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Time To Restore Arbitration's Promise Of Efficiency For All

By **Janice Sperow** (October 6, 2021, 5:45 PM EDT)

Janice Sperow

Recently, Uber Technologies Inc. sued the American Arbitration Association to block $100 million in arbitration fees and costs;[1] Amazon.com Inc. removed the mandatory arbitration clause from its terms of service, thus allowing customers to sue it in court, including as part of a class action;[2] and, in U.S. Chamber of Commerce v. Bonta, the U.S. Court of Appeals for the Ninth Circuit upheld California's new law banning mandatory arbitration as a condition of employment.[3]

Yet not long ago, arbitration was all the rage, as an efficient dispute resolution alternative that promised expert arbitrators, less costly information exchange and a streamlined timeline. Consequently, most American companies routinely included arbitration clauses in their contracts.

So, what changed for the star alternative to litigation? In short, the players, the numbers and the clauses.

The Players

As arbitration became the norm rather than the exception, more litigators entered the arena. They brought with them the tools of their trade: litigation skills.

They imported discovery strategies, discovery motion practice, automatic summary judgment motions, interrogatories, depositions, requests for admissions, requests for the production of documents, motions in limine, third-party discovery, subpoenas and more — many of which had previously been rare or even nonexistent in arbitration.

Technically, arbitration permits the parties to exchange information, not to conduct discovery. But as trial counsel entered the arbitral playing field in droves, formal discovery — with its benefits and its costs — often came with them, because they wrote it into their arbitration agreement, agreed to it with opposing counsel or simply requested it.

Formal discovery, while certainly beneficial when targeted and appropriate to the case, adds the most time and cost to an arbitration. Discovery simply takes time and money to conduct, whether in arbitration or in litigation. As a result, the importation of traditional litigation tools has eroded one of the cost efficiencies normally achieved in arbitration through more restrictive information exchange.

This phenomenon is particularly visible in arbitrations conducted under the Federal Arbitration Act. The FAA permits the production of nonduplicative material information — basically, evidence germane to the decision.[4] Litigation, on the other hand, permits discovery reasonably calculated to lead to the discovery of relevant information — in other words, a much wider scope of information.

Consequently, litigators, unfamiliar with the narrower scope of arbitration's information exchange, frequently demand access to much more far-reaching, costly discovery, including e-discovery — and these demands are often agreed to by opposing counsel equally accustomed to the litigation standard.

The Numbers

The sheer increase in the number of arbitrations has created some delay in getting to hearing, as practitioners plead no vacancies in their calendars. But the real numbers crunch has come from the influx of mass arbitration.

Mass arbitration, or mass claims arbitration, means hundreds or thousands of individual arbitrations against the same respondent, usually brought simultaneously by the same law firm, raising the same legal issues, based upon a similar set of facts.

Mass arbitration often follows an order upholding a class action waiver in a company's arbitration agreement, or most recently, a social media advertising campaign. Mass arbitration typically imposes significant fees on the respondent, which, as the company responding to an employee or consumer arbitration demand, must pay the more substantial fee.

For example, if a company must pay a $2,000 fee per claim, a mass filing of 5,000 claims means the company faces a $10 million upfront fee.[5] Faced with this hefty bill even before attorney fees, arbitrator fees and possibly claimants' attorney fees, it's no wonder some companies like Amazon have essentially said, "OK, sue me."

The Clauses

Arbitration itself is a creature of contract. Yet many parties, more focused on substantive deal points, give little, if any, real consideration to its provisions. Instead, they adopt a standard, well-tread clause invoking mandatory arbitration without specificity.

The generality of the clause opens the door to later post-dispute disagreements over scope, discovery, process and structure. At this point, when the parties' interests conflict, the generic clause becomes a basis for disputed motion practice, rather than an agreed-upon process for resolution.

Alternatively, parties insert such detailed prohibitions against consolidation of claims that they thwart rather than promote efficiency. For example, the number of mass arbitration claims arose mainly in response to mandatory class action waivers.

Most companies inserted clauses prohibiting any form of arbitration other than a single demand brought by a single claimant. In response, firms have signed up thousands of individual claimants, and filed nearly identical claims for each of them against the same company.

Importantly, these forced individual claims have not only cost millions of dollars in arbitration costs and fees, as noted above, but they have prevented substantive efficiencies as well, because each case must be adjudicated individually before its own arbitrator, without collateral estoppel or precedential effect on later cases, no matter how similar.

Thus, in their zeal to prevent class actions, companies have actually prevented many of the very efficiencies they sought through arbitration in the first place.

Bring Back the Promise

So arbitration appears to be broken. How do we fix it?

In fact, arbitration as an alternative to litigation is not broken. In a recent survey, respondents overwhelmingly preferred arbitration as a quicker, more cost-effective resolution process.

But it could use some fine-tuning, especially in how it is implemented. Below are some tips to preserve the arbitral promise.

Leverage Arbitral Differences

Embrace arbitration's differences. Understand the added delays and inefficiencies created when arbitration increasingly mirrors the trappings of litigation: extensive discovery, protracted motion practice, highly contentious advocacy, longer lifecycle, time-intensive processes, third-party funding and higher costs.

Instead of duplicating litigation in arbitration, leverage the unique facets of arbitration to reduce time and cost. For example, select an arbitrator with subject matter expertise in lieu of experts. Request qualified arbitrators with availability to hold the hearing within 90 days or six months, or during a specific week already convenient to the parties.

Ask for email exchange in lieu of briefing, and conference calls in lieu of hearings, to resolve disputes. Ban all formal court filings and motions without prior informal meet and confer and arbitrator leave.

Stagger or bifurcate the arbitration by issues where appropriate. In phase one, exchange information on key issues likely to resolve the matter first, and then proceed to phase two only as needed.

Bottom line: The parties and counsel have control to craft a process that maximizes their needs and goals.

Carefully Craft Clauses

Craft specific clauses designed to fit your typical cases. For example, describe the process the parties will follow in a breach of contract case, a different scheme for statutory claims and yet another for discrimination claims.

Or define a very streamlined documents-only process for small-dollar claims, or a document-exchange-only process for medium-dollar claims, with limited depositions for each party reserved for large-dollar matters.

Address all the procedural aspects to govern the case, including forum, venue, number and qualifications of arbitrators, administrator, applicable rules, arbitral statute, and substantive law. Consider addressing some foundational substantive issues as well, such as defining the governing contract in the event of a dispute.

Spell out the arbitrator's powers in detail: the right to issue sanctions; to grant injunctive or other equitable relief; to issue third-party discovery or hearing subpoenas; to determine jurisdiction, arbitrability and contract enforceability; and to entertain dispositive motions.

Frame the arbitrator selection process: how it will be conducted, how much time will be allowed for the process, how impasses will be resolved and what criteria shall apply. The parties will defeat arbitration's speed if it takes them six months just to select the arbitrator.

The American Arbitration Association has an online clause builder tool to help practitioners customize their arbitration agreements to address these issues, and the International Institute for Conflict Prevention and Resolution offers online model clauses definitely worth exploring.

Authorize Early Resolution of Legal Issues

Explicitly authorize, in appropriate cases, short motions of no more than 10 pages on disputed legal issues within a short time frame of the demand. For example, the agreement can require the resolution of a purely legal question which will help narrow the issues in dispute within 20-30 days.

The agreement can allow another 14 days for responsive pleadings if desired. The parties can empower the arbitrator to rule on the submissions, or hold a conference call. While this process may add motion practice to arbitration, it encourages early resolution of key legal issues, which often leads to mediation or settlement.

For example, a choice of law decision can be claim-determinative, the availability of punitive damages may bring the parties closer to settlement, or a standing ruling may resolve the case entirely. More importantly, the parties can craft the clause to fit their needs; they do not have to adopt a blank slate.

The agreement can permit only certain types of motions — such as those that would dispose of all claims — or it can permit such motions only in cases above threshold amounts, or any other

parameters. The agreement could leave the discretion to the arbitrator to determine if the cost savings achieved outweigh the costs of the motion.

Limit Discovery to Essentials

Take a page from the FAA and contractually authorize only specific nonduplicative discovery needed to determine the issues. Require the parties to exchange, without the need for formal discovery requests, all material information necessary for the party to prove its case, including damages, within 20 or 30 days of the preliminary scheduling hearing.

After the parties digest the information received from the other side, they can meet and confer and informally ask for anything more they need. Basically, the parties should gather what the arbitrator will need to issue an award.

Expedite Matters

Most associations provide for expedited arbitrations using alternative protocols. Unfortunately, many practitioners only use these alternatives for low-dollar cases. Consider opting for expedited proceedings in all cases, or all cases under a certain amount.

The parties can also specify a stepped timeline, such as hearing to be held within 60 days for matters less than $25,000; within 90 days for matters less than $50,000; with 120 days for matters less than $100,000; and so forth. The parties can control the speed of the arbitral process by writing it directly into their contract.

Remove Class Action Waiver, Not Arbitration

While understandable, Amazon's decision to toss its arbitration clause sounds a little bit like tossing the baby out with the bathwater. Arbitration is not the problem; it is mass arbitration designed to circumvent a class action waiver clause.

So, ditch the class action waiver clause, and proceed with arbitration, individually en masse or as a class. Many providers have class arbitration protocols, and have routinely handled class arbitrations in the past.

Fundamentally, the parties control the process, because arbitration is a product of agreement. Hence, whichever administrator, arbitrator or platform companies use, they can achieve cost-effectiveness, efficiency, privacy and faster final resolution through arbitration, as long as they use their arbitration agreement wisely to promote these goals — and that's a promise.

Janice Sperow is an arbitrator at Sperow ADR Services.

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[1] Uber Technologies Inc. v. American Arbitration Association Inc., Supreme Court of New York, Sept. 20, 2021.

[2] See Wall Street Journal, June 2, 2021, "Amazon Allows Customers to Sue."

[3] Chamber of Commerce v. Bonta , No. 20-15291 (9th Cir. Sept. 16, 2021).

[4] See 9 U.S. Code Section 7.

[5] A recent California law (SB707) raises the stakes even further by requiring companies to pay arbitration fees within 30 days; failure to do so can lead to default judgments and liability for the plaintiffs' attorney fees.

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