


AMERICAN ARBITRATION ASSOCIATION® EDUCATION SERVICES

**DRAFTING ARBITRATION CLAUSES**  
The Basics and Beyond



Webinar  
June 21, 2016

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**Speaker**



**Dani Schwartz**  
Rosenberg & Estis, P.C.  
New York, New York



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# Why Arbitration?



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“The object of arbitration is a fair, fast and expert result that is achieved economically.” – AAA

**How can you achieve this result?**



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# Drafting Arbitration Clauses



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## At a minimum, every clause drafter should:

- Define what is arbitrable
- Bind the parties to arbitration
- Pick a forum and a set of rules to govern
- Specify the governing law
- Provide for a reasoned award
- Provide for timing
- Require confidentiality
- Consider attorneys' fees
- State that judgment may be entered on the arbitrator's award by any federal or state court having jurisdiction (required for enforcement under the federal Arbitration Act)



Adapted from *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, by John M. Townsend



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## Defining what is arbitrable: A particularly poor example

- *In case of dispute, the parties agree to submit their claims to arbitration, but in case of litigation, the parties agree to submit their claims to the appropriate court of the State of New York.*

Adapted from *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, by John M. Townsend



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**A good start**

- *Any and all disputes and controversies arising out of or relating to this agreement or the breach thereof shall be resolved in an arbitration administered by the American Arbitration Association, in accordance with the [applicable industry] Rules*



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*Matter of BRG Sports, LLC v Zimmerman,*  
2015 NY Slip Op 03066 (1st Dept April 9, 2015)

“The 2010 employment agreement... contains a broad arbitration provision requiring that ‘[a]ny dispute, controversy or claim arising out of or relating to this Agreement, or breach hereof, shall be settled by arbitration’... and any doubts as to whether the issue is arbitrable will be resolved in favor of arbitration”



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*Pursuit Investment Management, LLC v Alpha Beta Capital Partners, L.P.,* 2015 NY Slip Op 03272  
(1st Dept April 21, 2015)

“A party will not be compelled to arbitrate ... absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal.”



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### Location of Arbitration

- *The place of arbitration shall be New York County*



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### Governing Law

- *The arbitrator shall decide the dispute in accordance with the substantive law of the State of New York*



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### Reasoned Award

- *The arbitrator's award shall be set forth in a written decision stating the reasons upon which the award is based*



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## Timing of Arbitration

- *The award shall be rendered within X months of the commencement of the arbitration, unless such time limit is extended by the arbitrator.*



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## Confidentiality

How important is it?



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Your worst case,  
nightmare  
scenario...



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**Confidentiality Clause**

- *Except as required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.*



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**Attorneys' Fees in Arbitration**

- **Playing it safe:**
  - *Each party shall bear its own costs, attorneys' fees and expenses, and an equal share of the arbitrators' and administrative fees of arbitration*



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## Attorneys' Fees in Arbitration

- Going “all in” -- loser pays
  - *The prevailing party shall be entitled to an award of the arbitrator's fees, administrative fees, and reasonable attorneys' fees incurred in connection with the arbitration*



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## Discovery in Arbitration

- Rule of thumb:
  - The more litigation features installed in your arbitration, the fewer benefits the parties are likely to get from arbitration.



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- Discovery alone can account for 50% of litigation costs.



*Judicial Conference Adopts Rule Changes, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH, Admin. Office of the U.S. Courts (1999)



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## Discovery

- *Consistent with the expedited nature of arbitration, pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents, carried out expeditiously.*



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## Discovery at the Arbitrator's Discretion

- *Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the arbitrator, which determination shall be conclusive. All discovery shall be completed within X days following the appointment of the arbitrator.*



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## Depositions

- *At the request of a party, the arbitrator shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate.*
- *Depositions shall be limited to a maximum of X witnesses per party, shall be conducted for no longer than XX, and shall be held within 30 days of making the request. Each deposition shall be conducted at the offices of the deposing party or their attorney/agent, and the costs of the deposition shall be borne by the deposing party.*



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## Arbitration is not Litigation:

### Understand and Appreciate the Difference



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## One Arbitrator or Three?

### A question of dollars and sense

Data & Charts provided by AAA



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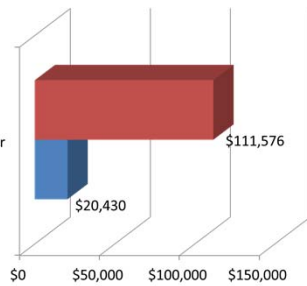
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## One Versus Three Arbitrators

One Arbitrator Cases: 57  
Three Arbitrators Cases: 43  
Largest Claim: \$128 million  
\$100 million

Median Arbitrator Compensation



■ Three Arbitrators ■ One Arbitrator



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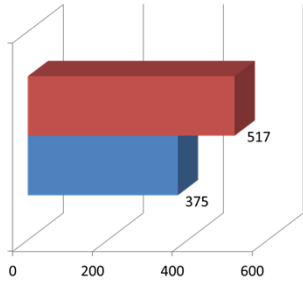
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## One Versus Three Arbitrators

One Arbitrator Three Arbitrators  
Cases: 57 43  
Largest Claim: \$128 million \$100 million

Median Filing to Award (in days)



■ Three Arbitrators ■ One Arbitrator



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## Questions



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## Concluding Remarks



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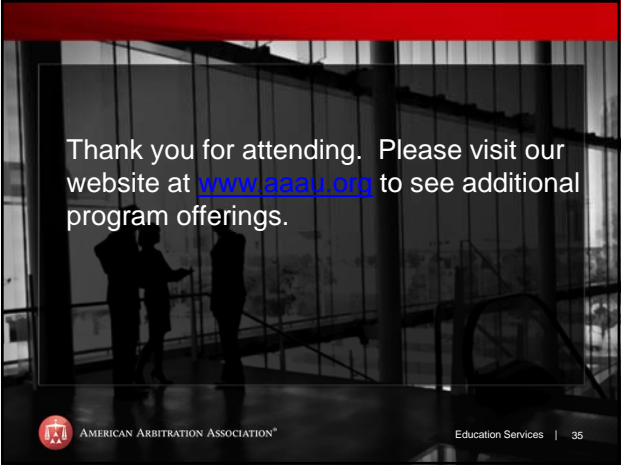
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