

## ADR = Arbitration Done Right?

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**D**espite the fact that an increasing number of matters are negotiated through mediation, arbitration remains the process of choice for many commercial and contract disputes, particularly in healthcare disputes. Given the popularity of arbitration, one is reasonably safe in placing litigators into one of two categories: those who have arbitrated, and those who will. Either category of advocate (or their client) might benefit from a quick review of ADR or, in this case, Arbitration Done Right.

### Arbitration: Litigation for Dummies?

Some law firms may use the arbitration hearing as a training ground for new associates, the thought being that a new litigator has less risk of harming the client in a process that is private and less formal than a public trial. Even though most new advocates rise to the occasion, the premise that arbitration may be less risky for the client is tenuous at best: not only does an arbitrator have more latitude than a judge; there is no arbitration “court of appeals.” The grounds for setting aside an arbitrator’s award are few,<sup>1</sup> and courts are reluctant to compromise an arbitrator’s discretion.<sup>2</sup> What does this mean for the litigator? No formal mechanism for appeal provides little, if any, ability to correct mistakes made in arbitration.

### Deal or No Deal?

Because the law of arbitration confers such authority upon the arbitrator, arbitral jurisdiction must be a product of the parties’ agreement. Arbitration is created, governed, and ultimately, judged by the language contained in the underlying agreement to arbitrate. This has profound implications for the advocate.

An agreement to arbitrate within a contract will probably exist even if the contract itself doesn’t survive. Courts effectively treat the agreement to arbitrate as a separate contract “within a contract” that will survive an attack that its host may not.<sup>3</sup> The counterintuitive result: an arbitrator may decide the fate of a contract, the arbitrator’s jurisdiction, and the scope of the arbitration even when the contract containing the arbitration clause fails.

### Arbitration as Threat

The threat of arbitration, like the threat of litigation, is sometimes just that. The fact that many matters settle shortly after their initiation may confirm many arbitrators’ suspicion that the filing party is often simply trying to get the other side to take its complaint seriously. However, the filing of arbitration merely as an attempt to gain leverage over the opposing side in the hopes of moving them toward settlement is much like

raising the stakes in a poker game when dealt a weak hand. As with poker, bluffs are often called, and it is necessary that, once a matter is filed, both sides are prepared to move forward with the arbitration. This is made more important by the fact that most arbitrators are trained to move matters to a final award promptly and diligently.

### Who Will Decide?

In selecting an arbitrator, it is of the utmost importance that one makes the proper inquiries as to a potential panelist’s impartiality and independence. It is equally important that, once one party has initiated a proceeding, the other party immediately review its right to participate in the selection process. This assures that the decision maker will be more acceptable to the parties. Where one party declines to exercise its rights in the nomination process, an arbitrator may be appointed solely on the basis of the other party’s preference. In the event that an arbitrator is not appointed in the allotted time, the court will appoint one.<sup>4</sup>

This remains true even when the parties disagree as to the validity of the arbitration agreement. Simply put, unless there is a court order stopping the arbitration process, once one party initiates the selection of an arbitrator, it is in the other party’s best interest to follow suit.

## May I Ask?

Although *ex parte* contact with an arbitrator or a potential arbitrator is to be initiated with great care, advocates need not totally relinquish control over the arbitrator selection process. I recommend the acronym “I PROSAIC” as a tool that reminds one of the areas of inquiry that courts generally have found permissible:

I Is the arbitrator Independent?

P Does the arbitrator have Prior knowledge of the dispute?

R Does the arbitrator have Relationships with the parties, counsel, or witnesses?

O Are there Other applicable areas of permissible inquiry or required reporting (as in California)?

S Is this arbitrator Suitable?

A Will this arbitrator be Available throughout the process?

I Can this arbitrator be Impartial?

C Is this arbitrator Competent to judge this dispute?

## Things Not to Be Taken for Granite

As the Geology professor testified: “You can’t take discovery for granite.” A bad joke, perhaps, but a good lesson. While parties generally assume that arbitration will provide an opportunity for

interrogatories, depositions, and requests for admissions, few advocates appreciate that the Federal Arbitration Act (FAA) does not provide for discovery.<sup>5</sup> In agreeing to arbitrate, litigators seem to assume that typical discovery will be part of the process. Be forewarned: if the underlying agreement to arbitrate does not provide for discovery, there is no guarantee of any discovery whatsoever!

How may one party ensure that some form of discovery will exist in arbitration? Write them into the arbitration agreement. True, it is nearly impossible to foresee every question that will arise in discovery; however, a general guideline for discovery procedures will help both the appointed arbitrators and the attorneys establish the existence and scope of a discovery process. Keep in mind, that while the FAA does grant arbitrators the authority to issue subpoenas,<sup>6</sup> it does not grant arbitrators the authority to issue subpoenas to third parties for the purpose of discovery and the circuits are split as to whether arbitrators have this authority.<sup>7</sup> Particular attention is required when discovery is sought from third parties that reside beyond an arbitration proceeding’s geographic jurisdiction.

## Damages, Is It About Splitting the Baby?

There is a misconception that in arbitration, the goal for an arbitrator is to divide the damages between the parties, so that no one walks away without receiving something for their time. The reality is that arbitrators do not aim to please all parties with the outcome, nor should they. What arbitrators

are trained to do is craft an award whose reasoning is impeccable, such that even the losing party is able to appreciate the methodology by which the decision maker made their findings and rulings.

Generally, arbitrators have broad authority in crafting remedies. Unlike judges, they are not restricted to the remedies available in a court of law. So long as the arbitration agreement does not specifically prohibit them,<sup>8</sup> arbitrators can issue punitive damages, award injunctive relief, assess attorney fees, or impose fees upon a losing party. Generally, the court is unlikely to vacate the awards.

## The Rules of the Game

Even more than the selection of an independent and neutral arbitrator, the selection of the rules under which are arbitration takes place will impact the manner in which the arbitration proceeds and perhaps even the outcome of the arbitration. As previously discussed, the arbitration agreement and the procedural rules will affect the discovery process and the awards issued. More importantly, they will also determine the functioning of the arbitration by controlling not only discovery, but also the issuance of subpoenas, the nature and extent of deadlines, objections, allocation of time, requirements of pleadings and briefs, permissibility of dispositive motions, and exchange of evidence. Many an advocate has made it part way through their presentation only to find that the rules they were operating under did not guarantee a desired extension of time.

## Objections: Be Careful What You Ask for

Although authors and arbitrators alike agree that virtually all evidence is admissible in a process that must provide a “full and fair hearing” that disposes of “all the issues that are the subject of the parties’ agreement,” litigators are loathe to let in evidence that is subject to objection. It is as if their client will suspect a lack of will or, worse yet, competence, if they do not see their advocate fighting tooth and nail to prevent their opponent’s evidence from coming in. Over the past several years, arbitrations have become more like litigation, and increased number of evidentiary battles continues to contribute to that trend.

Be careful what you ask for though, as you may win the battle, but lose the war. An arbitrator who sustains too many objections may open the award to attack on the grounds that the exclusion of too much evidence prevented a full and complete hearing of the matter. The truth is, no professional would last in their career as an arbitrator if they were not competent to weigh the relevance and weight of evidence. They most likely would not have been selected in the first place. So why not just let the less-offensive evidence in without objection? The arbitrator and the other side will appreciate your confidence in the process, it will be less disruptive (and thus, more efficient, which equals less costly) and, most importantly, will eliminate a very popular avenue to successful challenge of the award.

## That’s a Wrap

Because healthcare disputes exist in the context of a rapidly changing environment, rapid, complete and final resolution of disputes is often required. To meet those needs, arbitration will remain an important form of dispute resolution. Rather than be treated as a simpler form of litigation, however, arbitration needs to be respected for what it is, a unique form of resolution with its own rules. By understanding the importance of the arbitration agreement, the rules of the arbitration, the process for selection of an arbitrator, and the legal nuance, a litigator can master arbitration.

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1 See The Federal Arbitration Act, 9 U.S.C. § 10, (states the grounds for vacating an arbitration award in cases of corruption, fraud, partiality, or undue means).

2 See *Aramark Facility Serv. v. Service Employees Int’l Union, Local 1877 AFL CIO*, No. 06-56662, (9th Cir. June 16, 2008) (court refused to vacate arbitration award on public policy grounds), and *Employees Ass’n v. Bonita Unified Sch. Dist.*, 77 Cal. Rptr. 3d 486, (Cal. Ct. App. 2008) (appeals court refused to vacate arbitration award on grounds outside of the Federal Arbitration Act).

3 See *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402-06 (1967) (discussing that an arbitration agreement in a contract can be severed from the contract, allowing the arbitration agreement to stand even when the contract does not.)

4 The Federal Arbitration Act, 9 U.S.C. § 5.

5 See The Federal Arbitration Act, 9 U.S.C. § 1-14, (at no point is discovery discussed.)

6 The Federal Arbitration Act, 9 U.S.C. § 7.

7 See *Hay Group, Inc. v. EBS Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004) (in this opinion by then Circuit Judge Alito, the Third Circuit found that the FAA does not grant arbitrators the authority to subpoena witness for third party discovery); compare with *Security Life Ins. Co. v. Duncansen & Holt, Inc.*, 228 F.3d 865, 870-71 (8th Cir. 2000) (Eighth Circuit found that the power to subpoena a third party for discovery is implicit).

8 When the arbitration agreement specifically limits a particular remedy, the court will vacate the award, see, e.g., *O’Flaherty v. Belgum*, 9 Cal. Rptr. 3d 286, (Cal. Ct. App. 2004), compare with *Ajida Techs. v. Roos Instruments*, 104 Cal. Rptr. 2d 686, 692 (Cal. Ct. App. 2001) (the court “must draw every reasonable inference to support the award.”)