304 Arbitration vs. Litigation: The Debate Continues

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Faculty Biographies

P. Jean Baker

P. Jean Baker is district vice president with the American Arbitration Association (AAA), in Washington, DC. She oversees daily operation of the Washington, DC and New Jersey regions. In addition to her management duties, she assists attorneys with the drafting of clauses and businesses with the implementation of alternative dispute resolution (ADR) programs; serves as AAA's liaison to the ABA; serves as a staff mediator on special programs; writes articles and conducts presentations on a variety of ADR-related topics.

Prior to joining the AAA, Ms. Baker held a variety of management positions during many years in a career within the high tech industry.

She is listed in Who's Who in American Law: Arbitrators and Mediators, serves as an adjunct professor at Georgetown Law School teaching a legal negotiation and mediation advocacy course, and is co-editor of the ABA section of litigation's ADR committee newsletter.

Ms. Baker received a B.S. (Summa Cum Laude) from Wright State University, an M.B.A. from Northeastern University and a J.D. from California Western School of Law.

A. Stephens Clay

A. Stevens Clay is a partner at Kilpatrick Stockton LLP in Atlanta. He has trial and appellate experience in a broad range of business litigation matters, including contract and other commercial litigation, business tort actions, antitrust, and patent infringement actions.

He has served as an adjunct professor for ethics and litigation at the University of Virginia. Mr. Clay is also active in organizations that encourage the use of alternative dispute resolution techniques. He has served as an arbitrator and as counsel in arbitrations in Europe and the United States before the International Chamber of Commerce, London Court of International Arbitrations, the Zurich and Stockholm Chambers of Commerce, and the American Arbitration Association (AAA). He is a member of the arbitrator panels for the AAA's large complex case program, for the United States Council for International Business, for the International Chamber of Commerce, and for the CPR Institute. Mr. Clay was appointed to the ABA task force on GATT trade and services agreement negotiation regarding trade services. He has also been appointed to the CPR advisory committee on European cross border commercial disputes. He was appointed to the International Chamber of Commerce task force on arbitrating competition law issues. Mr. Clay has served as chairman of the antitrust section of the State Bar of Georgia. He has been an officer of the ABA antitrust section and is a member of the Georgia, Pennsylvania, and District of Columbia Bar Associations. Mr. Clay has been identified in The Best Lawyers in America ®. He is noted in Chambers USA. Additionally, he has been recognized as one of Atlanta's "legal elite" in Georgia Trend Magazine and in Atlanta Magazine.

Andrew L. Schaeffer

Andrew L. Schaeffer is corporate counsel and the leader of the intellectual property (IP) litigation group at E. I. du Pont de Nemours & Company (DuPont) in Wilmington, Delaware. In this position he leads the group responsible for IP litigation for all of DuPont's strategic business units. He is also responsible for counseling clients and colleagues on prosecution, opinion, and mergers and acquisitions practice as it relates to patent litigation. Mr. Schaeffer has counseled DuPont businesses on commercial and intellectual property matters and represented the company in all aspects of intellectual property litigation.

Mr. Schaeffer began is litigation career as an associate in the Philadelphia based IP firm of Seidel, Gonda, Lavorgna & Monaco, PC. Upon leaving private practice, Mr. Schaeffer joined DuPont where he has remained until the current date.

Mr. Schaeffer graduated from Lehigh University with a B.S. and received his J.D. from Widener University School of Law.

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The Debate Continues

The Demise of Pre-Dispute Jury Trial Waivers in California

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Bank South, N.A. v. Howard

- 264 Ga. 339 (1994)
- Pre-litigation contractual waivers of the right to a jury trial are not provided for by the Georgia Constitution or Code
- Thus, such waivers are not enforceable in Georgia

Grafton Partners, L.P. v. Superior Court

- 36 Cal. 4th 944 (2005)
- Pre-dispute waivers of the right to a trial are unenforceable under California law.
- California Code Section 631 (d) (2) does not provide for such waivers
- Nor does the California Constitution permit the right to a jury trial to be waived absent explicit statutory authority

Scope of the Grafton Decision

- Applies even when both parties to a contract are sophisticated commercial entities represented by counsel.
- Also applies retroactively to contracts entered into before the decision was rendered

Exclusions

- Does not, however, prevent parties from altogether waiving their right to a trial in a judicial forum
- Thus, pre-dispute arbitration agreements are still enforceable

Exclusions Cont.

- Nor does the decision explicitly prohibit CA signatories to a contract from agreeing to
- Have the contract governed by, and disputes decided in the forum, of a state or foreign country that recognizes pre-dispute jury waivers
- Provided the other jurisdiction has a valid nexus to the underlying transaction

Possible Solutions

- Legislative fix - as recommended by Justice Chen who "reluctantly" concurred in the *Grafton* decision
- But this will take time
- The fix may not apply to all types of contracts, such as consumer or employment contracts

Arbitration Agreements

- As noted by the Court in *Grafton*
- The CA Legislature has explicitly authorized certain methods of pre-dispute jury trial waiver
- Such as the use of arbitration agreements

Draft the CA Clause Carefully

- Arbitration clauses need to be tailored carefully to meet California's specific requirements for enforcement
- For example, claims for injunctive relief in consumer disputes are inarbitrable in CA
- No other state prohibits arbitration of public claims

Judicial Reference

- Jury trials in civil matters can also be avoided by means of judicial reference
- California Code of Civil Procedure Section 638
- Authorizes courts to refer disputes to a referee

Referee's duties

- May hear and determine any question of law or fact
- The decision of the referee, however, is subject to appellate review

Referee's Appointment

- By post-dispute agreement of the parties
- Or upon the motion of a party to a written contract or lease that provides that any controversy arising there from shall be heard by a referee

Common Attributes of Arbitration and Judicial Reference

- Tends to be speedier and less expensive than litigation
- Parties get to select a knowledgeable decision maker
- But the parties have to pay for the services of either the arbitrator or the referee

Common Attributes Cont.

- Neither process can be used to defeat class actions unless the class action waiver falls within the very limited exception laid out in *Discover Bank v. Superior Court (Boehr)*

Common Attributes Cont.

- The underlying pre-dispute provision must be voluntary and may be challenged as unenforceable if the agreement is found to be unconscionable or otherwise defective

Common Attributes Cont.

- If the original consumer agreement provides for the addition of new terms, it may be possible to add an arbitration or judicial reference provision through that device (*See Badie v. Bank of America)*

How Judicial Reference Differs From Arbitration

- Parties retain the right to an appeal
- Same rules of procedure and discovery apply in a judicial reference as in litigation
- Judicial proceeding so a hearing before a referee is open to the public

Differences Cont.

- A referee will probably have the power to decide claims involving injunctive relief in consumer matters
- California Rule of Court 244.1 (b) prohibits the court from appointing a referee to conduct mediation

Differences Cont.

- A referee does not need to make the stringent and exceedingly detailed statutory disclosures required of arbitrators
- Nondisclosure by a referee may provide grounds for a motion for a new trial if the nondisclosure prevented a party from receiving a fair trial
- In contrast, non-disclosure by an arbitrator mandates that the award be vacated (CCP 1286.2 (a) (6)

Differences Cont.

- Judicial Reference is largely untested in California
- During a recent two year period, reference was invoked in only .1% of civil cases – overwhelmingly as a special reference under CCP 639 with the referee's scope generally limited to an advisory opinion concerning discovery or settlement matters

Differences Cont.

- Relatively few cases in which California courts have considered the enforceability of pre-dispute agreements providing for judicial reference
- Of the four most recent cases, the reference was deemed to be unenforceable – *Pardee Construction Company v. Superior Court*

Drafting Concerns: Arbitration or Judicial Reference

- Agreement should not include one-sided provisions that limit consumers' rights
- Such provisions include limitations on damages, exclusion of punitive damages, shortening the statute of limitations, excessive limits on discovery, unequal cost-sharing, designating venue in a distant forum

Drafting Concerns: Judicial Reference

- Factors that mitigate against enforcement of a judicial reference clause include:
- Burying the provision in the text of the agreement
- Using a smaller font than the rest of the agreement

Drafting Concerns Judicial Reference Cont

- Failing to explain the process
- Failing to explain that judicial reference is in lieu of litigation
- Failing to explain that the parties will incur referee fees

Drafting Concerns Judicial Reference Cont

- Limiting the relief
- Failing to provide an opt out provision
- Using misleading captions
- See *Pardee Construction Company v. Superior Court*

Drafting Suggestions

Reference a set of arbitration rules or judicial reference procedures that have already passed the scrutiny of court review, such as those of the American Arbitration Association

Source of Arbitrators and Referees

- AAA maintains rosters of arbitrators and referees with expertise in a wide range of complex subject areas, such as intellectual property, technology, energy and healthcare.

Responses to *Grafton*

- Combine a jury waiver clause with an appropriate choice-of-law provision in commercial contracts
- Incorporate either an enforceable arbitration or a judicial reference clause in lieu of a jury waiver provision in all types of contracts

Responses Cont.

- Conclude that the risks imposed by a potential jury trial in California state court are not significant enough to warrant inclusion of any type of jury waiver.

COMPARING THE COSTS
OF ARBITRATING VERSUS LITIGATING

P. Jean Baker, Esq.
June 30, 2006

Unlike litigation, arbitration encourages parties to narrow the scope of the issues to be addressed, thus, restricting potential outcomes and significantly reducing discovery.

What follows is a listing of tasks necessary to resolve a dispute using either litigation or arbitration. Those tasks marked with one (*) typically incur no cost in arbitration. Those tasks marked with two (**) typically incur less cost in arbitration.

To compute the time aspect of the comparison, counsel needs to estimate the numbers of days it will take to complete each task and keep a running total of the number of days to final resolution.

To utilize the cost aspect of the comparison, counsel needs to (1) estimate an upper and lower number of hours it will take to complete each task; and (2) estimate an upper and lower cost to complete each task.

Counsel should find that arbitration takes less time to resolve a dispute, requires fewer hours to manage the matter and incurs less cost for the client.

PLEADINGS
Draft, File Complaint or Demand**
Service of Complaint or Demand**
Resolution of Jurisdiction (including arbitrability) and Venue Issues**
Respond to Counter, Third Party, Cross Complaints**
Motion Practice on Pleadings*
Amend Pleadings*

DISCOVERY
Preliminary Hearing and Scheduling**
Document Discovery
Interrogatories/Requests to Admit**
Motion Practice on Discovery**
_____Fact Depositions*
Motion Practice re: Depositions*
Prepare/Review Expert Reports**
_____Expert Depositions**

PROCEDURE
Legal Research

Separate Markman Hearing or Claim Construction by the Court for resolution of patent related disputes*
Dispositive Motion Practice*
Miscellaneous Hearings/Status Conferences**
Mandatory Settlement Conferences*
Mandatory or Optional Mediation*

TRIAL PREPARATION
Pre-Trial Briefs*
Jury Voir Dire*
Jury Instructions*
Verdict forms*
Motions in Limine*
Exchange of Documents
Exchange of Witness Lists
Production of Trial Exhibits

TRIAL**
_____Attorney(s)
_____Paralegal(s)
_____Support Staff
_____Associate(s)
_____Jury Consultant(s)
_____Appellate Lawyer(s)

POST-TRIAL MOTIONS AND BRIEFS**

APPEAL (Markman Decision and/or Trial Decision)*
_____Appellate Lawyer(s)
Transcripts
Brief & Reply Brief
Oral Argument

SECOND TRIAL*

CASE MANAGEMENT COSTS
Initial client briefing to discuss overview of case
Review of documents
Investigation
Client Briefing to discuss initial investigation results and strategies
Client and/or witness preparation prior to deposition(s)*
Client and/or witness preparation prior to mediation conference*
Review Expert Reports**
Client meetings to discuss trial strategy following completion of discovery**
Client, witness and expert witness preparation prior to trial**
Consultations during trial or hearing(s)**
Client meetings to discuss post-trial motions**
Client meetings to discuss appeal*
Meetings with appellant counsel and client*

OUT-OF-POCKET COSTS

Experts**
Travel**
Exhibit/Demonstrative Production**
Court Reporter Fees**
Copying/Telephone/ Misc Expense**
AAA Fees
Mediator Fees
Arbitrator Fees
Preparation of Record (including transcripts) for the appeal*

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CUSTOMIZING ARBITRATION AGREEMENTS

P. Jean Baker, Esq.
American Arbitration Association
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The High Cost of Litigation

Businesses feel the financial impact of litigation in a variety of ways: (1) Unpredictably large judgments that can sometimes include punitive damages; (2) Run away discovery costs; (3) destruction of business partnerships; (4) Negative publicity and falling stock prices; (5) Loss of employee productivity. As a result of these direct and hidden costs, "winning" a case can result in real economic and competitive "loss" to a business.[i]

Arbitration v. Litigation

Many factors contribute to the preference for arbitration. Unlike litigation, arbitration encourages parties to narrow the scope of the issues to be addressed, thus, restricting potential outcomes and significantly reducing discovery. In litigation application of *res judicata* and *collateral estoppel* may result in a company losing more than a particular case. In arbitration, an adverse domestic decision is restricted solely to a particular claimant. In the international context, arbitration awards are readily enforceable world-wide as a result of the ratification of the New York Convention for the Enforcement of Foreign Arbitral Awards by more than 100 countries. In contrast, the enforcement of national court judgments or mediation settlements is not similarly enhanced by any international treaties of comparable scope.

A *Corporate Legal Times* survey of corporate general counsel conducted in 2004 reported that 59.3% of respondents indicated that domestic arbitration was less expensive than litigation; 78% had found that domestic arbitration lead to faster resolution; and 83% felt that arbitration was either equally fair or fairer than the traditional adjudication process.[ii]

PricewaterhouseCoopers recently conducted a survey of multinational corporations to ascertain whether they also preferred arbitration in the context of cross-border litigation.[iii] The top reasons cited for choosing international arbitration over cross-border litigation were flexibility of the process, enforceability of international arbitral awards, confidentiality, and the ability to select knowledgeable arbitrators. 95% of survey respondents expected their use of international arbitration to increase.

Where to Begin? With the Drafting!

The vast majority of business relationships are contractual in nature. Thus, parties typically structure an arbitration proceeding via a pre-dispute arbitration provision in a contract. The arbitration clause generally includes reference to a specific set of ADR rules. In addition, the agreement should include provisions specifically tailored to foster resolution of specific types of potential business disputes (e.g., intellectual property).

ADR Rules

The rules of the major ADR providers (AAA, JAMS, CPR) do not include the same administrative procedures. For instance, AAA's rules provide for administration by a neutral third party, the AAA. In marked contrast, CPR's rules specify that the arbitrators shall administer the proceeding. Thus, prior to agreeing to the use of a specific set of ADR rules, practitioners should carefully review the administrative procedures to minimize surprises and ensure suitability.

American Arbitration Association's Domestic Arbitration Rules

AAA does not have a single set of procedures that apply to administration of every type of dispute. Specialized sets of rules govern the administration of different types of proceedings, such as employment, construction, consumer, and commercial arbitrations. AAA's Commercial Arbitration Rules are used when a dispute involves two or more domestic entities and the underlying transaction is commercial in nature.

Within AAA's Commercial Arbitration rules, there are subsets of procedures: (1) the expedited procedures are used when claims and counterclaims range from 0 to $75,000; (2) the regular rules when claims and counterclaims range from $75,000 to $500,000; and (3) the large complex procedures when claims and counterclaims are in excess of $500,000.

Administration of a commercial case using either the expedited procedures or the regular rules and the large complex procedures differs greatly. For instance: (1) arbitrators are specifically authorized to order the taking of depositions, interrogatories and requests for production of documents under the large complex procedures, but not under either the expedited or regular procedures; (2) the large complex procedures provide for the use of three arbitrators instead of one when the claims and counterclaims exceed $1,000,000 and the parties have not agreed otherwise. Practitioners should familiarize themselves with the provisions of the expedited, regular and large complex procedures and when desirable modify those procedures in the arbitral agreement, submission or stipulation. (For instance, by specifying use of the large complex procedures when the claims and counterclaims are less than $500,000 or use of three arbitrators when the claims and counterclaims are less than $1,000,000.)

In addition, AAA has sets of rules designed to supplement use of the Commercial Arbitration Rules; for example, the Supplementary Rules for the Resolution of Patent Disputes. To the extent that there is any variance between the Supplementary Rules and the Commercial Rules, the Supplementary Rules apply unless the parties have agreed in writing to vary the procedures set forth in the Supplementary Rules and/or the Commercial Rules.

AAA's Specialized International Rules

AAA's International Centre for Dispute Resolution ("ICDR") administers cases using a unique set of international procedures. If use of the International Dispute Resolution Procedures is not specified in the pre-dispute agreement or post-dispute submission, AAA applies the UNCITRAL definition of what constitutes an international dispute:

(a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different countries; or

(b) One of the following places is situated outside the country in which the parties have their place of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(d) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; if a party does not have a place of business, reference is made to his or her habitual residence.

If the arbitration agreement or submission specifies use of AAA's domestic commercial rules, but the dispute is deemed by AAA to be international in scope, the ICDR will administer the proceeding using both the domestic commercial rules and the Supplementary Procedures for International Commercial Arbitration. The Supplementary procedures require issuance of a reasoned award and appointment of neutral arbitrators. Use of these supplementary procedures is mandatory if a party wants to seek enforce of the resultant award in a foreign court under the auspices of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

The procedures used by AAA to administer international arbitrations differ markedly from the rules used by AAA to administer domestic arbitrations. For instance, AAA's international rules expressly forbid an award of punitive damages unless the arbitral agreement or submission specifies otherwise. Practitioners must understand exactly how AAA's domestic rules differ from AAA's international rules to be in a position to specify use of the appropriate set of procedures.

Adding to the complexity is the fact that the AAA's, the ICC's, and UNCITRAL's international rules lack administrative uniformity. For instance, AAA's international rules provide for administration by a neutral third party, AAA. In contrast, UNCITRAL's rules specify that the arbitrators shall administer the proceeding. Familiarization with the ways in which the different sets of international rules address administrative issues is essential if an arbitral agreement or submission is to be tailored to meet the unique needs of the international client.

Customizing the Arbitration Agreement

Neither the domestic nor the international rules of the various ADR organizations take into account all the variables that could impact administration of every type of dispute. Thus, the arbitration agreement needs to be customized to meet the specific needs of the parties. Options that should be considered for inclusion include the following:

Administered versus Non-Administered

In an independent survey of corporate General Counsel commissioned in 2005 by the law firm of Fulbright & Jaworski, nearly two-thirds of the total sample favored administered arbitration over non-administered arbitration.[iv] Of the four major arbitral institutions that administer international arbitrations, two-thirds preferred the AAA, less than a third selected the International Chamber of Commerce (ICC) and roughly 10% each said they preferred the London Court (LCIA) and the CPR Institute. The fact that the AAA's International Centre for Dispute Resolution (ICDR) offered more than 25 specialized sets of rules for specific industries seemed to be a factor in its strong showing among arbitral institution choices.

Preferences for non-administered international arbitral proceedings were highest among companies with the most arbitration experience. This included the large companies and those in industries that use the process extensively (i.e., finance, healthcare, energy and technology/communications.)

If an ADR administrator is not specified in the arbitral agreement and the parties cannot agree to whom the matter should be submitted, the parties will either have to let the arbitrator self administer the proceeding – referred to as an ad hoc proceeding - or obtain a court order designating the neutral third party administrator.

If the parties elect to not have the proceeding administered by a neutral third party, such as the American Arbitration Association, and disagreements arise between the parties or between the parties and the arbitrators concerning the materiality of the arbitrators' disclosures or the manner in which the arbitrators are interpreting or implementing the arbitration agreement and/or rules, the only recourse is for a party to go to court.[v]

Condition Precedent to Arbitration

Practitioners want to discuss with their clients' the advantages and disadvantages of including a provision that provides for either the optional or mandatory submission of a dispute to negotiation and/or mediation by the parties' respective senior or executive vice presidents either in person or by telephonic conference prior to the commencement of an arbitration proceeding. To prevent unnecessary delay, time limits should be established for the conclusion of any settlement discussions. For example, "Any dispute that is not resolved within (___) days by the parties' respective senior or executive vice presidents after in person or telephonic meetings by them to address the dispute shall be submitted to mediation. If not settled within (___) days after submission of the dispute to mediation, the dispute shall be resolved by arbitration."

Scope of the Arbitration Clause

Practitioners want to consider including non-contractual claims in the scope of disputes subject to the arbitration provision since parties frequently assert claims in terms of tort rather than in terms of contract related causes of action. For example, "any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, any question regarding its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims shall be resolved by arbitration."

Choice of Law

In 1925 Congress passed the United States Federal Arbitration Action ("FAA"). The FAA governs whenever a dispute can be deemed to "affect interstate commerce". During the past 99 years, the U.S. Supreme Court has consistently and very broadly applied the reach of the FAA. The FAA is a bare-bones statute that deals with such basic matters as court enforcement of arbitration agreements, appointment by the court of the arbitrator(s) in the absence of an alternative selection process, compelling the attendance of witnesses and court review of awards. Thus, the majority of procedural details are left to the arbitral agreement or submission, the rules of arbitration-sponsoring organizations, such as the AAA, and, as a last resort, the courts.[vi]

Since the primary purpose of arbitration is to avoid involvement of the courts, in 1955 the National Conference of Commissioners on Uniform State Laws unanimously passed the Uniform Arbitration Act ("UAA"). Although the FAA and UAA have a number of similar, if not identical provisions, the UAA was designed to function as a fully comprehensive statement of arbitral regulatory principles. Thus, the UAA addresses such matters as scope, majority action, waiver, party representation, payment of fees and expenses, non-appearance, depositions, issuance of the award and conversion to a court judgment. The UAA was enacted intact by 35 jurisdictions and with modifications in 14 more.[vii]

In 1995 the Uniform Law Commissioners decided that the time was ripe to modernize the old statute. In August 2000, the revised Uniform Arbitration Act ("RUAA") was approved and recommended for enactment in all the states. As of January 25, 2006, the RUAA has been adopted without amendment by three states: Hawaii, Utah and North Carolina. Nine states have passed legislation containing amendments: Alaska, Colorado, New Jersey, New Mexico, Nevada, North Dakota, Oklahoma, Oregon and Washington. Currently, four jurisdictions are actively debating whether to adopt, revise or reject the legislation: Arizona, District of Columbia, Massachusetts and Vermont.

In essence the RUAA turns the concept of party autonomy on its head.[viii] Under the FAA and the UAA, arbitration was essentially an "opt-in" process. If the parties wanted a special procedure to apply, such as expanded discovery rights, the parties had to include such a provision in their arbitral agreement or submission. In contrast, the RUAA approaches arbitration as an "opt-out" process. Thus, expanded discovery at the discretion of the arbitrator is available unless the parties specify otherwise in the arbitral agreement or submission. To avoid unwelcome surprises, the practitioner wants to ascertain whether the applicable state's arbitration state has been or is in the process of being revised.

In the absence of party agreement, provisions of a state's arbitration statute will govern whenever a dispute does not affect interstate commerce or the applicable state statute contains a procedure that does not conflict with provisions of the FAA and application of the state procedure is necessary to effectuate an arbitration agreement. If you are not familiar with the provisions of either the FAA or the applicable state arbitration statute, you should carefully review both documents. If you have questions concerning interpretation, applicability, or interplay of the two statutes, immediately seek the advice from an expert, such as an ADR professor at the local law school.

To avoid unnecessary delays and additional costs, the arbitration agreement should always specify the law that shall govern the proceedings. In addition, the arbitrator should be granted the authority to resolve procedural disputes.

Subject matter expertise

Disputes may require the presentation of extremely complex material and voluminous amounts of documents. In addition, disputes may turn as much on trade custom and industry norms as on black letter law. Thus, the arbitration agreement or submission should specify the legal or professional background and level of arbitral experience that must be possessed by the prospective decision-maker(s). Such a designation will lead to significant improvements in both the efficiency of the hearings - less time is required to educate an already knowledgeable decision-maker - and the quality of the decision on the merits (thus, greatly reducing the possibility that a less knowledgeable or inexperienced arbitrator will reach a decision by "splitting the baby").

Be advised, however, that such a designation may create delays and greatly increase the costs if use of a panel of arbitrators is specified and the pool of potential neutrals is very small or geographically dispersed.

Interim Emergency Relief

An aggrieved party may require equitable relief immediately: for example, a patent or copyright is being infringed or a trade secret has been misappropriated, and a preliminary injunction must issue immediately. The AAA's commercial rules authorize the arbitrator to award "injunctive relief and measures for the protection or conservation of property." If, however, the arbitrator(s) has not yet been appointed, his or her theoretical authority to award equitable relief will be cold comfort to the plaintiff.[ix]

While the cases are mixed, there have been a few decisions under the FAA that have held that parties to an arbitration agreement have waived their right to seek any judicial relief, or conversely, that seeking judicial relief operates as a waiver of arbitrability. In response, AAA's commercial rules include a provision expressly authorizing the parties to seek judicial relief on an interim basis. If you adopt arbitration rules that are silent on this issue, a good practice is to incorporate an express provision in your arbitration clause to the effect that (i) either party may avail itself of interim judicial relief, and (ii) seeking such relief will not operate as a waiver of arbitrability.[x]

An even better practice than seeking interim relief from the courts is to expressly authorize in the arbitration agreement use of AAA's Optional Rules for Emergency Measures of Protection. These procedures provide that an emergency arbitrator shall be appointed from a special panel within one business day, and a hearing schedule established within two days thereafter. The emergency arbitrator may award emergency relief upon a showing of a likelihood of irreparable harm, and may, in his or her discretion, condition such relief upon the posting of a bond or other security. Any interim award is subject to review by the plenary panel, once it is appointed.

Protective Orders

Disputes involve examination of trade secrets or proprietary information. The ability to protect this information from public disclosure is one of the principal attractions of arbitration. In civil litigation, all information produced in discovery or at trial is non-confidential by default, and the disclosing party must seek additional protective measures if it wishes to alter this default. In some cases, even when both parties agree to the confidentiality of certain information, the court may be unwilling to concur on public policy grounds or otherwise.[xi]

In arbitration, by contrast, the policy presumption is that the proceedings are private. In international arbitration, this policy is viewed as fairly absolute, and also self-executing. In the U.S., however, certain confidentiality obligations attach by default, but the parties must contract for whatever additional measures they deem necessary to achieve the desired level of confidentiality. For example, while the arbitrators have an inherent duty to preserve confidentiality of the proceedings, parties (and witnesses) generally do not.[xii]

Thus, when drafting the arbitration agreement or stipulation, counsel should consider including some or all of the following measures:

*Include a non-disclosure covenant. Confidential information should include, at a minimum, any information exchanged during discovery (or introduced into evidence) that the disclosing party designates as proprietary. Parties may also wish to consider treating the existence of the arbitration itself, and the contents of the ultimate award, as confidential. The non-disclosure agreement should also restrict use of confidential information to the limited purpose of conducting the arbitration, and should require the return or destruction of all confidential information after the period for taking an appeal has run.[xiii]

*Consider requiring that the party proffering evidence obtain an appropriate non-disclosure agreement for each witness.[xiv]

*Evaluate the logistical aspects of the arbitration that may affect confidentiality as a practical matter (e.g., access to the hearing room, the existence of a transcript, etc.), and make any special provisions that are warranted by the nature of the transaction.[xv]

*In situations where the parties do not want the arbitrators hearing the case to review the documents to which privilege is claimed provide for the use of another arbitrator as a special master.

Consolidation

Transactions may involve multiple contracts and/or multiple parties. This is particularly true of strategic partnerships, which often feature a dozen or more interlocking agreements, involving three, four, or more parties. Such transactions demand particular care in drafting the arbitration clause.[xvi]

The simplest scenario is the two-party deal involving multiple contracts. The best practice is to simply ensure that all of the contracts incorporate the same arbitration clause, either directly or by reference. While this simple expedient seems obvious, it is remarkable how often it is overlooked in practice. For instance, a transaction involving the joint development of a new technology by two strategic partners is negotiated. The drafter of the development agreement anticipates all manner of contingencies, including a separate, stand-by license that would apply in the event the relationship was terminated. What the drafter failed to anticipate was that, in the event of a dispute, the main agreement would be subject to arbitration, while the license would not. Any dispute serious enough to give rise to termination would almost certainly have involved claims arising under both the development agreement and the license, subjecting the parties to

parallel proceedings in both a judicial and an arbitral forum. At best, such parallel proceedings needlessly waster time and money; at worst, they can product inconsistent outcomes, further complicating the dispute.[xvii]

While the two-party case is easily addressed, more subtle issues arise in the multi-party scenario. When all parties are privy to each of the contracts involved, they can all agree to a single arbitration clause, as discussed above. But what if there are a series of inter-locking contracts, with differing permutations of parties privy to the various contracts? The drafter who is faced with a family of interlocking contracts which may generate related disputes – but which are not amenable to the unitary arbitration clause discussed above – should consider including a provision in each arbitration clause (i) consenting to consolidation of all disputes arising under the same family of contracts and (ii) specifying the procedure for effecting such consolidation.[xviii]

Drafting such a provision is not trivial. While the specifics will vary from one transaction to the next, the drafter may wish to consider the following:[xix]

(a) Which arbitrator decides whether consolidation is appropriate?
(b) Which arbitration survives?
(c) Should the parties to the non-surviving arbitration(s) have a voice in the selection of the arbitrators in the surviving proceeding?
(d) How should costs be allocated as between the prevailing party, the losing party, and "innocent bystanders"?

This is one of those areas where use of a neutral third-party administrator, such as the AAA, can be worth its weight in gold, as attempting to constitute the consolidated arbitration panel under ad hoc or non-administered rules can be virtually impossible.[xx]

Discovery

Extensive discovery has traditionally been disfavored in arbitration. Most arbitrators, therefore, are reluctant, absent express guidance in the arbitration clause or ADR provider's rules, to order depositions, interrogatories, or other burdensome forms of discovery. While the unavailability of leave-no-stone unturned discovery can be one of the greatest benefits of arbitration, most intellectual property disputes virtually demand some forms of sophisticated - albeit limited - discovery.[xxi]

On July 1, 2003, the American Arbitration Association revised their commercial rules. The revisions provide that the large complex procedures shall be used on all cases where the claims or counterclaims exceed $500,000. Under the LCC procedures, the arbitrator(s) is specifically authorized to order all forms of discovery consistent with the expedited nature of the proceeding. Drafters may specify that the LCC procedures shall be used for cases in which claims and counterclaims do not exceed $500,000.

Cases involving patent disputes shall, absent party agreement, be administered under the Supplementary Rules for the Resolution of Patent Disputes effective January 1, 2006. The Supplementary rules require that the parties regardless of the amount of the claims or counterclaims discuss the extent to which discovery, if any, shall be permitted and the procedure and time frame for the discovery. In the event the parties are unable to reach agreement concerning the extent of discovery, the arbitrators are authorized to resolve any differences.

Drafters who are concerned about arbitrators ordering excessive discovery may consider including any or all of the following provisions:

*Since depositions are especially useful in cases involving extensive use of experts, allow a finite number of depositions, but limit the scope and/or duration.[xxii]

*If access is essential for the electronic forensics that is the key to resolving a dispute, allow for access to the opposing party's premises and equipment as provided for under Rule 34 of the Federal Rules of Civil Procedure.[xxiii]

* Limit the use of interrogatories to unique situations, for instance an exchange of expert reports.[xxiv]

* Allow the arbitrator to either issue an interim order awarding monetary sanctions or adopt a negative presumption should a party violate a discovery order.

* To expedite the proceeding, provide that the panel chair has the authority to decide administrative and discovery issues unless the chair or a party requests that the other members of the panel be included in the decision making process on a significant issue.

Motion Practice

Traditionally, arbitrators are less likely than courts to grant preliminary motions. Arbitrators, however, are demonstrating a growing inclination to consider and grant such motions when specifically authorized by the parties to do so. Drafters, therefore, should consider including in the arbitration agreement a statement as to whether the arbitrator(s) is or is not authorized to grant summary judgment or dismissal motions and the basis for issuing such an award.[xxv]

Arbitrators are also less likely than a court to perform the gate-keeping role of excluding expert testimony. If the underlying technology is so cutting edge as to give rise to concerns about the acceptability of the expert testimony, the drafter should consider authorizing the issuance of Daubert motions and include the parameters the arbitrators should use to evaluate such objections.[xxvi]

Appellate Review

The courts are split concerning whether parties can contract for expanded judicial review beyond that contemplated by Sections 10 and 11 of the FAA. The parties, however, may contract for review of an arbitration award by another arbitrator if they so wish. After carefully considering the additional uncertainty and cost, if expanded review is deemed to be desirable, to effectuate such review the drafter needs to specify in the arbitration agreement: (1) the law that shall govern the substantive issues; (2) that the arbitrator(s) shall issue a reasoned award; (3) that a transcript shall be produced and the cost borne equally by the parties; and (4) the grounds that the appellate arbitrator(s) shall use as the basis for the expanded review – for instance, errors of law and/or errors of fact. The drafter should also consider whether to include a loser pay provision to dissuade frivolous requests for such review.

Obtaining Agreement to Arbitrate Post-Dispute

If privity of contract does not exist, parties can elect post-dispute to utilize arbitration via either a submission agreement or a stipulation. One way to encourage a party to agree to arbitrate is to reduce the risk of a run away award. This can be accomplished by structuring the arbitration in one of several ways.

Last/Best Offer. Each party proposes a monetary amount and/or settlement terms. The arbitrator's award is limited to selection of one party's settlement proposal.

Night Baseball. Each party proposes a monetary amount and/or settlement terms. The arbitrator independently determines a monetary amount and/or settlement terms. The arbitrator's determination is compared with the parties' proposals. The party's proposal that is closest to the arbitrator's determination constitutes the final, binding award.

High-Low/Banded Arbitration. Each party proposes a monetary amount and/or settlement terms. The arbitrator is at liberty to award any amount and/or settlement terms that falls between the party's proposals.

Conclusion

To optimize use of the alternatives to litigation, corporate counsel needs to appreciate the benefits of ADR and incorporate that understanding into their risk-management policies.[xxvii] Virtually all domestic and international commercial contracts should include an appropriate ADR provision. Relying, however, on a static, generic, off-the-shelf arbitration clause is a mistake that could prove costly. To avoid that mistake, corporate counsel first needs to fully understand the ADR options that are available. Then after carefully considering the nature of the underlying business transaction, select the right mix of options to include in the arbitration agreement.

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[i] Todd B. Carver, *ADR – A Competitive Imperative for Business*, Dispute Resolution Journal (August/October 2004).
[ii] Michael T. Barr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, Corporate Legal Times (February 2004). The same survey reported that mediation was assessed even more favorably than arbitration as an effective and efficient way for business to resolve domestic commercial disputes.
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[iv] *Second Annual Litigation Trends Suvey at litigationtrends@fulbright.com*, p. 30 (2005).
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[vi] P. Jean Baker, Esq., Revisions to Uniform Arbitration Act Under Consideration, Virginia ADR: Newsletter of the Virginia Alternative Dispute Resolution Joint Committee, Vol. II, Number 1, p. 1 (Fall/Winter 2003).
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INTERNATIONAL AND DOMESTIC ARBITRATION OF DISPUTES:
Advantages and Disadvantages

By

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INTRODUCTION

Kilpatrick Stockton LLP has developed substantial experience in domestic and international arbitration in Asia, Europe and in the United States over the past 25 years. The firm is serving or has served as counsel or on arbitration panels in more than one hundred arbitration proceedings in the United States, France, India, Malaysia, China, Japan, the United Kingdom, Sweden, Finland, Russia, the Ukraine, Germany and Switzerland.

Kilpatrick Stockton's arbitration practice is co-chaired by Steve Clay (404-815-6514) in the United States and by Stephen York in Europe (+44 (0)20 7154 6037).

SUBJECTS

A. In What Context Would the Dispute Arise?

B. Who Will Seek Enforcement? Where?

C. Important Considerations in Deciding Whether to Include Arbitration Clauses in Your Contract

D. Important Features of the Arbitration: What Do You Want?

E. Factors Affecting Choice of Arbitrators: The Possibility Of Gaming The System

F. The Pre-Hearing Process

G. The Evidentiary Hearings

H. The Award: Grounds for Challenge

INTERNATIONAL AND DOMESTIC ARBITRATION OF DISPUTES:

ADVANTAGES AND DISADVANTAGES

A. In What Context Would the Dispute Arise?
   1. The nature of the relationship
   2. Leverage
   3. Location
   4. Applicable law

B. Who Likely Will Seek Enforcement? Where?
   1. Are you likely to be defendant or plaintiff?
   2. Where are the parties' collectible assets?
   3. Is there a governmental entity involved?
   4. What relevant treaties?
   5. Country track records on enforcement

C. Important Considerations in Deciding Whether to Include Arbitration Clauses in Your Contract
   1. Comparable expense of arbitration proceedings
   2. Predictability of result/quality of decision makers
   3. Investigative powers
   4. Process: nature and length
   5. Privacy/confidentiality
   6. Absence of/importance of precedential value of decision
   7. Effect on private third parties: issue preclusion for non-parties
   8. Effect on governmental entities
   9. Effective participation by inside counsel
   10. The alternatives:

(a) Mediation: when and by whom?

(b) A judicial forum selected for its quality and speed and specified in the contract

(c) The default judicial forum: domestic and international

(d) Juries

D. Important Features of the Arbitration: What Do You Want?

1. Institutional or ad hoc?

(a) Published rules/saves time

(b) Specific rules/not materially different

(c) Effect on enforceability

(d) Dealing with arbitrators' compensation

(e) Availability of panels

(f) Compare costs (compare ICC to AAA; consider ad hoc); do cases affect quality?

2. Choice of law

(a) For arbitration procedure?

(b) For construing contracts?

3. How many arbitrators do you want?

4. Party-appointed arbitrators: "neutrals" or "advocates?" Expertise in subject?

5. What discovery process do you want?

6. How should hearings be conducted? What evidence rules do you want?

7. Location of the arbitration

8. Fast-track procedure?

9. Provisional remedies?

10. Finality of judgment vs. right of appeal

E. Factors Affecting Choice of Arbitrators: Possibility Of Gaming The System

1. How do you get reliable information?

2. Attitudes

3. What about interviews with candidates?

4. Disqualification issues

5. The "network:" advantages and disadvantages

6. English language proficiency

7. Background in relevant field

8. Persuasiveness: abilities and credentials

9. The identity and role of the Chairman

10. "Splitting the baby:" is it inevitable?

F. The Pre-Hearing Process

1. Initial conference

2. Jurisdictional challenges: scope of agreement

3. Conference to organize evidentiary hearings

4. Discovery

G. The Evidentiary Hearings

1. Probable venue

2. Stenographer

3. Long days

4. Use of technology

5. Written statements of witness testimony

6. Panel participation

H. The Award: Grounds for Challenge

1. Failure to Disclose Conflicts

2. Due Process/Fraud/Right to Present Evidence/Bias & Conflict

3. Delay and interest effect

4. Opportunity to settle

INTRODUCTION

My experience, which naturally affects my perspective, is as follows:

- 35 years of commercial litigation in state and federal courts all over the U.S.
- Since 1986, about half my work has been in arbitration, including several cases a year as an arbitrator.
- About two-thirds of my arbitration work has been international.
- I am also certified by CPR and by the ICC as a mediator.

If you are in the position of deciding whether to include an arbitration clause in your contract, my general view is that you should where you can, but I say that with many reservations I will address.

The ADR field has changed and is changing. The number of cases in arbitration has grown significantly, and as it has evolved, arbitration has become more like litigation in many respects:

- More front-end jurisdictional fights, often litigated in the courts.
- More challenges to arbitrators on conflict or non-disclosure grounds and very different reactions to such challenges by AAA and ICC.
- More discovery fights.
- More discovery allowed.
- More motions practice addressed to panel.
- More challenges to awards.
- International: more countries setting aside or annulling awards (Latin America; USA).
- International: some countries simply refusing to perform awards (Argentina; Russia). General politicization of the process reflective of rebalancing of power and influence over the world.

BUT: There is, for international disputes, no other realistic game in town.

And in domestic work, arbitration is often the better choice, for the reasons I will discuss.

DOMESTIC DISPUTES

(*i.e.*, within the United States)

A. Comparison on Important Characteristics

		Litigation	Arbitration
(1)	Cost of the process	Much less	Much more
(2)	Cost of the lawyers	More	Less
(3)	Discovery	More	Less
(4)	Confidentiality	Less	More
(5)	Motions practice	More	Less
(6)	Early disposition/motion	More likely	Less likely
(7)	Appeals	Yes	Not usually
(8)	Quality of decision	Beyond control (but see Business Courts)	Controllable
(9)	Length of process	Beyond control	Controllable
(10)	Promotes early settlement	More likely	Less likely
(11)	Precedential value	Yes	No

Footnote:

- "Split the baby" happens more often with juries than with arbitrators, especially in commercial cases between businesses, neither of which juries like.
- Can be addressed by quality of panel

B. With Respect to a Multi-Million Dollar Domestic Commercial Transaction That Might Create a Dispute with Another Company, If I Were Inside Counsel, What Would I Do?

(1) Arbitration agreement using someone like AAA

- (a) Specify special rules, if applicable (*e.g.*, AAA patent disputes)
- (b) Specify experience and qualifications of arbitrators if you are concerned about quality
- (c) Establish time period for final award from filing date
- (d) Identify standards for document production
- (e) Choose a mediation process from a source outside the panel

(2) Or, use a highly-regarded state business court with strong mediation adjunct and specify non-jury disposition. Delaware comes to mind.

(3) Hire counsel incentivized by fee agreement to achieve a defined level of success within a specified time period . Any firm representing a claimant in arbitration should be willing to consider contingent fees. All counsel should be willing to offer fixed budgets.

(4) Continuously review whether the realities of your litigation or arbitration are consistent with the strategic objectives of your business.

(5) With respect to outside counsel:

- (a) Reward realistic candor
- (b) Discourage inflated hype
- (c) Strive for long-term relationships

C. International Disputes: Comparisons on Important Characteristics

(Our team perspective: 15 attorneys in New York, London, D.C., Atlanta, Stockholm)
(Cases in Japan, China, India, Dubai, Paris, London, Mexico and US past 12 mos.)
(Rapid growth of these kinds of cases for obvious reasons)
(Conundrum: China)

		Litigation	Arbitration
(1)	Cost of the process	Less	More
(2)	Cost of the lawyers	Less	More (but consider incentives)
(3)	Discovery	Less	More
(4)	Confidentiality	Less	More
(5)	Motions practice	More	Less
(6)	Early disposition	More (but see India)	Less
(7)	Appeals	Yes	No
(8)	Quality of decision	No (but see UK and Canada)	Yes
(9)	Effective participation	No	Yes
(10)	Promotes early settlement	No	No
(11)	Enforceability	No	???*

* Successful capitalism favors enforceability

D. If I Were Inside Counsel, What Would I Do?

(1) Always choose international arbitration over litigation in most foreign venues

(a) Control
(b) Comprehension
(c) Fairness
(d) Multilateral enforceability
(e) Less corruption

(2) Not factors in choice

(a) Speed (India is slow; U.K. is fast; arbitration can be almost as fast as U.K.)
(b) Expense (a factor of speed; not a basis for choice)
(c) Confidentiality (equally available)

(3) Negatives

(a) Slow where process is not guided by arbitration clause
(b) Expense (lawyers = 82%; arbitrators = 15%; institutions = 3%)
(c) Selection of attorneys: beware of the famous, who are $1,000 per hour and often not really available
(d) Selection of experienced international arbitrators
- 2,000 cases filed annually = 3,000 arbitral appointments worldwide
- 4,000 cases pending = 6,000 serving arbitrators
- Within this group, perhaps 300-400 broadly experienced arbitrators satisfactory to you
- How do you find them? How do you find out about them?
  - Trust the institutions?
  - Interviews? The arbitrators won't do it anymore.
  - Google + telephone calls + "the network?"
  - THERE IS A GENUINE NEED FOR BETTER INFORMATION ABOUT INTERNATIONAL ARBITRATORS. NO ONE IS MEETING THAT NEED. CLIENTS SHOULD DEMAND.

(e) Use of the arbitral process to accelerate early disposition: special attention required
(f) Enforceability
China
India
Argentina
Venezuela
US
(g) Corruption
Russia
Stans
China

(4) Positives:

(a) Experienced and able pool of arbitrators, if you can find them.
(b) Credible and experienced institutions to be in charge of:
- Appointing panels
- Clearing panel conflicts
- Handling the money
- Providing technical review of award
- Providing access to expertise and to mediation as desired

(c) Conservative discovery practice
(d) Confidentiality
(e) Panel familiarity with requirements imposed by treaties
(f) Broader enforceability in most of the developed countries of the world than the judgments of any national court.

E. How to Make International Arbitration Move More Quickly and Predictably

(1) Agreement

(a) Simple and clean

(b) Use model clause of established arbitral institution; then add special provisions on time, discovery, technology and qualifications

(c) Specify English

(d) Review law of the jurisdiction where the arbitration will take place (Costa Rica, *e.g.*)

(e) Selection of arbitrators:

- Consider leaving entire appointment process to the organization, subject to written description of experience
- One or three? Effect on expense

(f) Fast-track procedures

(g) Time limit for rendering award (but see France)

(2) Selection of experienced counsel with sufficient time to give top priority

(3) Selection of experienced arbitrators with sufficient time. If you have three, you must have a chair with strong case management skills.

(4) Give the Chair power to resolve all procedural issues.

(5) Early organizational meeting to set procedural timetable and fix date for final hearing within nine months of filing.

(6) Clients: attend all conferences/hearings.

(7) The hearing

(a) Do you really need one?

(b) Use of video conferencing, even to examine witnesses (Lubbock, Texas story)

(c) Effect of bifurcation: is it worth it?

- Claimant: No
- Respondent: delay and duplication vs. early disposition

(d) Set the cases out in writing in detail on both sides well in advance of hearing

(e) Handle all documents electronically; strive for a paperless case

(f) Avoid duplicative witnesses

(g) Minimize reliance on experts except where essential; no one likes them.

- Use internal witnesses
- Have experts examined together by the panel

(h) Location

- Before designating, consider law
- Consider availability of technological support
- Ease of access
- Expense
- *e.g.,* Denver, Dallas, Chicago, Atlanta vs. London, Paris, New York and Mexico City

(i) Written closing presentations in 30 days (no oral closings; give panel opportunity to ask questions by teleconference after written closings)

(8) The award

(a) Reasoned award

(b) Within 30 days of final submissions

(c) Use of costs to control efficiencies

- At preliminary conference
- Agree to consider in setting costs:
  - requests for extensions
  - exaggerated claims
  - spurious defenses
  - repetitive arguments or testimony
  - excessive cross-examination
  - overbroad discovery requests

CONCLUSION

Arbitration, like old age, is not great. The better you prepare for it, the better it will go. And, also like old age, arbitration is better than the alternative.