



A Primer for Attorneys Who Are Retained To Represent Clients in an Arbitration

By Mark J. Bunim

Lawyers are often retained to represent a client in a business or insurance dispute where the contract that the client brings to the lawyer contains a mandatory arbitration clause. While the lawyer is a seasoned litigator who has tried many jury cases and argued many appeals, he or she may not have much experience in the world of arbitration. Arbitration is indeed different. The rules of evidence do not apply, discovery is much more limited,¹ the right to make a dispositive motion is not automatically approved, but the process is more expedited and usually is completed within 12 to 14 months in a complex commercial dispute, and less time in a rather straightforward matter. More and more commercial and insurance contracts now route disputes to arbitration rather than to the courthouse, so lawyers who never expected to practice in this world are increasingly finding themselves there. Here are some tips for litigators who find themselves representing a client, a world where they may feel a bit uncomfortable.

1. If you represent the claimant, make sure you begin the proceeding with a detailed and complete complaint. If you forgot something or new evidence comes to light, or you want to add damages, amend the complaint ASAP. After the arbitrator(s) is appointed, you would need permission to amend, but the earlier it is sought, the more likely it is to be granted. When writing an award, arbitrators go by what is pleaded. Arbitrators will not fill in the blanks for you. Unlike in many state courts, arbitra-

tors will not allow a motion to conform the pleadings to the proof at the end of the hearing. Claimant must meet their burden of proof based on the complaint's words.

2. In an insurance coverage case, primarily involving construction, if you are seeking coverage for an additional insured, it needs to join the party. Arbitrators cannot award coverage benefits to an additional insured that is not part of the contract that contains the arbitration clause even if there is a contract between the named insured and the additional insured, unless the additional insured agrees to participate in the arbitration. This is because the arbitrators' jurisdiction is limited to those bound by the arbitration clause in the contract.
3. The Preliminary Hearing: Try to reach agreement with your adversary before it takes place on what discovery is needed and on the schedule. Make sure you can think of every detail from the date of the preliminary hearing until the final award in your planning.² The dates that will be enshrined in the case management order are crucial; some may be able to be adjourned but you will lose points with the arbitrators if you repeatedly seek adjournments. The final hearing dates are set in stone and absent severe illness or weather-related issues, or other unforeseen events, will not be adjourned. Many arbitrators have monetary cancellation/adjournment penalty clauses in their fee arrangements, so be mindful.

4. Be thoroughly familiar with rules of the provider (i.e. AAA Commercial Rules or JAMS Rules).
5. Make sure your client pays their requested fee deposits on time. The case administrator will work this out with you. Do not risk suspension of the arbitration for failure to make deposits.
6. Because discovery is limited, an ESI protocol has to be negotiated rather than assumed. There is no default framework like the one that governs federal court litigation, so custodians, date ranges, search terms, and production format should all be raised at the preliminary hearing, not left to be worked out later. A little precision here goes a long way toward avoiding a costly satellite dispute over electronic discovery in the middle of a case that is supposed to be moving faster than litigation, not slower.
7. Depositions are not a right in arbitration. Ask the tribunal for a set number of hours to conduct depositions. Try to get agreement with your adversary on this before the preliminary hearing.
8. Dispositive motions are not automatic in arbitration, the way summary judgment can be in court, but that does not mean they are off the table. Most institutional rules give the tribunal discretion to entertain an early motion to dismiss or a motion for partial summary determination if it will genuinely narrow or resolve the case. Ask permission before filing, propose a briefing schedule that will not derail the case management order, and do not build your trial preparation around the assumption that the motion will be granted. Arbitrators are generally reluctant to decide a case without a hearing unless the issue is truly dispositive and undisputed.
9. Briefs submitted to the tribunal during the course of the arbitration should be hyperlinked to the cases, statutes and exhibits cited. In the alternative, always submit copies of the cases and statutes, yellow highlighting the paragraphs you want the arbitrator to focus upon. If the arbitrator wants hard copy, organize the cases in a notebook in sequence of their use in the brief and overnight mail (FedEx) to the arbitrator.
10. Subpoenas in arbitration have their own set of guidelines. Arbitrators will not issue a subpoena for a deposition. Subpoenas are only for hearings. If you want to subpoena someone or have documents produced at a deposition, a “hearing” must be arranged with an arbitrator present. The witness must be located within 100 miles of the deposition site, so if the seat of the hearing is New York and the witness is in California, the attorneys and at least one arbitrator need to go to California for a “hearing.” Counsel may not subpoena a witness to a zoom hearing (unless everyone agrees including the deponent, but in such instance, you do not need a subpoena). The 100-mile rule also applies to the final merits hearing. If a witness is important to a party and that witness is located at a distance, then the hearing needs to move, temporarily, to the location of the witness, who can then be subpoenaed, unless all counsel and the witness agree to a virtual appearance. The arbitrators will not object to having a few witnesses appear virtually.³
11. Final Hearing: (a) show up on time; (b) make sure you have a good court reporter – someone you have used previously; (c) dress as if you are going to court; (d) call the arbitrator Mr. or Ms.; (e) be careful and hesitant with objections – the rules of evidence do not apply; (f) on cross-examination the witness needs to answer [just] the question that was asked, not the question they wished was asked. It is not a problem for the witness to ask counsel to reframe the question because it cannot be answered the way it was asked.
12. Unless your client or witness is a professional testifier, you may want to consider having the direct testimony submitted to the arbitrators in the form of an affidavit, instead of orally. This saves time and cost. On the other hand, if your client (especially the claimant) has a great deal of emotion on the subject of the dispute and wants both the arbitrators and the other side to hear that, then oral direct may work best.
13. Give the tribunal in advance your real best estimate of how many days you will need for the hearing. It is very disconcerting for the parties to say, “we need three days” and then wind up needing six days. Finding extra days may be very complicated as arbitrators are booked up far in advance.
14. Experts are very important. If they are going to testify, make sure they speak directly and to the point, and in understandable English, not in “expertise.” Prime your expert to stay away from projections and assumptions regarding future damages and lost profits, especially in an industry where there is a lot of volatility and uncertainty. It is best to have the expert’s report be their direct testimony followed by cross and re-direct; the tribunal will appreciate the time saved.
15. Do not rely only on experts for your entire damages case. Claimants should have non-experts to testify as to impact and respondents should also have non-experts to concretely rebut that testimony.
16. Understand how expert hot-tubbing works before you start the hearing. The tribunal may suggest using this tool; do not be afraid. Each side’s expert is “on the stand”

at the same time and they question each other as to the basis of their conclusions. It is usually very beneficial.

17. In a breach of contract case, do not shy away from a discussion on *contra preferentem*, if it may be applicable. Arbitrators are usually thinking about it.
18. Closing arguments should be after the post-hearing briefs.
19. The tribunal should propound questions for the counsel to answer in the post-hearing briefs.
20. Decide with your client and your adversary the type of final award you want. The general award (1 or 2 pages with a result) is the least expensive. A hybrid award (or reasoned award lite) is about 5-7 pages and is the middle price range. It is a very brief reasoned award with a few sentences explaining each of the rulings. A full reasoned award (similar to a court appellate ruling) is the most expensive and it can run anywhere from 25 pages and up.
21. In a damage-only case, you may want to consider opting for a baseball award. It is a cost-saving device. There is day baseball, night-baseball, and other variations. In a baseball arbitration, each side submits an amount that the arbitrator should award the claimant. The arbitrator is limited to only picking one of the two amounts. A typical baseball clause will read:

In the event of any dispute arising out of this Agreement, such matters shall be resolved by arbitration and the arbitrator's award shall be rendered as follows: Within five days of the conclusion of the arbitration hearing, each party shall submit a proposed award to the arbitrator. The arbitrator shall choose between the proposed awards and shall be required to adopt one of them as the arbitrator's own and shall render the award as the arbitrator's final determination. The arbitrator shall not have discretion to compromise an award nor render any other than the one submitted by one of the parties.

If the parties exchange their proposed awards to each other at the time of submission to the arbitrator, it is "day baseball"; if not it is called "night baseball." In some instances, the time of each party's submission of its proposed award varies (it could be before the hearing). The typical time is five days after the hearing, but it is always a discussed and negotiated date. Since the arbitrator never has to write an award, just pick one of the two submissions, there is a tremendous cost savings (since the time to author a reasoned award is very expensive in a complex matter).

22. Choosing your arbitrator(s) deserves as much diligence as choosing your trial theme. If you have a party-appointed arbitrator, vet candidates the way you would an expert witness: ask colleagues who have appeared before

them and set up a virtual pre-appointment interview. For the chair or a sole arbitrator, look for a genuine industry or subject-matter background, not just a familiar name from a provider's roster. Scrutinize the disclosure statement carefully, and also do a virtual (zoom) interview and do not be shy about raising a potential conflict early; it is far harder to remove an arbitrator mid-case than to object at the outset.

23. Confidentiality is one of the real advantages of arbitration, but it is not automatic or absolute. Most provider rules keep the hearing and the award private, but they do not necessarily bind non-parties, and they do not control what happens if a party later goes to court to confirm or vacate the award, which can put the award on a public docket. If confidentiality matters to your client, address it expressly in a protective order at the preliminary hearing, and think ahead about how the award will be treated if enforcement litigation becomes necessary.
24. If your client needs urgent relief before the panel is even seated, most major providers now offer an emergency arbitrator mechanism. AAA and JAMS rules, among others, allow a party to request the appointment of a single emergency arbitrator to decide applications for temporary or preliminary relief on an expedited basis, often within days. Know the applicable rule and timeline in advance, because if you wait until the need arises to learn the procedure, you have likely already lost valuable time.
25. Do not assume the arbitration clause resolves how fees and costs will be allocated; most are silent on the point. Institutional rules typically give the tribunal discretion to apportion arbitrator compensation and administrative fees between the parties, and some also permit shifting attorneys' fees in favor of the prevailing party, depending on the contract's language.⁴
26. Do not treat settlement discussions and hearing preparation as mutually exclusive. Many tribunals will suggest, or the applicable rules will require, that the parties at least explore mediation at some point before the final hearing, sometimes with a neutral who is not one of the arbitrators. Settlement leverage in arbitration often peaks around the exchange of expert reports or the close of discovery, so keep an eye on that window even as you continue preparing for a hearing that may never happen.
27. Remember that a final award is not self-executing. The prevailing party generally must file a summary proceeding in court to confirm the award and reduce it to a judgment before it can be enforced like any other court judgment. Set client expectations early about how narrow the grounds for vacating an award actually

are under the Federal Arbitration Act and its state law counterparts, like corruption, fraud, evident partiality, or the arbitrator exceeding their powers, not ordinary legal or factual error. Clients accustomed to a full right of appeal from a trial court judgment are often surprised, and sometimes upset, to learn that an arbitration award is nearly final the moment it is issued. Counsel who explains this reality at the outset of the engagement, rather than after an unfavorable award has already come down, will have a far easier conversation with the client and will avoid being blamed for an outcome that the process itself, not the lawyering, made difficult to disturb.

None of this is meant to suggest that arbitration is simply litigation with different labels. It has its own culture, its own etiquette, and its own set of unwritten expectations that experienced arbitrators absorb over years of practice and that newcomers can only learn by doing, or by borrowing the hard-won lessons of colleagues who have been there before. A litigator who treats the preliminary hearing, the discovery plan, and the final hearing with the same care and foresight recommended above will not only serve the client better but will also earn the kind of credibility with a tribunal that pays dividends the next time, and the time after that, a mandatory arbitration clause lands on the desk.



Mark J. Bunim has been an arbitrator in New York City for over 20 years. He is a fellow of the College of Commercial Arbitrators, a member of various panels of the American Arbitration Association, including the large complex claims panel and the insurance specialty panel and a member of the Panel of FedArb for arbitration and mediation. He is the director of Case Closure (www.caseclosure.com).

Endnotes

1. Many arbitrators will only allow one or two depositions per side or as is becoming more in-vogue, a set number of hours for depositions, i.e., “take as many depositions as you want but you have a total of 15 hours per side for depositions.”
2. Most arbitrators will send the parties either a mock preliminary hearing order with dates to be filled in or a letter detailing each of the items to be discussed at the preliminary hearing. AAA Commercial Rules P-2 contains a checklist.
3. See *Broumand v. Joseph*, 522 F. Supp.3d 8 (S.D.N.Y. 2021).
4. Many arbitrators will bifurcate the issue of attorney fees and costs allocation until after the merits are ruled upon. This is a good procedure because it saves the party who does not prevail from spending time briefing their attorney’s fees and limiting their briefing to only opposition to the prevailing party’s application.



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