

ARBITRATION BEST PRACTICES

Idaho State Bar Litigation Section¹

May 18, 2018

Panelists: Hon. Cheri Copsey - Senior District Judge;

David R. Lombardi; J. Charles Hepworth

Moderator: Thomas E. Dvorak

I. QUESTIONS

- What are primary/important differences between arbitration and court adjudication?
- How should legal counsel go about picking the “right arbitrator”?
- If not specified in advance by the parties’ contract, what are the best practices for selecting the rules that will govern the arbitration?
- How should counsel best prepare for the preliminary scheduling conference?
- Discovery: Although specific parameters for discovery may range widely based on the size, complexity, and type of dispute, what are some general best practices in determining the proper scope of discovery?
- What are the best practices in getting evidence admitted and/or excluded?
- What do you consider to be the best mechanism for dealing with dispositive motions? Do you suggest limiting the parties’ ability to bring dispositive motions?
- Follow up Question with regard to dispositive motions: Does allowing for dispositive motions violate the Uniform Arbitration Act?
- What practices do you recommend so that hearing time is used most efficiently?
- What power does an arbitrator have to issue injunctive or preliminary relief?
- What is the scope of a party’s right to seek modification, reconsideration, or otherwise appeal an award after a final decision is made?

¹ Materials prepared by Thomas Dvorak and Emily Mueller (Copyright 2018)

II. QUESTIONS WITH NOTES & REFERENCES

Provisions from the Uniform Arbitration Act, codified in Chapter 9 of Title 7 of the Idaho Code are included where relevant in blue.

1. What are Primary/Important Differences Between Arbitration and Court Adjudication?

A THOMAS REUTER'S Practical Law Article, *Arbitration Procedures and Practice in the United States: Overview, Practical Law Country Q&A*, provides:²

Commercial arbitration is often regarded as having several distinct advantages over court litigation, including:

- Potentially greater speed and efficiency than typical court litigation.
- Privacy and confidentiality, at least in the sense that unlike court proceedings, arbitral hearings are closed to the public. However, in the context of judicial enforcement or challenge proceedings, arbitral awards often are publicly disclosed.
- Freedom to select the decision makers.
- Freedom to select the procedural rules, usually through designation of specific institutional arbitral rules or procedures, and typically greater flexibility of process.
- More limited discovery than US court litigation.
- Avoidance of having a dispute heard before the opposing party's potentially hostile home courts, judges, and/or juries. This factor is especially important in the context of international commercial arbitration.
- More limited grounds for challenging awards than in a typical judicial appeal process, and therefore potentially greater ease of enforcement for prevailing parties.
- Greater ability of winning parties in arbitration to recover their fees and costs as opposed to US court litigation, where under the "American rule", attorney's fees are presumptively borne by each party.

Depending on a client's position in the dispute, the above listed advantages can also be disadvantages. As noted in the Thomas Reuter's Q&A article: "losing parties may desire a wider scope of judicial review to challenge arbitral awards. Additionally, particularly in high value commercial disputes, where there has been a trend towards greater document discovery

² Tai-Heng Cheng, Julia Peck, Quinn Emanuel Urquhart & Sullivan, LLP, *Arbitration Procedures and Practice in the United States: Overview, Practical Law Country Q&A* 0-502-1714 (Jan. 2017).

and parties often seek regular court intervention, some of the traditional efficiency advantages of arbitration may be eroding.”³

2. How should counsel go about picking the “right arbitrator”?

A JAMS Publication on arbitrator selection provides the following advice:⁴

- First and foremost, counsel should review the language of the arbitration clause, as it may dictate the qualifications of the arbitrator.
- Certain disputes require someone with significant subject matter expertise (e.g. patent disputes, engineer and construction).
- Other characteristics of an arbitrator: review potential arbitrator’s background and reputation for: (1) strong management skills; (2) integrity, fairness, and stature in the legal community.

The Uniform Arbitration Act provides: I.C. § 7-903 Appointment of Arbitrators by Court: if the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails . . . the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

3. What is the import of the arbitration clause in a contract? If given the opportunity, what are the best practices in drafting an arbitration clause in a contract?

- a. If there is an arbitration clause, the arbitration clause will govern which rules apply. If the arbitration clause does not provide which rules will govern the proceeding, either the parties or the arbitrator will decide which rules to follow.
 - i. AAA and JAMS both have established arbitral rules that address many of the issues that arise during arbitration. The arbitral rules provided by AAA or JAMS are subject to state statutes, state common law, or the Federal Arbitration Act.⁵
- b. Drafting Arbitration Clauses: when drafting contract arbitration provision, one thought is to provide arbitration that shall be subject to the rules of the AAA or JAMS, but not conducted through the AAA itself. This avoids hefty administration fees.
 - i. JAMS website expressly provides that the JAMS rules “cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the

³ Tai-Heng Cheng, Julia Peck, Quinn Emanuel Urquhart & Sullivan, LLP, Arbitration Procedures and Practice in the United States: Overview, Practical Law Country Q&A 0-502-1714 (Jan. 2017).

⁴JAMS, *Arbitrator Selection* (June 2014), <https://www.jamsadr.com/publications/2014/arbitrator-selection>.

⁵ David McLean, *Selecting a party-appointed arbitrator in the US*, LexisPSL Arbitration (Nov. 2014), <https://www.lw.com/thoughtLeadership/us-arbitration-primer-lexis-latham-series>.

parties to an arbitration as the rules for that arbitration. If they are being used as the rules of an arbitration, proper attribution must be given to JAMS.”⁶

- ii. It is not clear as to whether using the AAA rules without using AAA’s administrative services violates AAA’s copyright.⁷
- iii. The AAA has its own “ClauseBuilder Tool,” which may assist in drafting an arbitration clause.⁸

4. How should counsel best prepare for the Preliminary Scheduling Conference?

- a. Read the Arbitration provision in the contract. Know what is required by the contract.
- b. In advance of Preliminary Scheduling Conference, a “Best Practices” article by two JAMS neutrals encourages counsel to discuss the following with their client and opposing counsel:⁹
 - claims and defenses;
 - nature and timing of discovery, including requests for electronically stored information;
 - number of witnesses expected and need for experts; and
 - need for dispositive motions.

5. Discovery: Although best practices for determining the scope and method of discovery may range widely based on the size, complexity, and type of dispute, what are some general best practices determining the proper scope of discovery?

- a. A JAMS publication on client-centered arbitration¹⁰ recommends to: “Limit discovery, especially depositions. Discovery is a major cost driver in arbitration. Both JAMS and AAA rules provide for limited depositions, yet parties often propose more. Selecting an arbitrator inclined toward efficiency and resistant even to joint proposals for more depositions provides some protection. Better yet, evaluate how to present your case through the fewest possible depositions.”

⁶ JAMS, Comprehensive Arbitration Rules & Procedures, <https://www.jamsadr.com/rules-comprehensive-arbitration/>.

⁷ AAA publishes PDFs of their rules. The copyright for those rules states that “These rules are the copyrighted property of AAA and are intended to be used in conjunction with AAA’s administrative services.”

⁸ The ClauseBuilder Tool is available to the public at:

https://www.clausebuilder.org/cb/faces/index?_afLoop=10697385576741624&_afWindowMode=0&_adf.ctrl-state=kn90wjrb6_4

⁹ Sharon Armstrong & Richard Chernick, *Making Arbitration Work: Best Practices*, King County Bar Bulletin (Oct. 2016), https://www.jamsadr.com/files/uploads/documents/articles/armstrong_chernick_kcba-bar-bulletin_making-arbitration-work-best-practices_october-2016.pdf.

¹⁰ Eric Van Loon, Esq., Ten Tips Toward Client Arbitration Satisfaction (Mar. 2018), <https://www.jamsadr.com/blog/2018/ten-tips-toward-client-arbitration-satisfaction-vanloon;>

- b. A WILLISTON ON CONTRACTS article¹¹ provides that “The default standard of RUAA is meant to discourage most forms of discovery in arbitration. Under RUAA, an arbitrator may permit discovery to the extent that the arbitrator decides it is appropriate under the circumstances, taking into account: the needs of the parties to the arbitration proceeding and other affected persons; and the desirability of making the proceeding fair, expeditious, and cost effective.”
- c. A *Best Practices* article by two JAMS neutrals¹² encourages counsel to embrace “Lay-Down Discovery” and other discovery limitations. The article states that “The goal of arbitration is to provide a just, speedy and cost-effective mechanism for resolving disputes,” and “best practices include producing a discovery plan that includes:
- Early “lay-down” production of all relevant, non-privileged documents and witnesses on which each party will rely to support claims and defenses;
 - Early identification of expert witnesses and reports or opinions;
 - Follow-up document discovery limited in timeframe, subject matter, and persons and entities to which the requests pertain;
 - Limited depositions, presumptively one per side;
 - No interrogatories or requests for admission;
 - Focused ESI discovery; absent compelling need, produce ESI only from sources used in the ordinary course of business;
 - Limit non-party out-of-state discovery;
 - Agree to an expedited procedure for handling discovery motions.”

The Uniform Arbitration Act, I.C. § 7-907 provides:

Witnesses, Subpoenas, Depositions

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

¹¹ § 57:97 Discovery, 21 Williston on Contracts § 57:97 (4th ed.).

¹² Sharon Armstrong & Richard Chernick, Making Arbitration Work: Best Practices, King County Bar Bulletin (Oct. 2016), https://www.jamsadr.com/files/uploads/documents/articles/armstrong_chernick_kcbar-bulletin_making-arbitration-work-best-practices_october-2016.pdf.

6. What are the best practices in getting evidence admitted and/or excluded?

- a. Unless otherwise specifically governed by the governing rules, arbitrators generally have broad discretion to admit or exclude evidence, and are allowed to accept evidence that would normally be barred in a court of law.¹³
- b. Generally, federal and state rules of evidence do not apply to arbitration. However, an arbitrator is required to apply rules concerning privileges and work product, and evidence concerning settlement offers or mediation.¹⁴

7. What do you consider to be the best practice for dealing with dispositive motions? Do you suggest limiting the parties' ability to bring dispositive motions?

- a. A JAMS publication recommends¹⁵ that arbitrators “limit or eliminate dispositive motions. Arbitration summary disposition motions are rarely granted; often key issues of material fact remain. Also award vacature can result from failing to allow parties to present their cases. Nonetheless, dispositive motions are often offered. Efficiency-oriented arbitrators can require a letter requesting leave to file dispositive motions before allowing them. [Counsel] can seize the initiative (and reduce client expense) by proposing a joint request to prohibit or limit dispositive motions.”
- b. The “Best Practices” article by JAMS neutrals recommends:¹⁶ “The parties should consult with the arbitrator before filing a dispositive motion. Only if the motion is highly likely to succeed and has a potential to streamline or shorten discovery or the hearing should the motion be permitted. Typically, dispositive motions may be appropriate for limited legal issues such as enforceability of damages limitation clause or the applicability of a statute.”
- c. Both AAA and JAMS rules provide that the arbitrator may allow the filing of and make rulings upon a dispositive motion.
 - i. JAMS Publication on Dispositive Motions in Arbitration recommends:¹⁷ “The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request. The point of this exercise is to – again – try to adhere to the fundamental principles of arbitration, namely, a prompt, thorough, and final decision that ends the

¹³ § 57:106 *Evidence*, 21 Williston on Contracts § 57:106 (4th ed.)

¹⁴ Sharon Armstrong & Richard Chernick, *Making Arbitration Work: Best Practices* (Oct. 2016), https://www.jamsadr.com/files/uploads/documents/articles/armstrong_chernick_kcba-bar-bulletin_making-arbitration-work-best-practices_october-2016.pdf

¹⁵ James P. Kleinberg, *Dispositive Motions in Arbitration* ABTL Report of the Association of Business Trial Lawyers (2015), <https://www.jamsadr.com/publications/2015/dispositive-motions-in-arbitration>

¹⁶ Sharon Armstrong & Richard Chernick, *Making Arbitration Work: Best Practices* (Oct. 2016), https://www.jamsadr.com/files/uploads/documents/articles/armstrong_chernick_kcba-bar-bulletin_making-arbitration-work-best-practices_october-2016.pdf

¹⁷ Hon. James P. Kleinberg, *Dispositive Motions in Arbitration* (2015), <https://www.jamsadr.com/publications/2015/dispositive-motions-in-arbitration>

dispute. Since the form of the request to the Arbitrator is not specified, it is best to ask. Efficiency-oriented arbitrators can require a letter requesting leave to file dispositive motions before allowing them.

- ii. AAA's Commercial Rule, R-33 provides: "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

8. Follow up question with regard to Question 6: Does allowing for dispositive motions violate the Uniform Arbitration Act?

The Uniform Arbitration Act, I.C. § 7-905 provides:

HEARING. Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five (5) days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

WILLISTON ON CONTRACTS provides:¹⁸ "Overall, the hearing requirements of due process are relaxed when a tribunal is an arbitral tribunal rather than a court. In the arbitration context, due process is satisfied so long as an arbitrator provided a fundamentally fair hearing, one that meets minimal requirements of fairness, adequate notice, hearing on the evidence, and an impartial decision by the arbitrator."

¹⁸ § 57:91 *Fundamental due process*, 21 Williston on Contracts § 57:91 (4th ed.).

9. What practices do you recommend so that hearing time is used most efficiently?

The following best practices were suggested by various JAMS neutrals:¹⁹

- Stipulate chronologies and undisputed facts.
- Hear the matter on consecutive full days; hold open an extra day at the end to assure the case can be completed.
- Submit testimony by deposition, or stipulated declarations and reports; submit direct testimony by declaration with the opportunity for live cross-examination.
- Have witness testify by video conferencing or telephone.
- Before opening statements, review with the arbitrator each witness, the nature of the testimony, and length of direct and cross; agree to call each witness only once; give at least 24 hours' notice of the order of witnesses.
- Admit all exhibits to which there is no objection at the outset of the hearing; but if the exhibits are voluminous and most of them will not be used in the hearing, admit exhibits only as they are mentioned in testimony with the opportunity to offer additional exhibits before closing.
- Use a chess clock or other time keeper to monitor time.
- Do not argue every contention. “While ‘throwing everything against the wall to see what sticks’ might be tempting, weak arguments hurt you in the long run. If your arbitrator concludes you’ll argue any point, regardless of merit, you’ve squandered valuable credibility and face an uphill climb on issues that matter. Don’t waste time – and hurt your reputation – espousing long-shot positions.
- Limit admissibility challenges.

¹⁹ Eric Van Loon, *Ten Tips Toward Client Arbitration Satisfaction* (Mar. 2018), <https://www.jamsadr.com/blog/2018/ten-tips-toward-client-arbitration-satisfaction-vanloon>; Sharon Armstrong & Richard Chernick, *Making Arbitration Work: Best Practices* (Oct. 2016), https://www.jamsadr.com/files/uploads/documents/articles/armstrong_chernick_kcba-bar-bulletin_making-arbitration-work-best-practices_october-2016.pdf.

10. What power does an arbitrator have to issue injunctive or preliminary relief

- a. Like many other issues, the answer to this question depends in large part on the particular rules governing the arbitration.
- b. Under the AAA Commercial Arbitration rules, an arbitrator “may take whatever interim measures he or she deems necessary including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.”²⁰
 - i. What if no arbitrator agreed upon yet? AAA Commercial Arb. Rules R-37 “Emergency Measures of Protection” provides for AAA to appoint emergency arbitrator to act.
- c. But to enforce such relief, likely need court involvement (or may want/need to go to court in first instance).
 - i. Issues:
 - (1) does the court have jurisdiction to entertain interim relief; and
 - (2) will a party be deemed to have waived its right to arbitrate if it seeks interim injunctive or equitable relief from a court?
 - ii. Some states have addressed this issue in their arbitration acts, e.g., California provides that seeking such aid is not a waive of right to arbitrate. *See* Cal. Civ. Proc. Code § 1281.8.
 - iii. Generally, a court of law has power to fashion relief in aid of preserving right to arbitrate. 7 Bruner & O'Connor Construction Law, *Court Jurisdiction Over Requests for Preliminary Injunctive Relief in Aid of Arbitration*, (2017) § 21:27 n.7, provides an overview of authority for this rule:

Toyo Tire Holdings Of Americas Inc. v. Continental Tire North America, Inc., 609 F.3d 975, 979–81 (9th Cir. 2010). The court remanded the case to the district court for a determination of whether injunctive relief should be granted. *See also Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986) (FAA did not prevent district court from granting preliminary injunctive relief to ensure defendant did not dispose of assets which could satisfy any eventual award); *Puerto Rico Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503 (1st Cir. 2005) (district court has jurisdiction to issue preliminary injunctions to preserve the status quo pending arbitration); *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1995 FED App. 0133P (6th Cir. 1995) (reversing district court's denial of preliminary injunction and joining other circuits in holding that district courts have subject matter jurisdiction under the FAA to grant preliminary relief pending arbitration); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, Fed. Sec. L. Rep. (CCH) P 95417 (2d Cir. 1990) (federal district court has power to issue injunction pending arbitration, even absent express contractual language so providing); *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806 (3d Cir. 1989) (district court has jurisdiction to issue injunctive relief pending arbitration, provided movant satisfies traditional four-prong test); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726, 3 I.E.R. Cas. (BNA) 843

²⁰ *See* AAA rule R-37

(10th Cir. 1988) (affirming district court's grant of preliminary injunction to preserve status quo until arbitration takes jurisdiction); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1050–55 (4th Cir. 1985) (“We do not believe that Congress would have enacted a statute intended to have the sweeping effect of stripping the federal judiciary of its equitable powers in all arbitrable commercial disputes without undertaking a comprehensive discussion and evaluation of the statute's effect. Accordingly, we conclude that the language of § 3 [of the FAA] does not preclude a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration.”); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983) (reversing district court's denial of injunctive relief pending arbitration pursuant to ICC rules). *But see Peabody Coalsales Co. v. Tampa Elec. Co.*, 36 F.3d 46 (8th Cir. 1994) (district court may issue injunctive relief in arbitrable dispute only if contract contains “qualifying language” that permits such relief, and only if such relief can be granted without addressing merits).

11. What is the scope of a party’s right to seek modification, reconsideration, or otherwise appeal an award after a final decision is made?

- a. **Modification:** Under I.C. § 7-911, reproduced in pertinent part below, a court of law shall modify an award where there was an evident miscalculation of figures, the arbitrator awarded upon a matter not submitted to them, and the award is imperfect in a matter of form, not otherwise affecting the merits of the decision.
- b. **Reconsideration:** Unless otherwise agreed to by the parties, an arbitrator does not have the power to reconsider his or her decision, even if arbitrator finds it misapplied the law. Under I.C. § 7-912, reproduced in pertinent part below, a court of law may vacate an award in very limited circumstances, such as a situation where the party may show the award was procured by corruption, fraud or other undue means.
- c. **Appeal:** JAMS and AAA both have “optional” rules governing appellate procedure, which the parties may agree to at any time.
 - i. Under AAA rules, a party can appeal to a separate panel of arbitrators “an error of law that is material and prejudicial,” or factual findings that are “clearly erroneous.”²¹
 - ii. Under the FAA, a court of law is only allowed to vacate an award where an arbitrator “manifestly disregards” the law. The Idaho Supreme Court *Barbee v. WMA Sec., Inc.*, 143 Idaho 391, 396, 146 P.3d 657, 662 (2006), defined “manifest disregard of the law” under the FAA as follows:

Under the FAA, an award may be vacated if it reflects the arbitrator's “manifest disregard of the law,” which requires “(1) the arbitrators knew of the governing legal principle and refused to apply it or ignored it altogether, and (2) the governing law was well defined, explicit, and

²¹ See AAA Rule A-10.

clearly applicable.” *Moore v. Omnicare, Inc.*, 141 Idaho 809, 819, 118 P.3d 141, 151 (2005); 9 U.S.C. § 10.

The Uniform Arbitration Act, Idaho Code §§ 7-911 through 7-913, provides in pertinent part:

§7-911: Confirmation of an award. Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 7-912 and 7-913, Idaho Code.

§7-912: Vacating an award. (a) Upon application of a party, the court shall vacate an award where;[:]

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 7-905, Idaho Code, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 7-902, Idaho Code, and the party did not participate in the arbitration hearing without raising the objection.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

§ 7-913. Modification or correction of award.

(a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

- (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
- (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.