

ARTICLES

## Ten Tips to Get the Most Out of U.S.-Based Business Arbitration

Learn how to lead more efficient and productive arbitrations for you and your clients.

*By Conna A. Weiner – March 17, 2020*

For cross-border, international disputes, experienced advocates generally accept the notion that arbitration, rather than litigation, is the more practical choice for a final adjudication: (1) Unlike a court judgment, an arbitration award will be widely enforceable in the many countries that are signatories to the New York Convention; (2) arbitration provides a neutral forum for companies of differing nationalities; and (3) the vagaries of local court systems are avoided in favor of a flexible, customizable process.

For litigators practicing in the United States, however, doubts persist regarding whether to recommend arbitration over litigation for disputes in the United States. The complaints about arbitration, whether real or perceived, are familiar: It is an “unpredictable” process; discovery is too limited; there is a lack of “appellate discipline” on an arbitrator who knows his or her award is unlikely to be overturned; arbitrators have a tendency to “split the baby” and reach a middle-ground decision; an arbitrator may have an incentive to drag out the proceedings because arbitrators are paid by the hour; and it may not result in actual savings of time and cost. In other words, many U.S. practitioners worry that arbitration’s benefits have been seriously diluted or never existed in the first place and are outweighed by the perceived disadvantages.

All too often, however, these concerns stem from nervousness about the unfamiliar, untested myths about the process, or one bad experience. Accordingly, it is important for U.S. litigators to take another look at the process in light of the facts and process reforms from the major institutions over the past several years and the ever-increasing length and expense of litigation in the United States.

Ultimately, commercial arbitration can be a far better forum for the resolution of business disputes *if* it is done with adequate planning *and* an arbitration mind-set. Below are tips for achieving an arbitration that meets client expectations for efficiency and fairness, time and cost savings, and ensuring a reasonably just process and result.

### 1. Mediate First

This may seem counterintuitive, but before diving directly into arbitration, it can be immensely beneficial to invest first in a thorough mediation procedure. A key aspect is to mediate with a

---

© 2019 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

knowledgeable neutral who focuses on preparation, the exchange of key information, and an effort to resolve as many issues as possible on a business basis. For more on the benefits of early mediation, see [these articles](#).

Even if an early mediation “fails” to result in a global settlement, it will have forced the parties and their counsel to prepare, which positions the parties to hit the ground running in the ensuing arbitration. An added benefit to early mediation is that you will have learned much about your case, received valuable input from an independent neutral about the strengths and weaknesses of your case and your opponent’s case, possibly weeded out non-issues (for example, disputes that may result from things like simple accounting mistakes or incorrect assumptions), and set the groundwork for future negotiations and communications. Rigorous time limits in a “step clause” can prevent gamesmanship and unnecessary delay.

## **2. Read the College of Commercial Arbitrators’ Protocols**

No lawyer should advise clients about arbitration without having studied a free, neutral resource that has been around for some time: the [College of Commercial Arbitrators’ Protocols for Expeditious, Cost-Effective Commercial Arbitration](#). This resource explores the issues that litigants have had with arbitration and invites all participants—outside counsel, in-house counsel, alternative dispute resolution (ADR) providers, and arbitrators—to be part of the solution. It also provides practical tips to help fulfill the promises of arbitration.

## **3. Soften Your Litigation/Jury Mind-Set: Be Comfortable with “Less”—Less Discovery, Less Motion Practice**

Remember that arbitration can and should be a flexible, customizable process. If the parties insist on a litigation-type arbitration replete with full-fledged discovery and the application of cumbersome rules of civil procedure and evidence that inadequately take into account the bench trial context of an arbitration, and if they engage in strategic delay tactics (including numerous motions or failures to meet deadlines), the many advantages of arbitration quickly will be lost. In addition, the tribunal will not be impressed.

In short, the nature of the process is very much dependent on the ability of litigators to adopt an arbitration, as opposed to a litigation, mind-set that takes full advantage of the absence of a jury and the expertise of your tribunal. Invest in early case investigation and witness interviews to figure out the scope of discovery that is really necessary and treat the preliminary hearing with the level of importance it deserves because that will create the road map for your customized process and lay the groundwork for the rest of the arbitration. Be prepared with suggestions about how to streamline it and explanations for the discovery you argue you will need. Also, you should avoid insisting on the automatic right to bring dispositive motions. To do an arbitration right, you simply must be more prepared on the facts and law at the outset than in connection with a litigation and have the experience and judgment to make strategic choices; consider it an extremely vigorous application of the principle of “proportionality” now applied in federal courts, in connection with every aspect of the case. And as a corollary note to clients, make sure that your chosen counsel is very experienced with litigation *and* arbitration processes and is

comfortable making smart selections about what is necessary to put in a good case in an arbitration context.

One specific example of the “less can be more” principle is depositions—one of the key culprits in the enormous expense of U.S. pretrial discovery (number one being e-discovery). In international cases, depositions will be frowned upon (the rules of the American Arbitration Association’s (AAA’s) International Centre for Dispute Resolution specifically note that depositions, along with interrogatories and requests to admit, “generally are not appropriate procedures for obtaining information in an arbitration under these Rules” ([Article 21\(10\)](#)), and even in domestic cases, they are not automatic and will need to be justified (*see* [AAA Commercial Rule L-3\(f\)](#)). The domestic litigation expectation that all material witnesses at a trial will have been deposed beforehand is not appropriate in arbitration. You need to be able to explain to the arbitrator why you need them and why particular deposition witnesses are necessary. In arbitration, the idea is to get to the hearing efficiently.

#### **4. Focus on Your Choice of Arbitrator and the Number of Arbitrators That Are Really Necessary**

You can’t choose your judge, but you can choose your arbitrator. The choice of arbitrators is the single most important decision for you and your client—it affects both time/cost and the fairness of the result. The ability to choose is one of the great advantages of arbitration over litigation. It can be very helpful, for example, to choose someone with business- or industry-specific knowledge, or at least a grasp of business negotiation, because these experiences will help the arbitrator understand your facts, assist in setting up a creative and streamlined arbitration process, and assess any expert testimony. A better business understanding can help inform a better result. You can and should interview candidates to assess style, philosophy, and availability—something you cannot do with a judge. Finally, three-arbitrator panels should be reserved for the biggest cases, and counsel should be prepared to arbitrate with a knowledgeable and experienced sole arbitrator for everything else. Having one decision maker is a fraction of the cost of a three-person panel, and any perceived risk associated with it can be mitigated by adopting optional appellate procedures.

#### **5. Agree on a Time Limit Between the Appointment of the Arbitrators and the Award**

Keep the time limit reasonable so that neither the parties nor their counsel are sorely tempted to agree to extensions. Counsel and arbitrators both should be chosen by clients with a view toward their ability to meet the timing requirements in the face of other commitments. Even complex cases can be resolved in under a year. Also note that, contrary to many perceptions, the statistics of the major providers show that arbitrations generally take much less time than court—the federal court average time to trial being over 27.2 months.

#### **6. Consider Expedited Procedures**

All of the major ADR providers now have adopted expedited procedures that parties may agree to use for any size case. Learn the options so that you can discuss them with your client.

### **7. Adopt Efficient Hearing Practices**

There are many ways that the arbitration hearing can and should be structured to ensure time is used efficiently: Create joint, pre-marked exhibit binders that note any objections to admissibility so that time will not be taken up with marking exhibits and arguing about them during the hearing; insist on consecutive hearing days, and have additional days reserved ahead of time; consider creative ways to present fact and expert witness testimony efficiently, including direct testimony through a witness statement, expert testimony organized by topic, or expert witness panels so that experts can be questioned at the same time.

### **8. Control the Number and the Result: Keep Open Settlement Pathways; Consider “High-Low” Ranges or Baseball Arbitration for the Award or Even Issues-Based Baseball Arbitration**

In-house counsel should keep open lines of communication about settlement as a matter of course as the arbitration proceeds—again, easier if you have started with a robust mediation—perhaps with the help of a stand-by mediator. In addition, consider agreeing on a “high-low” range or baseball arbitration (choosing one side’s number or the other) for the award, which helps to keep the result in check. Parties can even consider issues-based baseball arbitration (asking the arbitrator to choose one outcome for a list of issues).

### **9. Consider Adopting Optional Appellate Arbitration Panel Reviews—and Examine the True Value of the Ability to Appeal to an Appellate Court**

The major arbitration providers have all adopted optional appellate rules that permit the parties to appeal results to a group of senior arbitrators on an expedited time frame. These rules are relatively new and have not made their way into many agreements, and many litigators are not familiar with them. The adoption of such rules in an agreement or at the outset of a particular case helps mitigate risk of a so-called “runaway” award. In addition, have a frank discussion with your client about the likelihood that a decision in any litigation will be overturned on appeal—if an abuse of discretion standard would apply, the chances are slim.

### **10. Memorialize All of These Tips and More in a Well-Drafted Dispute Resolution Clause Adopting Administered Arbitration**

The number of arbitrators, the length of the process, controlled discovery, and many other issues—choice of law, location, etc.—can and should be dealt with clearly and unambiguously in your arbitration clause. Draft it with a view toward avoiding disputes later. Choosing administered rules of the major providers is important to this endeavor because they will set forth procedures for choosing arbitrators and managing the process—and all of the major providers have robust clause-drafting tools. There is no need to start from scratch.

### **Conclusion**

Following these tips will help you and your clients get more out of arbitration and will lead to a more productive and efficient arbitration process.

**American Bar Association, Section of Litigation  
Commercial & Business Litigation Committee**

---

*[Conna A. Weiner](#) is a mediator and arbitrator with JAMS and cochair of the ADR Subcommittee of the Commercial and Business Litigation Committee.*