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What Arbitrators Want

Litigation and Dispute Resolution

Cheat Sheet

Enforceable award. Every arbitrator seeks to produce an award that the courts will uphold.

***Fairness*.** In order for arbitration to succeed, both parties need to feel a sense of fairness.

***Process*.** One of the advantages of arbitration is the ability for the parties to choose the process — but arbitrators need to ensure fairness that will be upheld if reviewed.

***Efficiency*.** Avoiding lengthy litigation is another advantage, but parties and arbitrators may have different views of how efficient the arbitration needs to be.

Five years ago I became a full-time neutral — serving as an arbitrator and mediator. My experience, not only as a sole and panel arbitrator but also as a member of professional arbitral organizations, confirms that an arbitrator's perspective on arbitration differs from an in-house lawyer’s view of arbitration.

What do arbitrators want (or perhaps “need”)? The highest goal of most arbitrators is producing an award that a court will enforce and avoiding one that gets vacated. Arbitrators want both to be fair to the parties and to be seen as fair.

Less urgent are secondary goals: efficiency and party autonomy. These goals and their ranking have implications for the arbitration process and for advocacy by the parties. They also highlight important differences between arbitration and litigation. As a result, understanding what arbitrators want and why is useful to in-house counsel as they go through the arbitration process.

Producing an enforceable award

People who do not hear all of the evidence in an arbitration hearing often have difficulty knowing if the result was correct. Because arbitration is private, and often confidential, there are few people in a position to evaluate the correctness of an arbitral award on the merits.

But court decisions to enforce or vacate an arbitral award are public. Most law governing arbitration provides limited grounds to overturn awards — whether the US Federal Arbitration Act, or the international New York Convention, or less often a state arbitration act. While there is some variation among the standards to vacate an award depending on which law applies, errors that can lead to vacating are generally procedural, not substantive — that is, not on the merits.

The main reasons to vacate an award include corruption, fraud, evident partiality (bias), failure to disclose potential partiality, failure to grant an appropriate adjournment or to hear material evidence, other misbehavior that prejudices a party, or acting in excess of the powers provided arbitrators by the law or the parties' agreement.

When an arbitral award is judicially and publicly vacated, there are effects on the arbitrators who rendered it. First, they have failed to do what the parties hired them to do: produce an enforceable award. Second, because a court has determined they did something seriously wrong in the one field in which they are considered expert — the law of arbitration — it doesn't help their reputation. In fact, it reduces the likelihood of being chosen as arbitrator in the future.

Parties share this goal, but perhaps not its primacy, as we shall see.

Producing a sense of fairness in the parties

Typically, people who participate in arbitration (or litigation) are happy when they are declared the winner. "Splitting the baby" (awarding an amount of about half of the claim) usually makes everyone unhappy. This even split happens in fewer than 20 percent of all arbitrations, separate studies by both the American Arbitration Association and Queen Mary School of International Arbitration report. So, it is the exception that both parties are disappointed.

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Arbitrators want those who lose to believe that the process was fair, even if they disagree with the result. The American Arbitration Association emphasizes in its training that awards should be

written for the loser. The loser should believe the arbitrators heard and understood their position, even if they didn't accept it.

Well before the award is decided, the arbitrators often try to make sure the parties believe that they have been heard. Some arbitration organizations require, or at least encourage, arbitrators to ask, "do you agree you have had a full [or fair or both] opportunity to be heard?" as part of the procedure for closing the hearing.

Whether this question is asked or not, some of the few potential grounds to vacate an award involve a party having been denied a fair opportunity to have its evidence heard. Thus, exclusion of evidence and expediting hearings create a risk the loser will think the decider was unfair. It also creates a risk the award will be vacated.

Extending the proceedings not only supports these goals, but may be in the arbitrators' self-interest because many, like lawyers, are paid by the hour although the International Chamber of Commerce has an "ad valorum" arbitrator's fee structure focusing on how much is at issue, and American Arbitration Association has flat fee plans

Secondary goals: Party autonomy and efficiency

Arbitrators are not blind to what parties want. Indeed, "party autonomy" is a mantra often uttered by arbitrators. One of the advantages of arbitration is that the parties are free to agree on any process they want, unless what they want is expressly legally prohibited. Parties often want to design a process that is more efficient than litigation. Such a process uses fewer resources — mainly money and time — than courts.

While in my experience these values are recognized by arbitrators, many arbitrators accord them less weight than getting it right and seeming fair. This tension between being right and letting the parties decide their process often manifests itself in debates about the degree to which arbitrators should raise questions of law or fact that the parties have not.

A court of no appeal

While judges usually give it their best, they know that most trial decisions are appealable of right. Certain other matters can be appealed by permission.

No trial judge gets as much deference on appeal as arbitrators do on judicial review of arbitral awards. Usually on questions of law appeals judges decide the law anew; they owe no deference to the trial judge. On questions of fact, the issue is whether any reasonable judge might decide as the trier did (clear error). On matters of discretion, did the trial court abuse its discretion? This doesn't exhaust all of the standards of appellate review, but the core point is on some questions a trial court gets no deference; on certain questions some but not unlimited deference. So, there is a reasonably available method to correct erroneous trial court results.

As we have seen above, merely being wrong — whether about the law or the facts — is not grounds to vacate an award under any law applicable to a US or international arbitration. Only the enumerated

defects in the process justify vacating an award. Thus, the judicial system is more deferential to arbitrators than to trial courts. There is no appeal, except if the arbitral organization's rules allow and the parties choose to invoke those appellate rules in advance of first hearing, something they rarely do.

The effect of this is to make arbitrators warier than judges of deciding a matter without a full merits hearing, because if they get it wrong it can't be corrected.

Second, generally judges have fixed tenures, sometimes ending only in their death. Further, rarely does a party's preference among judges matter to the judicial system in allocating cases.

> Merely being wrong is not grounds to vacate an award.

On the other hand, each arbitrator's tenure is limited to the current case. An arbitrator who has an award vacated fears that that arbitrator will be chosen for new matters less often than those without that scarlet letter. This risk of loss of future assignments fortifies the view among arbitrators that there needs to be a full process.

In the arbitral community and arbitral literature, the term "due process paranoia" is often used. Some arbitrators fear having their awards vacated so much they often provide more process than any court would. They do this to protect themselves and to give the appearance of fairness. But that added process may delay the result and increases expense to the clients (including in counsel and arbitrators' fees). It often makes no difference to the outcome, a fact that may be predictable in advance.

International Bar Association podcast: Due process paranoia in arbitration

In this podcast, Arbitration Committee Co-Chair Philippe Pinsolle of Quinn Emanuel discusses the IBA report The Annulment of Arbitral Awards by State Court, and Emmanuel Jacomy dispels misconceptions about the setting aside of awards in China. Committee officer Angeline Welsh introduces the podcast and gives the perspective from England and Wales.

These forces are contrary to what in-house counsel wants. No one wants to spend more in counsel and arbitrator fees than is at issue in the matter. Nor do most businesspeople want to spend even a significant portion of what is at stake on dispute resolution. In addition to money, client time distracted by the arbitration from managing the business should be minimized. A decision in six months, even if

adverse (and therefore of course wrong) may in some cases be better than a favorable decision in six years. Sometimes drawing a line under a problem and moving on has value. But what arbitrators want, as discussed above, pushes in the opposite direction.

What this means for advocacy

The thesis of this article is that arbitrators, even more than judges, want to get it right and to be seen to be fair. They seek to avoid increasing the risk of failure on these scores.

Clients and in-house counsel in many cases prefer to avoid the risks of cost and delay. They see speed and efficiency among the leading values of arbitration (as well as arbitrations more sophisticated decision makers and confidentiality). While the goals of arbitrators and clients often are similar, their priority order may differ significantly.

Not all arbitrators agree on where to balance the inevitable tradeoffs between the goals of correctness and perceived fairness on the one hand, and efficiency and party autonomy on the other. From assessing their background (in-house or outside lawyer; M&A or litigator), from the experience of counsel with particular arbitrators in prior cases (sometimes obtainable online and sometimes by a call) and sometimes from the arbitrator's own statements (website descriptions of values, articles, etc.), one may be able to gain insight (or at least an estimate) into how a particular arbitrator ranks the different goals of arbitration. There are some services that can provide additional information about arbitrators.

Step one in effective arbitration advocacy is choosing an arbitrator who is likely to be close to your view on this balance. In-house counsel’s view on this continuum may vary from case to case with the character and size of the dispute — the smaller the matter the easier to swallow an unhappy result — as well as other factors. Inside counsel often want a cost-effective resolution of the dispute. Outside counsel may want a more “perfect” result that earns them more in fees and may create a Pyric victory for their client.

> Successful advocacy requires putting the advocate into the mindset of the decider.

After choosing an arbitrator wisely, advocates who want to win issues in arbitration should tailor their proposals and arguments to give arbitrators what they want. Addressing these goals need not be overt — it need not use the magic words “fairness” or “enforceability”. It may be by crafting arguments with these values in mind so the arbitrators are persuaded without even knowing the argument has been crafted this way. Successful advocacy requires putting the advocate into the mindset of the decider.

For example, some arbitrators are transactional lawyers. The court rules of discovery (sometimes called disclosure in the arbitration context) they learned years ago in law school have changed, and they may not be up to speed on the changes. If arguing against discovery, it may give them comfort to know the court rules have narrowed permissible discovery. For example, the concept of proportionality was introduced some time ago and more recently elevated in court rules. Arbitrators are usually not bound by court rules. Knowing the trend, however, may comfort an arbitrator that an award will not be vacated. Denying a party discovery they couldn't have gotten in court is unlikely to be basis to vacate an award for lack of a fair opportunity to be heard.

Whether the question is scope of discovery, scope of witnesses at the hearing, or the availability of expedited determination (think summary judgment), effective advocates will address their arguments to arbitrators' concerns. Does the request treat the parties equitably, or even better equally? Is there anything being excluded that increases the risk of vacatur of the award, or is the exclusion legally irrelevant? Is it not just remote, but inconceivable, that the request would change the result if denied? Is there something less than your client's ideal that will comfort an arbitrator on these points and still be better than a full proceeding? Is there context that would comfort an arbitrator that ruling for you will not lead to vacating the award, or a perception of unfairness?

Choosing arbitrators and crafting arguments mindful of these questions — helping arbitrators achieve they want — may also achieve what you and your company want.

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