2016: Consolidation - What are your thoughts?

Multiple arbitrations involving the same parties but separate panels were the subject of motions to consolidate filed in each separate arbitration. The administering arbitral organization's rules did not contain a rule addressing motions to consolidate. How should the motions be handled -- which panel(s) should decide, could the panels act jointly and/ or confer, and would a panel in one arbitration have authority over the others? What are your thoughts? Please provide your comments/thoughts below.

I've never run across this situation. But my first question would be without the consent of all the parties to any one of the on going proceedings, the motions would be denied because there arbitrators would be exceeding their authority. The rules of the administering organization are silent so there is no authority there. That leaves only the arbitration clauses and any governing statute. Assuming that there are no statutes that apply in this situation, unless the clauses all provide for this, there isn't any authority that I can see. The only way that it could be worked out would be for all parties to all proceedings to agree to consolidate. Otherwise, I can't see anyway if the motions are contested, because the contest itself would be evidence of a lack of consent.

Posted by Paul Marrow | October 9, 2016 7:01 PM

On one occasion I was invited to serve as an arbitrator on a counterclaim asserted by the respondent in another pending arbitration. I declined the invitation on the ground that it raised the potential for conflicting rulings and urged that the counterclaim be pursued in the original proceeding.

Posted by Anonymous | October 9, 2016 7:25 PM

The California Arbitration Act, section 1281.3 allows a party to petition the court to consolidate separate arbitration proceedings. Without court approval, I agree with Paul Marrow that agreement of all parties is required.

Posted by Sue Nusbaum | October 9, 2016 8:00 PM

I think I must respectfully disagree with Mr. Marrow. I wouldn't concede without some respectable research that the issue is really a new one for the arbitration regime. But even if it is, there are presumably precedents in traditional practice, and guidance could presumably be derived from them because the procedural issues are essentially similar. If the arbitration forum can't produce a consensus, the court system can, and it should be invoked for that purpose.

Posted by andrew gerber | October 9, 2016 8:00 PM

An independent arbitrator should decide the motions.

Posted by Anonymous | October 9, 2016 8:20 PM

Great question. Absent a controlling procedural rule concerning consolidation, ordering the parties to arbitrate together when they haven't agreed to do so seems risky to me. It doesn't matter who enters the order (the administrator or any panel/arbitrator) I believe there would be a basis to eventually succeed in a Court challenge to the Award in an arbitration where the parties were forced to arbitrate collectively.

Posted by Peter Altieri | October 10, 2016 7:43 AM

Whatever is done, based on the facts given, all the parties would need to agree to whatever method is used to decide consolidation and to agree structure for the consolidation. All the parties might agree to mediate the consolidation question with a mediator not involved in any of the pending arbitrations. Mediation of the consolidation question might be a preliminary step that all the parties would agree to pursue.

Posted by John Allen Chalk | October 10, 2016 9:22 AM

I'm going to assume that the parties are not in agreement on how to proceed. In that case, the decision falls to the arbitrators (see, for example, Safra Nat. Bank of New York v. Penfold Inv. Trading, Ltd.,2011 WL 1672467 (S.D.N.Y. Apr. 20, 2011)).

One would hope that the party seeking consolidation would apply to only one tribunal for a ruling. If so, that decision should be respected.

If the movant has made the request to more than one tribunal, as an arbitrator, I would direct the movant to choose one tribunal before considering the application.

Posted by Steven Skulnik | October 10, 2016 11:25 AM

I tend to believe that written consent by both parties as to consolidation should suffice. It would amend the governing contract. The same would be true as to the selection of the panel. In the absence of consent and the absence of a controlling statute or contractual provision, the panels should advise the parties that they intend to confer on the issue and (presuming different counsel in the two proceedings) invite written comments for both panels to consider at least if the briefs filed in each matter do not suffice. The parties may also be invited to make a simultaneous (telephone) presentation to both panels. Presumably counsel for the parties will take the same position in both proceedings. I can see why one party may not want consolidation of a matter with a weak claim or defense with another with a stronger position. However, consolidation of related claims will generally save both parties time and expense, and should be favored at least in the absence of some showing of prejudice by one of the parties. Mr. Chalk talks about a mediator with respect to the issue of consolidation. The idea is intriguing; someone should endeavor to work out the issue in a effort to achieve consensus.

Posted by Edwin H. Stern | October 10, 2016 1:58 PM

Each Panel has jurisdiction over its case, but cannot order with respect to the other case. Each panel should deny their respective motion and perhaps point out to the parties that they may file an appeal to a court for resolution.

Posted by Anonymous | October 10, 2016 2:41 PM

It would be ideal if all the parties agreed on a Consolidation Arbitrator adopting the AAA approach. If not, I agree that proceeding to court would be the proper solution.

Posted by Joseph McManus | October 11, 2016 10:21 AM

In response to the post by Anonymous, courts generally have no authority under the FAA to consolidate related arbitral proceedings without party consent (see United Kingdom v. Boeing Co., 998 F.2d 68, 6971 (2d Cir. 1993)).The arbitrators should not punt when confronted with the issue.

Posted by Steven Skulnik | October 11, 2016 11:16 AM

I also would look to the contract for direction. If the contract allows for the various actions to be tried together, then they should be consolidated. However, if each contract stands alone, then the arbitrator would exceed the contractual jurisdiction to consolidate cases. The parties would have to amend all of the relevant contracts, preferably in writing, and specifically identifying the contracts that are amended. Otherwise, the losing party could have a change of heart and challenge the award based on the arbitrator's lack of jurisdiction.

Posted by Federico C. Alvarez | October 12, 2016 1:42 AM

Does the analysis change if the demand initially is for a putative class action with multiple named claimants, and the determination is made in a clause construction award that the matter cannot go forward as a class action? Parties then disagree whether the matter should proceed with all the individual claims determined in one arbitration. Is this a motion to sever? A motion to consolidate? Does it matter?"

Posted by Anonymous | October 13, 2016 2:15 PM

October 16, 2016: Pre-Award Interest – What are your thoughts?

What should arbitrators do regarding pre-award interest either where the applicable law is not clear or if the statutory interest rate is not reflective of the true cost of funds? Is this a procedural or substantive analysis? Does the analysis differ as between domestic and international arbitration? Please provide your thoughts/comments below.

AAA Commercial Rule 47(d)i provides that an arbitrator may award interest at such a rate and from such a date as the arbitrator may deem appropriate. I do not believe the ICDR rules have similar language.

The authority to award pre-award interest pursuant to this rule was challenged in one of my cases - the trial court upheld and the case went to the first Circuit - Doral Financial Corporation v Garcia-Velez - 12-1519 which also upheld the Arbitrators authority to issue pre award interest. Though this case was an international Arbitration it was conducted under the AAA commercial rules and International Commercial Arbitration Supplementary Procedures. The opinion is also interesting since it addressed the Arbitrators authority to manage the arbitration proceedings.

Posted by Richard DeWitt | October 16, 2016 4:03 PM

Certainly, the obvious first step is to check the agreement, though the inquiry calls for more. The second threshold question is whether awarding interest would be an act beyond the authority of the arbitrators. I would answer this in the negative since it does not represent the determination of an issue not before them, but rather part of an award crafted to fit the circumstances of the case within the context of the award as a whole. In this context, the matter must be viewed as within the discretion of the arbitrators. In my view, denying pre-award interest would represent a hardship as it would deny the recipient of the monetary award of the use of funds, and, on the other hand, would constitute an incentive on the part of the party sitting in the position of obligor to seek to delay the proceeding as long as possible. By viewing the action of the arbitrators in this respect to be discretionary I am urging that the local statutory interest rate would not be dispositive. The interest needs to be fairly set in the context of all circumstances so as not to render it a windfall nor a penalty. In viewing the difference in international proceedings, I suggest that the concept/process should remain the same with the standards in the jurisdiction in which the obligation is created being those operative in the consideration by the arbitrators.

Posted by Sidney D. Bluming | October 16, 2016 6:14 PM

There are, in my opinion, three sources for the authority of an arbitrator to add prejudgment interest to an award. The rules the arbitration are being conducted under. The agreement between the parties. The pleadings.

In many cases the lawyers add boilerplate language to the pleadings requesting that the arbitrator award prejudgment interest and attorney fees. Unless the rules the arbitration are being conducted under prohibit such awards, the fact that both parties asked for those awards means that they have agreed to those awards.

In many cases the contract the parties came to arbitration under requires that the law of a particular state be applied to the contract and its interpretation. In other cases, the contract applies the law of a particular jurisdiction to the arbitration itself in addition to the law of the particular jurisdiction that is to be applied to the contract.

Those jurisdictional laws almost always have a prejudgment interest rule. If the pleadings or the rules the arbitration are being conducted under allow for prejudgment interest, I would use the jurisdictional law to determine the rate of the prejudgment interest. In those cases where the contract actually sets a prejudgment interest rate I would use the prejudgment interest rate set in the contract.

Posted by Paul Peter Nicolai | October 17, 2016 7:43 AM

I generally agree with Mr. Nicolai. While the AAA commercial rules (and rule 31(4) of the ICDR rules, provide the arbitrators with discretion to determine the availability and amount of interest) the absence of an agreement to follow such a rule, such as may exist in an ad hoc arbitration, or a provision in the underlying agreement, an arbitrator should follow the applicable substantive law, as dictated by the contract or the circumstances of the case. If that is New York, it means that the provisions of CPLR 5001 and 5004 should control.

Posted by George Graff | October 17, 2016 11:54 AM

October 24, 2016: Arbitral Options for Issuing Relief - What are your thoughts?

Is it good practice for an arbitrator to issue relief that a court would not, even if the agreement or applicable law and rules empower the arbitrator to do so? Please provide your thoughts/comments below.

This bears thought. If the Agreement itself says so, and it's clear that's what the parties intended, then the Arbitrator may do so. He or she should nonetheless proceed with caution so as not to exceed his powers. Legally, the reference to or incorporation of a forum provider's rules may be a sound basis for granting such relief. But I am reluctant to do so, because I very much doubt that is what the parties had in mind.

Posted by Robert L. Arrington | October 24, 2016 3:35 PM

Presented as stated, without circumstances, it could be good practice, but I would say instead, it is acceptable practice depending on the merits of the case. However, agreements are not always legal while law is.

Posted by Robert E. Barras | October 24, 2016 3:42 PM

Arbitrators should exercise that authority where appropriate, but sparingly. See S. Lee and S. Ditko, Amazing Fantasy No. 15: 'SpiderMan,' p. 13 (1962) ('[I]n this world, with great power there must also come—great responsibility'), cited in Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2415 (2015).

Posted by Steven Skulnik | October 24, 2016 3:45 PM

Just because you are not prevented from awarding a relief doesn't mean that would be a wise thing. I would tread gently here, if for no other reason than making sure that you are operating within the bounds outlined by the parties' arbitration contract and good sense.

Posted by Raoul Drapeau | October 24, 2016 3:49 PM

This is not generally a good idea. Courts are not usually interested in issuing judgments which require future performance either by one party or between the parties. This is because the court would perforce be required to hear arguments of contempt of court for failure to comply with the judgment. The standard in most states for contempt of court for failure to comply with the judgment requires that the judgment be crystal clear and that the contempt be proven to be based upon a willful disregard of the judgment.

An arbitrator, on the other hand, faces the problem that even if the arbitrator were to issue such an award the common law of arbitration is that the arbitrator is functus officio with the issuance of the final award. Therefore, there is no tribunal for the parties to come back to. Unless the arbitration award itself contains an arbitration provision (which would be of dubious enforceability because it was not an agreement of the parties) one would have to argue that somehow the arbitration award was a product of the underlying agreement which required arbitration and, therefore, also requires arbitration. If not, the parties are left with having to attempt to enforce the arbitration award in a subsequent court proceeding. Unless the award was a simple requirement that money be paid, what the standard for that enforcement would be is a very good question. More likely than not, it would end up being the standard used for contempt of court proceedings and a standard judgment; a very high standard to meet.

The bottom line here is that the award would end up creating a high risk of more litigation; litigation in a forum and through a process which is likely to be more expensive than the form and process which led to the award itself.

Posted by Paul Peter Nicolai | October 24, 2016 3:50 PM

Yes, I believe the agreement should govern the proceedings as much as possible. It may be that that parties agreed to arbitration and avoid the courts precisely because they knew courts could not grant the relief which they wanted the tribunal to be able to grant.

It comes down to the right to disagree with the law. If my counter-part and I both think liquidated damages are appropriate, then we should not be barred from making that agreement simply because the government thinks liquidated damages may not be appropriate.

Posted by Bob Jenevein | October 24, 2016 3:51 PM

It depends on the nature of the relief and reason why a court would not grant it. If the relief is such that a court would not/could not grant because it is beyond the power of the court to grant, but nevertheless within the provisions of the arbitration agreement and the rules for the arbitrator to grant, and is sought by a party, in my view the answer to this question is "YES".

Posted by Daniel | October 24, 2016 3:54 PM

Why not, if appropriate?

Posted by Jose W Cartagena | October 24, 2016 4:25 PM

Before doing this, the arbitrator needs to consider how he/she is going to enforce the order if the court will not. Certainly do not want to make an order that is unenforceable.

Posted by Bernard Kamine | October 24, 2016 4:46 PM

It can be, if the circumstances warrant.

Posted by andrew gerber | October 24, 2016 5:00 PM

It is difficult to envision what form of relief an arbitrator might award that a court may not. However, since arbitration is a creature of contract, and the question posits the given that the relief would be statutorily permissible, I see no reason why an arbitrator can not award relief sanctioned by the parties agreement so long as it would not offend public policy.

Posted by Judge Gerald Harris | October 24, 2016 6:52 PM

I would hesitate to do so in situations where the nature of the award isn't something the parties could reasonably expect to receive. I also agree with comments about the vulnerability of such an award.

Posted by Mary K Austin | October 25, 2016 9:54 AM

The question assumes that the arbitrator "knows" how a court would rule.

For example, consider prevailing party attorney fees which turn on a lodestar calculated as "reasonably necessary hours" X " reasonable rate."
These lodestars then may be enhanced if an attorney's fee is partially, or entirely contingent on litigation success to compensate for added risks of undertaking representation. Variables germane to fee enhancements include: experience of the attorneys; legal skills required; potential damages; and fee levels sufficient to attract competent counsel to meritorious cases.

How would an arbitrator ever know for certain how a court would rule on this issue? Parties, in my opinion, go to arbitration to receive an award from experts in the area; not for a "best guess" on how a court might rule.

Pat Westerkamp

Posted by Patrick Westerkamp | October 25, 2016 1:37 PM

I agree with most of the comments. Arbitration IS different from court litigation. IF the agreement allows such expressly (which is better) or by implication, then yes with some caution not to be a cowboy or cowgirl.

This is an alternative to courts, and that is its advantage.

Posted by Jim Purcell | October 30, 2016 5:30 PM

October 30, 2016: Applications for attorneys' fees - What are you thoughts?

What should arbitrators do regarding applications for attorneys' fees: take submissions at the same time they are deciding the merits or issue a partial award on the merits and take the fee application afterwards? Should an arbitrator award attorneys' fees as sanctions? Please provide your thoughts/comments below.

In my opinion, applications for attorneys' fees should be submitted by the parties for consideration together with their submissions to the arbitrator(s) for entry of the final award. Normally such applications are based on a provision in the arbitration agreement specifying that the prevailing party shall be entitled to his/her attorneys' fees. If there is no such provision in the arbitration agreement, the fee application could be considered if made by one or both parties at the time their final submissions on the merits are being considered; or if appropriate be considered after a partial final award on the merits has been entered. Regarding the issue of attorneys' fees being awarded by an arbitrator as sanctions, this is only appropriate in my opinion in

circumstances where clearly allowable in accordance with the arbitration agreement and/or rules and applicable law pursuant to which the arbitration is being conducted, and such a sanction has been sought and justified by a party

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Posted by Daniel Margolis | October 30, 2016 4:15 PM

The decision on how much, if any, attorney fees to award is likely to depend on specifics of the substantive award, and the parties should be informed of those details before being asked to address the fees issue. Also, determination of the proper amount of fees may require some detailed analysis of the attorney's time records, which might have an improper influence on my determination of the merits of the case. Finally, the substantive decision may be such that no fees are awardable so any time spent on justifying fees before the substantive award is rendered would be wasted. For all these reasons, I generally issue a partial award on the merits, then invite submissions on attorney fees.

I award attorney fees as sanctions in situations where I believe one party has improperly multiplied proceedings by taking an unjustified position in discovery or motion practice. I invite the opposing party to demonstrate the amount of fees incurred as a result of the unjustified conduct.

Posted by William Ewing | October 30, 2016 4:24 PM

It takes less time to take written submissions for all attorneys' fees requests and objections as part of the entire case rather than issuing a partial or interim award on liability and damages but not on attorneys' fees. Attorneys' fees should be available as one of the possible consequences of sanctionable conduct.

Posted by John Allen Chalk | October 30, 2016 4:36 PM

This is one of the toughest questions I encounter in a case. Usually, the arbitration agreement mentions the matter, in which case I would just follow the agreement - e.g. winner gets their attorneys fee covered in the award. If there is no procedure to follow, I would try to get the parties to agree on a procedure before testimony starts to avoid being accused of piling on. If they do not agree to a procedure, then all one can do is best judgment.

Posted by Raoul Drapeau | October 30, 2016 4:50 PM

First - if you are going to deal with fees and expenses after the award on the merits it is best not to issue a partial award but rather issue an interim award - a partial award is a final award and starts the clock running as to various post award issues an interim award does not.

I generally require the parties to advise what their fees and costs are prior to their knowing which is the prevailing party to keep them honest - then use a post interim award process to determine the award of legal fees and costs.

Also an important post interim award issue is prevailing party - just because a party receives an award does not necessarily mean they are the prevailing party - this issue can best be addressed after an interim award on the merits.

Posted by Richard DeWitt | October 30, 2016 5:17 PM

I routinely request fee submission at the same time
Because :
It is not burdensome since time is electronically stored.
It provides a comparison to judge reasonableness.
It prevents the disgruntled party from launching a challenge between the issuance of the interim award and the final award.
I have seen unmerited challenges filed after the interim award issues.

Posted by William G Bassler | October 30, 2016 5:26 PM

As a general matter, an application for fees and costs should await the award on the merits and a determination that the one party is entitled to fees and costs under the contract. However, if both sides wish to make a fees and costs submission when the case on the merits closes, this will lead to quicker and less expensive resolution of the dispute. For that reason, I would not discourage them.

Regarding sanctions, arbitrators clearly have the power to sanction parties, where appropriate, when they are proceeding under a general and broad arbitration clause(see ReliaStar Life Ins. v. EMC Nat'l Life Co., 564 F.3d 81, 883 (2d Cir. 2009)). Whether that power should be exercised, of course, depends.

Posted by Steven Skulnik | October 30, 2016 6:11 PM

If the case is a less than $1M dispute, I would take the submissions on attorney's fees and decide them together with the substantive Award. If it is a large case that has gone on for some time and takes more than very few days to hear, then I would go

toward bi-furcation and decide attorneys fees in a separate proceeding with separate briefs and perhaps a live hearing/argument after the merits portion of the case has been decided via a partial Award.

Attorney's fees should be awarded in matters where the arbitration clause of the parties' contract calls for it, or when allowed by the governing law of the jurisdiction.
I would be very reluctant to grant attorney's fees simply as sanctions.

Posted by Mark Bunim | October 30, 2016 6:21 PM

Assuming attorneys' fee are awardable in a given case, proof of such fees are usually produced in documentary format. Therefore, they should be submitted at the hearing, usually at the conclusion with an opportunity for counsel to address such award as part of closing arguments or in post-hearing briefs.
I don't believe attorneys' fees should be awarded as a sanction in general but may be considered in the context of frivolous motions or other patently wasteful activities and should be limited only to such fees as can be shown to have been incurred in opposing such inappropriate actions.

Posted by Judge Gerald Harris | October 30, 2016 7:55 PM

I usually ask that the parties submit their attorneys fees within a few days of when I close the hearing. That way I can include any fee award in the final award without having to bifurcate the award.

Norman Rosen

Posted by Norman Rosen | October 31, 2016 11:55 AM

I find it best to take applications for attorneys' fees along with post-hearing briefs on the merits. Law firms are generally quite capable of generating the appropriate supporting data for such applications. In most cases, it should be apparent from the pleadings, the arbitration agreement, and/or the applicable law and AAA rules whether the arbitrator(s) have the authority to award attorneys' fees. At the conclusion of the oral hearing, the parties may agree on a briefing schedule to include reply briefs, which provides the opportunity to comment on fee applications from the other party as well as to update their own applications. I am reluctant to award attorneys' fees as sanctions, and this should rarely be necessary if a comprehensive case management plan or scheduling order is in place and followed.

Posted by Gerard F. Doyle | October 31, 2016 1:20 PM

November 5, 2016: Arbitrator Cancellation Fee - What are your thoughts?

Should arbitrators charge a cancellation fee? If so, how many days before the scheduled hearing is appropriate to trigger the cancellation fee? Please provide your thoughts/comments below.

Arbitrators should be free to charge cancellation fees, at their discretion if the parties agree at time of selection. Imposing the fees may depend on the timing and reason for the cancellation and on whether the arbitrator is unable to fill the scheduled time with fee paying work.

However, I was advised some years ago by a AAA representative that having a cancellation fee on my information sheet is a negative factor in the selection process. I no longer have a cancellation fee.

I also have found that in the situations where there have been cancellations, the reasons for the cancellations are ones for which I would not have imposed a cancellation fee if I had one.

Posted by Anonymous | November 5, 2016 2:13 PM

I'm not sure under what conditions a formal cancellation fee would be charged. In my experience, if the parties settle or otherwise drop out of the process, they will already have made a deposit to the AAA that would cover my time spent up to that point for study, etc. I would not assess a cancellation fee that is a separate line item.

Posted by Raoul Drapeau | November 5, 2016 2:24 PM

In AAA arbitrations I participated in I have never charged a cancellation fee. However, I do believe that charging a cancellation fee is appropriate in many circumstances. I remember on one occasion where the parties settled their dispute the afternoon

before the day of the hearing when the tribunal was en route to the site of the arbitration. The tribunal was "called off" and we returned home. The parties requested we issue the Award to include the terms of the settlement. One of the settlement clauses included the payment to the hotel where the matter was to be heard of $35,000 cancellation fee! The parties had reserved the hotel for three weeks in anticipation of the hearing. of course the arbitrators were not paid a cancellation fee while the hotel did. Each arbitrator lost the income anticipated of a three-weeks hearing. At the time, I did not think that this outcome was fair to the members of the tribunal.

Under other Regimes I have included a cancellation fee which stated something like this: if the matter settles prior to the hearing a cancellation fee would be charged. However, if I am able to fill the time previously reserved for this matter with another assignment I would reduce the cancellation fee by that amount. I have had success getting this wording approved by the parties and I believe that a cancellation fee charged in this fashion would be appropriate. On two occasions I did return money to the parties in accordance with my fee schedule which had included such a cancellation fee.

Posted by Nasri H Barakat | November 5, 2016 6:50 PM

In the past I never charged a cancellation fee. I was actually happy to have the time to spend on other matters or no matters at all.
Recently I I expressed my policy to frequently appointed arbitrators, I had the impression that not to charge one reflected adversely on my standing.
I have since incorporated a clause but have yet to use it and am not sure I will. Waiver is always an option.
Judge Bassler

Posted by William G. Bassler | November 5, 2016 7:36 PM

I do state a cancellation fee to encourage the parties to be considerate and to not advise me at the last minute of a resolution. I will not likely find something to replace the scheduled arbitration when I have abrupt notice. However, I only require notice of two business days, which I consider to be more than reasonable.

Posted by Federico C. Alvarez | November 5, 2016 11:46 PM

I don't charge for cancellations because I can fill the time with productive work. Full-time neutrals have find the right balance.

Posted by Steven Skulnik | November 6, 2016 1:07 AM

I have never charged a cancellation fee and do not expect to ever do so, unless AAA establishes a policy that cancellation fees should be charged under specific circumstances. I think it would be appropriate for all neutrals to charge for direct costs, actually incurred, associated with a cancellation. Such charges, in my opinion, should include the cost travel to the location, if such costs are actually incurred, such as airfare, hotel costs, meals, driving costs and similar expenses and the time expended for such travel. I do not think that lost opportunity charges should be charged unless, the neutral has been given an income producing activity and has requested an alternate time for the hearing because the opportunity will be lost if not accepted and the parties have refused to reschedule. In all other cases, there should be no cancellation charges.

Posted by Kenneth R. Skinger, PE, F. NSPE, Esq. | November 6, 2016 2:31 PM

I do not include a cancellation fee in the poster AAA information
because I don't know what type or length case
an observer may have, most cases are short and I can
generally use the time in case of cancellation productively.
However, when contacted directly by other attorneys about being
retained for an arbitration and discussing a retainer, I have
considered including a modest cancellation fee when multiple
days must be reserved and it will be difficult filling all that time
on short notice.

I add that my circumstances may be somewhat different than
others. I am a retired judge who enjoys doing arbitrations and
and don't want to lose an arbitration I might enjoy by
including a cancellation fee.

Posted by Edwin H. Stern | November 6, 2016 6:50 PM

I do not include a cancellation fee in my posted rates for AAA arbitrations because most cases are short and, like others, I can generally use the cancelled time to good advantage. Moreover, I don't know what type of proceedings the observer is involved in, or what might be involved in the matter, and don't want to lose an arbitration I might enjoy conducting by including a fee that might be deemed unreasonable and which I am given no opportunity to discuss.

However, when contacted about conducting an arbitration and discussing a retainer with private parties, I might include a cancellation fee if multiple days are involved and it will be difficult to fill the time if the matter is cancelled on short notice. But I have not done it yet, in part, because if the matter is cancelled on short notice in such a case, there would be billables for preparing the matter which I do in advance of the proceedings.

Posted by Edwin H. Stern | November 6, 2016 8:37 PM

Cancellation fees protect arbitrators from economic losses caused by last-minute adjournments. Since I have included them on my Fee Schedule untimely adjournments have decreased. Of course, I waive the charge when an adjournment is beyond the parties' control, e.g., Super Storm Sandy, illness.

To the extent that a last-minute adjournment fee might be negative factor in selection, I am accept this lost opportunity as a necessary cost to control my calendar.

Pat Westerkamp

Posted by Patrick Westerkamp | November 7, 2016 11:05 AM

I do not charge a cancelation fee unless I have incurred actual expenses in preparation of the hearing (travel, hotel reservations). There are three main arguments posed by those opposed to arbitration. The award is not subject to an appeal through the court system unless under rare circumstances (failure to disclose material matters); the award is arbitrary and not based on state or federal law; and its too expensive. I think we should endeavor to be more sensitive to the parties when thinking of cancelation fees. I certainly am not critical of those that charge one, particularly those arbitrators who are in constant demand. I just haven't reached that plateau.

Posted by scott link | November 7, 2016 12:45 PM

November 12, 2016: The Recent Election and Arbitration - What are your thoughts?

Do you think the recent election will have an impact on arbitration? Please provide your thoughts/comments below.

No.

Posted by Warren Conklin | November 12, 2016 2:04 PM

No.

Posted by Denise Presley | November 12, 2016 2:25 PM

No

Posted by Melvyn W. Wiesman | November 12, 2016 3:37 PM

Not if arbitrators and arbitration providers and associations remain vigilant and take the opportunity to assure opponents of arbitration that arbitrators are truly neutral, seeking to allow the parties every opportunity to prove their cases, basing awards on the facts and the law, and providing hearings much quicker than trials and final decisions that end the disputes many, many months or years before similar cases proceeding through the court system.

Posted by John Dewey Watson | November 12, 2016 4:22 PM

I see no direct connection. What is interesting is whether or not any of the approximately 75 civil cases pending by/against Trump and/or the Organization which are reported in the media are to be decided in arbitration, and if the company's current form contract utilizes arbitration clauses. From my personal experience in negotiating a license for a client with Mr. Trump in 2004, the rather simplistic agreement (this was fairly early in his entree into licensing) contained the following clause: "All disputes under this Agreement shall be resolved by the courts of the State of New York, and the parties all consent to the jurisdiction of such courts.... " That said, however, the final draft stated that "All disputes under this Agreement shall be resolved by submission to the American Arbitration Association in New York City and the parties all consent to be bound by the deci-

sions rendered in such arbitration proceedings." From what has been on the news, it appears that current agreements do not contain arbitration clauses in that the approach by the organization appears to be to litigate from strength, by overwhelming force and intimidation. In my almost 50 years of practice, I noted that parties hopeful that any dispute could be settled would be more inclined towards arbitrating. Mr. Trump had stated in one of his primary debates that he never settles. Of course the upcoming trial in the Federal Court class action against Trump University demonstrates that the operating documents with users do not have arbitration clauses or prohibit arbitration of class actions. I would venture to say that there does not appear to be any motivator to promote arbitration based on the President-Elect's prior conduct.

Posted by Sidney D. Bluming | November 12, 2016 4:50 PM

I just blogged on this very topic! See "The Election is Finally Over – What Does It Mean for Arbitration?" published in my blog at Arbitration Resolution Services. Short answer: good news if you like mandatory arbitration and less regulation; not so good if you don't.

https://www.arbresolutions.com/2016-election-arbitration/

Posted by George Friedman | November 12, 2016 6:41 PM

I believe the Trump administration is likely to reflect the general preference of large corporations to promote arbitration and limit access to courts. This direction will probably be expressed by the judicial appointments made by the new president and the confirmation process in the Republican controlled Senate.

Posted by Judge Gerald Harris | November 12, 2016 9:58 PM

No, nothing can change ethical behavior, nor the rule of law.

Posted by Robert E. Barras | November 13, 2016 9:57 AM

The election is likely to be a setback for efforts to limit compulsory arbitration in consumer transactions and employee/labor relations. (This is another way of saying what Judge Harris says above. I'd only add that moves to protect compulsory arbitration can be expected in the regulatory and legislative sectors, as well as the judicial area he refers to.) I don't think the election will have any particular effect on voluntary arbitration pursuant to negotiated arbitration agreements.

Posted by andrew gerber | November 13, 2016 1:06 PM

Yes. There will be a new NLRB, for example.

Posted by Robert L. Arrington | November 14, 2016 8:44 AM

November 25, 2016: Collateral estoppel and arbitral awards - What are your thoughts?

Under what circumstances will arbitrators and courts give collateral estoppel effect to prior arbitral awards? Are the considerations different in the international and domestic contexts? Please provide your thoughts/comments below.

It will depend on the applicable law, but generally in deciding whether issue preclusion applies, the court or arbitrator in the second proceeding must examine whether the same issues were decided in the previous arbitration. If the basis of the arbitral award is unclear, relitigation of the issue is not precluded (see Hogue v. Hopper, 728 A.2d 611, 615 (D.C. 1999)). The party claiming issue preclusion must prove that the issue decided by the arbitrator was identical to the issue presented in in the later proceeding (see Dujardin v. Liberty Media Corp., 359 F. Supp. 2d 337, 359 (S.D.N.Y. 2005) and Advanced Aerofoil Technologies AG v. Missionpoint Capital Partners LLC, 2015 WL 1850503, *7 (Sup. Ct. N.Y. Co, April 12, 2015)).

In an arbitration involving a foreign party or conducted under foreign law, barring relitigation of the issue may not be consistent with the reasonable expectations of the parties as many civil law jurisdictions do not recognize collateral estoppel. A US court or tribunal presented with an argument that a foreign award should be given collateral estoppel effect, should examine the expectations of the parties and the extent to which the law of the seat of the first arbitration has an established rule on issue preclusion.

For fuller discussion, see Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 4-10 cmt. d (iii) (Tentative Draft No. 2, 2012).

Posted by Steven Skulnik | November 25, 2016 5:58 PM

Collateral Estoppel generally applies to issues of fact, or law that were placed before, and previously decided in a prior award by a different arbitrator. As more narrowly applied by labor arbitrators, it prevents re-litigating factual and legal issues that were NECESSARY factors in reaching a prior award. Its use, of course, is contingent on the precluded party having had a full and fair opportunity to litigate the issues in the first arbitration.

Pat Westerkamp

Posted by Pat Westerkamp | November 26, 2016 12:24 PM

Generally, collateral estoppel is available to parties in arbitration, subject to the governing law for the dispute. Application of collateral estoppel will require careful legal and factual considerations but, generally, the arbitrator should not reject out-of-hand a request for application of collateral estoppel.

Posted by John Allen Chalk | November 26, 2016 2:57 PM

I agree with Steven Skulnik's succinct analysis.
As to domestic arbitrations, I suggest a three step process.
1.Determine the state's governing law on collateral estoppel now more often referred to as issue preclusion.

2.If the state often cites the Restatement utilize
the analysis and commentary in the Restatement (Second of Judgments).

3.Find case law support for applying the state's law on issue and claim preclusion to arbitration.

I recently sat on a panel where we applied the state's law and Restatement analysis in barring the claim because of claim preclusion (res judicata).
Where the first Panel rendered a valid and final award the merger and bar rule of Section 19 of the Restatement (Second) Judgments prevented the claimant from suing on the same claim in the absence of an exception under sections 20 and 26.

Posted by Hon. William G. Bassler | November 26, 2016 5:58 PM

In one of my cases the first issue to be resolved was the confidentiality of the First award. Apparently both parties wanted confidentiality but when one prevailed he wanted to wave the confidentiality required by the arbitration agreement. He turned to the second panel for relief but we (the second panel) did not believe it was our issue to resolve. Therefore, the confidentiality remained in place. This was an obstacle to overcome as a threshold issue before raising the estopel argument. When the parties in the first arbitration went to court to confirm the award the award itself became public record. The second panel heard oral arguments on the issue and awarded the motion based on collateral estopel. I was a member of both panels and managed to keep the confidentiality imposed in both matters. The decision of the second panel was a majority decision. The view of the dissenting arbitrator was that the parties had initiated two proceedings because they wanted two outcomes. Otherwise they would have opted for consolidation. They opted for two proceedings when they had no idea how the decision would come down. Once a decision was made in once case the winning party wanted to use collateral estopel as an argument to put the matter to rest.

In my view, confidentiality is a hurdle that must be overcome. After that, whether the parties had wanted one or more outcomes I believe that the winner in the majority of the cases would want to use the argument to win the proceedings. A second panel not being privy to the universe of documents produced in the first proceeding may have a problem accepting the argument based on the First Award alone.

Of course the estopel argument is valid in law and equity however, in my view its applications may not be as straightforward as a panel would like it to be in order to issue its award based on arguments it did not hear or evidence it did not see.

Posted by Nasri H Barakat | November 26, 2016 7:18 PM

December 4, 2016: Escrow accounts for ad hoc arbitrations - What are your thoughts?

What are your thoughts about escrow accounts for arbitrator fees in ad hoc arbitrations? Are the rules different for arbitrators who are lawyers? Please provide your comments/thoughts below.

I believe as an attorney the prudent (and probably required) approach is to deposit ad hoc arbitration deposits in my regulated IOTA trust account and of course manage the funds according to the trust account rules.

I do not know how non-lawyer arbitrators deal with ad hoc arbitration deposits.

Posted by Richard DeWitt | December 4, 2016 6:18 PM

IOLA accounts have two essential characteristics. First, they are a place for lawyers to deposit funds received from clients and others involved in transactions with clients, for future use in furtherance of the transaction. Secondly, it is a state functioning program to support funds for indigents, i.e., legal aid and improvements to the justice system. Neither is applicable to arbitrators holding in escrow funds from two litigants to ensure payment of their fees. it seems to me that the Code of Ethics speaks to the issue of improper abuse of the ethical responsibility of holding anticipated fees in escrow. While it is tempting to create rules and regulations governing this process, I think it an unnecessary exercise, and puts an onus on arbitrators with which they should not be burdened. Clear from my comment is that lawyers and lay persons acting as arbitrators should be held to the same standards, and no difference should apply to lawyers acting as arbitrators as they are not representing clients or otherwise acting in a duel role as lawyers usually do in transactions when holding funds.

Posted by Sidney D. Bluming | December 4, 2016 7:50 PM

I am a member of the Grievance Committee for the 9th Judicial District. The suggestion that an attorney's escrow fund can be used as a place to deposit monies to be applied against fees earned by the attorney in connection with services provided as an arbitrator is a very serious mistake, one that will probably result in severe disciplinary action against any attorney who does so. And here is why:

A lawyer should never place funds into an escrow account that aren't being held for a client or on behalf of a client. Lawyers are barred from using an escrow account for any other purpose. It is an ethical violation to co-mingle escrow funds held for a client with funds belonging to an attorney. Period.

This said, if the funds held include monies belonging to a client, or some third party on behalf of a client, and fees due the lawyer that are linked to the escrow arrangement involving the client, and there is a written agreement that spells out the details, the lawyer is not violating the law and/or the rules of the Appellate Divisions. This happens all the time, an example being in connection with real estate transactions.

In an ad hoc arbitration situation, the parties are not clients of the arbitrator just because the arbitrator is an attorney. The relationship between the parties and the arbitrator is quite different from the relationship of an attorney and a client. This makes all the difference in the world when it comes to escrow accounts administered by an attorney, even if that attorney is an arbitrator.

In the situation described where the arbitrator who is a lawyer receives monies to be held and applied against arbitral services rendered in the future, if the arbitrator were to deposit these funds into an "attorney escrow" account, doing so would be a serious violation and could result with the lawyer being admonished or worse. To be clear, a lawyer can not and should not use an escrow account for the expressed purpose of conducting that lawyers personal business. Period.

If an arbitrator who is an attorney is involved in an ad hoc situation and receives monies "in escrow" to be applied to arbitral services still to be rendered, the proper thing for the arbitrator to do is enter into a written agreement with the party or parties providing the funds spelling out the details. The arbitrator should segregate the funds and thereafter access them in accordance with the agreement entered into. It is proper for the arbitrator to open a separate account to hold these funds. But is it not proper for the arbitrator to designate this fund as an attorney escrow account.

The confusion around this issue leads a lot of lawyers to run afoul of the law and it is one of the most common reasons why lawyers end up before a grievance committee. Great care needs to be taken so as to avoid at all costs the comingling of client funds with an attorney's personal funds. An attorney's escrow account can never be used solely for the purpose of conducting the attorney's business.

Paul Marrow

Posted by Paul Marrow | December 4, 2016 10:09 PM

December 11, 2016: Personal Attorney Present at Arbitration Hearing - What are your thoughts?

Claimant originally brought an arbitration against both corporate Respondent and one of corporate Respondent's employees personally. Because the contract containing the arbitration clause was only between the Claimant and the corporate Respondent, Claimant dropped the claim against the employee. Two weeks before the evidentiary hearing, Claimant sued the employee directly in court.
Hearings in the arbitration are about to begin and now the employee, who will be attending and testifying in the arbitration as a representative of the corporate Respondent, would like to have her own personal attorney attend the arbitration. Is it proper for that personal attorney to be present at the arbitration? The parties have indicated he will be given access to the transcript anyway. Under AAA Construction Rule 26, arbitrators have discretion to determine the propriety of someone's attendance. Please provide your thoughts/comments below.

I believe it would be appropriate to allow the employee to have her attorney present when she is examined but I would not permit the attorney to participate in the questioning which should be conducted by the attorney for the corporate respondent, the party to the arbitration.

Posted by Judge Gerald Harris | December 12, 2016 12:30 AM

No, not appropriate.

Posted by Robert L. Arrington | December 12, 2016 9:04 AM

I would tend to allow the attorney's presence only in an advisory capacity to assure their attorney / client privacy be maintained, especially since the record of testimony will be provided to the parties.

Posted by Robert E. Barras | December 12, 2016 9:21 AM

I would allow the employee's personal attorney to be present during the employee's testimony, but not at any other time.

Posted by Mark Bunim | December 12, 2016 9:46 AM

I have allowed it in a labor arbitration (counsel representing employee) with the understanding that the Union's attorney would be representing the grievant and that the personal attorney would not participate and would remain silent. He cooperated fully and it worked out fine.
EES

Posted by Edward Shumaker | December 12, 2016 10:09 AM

I agree. The Attorney should be allowed to be present when his client testifies.

Posted by Charles Shaffer | December 12, 2016 11:23 AM

Sounds like a "mess." In any instance, absent the parties' mutual consent, I would not be inclined to allow the employee to have her attorney present.

Pat Westerkamp

Posted by Pat Westerkamp | December 12, 2016 12:40 PM

As most of the commenters, I'd allow the attorney to attend during the client's testimony, and not participate in any way in the hearing other than to protect privilege.

Posted by Jim Purcell | December 12, 2016 1:52 PM

Because the contract authorizing the arbitration specifically limited the parties to the Claimant and the corporate Respondent, I would probably allow the employee's personal attorney to attend during her testimony in the arbitration but not otherwise participate. She is now representing the corporation which has its own attorney. Her personal attorney will later have access to the transcript of the entire arbitration hearing if and when she goes to state court.

Posted by Robert Echols | December 12, 2016 1:59 PM

As with most others, I think the attorney's presence during the employee's testimony is appropriate, as it would be for personal attorneys for any other witness. That said, this question would need to be viewed in the context of the entire proceeding and the arbitrator's policy. Is it to let others generally to attend the hearing if at all connected to anyone in the proceeding, or is it limited? In my experience, this is discussed with the parties in advance and decided with agreement of the parties. Remember, the arbitration belongs to them.

Posted by Sidney D. Bluming | December 12, 2016 7:35 PM

The employee's attorney should be allowed to counsel the employee during the employee's testimony, without restriction as to the subject matter of the advice.

Posted by andrew gerber | December 12, 2016 7:41 PM

In response to Mr. Bluming's suggestion, above, that it should be up to the parties because "the arbitration belongs to them": That comment is true, but only up to a point. When another (like the employee here) may be affected by the arbitration, the arbitrator can and should use her/his discretion to serve the interests of justice, whether or not that is what the parties want.

Posted by andrew gerber | December 13, 2016 7:42 PM

I agree with Sid Bluming. This sort of issue is usually worked out by the parties. For this hypothetical, I suppose we have to assume that the Claimant has objected to the lawyer's presence. Claimant would have to have a good argument. The notion that arbitration is confidential is not, in my view, a sufficient reason to prevent this witness from having his own counsel attend during his testimony.

Posted by Steven Skulnik | December 13, 2016 9:03 PM

I have allowed an attorney to be present for the testimony of his client. The client/witness was also an attorney who had performed legal work for the corporate party. The attorney-client privilege had not been waived. So counsel could signal the witness and thereafter, the witness would invoke the privilege in answer to questions. The attorney did not represent the corporate party so I did not allow him to participate otherwise in the proceedings.

Posted by Federico C. Alvarez | December 14, 2016 6:37 PM

December 19, 2016: Clarification/Interpretation of the Final Award - What are your thoughts?

Parties to a commercial arbitration matter with an ADR provider mutually seek a clarification/interpretation of one section of the final award 40 days after it was issued. The provider's rule on awards states:

Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the ADR provider, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the provider to the arbitrator of the request and any response thereto.

What should the parties do? What options do the parties have? *Please provide your thoughts/comments below.*

One could look at a joint request by the parties as a request for a new arbitration, the subject matter of which is the meaning of the prior award. One could also look at a joint request as an agreement by the parties to waive the time limit in the institutional rules. On either analysis, the arbitrator is free to provide the clarification/interpretation sought.

Posted by George A. Davidson | December 19, 2016 11:51 AM

Where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises that arbitrators are entitled to clarify (see Play Star, S.A. De C.V. v. Haschel Export Corp., 2003 WL 1961625, at *3, n. 5 (S.D.N.Y. Apr. 28, 2003) (quoting Colonial Penn Ins. Co. v. Omaha Indemnity Co., 943 F.2d 327, 332 (3d Cir. 1991).

Although arbitrators may feel that the provider's rule nonetheless makes them functus officio, that view is not supported by the law. The functus officio doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended,and "the arbitrators have no further authority, ABSENT

AGREEMENT BY THE PARTIES, to redetermine those issues (T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342 (2d Cir. 2010) (emphasis added). Here, both parties are seeking clarification/interpretation and have therefore empowered the tribunal to rule on the request.

Posted by Steven Skulnik | December 19, 2016 11:59 AM

In the interests of justice, and since both parties are requesting the clarification or interpretation, I would grant it. The rule doesn't seem to anticipate the case where both parties seek the clarification since it provides for a response to the request.It is important that the parties understand the language of the award in order to go forward. Since both parties are making the request there is reason to think a clarification or interpretation is needed.

Posted by Norman Rosen | December 19, 2016 12:05 PM

The parties should be asked to explain briefly why they have delayed requesting a clarification/interpretation of the Award for more than 20 days, and whether they agree to a resumption of the arbitration, including payments for the arbitrators time and expenses to resolve the issue. If they agree to a resumption of the arbitration, the arbitrator(s) should proceed to resolve the issue.

Posted by Daniel Margolis | December 19, 2016 12:28 PM

The comments above are very perceptive. I agree that with consent the arbitrators can proceed despite the rule.
As long as there is mutual consent I see no problem with proceeding to clarify the Award. Absent that, I think the functus officio rule kicks in.

Posted by Hon. William G. Bassler | December 19, 2016 3:34 PM

I would decline to react, unless both parties agreed explicitly to an extension of their contract to arbitrate and/or to the time limit to correct an award. It is unwise, in my opinion, to infer from a mutual request that the parties have knowingly extended the authority of the arbitrator. Whichever party dislikes the response of the arbitrator may then disregard it, arguing that the arbitrator lacked authority to issue it. This reaction occurs regularly, although not frequently, in courts where a party litigates a proceedings but then argues that the unfavorable result is void for lack of jurisdiction. An arbitrator's response here could be confirmed but it would require more unnecessary litigation.

Posted by Federico C. Alvarez | December 19, 2016 4:18 PM

First, we should write awards in a sufficiently clear manner so that clarification is unnecessary. Second, we should be careful to distinguish between requests to correct errors and requests for clarification/interpretation since I believe different rules and time frames may apply. Finally, if both sides are requesting clarification we have to accept the likelihood that an ambiguity exists and, I believe,that under such circumstances it would behoove us to make our meaning and intent more clear regardless of the time frame. Indeed, the court in which enforcement of the award is sought may, itself, remand for that purpose.

Posted by Gerald Harris | December 19, 2016 9:46 PM

I do not believe the rule applies since the parties are not requesting that the Tribunal correct any clerical, typographical, or computational errors in the award.

Though the Tribunal may be functus officio the parties are not requesting that the Tribunal take action to modify the award - rather the award must unfortunately have had some ambiguity (if both parties are requesting clarification) which I see no problem with the Tribunal providing clarification.

I may have a different view of the issue if it were not both parties making the request

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Posted by Richard DeWitt | December 19, 2016 10:52 PM

My fundamental belief is that parties to a private proceeding (with no governmental party or governmental interest at stake) can modify procedures by agreement. Accordingly, if both parties agree that clarification or interpretation of an award is warranted at a time beyond the normally appropriate time limit, I would try to accommodate them.
It may be, for example, that some aspect of the award or some wording presents an unexpected or unanticipated wrinkle or problem that no one could have foreseen and why should the wrinkle or problem not be resolved as opposed to generating a new dispute and delayed resolution. Moreover, there are occasions when an ambiguity not apparent to the author is contained in an award, or from the experience and perspective of a party, an award, or aspect of a award, can mean different things to different parties. If arbitrations are to succeed as a mechanism for providing expeditious and fair dispute resolution, they should do that--and fully resolve the matter.

Of course, it is important to be sure that the parties agree to the request for clarification or interpretation and that they are indeed requesting that the same action be taken. This should be made clear in writing obtained and easily accessible when the clarification or interpretation is made (or the arbitrator concludes no clarification or interpretation is warranted or can be made). Moreover, it is important, from my point of view, to be sure that the request for clarification of interpretation is just that---a request for clarification or interpretation of an award that was made, and not essentially a request for a new award or modification based on consequences or circumstances flowing from the award but even there (provided that the parties are not seeking to secure another arbitration at the provider's expense and the judgment has not been substantially executed), I would try to accommodate the parties' truly mutual request.

There are interim awards in cases, and I have not addressed herein the concept of finality. It may well be that in areas in which the arbitrator is not a technical expert, finality has not or cannot be achieved and the parties should be able to jointly and mutually seek clarification or interpretation. The situation is different when a party disagrees with such a need, and the party can make that clear.

Best wishes for the holidays and new year.

Posted by Edwin H. Stern | December 26, 2016 5:46 PM

December 28, 2016: Implicit Biases - What are your thoughts?

To what extent should arbitrators adjust their behavior for implicit biases? To what extent do such biases regularly impact on the arbitration process? Please provide your thoughts/comments below.

I think the greater danger is in trying to overthink things in an effort to eliminate implicit biases one imagines he or she has.

That's a bit different than recognizing a bias and making a conscious effort to eliminate it from one's analysis. The latter is always a necessity.

Posted by Robert L. Arrington | December 28, 2016 1:49 PM

I would think if one is aware of one's biases, appropriate adjustments would be made based on that awareness. Hard to know what biases regularly impact the arbitration process, since if one is aware of them, appropriate adjustments will be made and if not, how would we know?

Posted by Micalyn S. Harris | December 28, 2016 1:56 PM

It may largely depend on the type of biases at issue. In certain cases, those biases call for a disclosure to the parties. Certainly, our initial oath questionnaire allows for some biases to be teased out. Other times, those biases may be more perceived than actual. If I have any situation where there could be a perception of bias,I address it head on with the parties to ensure that everyone is on the same page and agrees that there is no bias that would affect the outcome of the proceeding. As to other kinds of biases that are implicit to us being human, it is incumbent on the arbitrator to recognize them and neutralize them in making decisions.

Posted by Kyle-Beth Hilfer | December 28, 2016 2:28 PM

I agree with both of the above comments. "Behavior" can mean many things, but if we limit the word to mean "outward actions and manifestations" as distinct from "internal thought processes," it may be a tiny bit helpful in addressing the question. We all have biases based on our life experiences, just like judges and jurors. No matter what one's biases, it is of great importance to "behave" (act) consistently judiciously, at every stage of the proceeding, even while harboring thoughts that are possibly fed by our natural, individual biases. If we maintain the proper "behavior" throughout the process, we can always self-adjust for those of our natural biases of which we are self-aware , more confident in making a ruling or an award that we have given everyone a fair shake at making their case.

Posted by Sayward Mazur | December 28, 2016 3:07 PM

Implicit biases--by definition--are below the surface. An interesting way to discover if they exist in each of us is by participating in the online, anonymous test at https://www.projectimplicit.net/index.html

Pat Westerkamp

Posted by Pat Westerkamp | December 28, 2016 3:13 PM

Arbitrators need to pay attention to possible causes of bias at each stage of the case and educate themselves on this issue. Theo Cheng's recent blog post, "The importance of developing skills to address culture in arbitration" (http://arbitrationblog.practicallaw.com/the-importance-of-developing-skills-to-address-culture-in-arbitration/), is a good place to start.

Posted by Steven Skulnik | December 28, 2016 3:34 PM

The biggest potential bias that the parties need to deal with is in selecting the arbitrator to begin with. If his/her background would lead them to think that there is an implicit bias, then they need to decide whether to engage that arbitrator or not. From the arbitrator's perspective, if you know something negative about one of the parties that could create a bias, then you should declare it during the appointment process.

Posted by Raoul Drapeau | December 28, 2016 7:53 PM

It is hard to imagine that adjusting behavior will temper biases. They are inherent in human nature. That lawyer's glasses are nicer than the other's. The essence of being an arbiter is not allowing those biases to carry over into action. I believe all have prejudices, some implicit and some derived - even from the matter at hand; and it is those who do not allow them to affect their judgment or conduct that make the best arbitrators.

Posted by Anonymous | December 29, 2016 8:28 AM

Regarding the issue of bias, I thank all seven of the foregoing comments of wisdom. While I have nothing to add, I read with interest the online test on implicit bias.

Posted by Robert E. Barras | December 29, 2016 11:02 AM

January 3, 2017: Unethical Conduct by Counsel - What are your thoughts?

If an arbitrator thinks that counsel has engaged in unethical conduct, does the arbitrator (or full panel) have a duty to investigate to see if that was the case? Please provide your thoughts/comments below.

I would report this to the AAA, but I don't think the panel has the authority to sanction unethical conduct. It is unlikely that if the arbitrator senses it so does opposing counsel. I would leave it to her or him to determine how to proceed in any of the obvious ways. As counsel I learned that my adversary had confronted one of my witnesses. I confronted him (he claimed to be the ethics advisor in his rather large firm) and we resolved the matter. I would have found it an intrusion if the panel had stepped in and potentially caused a disqualification and a resultant long delay in the proceedings.

Posted by Sid Bluming | January 3, 2017 10:49 AM

What would be the basis for an arbitrator doing such a thing? Where would such a duty come from? The rules of the AAA don't authorize such an investigation. I've never seen an arbitration clause that grants such authority and I seriously doubt such a clause has ever existed. And wouldn't such an investigation be a compromising of neutrality? Wouldn't the arbitrator have to disclose the investigation to the parties? And would anyone want to let that arbitrator continue to serve? Wouldn't this be disruptive to the process?

An arbitrator isn't a policeman. An arbitrator isn't a judge. An arbitrator's obligation is to do that which the parties have asked for, i.e. decide the issues in the case and no more. A judge, on the other hand, has a duty to the law, first and foremost. Judges can and should refer perceived misbehavior by a lawyer to a grievance committee and can do so without being accused of compromising neutrality.

If an attorney acts badly, the party being prejudiced has the power to file a grievance and doesn't need the permission of anyone, including the arbitrator, to do so.

Paul Marrow

Posted by Paul Marrow | January 3, 2017 11:02 AM

Just as arbitrators aren't supposed to independently investigate matters that come up in a case, it seems to me that investigating one of the client attorney's actions would fall in that same category.

If I thought that one of them had done something inappropriate, I would bring it up in the hearing - perhaps the opposing counsel might want to pursue the matter.

Of course one recourse that we all have is to take anything that comes up in the hearing into account when it comes to constructing the award.

Posted by Raoul Drapeau | January 3, 2017 11:09 AM

An arbitrator, who is a licensed attorney in the jurisdiction in which the suspected unethical conduct transpired, may have a duty under RPC to take action under the Rules. This is a complicated decision requiring research, and thought before acting.

In any instance, the immediate question is whether the conduct has interfered with due process, or the gathering of evidence in the matter before the arbitrator.

I'll be interested in the responses of some of our retired judges who have joined the arbitration community.

Pat Westerkamp

Posted by Pat Westerkamp | January 3, 2017 11:14 AM

I believe arbitrators, if they are attorneys, have a professional obligation to report the unethical conduct of attorneys committed in their presence to the Grievance Committee. Such action should be taken only if the violation is patent and, as a practical matter, should be deferred until the arbitration has been concluded.
Judge Gerald Harris

Posted by Judge Gerald Harris | January 3, 2017 11:53 AM

I agree that arbitrators should not independently investigate matters and since the question here asks whether "the arbitrator or full panel have a duty to investigate"--my answer is: There is no duty. However, a lawyer's ethical misconduct presents a challenge for lawyers serving as arbitrators. Lawyers have reporting obligations imposed upon them by the Rules of Professional Conduct when they have actual knowledge of the misconduct. The majority of states' statutes do not contemplate the conflict between the lawyer disclosure requirements and arbitration confidentiality, and they don't provide mechanism to deal with this conflict.

Posted by stephen conover | January 3, 2017 12:10 PM

While an arbitrator does not have a duty to investigate possible unethical conduct, the issue is more difficult where an arbitrator is a lawyer and has actual knowledge that corrupt or dishonest behavior has taken place. The ABA Canons of Professional Ethics provides in Cannon 29 that "lawyers should expose without fear or favor before proper tribunal corrupt or dishonest conduct in the profession". Canon 41 may also apply "when a lawyer discovers that some fraud or deception has been practiced." However, I think that any duties imposed by these canons would be satisfied if the arbitrator reports what he knows to the AAA.

Posted by Michael Blechman | January 3, 2017 12:14 PM

In New York, an arbitration is considered a "tribunal" under the Rules of Professional Conduct. Also, the AAA has Standards of Conduct for Parties and Party Representatives. To the extent that unethical conduct violates those standards, applicable arbitration rules or orders of the arbitrator, I do think it is appropriate for an arbitrator to raise the issue of possible ethical violations and potential remedies for the same as necessary to preserve the integrity of the proceeding.

Posted by Lisa Renee Pomerantz | January 3, 2017 2:30 PM

The key word in the question is "thinks" implying no certainty. In my view the arbitrator has no duty nor authority to go further with this issue, especially when said arbitrator, like myself, is not an attorney. But I would refer the issue to the AAA case manager.

Posted by Robert E. Barras | January 3, 2017 2:30 PM

I have not faced the problem of unethical conduct in arbitration or researched it so my response is provisional.
My inclination is to go with the comments that there is no obligation to report the conduct to the applicable ethics committee. But the comment to check the applicable RPC rule would be advisable.
I certainly would report it to the arbitral institution if there is one.
Arbitration is fundamentally a private process that is supported by limited judicial supervision and enforcement. It is not always easy to identify whether rules applicable to a lawyer in the practice of law are applicable to arbitration.
This topic is certainly worth a seminar.

Posted by Hon. William G. Bassler | January 3, 2017 3:36 PM

In the case of a three members panel I believe that in the least the arbitrator has the obligation to share the suspected unethical conduct by an attorney with the panel. I agree that the panel's authority may not extend to sanctioning the attorney for the unethical behavior but exposing the situation is in some cases enough to have the attorney cease and desist! When confronted with a situation such as this one I believe it is the duty of the arbitrator to share the details with his or her co-panelists. In one case I was exposed to such a behavior during a break at a hearing. I shared the details of the incident with my co-panelists. The President of the tribunal chose not to mention the collective knowledge with counsel but during the hearing reiterated to counsel that ex-parte communications of any kind was not allowed and that was sufficient for the attorney to realize that his unethical behavior was exposed and that resulted in the matter proceeding without further incidents.

Posted by Nasri H Barakat | January 3, 2017 4:27 PM

I conclude that the arbitrator does not have a duty to investigate a suspicion of unethical conduct and should not do so. If the arbitrator did investigate, it creates an adversarial position with that counsel, so the arbitrator loses the position of neutrality. It raises the administrative question of whether counsel is entitled to some type of due process, such as notice of an investigation, procedural rights, etc. And the party represented by counsel may suffer prejudice in the case from counsel's actions, even if the facts of the case do not warrant it. Of course, opposing counsel can complain to the appropriate disciplinary body, which may then perform its own investigation.

Posted by Federico C. Alvarez | January 3, 2017 6:25 PM

January 10, 2017: Deposition Subpoena - What are your thoughts?

Should an arbitrator agree to sign a deposition subpoena for a non-party out of state deposition, knowing it is not legally enforceable? Please provide your thoughts/comments below.

It is enforceable if processed correctly. Otherwise, why do anything that is invalid?

Posted by David Evans | January 10, 2017 12:26 PM

The proposition presented may not be accurate depending on what statutory and case law applies. A lengthy discussion of this issue is found in a number of articles to include "A Model Federal Arbitration Summons To Testify And Present Documentary Evidence At Arbitration Hearing" By the International Commercial Disputes Committee and Arbitration Committee of the New York City Bar Association (May 2015).

Posted by Donald G. Gavin | January 10, 2017 12:32 PM

I would sign the subpoena. Our role as arbitrators is to organize, manage, facilitate and ultimately adjudicate the merits of the case. It is not for us to protect a third party witness from the use of an unenforceable subpoena. It is for the witness to contest, or not contest, the subpoena's enforceability. Sometimes a witness wants a subpoena in hand before providing assistance, and may elect not to challenge enforcement. We should not make this decision for them at the expense of the party seeking the discovery.

Posted by Steven Certilman | January 10, 2017 12:46 PM

Colorado has a statute that authorizes district courts to validate out of state subpoenas. A case has to be filed. The witness has to be served to appear in court. The judge serves the witness with the subpoena and orders the witness to honor it, and tenders the required travel funds or airline tickets. If the witness ignores the subpoena, the judge can impose contempt penalties. So an arbitrator's subpoena from out of state is enforceable through this vehicle. Speaking out of ignorance, I believe that most states have a similar, expedited mechanism. So arbitrators can issue subpoenas, knowing that the enforcement occurs elsewhere.

Posted by Federico C. Alvarez | January 10, 2017 12:55 PM

The answer is NO if you know it is not legally enforceable. There are an awful lot of reasons why, including credibility and not assisting in persuading an out of state non party that he had to do something he doesn't have to do. Seems pretty fundamental to me.

Posted by Jim Purcell | January 10, 2017 12:58 PM

In my opinion an arbitrator has the obligation to follow the applicabke law.
If the Subpoena is not authorized under the Law of theCircuit interpreting
Sec 7 of the FAA or the applicable state law the arbitrator should not sign the subpoena.

That is the position of theNYC Bar report.

To do otherwise subverts the rule of law.

Posted by William G Bsssler | January 10, 2017 1:41 PM

I would sign the subpoena because often witnesses (especially companies) want a subpoena for documentation of the request and are not concerned with whether it is enforceable

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Posted by Richard DeWitt | January 10, 2017 2:18 PM

NEVER sign a document which you know to be illegal. Sure, a witness appreciates a subpoena in order to facilitate getting out of work and being able to testify. But what could that possibly have to do with an Arbitrator performing an illegal act? To scare a witness into an honoring an illegal subpoena? To force an unsuspecting citizen to appear without legal basis? Putting the obligation onto a witness to discern the illegality of the subpoena seems antithetical to our mission of fairness, professionalism and civility!

Posted by Michael Orfield | January 10, 2017 3:48 PM

I think some of the respondents misunderstood the question: It does not assume that all such subpoenas are unenforcible. It is meant to ask "Should an arbitrator . . . IF HE KNOWS it is not (etc.)."

Beyond that, I agree with Mr. Purcell and would not sign a subpoena I know is unenforcible. If I don't know I would probably might ask the requesting party to submit authority on the applicable law and, of course, give the opponent a chance to rebut. If still in doubt, I would probably sign, following Mr. Certilman's reasoning. I don't think it would be my place to undertake research beyond the AAA rules.

Posted by andrew gerber | January 10, 2017 3:49 PM

I agree with Steven Certilman's line of reasoning. I am currently involved in an arbitration where this issue came up. We asked the party seeking the subpoena why the request was being made because the witness was in California. The explanation was that the witness was willing to appear but would not do so without a subpoena in hand. So the key is to first determine why the subpoena is being asked for and if there is a reasonable explanation, then what harm is there in complying? So far as I can see, none.

Posted by Paul Marrow | January 10, 2017 6:50 PM

Starting with the given, as posed in the question, that the arbitrator knows the requested subpoena to be unenforceable it should not be issued. To do otherwise would involve the arbitrator in a deception that smacks of the illicit tactics of some collection agencies who issue phony subpoenas and might even be viewed as borderline illegal. Of course, if counsel represents that the witness is a willing participant who simply wants the comfort (or cover) of a subpoena a different decision might be made.

Posted by Judge Gerald Harris | January 10, 2017 11:19 PM

Although most US attorneys think of depositions as primarily a discovery device, they often serve a different, salutary function: obtaining the testimony of witnesses who cannot be compelled to attend the trial or hearing. If an arbitrator believes the testimony of a third party witness is material to the determination of the merits, then he or she should cooperate with the party seeking to secure such testimony. If the witness is located in a jurisdiction that will not enforce the arbitrator's subpoena and the witness will not comply voluntarily, then arbitrator should consider other procedures, such as seeking letters rogatory from the local court, or convening a special hearing in the jurisdiction where the witness is located.

Posted by George Graff | January 11, 2017 11:28 AM

January 17, 2017: Prior Relationships – What are your thoughts?

How far does an arbitrator need to go to find prior relationships that, if known, should be disclosed? Is there an obligation to disclose relationships the arbitrator does not himself/herself think are disqualifying? Please provide your thoughts/comments below.

Disclose everything and let the AAA case administrator and the parties determine if the prior relationship is disqualifying.

Posted by J. SCOTT Greer | January 17, 2017 11:09 AM

I think that you should disclose it in order to protect the arbitration even if you think it is not disqualifying. I recently disclosed that I had been an associate 40 years ago of one of the firms that appeared before me. It wasn't a problem, as I expected.

Norman Rosen

Posted by Norman Rosen | January 17, 2017 11:13 AM

I think it's a good rule of thumb for the arbitrator to give the parties the opportunity to decide for themselves whether a prior relationship is of concern or disqualifying.

Posted by Dani Schwartz | January 17, 2017 11:19 AM

The Arbitrator/Neutral has an ultimate duty to protect the award, the process and the Association. If there is any current or past relationship (remote or not) after appropriate and diligent investigation, then disclosure is appropriate and providing advice on the neutral's observation of "no conflict" is acceptable; however, disclosure is required and the neutral should not discount this step unilaterally.

Posted by John B Wood | January 17, 2017 11:20 AM

The answer to the first question is as far as reasonably possible and as to potential conflicts, the issue may be one of appearance. A non-disclosed potential conflict becomes significant beyond the actual potential of there being a conflict. The arbitrator should no more determine whether the potential conflict might be an actual conflict than the surgeon should perform surgery on himself.

Posted by Stanley Eleff | January 17, 2017 11:21 AM

Yes, all relationships, however, tenuous, should be disclosed. Harriet Derman

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Posted by Harriet Derman | January 17, 2017 11:22 AM

My rule of thumb: When in doubt, disclose.
If a court is inclined to vacate, failure of adequate disclosure provides the path.

Posted by Hon. William G. Bassler | January 17, 2017 11:43 AM

All relationships should be disclosed, even if arbitrator doesn't think they are disqualifying. As to how far back to go, arbitrator should be maintaining a conflicts check sheet with regard to prior arbitrations. They should do a complete review of their "rolodex", including their social media first degree connections. If something should surface once the arbitration starts because the arbitrator's memory has been jogged, the arbitrator should immediately make the disclosure to the parties.

Posted by Kyle-Beth Hilfer | January 17, 2017 11:55 AM

Arbitrators are supposed to dig deep and disclose anything that might pose even the smallest doubt about neutrality. Maybe not as far back as primary school, but any relationships from adulthood on seem appropriate to me. Yes, it can be a bother but it would be even more so if an aggrieved party digs up something that any reasonable person would think compromising.

Posted by Raoul Drapeau | January 17, 2017 12:27 PM

I think it is up to the parties, not the arbitrator (candidate) to determine whether a prior relationship is tenuous or should be disqualifying. Sufficient disclosure should be made in each matter to give the parties the opportunity to make that judgment. On the other hand, I do not believe an arbitrator needs to do a lobotomy on all prior case files and relationships over an extended period of time, to see if a potential conflict exists. Each arbitrator has a "conflict list" and that should be routinely examined and updated.

Posted by Mark Bunim | January 17, 2017 12:35 PM

Forgetting our legal obligation to search for possible conflicts, and to disclose, in my experience counsel and parties gain increased respect for Arbitrators who are candid.

Pat Westerkamp

Posted by Pat Westerkamp | January 17, 2017 1:10 PM

The question will always answer itself. If you even have to think about it, you should disclose it.

Posted by andrew gerber | January 17, 2017 1:52 PM

For me, the test is not would "I" think they are disqualifying, but would a reasonable person in a similar situation think that they might be disqualifying. As is the gist of the above responses, disclose more not less....all, not almost all.

Posted by Michael Orfield | January 17, 2017 3:09 PM

The definition of "relationships" may be fixed but the challenge is the extent to which we search for them. Previous work associations and affiliations are easily relationships to disclose. While I prefer to disclose everything (including "connections" on Linked-In) how about if I presented at an educational program at which Claimant's counsel also presented or if I was a director of the Bar organization where counsel was also a director? Even more tenuous, what if counsel & I subscribed to the same Bar or practice-related list serve? The universe of historical information we must search continues to expand.

Posted by stephen conover | January 17, 2017 3:28 PM

Disclose, disclose, disclose. The best practice is to disclose every possible conflict. This returns the decision to the parties and protects the integrity of the arbitration. I recently disclosed a relationship that did not, in my opinion, create a conflict, but I was concerned about "buyer's remorse." I included a special disclosure. It read as follows: "So, while I do not have a personal relationship with Mr. XX (although I believe I have met him) and have not interacted with him in my capacity as an attorney, arbitrator or mediator, his relationship with the [name of organization I run] and my position [running the organization] may create an appearance of bias such that even if the parties initially accepted the appointment after full and complete disclosure, the parties might subsequently be inclined to view an adverse decision as biased.

IF, AFTER READING THIS DISCLOSURE, THE PARTIES AGREE TO PROCEED WITH ME AS THE ARBITRATOR, I WILL AGREE TO SERVE."

Posted by Nancy Greenwald | January 17, 2017 7:26 PM

Disclose everything. At one point, I disclosed a blind date I'd had with a party over 50 years prior. No one would have known, since it was under my maiden name, but I disclosed it. No one cared. Afterwards, one of my co-arbitrators said, incredulously, "You remembered?" Yes, I remembered, so I disclosed.
Micalyn S. Harris

Posted by Anonymous | January 18, 2017 5:24 PM

January 25, 2017: Arbitrators Writing Long Opinions – What are your thoughts?

Do some arbitrators write opinions that are unnecessarily long and, if so, is that unethical? Please provide your thoughts/comments below.

I believe that the length of each opinion is "case dependent". If a case is for $25,000, one would not expect a ten page opinion; if it is a complicated fact and legal intensive $200 million case, then a lengthy opinion may very well be justified. Dispositive motion rulings, where the parties have submitted detailed briefing based on legal issues, should, in my opinion, have a discussion of the relevant statutes and case law; and not just a bare-bone ruling finding for one side.

Posted by Mark Bunim | January 25, 2017 11:24 AM

It's hard to spot an ethics issue. Is the suggestion that the arbitrator is writing a longer award to bill more hours? That may be a false assumption. See quote attributed to Blaise Pascal: "I would have written a shorter letter, but I did not have the time" (Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.).

Posted by Steven Skulnik | January 25, 2017 11:24 AM

It is not unethical to write long opinions but it is unnecessary. I just read an article that Judge Posner wrote. In it Judge Posner states that lawyers should learn to write simpler sentences and briefer briefs. I find that long opinions give the lawyers lots of reasons to try and overturn the award, especially if there is an incorrect statement in the opinion. Be short and to the point. As we say down here in Texas, "Rule and run!"

Posted by Joe Cox | January 25, 2017 11:27 AM

To state the obvious, opinions should be only as long as necessary to resolve the issues clearly and grant appropriate relief. However, I don't see a connection between long-windedness and unethical behavior unless the arbitrator bills for time unnecessarily expended.

Posted by Judge Gerald Harris | January 25, 2017 11:27 AM

Yes, some arbitrators do write opinions that are unnecessarily long. I doubt that this is somehow unethical, but it is both dangerous and potentially destructive to the concept of timely and cost-effective arbitration. With the growth of arbitration, so has grown the boutique practice area that I call "Larbigation." Traditional litigation in the arbitration context. I also note that it is popular now for litigators to feed off "failure to disclose" situations, "exceeded authority" situations and any other method they can find to vacate an Award now that manifest disregard is a doubtful basis. So, the less said, the better the Award. I do not think I have ever seen an Award vacated because it was to succinct.

Posted by William H, Lemons | January 25, 2017 11:39 AM

Actually, it depends upon the nature of the case. In an employment or contract interpretation matter where there are complicated and disputed facts the parties may need resolution of multiple issues. In other matters it may not be necessary.
I dont really understand the ethical issue so I will not speculate.

Posted by Roger B Jacobs | January 25, 2017 11:44 AM

Except, perhaps, in the case where an arbitrator simply burns time by writing an unnecessarily long opinion for the purpose of making money, this is not an ethical issue.

Every word in an award is a possible basis for further litigation. Only the words necessary to arrive at the result should be in the award.

Posted by Paul Peter Nicolai | January 25, 2017 11:51 AM

Maybe I am overstating the obvious but an opinion should resolve the dispute and reveal how the arbitrator fulfilled the assigned duties. Style and substance are important ingredients of a good "ethical opinion" and in my view, the length of an opinion does not determine whether its ethical. Sloppy writing shows that the arbitrator put insufficient time into writing the opinion; perhaps sloppy writing creates an opinion that's "unnecessarily long" but not unethical. An opinion with a slanted version of the facts or gives short shrift to a seemingly meritorious argument suggests that the arbitrator did not explore both sides of an issue, is a poor opinion but that may not be unethical. Lambasting or lampooning lawyers or litigants might indicate bias and that may be unethical.
In every opinion, I try to precisely, simply, and concisely state the rule on which the decision turns and articulate the award.

Posted by stephen conover | January 25, 2017 11:58 AM

I agree with the comments to date.
It is harder to write shorter opinions, so in the long run a longer opinion might end up costing the parties' less money.I have heard of one case where it was alleged the arbitrator deliberately wrote long opinions to pad the bill.
That , however, has not been something I have seen.

Posted by William G. Bassler | January 25, 2017 12:54 PM

I agree with the view that, as with any opinion, the length of the opinion must be case specific. Length depends on the issues raised and whether they involve fact finding as well as a pure legal analysis. I do not feel comfortable with unreasoned opinions because, in my view, a statement of reasons focuses the decision and avoids the ability to be arbitrary (or perception of that possibility). When giving reasons, you must be able to state what is necessary to satisfy the author that he or she has explained why the decision is warranted and appropriate. I suppose that may, in some cases, be deemed excessive, but the author should consider length as part of the endeavor to make the opinion clear and understandable.

Posted by Edwin H. Stern | January 25, 2017 1:04 PM

Well, if it is unnecessarily long, it is inefficient, but it is not unethical unless it's done with intent to pad the arbitrator's invoice. But reasonable people can and do differ on what is unnecessarily long.

Posted by Robert L. Arrington | January 25, 2017 3:00 PM

In addition to the great points made by others ... I think it's important to memorialize the facts and findings contemporaneously with the award. Even if it's not billable time.

Posted by Denise Presley | January 25, 2017 3:40 PM

The only ethical aspect I see in award writing is where the arbitrator bulks it up to enhance the fee charged. And the more you write, the more there is to challenge later on by the 'losing' party. It's human nature for us to expound on our reasoning to make sure the parties know we were listening and took into account all the evidence they thought was important. But the Association cautions against unasked-for reasoned awards.

Posted by Raoul Drapeau | January 25, 2017 8:03 PM

When I first came on the AAA panel, back in the early 1990s, reasoned opinions were the exception. Now they are the norm. In part, this trend changed because parties wanted to understand the result. In part, the change occurred because the case-load, over the years, became more complex and a simple one line financial award was no longer appropriate. I always ask parties if they want a reasoned opinion in preliminary hearing. If they do not request one, but I feel that some explanation is needed, I try to keep it succinct. Even if parties do request a reasoned award, that does not mean that the panelists or solo arbitrator should not endeavor to keep the opinion limited by necessity. At times, panelists may disagree internally on the need for explanation. Sometimes, chairs will also have different parts of the reasoned opinion drafted by different panelists. In all cases, it is the chair's job to review the opinion and ensure its length and content are appropriate and even-handed throughout the opinion.

Posted by Kyle-Beth Hilfer | January 26, 2017 11:07 AM

Opinions can be too long, and the more you write, the more potential pitfalls in terms of appeal. When opinions have a tone or unnecessarily seem to praise or criticize a party, they become more vulnable to claims of prejudice.

Posted by Mary K Austin | January 31, 2017 10:06 AM

January 31, 2017: Cultural Differences - What are your thoughts?

What are cultural differences that impact on ethics in international arbitrations? Please provide your thoughts/comments below?

What an interesting question. Certainly there are cultural differences that may impact testifying. One I have seen is the reluctance of women from many countries to speak out against a male.
To carry the point further, in a theocratic country, it seems to me that an arbitrator might tend to (or even be expected to) discount testimony from a witness having a different religion. If that were to happen, I would call it unethical.

Posted by Raoul Drapeau | January 31, 2017 10:11 AM

Understanding cultural differences maybe very helpful to understanding and judging the ethical behavior of the parties. However, as arbitrators we are bound by the agreement of the parties and our task is to interpret the relevant agreement (s) in accordance with our understanding of the custom, practice and the applicable law. While we maybe able to give some consideration for the cultural differences and their impact on the parties behavior I doubt that we should carry our understanding so far as to excuse the culprit. The ethical standards are almost universal and their applications should be uniform regardless.

Posted by Nasri H Barakat | January 31, 2017 10:25 AM

In some cultures the making of payments to "grease" transactions is considered appropriate and usual. Americans doing business in such locales must resist such practices lest they run afoul of the Foreign Corrupt Practices Act. How these different perspectives may be dealt with in international arbitration is a sensitive and complicated matter.
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Posted by Judge Gerald Harris | January 31, 2017 2:01 PM

February 6, 2017: Retired Judges and Disclosures – What are your thoughts?

What is the duty of retired judges serving as neutrals to disclose past cases (e.g. names of past parties and counsel) from the bench? In the case of arbitration, when would failure to disclose create a risk of award vacatur for lack of impartiality? Please provide your thoughts/comments below.

I see it as no different from other arbitrators. If the parties or counsel have appeared before you, you disclose it; just as, if you'd sat on a case with the same or similar issues. Both the fact and appearance of impartiality are critically important.

Posted by Jim Purcell | February 6, 2017 11:10 AM

I think a retired judge should disclose the cases in which the parties have appeared before him/ her on the bench if known. As an arbitrator I have no way of doing a conflicts search that capturs 20 years of adjudication.

So in my disclosure I advise counsel that I have not conducted a search of former cases and have not disclosed them unless I specifically remember.
Better safe than sorry.

Posted by William G Bassler | February 6, 2017 11:12 AM

Recognizing that complete disclosure is the goal,the information available to the former judge (ie, names of past parties in cases) must be disclosed. By contrast, if the former judge had administrative responsibility over a case or party should not prevent the former judge from acting as a neutral in a matter when the judge previously exercised remote or incidental administrative responsibility that did not affect the merits.

Posted by stephen conover | February 6, 2017 11:15 AM

Both the IBA Guidelines on Conflicts of Interest in International Arbitration and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes require that any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure. Therefore these connections should be disclosed. Whether the failure to disclose creates a risk of award vacatur for lack of impartiality depends on a variety of factors.

In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), the US Supreme Court set aside an award where an arbitrator failed to disclose that he had a business relationship with one of the parties. Justice Black's opinion stated that arbitrators should disclose to the parties any information that "might create an impression of possible bias." Justice White concurred but reasoned that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial" (Commonwealth Coating, 393 U.S. at 150).

Courts disagree about whether Justice Black's opinion in Commonwealth Coatings was a plurality or a majority opinion (compare Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) with Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82 (2d Cir. 1984)).

Some courts have held that an arbitrator's failure to disclose any information that may create an impression of possible bias may, but does not automatically, constitute a ground to vacate an award. Other courts have fashioned a "reasonable person" standard for determining whether an arbitrator is evidently biased (see App. Indus. Mat. Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 139 (2d Cir. 2007) (applying reasonable person standard, holding that an arbitrator's knowledge of a potential conflict and failure to disclose or investigate it indicates evident partiality)).

In U.S. Electronics Inc. v. Sirius Satellite Radio Inc., the New York Court of Appeals adopted the Second Circuit's "reasonable person" standard to determine whether there was evident partiality (934 N.Y.S.2d 763 (2011)).

Posted by Steven Skulnik | February 6, 2017 11:15 AM

He has the same duty as any other arbitrator to disclose. It can be relevant if the parties' attorney actively practiced in the county where the judge was located.

Posted by Anonymous | February 6, 2017 11:19 AM

I was on the bench from 1977-2005 and have been practicing ADR since then. There is no way I would be able to make complete disclosures regarding all of the cases I presided over in that time frame and no way to access the data in the two counties I served as many were not electronically recorded in archives and I doubt I'd get access even to those that are. I also sat for

two MI Court of Appeals Panels under a program to assist that Bench with a backlog of cases, I think one Panel in the 1980s and one in the 1990s. I have no access to those records.

Cases I sat for that I do remember I can disclose. Those that I do not remember the Parties and Counsel for I simply cannot disclose for a lack of memory.

I can certainly ask counsel if they recall being before me during my bench years, or their present or former firm, but they may not know if their current clients have been before me, perhaps with different counsel.

I submit that former judges disclose their bench years and courts served on, asking counsel and the parties if they recall being in a case before the present judge/arbitrator. If an arbitrator/judge does remember a case it should be disclosed.

I suggest that any rule or interpretation recognize the difficulties of former judges recalling over thousands of cases (in my situation I believe the total number was in the range of 50,000 cases) because the memory of one's entire docket over decades and with no access to searchable databases. The duty in such circumstances should be "as practicable".

Alternatively, it may just more in tune with reality to limit a judge/arbitrator to disclose regarding his ADR practice, recognizing that our resumes list out bench tenures.

Posted by Lawrence C. Root | February 6, 2017 11:43 AM

As a commercial arbitrator, I have not been asked to disclose all prior matters, parties and lawyers. Of course, the proceedings generally are considered private and thus would not be disclosed. I also do not have a complete list of those prior matters. I would disclose any relationship with the parties or counsel as should a retired judge, but I doubt that a retired judge would have available such information, although in this day almost all of that information should be available through database searches for most courts. I believe labor arbitrators, on the other hand, do publish and therefore disclose prior cases, but confidentiality is not expected.

Posted by Bernard Bonn | February 6, 2017 12:02 PM

While it appears that disclosure of parties involved in prior cases should be made, is there need for a jurist to disclose if he has written a decision that appears to be directly on point on a central issue raised in the dispute. This might be of more concern to the parties than a case involving a party in an unrelated dispute. The parties could pick up published decisions in their due diligence, the same as picking up cases involving the other party but what is the duty of the judge?

Posted by Eric Wiechmann | February 6, 2017 12:11 PM

Always disclose. Transparency is the key, but it would seem that only knowledge of the participants in dispute at hand is required, albeit disclosure of people and accounts that arise during the hearing require further disclosure.

Posted by Robert E. Barras | February 6, 2017 12:22 PM

As a retired judge I would disclose the prior appearance before me of a party or counsel should I recall such appearance. I do not believe that an award would be susceptible of vacatur, on grounds of partiality, unless the non disclosure involved circumstances which rendered unreasonable any claim of failed memory (e.g., the earlier appearance resulted in the rendition of a noteworthy opinion which has been widely cited).

Posted by Judge Gerald Harris | February 6, 2017 1:01 PM

All arbitrators, without exception, should have a duty to disclose if either party has previously appeared before the arbitrator. Attorney-arbitrators typically conduct a formal conflict check before they confirm appointment to a case because we, and our insurance carriers, think it's risky to rely solely on our memories. Nowadays, courts are digitizing their old archived files to ensure that case information, including the name of the judge, is readily available. [Thankfully, researching via microfiche is being phased out.] The former jurist might have to contract with a tech services vendor to sort the data into an easy to reference list of parties, but isn't that de minimis effort worthwhile to protect the integrity of the arbitration process?

Posted by Denise Presley | February 6, 2017 2:21 PM

My sense is that it is more realistic to limit the strict standard of disclosure to the ADR cases, where the neutrals keep records of parties, counsel and witnesses. However, judges are not required to disclose in court cases whether they have handled cases involving the same counsel, parties, or witnesses. It is no conflict for a judge to handle cases involving the same actors. Most judges may have handled hundreds or even thousands of cases involving one district attorney's office, or one public defender's office or one firm handling collections or evictions. Judges do not segregate records of all cases over which they have presided and do not control the records after leaving.

So, a practical approach could be for a judge to make a general statement of the judge's tenure and note that most local counsel may have appeared before the judge at some point, with specific reference only to cases that the judge recalls that have higher relevance. A judge could couple this with an instruction to counsel to disclose any history that their side has had with the judge for the opposing party's consideration.

Posted by Federico C. Alvarez | February 6, 2017 7:08 PM

Like most others have stated, any arbitrator has an absolute obligation to disclose any past interactions with the parties and counsel to the arbitration. Failure to do so could be grounds for vacature. A retired judge might have an issue remembering all of the cases he/she worked on, particularly if he/she was on the bench for a long period of time.

Posted by Marvin Schuldiner | February 7, 2017 1:51 PM

I was a judge for 18 years and then sat as a senior judge in various courts for almost a year. Litigants filed about 5000 cases a year in my court, which adds up to about 90,000.They encompassed almost all kinds of criminal and civil cases. There is no earthly way that I can remember most of those cases, except for the most memorable. Certainly I would disclose any acquaintance or familiarity with counsel and parties but would also instruct counsel to advise me of any dealings that they, their clients or witnesses might have had with with me or my court.

Posted by Judge Stephanie Klein | February 9, 2017 2:24 PM

As a state district judge, I tried over 400 cases to a jury verdict. I also tried over 100 non jury cases. Further, I held a Motion Docket every Monday morning. There isn't a way to remember or research every lawyer who appeared in my Court. There are obviously some attorneys who I distinctly remember, and information about these individuals is disclosed. Otherwise, I add a statement that the attorneys may have appeared in my court and moreover may have attended one of my fundraisers and contributed money to my campaign.

Posted by scott link | February 13, 2017 10:53 AM

February 12, 2017: Third-party Funding and Ethics – What are your thoughts?

Does third-party funding in connection with arbitrations present ethical problems? Please provide your thoughts/comments below.

The only exposure I have had as an arbitrator with third-party funding was a dispute between the funder and the recipient. There was an arbitration clause in their agreement and the proceeding was pretty straightforward. It is not clear to me what ethical issues the question contemplates unless the concern is about whether the party to the agreement which is the subject of the arbitration continues to be the real party in interest if the recovery ultimately will be paid to the person advancing the funds. At first blush I don't see that as an ethical issue.

Posted by Judge Gerald Harris | February 12, 2017 4:19 PM

Third-party funding raises "evident partiality" questions and, therefore, creates greater risk of vacatur. The disclosures required of arbitrators in the Code of Ethics for Arbitrators in Commercial Arbitration, in my interpretation of the Code, require the arbitration party with third-party funding to disclose the identity of the third-party funding source, including principals of the source. The disclosure of a third-party funding source, however, could create a strategic opportunity for the non-funding party that raises a fairness question for the arbitration party being third-party funded. One possible solution is for all parties to the arbitration to agree that no information about arbitration party funding in any form will be provided to the arbitrator and that the arbitrator is under no obligation to make disclosures related to third party funding. Another possible solution, although draconian, is to require that arbitrators have no personal, business, social, or financial interest in any entity that provides third-party funding to arbitration parties. Under any scenario, the disclosure obligation appears to be the major issue created by third-party funding of arbitration parties.

Posted by John Allen Chalk | February 12, 2017 4:41 PM

I agree with both comments. The regular disclosures required of arbitrators should be enough to weed out possible conflicts of interest.

Jeremy Sussman

Posted by Jeremy Sussman | February 12, 2017 8:05 PM

I will be moderating a program on "Third Party Funding: What You Need to Know" at the ABA Dispute Resolution Section annual conference in San Francisco, April 20, 2018. Panelists, representing funders, users, corporate interests and arbitrators, will discuss how the dynamics of this increasingly widespread billion dollar industry is impacting arbitration. We will include in the discussion the possible ethical and disclosure obligations it might impose. Hope you can come and participate in the discussion.

Posted by Ruth V Glick | February 12, 2017 11:24 PM

February 18, 2017: Deposition Transcript Only – What are your thoughts?

What is your position regarding the presentation of evidence at a Hearing by deposition transcript only (the witness does not appear either in person or by video)? Please provide your thoughts/comments below.

As in any kind of evidence, one of the freedoms that we arbitrators have is the recognition that we aren't required to give each piece of evidence the same weight. If there is only a deposition with no one to defend or explain it, then surely it would carry less weight than something that can be examined.

Posted by Raoul Drapeau | February 20, 2017 7:29 PM

I always prefer live testimony if available. Transcripts are two dimensial; live testimony is three dimensional. They don't capture the nuance and can be misleading. I'm reminded of the line in My Cousin Vinnie: "I shot the sheriff, right." It was said with sarcasm, but the transcript was used against the fellow at trial.

Posted by Mark C. Zauderer | February 20, 2017 7:51 PM

I agree the deposition transcript is not as good as live testimony. But the opportunity to cross examine was there. I would give it the weight I thought it deserved. The Arbitrator should bear in mind that not all witnesses can be subpoenaed to the hearing. And the Arbitrator should understand that even those who can be subpoenaed may have health or other issues that preclude live appearance.

Posted by Robert L. Arrington | February 20, 2017 9:04 PM

This is an easy one. Anyone who has ever read the transcript of a deposition or testify can tell you that it is, at best, a poor representation of what was presented.

Posted by Tc Barr | February 20, 2017 9:17 PM

Deposition testimony is to be given the same weight as 'live' testimony. Both sides are present and can examine the witness who is under oath. Approximately 25% of all testimony in trial is through the reading of depositions. Try getting a doctor to appear live at trial or arbitration. It ain't happening.

Posted by scott link | February 20, 2017 9:57 PM

While hesitancy in accepting a deposition transcript with nothing more is clearly appropriate, I can also envision circumstances in which it is appropriate to take such submitted testimony into evidence. The over-arching value, I believe, is to be flexible in considering such atypical requests and avoid allowing rigid adherence to "best evidence" to deprive a party of necessary evidence.

Posted by Steven Certilman | February 20, 2017 10:20 PM

I'd want some background. Was the deposition indicated in the exchange of information prior to hearing as possibly being offered into evidence? Did counsels discuss and agree to its admission? If both parties agree a deposition should be admitted, admission would be acceptable and the question would be weight. If one party objects, there would have to be a showing of necessity with no other way to obtain the information, that the information was key, that the unavailability of the witness was beyond the requesting party's control (e.g. death, physical or mental incapacity) and the arbitrators' need for the information would also be a factor. Other specific factors would include whether there was adequate opportunity for cross-examination, whether it was the same or a different attorney examining and cross-examining and what kind of information was involved - factual, background, technical, etc. It feels uncomfortable at best, and under most circumstances, an objection would be difficult to overrule.

Posted by Micalyn S. Harris | February 20, 2017 10:34 PM

If the person deposed was cross-examined and assuming the parties are in agreement as to admissibility, I see no reason not to accept the transcript. If admissibility is disputed I would want to hear the reasons for the unavailability of the witness and any other basis for the objection. Ultimately, the test will remain whether the party with the burden of proof has met its obligation based on the evidence presented, including deposition transcripts.

Posted by Judge Gerald Harris | February 20, 2017 11:58 PM

If the witness is employed by or under the control of either party or otherwise is critical to the claimant or respondent, then he/she should testify in person unless there is a truly compelling reason why that is not possible. I want to see and hear the witness live, ask her questions or ask her to explain her testimony and be in the best position possible to see her demeanor, hear the inflection, hesitation or emotions in her voice, and get a true sense of the person so that I can more accurately assess her credibility and the merits of her testimony. If either party anticipates that a party or critical witness may be unavailable to testify at the hearing (for example, the witness resides in Australia and the arbitration hearing is in Boston), then videoconferencing should be explored.
Presenting testimony by written deposition will give me only part of what I need, and, in my view, is a method that should be used only as a last resort.

Posted by Mark F. Brancato | February 21, 2017 8:58 AM

It would be preferable if it as a video deposition in which the adversary could cross exam. If not the weight of the evidence may be weaken if the matters are in controversy.

Posted by Anonymous | February 21, 2017 9:43 AM

I'm a trial lawyer. If a deposition was taken for use at trial it is admissible.

Posted by Charles Shaffer | February 21, 2017 9:45 AM

I agree with Judge Harris's comments and also with the comments of Mr. Shaffer. My bottom line would be to accept deposition testimony if it was prepared and offered for trial purposes, in the absence of disqualifying factors .

Posted by Sid Eagles | February 21, 2017 10:54 AM

I concur with Arbitrator Steven Certilman, who listed the array of factors to be considered.

Pat Westerkamp

Posted by Pat Westerkamp | February 21, 2017 11:09 AM

As a couple of people have mentioned, use of deposition testimony in lieu of live testimony is commonplace at trial, subject to a couple of conditions such as opportunity to cross examine. While live testimony is sometimes preferable, use of depositions may have advantages in terms of expedition (for example, by requiring the parties to designate the pertinent sections in advance, or by agreeing that the arbitrator can read the testimony outside the hearing room). Seems unwise to make use of depositions more limited or difficult in the arbitration context, and if anything an arbitrator should have somewhat more flexibility than a trial judge in relaxing the restrictions on use.

Posted by Tim Russell | February 21, 2017 12:41 PM

If the deposition testimony were admissible under the applicable rules, I would allow it. If not, I would not admit it in the absence of agreement by the parties.

If it were admissible, I think that I would caution counsel who wanted to admit the testimony that reading such testimony into the record or leaving it to the arbitrator to read it on his/her own is, as a general matter, a very ineffective way to present testimony. Indeed, one federal district court judge described reading such testimony into the record as "an act of contributory somnolence."

One exception: If counsel has a crisp clear admission from a witness on the other side, reading just that admission into the record can be very effective.

Posted by Dennis R. Suplee | February 21, 2017 2:53 PM

Admissible, yes, assuming the opportunity to cross-examine at the time of deposition, or in the absence of an objection by the opponent.

However, it is not the preferred mode of presenting testimony for many reasons, especially the inability of the arbitrator to view the demeanor of the witness (unless the deposition was videotaped).

Posted by E. William Pastor | February 21, 2017 4:00 PM

In prudence and foresight, the arbitrator can include in his/her Scheduling and Case Management Order that if depositions are taken during discovery, the opposing counsel may cross-examine the witness at that time so there is full testimony by the witness from both sides at the final hearing. Or course, it is better to have the testimony from a live witness at trial because other proof will be presented and other questions may be relevant and helpful. However, if the opposing attorney does not have a chance to cross-examine the testifying witness when the deposition is taken, he/she is disadvantaged in challenging the testimony of the unavailable witness at the hearing. The arbitrator should clarify this matter before trial if possible so the attorneys are not arguing about the admission of the signed sworn one-sided deposition because the other attorney failed to challenge the testimony when it was taken in discovery.

Posted by Robert Echols | February 21, 2017 4:55 PM


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