Don't Call It A "Trial": What Litigators Should Know About Arbitration

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Though demand for arbitration may ebb and wane, it will likely grow substantially over the next decade. International trade will continue to expand. Foreign companies fear our courts, and we fear theirs. Even domestic companies distrust certain jurisdictions in the United States. Privacy concerns will drive many contracting companies under the blanket of a confidential proceeding.[1] And parties to disputes involving a high degree of complexity or technical challenges will want decision makers with industry expertise.

Litigators new to arbitration may benefit from a primer on this arena. Though both arbitration and court litigation are adversarial systems for seeking the truth and meting justice, their respective cultures, procedural rules and even nomenclatures differ in various ways.

Lexicon: Talk the Talk

"***Language is the armory of the human mind, and at once contains the trophies of its past and the weapons of its future conquests."*** –Samuel Taylor Coleridge.

Using trial lawyer terms in the arbitration arena will brand the speaker as an amateur. A lawyer's skill set may essentially be the same in each forum, but the lexicons are different. So, here is a glossary of commonly used arbitration terms:

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[1] Be warned, however, that parties and counsel to an arbitration proceeding are not constrained from publishing the details of the proceeding, including the award, absent an agreement providing for such protection.

1. “Claimant” is the proper arbitration term for plaintiff.

2. “Respondent” is the term for defendant.

3. Discovery may be called “exchange of information.”

4. “Hearing” is the arbitration counterpart for trial.

5. “Award,” not judgment, is the decision of the arbitrators, even if no affirmative relief is actually “awarded.” A party may obtain a court judgment to enforce an award.

6. “Vacatur” means modification or reversal of the award by a court in an appeals process that starts with the trial-level court. A winning claimant will petition the court to enforce the award by judgment, and the losing respondent may ask the same court to vacate the award.

7. “Solo arbitrator” refers to a single arbitrator appointed to hear and decide a matter by himself. “Panel” and “tribunal” refer to three (rarely more) arbitrators so appointed. Usually, each party will appoint a member of the panel or tribunal, and the two party appointed members will appoint the third. Sometimes, all three are jointly chosen by the parties.

8. “Administered” means that the process is aided and facilitated by an arbitral institution (privately owned; usually nonprofit) such as the American Arbitration Association (“AAA”) or the International Institute for Conflict Prevention & Resolution (“CPR”). Arbitrations are “administered” when facilitated by institutions such as the American Arbitration Association (“AAA”) or the International Institute for Conflict Prevention & Resolution (“CPR”). The attached Addendum lists prominent arbitral bodies that administer arbitrations, promulgate rules for arbitration, and maintain rosters of neutrals vetted for qualifications and experience. An “ad hoc” arbitration is not administered.

9. “Ad hoc” means not administered by a third party. The arbitrators themselves are responsible for their billing and collection, challenges to panel members and all communications with counsel.

10. “Chair” means the head of the tribunal or panel.

11. “Wing” means an arbitrator who is not Chair. Wing arbitrators may be party appointed or jointly appointed. In either case, they are almost always to remain neutral and independent.

12. “Seat” or “situs” means the place of the arbitration, which will determine whose law governs the conduct of the arbitration.

A Word About International Arbitration

An "international" arbitration involves a dispute between citizens of different countries, even if the seat is in the U.S.

The principal treaty governing international commercial arbitration is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"),[2] ratified by more than 140 countries, including the U.S. and the other major industrial nations. Contracting states agree to recognize and enforce arbitration agreements and foreign arbitral awards issued in other contracting states, subject to certain limited exceptions. Each ratifying state has enacted legislation to implement the terms of the New York Convention. In the U.S. we have Chapter 2 of the Federal Arbitration Act ("FAA")[3].

Generally speaking, the institutional rules governing international arbitrations have arisen from civil law (European) culture. Civil law states, and lawyers and parties therein, eschew American-style, aggressive, broad discovery. For example, the United Nations Commission on international Trade Law ("UNCITRAL") Arbitration Rules,[4] sometimes incorporated into international agreements, require each party to produce documents on which it intends to rely. The sole reference to any other form of discovery appears in Art. 27.2: At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine." In some cases, no other discovery occurs, and depositions are uncommon.

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[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S., *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[3] 9 U.S.C. § 201–08 (2012).

[4] *Available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

A Contract Is The Genesis and Writ of Each Arbitration

An arbitration proceeding springs from a contract. Typically, a contract providing the terms of an underlying business deal will contain a clause requiring that disputes arising under the contract be submitted to binding arbitration; or less frequently, after a dispute arises, parties sometimes enter a stand-alone agreement to arbitrate.

The contract should define or set the:

a. The substantive scope of the proceeding -- i.e., what subject matter the arbitrator has the power to decide.
b. The location or "seat" of the arbitration (more later).
c. The number of arbitrators (one or three, rarely more).

The contract may also provide:

a. That the proceeding will be administered by an arbitral institution whose procedural rules will apply. E.g., AAA, CPR, ICDR, ICC, etc. (*see* Addendum). If the proceeding will be ad hoc, the agreement may incorporate a set of rules by reference.
b. Limitations on permissible discovery (e.g., no more than X depositions or Y cumulative hours of depositions).
c. A hearing deadline and maximum days of hearing time.
d. Minimum or special arbitrator qualifications.

Arbitration Statutes -- The Legal Framework

The seat of the arbitration will determine which country's law will govern enforcement of the arbitration agreement, the judicial remedies in connection with the arbitration proceeding and the enforcement of the award.

For arbitrations seated in the U.S., the Federal Arbitration Act ("FAA"), which broadly applies to contracts involving interstate commerce, provides a statutory basis for enforcement of arbitral agreements and arbitral awards.[5] The FAA may be invoked

[5] *See* 9 U.S.C.A. § 2.

in either a federal court or state court, depending upon which has jurisdiction.[6]

The FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[7] This mandate preempts inconsistent state law.[8]

Almost every state has adopted a local version of the FAA.[9] In Texas, the Texas Arbitration Act ("TAA")[10] will govern if the contract so provides,[11] or if interstate commerce is not involved. Again, either a federal court or a state court may apply the TAA.

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[6] Of course, in cases of diversity of citizenship, federal jurisdiction may be obtained. The FAA provides a federal question basis for federal jurisdiction when the New York Convention is applicable. *See* 9 U.S.C. § 203 (2012) ("action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States"); *see, e.g.*, *Telenor Mobile Communs. AS v. Storm LLC*, 584 F.3d 396, 404 (2d Cir. 2009); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 (5th Cir. 2003).

[7] 9 U.S.C. § 2.

[8] *See*, *e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *THI of New Mexico at Hobbs Center, LCC v. Patton*, No. 13- 2012, 2014 WL 292660 (10th Cir. Jan. 28, 2014).

[9] Many states have adopted the Uniform Arbitration Act, which tracks the terms of the FAA. The 1955 Uniform Arbitration Act (amended in 1956) was adopted in 49 states. The 2000 Revised Uniform Arbitration Act has been adopted by 18 states, *available at* http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000).

[10] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–.098.

[11] *See, e.g.,* Ford v. NYLCare Health Plans of Gulf Coast, Inc., 141 F.3d 243, 247–48 (5th Cir. 1998). The FAA, however, will preempt conflicting state law. *See* Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

"Toto, we're not in court anymore." Arbitration Procedures

Initiation

Arbitration begins with a notice of claim either filed with the administering institution or served directly on the respondent. The applicable rules, if any, should be consulted as to the form of notice and any further statement of claim, and whether a responsive pleading is required and in what form. If no rules apply, the arbitrator will determine these matters. Remember, unless incorporated by agreement, the state and federal procedural rules have no application.

Seating the Panel

The arbitration agreement may specify the arbitrator(s) by name or a method for their selection. Otherwise, when institutional rules apply, they will dictate the selection process. If the agreement is silent on the method of selection, the parties will attempt to agree on a panel. If that effort fails, the claimant will need to petition either the administering body (*e.g.*, AAA) or a court (in the case of an ad hoc proceeding) to make the appointment.

When three arbitrators will preside, typically each party will appoint one arbitrator, and those two will select the third, with input from the parties. Though some limited *ex parte* communication (fee discussion; nature and subject of the dispute; names of counsel and parties; chair candidates) is allowed during this selection process, all arbitrators must remain neutral. Once the chair is seated, no further *ex parte* communication is permitted.

When a candidate is appointed, he must disclose all material relationships and contacts with counsel and parties so as to allow them to object to his service in light thereof. Failure to disclose such information may be a ground for vacatur of the award.

Preliminary Hearing

After the panel is approved, it conducts a preliminary hearing, usually by telephone, at which counsel and the panel determine a

schedule for the proceeding (including hearing date, and deadlines for completion of discovery, exchanging witness and exhibit lists, pre-hearing briefing dates, etc.), allowable discovery and motion procedures. The panel then memorializes the schedule in an order.

Discovery or Exchange of Information

Interrogatories and requests for admissions are not recognized as discovery tools in arbitral rules and in any event are generally disfavored by arbitrators as a waste of time and money. Document requests are usually allowed, but under some rules (*e.g.,* AAA) must be narrowly tailored to seek documents "reasonably believed to exist" and "relevant and material" to the dispute.[12] The broader "reasonably-calculated-to-lead-to-the-discovery-of-admissible-evidence"standard found in court rules does not apply. A competent panel that gets a whiff of "fishing" will dock the boat.

Depositions are usually at the discretion of the panel. In substantial US business disputes, depositions are commonly allowed, but they may be limited in number and duration. In international disputes, depositions are often not permitted.

Discovery disputes may be handled informally on short notice, and the parties may agree to submit them solely to the chair to speed the process.

Dispositive Motions

Contrary to lore, arbitrators grant dispositive motions, though sparingly.[13] Some proceedings present questions of law, either in whole or in part. For example, if a contract unambiguously supports one party's position as to breach or lack thereof, that party may be entitled to a favorable award on liability as a matter of law. Similarly, if controlling law precludes claimant's sole liability theory, the respondent should be entitled to an award of no liability without an evidentiary hearing or even discovery.

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[12] *See* AAA Commercial Rule R-22.

[13] AAA's Commercial Arbitration Rules expressly allow dispositive motions. *Id.* R-33.

Nevertheless, arbitrators disfavor court-style motions urging mere insufficiency of evidence (and often intended to "educate"). As noted below, refusing to hear evidence, weak though it may be, can put the award at risk for vacatur.[14]

Enforcement of Orders and Rules

AAA, JAMS, and CPR rules vest panels with the full range of enforcement powers available to judges (AAA forbids default as a sanction).[15] Other rules, all international, allow shifting of costs and fees for bad behavior but contain little express authority for other sanctions.[16] Nevertheless, courts have consistently found ways to uphold sanctions awarded against a party for misconduct in arbitration[17]

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[14] *See* 9 USC §10 (2012); *see also* J.S. "Chris" Christie, Jr., Preparing for and *Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 266, 277–79 (2008); *see* generally George M. VonMehren & Claudia T. Salomon, *Submitting Evidence in International Arbitration*, 20 J. INT'L ARB., 285 (2003).

[15] AAA Commercial Arbitration Rules R-23 and R-58 (but no default sanction)*;* JAMS Comprehensive Arbitration Rule 29; CPR's Administered Arbitration Rule 16; CPR's 2007 Rules for Non-Administered Arbitration of International Disputes Rule 16.

[16] *See* ICDR International Arbitration Rules, arts. 28, 31.

[17] *See* Hamstein Cumberland Music Group v. Estate of Williams, 2013 WL 3227536 at *4 (5th Cir. May 10, 2013) ("inherent authority to police the arbitration process"); ReliaStar Life Insurance Co. v. EMC Nat'l Life Co., 564 F.3d 81, 85-87 (2d Cir. 2009) ($3.5 million costs/attorneys fees award upheld where party "lack[ed] good faith); Seagate Technology, L.L.C. v. Western Digital Corp., 834 N.W.2d 555, 563–64 (Minn. Ct. App. 2013); *see generally* G. McGowan, *Sanctions in US and International Arbitrations: Old Law In Modern Context*, Kluwer Arbitration Blog, October 10, 2013.

Hearing

The hearing, usually ensconced in a hotel or office, is a private, evidentiary proceeding. Its basic structure resembles a bench trial– opening statements, claimant's evidence, respondent's evidence, rebuttal evidence and closing arguments. Witnesses are sworn and give direct testimony subject to cross-examination. If either party wishes, the hearing is transcribed.

But, unlike a bench trial, rules of evidence do not strictly apply (unless the parties agree otherwise). Generally, arbitrators view extensive use of objections as obstructive and/or time wasting. Moreover, they are reluctant to exclude evidence for fear of vacatur. "[R]efusing to hear evidence pertinent and material to the controversy" is one of the few grounds for vacating an award.[18] So, all documents are usually deemed admitted at the outset, unless there are serious questions about authenticity. The hearsay rules bend. Motions to strike experts will likely be denied. As to peripheral maters, affidavits may be allowed with no cross-examination. And so forth.

Nevertheless, objections may get traction if the evidence is

a. Cumulative or redundant, especially if it jeopardizes the schedule;
b. Completely irrelevant or not probative;
c. Too much hearsay or double hearsay; or
d. Leading a friendly witness on disputed subjects.

The parties may agree on almost any hearing procedures, and the panel has broad flexibility to adopt procedures to promote speed, efficiency and fairness. For example, it is common in international arbitrations for direct testimony to be submitted by affidavit (and read by the tribunal in advance) so that hearing testimony is limited to cross-examination.

Award

After the close of evidence, the Panel deliberates and renders its award, which may be a simple summary of the outcome and relief granted, or reasoned, or a detailed statement of findings

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[18] *See* 9 USC §10; Christie, *supra* at 277-79; *see generally* VonMehren & Salomon, *supra*.

of fact and conclusions of law. Most institutional rules do not speak to the form of the award (except CPR, which mandates a reasoned one). The parties, by agreement, usually determine the form.

Enforcement and Appeal of Awards: The Role of the Judiciary[19]

A party who obtains an award of monetary, declaratory or injunctive relief can petition a court to enter judgment on the award pursuant to the applicable state arbitration statute or the FAA. Such appeals are first lodged in the trial court and thereafter follow the normal appellate path.

The losing party may seek to vacate the award. Both the FAA and the Texas Arbitration Act provide the same grounds:

a. Where the award was "procured by corruption, fraud, or undue means." Bribery or extortion of an arbitrator comes to mind.
b. Where there was "evident partiality or corruption in the arbitrators". This usually occurs when an arbitrator has failed to disclose a material relationship with a party or counsel.
c. Where the arbitrators "refus[ed] to postpone the hearing, upon sufficient cause shown," or "refus[ed] to hear evidence pertinent and material to the controversy," or committed "any other misbehavior by which the rights of any party have been prejudiced."
d. Where the arbitrators "exceeded their powers." This happens when an arbitrator goes beyond the scope of his authority as circumscribed by the parties' agreement to arbitrate. Examples:
    - Awarding punitive damages when the contract expressly excludes them.
    - Hearing and deciding a tort claim where the agreement limits the scope of the arbitration to contract claims.

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[19] This article does not address the other roles a court may play – compelling arbitration at the outset and, in an ad hoc proceeding, appointing arbitrators (when the parties cannot agree) and deciding challenges to arbitrators.

- Exercising arbitral jurisdiction over a party who did not agree to arbitrate (*i.e.*, a nonparty to the arbitration agreement).[20]

Arbitration and the Rule of Law

Are arbitrators bound to follow controlling substantive law? After all, they need not be attorneys (though most are). The answer is "maybe."

Some courts have embraced a ground for for vacatur not found in the FAA or the state equivalents – "manifest disregard for the law."[21] On its face, this ground suggests that arbitrators must correctly apply controlling law. But application of the rule has resulted in vacatur of few awards, and some circuits and states have declined to accept the doctrine.[22]

A recent case exemplifies how narrowly some courts view "manifest disregard." In *Schafer v. Multiband Corp.*[23], the Sixth Circuit candidly stated that "we would reverse the decision if it had been made by a district court." But "[m]anifest disregard of the law is not just manifest error of the law." The scope of manifest disregard is "very narrow", so as to further the goals of the FAA -- finality, efficiency, and speed. Thus the arbitrator's "colorable" reading of ERISA was enough to confirm the award.

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[20] *See* 9 USC §10 (2012) (emphasis added); TEX. CIV. PRAC. & REM. CODE ANN. § 171.008.

[21] *See, e.g.,* Comedy Club, Inc. v. Improv West Assocs., 553 F. 3d 1277, 1290 (9th Cir. 2009); Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 548 F.3d 85, 94, 95 (2d Cir. 2008); Coffee Beanery, Ltd. v. WW, LLC, 300 F. App'x 415, 418–19 (6th Cir. 2008); Pearson Dental Supplies, Inc. v. Super Ct., 229 P.3d 83, 91 n.3 (Cal. 2010); Sands v. Menard, Inc., 767 N.W.2d 332, 335 (Wis. 2010).

[22] *See, e.g.,* Frazier v. CitiFinancial Corp., 604 1313, 1324 (11th Cir. 2010); Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009); Volvo Trucks N.A., Inc. v. Dolphin Line, Inc., 50 So.3d 1050, 1054 (Ala. 2010).

[23] 2014 FED App. 0003N; 2014 U.S. App. LEXIS 288; 2014 WL 30713 (6th Cir. Jan. 6, 2014) (unpublished).

Nevertheless, with rare exception, parties and counsel expect arbitrators to use best efforts to follow controlling substantive law. And, in this writer's experience, well-chosen arbitrators try to do so.

Addendum

Institution	Location	Type of Arbitration
American Arbitration Association ("AAA") www.adr.org	New York	Domestic
Institute for Conflict Prevention and Resolution ("CPR") www.cpradr.org	New York	Domestic & International
International Centre for Dispute Resolution ("ICDR"), a division of AAA • www.icdr.org	New York	International
International Court of Arbitration ("ICC") www.iccwbo.org	Paris	International
London Court of International Arbitration ("LCIA") www.lcia.org	London	International
International Centre for Settlement of Investment Disputes ("ICSID") • https://icsid.worldbank.org/ICSID/Index.jsp	Washington, D.C.	International
Judicial Arbitration & Mediation Service ("JAMS") www.jamsadr.com	Irvine, CA	Domestic & International

About The Author

Gary McGowan is the principal in McGowan Arbitration and Dispute Resolution. A former business litigator and founding partner of Susman, Godfrey & McGowan, he has for the past 25 years served as arbitrator and mediator in both national and international disputes involving complex, high-stakes matters.