

# Ten (or More) Worst Mistakes Lawyers Make in Arbitration [Shawn Aiken]

## 1. Introduction

1.1. What are the benefits of arbitration (and therefore how do we recognize mistakes)?

1.1.1. Choice of neutral forum and decision-maker

1.1.2. Finality of dispute

1.1.3. Reliance on enforceability

1.1.4. Party autonomy

## 2. Failure to understand that a body of substantive arbitration law exists.

2.1. *For example: Is the agreement to arbitrate enforceable? Know the Clark case.*

2.2. Costs issue: *Clark v. Renaissance West, LLC*, 232 Ariz. 510 (Ct. App. July 30, 2013).

2.3. Discussion:

2.3.1. Arizona Court of Appeals affirmed trial court's finding that an arbitration provision was unconscionable because the cost to arbitrate would be prohibitively high. Here, \$22,800 in upfront costs. One of the few courts to rule that the cost of arbitrating makes an arbitration agreement unconscionable.

2.3.2. After hip surgery, John Clark was admitted to a skilled nursing facility operated by Renaissance West, LLC ("Renaissance"). Several days after his admission he signed an all disputes arbitration agreement. Later he filed a complaint against Renaissance for medical negligence and abuse and neglect of a vulnerable adult under Arizona's abuse and neglect statute. Renaissance moved to compel arbitration and the trial court held an evidentiary hearing. Mr. Clark presented evidence that the fees to arbitrate the case would be \$22,800, and testified he was retired and lived on a fixed income and could not afford to arbitrate his case. The court of appeals affirmed the trial court's ruling denying arbitration as substantively unconscionable.

2.3.3. The court held that an "arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights. The court stated that the party opposing arbitration must demonstrate (1) specific facts showing with reasonable certainty the likely cost of the arbitration; (2) an individualized showing as to why he or she would be financially unable to bear the costs; and (3) whether the arbitration agreement permits a party to waive or reduce the costs.

2.4. Overlooking the substantive law of arbitration: other quick examples.

2.4.1. Alabama recently joined the 8th Circuit in holding that AAA rules permit the arbitrator to decide arbitrability

- 2.4.2. FAA or RUA (does it matter?);
- 2.4.3. agreement to restrict judicial review (probably against public policy);
- 2.4.4. distinction between waiver of class action and representational / associational / collective actions;
- 2.4.5. consolidations;
- 2.4.6. disclosure by the arbitrator (expert service; concurrent service; professional background); and,
- 2.4.7. enforcement in the proper jurisdiction.
  - 2.4.7.1. *does the award refer to interest (unenforceable in Muslim countries (e.g., Saudi Arabia))*
  - 2.4.7.2. *is the award enforceable under the FAA : In SwissMex-Rapid, SA vs. SP Systems LLC, Cal App 2nd Dist. B238954 it was held that the procedural aspects of the FAA do not preempt state law, only the substantive aspects. SP Systems objected to enforcement of an award because the arbitration clause did not specify that it could be judicially confirmed. FAA section 9 requires the parties to agree to confirmation by a court in order for the award to be enforceable. The court held that because the arbitration clause incorporated AAA rules and R-48 (c) provides that parties "to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof," the parties consented to enforcement of the award by a court of competent jurisdiction.*
  - 2.4.7.3. *At least one court has ruled it is not necessary for an arbitration clause to expressly state "a judgment of the court shall be entered upon the award," language from FAA §9, for an award to be enforceable under the FAA. See Qorvis Communications, LLC v. Christopher Wilson, 549 F.3d 303 (4th Cir. 2008), which noted comments in Hall Street to the effect that §9 did not have to be satisfied by any magic language. Rather, courts must enforce arbitration awards "so long as the parties expected judicial enforcement of their agreement." Best practices suggest that the language should be included.*
  - 2.4.7.4. *With acknowledgments to William J.T. Brown, let's recall basic principles related to FAA section 9: If there is a foreign party in an arbitration sited in the United States, it is an international arbitration and FAA Chapter 2 applies. That means the federal court has jurisdiction, including removal jurisdiction that may be exercised right up to "trial," but the parties could decide to proceed in state court, which would be bound to apply federal law favoring arbitration but not necessarily federal limitations on arbitration. FAA section 208 provides for application of all provisions of the domestic FAA, Chapter 1, except any that are in conflict with the New York Convention. The Second Circuit has held that the provision in FAA section 9 that judgment shall*

*be entered on an arbitration award only if the parties have so agreed in their arbitration agreement is in conflict with the New York Convention, and thus such a consent to judgment entry is not necessary in an international arbitration agreement. Phoenix Aktiengesellschaft v. Ecoplas, 391 F. 3d 433 (2d Cir. 2004). The second Circuit reached the same result a few weeks later in Stone & Webster v. Triplefine, 118 Fed. App. 546 (2004). In domestic arbitration the section 9 consent to entry of judgment is usually required, although this is a trap for the unwary drafter of arbitration clauses and the AAA has helpfully inserted an entry of judgment consent in their commercial rules to benefit those who agree to arbitrate under those rules. However, there is no such helpful provision in the ICC rules or in the ICDR international rules and thus those who arbitrate under such rules have to look for cases such as Phoenix Aktiengesellschaft to make their arbitration award enforceable in federal court.*

- 2.5. Your quick (partial) solution to this no. 1 mistake: read Bruce Meyerson's article and the RUAA.
3. Overlooking the power to select your arbitrator: why forego the one certain advantage of arbitration?
  - 3.1. Parties often choose arbitration for wrong reason (sure, it may be better, faster, cheaper); the only certain advantage is the power to choose your decision-maker.
  - 3.2. How to do it?
    - 3.2.1. At the American Arbitration Association, contact your case manager and influence the AAA's composition of the list; or,
    - 3.2.2. Agree with your opponent on selection of the arbitrator (best method).
4. Arbitrating before three-member panels: the surest way to drive up expenses.
  - 4.1. The arbitration clause may require three- member panels, but give thought to whether your client needs that much horsepower.
  - 4.2. Do the issues involve technical expertise?
  - 4.3. Does the amount in controversy justify the expense?
  - 4.4. Is time to resolution important?
5. Failure to ask: do we move to compel arbitration, dismiss, or both?
  - 5.1. In federal court, the dismissal order would be appealable and further delay arbitration.
    - 5.1.1. *Marsh & McLennan Cos. v. GIO Insurance Ltd.*, No. 11 Civ. 8391 (S.D.N.Y. Aug. 6, 2013) (staying action pending arbitration, rather than dismissing action, because dismissal is an appealable order that could further delay quick resolution through arbitration; denying defendant insurance company's motion to release the \$1.5 million security it was required to deposit with the court as an "unauthorized foreign insurer," favoring New York's public policy that a foreign insurer's funds should be available in New York to satisfy any potential judgment).

- 5.2. The motion to compel arbitration would not be appealable.
- 5.3. And, under the stay, you could go to the court for help in discovery from third parties?
- 6. Failing to know (and follow) the rules: ARR (Always Read the Rules).
  - 6.1. If no rules have been selected, then the RUAA applies to the agreement.
  - 6.2. Do the rules of evidence apply? Not under the rules of the American Arbitration Association (and most other administering bodies).
  - 6.3. What of privilege? The AAA rules recognize the attorney-client privilege.
  - 6.4. Should you and your opponent consider application of the civil rules?
- 7. Overlooking the power of arbitrators to grant interim remedies.
  - 7.1. One of the great stories of arbitral success and change in our careers
  - 7.2. The RUAA (A.R.S. § 12-3001- 3029) and AAA rules (R-34) provide for interim relief.
  - 7.3. Recent case study: appointment of a receiver subject to arbitration.
    - 7.3.1. *Sun Valley Ranch 308 Ltd. Partnership ex rel. Englewood Properties, Inc. v. Robson* (2012 WL 5862464) (Nov. 20, 2012).
    - 7.3.2. ¶ 25 We are unpersuaded by plaintiffs' contention that only the superior court may appoint receivers. Nothing in our statutes prohibits an arbitrator from exercising such authority. Indeed, A.R.S. § 12-3008(B)(1) confers broad powers on arbitrators, authorizing them to: issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action. See also Meyerson, 43 Ariz. St. L.J. at 494 (“The AZ-RUAA includes an important new section ... clarifying an arbitrator's power to grant interim remedies...”).
    - 7.3.3. ¶ 26 Comments to RUAA make clear that arbitrators “have broad authority to order provisional remedies and interim relief .... This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin and sequestration to preserve assets.” See RUAA § 8, cmt. 4, available at <http://www.uniformlaws.org/>. “Sequestration” is defined as, inter alia, “[t]he separation or removal of property from the person in possession, pending some further action or proceedings affecting the property.” Black's Law Dictionary 1366 (6th ed.1990). In significant respects, sequestration is the functional equivalent of a receivership under A.R.S. § 12-1241. Plaintiffs' request for a receiver is subject to arbitration.
- 8. Twofer: allowing pre-hearing discovery to get out of hand and overlooking the power of the submission agreement.
  - 8.1. First, always read the contract: what does your arbitration provision say?
  - 8.2. Consider an arbitration submission agreement that covers the main case

management issues -- discovery, document production, depositions, and deadlines. Sample streamlining agreement (from D.C. Toedt):

**8.2.1.** In the interest of increasing efficiency and reducing cost, the Arbitral Tribunal is to take suitable measures, where appropriate, to streamline the arbitration proceedings. In appropriate circumstances, such streamlining measures may include (for example) the Arbitral Tribunal's directing or authorizing one or more of the following:

**8.2.2.** (1) motion practice for early disposition of issues;

**8.2.3.** (2) testimony by telephone- or video conference;

**8.2.4.** (3) direct testimony by written narrative statement, with oral summarizing by the witness followed by oral cross-examination;

**8.2.5.** (4) joint written reports by opposing expert witnesses, explaining their points of agreement and disagreement;

**8.2.6.** (5) witness-examination procedures such as "witness panel" or "hot-tub" examination of fact- and/or expert witnesses;

**8.2.7.** (6) summary exhibits to supplement or substitute for voluminous evidence;

**8.2.8.** (7) issuance of a tentative or draft award to allow the parties an opportunity to comment before issuance of the final award.

**8.2.9.** <http://www.commondraft.org/#ArbStreamliningCls>

**8.3.** Consider an agreement that covers the hearing -- witnesses, division of time, form of award, time to decision.

**8.4.** On these points, see the article on pre-trial and trial agreements at my web page ([www.shawnaiken.com](http://www.shawnaiken.com)).

**8.4.1.** "Better Litigating Through Pre-Trial Agreements," Stephen D. Susman and Johnny W. Carter.

**8.4.2.** Appendices: Pretrial Agreements • Trial Agreements.

**9.** Discovery from third parties: overlooking the locale and its effect on third-party discovery.

**9.1.** An arbitrator's power to authorize non-party discovery (issuance of a subpoena) derives solely from

**9.1.1.** the Federal Arbitration Act (sec. 7); and,

**9.1.2.** the RUA (A.R.S. § 12-3017).

**9.1.2.1.** 12-3017. Witnesses; subpoenas; depositions; discovery

**9.1.2.2.** A. An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, on motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

**9.1.2.3.** B. In order to make the proceedings fair, expeditious and cost effective, on request of a party to or a witness in an arbitration

proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

**9.1.2.4.** C. An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.

**9.1.2.5.** D. If an arbitrator permits discovery under subsection C, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state.

**9.1.2.6.** E. An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state.

**9.1.2.7.** F. All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.

**9.2.** Prepare in advance: do you need materials or testimony from non-party witnesses out of state?

**9.2.1.** The authority of an arbitrator to issue a non-party subpoena is not equivalent to the authority to enforce that subpoena.

**9.2.2.** In Arizona, we are aided by the powerful section above (12-3017).

**9.2.3.** In non-RUAA states, the FAA sec. 7 provides a mechanism to enforce arbitral subpoenas in the federal district court located where the arbitrators sit.

**9.2.4.** Rather than wade into the weeds on the enforcement of pre-hearing subpoenas, please refer to Steven P. Caplow's article at my web page ([www.shawnaiken.com](http://www.shawnaiken.com)): "Through a Glass Darkly: Non-Party Discovery Under the Federal Arbitration Act," *Arbitration (CI Arb): The International Journal of Arbitration, Mediation and Dispute Management* (78:3 (August 2012)).

**9.3.** Under either the RUAA or the FAA, get quickly in front of the arbitrator on compliance from third parties.

**10.** Misunderstanding how to deal with non-payment: do not let the other party's

failure to pay stall the proceeding.

**10.1.** You won't have time to seek court enforcement of obligation to pay fees.

**10.2.** Your arbitrator may proceed without full payment (but likely not).

**10.3.** So, will your client front the costs? If so, then seek an award for those costs. See Dispute Resolution article (No Pay, No Play).

**10.4.** See American Arbitration Association Construction Industry Rules R-56 (summary and treatment of the issue).

**10.4.1.** R-56. Remedies for Nonpayment

**10.4.2.** (a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

**10.4.3.** (b) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator issue an order directing what measures might be taken in light of a party's non-payment. Such measures may include limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any such determination. In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments, to submit such evidence as the arbitrator may require for the making of an award.

**10.4.4.** (c) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

**10.4.5.** (d) If arbitrator's compensation or administrative fees remain unpaid after a determination to suspend an arbitration due to non payment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator.

**11.** Overlooking pre-hearing briefs: tell the arbitrator what issues need to be decided.

**11.1.** Include a proposed form of award in all but the simplest cases.

**11.2.** Don't overlook the attorneys' fees issue.

**11.3.** Offer a chart or checklist of the damages components.

**12.** Common mistakes at the hearing:

**12.1.** Failure to exchange or produce documents: do not overlook the request for negative inference at the hearing.

**12.2.** Failing to understand your arbitrator: owl? or lark?

- 12.3. Overlooking presentation of testimony via written statements (AAA R-32).
- 12.4. Presenting redundant witnesses.
- 12.5. Leading witnesses through critical areas of testimony (informality should not result in lazy direct examinations).
- 12.6. Underlawyering the damages case.
- 12.7. Failing to divide or ask your arbitrator to divide time.
- 13. Opposing confirmation or appealing confirmation on any ground other than exceeding powers: don't try this at home.
  - 13.1. Exceeding powers is the only serious ground for attack.
  - 13.2. See James Gaitis on this topic generally.
  - 13.3. Notes updated: 8.6.18. Shawn Aiken PLLC.