

NEW YORK STATE BAR ASSOCIATION



AN ARBITRATION PRIMER FOR LITIGATORS

Dispute Resolution Section
David C. Singer, Section Chair





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Introduction

It is a common misconception among litigation attorneys that any attorney who has represented a client in court is completely prepared to represent a client in a domestic arbitration. Although there are certainly similarities between domestic arbitration and litigation, the differences between these processes are significant, and could easily prove to be traps for the unwary.

With this in mind, the NYSBA Dispute Resolution Section has prepared this manual as an aid to litigators representing clients in a domestic arbitration in New York. (Much of the information will also apply to domestic arbitrations being conducted elsewhere.) It should be useful both to novice attorneys and experienced court litigators and even those with one or more arbitrations already under their belts. The topics include arbitrator selection, applicable law (procedural and substantive), the interplay between mediation and arbitration, effective use of arbitral pleadings, strategies for the preliminary conference, court intervention, party and third-party discovery, preparing for the evidentiary hearing, and post-award actions and deadlines.





Arbitrator Selection

Arbitrators are not randomly selected as judges are; instead, the parties often choose their tribunal through a system of striking and ranking potential candidates. The tribunal may consist of one or three arbitrators, depending on the arbitration clause's requirement or the rules of the institutional provider administering the case.

When choosing arbitrators, factors to consider include case management skills, i.e. the ability to organize and conduct a cost- and time-efficient process and deal decisively with procedural issues; experience, expertise and background, including familiarity with the subject matter in dispute and governing law; and temperament and evenhandedness. The benefits of diversity should also be taken into consideration.

When an institutional provider (such as JAMS, the American Arbitration Association, or CPR) is administering the case, it provides the parties with a list of arbitrators from its roster. The providers have separate commercial, employment, construction, and other rosters; which roster is used may be specified in the arbitration clause, or if not, will depend on how the provider classifies the case. If your case might overlap several rosters, consider which would be preferable and request that it be used. A case manager, working closely with the parties, compiles an initial list of candidates — often from a keyword search for particular experience — who best meet the parties' needs, and provides CV's or bios for the parties' review. If appropriate, the provider, often with the parties' direct participation, may also pre-screen candidates, whether through written responses to pre-defined questions or occasionally telephonic interviews, to elicit specific desired information.

Counsel must familiarize themselves with the provider's rules governing the striking and ranking of arbitrators and the deadlines for doing so, as the penalty for failing to timely respond may be drastic indeed: presumed agreement with the other side's choices. Do not hesitate to seek clarification from the case manager if you do not fully understand the

mechanics of the process. Selecting arbitrators is the most crucial choice any party faces in arbitration and is a crucial advantage of arbitration over litigation. Do not simply acquiesce in your adversary's selection out of some sense of conveying good will. Each party should fully take advantage of its opportunity to carefully select the arbitrators it desires; otherwise it may very well end up with a panel it does not want. The selection process occurs once; make the most of it!

Once a list is in hand, feedback from colleagues is generally counsel's best resource when striking and ranking candidates. Google searches, social media, candidates' websites, and published writings also provide further insight. Rely on trusted sources. If you do not know the ultimate source of any online material, be skeptical of what you read, as much erroneous information exists online. If a candidate is plainly disqualified — for example, if he or she is related to you or a family member — you should have the case manager replace that individual immediately, so that the number of potential arbitrators to choose from is not reduced.

If the striking and ranking process fails to yield the necessary number of arbitrators from the first list, a new list will be generated and the process will be repeated.

After the arbitrator or panel of arbitrators has been appointed, they are required to disclose any financial, professional, social, or other relationships with any of the entities or individuals involved in the case. Upon receiving these disclosures, counsel should carefully consider whether the disclosures warrant objecting to the appointment, and be wary of the deadline for doing so; note that your objection will not be shared with the arbitrator, but may be challenged by opposing counsel. Conversely, if your counterpart objects to an arbitrator based on the disclosures, you may challenge the objection and argue against the arbitrator's removal; the provider will then make a determination.

Note that holding back possibly-disqualifying information about an arbitrator for potential use later in the case, is likely to be considered a waiver.

Selecting arbitrators is tricky and time-consuming. But the rewards of choosing wisely are well worth the time and effort expended in the selection process.

What Law Applies

If the applicable law is not specified in the contract or arbitration agreement, one of the advocate's first tasks is to determine the procedural law and the substantive law that will apply to the arbitration. Notably, a generic choice of law provision designating New York law is generally interpreted to mandate application of New York's substantive law, not its procedural rules.

If the arbitration is conducted in New York, the procedural law to be followed will be either the Federal Arbitration Act (9 U.S.C. §1 et seq.) ("FAA"), the New York CPLR, Article 75, or a combination of both. The FAA applies to all arbitrations "involving commerce," which is broadly interpreted.¹ While the overwhelming number of arbitrations that take place are accordingly governed by the FAA, there are some disputes, such as professional malpractice disputes or New York-based real estate disputes, that do not involve interstate commerce, and therefore are governed instead by the CPLR. Accordingly, counsel must

determine which statute applies, and be aware of differences between FAA and CPLR-governed arbitrations, such as:

- **Whether the Dispute is Barred by the Statute of Limitations:** Under the FAA, the arbitrator decides, under the CPLR, the Court decides.
- **Whether Res Judicata or Collateral Estoppel Precludes the Arbitration:** Under the FAA, the arbitrator decides; under the CPLR, the Court decides.
- **Award of Punitive Damages:** Permitted under the FAA; prohibited under the CPLR.
- **Award of Legal Fees to the Prevailing Party:** Permitted under the FAA; not permitted under the CPLR unless the arbitration agreement itself or an applicable statute so provides.
- **Non-Party Pre-Hearing Document Discovery:** Under the FAA, the arbitrator can convene a hearing to have the documents produced; under the CPLR, a subpoena can be issued but the Courts will rarely enforce it.
- **Effect of Appearance:** Under the FAA, a party may oppose arbitrability before the arbitrator and, if he loses, proceed with the arbitration and raise the issue in court at the conclusion of the arbitration; under the CPLR, if a party participates in the arbitration it waives any argument of non-arbitrability.
- **Availability of Court Relief:** Under the FAA, once an arbitration begins, the parties cannot go into Court for relief until the final award is issued; under the CPLR, they can go to Court at any time and seek a stay or other relief.
- **Deadlines to Confirm an Award:** Under the FAA, it is one year from the date of the award; under the CPLR the one year period runs from the date the award is delivered by the prevailing party to the losing party.
- **Deadline to Vacate or Modify an Award:** Under the FAA, 9 U.S.C. §12 provides that “[n]otice of a motion to vacate, modify, or correct an award must be served within three months after the award is filed or delivered.” Under the CPLR (§ 7511), the application must be made within ninety days after delivery of the award to a party.
- **Effect of Arbitrator Refusal to Grant an Adjournment:** Under the FAA, (9 U.S.C. §10) one ground for vacating an award is that “the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause or in refusing to hear evidence pertinent and material to the controversy...” The CPLR does not provide such a ground for reversal (CPLR §7511).

While many of the provisions of the two statutes are the same, and outcomes are often identical regardless of which applies, counsel should nevertheless be mindful of the key differences pointed out here. Moreover, it is important to recognize that, even in FAA-governed arbitrations, certain CPLR provisions may sometimes be invoked to fill procedural gaps, so long as they do not conflict with federal law.

As for the applicable substantive law, often the parties’ contract will specify what law is to apply. If it does not, counsel should determine which state’s law is applicable, and if choice of law is an issue, should clarify with opposing counsel and the arbitrators at the outset which law will apply.

Arbitrability

The existence of an arbitration clause in a contract does not automatically guarantee that a particular dispute will be subject to arbitration. Before proceeding to commence or participate in an arbitration, counsel must ascertain whether the dispute is indeed “arbitrable.” This inquiry has two prongs: the “gateway” prong and the “who decides” prong.

The “gateway” prong asks whether an agreement to arbitrate exists between the parties. If this is found to be the case, the second prong is whether the dispute falls within the scope of the arbitration agreement.

As to the gateway prong, §2 of the FAA mandates that an agreement to arbitrate must be in writing and embedded in a transaction involving commerce and be enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” That provision generates at least three more questions:

- Is the agreement to arbitrate in writing and who is bound by its terms?
- Does the underlying contract involve “commerce?”
- Does state contract law create grounds, such as fraud, lack of capacity, or unconscionability, for revoking the agreement to arbitrate?

As to whether the arbitration clause covers the dispute at hand, that will depend on the breadth of the clause, i.e. does it cover “any and all” disputes arising under the parties’ contract, or is arbitration mandated only for certain types of disputes?

If any of these issues requires a ruling by a decision-maker, the “who decides arbitrability” question — arbitrator or court — comes into play. The U.S. Supreme Court has held that courts will determine arbitrability, i.e. the validity and applicability of an arbitration agreement, in the absence of “clear and unmistakable evidence” that the parties intended the arbitrator to resolve such issues. The parties’ agreement to abide by a provider’s rules, which rules in turn give arbitrators the authority to rule on their own jurisdiction, has been held to constitute such “clear and unmistakable” evidence. Notwithstanding that line of case law, however, where the issue is whether a putative party — such as a non-signatory to the agreement — is required to arbitrate in the first instance, a court will make the determination. Thus counsel should be mindful that the arbitration panel is not always the appropriate decision-maker.

Adding to the confusion, challenges to the entire contract are ordinarily decided by the arbitration panel, while challenges solely to the arbitration clause will be decided by the courts. If, however, the parties have delegated authority to the arbitration panel to rule on its own jurisdiction, even challenges made solely to the arbitration clause will be decided by the panel.²

Arbitrability is the most complex area of arbitration law. Being aware of potential issues of arbitrability at the outset is an absolute must for advocates on both sides of the dispute.

Mediation

In some arbitration clauses and under some applicable rules, mediation is a required step in the process of resolving a dispute before resorting to arbitration. If your adversary has commenced arbitration without first complying with a requirement to mediate, your remedy is to challenge the arbitrability of the dispute, either by letter to the provider, by asserting the failure to mediate as an affirmative defense in your answer, or both. Conversely, if your client has attempted to comply with a mediation pre-requisite and been frustrated by its counterpart's stonewalling, you may assert in your demand for arbitration that the respondent has waived the mediation requirement by its [in]actions.

Even if mediation is not mandated, counsel should consider mediation in the appropriate case. As most practitioners are aware, mediation is a confidential dispute resolution mechanism in which the parties engage a neutral, disinterested third-party who facilitates discussion amongst the parties to assist them in arriving at a consensual resolution. Mediation can resolve a broad array of disputes and is well suited to disputes arising out of commercial transactions where the parties contemplate an ongoing relationship once the dispute has been resolved. Mediation is also particularly appropriate in those situations where the parties are not effectively negotiating a resolution on their own or have arrived at an impasse in their dialogue.

Unlike arbitration, mediation is a non-adjudicative process. Unlike in a judicial settlement conference, there is no judge or other decision-maker who will determine the merits of the dispute. Rather, the mediator tries to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in the hope of moving them towards a negotiated settlement or other resolution of their own making. Although a mediator may be asked to recommend possible solutions, a mediator is not authorized to impose a resolution, but, rather, provides an impartial perspective on the dispute to help the parties satisfy their core interests while uncovering areas of common ground. As is the case with arbitration, selecting an appropriate neutral — one who is well versed in mediation process skills and, when appropriate, knowledgeable about or familiar with the area of law and/or the industry in which the dispute arose — is of paramount importance and can lead to a greater likelihood of settlement. (Note that if an arbitrator has already been appointed when mediation is agreed to, the arbitrator is not typically invited to serve as the mediator because of ethical difficulties that dual role could create.)

Importantly, mediation is confidential. Because the mediator is ethically bound to keep confidential all communications and information disclosed in mediation, counsel should not fear that admissions made during mediation will later be revealed to the arbitrator if the mediation does not succeed.

Moreover, the parties can choose to mediate while simultaneously proceeding with an ongoing arbitration at virtually any time before the final award is issued and, in certain circumstances, even afterwards. All it takes is for the parties to give their informed consent to mediate the issues that remain outstanding between them.³

Pleadings

Commencing Arbitration. The arbitration clause is the starting point for drafting the demand for arbitration (also called a statement of claim), both to ensure that notice is legally effective⁴ and to avoid unintentionally expanding the arbitrator's authority. Some issues that may be addressed in the arbitration clause and that should be considered when drafting include: (i) the process for initiating arbitration; (ii) pre-conditions to arbitration (such as mediation); (iii) the scope of disputes subject to arbitration; (iv) claim limitation periods; (v) the arbitrator's remedial authority; (vi) the governing procedural arbitration law; and (vii) procedural matters such as the appointment of arbitrators. Additional relevant issues, such as the substantive law applicable to the dispute, notice requirements, and confidentiality, may be addressed in the arbitration clause or in other provisions of the parties' underlying contract.

Many arbitration clauses incorporate the rules of an arbitration provider, which will establish the procedural framework for the arbitration, including the process for initiating arbitration.

Hidden pitfalls lurk. If both parties make a boilerplate request for fees and costs (as is typical in litigation matters), they may unwittingly give the arbitrator authority to shift attorneys' fees in the award.⁵ The unwary may also be surprised that the quantum of damages claimed may affect the amount of fees payable to the arbitral institution, impose a duty to mediate, and/or trigger supplementary rules (such as expedited or large commercial case procedures).

The level of detail to be included poses another potential pitfall. As arbitration rules tend to be vague on this point, many cases are commenced with one-page demands. Counsel should, however, make a strategic decision about how deeply to delve into the material facts, law, and evidence. Although a bare-bones "notice" pleading may suffice to comply with a limitations period or in the context of settlement negotiations, failure to provide a narrative is usually a tactical error, since the demand for arbitration is the claimant's first opportunity to argue the merits of its case and to influence the arbitrator's thinking about appropriate procedures and discovery.

It is also a mistake to assert indiscriminate or unsupportable claims or arguments or to assume that new claims or different requests for relief can be made at a later date. Amendments may depend on the arbitration panel's consent (see below). Furthermore, although arbitrators appreciate that parties will refine their cases over time, a party that seeks to make significant changes to its case may damage its credibility with the arbitrator. Moreover, in cases with potential fee-shifting, failure to prove particular claims may prevent the claimant from fully recovering attorney's fees and costs as the "prevailing party." Thus, before putting pen to paper, counsel should investigate the relevant documents, witnesses and law, weed out any weak claims, and craft a persuasive theory of the case.

Some arbitration clauses will be silent about notice. If the FAA governs, there are no mandatory rules regarding notice, and counsel should be guided by the general considerations above. If the arbitration clause is silent but New York's arbitration law governs, the demand should comply with CPLR §7503(c).

Although not mandatory, the claimant may wish to include “warning” language from §7503(c) in its demand. §7503(c) precludes a respondent from asserting certain objections to arbitration unless it timely seeks a stay of arbitration, but only if the respondent was so warned in the demand. Although the issue is unsettled, some courts have held that §7503(c) may have preclusive effect even if a case is governed by the FAA.⁶

Responsive pleadings. The responsive pleading to a demand for arbitration is an answering statement (the “answer”). The respondent may also assert counterclaims, to which the claimant (respondent-by-counterclaim) will typically have the right to respond.

Many of the same general drafting considerations apply to the answer as to the demand. Thus counsel should carefully review the demand for consistency with the arbitration agreement and any applicable arbitration rules, be attentive to its request for relief, and tell a story that persuasively presents its theory of the case. Although — unlike in litigation — it is not necessary to admit or deny individual allegations in the demand, it may be helpful to “join issue” by doing so, in addition to presenting a counter-narrative. The key difference between the demand and the answer is that to avoid potential waiver, the answer should state any objections to jurisdiction or the arbitrability of claims.

If arbitration rules of an institutional provider apply, they will typically: (i) establish the deadline for the answer (e.g., within 14 days of the claimant’s filing of the demand with the provider); (ii) permit the assertion of counterclaims, subject to payment of a filing fee; (iii) state the consequences of not submitting an answer (usually, non-participation is deemed a denial of all claims and does not relieve the claimant of the burden of proof); and (iv) require that the respondent state any objections to jurisdiction or to the arbitrability of claims, upon penalty of waiver. Some arbitration rules may also establish procedures for disputes involving multiple parties and/or contracts. For instance, they may permit the respondent to join new parties, consolidate a related arbitration, or make cross-claims against another respondent.

Amendments to pleadings. Because arbitrators will look not only to the arbitration agreement but also to the parties’ pleadings to determine their mandate, counsel should take steps to formally amend pleadings to reflect any changes to a party’s request for relief (such as an increase in the amount claimed for damages), or to add any new or different issue or claim for adjudication. Applicable arbitration rules may provide that amendments depend upon the consent of the arbitrator, or upon the payment of administrative fees.

Interim Emergency Relief

Two sources of emergency relief are available when needed in arbitration cases. The courts are available for preliminary injunctions and orders of attachment. Arbitrators can also provide interim relief, either from the panel if it has been seated, or from an emergency arbitrator if the panel is not yet in place.

CPLR 7502(c) provides that New York courts in domestic and foreign arbitrations can grant preliminary injunctions and orders of attachment in aid of arbitration.⁷ These remedies are invaluable for parties who seek to maintain the status quo and to enforce an arbitral award once obtained. (Note that, because the FAA is silent regarding emergency relief, even in FAA governed arbitrations the CPLR procedures may be invoked to “fill the gap.”)

The sole ground for obtaining a provisional remedy under 7502(c) is that the award “may be rendered ineffectual without such provisional relief.” However, some procedural requirements set forth in CPLR Articles 62 (*Attachment*) and 63 (*Preliminary Injunction*) apply to applications under 7502(c).⁸

Relief under 7502(c) is granted in the court’s discretion. Courts previously considered only whether the ultimate arbitration award would be ineffectual if the remedy were not granted. More recently though, courts have also considered traditional equitable criteria. Thus, for preliminary injunctions in the context of arbitration, the movant must satisfy the customary equitable criteria, including a likelihood of success on the merits, irreparable harm and a balance of equities in movant’s favor, as well as the 7502(c) “rendered ineffectual” test.⁹

With respect to attachment orders in aid of arbitration, the case law is murkier. Earlier cases held that since 7502(c) specifies the sole ground for such an order, namely, that the arbitration award may be rendered ineffectual without it, the alternative grounds for attachment set forth in 6201 — for example, that the respondent is secreting or encumbering assets with intent to defraud — are not relevant.¹⁰ Later case law has integrated the requirements of 6212(a) (probability of success on the merits) into the showing needed to obtain an attachment order under 7502(c).¹¹ Other decisions have required petitioners seeking such attachment orders to demonstrate the traditional elements of a preliminary injunction, rather than simply satisfy the minimal showing required under 7502(c); still others have denied attachment orders in the absence of evidence that assets were being hidden or dissipated.¹²

The application for an order of attachment or preliminary injunction is made in the form of a special proceeding, unless a related action or special proceeding is already pending, in which case a motion is the appropriate mechanism.¹³ Some basis of jurisdiction over the respondent must support the New York court’s power to entertain a special proceeding for provisional relief. Usually personal jurisdiction will be needed with respect to injunctive relief. The location of property in New York suffices to support the attachment even if all of the contacts relating to the claims asserted in the arbitration are foreign.¹⁴

If the application for an attachment or preliminary injunction is made prior to commencement of arbitration, the arbitration must be commenced within 30 days of the granting of provisional relief. The failure to meet this deadline will nullify the order, and costs, including reasonable attorneys’ fees, are to be awarded to the aggrieved party. The 30-day period, however, can be enlarged or shortened for good cause shown.

Arbitration provider rules typically make clear that applications for judicial provisional relief are not deemed a waiver of the right to arbitrate.

Most arbitration rules also give the panel power to take whatever interim measures it deems necessary, including injunctive relief and measures for the conservation of property and the disposition of perishable goods. Such relief would normally be in the form of an interim award, which would require confirmation by a court for enforcement.

The AAA, JAMS, and other providers have rules permitting the appointment of an emergency arbitrator for highly expedited emergency relief in situations when the panel has not yet been seated. The standards for such relief are typically proof of irreparable harm, balance of equities and likelihood of success on the merits.

The Preliminary Conference

The preliminary conference is generally held by telephone shortly after the arbitration panel is in place, and includes the arbitrators, counsel, and party representatives if they wish to or the panel requests that they participate. Its importance cannot be overstated. It is a critical opportunity to begin persuading the panel of the merits of your client's claims or defenses, establish your credibility, demonstrate your reasonable approach to the issues, and design a process that meets your client's needs.

The purpose of the conference is to craft a "roadmap" for the arbitration; *i.e.* to organize and plan the future conduct of the proceeding that will result in a balanced, proportional, efficient, cost effective, focused arbitration process while safeguarding each party's opportunity to fairly present its claims and defenses. In contrast to litigation practice, rather than imposing deadlines for discovery, briefing, and the hearing itself, the panel will usually accommodate the parties' and counsels' schedules, and will try to reach consensus on issues rather than rule by fiat.

A proactive approach to the conference is a must. This includes reaching out to opposing counsel in advance to agree on as many issues as possible, and to identify points of disagreement. Providing the panel with the outcome of counsels' discussion will result in a much smoother (and shorter) preliminary conference.

Counsels' agreement on several sets of dates for the evidentiary hearing to propose to the panel in advance can save time during the conference call. However, in case none of the proposed dates is acceptable to the panel, counsel must be prepared to select hearing dates during the conference call, with their calendars at hand and their clients' and key witnesses' schedules also available.

Advance agreements concerning discovery are also highly beneficial. Limiting discovery to what is essential rather than the "leave no stone unturned" approach is one of the best ways to control time and costs. Key topics for discussion with opposing counsel, and with the arbitration panel if agreement is not reached, are preservation of documents, confidentiality agreements, any necessary e-discovery and the details of e-discovery, such as the scope and form of production, reasonable search parameters, and what types of electronic documents will not be searched, *e.g.* archives.

You should think carefully before the preliminary conference about such things as anticipated dispositive or *in limine* motions, the need for or opposition to depositions, the need for experts, the need for subpoenas, the possibility of taking testimony by videoconferencing or telephone, and, if not covered in the arbitration clause or applicable rules, the type of award (*i.e.* reasoned or "bare") that would be best for your client, and raise these matters during the preliminary conference if the panel does not. Do not hesitate to request that direct (not *ex parte*) communication with the panel be permitted, and that a subsequent status conference be scheduled, particularly if you fear foot-dragging by your opponent during the discovery process.

In preparation for the preliminary conference, be sure to become familiar with the provider organization's applicable rules; most have guidelines, checklists, or rules for conduct of the preliminary conference that provide insight on topics to be discussed with the client and with your adversary in advance, as well as with the panel during the conference.¹⁵ Many providers

also have discovery and information exchange protocols that are useful for the parties to consult.¹⁶

Although time consuming, preparation with your client and with opposing counsel in advance of the preliminary conference will result in an invaluable blueprint for the arbitration. And maintaining a courteous, reasonable, and thoughtful demeanor during the preliminary conference call will stand you in very good stead as the arbitration moves forward.

Discovery

Arbitration discovery is typically more limited than in litigation and, in principle, is in the discretion of the arbitrators. There is no “right” to discovery as there is, for example, under Rule 26 of the Federal Rules.

However, in all but the simplest cases, discovery is available. This generally includes fairly generous documentary discovery, uncommon but possible depositions, and almost never interrogatories.

Requests for documents are generally exchanged on a schedule agreed to at the preliminary hearing. Requests should be as specific as possible and focused on the issues important to the requesting party. Objections may be ruled on by the whole panel or, as more customary, by the Chair. A meet and confer session is usual before the panel or Chair is asked to rule.

It is particularly important that counsel agree on protocols for handling electronic documents, such as emails. Search terms and the format for production should be negotiated. Confidentiality stipulations, and stipulations regarding claw-back of inadvertently produced materials, are also frequently agreed to. Arbitration is private, i.e. proceedings are not open to the public, but not necessarily confidential. Without a confidentiality stipulation only the arbitrators — not the opposing party — may be required to keep documents confidential.

Depositions are not generally permitted in arbitration; they are always expensive and often do not produce much that is helpful in commercial cases. However, limited depositions may be available under certain provider rules or when the parties (or the arbitration panel) agree that they are necessary. Depositions can also be useful if a particular witness may not be able to appear at the evidentiary hearing. Depositions of expert witnesses are also often useful.

If a party desires a deposition, an application should be made to the panel or the Chair, explaining why the deposition is necessary and how it will expedite the proceedings. If your adversary is insisting on a deposition, the panel may be receptive to a request to limit its length. You might also suggest that witness statements be exchanged in advance of the evidentiary hearing, in lieu of depositions.

Arbitration’s flexibility is particularly beneficial in the discovery process, as counsel may contact the panel or Chair regarding a discovery dispute and generally get very prompt attention.

While discovery in arbitration is less formal than in court proceedings, counsel should feel free to request certain protections to ensure fairness and completeness, such as that a privilege log be provided, that purportedly privileged documents be reviewed by the Panel *in*

camera, and that certifications from the opposing party be required to support a statement that no responsive documents exist.

Third-Party Discovery

Obtaining information from third parties prior to the arbitration hearing involves expense and complexity. The law regarding pre-hearing discovery is unsettled and varies between and among federal circuits and state courts. This summary focuses on the law in state and federal courts in New York.

Most commercial disputes are governed by the FAA. While the FAA authorizes a majority of the arbitrators to issue hearing subpoenas for testimony before one or more of the arbitrators,¹⁷ the Second Circuit has held that the FAA does not authorize discovery subpoenas.¹⁸ There is a work-around. The arbitrators can subpoena a witness to bring documents to a hearing prior to the main merits hearing so long as one or more arbitrators are present to preside.¹⁹

The FAA does not authorize counsel to issue subpoenas. The arbitrators' subpoena may be served anywhere,²⁰ but the witness is required to appear only within 100 miles of the place where the witness resides, is employed, or regularly transacts business in person,²¹ or, so long as the witness would not incur substantial expense, elsewhere in the state in which the witness resides, works, or regularly transacts business in person.²²

In the case of a distant witness, one or more arbitrators would have to travel to the vicinity of the witness to hear the testimony.²³ As a practical matter, however, this may prove unnecessary. In the case of subpoenas to document custodians, the custodians often agree to ship the documents to counsel rather than be put to the expense of producing a witness to provide the documents at a hearing.²⁴ And a testimonial witness may agree to testify by video conference or, if travel expenses are paid, to come to the arbitration panel rather than require the arbitrators to come to the witness.

In the event of a recalcitrant witness, enforcement must be sought in the federal district court near the witness, not the district court in which the arbitration is seated.²⁵ Other aspects of enforcement are less clear. In spite of express language in §7 of the FAA appearing to provide federal subject matter jurisdiction over subpoena enforcement,²⁶ the prevailing view is that a separate ground of federal jurisdiction is required, such as federal question or diversity.²⁷ Most cases measure jurisdiction by looking at the parties to and allegations in the underlying arbitration.²⁸

In cases not subject to the FAA, the CPLR empowers both arbitrators and counsel to issue hearing subpoenas.²⁹ It is understood that the authorization of counsel to subpoena third parties is limited to hearings and does not cover depositions.³⁰ CPLR 3102(c) permits the court to order discovery "to aid in arbitration," but this power is to be exercised only in "extraordinary circumstances."³¹

In cases which are subject to the FAA, it is not clear whether these state law avenues to compel testimony are preempted.

The Evidentiary Hearing

There are two significant differences between an arbitration hearing and a courtroom trial. The first is that the rules of evidence do not apply. Whether evidence is admitted is left to the discretion of the arbitration panel, with the overriding consideration being whether it is relevant and necessary to an understanding and determination of the dispute. While arbitrators can exclude evidence which is hearsay, unreliable, duplicative or irrelevant, that determination is often made with an eye toward ensuring that the parties will be satisfied at the conclusion of the hearing that they have had a full and fair opportunity to present their cases. One of the most common evidentiary rulings at arbitration is: “We will take it for what it is worth.”

The second difference is that the flexibility of the arbitration process offers numerous possibilities as to the manner in which the evidence is presented. One common practice is to present some or all direct testimony in the form of a witness statement so that the witness, after a brief “warm up,” begins with cross-examination. Another option that is gaining momentum with expert testimony is the “hot tub” method, where both experts testify at the same time and may ask each other questions and respond to questions posed by the parties or the arbitrators. Testimony may be taken by phone or videoconference. So long as the method is fair, the parties and arbitrators have great leeway in fashioning non-traditional ways to present evidence that can lead to a better understanding of a particular issue or as a way to save time and money.

How the hearing will actually proceed is generally addressed in one or more pre-hearing conferences. Issues to be considered include whether there will be pre-hearing briefs, whether there will be opening statements, whether exhibit books should be prepared and what they should contain, whether the hearing will be transcribed and, if so, the manner and arrangements pertaining to the transcription, whether any of the less traditional alternative options of presenting evidence will be used, and whether the presentations of each side will be limited to a certain number of hours or days.

Absent any prior determinations to the contrary, the hearing will generally proceed, after introductions, with a relatively short opening statement from each side. The claimant will then go first and present its case by calling witnesses who are subject to direct and cross-examination. Once the claimant rests, the respondent will present its case. Claimant is then afforded a rebuttal.

As depositions are often not part of discovery in arbitration, cross-examination and impeachment require a different kind of preparation and more reliance on extemporaneous skill. Moreover, arbitrators often are active participants in the questioning, honing in on the points that are of particular importance to their understanding and view of the case. The parties and their attorneys should pay close attention to the questions and the rulings of the arbitrators. The arbitrators are the persons who need to be persuaded and who will be making the decision — and that decision is not likely to be subject to review. Thus, absent the limited situations in which an arbitrator’s actions may be the basis to vacate an award, “making a record” may be far less important than following the guidance the arbitrator may give in the course of the hearing or working within the confines of adverse rulings.

At the conclusion of the testimony, the arbitrators will typically ask the parties if they have anything else to present and if they have had a full and fair opportunity to be heard. There may be closing statements, or closing statements may be waived in favor of presenting closing briefs, which may also include appendices of relevant testimony or exhibits admitted into evidence.

As the arbitrators are dependent on the parties to provide them with all the information necessary to render a decision, parties should be certain that, at some point during the hearing or in the briefs, adequate guidance is provided on damages and that any applicable law is provided to the panel. While arbitrators are not necessarily required to follow the law, in those jurisdictions where “manifest disregard of the law” may be a basis for vacatur, it is essential that the party so claiming actually advised the arbitrators of the applicable law. To ensure that any relief granted is framed and calculated correctly, parties may request permission to present a draft award. Arbitrators generally appreciate any assistance the parties are able to provide to result in an award that accurately addresses all open issues, finally resolves the dispute, and allows the parties to move on without any uncertainty as to its meaning.

The hearing will generally remain open until the final submissions. Once the hearing is closed, there can be no more submissions.

Post-Award Issues

Once an award has been issued, how do the winning and losing parties proceed? What must counsel be careful about to protect their clients’ rights? What is necessary for the award to be confirmed and for a judgment to be obtained in New York? What is required to vacate the award?

- If clarification or correction of the award from the arbitrator or panel is desired, a party needs to check if the rules governing the arbitration or the award permit this. The party must check the limitations on the scope of the request, and the time deadline for making one. Once an award has been issued, the arbitrators have only limited powers to make changes, which are generally limited to technical and computational corrections.
- It is critical to clarify whether the FAA or the CPLR applies. If the FAA applies, key provisions include:
 - § 9: An application for confirmation of an award shall be made within one year after the award is made, to the court specified in the arbitration agreement or otherwise to a court where the award was made.
 - § 10: Note the grounds for vacating the award. The application to vacate may be made in the federal court where the award was issued, if and only if independent federal subject matter jurisdiction exists; the FAA itself does not supply subject matter jurisdiction for domestic arbitrations. If independent subject matter jurisdiction (diversity or federal question) is lacking, you may bring the application to vacate under the FAA in New York State Court.
 - § 11: Note the grounds for modifying or correcting the award. Application may be made in the federal court where the award was issued, or in State Court. (See the jurisdictional caveat described above.)

- § 12: Note that a motion to vacate, modify, or correct an award must be made within three months after the award is filed or delivered.
- § 13: Note the papers to be filed with the clerk of the court.
- If the CPLR applies, Article 75 sets forth the rules for post-award applications.
 - Under CPLR 7505, the award must be “in writing, signed and affirmed by the arbitrator.”
 - Modification of award by arbitrator (CPLR 7509) — Application must be in writing and submitted to the arbitrator within 20 days of delivery of award and limited to grounds in CPLR 7511;
 - Confirmation of award (CPLR 7510) — Application to confirm must be made to the court within one year after delivery of award to party; under CPLR 7505, the award must be “in writing, signed and affirmed by the arbitrator.”
 - Vacating or modifying award (CPLR 7511) — Application to the court must be made within 90 days of delivery of award. Grounds for vacatur are set forth in CPLR 7511(b); grounds for modifying are set forth in CPLR 7511(c); grounds for rehearing (CPLR 7511(d)); confirmation of modified award (CPLR 7511(e));
 - Fees and expenses (CPLR 7513) — Note that unless otherwise provided in the arbitration agreement, these will be paid as provided in award; but court, on application, may reduce or disallow fees if excessive, or re-allocate as justice requires;
 - Judgment on an award (CPLR 7514) — Judgment shall be entered upon the confirmation of an award; the judgment roll and the required papers are set forth in CPLR 7514.



Endnotes

What Law Applies.

1 9 U.S.C. Sec. 2: Citizens Bank v. Alfabco, Inc., 539 U.S. 52 (2003).

Arbitrability.

2 Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010).

Mediation.

3 For more information on mediation as a dispute resolution mechanism, please consult any number of available free resources, such as the New York State Unified Courts System – Alternative Dispute Resolution (nycourts.gov/ip/adr), the National Academy of Distinguished Neutrals (nadrn.org/faq-adr.html), Mediate.com (mediate.com/about), the International Mediation Institute (immediation.org), the American Arbitration Association's Mediation.org (mediation.org), and JAMS (jamsadr.com/adr-mediation).

Pleadings.

4 Under both federal and New York arbitration law, courts will uphold contractual agreements regarding the manner in which notice of arbitration is to be made. See, e.g., *Smith v. Positive Productions*, 419 F. Supp. 2d 437, 466 (S.D.N.Y. 2005) (AAA rules not New York law governed service where “[t]he parties expressly agreed . . . that the AAA’s Rules would govern the arbitration”); *New York Merchants Protective Co., Inc. v. Backyard Party Tent Rental, Inc.*, 939 N.Y.S.2d 220 (2d Dep’t 2011) (“[T]he parties may agree to an alternative manner of service [to CPLR 7503(c)], and a contractual provision for such service will be upheld in the absence of prejudice.”).

5 See, e.g., *Spector v. Torenberg*, 852 F. Supp. 201, 210 (S.D.N.Y. 1994) (in accordance with New York law. Petitioners agreed to an award of attorney’s fees by placing a request for “reasonable attorney’s fees” in their demand for arbitration, their post-hearing briefs, and by failing to object to such fees during final arguments).

6 See *Irving R. Boody & Co. v. Win Holdings Intern.*, 213 F. Supp. 2d 378 (S.D.N.Y. 2002) (noting the “Second Circuit has yet to affirmatively establish whether it accepts CPLR 7503 as binding on the federal courts within its jurisdiction” and collecting cases finding for and against application of CPLR 7503 in FAA matters).

Interim Emergency Relief.

7 An order of attachment and a preliminary injunction are the only two provisional remedies that may be invoked in aid of arbitration. Temporary receivership (Article 64), Notice of Pendency (Article 65) and Seizure of Collateral (Article 71) are not available. *Salvano v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173 (1995). But see *Nastasi v. Nastasi*, 805 N.Y.S.2d 585 (2d Dep’t 2005) (plaintiff filed Notice of Pendency on commencement of action for judgment affecting real property, granting of stay based on arbitration clause did not automatically entitle defendant to cancellation of Notice of Pendency).

The court is authorized to grant a temporary restraining order while an applicant for provisional relief is pending. *Sierra USA Communications, Inc. v. International Telephone & Satellite Corp.*, 824 N.Y.S.2d 560, 561 (Sup. Ct. N.Y. Co. 2006). Also, the parties might specifically agree that other form of relief may be sought. *HSBC Bank USA v. National Equity Corp.*, 719 N.Y.S.2d 20 (1st Dep’t 2001).

8 *Erber v. Catalyst Trading LLC*, 754 N.Y.S.2d 885 (1st Dep’t 2003).

9 See, e.g., *G Builders IV, LLC v. Madison Park Owner, LLC*, 924 N.Y.S.2d 75 (1st Dep’t 2011); *Jetblue Airways v. Stephenson*, 932 N.Y.S.2d 761 (N.Y.Co. 2010); *aff’d*, 931 N.Y.S. 2d 284 (1st Dep’t 2011).

10 See *Drexel Burnham Lambert v. Ruesamen*, 531 N.Y.S.2d 547, 550 (1st Dep’t 1988).

11 *Erber v. Catalyst Trading LLC*, 754 N.Y.S.2d 885 (1st Dep’t 2003).

12 *First Wind Energy v. Clipper Windpower*, Index No. 653088/2012 (N.Y.Co. Oct. 2, 2012); *Spiegel v. D.H. Blair & Co.*, 733 N.Y.S.2d 602 (1st Dep’t 2001); *Erickson v. Kidder Peabody & Co.*, 630 N.Y.S.2d 861, 862 (N.Y.Co. 1995).

And see “Criteria for Provisional Remedies in Aid of Arbitration,” George Bundy Smith and Thomas J. Hall, NYLJ 2/21/14, for helpful analysis of these issues.

13 See CPLR 7502(a).

14 *Sojitz Corp. v. Prithvi Information Solutions, Ltd.*, 921 N.Y.S.2d 14 (1st Dep’t 2011).

The Preliminary Conference.

15 See, e.g., AAA’s Commercial Arbitration Rules and Mediation Procedures (effective October 1, 2013) (AAA Arbitration Rules), Preliminary Hearing Procedures P-1 and P-2; CPR’s Administered Arbitration Rules Rule 9.3 (effective July 1, 2013); and JAMS Comprehensive Arbitration Rules and Procedures (effective July 1, 2014) Rule 16. See also New York State Bar Association Dispute Resolution Section Arbitration Committee, Report on Arbitration Discovery in Domestic Commercial Cases (June 2009). <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26861>.

16 See, e.g., AAA Arbitration Rules 22-23 and L-3 Procedures for Large, Complex Commercial Disputes; CPR’s Protocol on Disclosures of Documents and Presentation of Witnesses in Commercial Arbitration (2009); and JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (effective January 6, 2010). It is also important to understand the arbitrator’s role for the conduct of the pre-hearing phase of the arbitration process. See, e.g., the New York state Bar Association Guidelines for the Arbitrator’s Conduct of the Pre-Hearing Phase of International Arbitrations (April 2009 and November 2010 respectively).

Third-Party Discovery.

17 9 U.S.C. § 7.

18 See Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 216-17 (2d Cir. 2008). The Appellate Division, First Department took a different view, holding that deposition subpoenas may issue where there is a showing of a "special need or hardship." *ImClone Sys. Inc. v. Waksal*, 22 A.D.3d 387, 388 (1st Dep't 2005).

19 Life Receivables, 549 F.3d at 218; *Stolt-Nielson SA v. Celanese AG*, 430 F.3d 567, 577-79 (2d Cir. 2005).

20 Fed. R. Civ. P. 45(b)(2).

21 Fed. R. Civ. P. 45(c)(1)(A).

22 Fed. R. Civ. P. 45(c)(1)(B).

23 See, e.g., *In re National Fin. Partners Corp.*, No. 09-mc-00027-JF, 2009 U.S. Dist. LEXIS 34440, at *2 (E.D. Pa. Apr. 21, 2009); see also International Commercial Disputes Committee, Association of the Bar of the City of New York, *Obtaining Evidence From Non-Parties in International Arbitration in the United States*, 20 Am. Rev. Int'l Arb. 421, 454-55 (2009); Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 Am. Rev. Int'l Arb. 197, 227 (2003); Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 Fordham Urban L.J. 83, 99 (2008).

24 See *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413-14 (3d Cir. 2004) (Chertoff, C.J., concurring).

25 Fed. R. Civ. P. 45(d). In "exceptional circumstances" or on consent, a motion to enforce may be transferred to the issuing court, the court in whose jurisdiction the arbitration is seated. Fed. R. Civ. P. 45(f).

26 Section 7 provides that if the subpoenaed witness refuses or fails to appear, "upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or person for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." 9 U.S.C. § 7.

27 *Stolt-Nielson SA v. Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005). Courts have been led to this peculiar result by the misapplication of dictum in a footnote in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* 460 U.S. 1, 25 n.32 (1983), addressed to section 4 of the Federal Arbitration Act, the language of which is quite different from that of § 7.

28 See, e.g., *Stolt-Nielson*, 430 F.3d at 572-73. One recent case looked to the subpoena dispute itself; even if the parties to the subpoena dispute were of diverse citizenship, enforcement was denied for failure to satisfy the \$75,000 amount-in-controversy requirement. *In re Cianflone*, Misc. No. 3:14-MC-63, 2014 U.S. Dist. LEXIS 167919, at *3 (N.D.N.Y. Dec. 4, 2014).

29 CPLR 2302(a); CPLR 7505.

30 See *Friedland & Martinez*, supra note 9, at 229.

31 *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (1974) (quoting reference omitted).

About the Editors and Contributors

This pamphlet was prepared by members of the DRS Domestic Arbitration Committee.

Barrett, William L.D. [Co-Editor]: Committee Co-Chair. Arbitrator for more than 30 years, chiefly with AAA and ICDR panels. Formerly director, Executive Committee and Chair of Finance Committee of the AAA. Recipient of Whitney North Seymour medal.
wldbarrett@aol.com

Pessen, Abigail [Co-Editor]: Committee Co-Chair. Arbitrator and Master Mediator for the American Arbitration Association and ICDR. Arbitrator for FINRA. Mediator for various court panels. DRS Chair-Elect. abigail@pessenADR.com

Contributors

Bunim, Mark: arbitrator and mediator in New York City. He specializes in commercial, professional liability, real estate and insurance related disputes. He is on the panels of the American Arbitration Association; NAM (National Arbitration and Mediation); Case Closure, LLC., and the Agency for Dispute Resolution.
Bunim@caseclosure.com

Cheng, Theodore: commercial and intellectual property litigation partner at Fox Horan & Camerini LLP. He is also an arbitrator and mediator with the American Arbitration Association

and Resolute Systems, as well as on several federal and state court rosters. He can be reached at tcheng@foxlex.com.

Cohen, Stephanie: arbitrator based in New York City; Fellow of the Chartered Institute of Arbitrators; member of the ICDR/AAA International Panel of Arbitrators; ICC arbitrator; for more information, see www.cohenarbitration.com.
cohenarbitration@gmail.com

Davidson, George: arbitrator on the panels of the American Arbitration Association and the Center for Public Resources (CPR). Senior Counsel, Hughes Hubbard & Reed LLP.
georgedavidson@georgedavidsonadr.com

Janvey, Richard: mediator on various court panels and a commercial litigator who focuses on alternative dispute and conflict resolution processes.
rjanvey@diamondmccarthy.com

Krauss, Geri S: arbitrator/mediator/litigator; AAA Commercial and Employment Arbitration and Mediation Panels; FINRA; various court panels.
gsk@kraussny.com

Marrow, Paul: Member, panels of the American Arbitration Association, FINRA, National Arbitration and Mediation, National Futures Exchange, United States Council for International Business (USCIB) of the International Chamber of Commerce (ICC); Kuala Lumpur Regional Centre for Arbitration, Kuala Lumpur, Malaysia. Member, International Panel, British Columbia International Commercial Centre, Vancouver, Canada. Fellow of the Chartered Institute of Arbitrators (FCIArb) and member of its Board of Managers.
pbmarrow@optonline.net

Mentz, Barbara: arbitrator and mediator. Fellow of the Chartered Institute of Arbitrators (FCIArb), member of numerous panels including the American Arbitration Association, ICDR, International Institute for Conflict Prevention and Resolution (CPR), FINRA, and the National Futures Association. More information available at www.mentzadr.com.
bmentz@mentz.org

Michaelson, Peter: attorney/arbitrator/mediator with Michaelson ADR Chambers; with offices in New York City. He is a Fellow of the College of Commercial Arbitrators and a Fellow, Chartered Arbitrator, and Chair of the NY Branch of the Chartered Institute of Arbitrators.
pete@plmadr.com

Safer, Jay: Partner, Locke Lord LLP in New York City. Commercial litigator, domestic and international arbitration, mediation. Diploma in International Arbitration from the Chartered Institute of Arbitrators (CIArb). Teaches litigation and ADR at Fordham Law School and at U.S. and international programs.
jsafer@lockelord.com

Shamoon, Rona: litigator at Skadden, Arps, Slate, Meagher & Flom LLP, a member of Skadden's International Arbitration Group, and a member of the Commercial Arbitration Panel of the American Arbitration Association.
Rona.shamoon@skadden.com

Wilkinson, John: Of counsel, Fulton, Rowe and Hart; arbitrator and mediator for the American Arbitration Association and ICDR. johnhwilkinson@msn.com



NEW YORK STATE BAR ASSOCIATION

DISPUTE RESOLUTION SECTION

One Elk Street, Albany, NY 12207

www.nysba.org

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