BEST PRACTICES REGARDING EVIDENCE IN ARBITRATIONS

Alternative Dispute Resolution Committee

Approved by the Board of Regents
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BEST PRACTICES REGARDING EVIDENCE IN ARBITRATIONS

Introduction

Most arbitrators and academics have long understood that, absent terms to the contrary in the agreement providing for arbitration, the traditional rules of evidence do not apply, and certainly do not strictly apply, in arbitration.[1] By contrast, lawyers representing clients in arbitrations often expect that the arbitrator will enforce the rules of evidence or, at a minimum, will view the rules as presumptively authoritative.[2] Similarly, lawyers often view arbitrations as merely a non-judicial forum for presenting evidence in much the same way as evidence would be presented in a courtroom, while most arbitrators are open to alternative methods for presenting evidence that would not be permitted in court. The arbitration process would benefit from greater clarity as to how the rules of evidence, evidentiary principles, and customary practices for receiving evidence should apply in arbitration. This paper identifies best practices regarding such evidentiary issues in arbitrations.

This paper is the work of the Alternative Dispute Resolution Committee of the American College of Trial Lawyers, which consists of trial lawyers who also have significant experience in litigating arbitrations through hearing as well as in serving as arbitrators. It reflects their collective experiences, as well as their research. To gather additional insight, the Committee interviewed experienced neutrals throughout the country on their practices and views regarding evidentiary issues in arbitration. This paper incorporates their input, for which the Committee is grateful.

Background

Consistent with applicable law, the rules of the major arbitration associations are clear that federal and local rules of evidence do not control in arbitration and that arbitrators have wide latitude

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1 Arbitrators should "[m]ake clear to counsel that, unless formal rules of evidence apply (which is rare in arbitration), virtually all non-privileged evidence offered by any party will be received and traditional objections (hearsay, foundation, etc.) will not be entertained." Coll. of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration 75 (Thomas J. Stipanowich et al. eds., 2010). In many instances, the rules governing the arbitration are explicit that the legal rules of evidence are not binding. *See infra* note 3 and accompanying text. Case law similarly confirms that the rules of evidence are not binding in arbitration. *See, e.g.*, *Rosensweig v. Morgan Stanley & Co., Inc*., 494 F.3d 1328, 1333 (11th Cir. 2007) (citation and quotation omitted) (stating that arbitrators "enjoy wide latitude in conducting an arbitration hearing" and "are not constrained by formal rules of procedure or evidence."); *Sunshine Mining Co. v. United Steelworkers of Am*., 823 F.2d 1289, 1295 (9th Cir. 1987) (citation omitted) ("Arbitrators may admit and rely on evidence inadmissible under the Federal Rules of Evidence."); *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985) ("An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence . . . ."). Some mandatory arbitration programs, such as in California for cases involving small amounts in controversy, provide that the local rules of evidence, albeit with several important exceptions, apply. *See* Cal. R. Ct. 3.823 (2017).

2 "Arbitrators, in contrast, are bemused by litigators who approach arbitration as a shadow judicial forum with the expectation that arbitrators are to be impressed by frequent and expert citations to court rules such as the Federal Rules of Evidence ('FRE'). The fact that formal rules of evidence do not apply in arbitration (unless the parties expressly mandate it, which is rare) little deters the transplanted trial lawyer." Alfred G. Feliu, *Evidence in Arbitration: A Guide for Litigators*, *in* AAA Handbook on Commercial Arbitration 267, 267 (2nd ed. 2010).

regarding evidentiary issues.[3] That, of course, raises what role, if any, the rules of evidence do or should have in arbitrations.[4] As noted, according to what limited empirical data exists, the vast majority of arbitrators do not view the federal rules of evidence and their state law counterparts as controlling, though they often finesse how such rules apply by accepting the evidence while stating that the evidence will be considered "for what it is worth."[5]

That the rules of evidence are not controlling means that arbitrators have discretion to, and often do, consider evidence that would be inadmissible in court. As one leading commentator described the evidentiary process in the majority of arbitrations:

> Arbitrators tend not to exclude evidence . . . . Since there is essentially no appeal, arbitrators have been especially careful to ensure that not only are the parties afforded a fair hearing but that the parties perceive it to be fair. In addition, arbitrators may feel that they could be jeopardizing the award and risking a challenge for failure to afford a party a full and fair opportunity to present its case if they exclude evidence. While case law, at least in the United States, has confirmed awards that were challenged on this basis because they were found not to impair the "fundamental fairness" of the proceeding, (citation omitted), if the evidence is not time-consuming and does not cause the parties to incur meaningful additional costs, admitting such evidence may well be viewed as creating no harm and averting a challenge, which in and of itself costs time and money.[6]

This tendency in arbitrations to admit evidence despite its non-compliance with traditional admissibility standards likely, at least in part, reflects arbitrators' desire to insulate their awards from challenges that the arbitrator refused to receive material evidence. For example, Section 10 of the Federal Arbitration Act ("FAA") provides, in relevant part, that the Court may vacate an arbitral

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3 *See, e.g.*, Commercial Arbitration Rules & Mediation Procedures r. 34(a) (Am. Arbitration Ass'n 2013) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present."); Emp't Arbitration Rules r. 30 (Am. Arbitration Ass'n 2009) ("The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary."); Comprehensive Arbitration Rules & Procedures r. 22(d) (JAMS 2014) ("Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence."); Code of Arbitration Procedure for Customer Disputes § 12604(a) (FINRA 2008) ("The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence."). The AAA presently has fifty-six active sets of rules. The International Institute for Conflict Prevention and Resolution ("CPR") has three sets of rules currently in effect. None of the rules of these organizations requires the use of any particular code of evidence. Most expressly license the arbitrators not to use any set of judicial rules of evidence.

4 *See, e.g.*, Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 Fordham L. Rev. 247, 271 (1995) ("Another general problem is that without predetermined evidence rules, the two parties could come to the hearing with vastly different expectations as to what evidence will be allowed.").

5 *See, e.g.*, Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 SPG L. & Contemp. Probs. 105, 129–30 (2004) ("[D]espite having the power to exclude irrelevant evidence, arbitrators have a 'well documented' tendency to 'let it all in.'"); Edna Sussman, *The Arbitrator Survey: Practices, Preferences and Changes on the Horizon*, 26 Am. Rev. Int'l Arb. 517, 521 (2015) (discussing e-mail survey of 401 experienced arbitrators conducted between October 2012 and February 2013; 34% of arbitrators "never" exclude evidence that would be inadmissible in court; 55% do so only 25% of the time; only 11% do so always or often).

6 Sussman, *supra* note 5, at 522.

award "where the arbitrators were guilty of . . . *refusing to hear evidence pertinent and material to the controversy*." 9 U.S.C. § 10(a)(3) (emphasis added)." Against this backdrop, a very liberal approach to admitting evidence is understandable.

In addition, arbitrators accepting evidence that would not be admitted in court often reason that they do so because they are comfortable that they, unlike jurors, can appropriately weigh the evidence and disregard evidence that is not trustworthy.[7] There is no certainty, however, that this belief is accurate. Research suggests that cognitive and implicit biases, which may be triggered or exacerbated by exposure to evidence of questionable relevance or reliability, may play a much larger role in arbitrators' and judges decisions than they may understand or admit. In other words, receiving otherwise inadmissible or questionable evidence may tilt the outcome in favor of the offering party, despite the evidence being untrustworthy or unfairly prejudicial.[8] The let-it-all-in approach fails to take account of this concern.

Literature Review

A survey of relevant law review articles and treatises confirms the result of our survey and Committee consensus that, absent a statutory or contractual provision expressly requiring strict application of a particular regime of evidence law, the rules of evidence are not strictly observed in the presentation of a case in arbitration.[9] Rather, the majority of arbitrators tend to let in nearly all evidence that is pertinent to the controversy, going so far as to admit evidence that is only tangentially pertinent "for what it's worth,"[10] while excluding only evidence that is unnecessarily cumulative, or privileged.[11]

Very little guidance was found, however, advising *how best* to handle evidentiary issues in a proceeding where the accepted standards of evidence are not controlling. Some authority advises that, despite the non-applicability of the rules of evidence, evidentiary objections still have value, especially with respect to hearsay. Repeatedly objecting can have the effect of persuading the arbitrators that particular evidence should be given little weight because, as the policies underlying the law of hearsay explain, with cross-examination its credibility could be reduced, if not defeated.[12] Thus, argumentative objections seeking to prevent opposing counsel from eliciting hearsay or, as another example, excessive leading of a witness, can bring home to the arbitrators the weakness of particular evidence or its presentation. Another paper encourages advocates to object on the record whenever the arbitrator *refuses* to receive evidence tendered by that advocate *and* whenever

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7 *See id.*

8 *See, e.g.*, Edna Sussman, *What Lurks in the Unconscious: Influences on Arbitrator Decision Making*, 32 Alternatives to High Cost Litig. 149, 153 (2014) ("Yet studies with judges have confirmed that inadmissible evidence, once heard, has a profound impact on judicial decisions;" concluding the same is true for arbitrators); Andrew Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1279–81 (2005) (finding that well more than half of a control group of judges who saw a document damaging to plaintiffs and claimed to be privileged ruled against the plaintiffs, while, in the other half that did not see the document, more than half ruled in favor of plaintiff).

9 4 Am. Jur. 2d *Alternative Dispute Resolution* § 169 (2017) ("Absent a provision or agreement to the contrary, arbitrators are not bound by the formal rules of evidence, but instead have broad discretion in ruling on the admission of evidence.").

10 Thomas H. Oehmke, 3 Commercial Arbitration § 92.3 (3rd ed. 2015) ("Practice Tip" suggests that whenever an arbitrator admits evidence with that caveat, the arbitrator is also telling the parties "this is a coded warning . . . that, preliminarily, the evidence appears neither pertinent nor material and offers little promise of carrying much weight.").

11 *E.g.*, 1 Alternative Dispute Resolution Practice Guide § 12:5 (Bette J. Roth et al. eds., 2016).

12 Robert Coulson, Am. Arbitration Ass'n, Business Arbitration: What You Need to Know (5th ed. 1994).

arguably unfairly prejudicial evidence tendered by the other advocate is received, as failure to do so can be deemed a waiver of a claim that a fair hearing has been denied.[13] Again, arbitrators' decisions regarding the admission of evidence are given extreme deference in any subsequent judicial proceedings.[14]

None of the authorities deny that arbitrators are permitted to exclude hearsay in an arbitration in order to ensure that evidence presented is reliable,[15] even though strict enforcement of the rule against hearsay does not make sense where the information provided by it appears reliable and probative of a material issue.[16] Thus, in considering whether to assert a hearsay objection, the advocate must be careful to weigh the relative benefit of cross-examination in testing the reliability of the information being provided and then emphasize that issue when presenting argument.

Since one of the goals of arbitration is a speedy and efficient resolution of disputes, multiple articles observe that arbitrators tend to become impatient with redundant or cumulative evidence. Thus, objections based on redundancy may be better received than objections to hearsay, relevance, or materiality. Implicit in this observation is that advocates in an arbitration should carefully prepare *not* to present redundant evidence by first gathering all of the evidence on an issue and thoughtfully ranking the relative strength. The advocate should consider presenting either only the strongest evidence on each issue, or, if there is a desire to present all probative evidence on a subject, to rank the strength of the evidence on each issue and consider presenting the strongest evidence first. That way, if a redundancy objection is successfully interposed, the most persuasive evidence will already have been presented.

The authorities that speak about issues of privilege in arbitration seem to agree that rules of privilege are more than merely rules of evidence. Rather, they are matters of public policy that are to be enforced in arbitration just as they would be in litigation. From this it can be gleaned that privilege objections should be made and enforced in arbitrations, and, conversely, that failure to object to the disclosure of privileged information could constitute a waiver of the privilege by voluntary disclosure that could have ramifications both during and after the arbitration. Then, if a party becomes aware during the proceedings of a departure from the applicable procedures in the case, it is incumbent upon that party to object in writing to the departure to avoid waiving the ability to use such departure as a possible basis for vacatur.

As another way to ensure the goal of an arbitrator or panel for speed and efficiency, literature recommends offering to present evidence in arbitrations using visuals, affidavits, reports, summaries, and demonstrative exhibits to an extent that likely would not be acceptable in court.[17] Arbitrations

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13 Martin Domke et al., 2 Domke on Commercial Arbitration § 29:10 (citing *Safety Control, Inc. v. Verwin, Inc.*, 16 Ariz. App. 540, 542, 494 P.2d 740, 742 (1972)).

14 *See, e.g.*, *Farkas v. Receivable Fin. Corp*., 806 F. Supp. 84, 87 (E.D. Va. 1992) (rejecting arguments that arbitration was tainted by admission of hearsay and other evidence that would be inadmissible under the rules); *Racine v. State Dep't of Transp. & Pub. Facilities*, 663 P.2d 555, 557–58 (Alaska 1983) (finding admission of prejudicial hearsay to be insufficient to justify vacatur as long as the arbitrator received other evidence to support the award).

15 76 Am. Jur. *Trials* 1 § 63.

16 *See, e.g.*, James A. Wright, *The Use of Hearsay in Arbitration*, *in* Arbitration 289, 302 (1992) (advocating a rule that hearsay evidence be presumptively admitted and that such a rule would force arbitrators to deal with "the real evidence issues—that is, the relevancy and reliability of hearsay.").

17 *See, e.g.*, Susan Hanmer Farina, *Efficient and Effective Presentation of Arbitral Evidence*, 43 The Brief 46 (2014).

offer more flexibility than a courtroom trial regarding the manner of presentation. Arbitrators and the parties should work together, where possible, to take advantage of that flexibility.[18]

In recent years the literature has grown to include new experimental and other evidence about how judges and arbitrators' decisions may be affected by various cognitive biases and exposure to prejudicial evidence that, in a jury trial, would be excluded under the rules of evidence.[19] This scholarship highlights dangers in the let-it-all-in approach and counsels that arbitrators should avoid or limit unnecessary exposure to potentially unfair and prejudicial evidence. The literature suggests, for example, that, when admitting questionable evidence "for what it's worth," arbitrators should articulate to the parties what value the arbitrator perceives in the evidence—a process that may stimulate the arbitrators' deliberative ability to put the evidence in the proper substantive context and educate the parties as to what additional attention to give (or not give) to the evidence or its subject matter.[20]

Recommendations

With this background in mind, our recommendations of Best Practices Regarding Evidence in Arbitration are as follow:

1. Sole arbitrator or arbitral panels (hereinafter "arbitrators") and the parties should engage early and directly on evidentiary issues. Too often, these issues are not addressed until the hearing begins, and certain issues are never directly addressed or resolved.

2. Several objectives and considerations should be taken into account in

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18 The Federal Arbitration Act allows arbitration to proceed with only a summary hearing and even with restricted inquiry into factual issues. *See Booth v. Hume Publ'g, Inc*., 902 F.2d 925, 931 (11th Cir. 1990) (citing *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc*., 857 F.2d 742, 747–48 (11th Cir. 1988)). An arbitrator should be expected to act to simplify and expedite the proceeding. *See, e.g.*, *Forsythe Int'l v. Gibbs Oil Co. of Tex*., 915 F.2d 1017, 1022 (5th Cir. 1990); *see also Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985)) ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'").

19 *See, e.g.*, *supra* note 8 and accompanying text; Drahozal, *supra* note 5, at 106 ("[T]his Article focuses on an aspect of arbitral decisionmaking that has been largely unexamined: the extent to which decisionmaking by arbitrators is affected by heuristics ('rules of thumb') and cognitive biases."); Jan-Philip Elm, *Behavioral Insights into International Arbitration: An Analysis of How to De-Bias Arbitrators*, 27 Am. Rev. Int'l Arb. 75, 78–79 (2016) ("Experiments indicate that national court judges fall prey to the same cognitive anomalies as everyone else. The same may be assumed for international arbitrators as well, which highlights that even the brightest decision-makers fall prey to cognitive biases and heuristics."); Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 Emory L.J. 1115 (2017) (reviewing the literature, reporting experimental evidence, and concluding that arbitrators are often influenced by irrelevant numerical anchors and irrelevant emotional cues); Sussman, *supra* note 8, at 153 ("Research has shown that, as with all human beings, the intuitive reactions of System 1 play a significant role in judicial decision making. Given the similarity of the tasks, one must conclude that this is equally applicable to arbitral decision making.").

20 *\See, e.g.*, Michael Z. Green, *No Strict Evidence Rules in Labor and Employment Arbitration*, 15 Tex. Wesleyan L. Rev. 533, 541 (2009) ("In response to these concerns, arbitrators must say more than 'I'll take it for what it is worth.' Instead, arbitrators should tell the parties what he or she feels about the quality of the evidence based upon the arguments presented."); Marvin F. Hill, Jr. & Tammy M. Westhoff, *"I'll Take It for What It Is Worth"—The Use of Hearsay Evidence by Labor Arbitrators*, 1998 J. Disp. Resol. 1, 34 (1998) ("[W]e believe that the arbitration system is not well served by a rule that allows everything into the record. . . . We think the parties are better served by arbitrators who give the advocate some indication what the evidence is worth at the hearing."); Sussman, *supra* note 8, at 154 (offering suggestions "to assist arbitrators in ensuring the active engagement of the brain's deliberative faculties and avoiding the impact of unconscious blinders;" one suggestion is that, before reaching a final decision, arbitrators identify "any significant inadmissible or unreliable evidence that may have influenced" their thinking and consider the outcome without that evidence). For a review of the science and options available for neutralizing the effects on jurors who have been exposed to inadmissible evidence, see Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 Geo. Mason L. Rev. 99 (2008).

determining evidentiary issues in arbitration. Arbitrators should address evidentiary issues by permitting the parties the latitude, within reason, of offering the evidence they desire to support their cases; preserving the award from attack; mitigating unnecessary legal expenses or inconvenience of witnesses; and avoiding unnecessary exposure to clearly immaterial or unfairly prejudicial evidence. These considerations may differ from case to case depending on size, complexity, the amount at stake, the time allotted for the hearing, and the preferences of the parties.

3. Arbitrators should disclose their philosophy and intentions to the parties regarding the receipt and admission of evidence as early as possible and solicit the parties' feedback as well. These discussions should extend to whether the Arbitrator believes rules of evidence should govern the arbitration; if not, whether such rules will be treated as presumptively applying; and, in all events, any particular evidentiary rules or principles that the arbitrator(s) expects will be relaxed or, conversely, strictly enforced. To the extent that the parties are arbitrating under the rules of a particular arbitration organization, arbitrators should promptly identify and discuss with the parties any rules such organizations have concerning the receipt and admission of evidence, even if the organization's rules on this subject are that the rules of evidence do not apply. Arbitration organizations are encouraged to point out such rules to their arbitrators as part of the appointment process. Arbitration organizations should consider modifying their rules and guidelines in a manner set forth in Recommendation 8, *infra*, to ensure issues concerning evidentiary issues are addressed early in the proceeding.

4. In all cases, arbitrators should inform the parties in advance of the hearing of their preferences or positions regarding the taking of evidence. Arbitrators should make clear to the parties that serious admissibility issues concerning evidence that may be unfairly prejudicial or a waste of significant time, should be, whenever possible, dealt with in advance of arbitration. Specific examples where arbitrators should be inclined not to admit evidence, even using a relaxed standard, or which certainly should be clarified with the parties in advance of arbitration, include the following:

(a) evidence that is subject to the lawyer-client privilege or work product protection;

(b) unduly protracted or repetitive evidence;

(c) expert testimony that is offered to opine on the ultimate question before the tribunal (as distinct from scientific or like opinions from qualified experts on subjects as to which the tribunal is not likely to be conversant or may need educating); and

(d) marginally relevant evidence where the relevancy is clearly outweighed by undue prejudice, especially where the evidence may serve primarily to cause embarrassment or harassment of a party or witness to the arbitration or result in the arbitrator's exposure to settlement negotiations, subsequent remedial measures, or impertinent character evidence.

5. During a hearing presented to a panel of arbitrators, one panel member, usually the chair, should rule on all evidence objections, but on matters where reasonable persons could differ in their views, should consult with the other panel members to ascertain their views,

and strive for unanimity.[21] Evidentiary issues may be of sufficient importance that their resolution warrants deliberation by the full panel. A co-panelist should feel free to consult with the chair and the other panelist *in camera* if the chair's rulings are problematic, and should seek to persuade the chair to allow all panel members to confer on evidence issues involving key facts in the case. A benefit of the panel in delegating, conferring, and ruling on evidence issues is to preserve the award from vacatur. Discussion may also result in the panel formulating feedback to be given to the parties regarding whether or not and the extent and purposes to which the evidence will be admitted and considered.

6. Arbitrators should actively, and well in advance of the hearing, explore with the parties alternative ways to streamline the presentation of evidence in order to save time, mitigate any prejudice, reduce expense, alleviate inconvenience to witnesses, and accommodate a party's preferences for presenting its case**.** This may include, by way of example:

(a) permitting direct testimony via declaration, affidavit, or report;

(b) encouraging evidentiary stipulations in advance of the hearing, during the hearing, or during recesses;

(c) accepting proffers of documentary or deposition evidence in lieu of testimony;

(d) permitting leading questions;

(e) encouraging all authentication, foundation and Rule 403 objections to documentary evidence to be addressed prior to the hearing, except in cases of good cause, and requiring parties to exchange and pre-mark exhibits to avoid any unfair surprise;

(f) exploring with the parties ways to more efficiently obtain expert evidence, including discussing whether the parties will stipulate to a single expert or to expert reports, whether experts may testify on direct in a narrative fashion; and

(g) allowing testimony via remote means, such as via telephone or videoconference.

7. The parties should be informed before the hearing that, where there is counsel or party misconduct regarding discovery, disclosure, and evidence, arbitrators may consider the impact of improper behavior as grounds for excluding evidence if the behavior prejudices the

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21 "The arbitrators should, early in the proceedings, discuss among themselves the roles they will play in the proceedings leading up to the award. Arrangements among the arbitrators should be such as to assure that their capabilities and time are most effectively utilized. There should be a chairperson of the tribunal. The parties and the arbitrators should agree at the outset of the arbitration the extent to which the chairperson may rule alone on specified procedural matters, conferring, in his or her discretion, or as agreed on, with the other two arbitrators." *Guidelines for Arbitrators Conducting Complex Arbitrations*, CPR 1–2 (2012), https://www.cpradr.org/resource-center/protocols-guidelines/guidelines-for-arbitrators-conducting-complex-arbitrations/_res/id=Attachments/index=0/Arbitration-Award-Slimjim-for-download.pdf.

rights of other parties to a fundamentally fair hearing.[22] Arbitrators may consider reminding the parties of the importance of not unnecessarily exposing the Arbitrator to likely inadmissible evidence (e.g. prior settlement offer) that may be unfairly prejudicial.

In appropriate cases, arbitrators should request that the parties report on their efforts to confer about such issues.

8. Although they differ in format and detail, the rules and guidelines of the leading arbitration organizations generally include a suggested list of issues for arbitrators to discuss with the parties at the initial or preliminary hearing. For example, the current AAA Commercial Arbitration Rules contain, at section P-2, a three-page checklist of matters to be considered. We recommend that arbitration organizations amend their lists to suggest discussion at preliminary hearings as to which evidentiary rules or principles shall govern or be enforced at the arbitration.[23] This discussion should extend to whether the "Rule of Exclusion" as codified, for example in FRE 615, shall apply. Until such amendments are made, practitioners should keep in mind that most lists, such as the AAA checklist just referenced, include a catch-all category of, for example, "any other matter that the arbitrator considers or a party wishes to raise." Arbitrators and parties should use this opportunity to clarify understandings and expectations regarding foreseeable evidentiary issues in the absence of a formal amendment of the organization's preliminary hearing list to include evidentiary issues.

Conclusion

To what extent the traditional rules of evidence apply in arbitration can be unclear, and parties often have expectations in this context different from each other and/or different from those held by arbitrators. We offer here best practices for arbitrators and counsel to enhance the transparency and clarity of the arbitration process regarding the rules of evidence, without interfering with the principal goals of arbitration to provide a fair, efficient, and less expensive alternative to protracted state and federal litigation.

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22 *See, e.g.*, Paul Bennett Marrow, *Arbitrators Excluding Evidence as a Sanction*, N.Y. L. J., May 31, 2016.

23 This is true even if guidance about evidentiary issues is given elsewhere in the organizations' rules and guidelines, particularly given that such guidance often is that evidentiary issues will be left to the arbitrator's discretion.

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