

Adapting Arbitration to Meet Client Needs

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Presenters:

James R. Ferguson: Partner, Mayer Brown LLP; Lecturer, University of Chicago Law School

Karen Jalkut: Vice President, American Arbitration Association

Reporter: Melany Guzman, University of St. Thomas School of Law

Program Description: This program will examine the specific concerns that clients have about arbitration and the ways in which arbitral stakeholders can modify the arbitral experience to meet those needs. Presenters will focus on specific innovations adopted by administering institutions such as the AAA, JAMS, CRP and the ICC in areas related to cost containment, emergency and equitable relief, and the impartiality of arbitrators. The session will also identify the ways in which artfully-crafted arbitration clauses can address client needs and concerns. This presentation will explore how arbitration, which is the most flexible of ADR, can be adapted to client needs.

Arbitration v. Litigation

James Ferguson described advantages and disadvantages of arbitration and litigation. The single most important difference is the right to appeal in litigation. This makes clients to prefer litigation instead of arbitration because of the comfort of an appellate review.

The parties need the security of an appellate review. That is why in 2013, the AAA developed the optional appellate arbitration rules where the parties either put that in the arbitration clause or agree that a panel will review the decisions. This is a relatively new process and there are not many cases involving appellate review.

What Do Clients Want?

Based on the presenters' experience, clients most want cost containment. They have found that arbitration sometimes is as expensive as litigation, but if they can resolve the case without arbitration or any other dispute resolution process, that is huge cost containment.

Another way to limit costs is to limit discovery. Without depositions, document productions, or even motions, they can go directly to dispute resolution. The parties can choose the rules of the procedure.

Clients also care about a quick resolution, securing a "fair" arbitrator, availability of emergency relief, access to court, and limiting arbitrator discretion, among other

things. Lawyers must prioritize the needs of clients because there is a tension between these goals and the best choice will depend on their primary goals.

Parties can secure a timely award by eliminating a hearing, not requiring a reasoned award, and requiring issuance of an award within a specified time

A “fair” arbitrator is an experienced, commercial arbitrator who has no ties to the case of any kind. It is surprising how many clients prefer party-appointed arbitrators.

Under AAA Rule 38, in a contract after October 2013, any party can apply for emergency relief. This rule is for situations where parties cannot agree on anything. There is an increase in its application.

Drafting Arbitration Clauses

Top 10 factors for adapting arbitration to client needs:

1. Clause: The clause is the most important thing. It directs AAA and the arbitrator to what they can and cannot do.
2. Select the right attorney: Parties need lawyers who understand the process.
3. Set a budget: There are several ways to do that. AAA gives an option to get “a la carte services.”
4. Choose the right arbitrator: Look at the expertise. AAA has developed a search platform for selecting arbitrators.
5. Keep the process fast and economical. Consider that mediation can reduce costs.
6. Set the stages for the preliminary hearing: Once the scheduling order is set, it's an agreement.
7. Know the rules you are operating under: Providers' rules (JAM, AAA, etc.) are different.
8. Be open to settlement during the whole process
9. Trust the arbitrator's expertise.
10. Present the case effectively and efficiently: Be prepared, on time, and civil. Turn your phones off.