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*Professional/Ethics Series:*

*Understanding the Benefits  
and Challenges of  
Arbitration v. Litigation in  
Order to Maximize Your  
Potential for Success*

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# About the Presenter

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## *Howard S. Suskin*

Howard S. Suskin is a partner in Jenner & Block's Litigation Department and Co-Chair of the firm's Securities Litigation Practice and its Class Action Practice. Mr. Suskin has substantial first-chair experience representing individuals and business entities in civil and criminal securities matters, including class actions alleging securities fraud and misrepresentation claims, derivative actions claiming breach of fiduciary duty, contests for corporate control, insider trading investigations and broker-dealer issues. He serves as an arbitrator with the American Arbitration Association, and for self-regulatory organizations including the Chicago Board Options Exchange, FINRA and the National Futures Association. Mr. Suskin is an active member of the ABA Securities Law Committee, including serving as Co-Chair of the Class and Derivative Actions Subcommittee. Mr. Suskin currently serves as General Counsel for the Chicago Bar Association (CBA), and served previously as a member of the CBA's Board of Managers and as Chairman of the CBA's Class Action Committee, Bench & Bar Committee, Financial & Investment Services Committee and Securities Law Committee.

Mr. Suskin is a member of the Advisory Board of Board IQ, a Financial Times publication, and The Deal, has served as a member of the Securities Editorial Advisory Board of Law360, and serves on the faculty of Practising Law Institute. He has lectured extensively and has published numerous treatises and articles on issues relating to arbitrations, class actions and securities law, including serving as editor and co-author of the West Publishing Illinois Civil Litigation Guide, Moore's Federal Civil Motion Practice and Pretrial Civil Litigation, the Illinois Institute of Continuing Legal Education Treatise on Class Actions, and the ABA's Annual Survey of State Class Action Litigation. Members of the Leading Lawyers Network have consistently recognized Mr. Suskin's work in several areas including class actions, commercial litigation, alternative dispute resolution, and securities and venture financing law. He has been named one of the "Best Lawyers in America" for commercial litigation, and has been recognized eight times as a "Top 100 Illinois Super Lawyer."



Mr. Suskin graduated from Northwestern University with distinction, where he was elected to Phi Beta Kappa, and obtained his J.D. degree with honors from the University of Michigan Law School, where he was a member of the Michigan Law Review.

**Email Address:** [hsuskin@jenner.com](mailto:hsuskin@jenner.com)

**Website:** [www.jenner.com](http://www.jenner.com)

**Mailing Address:** 353 N. Clark Street, Suite 4200, Chicago, IL 60654

**Phone Number:** (312) 923-2604



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## Course Description

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### *Course Presentation*

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This course discusses strategies for deciding whether to arbitrate or litigate a dispute. It will address the relative benefits and challenges of arbitration vs. judicial forums and provide practical tips for understanding the differences in approaches that lawyers take in each of these forums to maximize the chances of success.

### *Course Material*

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This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



## **Course Learning Objectives and Outcomes**

Participants will learn the ways to most effectively tailor their presentation to the decision maker, depending on whether they are in arbitration or a courtroom.

Participants will develop an understanding about the pros and cons of selecting an arbitration forum over a courtroom.

To prepare the attorney to represent their client in alternative dispute resolution settings.

Participants will improve their ability to represent their clients as a counselor, negotiator and problem solver in alternative dispute resolution forums.

The knowledge level of this course is broad fundamental – new attorney or overview for any attorney.

The primary practice areas for this course are Contracts, Commercial/Consumer Law, and Litigation.

### **This course does contain Ethics/Professionalism information.**

Participants will develop an understanding about providing a service to the client and the administration of justice through the alternative dispute resolution process resulting in a reduction of the judicial caseload.

Participants will develop an understanding about the attorney's roles as a counselor, negotiator, and problem solver that can effectively reduce litigation costs through alternative dispute resolution.

Participants will develop an understanding about accessing an alternative to the litigation legal system through arbitration.

Participants will develop an understanding about reducing client legal expenses and reducing litigation discovery through an alternative dispute resolution process involving arbitration.

Participants will develop an understanding about comparing and contrasting the judicial litigation system with the alternative dispute resolution process.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

## **Timed Agenda:**

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**Course Name: Professionalism/Ethics Series: Understanding the Benefits and Challenges of Arbitration v. Litigation in Order to Maximize Your Potential for Success**

**Presenter: Howard Suskin**

<b>Time Format Hours:Minutes:Seconds</b>	<b>Description</b>
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title ARBITRATION v. LITIGATION
00:00:30	Presenter Introduction
00:02:00	CLE Substantive Material Presentation Introduction
00:02:38	Selecting the Forum
00:09:23	What Does the Contract Provide
00:15:07	Pros & Cons of Single or Multiple Arbitrator
00:20:10	Performing Due Diligence on Arbitrator Candidates
00:25:27	Arbitration vs. Judicial Procedures
00:29:46	Motion Practice
00:34:03	Scope of Discovery
00:40:47	The Hearing/Trial
00:43:07	How Hearings are Conducted
00:53:28	Opportunities for Appeals
01:02:52	Presenter Closing
01:09:21	Close of Substantive Presentation Material
01:09:27	ApexCLE Company Closing Credits
01:09:34	End of Course



## Professional/Ethics Series: Understanding the Benefits and Challenges of Arbitration v. Litigation in Order to Maximize Your Potential for Success

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**Howard Suskin  
Jenner & Block  
Chicago, Illinois**

### What We Will Cover

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- I. SELECTING THE FORUM
  - A. WHAT DOES THE CONTRACT SAY?
  - B. WHAT IS THE SCOPE OF THE ARBITRATION?
  - C. SELECTING THE ARBITRATOR
- II. ARBITRATION VS. JUDICIAL PROCEDURES
  - A. FORMS OF PLEADINGS
  - B. SCOPE OF DISCOVERY
  - C. MOTION PRACTICE
  - D. THE HEARING/TRIAL
- III. OPPORTUNITIES FOR APPEALS

### SELECTING THE FORUM

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Different considerations for federal or state courts  
Different considerations for domestic and international arbitration forums  
Is mediation an option?

### The Federal Arbitration Act

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A statute enacted in 1925 that provides the basic legal principles applicable to arbitration in the US (9 U.S.C. §§ 1-16; 9 U.S.C. §§ 201-208; 9 U.S.C. §§ 301-307). Its core principle is that arbitration agreements involving interstate or foreign commerce must be considered:

- Valid.



- Irrevocable.
- Enforceable, except on legal or equitable grounds for the revocation of a contract.

Under the FAA, an arbitrator's decision binds the parties unless the arbitration or the arbitrator was fundamentally unfair. All fifty US states and the District of Columbia have enacted arbitration laws of their own to address issues that the FAA does not address.

The FAA consists of two chapters. Chapter 1 of the FAA (9 U.S.C. § 200) contains the general principles applicable to all arbitrations that fall under the FAA. It provides that the FAA applies to any arbitration agreement that:

- Is in writing.
- Relates to a maritime transaction or a transaction involving interstate or foreign commerce.

Chapter 2 of the FAA (9 U.S.C. § 201) incorporates the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) into US law. (Westlaw, 2019).

“The Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms.” *Lamps Plus, Inc. v. Varela*, — U.S. —, 139 S. Ct. 1407, 1412, 203 L.Ed.2d 636 (2019). *Matter of Henry*, 18-20809, 2019 WL 5295056, at \*2 (5th Cir. Oct. 17, 2019)

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, “reflects a legislative recognition of ‘the desirability of arbitration as an alternative to the complications of litigation.’” *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) (quoting *Wilko v. Swan*, 346 U.S. 427, 431, 74 S.Ct. 182, 98 L.Ed. 168 (1953)). The FAA, “reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts.” *Id.* (internal quotation marks omitted). To achieve these goals, it provides that arbitration clauses in commercial contracts “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Therefore, “[b]y its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (emphasis in original). *Daly v. Citigroup Inc.*, 939 F.3d 415, 421 (2d Cir. 2019).



In reviewing a motion to compel arbitration, a court must determine: (1) “whether the parties agreed to arbitrate”; (2) “the scope of that agreement”; and, (3) “if federal statutory claims are asserted, ... whether Congress intended those claims to be nonarbitrable.” *Genesco*, 815 F.2d at 844. In accordance with the “strong federal policy favoring arbitration as an alternative means of dispute resolution,” we resolve any doubts concerning the scope of arbitrable issues “in favor of arbitrability.” *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 61 (2d Cir. 1996). In so doing, we “will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Id.* (internal quotation marks omitted). *Daly v. Citigroup Inc.*, 939 F.3d 415, 421 (2d Cir. 2019).

## Selected State Arbitration Acts

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### Florida Arbitration Act

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682.01 *et. seq.* Revised Florida Arbitration Code.

682.02 Arbitration agreements made valid, irrevocable, and enforceable; scope.—

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

(5) This section also applies to written interlocal agreements under ss. [163.01](#) and [373.713](#) in which two or more parties agree to submit to arbitration any controversy between them concerning water use permit applications and other matters, regardless of whether or not the water management district with



jurisdiction over the subject application is a party to the interlocal agreement or a participant in the arbitration.

[http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0600-0699/0682/Sections/0682.02.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0682/Sections/0682.02.html)

## Texas Arbitration Act

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CIVIL PRACTICE AND REMEDIES CODE

TITLE 7. ALTERNATE METHODS OF DISPUTE RESOLUTION

CHAPTER 171. GENERAL ARBITRATION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 171.001. ARBITRATION AGREEMENTS VALID. (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:

- (1) exists at the time of the agreement; or
  - (2) arises between the parties after the date of the agreement.
- (b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

<https://statutes.capitol.texas.gov/Docs/CP/htm/CP.171.htm>

## Illinois Arbitration Act

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ALTERNATIVE DISPUTE RESOLUTION

(710 ILCS 5/) Uniform Arbitration Act.

(710 ILCS 5/1) (from Ch. 10, par. 101)

Sec. 1. Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract, including failure to comply with the terms of the Workplace Transparency Act, except that any agreement between a patient and a hospital or health care provider to submit to binding arbitration a claim for damages arising out of (1) injuries alleged to have been received by a patient, or (2) death of a patient, due to hospital or health care provider negligence or other wrongful act,



but not including intentional torts, is also subject to the Health Care Arbitration Act. (Source: P.A. 101-221, eff. 1-1-20.)

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1867&ChapterID=51>

## California Arbitration Act

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Code of Civil Procedure - CCP

PART 3. OF SPECIAL PROCEEDINGS OF A CIVIL NATURE [1063 - 1822.60] ( Part 3 enacted 1872. )

TITLE 9. ARBITRATION [1280 - 1294.4] ( Title 9 repealed and added by Stats. 1961, Ch. 461. )

A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=1281](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=1281).

## New York Arbitration Act

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Article 75 Arbitration. <https://www.nysenate.gov/legislation/laws/CVP/A75>

Section 7501 Effect of arbitration agreement

Civil Practice Law & Rules (CVP)

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. <https://www.nysenate.gov/legislation/laws/CVP/7501>

## WHAT DOES THE CONTRACT PROVIDE?

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Bound by a pre-dispute contract to arbitrate?

Drafting a post dispute contract to arbitrate



## WHAT IS THE SCOPE OF ARBITRATION?

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What does the language of the contract provide?  
Who decides scope?

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## SELECTING THE ARBITRATOR

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Performing due diligence on arbitrator candidates  
Pros and Cons of single or multiple arbitrators

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## ARBITRATION VS. JUDICIAL PROCEDURES

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Forms of Pleadings  
Scope of Discovery  
Motion Practice  
The Hearing/Trial

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## FORMS OF PLEADINGS

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Court rules requirements vs. arbitration informality  
Understanding your audience

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## SCOPE OF DISCOVERY

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Federal or state rules of procedure  
Arbitration forum rules  
Flexibility and restrictions in arbitration forums.

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## MOTION PRACTICE

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Court rules vs. arbitrator discretion  
Strategies for making motions in court vs. arbitration  
Relative likelihood for a successful dispositive motion

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## THE HEARING/TRIAL

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In court: a judge or a jury?  
In arbitration: how hearings are conducted  
Formalities in court and arbitration

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## OPPORTUNITIES FOR APPEALS

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Federal and state rules  
Federal Arbitration Act and state equivalents  
Risks of no appeal in arbitration: pros and cons

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## Transcript of Presentation

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The following is a transcript of the video presentation. Every effort has been made to accurately transcribe the program. If there are any inconsistencies, please refer to the video for clarification.

## Arbitration v. Litigation Pros and Cons

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Hello everyone and Welcome to our presentation on considerations for determining whether to arbitrate or litigate I'm Howard Susskind I'm a partner with the law firm of Jenner & Block in Chicago will be spending the next hour discussing strategies for first deciding whether to pursue arbitration or litigation as a means of dispute resolution and assuming that you have a choice discuss how to draft the appropriate Clauses to make a proper arbitration agreement and then walking through the strategies and practice points of how to litigate or arbitrate dispute what the differences are in a 2 forums Begin by telling you a little bit about my practice and the perspective that I come to this topic with I've been practicing for 35 years mainly in the area of Securities litigation I'm in the course of my practice I've had to arbitrate disputes and I've had to litigate disputes and so I can give you a good practical perspective is from a lawyer's Vantage Point as to what the difference in procedures and ways of operating are between the two forums I'm also an arbitrator with a number of organizations including the American Arbitration Association and a number of Securities industry self-regulatory organization is like finra in the New York Stock Exchange in the Chicago Board options exchange will offer you some practical perspectives from the other side of the table what I have seen is an arbitrator that I think makes for Effective advocacy and what I think sometimes the tracks from advocacy in the arbitration for him so let's let's get started and my hope is that by participate in this program you'll come away with some real practical insights about what the differences are between arbitration and litigation and how to be most active if you are in an arbitration Forum.

## Selecting the Forum

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In presenting your case just began by talking about selecting a forum assuming you have a choice and salami to give you maybe a little bit of a big picture since here as many of you know arbitration has become increasingly for evasive in our everyday lives if you sign a cable TV contract or if your customer getting a new cell phone and if you are someone opening up a brokerage account all those commercial activities almost invariably these days will involve you signing a customer agreement that contains an arbitration clause and in most of those instances you don't have any choice if you want to get your cell phone if you want to get cable TV if you want to open up a brokerage account you absolutely are going to be bound to arbitrate you are dispute and those arbitration clauses



will contain Provisions including Nail Express waiver of a Jury Inn Express waiver of your right to participate in a class-action or you were ability to combine your particular dispute with anyone else is dispute those are basically contracts that the courts have upheld as valid or not viewed as contracts of adhesion and if you sign one of those contracts you will be going to arbitration what's assume that you are drafting an agreement as part of a transaction yourself and you're trying to determine whether or not you want including arbitration clause or just not have a clause in your contract requiring arbitration what you mean that either party would have the ability to go to court if you dispute arises you couldn't be involved in a dispute and you're debating whether or not to enter into an arbitration agreement with the party knowing that there is a dispute with the other party and besides you know determining that they'd rather have his be arbitrated by consent rather than go to court so let's talk a little bit about what the considerations are tween deciding if arbitration or litigation is appropriate interview for yourself and for your client if you're representing a client in the matter I got this assumes that you are not bound by any pre-dispute Contracting you're starting with a clean slate so let's talk about what would somebody considerations are pros and cons for determining whether or not you want to look at your dispute in court or arbitrate before an arbitration panel one of the biggest factors in deciding to arbitrate versus going to court is that when you are betrayed you have much more play and control to decide who's going to hear your dispute and particularly if your dispute involves matters of a highly technical nature crafts construction type of dispute or something involving very esoteric investment related Concepts you may feel much more comfortable going out and finding a single or multiple panels arbitrators actually have real deep experience industry knowledge in that particular area in a way that if you don't go to court you're likely going to get a judge who sees a wide range of disputes and subject matters and likely may not have very specific technical expertise in the area that your dispute involves so that's really number one your ability to control the decision-maker and and his or her background tailoring it to what you are particular needs maybe a second big motivator in arbitration vs. court is ability to keep your dispute confidential arbitration is private is conducted before a arbitration panel or single arbitrator in a closed-door conference room public is not allowed there's no publicity no one can ever see a transcript of what occurred at the arbitration panel and for many individuals and businesses involved in disputes particularly if the disputes involve proprietary confidential information having the ability to keep the dispute and resolution private becomes very important and that's obviously something that is not an option if you go to court if you're in court it's in a public space that the news media to attend are there is a public record and how many businesses many individuals who simply do not want to have that kind of publicity and they would prefer arbitration as result another consideration is cost and and speed and traditionally The View has been that arbitration is more expeditious and less expensive than quartz certainly the parties and the arbitrator have greater control over the scheduling it's generally



done by can send you normally take the timetable and arbitration in a way that in court that the judge pretty much decides how they want to proceed and it may not be that quickly particularly if you're in a quart that is in a backlog with many other cases criminal dockets off and get precedent over civil dockets because of speedy trial rule requirements and so you may find that that if you're interested in getting your dispute resolved quickly that arbitration is a better way to go I'm initially cost can be different in arbitration and in court it's it's a limit order to protect actually which is better when you go to court the judge doesn't get paid by the parties the judge has obviously paid by the by the government entity that the Judgment in employed by you don't you don't have to think about paying for the judge is part of the arbitration for the litigation process rather an arbitration you have to pay the arbitrator and some arbitrators charge a significant amount of money can be literally in the thousands of dollars per day that the party is you don't have to jointly contribute to and so you want to think about you know what the length of your hearing is going to be what kind of arbitrator given expertise may you know what they may require in terms of conversation and that is is going to be a consideration to factor in as well

## What Does The Contract Provide

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So let's consider the pros and cons of litigation vs. arbitration and again assuming that you're not required to arbitrate by a pre-existing contract what's an let's assume that you decide that you would like to arbitrate your dispute what you need to do is then draft an arbitration agreement which sets out the parameters of what the arbitration will cover and it really will Encompass several items that will will discuss now at this point first you have to determine exactly what the scope of the arbitration Clause is going to be meaning you have to decide what disputes are going to fall within the arbitration clause you really have flexibility if you're the one who's drafting that particular closet you want to really think through what is it that 15 could become a dispute between the parties that you really want to have covered by arbitration and there may be situations where you save yourself look I can't predict exactly what kind of speeds going to rise we want to have a very broad arbitration Clause that encompasses any possible is feared that might arise between parties and you can do that and and edited makes it clear with very expensive language that any dispute that arise in the future will have to go to arbitration it could be that there are some disputes that you may have with the party that you want to arbitrate but there are other categories of a potential disputes that may arise that you want to leave open the possibility of going to court and so for example if you're entering into a particular transaction with a party but your other dealings with that party you may say with regard to this particular transaction if there was this dispute rising out of our particular dealings in this specific regard you have to go to arbitration and you just find the arbitration clause in a way that encompasses only what it is you want to dispute and leave open options to go to court for other things you may say for



example any dispute between the parties for monetary compensation has to go to arbitration but if a party seeking injunctive relief which often requires no immediate very quick action that press a court can provide because of Courts used to entering temporary restraining orders are injunctions you say relief of an injunctive nature the parties can go to court it's really it's really up to you Albert rayshun is strictly a matter of contract you have to have an agreement between the parties as to what the parameters are in so the party's going to go straight back and forth and really taylor-klaus that that that suits were they believe but me most comfortable with and what makes the most sense given their particular interactions later there is a dispute and there is not agreement between the parties as to whether this particular dispute Falls within the scope of the arbitration clause or not normally the rule is that the arbitrator gets to decide what's within the arbitrator's jurisdiction courts have pretty consistently held that disputes over with a scope of the claws are going to be get resolved by the arbitrator the only time the court would generally intervene in an issue like that is if one of the parties says I never entered into that arbitration Clause it was procured by quad somebody forged my name and in that instance does the party who is seeking to require arbitration I have to actually go to court to compel arbitration and needs to be able to demonstrate that affect the counterparty did agree to arbitrate and that this is the arbitration agreement and there was no fraud and that the arbitration Clause should be enforced that's really the only instance in which your court will will will not just referred to the arbitrator but will actually a way in on whether an arbitration agreement actually exist but if it really is an issue about whether this particular dispute Falls within the scope of the Clause that something that would normally go to the arbitrator and they were treated wood decide in the first instance what's within their own Korea so it really it really behooves you when you're drafting these Clauses to Think Through in advance do you want something very broad if you don't want something very Broad and all-encompassing think very carefully about how you define the scope because that will ultimately govern what gets arbitrated and what doesn't in addition it's really important when your draft in the arbitration Clause to set out some of the new basic parameters of where the arbitration is going to look like and what the most important things to consider in the actual arbitration Clause is whether you're going to have an arbitration of one arbitrator or multiple arbitrators and it's normally spelled out in the closet sell along with other basic procedural points that are are covered at the outset between a single arbitrator vs. a panel arbitrator just like the real is pros and cons between going to avenge trial in in cord versus a jury trial very different considerations for each of those scenarios for the situation.

## Pros & Cons of Single or Multiple Arbitrator

If you have one arbitrator you really probably putting all your eggs confidence in one person to make the correct result if you have a panel of arbitrators you have



them the benefit of wisdom of three people and is normally a three-person arbitrator I've never encountered a two-person arbitration panel to have some young counterweight if you have one arbitrator group turns out goes in a way to track and you know we can put up with a lot of people are off and come more comfortable with three arbitrators particular as well discuss later because they're generally is very very limited ability to appeal from the arbitration ruling and so given that there's often a sensor that you don't want to really risk having just one person be the complete decider and knowing that you may not have reports online the preference is often to have a 3-hour Traders how do you select a travel trailer that's also something that often is advisedly in the actual arbitration agreement at the store some arbitration agreements provide that the arbitration will be conducted by a recognized arbitration organization that will have procedures for selecting either the one or multiple arbitrators workout Racing Association for example which is an organization that I don't have litigated Robert rated matters before as an advocate lawyer and also I serve as an arbitrator for them they have very very specific rules about how are patricians are conducted procedures arbitrators selection and many people are very comfortable just having an arbitration Clause the provision saying that the arbitration will be conducted in accordance with the rules of the American Arbitration Association even though it's generally best to specify what kind of rules of the of the AAA because the AAA has a commercial arbitration rules that specific rules for labor and employment disputes and have supper rules for example for construction disputes so it's a good generally to think about having a recognized organization be the presiding over your arbitration it will enable you to have already pre-set rules that we followed without you having a completely reinvent the wheel in arbitration clause and coming up with all the rules and parameters which could be your very very onerous if you try to do that but even if you in a ReliOn a form like the Triple-A or jams to be your arbitration Forum you still need to make some basic decisions including will be before 1 arbitrator or multiple edits before multiple how are they selected some some parties like to have a situation where the arbitration for just provides a list of eligible arbitrators and the parties select them and we'll talk in a moment but how you go about selecting them or other parties like a situation where each side selects an arbitrator and then the two arbitrators select the third arbitrator and that has pros and cons in it too because event instance is often a sense that each party is selected arbitrator is somehow the whole into them and it usually is not such a good thing because you often want a panel that's completely neutral completely independent and it changes the dynamic a bit if each party gets to select one and a two of them could select the third it's done but it takes a little little bit I think it might experience from the eve the view of impartiality because you know his Advocate you're mindful that you're arguing before one person who you selected and you're arguing before one person to the other side selected so I would think carefully about going that route often in my view is best to just let a recognized arbitration Forum administer the arbitration they collect the fees they said helps up the scheduling they will help



you provide the location and it's just much much better I think to have an organizing framework do that for you rather than try to Mr. How to complete Slade and try to manage everything totally on your own.

## Performing Due Diligence on Arbitrator Candidates

One thing that is in my experience is very very important is to do due diligence about potential arbitrators normally if an arbitration Forum will provide a list of eligible arbitrators the parties in many instances will separately rank the arbitrators in terms of each party's order of preference for who should be selected and the arbitration forum highest ranking Additionally you will often have an opportunity to properly strike somebody from the list if you you know what a reason don't want that person to be eligible to do that effectively you have to do diligence where was that mean it means in my experience I work at a larger firm so when I get a list of eligible arbitrators that organizations proposed I will send an email out to all my colleagues and ask if anyone has had experience with this list of of arbitrators and I'll get the feedback and declined figure out who we think is going to be the best fit if you're at a smaller shop and you don't have access to in a wide range of colleagues you you want to do internet searches you want to get as much information as you can about what does arbitrary as background is our weather for example if you're involved in an employment-related arbitration dispute you don't have a spa most of their career on management side I have a word for labor unions no one is much about their background will give you a sense just like you would do more deer in a jury box gives you a good sense of is the sun blonde who at a minimum will hear the case fairly and objectively and candidly you know how do you think will because of their background be somewhat more sympathetic to your argument you obviously want to do that just like you would do that and voir dire but it requires taking the arbitration selection process very seriously very methodical and make sure that you due diligence on the arbitrator right off the bat before we leave the topic of drafting your arbitration clause in determining you know what the Forum is going to be what the number of arbitrators that can be horrible tration selection goes you mention one other issue to think about in connection with drafting you arbitration clause and that's in thinking about whether before the party is can go to arbitration you want the parties to have an opportunity to mediate their dispute and many are how many commercial contracts will have a mediation provision that is tied into an arbitration clause and let's talk for a moment about what that means what mediation is and how that's different from arbitration if you have a mediation clause in your contract as a precondition to going to arbitration what that means is that the parties have to make an effort to try to settle their dispute before formally taking it to arbitration and having a a claim actually launched with an arbitration Forum mediation is different than arbitration mediation is an effort by the parties to settle arbitration by contrast is an adjudication process it's having a decision maker make the decision for the parties about what the



outcome is going to be a winner or loser often times in connection with an arbitration Clause you'll have this mediation Clause it will say prior to filing an arbitration claim the parties are required in good faith to participate in mediation there may be some discussion in the closet in the contract of how a mediator is selected a mediator is never the same person in my experience who is the arbitrator in part because the mediator will have exported Communications with each side and attempt to try to settle the dispute an arbitrator is like a judge never has ex parte Communications with one side to the exclusion of the other but including the mediation Clause because oftentimes it is just by portion of parties to sit down and to try to see if a resolution can be had over this dispute you cannot avoid what would can be a very costly you know some arbitration process later down the road see you often see those two kinds of Clauses combined but understand that the processes are very very different settlement vs. adjudication in mediation vs. arbitration no no blending of the roles of mediator vs. arbitrator but many parties you know like to have that two step process as an effective way to ultimately see if a resolution can be arrived at sooner

## Arbitration vs. Judicial Procedures

Let's assume that you are committed now to arbitration and want to get the process going generally an arbitration proceeding starts with the filing of a statement of claim very similar to what the filing of a complaint would be in court in terms of it being the first move for the two forms of a pleadings are actually in my experience very different a complaint has as many of you already familiar with involves you know reciting in numerical paragraphs what each cause of action is follow your procedure generally by what the factual background is of the case you have a request for a request for a jury demand or not or what is a very formalized document that in the federal rules for example you know where you have notice pleading under related has very very specific rules about what the complaint should look like what's included in the complaint if you have a blood count rule 9 B of the federal rules requires specified allegation are the four different from a statement of claim often is a narrative it looks more like a brief in some instances than a complaint and the reason for that is you have to keep in mind who your arbitrator or arbitrator is might be often times arbitrators aren't lawyers they could be industry experts in a particular area and so you don't if you're an arbitration you don't want to have formalistic legal document that may not resonate with your audience the arbitrator instead you may want have an area that basically tells your story and a lustful on my way but maybe a more engaging interesting way that you think will capture the arbitrator's attention I'm so it's different in arbitration there aren't rules like 9 be there require a specific allegations about fraud of how much more detailed way and it can be much more informal and so you want to be thinking about and prepare pleadings you know who you are demons is and understand your audience and realizing that you don't really have formalistic rules in the same



way that you do in court in court you'll have very specific procedures for filing an answer or a motion to dismiss or Russia for more specific pleading that's not really how it's done in arbitration an arbitration you do have an opportunity to respond and you should respond to the statement of claim but again and it can be in a narrative form that even if your claimant the girl in the plaintiff files something that looks like a complaint that has number paragraphs that doesn't mean that you're restricted simply to admitting or denying the specific paragraph you can respond with a narrative brief if you think that's going to be more effective and and more helpful and telling your story and so that's something that you you need to think about you no understanding of very different audience may not be who is legalistic and it may not be effective to write you know I crumble answer in the same way to make sure that you're covering you know all of your potential defenses in some fashion so that the other side doesn't claim that you waved particular defense first and again it's more of a narrative in many instances that's how much a formal document pleading in the way that you would mean cord much more flexibility in arbitration.

## Motion Practice

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Another big difference between chord and arbitration is with regard to motion practice and in court we know that in many instances the very first thing that the defendant will file will be a motion to dismiss asking the court to cut off the case on the grounds that it doesn't start a claim and and this was seeking an adjudication of the case should be dismissed at the outside but is not how arbitration works the ability to file a dispositive motion in arbitration is very very limited and and we talked a few minutes about the very narrow ways in which an arbitration award can be reversed at one of those ways is if one of the parties doesn't get an opportunity to present their case and so there is very much a bias allowing dispositive Motions like a motion to dismiss or motion for summary judgment the prevailing view is that the water be hearing. To go to a hearing on the merits where are the arbitrator hears evidence presented by both sides and I will tell you is part of my training as an arbitrator that's something that over the years has really been drilled in to a large degree that might dispositive motions are really frowned upon and should be granted in very very limited circumstances in most circumstances arbitrators are are imbued with this background of I'm just going to let it I'm still here the evidence I'm going to conduct a hearing I'm going to give each side of their chance to present their arguments and their proof and I will decide at the end rather than cutting off 140 from presenting their hearing on the merits consideration of dispute something that you really don't want to agree to arbitrate if you are a descendant and you can see a dispute coming on at Verizon and the other side says what's arbitrate does rather than go to court if you think for example that you have a very strong statue of limitations defense that you think would be a dead man winter if it went to court you might want to really think twice about entering into an arbitration agreement because even in you



know an instance of something you may think you know this is a clear failure to State a claim and it's obvious that the claimant you know can't proceed you may be surprised to find out the arbitrator says well let me hear another hearing and I'll make a decision then and your ability to short-circuit the matter and get a quick resolution on a motion to dismiss for motion for summary judgment really could be lost if you if you go there were traction route rather than just say no I want to go to court so that you want to think about that as a strategic decision at the at the beginning having said that if you are an arbitration and you really think you have a compelling dispositive motion I'm not suggesting that you abandon it I am suggesting that you give the arbitrator a heads-up that you think there is a narrow ground on which the arbitrator can rule without having a cure know a lot of evidence you can meet you in some respects your motion to dismiss as a teaching opportunity for the arbitrator that even if the arbitrator and is uncomfortable denying the claimant a full hearing at least you're having an opportunity to educate the arbitrator is to potential defects in the plaintiffs claim and so you may still want to pursue it but you have to go into an understanding and explaining your client about the likelihood of getting this positive Motion in arbitration is is very limited just given the general training and philosophy behind arbitration futuristic give each side of their chance to present their their arguments and their proof out of hearing and not in that profit process.

## Scope of Discovery

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Let's talk about another significant difference between arbitration and litigation in terms of how the life of the dispute resolution goes in it pertains to discovery which is very different in arbitration vs. litigation that may again inform your decision about what what do you want to pursue the arbitration course if you have that option to choose as you know in federal court or in state courts there are very specific to find Discovery mechanisms including request for production and Rocket Rory's depositions requests for admissions and the rules in the Unicorn that you're in will specify exactly what tools are available to you in Discovery and and how you go about using those tools arbitration is very different generally and arbitration Discovery is very very limited normally it is limited to the party's exchanging Rolla documents in response to request for production generally the arbitration rules do not recognize in rocket stories do not recognize depositions Hardee's because arbitration is you know an agreement between the parties to to have dispute resolution in a particular way the parties are free to agree to whatever Discovery they would like but they have to agree and if you have one party that says I don't want any Discovery to relieve the defendant and you have the claimant who's like I need Discovery you have you have a a real impasse they'll have to go before the arbitrator to the side and in many instances parties cannot agree the arbitrator's off and will not allow Discovery because the rules don't expressly provide for it and the arbitration agreement presumably didn't expressly provide so a couple things never going to



be worn if you're envisioning that you're going to be the claimant before dispute arises you may want to have in your arbitration Clause express provision setting forth with the types of Discovery you're going to allow conversely if you think more likely you're going to be the one or clients going to be the one to be sued not want to agree in the arbitration Clause to any provision concerning Discovery in simply refer back to the rules of the governing form lycanroc an Arbitration Association in arbitration you know when you can normally get documents from the other side but you may not be able to get documents from third parties courts have been a little bit of across-the-board on the issue of whether subpoenas can be issued directing a non-party to produce documents in advance of a hearing arbitrators do have subpoena power under the federal arbitration act which sets for the federal rules governing arbitrations generally and there are State equivalents for the states under the uniform large arbitration act Which Wich imbue the arbitrator is with the power to issue subpoenas but often those are powers that the arbitrator's seed directed toward compelling a party or non party witness to appear I'm at the hearing maybe you Pierre and bring documents to the hearing but their Courts are there arbitrators don't have the ability to issue a subpoena subpoena for pre-hearing exchange of documents for Discovery and so did the difference between chord and arbitration with regard to how Discovery is conducted is a real big determining Factor about whether or not you want to arbitrate or not if you are a party who in order to prove your case or possibly prove your defense you feel that you really are going to need a testimony of witnesses who may not be computer may be outside the jurisdiction may not be able to attend the hearing you may really want to resist arbitration because you may not get your proof in before the arbitrator because Discovery is so limited and you wouldn't be able to deposition of somebody you know outside the jurisdiction to meet you may not be able to take a deposition at all and arbitration so differences in Discovery huge distinction between core and an arbitration and you really need to be strategic before you sign the document compelling arbitration to think about it is is arbitration ruling the right path was are we going to be so hindered in our ability to gather relevant evidence that it just it's just not something we can we can live with so think about that I know very carefully maybe a good example of why you know now as I mentioned at the outset when you send your cable TV customer agreement or the cell phone agreement or you open up a brokerage account that's why the you know many corporations are requiring consumers to enter into those agreements they don't want to be subject to burn some expensive Discovery is part of a hearing they want to limit the amount of information that the plaintiff will have in bringing the claim and so that's that's a huge disadvantage potentially if the other side has all the materials are there you know outside Witnesses who have a lot of information and then you may not be able to get it in arbitration so think really carefully at the outset about can you live with limited Discovery in arbitration assuming you have a choice that was an arbitrator litigate and if you are in a where you bring your case that you may be very limited in terms of gathering information and may not be in a



practical free to bring the case without having the ability to access information that you don't have that you really need to

## The Actual Hearing or Trial

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Let's talk about how the actual arbitration hearing will compare to what you may be familiar with in terms of a court bench or jury trial in practical purposes analogize and compare an arbitration hearing versus a bench trial because obviously you know a jury trial is very very different from bench trial in from arbitration again remind you to be strategic and terms of thinking about do you want to enter into an arbitration clause in the first place if you have that option if if you're an employee for example and your employer is giving you an option of entering into a 00 Patrician Claus or not or if your lawyer representing employee and there is not currently in arbitration Quadra given the option think about you know what kind of form do you want to be in many plaintiffs lawyers I really want to be before a jury because they feel that they may be more sympathetic to an individual clients particular circumstance and obviously you're giving up that access to a jury if you go the arbitration rap if you're involved in a personal injury type matter again you may want to think about what audience is going to be most sympathetic to your client and that may affect your decision about what you want to give up the right to go to a jury in favor of arbitration but in terms of the practicalities of arbitrator vs. of single judge there are significant differences there whether you go in arbitration or whether you litigate in court.

## How Hearings Are Conducted

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Let's begin with a discussion on the physical setting of how the hearings conducted court and Court obviously you're in a courtroom it's public as we mentioned at the start open to anyone and there are you're very specific you know codes of behavior that are expected of the participants in court and and you are you are really subject to whatever the schedule is that the judge has and will impose and it's obviously very formal and there will be a court reporter and it's just there's a whole mechanism that many of us as lawyers are familiar with these different it normally is held in a conference room that conference room could be at a neutral location like a hotel no conference room or he could be hosted by the arbitrator at the arbitrator's office and and personally when I'm the arbitrator I really like to do that because I have all of my you know resources available to me and during break so I can just go back to my office down the hall and I'm not in a you know strange location so many arbitrators will offer to host the arbitration at in one of their offices if it's you know a single arbitrator or multiple arbitrators one of them will agree to be host is possible so that when the party's will offer to post Patrician but my experience it is a party I would be happy to host is going to just like every traitor to walk back to the office on the hall the stain is on their home turf you were one think about the green to that a few times before you



agree to it if you're not the hosting party because you know being in a unfamiliar where you actually in the enemy's Camp may not be the best location for you and your Witnesses or may not be real privacy for you during breaks he may want no one to really let me just want to have it be done at a hotel which is a neutral site something about that it's going to be a conference room you're not going to have a court reporter unless the parties agree that they want to transcribe and it will be a much more flexible schedule and times during his arbitrations you know the lunch break you can pretty much take a break whenever you know the parties agree it isn't so rigidly man with a judge's schedule is and what other case of the judge might have on their docket on that particular day it's a little bit less formal and arbitration General is average height around like the parties to take the jacket off and it's not like totally informal but it's less so clearly less so than in court referred to the arbitrator as mr. Smith or mrs. Jones you wouldn't refer to the arbitrator or by their first name so don't get too informal you don't necessarily have to record Marvel trailer is your honor I don't like that when when party is referred to me that way cuz I'm not a judge but it is a different Dynamic than you would have in court where they're very very rigid formalities I mean you could have you ever true say how many days do the parties want try to put it all in consecutive days of asthma complex arbitration it could be scheduled over series and once again very different than what you experienced in court would generally bench trials are done in a condensed no card out time in the judge's schedule another significant difference between arbitration and court is Noah what's the ruling going to look like I'm after the hearing in court if you're going to bench trial you can have several things to creep have the judge read the ruling From the Bench now for notes and pissed right if it's recorded onto a transcript and that's your that's your ruling the judge could issue a written opinion and and that will be your ruling arbitration is is is differin arbitration can have a ruling in one of two ways you can have either a reasoned award which means that the judge has to give a written document the judge's reasons for fighting for a party so a judge would write or an arbitrator would write a school in a judge would do you know what a written opinion that's it for the nature of the case in the background and we'll give the guildsmen ruling until recent award by an arbitrator is very similar to that but you can also have what's called an unreasoned award doesn't mean that it's unreasonable it just means that it doesn't give reasons and so an unreasoned award could simply be a one-page document William true size after hearing all of the evidence I find for the claimant in the amount of \$100,000 and that's it there are no reasons given an end there are pros and cons to to both of those as again we'll talk about in a few minutes there are very very limited abilities to appeal one so you know the hope that if you're the losing party that the arbitrator will have made an incorrect statement of the law or somehow you know wrote something that's not factually soap I can give you a great chance of an appeal that's not a realistic view in arbitration as we'll talk about surely they're only very very limited grounds on which an arbitration award can be reversed, that's different from Court where you can pick apart the judge's



opinion and show that it's not supported by the law or not supported by the evidence and get the Appellate Court to agree with you can't really do that in an arbitration as an arbitrator I prefer unreasoned Awards because it's less work on other you to get paid by the hour or so and I suppose some of the Traders like reasonable words cuz they can build for the extra time I'd like to put into it but you know what I can pros and cons if you're the party I don't know that really makes a lot of sense to have a reason to worry because it's very unlikely you're going to use it for an appeal but it may be something that you feel and would be helpful for the clients know why the client won or lost I am a shape future business practices and so someone who's really in Grant a client's you know where we prefer to have a reason to work but again you're going to have that choice going into the hearing unless the Restriction Claus says specifically one reason to reason award in the arbitration clauses do specify which way the awards going to be issued in the arbitrator test follow whatever the parties agree to in their arbitration Club but that's against a big difference arbitration vs. court and and something to think about what other think I should wear events leading up to the award is that in itself is is going to be a presentation of evidence by both sides and it's the base number to Havertys going to make their decision but there's going to be a big difference between arbitration and cord in terms of how that presentation of evidence occurs in court as it is we all know you are bound as lawyers by the rules of evidence and and so there are you know many types of potential evidence that could get excluded from court because for that was hearsay applying arbitration arbitrators aren't Bound by Rules of Evidence and so there is much more of a tendency to allow informal types of testimony to come in there wouldn't be really allowed in court and dynamic I'm in that regard if you know your number tration and the other side is presenting evidence that is like blatant hearsay and an otherwise when we allowed you can certainly object and pointed out you're not going to succeed in excluding it but at least you're informing the the arbitrator that there is a lack of credibility to what is being presented and and hopefully alert the arbitrator not to give it a significant weight however it again will go into the further a few moments with regard to appeals arbitrators are imbued with in their training with a sense of just let it out let it it just let the evidence in and they were trained will consider or whatever wait to put on it that's a very typical comment that I returned it will make during the course of the hearing because it's the purposes of very limited rights of appeal an arbitration one of those is the exclusion of evidence if if an arbitrator said her party know I'm not going to let you present this particular evidence if you try to present that's actually a potential ground for vacating an arbitration award and so again to let you in on some of the secrets of arbitrators and how we're trained there's a lot of of instruction given to arbitrators and training of don't exclude evidence let it in and may take a little bit more time up in the arbitration hearing but let it in you can never be reversed for letting evidence and you can only be reversed if a court feels that you excluded evidence to the detriment of a party and it presented that prevented them from presenting a full and fair hearing so



again big difference between how cases are presented in court and how cases are presented in arbitration.

## Opportunities for Appeal

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So let's conclude by talking about opportunities for appeal an arbitration vs. court and that is a huge distinction between the two forms and again it's something he want to think about in deciding whether or not to arbitrate or to litigate explains why in your cable cell phone brokerage account and many other places in commercial life companies are requiring arbitration clauses cuz they want to they want to put it into disputes and they want to have it be as limited as possible but there's risk there for both sides because giving a very narrow ground so we'll talk about a moment aerolite that are permitted for peels in arbitration they're very very limited there's a significant risk but if you have an arbitrator who grants Aug award for the claimant you know that cable company May really grab having agreed to arbitrate knowing that there's very limited rights of appeal and likewise if you know you're the claimant and you lose your case you're pretty much done when it comes to arbitration there just is not the ability to to go to court and seek for the review so what were you is is prescribed by the federal arbitration act in by the analogous a state uniform arbitration act to permit appeals in in the following very very limited circumstances number one where the arbitration award was procured by corruption fraud or undo means it's pretty Limited in my experience arbitrators are people of great integrity they are within organization like Mission they are significantly that it in terms of their background and it's extremely rare that he would be able to show that an arbitrator was susceptible to corruption fraud or or some kind of undo means of influence is so extremely extremely rare second weather is evident partiality or corruption in the arbitrators and again this very very rare arbitrators are required once their contact info for possible service is an arbitrator required to disclose any possible connection that they or their family or their companies have had with any of the parties or any of the witnesses and and so it's important for you as a lawyer representing a party to make sure that you have fully disclosed identities the parties are and any of the witnesses who you he will be called or refer to during the course of the hearing because those list at the outset are given the arbitrator's arbitrators are required to fill out an extensive questionnaire under oath under and under AAA attesting that they have no connection at all with any of the parties or any other Witnesses but turns out that an arbitrator did have some secret conflict and you're able to find out about it after the fact you may have a basis to seek award but that's very very unusual and there have been instances incidentally where a party learned that a arbitrator actually did have a connection of the arbitrator didn't disclose but the party and their lawyers waited until after they got an adverse ruling and then then try this again appeal but they weren't successful because the court said what if you knew about a potential conflict over some kind of connection and you still went ahead with the arbitration hearing you waved your ability to later complain



about it so you know what your banking on is is discovering some undisclosed conflict after the whole hearing is very very rare very unusual for that to occur for ground on which you can see the appeal in this goes back to him some of the points we were talking about is where the arbitrator's were guilty of misconduct in refusing to postpone the hearing of constipation cause or in refusing to hear evidence pertinent material to the controversy or any other misbehavior by which the rights of any parties have been prejudiced so we we talked about how you don't cover Trader says I'm not going to let you present that evidence I don't want to hear it what is opening up the door to a potential appeal ever say that they are you doing much more inclined to say shredded and I'll consider it a little bit of a wait I think it's it's appropriate later but if you're in one of the situations we arbitrator has probably cut you off from presenting your evidence you if you want to make a record of that having happened and you may have a basis for an appeal with the award goes against you what is it out in the program I just read an arbitrator unreasonably refuses to give one side of the continuance that can be reversed just as I could be reversed in court of a judge said he know I don't care that your witness you know just fell down the stairs and can't come to court today we're going forward with this trial and too bad if you can present your proof probably be a decent ground for the peel and it would be likewise a decent Clancy to vacate an unfavorable award if an arbitrator did that having said that I will tell you again it's part of our training is arbitrator and we are encouraged to be very flexible with regard to scheduling and not coming down too hard on the party's if a party says or the larger size of a schedule conflict I can't do it during this day can we move it to another day it's a very rare that an arbitrator won't go along with a reasonable request for continuance and it doesn't mean that you I need to take advantage of that because you know you don't want to return to get annoyed with you and feel that you're not being cooperative but but notice a difference between forward judges as we know will up and say you know he hears your trial date I expect you to be there and we'll pull off and proceed with it and finally it was a provision in the federal arbitration act as if you can seek to make it an award if the arbitrator has exceeded our powers or so imperfectly executed them in a mutual final and definite award was one if an arbitrator explain the beginning of an arbitrator determines what the scope of arbitration Clause is but it's so blatantly wrong the arbitrator so the party's after I return something that is just by its terms just outside the struggle with claws why's he may have a shot at getting a court after the award to review that in addition if the arbitrator's would say using an example of it earlier if the quad says only compensatory relief is to be traded that injunctive relief has to go to court if during the course of the arbitration proceeding the arbitrator says I'm an issue an injunctive order right now I mean that they may well have exceeded their powers and I could be a ground and which you could seek an appeal from the court Elsa doll that the mere fact that a judge and we know that can be a basis for seeking an appeal from a bench trial generally is not a basis for seeking a vacating an award of an arbitrator sure gave and the arbitrator relied on a lot of cases that's been



overruled and it's not really good Lonnie Moore Blue Door not the snack and real basis for you to seek to vacate the arbitration award making a mere error of law mistake of law is generally been recognized as not a basis to overturn an arbitration award and so I got to go back to what we talked about earlier which is really a traitor will you feel is experienced in your particular area who for whom there is less likelihood that they're going to get derailed and go off on some principal law that is incorrect so I understand that you'll get there I'm sure to make that kind of mistake in all likelihood you're not going to be able to use it as a basis to seek an appeal and a really maybe a very limited in terms of how you can proceed from there so we we've covered in this presentation so far what what I consider to be the key distinctions between arbitration and court and what I hope for you will be practical considerations of deciding whether arbitration is better for you vs court if you have a choice and if you don't have that choice and if you are bound to arbitrate to understand what the benefits and limitations are of arbitration forums and how effectively to you no use them to your advantage in terms of crafting your narrative in the claim and thinking strategically about you know how to present your case let me conclude by giving some maybe final practical considerations and I'm speaking now much more from my perspective as arbitrator to give you a sense of specifically things to think about about being the most effective Advocate that you can be I think above all in my experience credibility really really matters I have found all over the year is serving as an arbitrator that there have been times when I just feel that the lawyer has just not been no completely credible you know with me and terms of you know either what the history of the preceding has been or presenting particular Authority or evidence that the really is not supported in terms of what they're saying above all in my view credibility is extremely important and in some lures I think they intend to think that because you're not in court and you're not subject to contempt of court sanctions that that's somehow that more information Leti can allow for Less Integrity or less credibility and nothing from the truth I think arbitrators tend to view themselves as a trying to reach the right result and and are put off by a sense that they're being not been given you know full Candor by the party so that's new in my view something to always keep in mind I would also say that resonates with me very much as an arbitrator is a sense of whether or not counsel for the parties are being cooperative in the process or whether they're being disruptive in some fashion I will tell you that one of the things that most arbitrators me included dislike the most our Discovery disputes it's just it is very frustrating that the parties can't just work it out and and you as an arbitrator often are are drawn to a conclusion that will if you're not working it out it's got to be somebody somebody is to blame for this and an ultimately you know what's number to intuitively you you do come to a sense that one side is trying to be reasonable and one side is not an end that can really have significant consequences for the party that's not in terms of the arbitrator to the viewing generally their presentation with disfavor I mean sometimes you have situations were both parties in a week away with they're both equally bad and then becomes



a pox on both of them and you're still trying to reach the results you have to reach you know they're the correct result there you don't want to be no the party viewed as being know the least credible or the most disruptive it just it is not good just as it would between court it's true in arbitration but because of the informality I think some lawyers think that they have more more rope to go in that regard and it's just not true at all I'll leave you with in terms of Court vs. arbitration is this judges in my experience feel very Bound by President and by the evidence and they try to reach you know the correct result based on what the law requires and what does the evidence shows I think most arbitrators you that similarly but an arbitration there's an additional element and that is equity I think arbitrators are again as part of their training and fused with the notion that yes you have to try to apply the lawn and you have to listen to the evidence in the proof and enrich the right result what caused the Rules of Evidence are not so strict and because you do get your say and you do get your narratives in the paperwork that go beyond the scope of what ordinarily would be permitted in court or is an infusion of a sense of fairness and Equity is part of the ultimate arbitrator is a goal and and so my final point to you in and thinking about presenting your battery is obviously present the law obviously present the best proof of the facts that you can to support your case but don't forget to infuse your presentation with a sense of equity and fairness you want the arbitrator to feel that only that they are reaching the correct result by the law and the evidence but also that they're reaching the fair result and even if the law is maybe against you in a particular way or the other than this is not you know as compelling as you would like I think the infusion of a sense of fairness and Equity can actually help your client in terms of moving the arbitrator more toward your side and so don't you know it don't feel that you're limited in the way that you are in court in arbitration arbitration is a very effective dispute resolution process for all the reasons we talked about but it has the additional benefit in some instances of allowing you to make a presentation of fairness and equity and Annette that ultimately strategically May compel you to want to go to arbitration because you think you'll get a more complete here has made better I'm in that for mini wooden Court I wish you all the best in whatever form you pursue Court arbitration and a thanks for listening today.



## Resources

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### Resources Specific to this Course

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#### *ARBITRATION ORGANIZATIONS*

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For an additional list of arbitration organizations see Georgetown Law Library, [International Commercial Arbitration Research Guide](#),

AAA (American Arbitration Association) [AAA Website](#)

CPR (International Institute for Conflict Prevention & Resolution) [CPR Rules for Arbitration, Mediation, and International/Other](#).

FINRA (Financial Industry Regulatory Authority arbitration, subject to SEC oversight) [FINRA Code of Arbitration Procedure](#)

ICC (International Court of Arbitration) <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/>

ICDR (International Center for Dispute Resolution, the International Arm of the AAA) <https://www.icdr.org/>

ICSID (International Centre for Settlement of Investment Disputes) <https://icsid.worldbank.org/en/>

JAMS (formerly Judicial Arbitration and Mediation Service) <https://www.jamsadr.com/>

### Resources for the Legal Professional

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ABA Center for Professional Responsibility - [www.abanet.org/cpr](http://www.abanet.org/cpr)

Chicago Bar Association - [www.chicagobar.org](http://www.chicagobar.org)

Commission on Professionalism - [www.2civility.org](http://www.2civility.org)

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - [www.ilbaradmissions.org](http://www.ilbaradmissions.org)



Illinois Department of Financial and Professional Regulation - [www.idfpr.com/default.asp](http://www.idfpr.com/default.asp)

Illinois Lawyers' Assistance Program, Inc - [www.illinoislap.org](http://www.illinoislap.org)

Illinois State Bar Association - [www.isba.org](http://www.isba.org)

Illinois Supreme Court - [www.state.il.us/court](http://www.state.il.us/court)

Lawyers Trust Fund of Illinois - [www.ltf.org](http://www.ltf.org)

MCLE Program - [www.mcleboard.org](http://www.mcleboard.org)

