

Outside Counsel

The Role of Arbitration Counsel in Ensuring Legitimacy and Efficiency

The increasing use of arbitration has coincided with increasing dissatisfaction as arbitration has become more judicialized: Parties have come to expect similar procedural rights and processes as they would receive in the courtroom. International arbitration has also become “Americanized” by the use of imported guerrilla tactics, which may becoming the new norm. The efficiency of arbitration, its legitimacy as a system of resolving disputes, and its original purpose of providing a fair alternative to courts have been called into question. Too often the question is focused on what parties and their counsel expect from arbitrators, because in many ways it is a service profession. The equally important question is what arbitration as a practice expects and needs from parties and their counsel. Practitioners share responsibility for ensuring that arbitration maintains its efficiency and legitimacy

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and that it continues to be viewed as offering access to justice.

The increasing use of guerrilla tactics span a spectrum of actions, including document

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production and disclosure maneuvers, delay tactics, frivolous challenges to arbitrators, last minute surprises with new witnesses and documents, anti-arbitration injunctions, ex parte communications, witness tampering, and lack of courtesy and respect for the tribunal or opposing counsel.

Arbitrators cannot streamline the process without the assistance of parties and their counsel. Depending on the parties’ arbitration agreement, there are

a number of ways that arbitrators can improve the efficiency of proceedings, from managing discovery to leveraging the flexibility of the process to allow for multiple opportunities for the parties to consider settlement.

Pre-hearing conference calls (or in person meeting) offer an early opportunity for counsel to work with arbitrators in setting up a comprehensive plan which should avoid duplicating the lengthy and expensive experience of court litigation and minimize the discovery process. Alternatively, to keep costs down in cases where damages sought are lower, arbitrators can hold preliminary conference calls by video and perform some examinations via videoconference. Bringing parties together earlier rather than later, arbitrators can clarify their expectations and encourage the parties to do likewise as to discovery. Increasingly, data from ADR provider organizations indicate that arbitrators are not reluctant to issue sanctions, including monetary awards for discovery abuses. See FINRA, *The Neutral Corner—Volume 1* (2019).

Arbitration is relatively flexible when it comes to procedure. Arbitrators should consider methods of resolving cases at an early stage, whether through settlement, creating space for dispositive motions, or bifurcating arbitrations. Arbitration must offer opportunities for settlement similar to litigation in order to remain a competitive method of dispute resolution. AAA statistics indicate that over 65% of commercial cases settle and nearly 85% of employment cases settle. JAMS International Rules provide for a “mediator in reserve” policy. Pre-hearing conferences help parties generate a roadmap for a potential settlement by identifying agreed upon and disputed factual and legal issues. Building into the scheduling order multiple opportunities for the consideration of mediation—at the inception of the matter, after key disclosures or depositions and at an interim conference call before the arbitration hearing—may lead to the settlement rates seen in the Courts.

Increased transparency can help in gathering the information necessary to better tailor solutions to particular problems. Tools like Dispute Resolution Data or Arbitral Intelligence in the International Arbitration arena indicate a growing interest in the collection and availability about data whether that concerns the type of dispute, time to resolution, and geographic region. Data can help advocates and their clients make informed decisions about their strategy in approaching a case, establish reasonable expectations about the

arbitration process, and make more accurate assessments of potential costs. Increased participation in reporting data could greatly improve efficiency and transparency in arbitration.

Recent criticism of arbitration has focused on three issues: the impartiality and independence of party appointed arbitrators, diversity, and access to justice. The first—the perception that arbitrators are inadequately independent and impartial—is by far the most critical. While arbitral institutions, such as AAA, have offered mechanisms that permit blind selection for some time, the practice seems to have gained greater acceptance. The Institute for Conflict Prevention and Resolution (CPR) has an opt in process that prohibits ex parte communications between the parties and arbitrators where communications go through the arbitral institution, which acts as a “screen” to ensure that the party selected arbitrators do not know who selected them. Blind screening maintains party control over the choice of arbitrators while making it less likely that those arbitrators will be, or will be perceived to be, biased.

The second area of criticism is the lack of diversity. Participants in arbitration have expressed concerns not only about diversity in gender and geographical representation, but also in terms of age, ethnicity, culture, language, country of origin, and legal background. To trust the system, participants must trust that arbitrators reflect their values. Increased diversity is

broadly recognized as beneficial, but there is less consensus on who bears the burden of promoting it. Improving the diversity of the pool of candidates is not enough if parties and counsel do not select diverse candidates. Setting benchmarks and collecting data on progress and publishing, and aggregating data help promote transparency about the state of diversity and facilitate improvements.

The final area of criticism is access to justice in a fair forum. Domestically, the recent focus has been on the increased use of mandatory arbitration to resolve disputes between companies and their customers and employees. Increasingly, BigLaw is ditching mandatory arbitration agreements for all employees, a reform that has gained increasing support across the legal industry in the wake of the #MeToo movement. See Pipeline Parity Project. Among notable opponents of mandatory arbitration policies are the ABA (August 2018) and student organizers at Harvard Law School who founded the Pipeline Parity Project encouraging law students to boycott firms that require employees to sign arbitration agreements.

ADR provider institutions and counsel and their parties must all play a part in addressing this issue because of the inherent resource imbalance, public policy implications, and questions about genuine consent. While this does not directly implicate all forms of arbitration, arbitration as a whole is associated with these issues, fairly or not. It is important that

perceived unfairness is mitigated to maintain the reputation of arbitration overall.

All arbitration stakeholders have an interest in making sure that arbitration as a practice is not viewed or used as a tool for those with greater bargaining power because they are repeat players. Wielding unequal power to exact a disproportionate benefit is unfair and is also likely to result in legal changes that send these claims back to the courts. Permanently losing the benefits of arbitration for short term gains is not in the best interests of any stakeholder. Arbitration in this context can be designed with appropriate safeguards tailored to the specific needs of consumer and employment arbitration. Doing so will allow a sustainable, just, and respected system that remains a desirable alternative to litigation.

Practitioners must make these realities clear to their clients and help them develop arbitration agreements that reflect these realities. Certain safeguards and attempts to balance the power disparity must be built in to the agreements. This might involve: offers to pay the costs of arbitration if practicable; avoiding unreasonable limitations of legal remedies; compromising on the location of the arbitration; stipulating to some level of discovery; and considering whether certain disputes simply should not be subject to mandatory arbitration, such as discrimination or sexual harassment claims. These are some of the ways that companies and counsel can demonstrate their commitment to a fair

process. When the dispute calls for increased process or discovery, arbitrators should ensure this occurs. Allowing users to make the process unfair will likely result in the loss of all these cases to litigation and will certainly diminish arbitration's integrity and reputation.

Academics, legislatures, and advocates have also noted the lack of data available to properly evaluate the fairness of mandatory arbitration and have called for increased reporting requirements. See generally Cynthia Estlund, "The Black Hole of Mandatory Arbitration," 96 N.C. L. Rev. 629 (2018); Ramona L. Lampley, "'Underdog' Arbitration: A Plan for Transparency," 90 Wash. L. Rev. 1728 (2015).

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Arbitration stakeholders should not wait to be required to collect and provide this information but should work together to develop a uniform reporting system that maintains confidentiality while allowing for critical analysis of mandatory arbitration outcomes. Providing this information will either vindicate the fairness and efficiency of mandatory arbitration or will identify shortcomings. If outcomes are fair, transparency and auditability will improve public trust in arbitration; if not, it will be possible to identify

necessary changes. Either outcome should be viewed as beneficial to the arbitration community.

Practitioners have a right to demand that arbitration continue to deliver efficiency in a cost-effective manner, but that can only happen if there is a partnership with parties and their counsel to guard the process. Similar to the U.S. Constitution, which is a living document, arbitration needs to be viewed as a practice able to grow and change. Counsel and their parties must help ensure that the practice of arbitration adjusts to changing practices and expectations, but at the same time remains capable of delivering alternative access to justice, both domestically and internationally.

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