ISSUES IN DRAFTING ARBITRATION CLAUSES FOR HEALTHCARE CONTRACTS REFERENCING THE AAA COMMERCIAL RULES OR THE HEALTHCARE PAYOR-PROVIDER RULES

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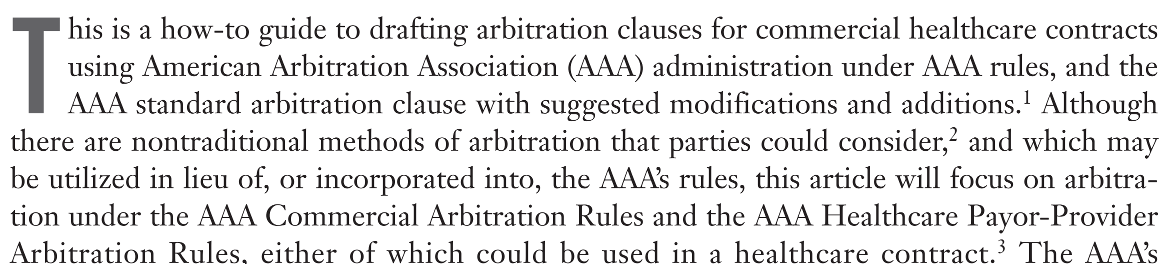
What parties to commercial healthcare contracts need to know about drafting an arbitration clause for a commercial healthcare contract, including the differences between the AAA Commercial Arbitration Rules and the AAA Healthcare Arbitration Payor-Provider Rules, whether the parties qualify to use the payor-provider rules, and how to tailor the arbitration clause by modifying or adding to the AAA rules.



This is a how-to guide to drafting arbitration clauses for commercial healthcare contracts using American Arbitration Association (AAA) administration under AAA rules, and the AAA standard arbitration clause with suggested modifications and additions.[1] Although there are nontraditional methods of arbitration that parties could consider,[2] and which may be utilized in lieu of, or incorporated into, the AAA's rules, this article will focus on arbitration under the AAA Commercial Arbitration Rules and the AAA Healthcare Payor-Provider Arbitration Rules, either of which could be used in a healthcare contract.[3] The AAA's

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newer rules—the payor-provider rules—were specifically designed for claim payment disputes between "healthcare payors" (e.g., insurance companies, health maintenance organizations, healthcare plans and the like) and "healthcare providers" (e.g., doctors, medical practices, dentists, nurses, medical laboratories, and others who provide healthcare services). Parties who do not qualify as payors and providers must use the commercial rules, while those who do qualify can choose between the commercial rules and the payor-provider rules. For parties who do qualify as payors and providers, the payor-provider rules are likely to be the frontrunner since they were prepared by the AAA with the input of the AAA Healthcare Dispute Resolution Advisory Council, on which I serve, along with representatives of hospitals, doctors, HMOs and insurers, and they were designed to allow payors and providers to arbitrate while "containing transaction costs, reducing time spent on resolution of each claim and potentially preserving ongoing business relationships."[4]

The goals of efficient dispute resolution at lower cost may be especially important to providers and payors in the current sluggish economy. So may the flexibility of the payor-provider rules. An example of this flexibility is the aggregation of claims provision, which allows a provider to aggregate reimbursement claims involving multiple patients or multiple dates of service. Some of the major differences between the commercial and payor-provider rules are highlighted in the sidebar on page 47. (A more detailed comparison of the two sets of rules can be found in a chart, "Payor-Provider Rules vs. Commercial Rules: At a Glance," on the AAA Web site at www.adr.org.)

As important as the AAA rules themselves is the ability of the parties to deviate from the rules. Both the commercial rules and the payor-provider rules expressly state that the parties may vary the rules by written agreement.[5] Once the arbitrator is appointed, his or her consent is required for a rule change, so the best approach is to tailor the rules in the arbitration clause, which eliminates the need for any consent.

There is one difference between the commercial rules and payor-provider rules when it comes to modification of the rules. The AAA and the arbitrator may make the right to vary the payor-provider rules "subject to additional fees by the AAA or the arbitrator."[6] The AAA and/or the arbitrator may be more inclined to impose additional fees if the parties change the rules in a way that would make the arbitration more complex.

The balance of this article discusses how key provisions in the commercial rules and the payor-provider rules operate. It also indicates some of the ways parties might want to modify them and suggests additional clauses that the parties might want to consider adding to their arbitration clause.

The new AAA healthcare rules were designed to allow "payors" and "providers" to arbitrate reimbursement disputes while containing costs, reducing resolution time, and "potentially preserving business relationships."

Summary of Operative Provisions

AAA Healthcare Payor-Provider Arbitration Rules

The payor-provider rules, unlike the commercial rules, provide for three distinct electable "tracks." Regardless of the amount in controversy, when a dispute arises, the parties may agree to use either: (1) the desk/telephonic track, (2) the regular track, or (3) the complex track. Absent specific agreement, the regular track will govern.[7]

All cases under the payor-provider rules have one arbitrator appointed, unless the parties otherwise agree.[8] The arbitrator is selected from the AAA National Healthcare Panel.[9]

Track selection determines whether there will be an oral hearing and the amount of discovery available to each party. The regular track rules contemplate that the parties may have to disclose certain provider information, enrollee information, and billing information.[10] With respect to documents, they provide that the arbitrator may order a pre-hearing exchange of documents and other information, if consistent with the expedited nature of the arbitration, and the exchange of witness lists and exhibits.[11] In addition, the parties are limited to one deposition per person.[12]

The desk/telephonic track rules are designed to provide a swift proceeding.[13] They allow the parties to agree to resolve any claim or counterclaim of any size based on documents (i.e., initial and rebuttal documents and briefs, if any).[14] No other discovery (i.e., depositions) is allowed,

unless there are extraordinary circumstances and an arbitrator finds that depositions (or other methods of discovery) are necessary to prevent an unfair or unjust result.[15] To supplement the record, the arbitrator may order one or more telephonic hearings.[16]

The complex track rules[17] allow, in addition to the document production and exchanges referred to in the regular track rules,[18] two depositions per party.[19] They also give the arbitrator discretion to order the use of interrogatories, if good cause is shown and consistent with the expedited nature of arbitration.[20]

AAA Commercial Arbitration Rules

The commercial rules do not have elected tracks. They have "Expedited Procedures" and "Large, Complex Case Procedures" (LCC Procedures) that apply to cases involving specified dollar amounts.[21]

The default number of arbitrators under the commercial rules is one arbitrator (unless the parties otherwise agree) who is selected from the AAA's National Roster of Commercial Arbitrators. There is an exception from the one-arbitrator rule for cases under the LCC Procedures.[22]

The Expedited Procedures apply when the matter in controversy involves $75,000 or less (unless the parties or the AAA determines otherwise).[23] They provide that the parties may agree to have a decision based on documents when no party's claim exceeds $10,000.[24]

The LCC Procedures provide that the parties can agree to have one or three arbitrators. If they are unable to agree, three arbitrators will decide the case if a claim or counterclaim involves at least $1 million, while one arbitrator will decide it if each claim and counterclaim is less than $1 million.[25]

The payor-provider rules and the commercial rules, notwithstanding the Expedited Procedures and the LCC Procedures, allow the parties to waive an oral hearing.[26] So it is possible for parties to agree to obtain a decision based on documents, regardless of the size of the case.

Rules that Could Be Modified

Number of Arbitrators/Method of Appointment

The number of arbitrators has a major effect on the cost of arbitration. It is obviously less expensive to pay one arbitrator than three. It is apparent that the AAA considered one arbitrator to be sufficient, as do I, by making one arbitrator the default rule for cases under the payor-provider rules[27] and for smaller (less then $1 million) cases under the commercial rules.[28] However, as noted above, the AAA allows the parties to agree to three arbitrators if they so desire.[29]

Some Differences Between the Commercial Rules and the Payor-Provider Rules

Rule	Payor-Provider	Commercial
number of arbitrators in large, complex case	one absent contrary agreement	three absent contrary agreement
number of arbitrators in all other cases	one absent contrary agreement	one absent contrary agreement
depositions (regular case)	one deposition per party	none specified
depositions (large, complex case)	two per party	none specified
aggregation of claims	allowed	not specified
substitute withdrawn claims	allowed	not specified
track election requirement	yes, absent election regular track is default rule	no, since there are no tracks.
ability to vary rules	yes, but possible additional fees	yes
decision based on documents	yes for desk/telephonic track	yes if Expedited Procedures apply and case under $10K
applicable panel	experienced healthcare panel	commercial or LCCP panel

Before agreeing to three arbitrators, the parties should discuss with counsel the benefits and drawbacks of that decision. On the plus side, three arbitrators have more collective expertise than just one. It is often a less contentious process to select three arbitrators than it is to select only one arbitrator. A panel of three also insulates the parties against the generally unchecked judgment of a single arbitrator.

On the negative side, having three arbitrators creates delay and higher costs due to difficulties in scheduling hearings around three busy schedules and the fact that three times the amount of arbitrator compensation must be paid. Also, there is the possibility that the AAA and/or the arbitrators could increase their fees if the rules do not require three arbitrators.

As for the method of selecting the arbitrators, the AAA rules provide for the "list/strike" method when the parties have not specified the method of selection, whether the parties are using one arbitrator or three.[30] This method works well, so there is generally no need to speci-

fy a different method in the arbitration agreement. However, many parties provide for a method of selection in their arbitration clause when they have decided to use three neutral arbitrators. Under this method, or a variation thereof, each party appoints one arbitrator, and the two party-appointed arbitrators appoint the third arbitrator, who becomes the chair of the panel.

Arbitrator Compensation

Both the commercial rules and the payor-provider rules provide that the parties are to compensate arbitrators at their "stated rate of compensation."[31] Usually this rate is based on the amount of time spent on the arbitration. Both the commercial rules and the payor-provider rules state that any other arrangement for paying arbitrators must be made through the AAA.[32] Many parties are interested in a fixed-fee compensation arrangement. The following clause is an example of how parties can request fixed-fee arbitration:

> The parties agree to request that the AAA Case Manager inquire as to whether prospective arbitrators would be willing to arbitrate the dispute for a fixed fee and, if so, the amount of such fee, and to relay such information to the parties.

The parties should consider the advantages and disadvantages of a fixed fee or any alternative fee arrangement they are contemplating. For example, a fixed fee allows the parties to know the full amount of the arbitrator's compensation at the outset. Especially in cases requiring an arbitrator with great stature (and, presumably, a commensurately great "rate of compensation"), establishing a fixed fee would help the parties manage costs.

A difficulty with this arrangement is that it is often hard to predict how long an arbitration proceeding will take, which is necessary to determine an appropriate fixed fee. Therefore, arbitrators may request a high fixed fee to make sure that they will not be under-compensated. Some arbitrators will decline or hesitate to agree to arbitrate a case based on a fixed-fee arrangement.

Place of Arbitration

The payor-provider rules state that the arbitrator "shall set the date, time, and place for each hearing."[33] The commercial rules provide that the parties "may mutually agree on the locale where the arbitration is to be held."[34] Both sets of rules provide that "[i]f any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding."

It is generally good practice to put the location of the arbitration in the arbitration clause. It eliminates an area of possible disagreement later on and provides predictability.

Some details that parties could specify in their arbitration clause include the place of arbitration, the governing laws, the election to apply the Optional Rules for Emergency Measures of Protection, and the desired track under the payor-provide rules.

Confidentiality

The AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes says in Canon VI(2) that arbitrators "shall keep confidential all matters relating to the arbitration proceedings and decision."[35] Both the commercial rules and the payor-provider rules require arbitrators and the AAA to respect the confidentiality of the proceedings.[36] There are no other provisions in the commercial rules mentioning confidentiality and the parties and their counsel are not generally bound to maintain the confidentiality of any aspect of an arbitration proceeding. However, the payor-provider rules have a unique rule barring the dissemination or publication of the award, unless the parties agree otherwise in writing, or unless required by law, "except to the extent necessary to effectuate enforcement of the award or following issuance of a court order."[37]

If the parties wish greater confidentiality protection (as commercial parties often do to avoid negative publicity, prevent disclosure of intellectual property and trade secrets, among other reasons), they can provide for it by contract. Indeed the payor-provider rules say that, during the preliminary hearing, the arbitrator may consider

"[w]hether the parties wish to enter into a confidentiality agreement that could cover, among other things, information exchanged by the parties in the course of the arbitration or any award entered by the arbitrator."[38] Confidentiality agreements are, however, costly to implement, and difficult to enforce; nevertheless, experienced arbitrators often require them to protect proprietary and patient information consistent with federal law (e.g., Health Insurance Portability and Accountability Act of 1996 (HIPAA)).

Instead of, or in addition to, a confidentiality agreement, the parties could provide the following clause in their arbitration clause.

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

Conduct of Proceedings and Evidence

One feature of arbitration that distinguishes it from litigation in court is that judicial rules of civil procedure and evidence do not apply in arbitration. Nevertheless, some lawyers want the arbitrator to adhere to the Federal Rules of Evidence and/or Civil Procedure. I do not recommend this. Arbitration is a different process from litigation. Litigation procedures and rules of evidence belong in court. Stricter rules of procedure and evidence can bog down proceedings with cumbersome procedural/evidentiary rulings. Some rules of evidence could be perceived as unfair, such as when substantively valid evidence cannot be introduced on procedural grounds.

If the lawyers want to litigate in arbitration, they should discuss this with their clients. It is likely the clients had more expeditious AAA arbitration rules in mind when they agreed to arbitrate.

All AAA rules give the arbitrator the discretion to conduct the proceedings "with a view to expediting the resolution of the dispute." They also give the arbitrator authority to rule on the admissibility, relevance, and materiality of the evidence; and to exclude cumulative or irrelevant evidence, provided that the parties are treated with equality and each party has the right to be heard and is given "a fair opportunity to present its case."[39]

Moreover, some rules pertaining to the form in which evidence can be introduced in arbitration are more relaxed than in court proceedings. Both the commercial rules and the payor-provider rules allow direct evidence to be presented at the hearing by declaration (i.e., a written statement that is not notarized) or affidavit (a written statement that is notarized).[40] These rules state that the arbitrators shall "receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission."[41] While video-taped testimony is not expressly authorized, conceivably an arbitrator could allow it on the same basis as a declaration.

The witness affidavit procedure is drawn from international arbitration, where the practice is to require the witness to appear at the hearing for cross-examination. The procedure is intended to save money and time. But since neither the commercial rules nor the payor-provider rules require the affiant or declarant to appear for cross-examination, either in person or by video conference, the parties could be concerned that the arbitrator might give too much or too little credence to evidence presented by affidavit or declaration. To allay this concern, the parties could provide in their arbitration agreement that a witness declaration or affidavit may be used only if the witness attends the hearing for purposes of live cross-examination, or if the witness cannot attend, he or she participates by video conference.

Video-conferencing is sometimes used in arbitration in order to avoid delay and scheduling difficulties. This technology allows a witness who is unable to appear in person at a scheduled hearing to testify on direct and be cross-examined. It also eliminates the cost and inconveniences of travel. However, it may be more difficult for the arbitrator to determine if the witness is credible.

Parties and arbitrators will have to weigh the efficiency and expediency of allowing witnesses to participate in the hearing by video conference against the costs and delay that may occur if live testimony is required.

Discovery

As shown above, the payor-provider rules provide more specific discovery rules than the commercial rules. Where the rules do not specify the type of discovery, the arbitrator has considerable discretion to determine the amount of discovery. To curb that discretion, the parties may choose to describe in their arbitration clause the amount and type of permitted discovery. For example, they can specify particular methods (e.g., depositions and interrogatories) and amounts of discovery to be allowed (e.g., the number of depositions and interrogatories). The parties can also set a time limit for completion of discovery.

Under either set of rules, parties should weigh the benefits and burdens of increased discovery.

Will more depositions uncover more relevant evidence? Will interrogatories lead to a fairer proceeding? How much more will it cost? How much more time will it take? The answers to these questions should help the parties decide both how much discovery to provide for in their arbitration clause as well as how much to seek when a dispute arises.

Optional Rules for Emergency Relief

Both the commercial rules and the payor-provider rules contain "Optional Rules for Emergency Measures of Protection" to resolve critical issues that require resolution before the arbitrator is appointed, such as to preserve the *status quo* and prevent a party from disposing of its assets.[42] Parties must elect to have the optional rules apply in a special agreement or in their arbitration clause.[43] I recommend making this election with a clause such as this one:

> The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

Post-Hearing Briefs

Arbitrators are supposed to conduct the proceedings, whether under the commercial rules or the payor-provider rules, "with a view to expediting the resolution of the dispute."[44] Although the rules contemplate that post-hearing briefs could be filed, they are not required. Arbitrators may believe that post-hearing briefs are unnecessary because they already understand the issues, the evidence, and the parties' arguments. The parties can ensure that they have the right to submit briefs by including language similar to the following in the arbitration clause:

> The parties shall have 30 days to file briefs after the last day of the final evidentiary hearing.

While the parties may welcome the opportunity to present reasoned arguments after the hearing, they should consider how much it would cost and the time it will take for their attorneys to research, write, edit, and submit these briefs. The submission of post-hearing briefs will delay the closing of the hearing and therefore the issuance of the award.

Under the payor-provider rules, track selection is important because it determines the amount of discovery and whether there will be an oral hearing.

Reasoned Awards

Neither the commercial rules nor the payor-provider rules require arbitrators to give reasoned awards. The commercial rules state that awards "shall be in writing,"[45] but an "arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator, or unless the arbitrator determines that a reasoned award is appropriate."[46] The payor-provider rules have an identical provision.[47] Thus, the parties can specify the kind of award they want and they can do this in their arbitration agreement. The following language can be used to request a reasoned award:

> The award of the arbitrators shall be accompanied by a statement of the reasons upon which the award is based.
>
> The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.

However, requiring a reasoned award in an arbitration clause increases the cost of arbitration and extends its length, so that type of award should not be required without thoughtful consideration by the drafter. The parties will have another opportunity to decide whether to have a reasoned award after a dispute arises. At that time they can advise the AAA of their preference before the arbitrator is appointed. Failing this, only the arbitrator can mandate a reasoned award. I am loath to do this if the parties neither provided for a reasoned award in their agreement nor jointly petitioned the AAA for such an award in advance of my appointment.

At one time arbitrators thought that by providing written reasons, their awards would be more vulnerable to challenge. That concern has been allayed with judicial precedent that shows that reasoned opinions actually increase the likelihood that the award will be upheld.

Costs and Attorney Fees

The American rule in litigation and arbitration is that the parties pay their own expenses and attorney fees. The AAA rules provide that attorney fees may be awarded only if requested by both parties, or authorized by their agreement, or by law.[48]

The parties can require the arbitrator to apply

the American rule or reverse the American rule. The following clauses allow attorney fees and costs to be awarded:

> The prevailing party shall be entitled to an award of reasonable attorney fees determined by the arbitrators.

> The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" mean all reasonable pre-award expenses of the arbitration, including the arbitrator's compensation, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorney fees.

The parties could decide that each party bear its own costs and expenses and share the arbitrator's compensation, or give the arbitrator discretion to allocate arbitration costs and expenses, including the arbitrator's compensation, but excluding attorney fees.

> Each party shall bear its own costs and expenses and bear an equal share of administrative fees and the arbitrators' compensation.

> The arbitrators may determine how the costs and expenses of the arbitration shall be allocated between the parties, but they shall not award attorney fees.

Agreeing on a division of costs and fees beforehand establishes a predictable payment scheme agreeable to both parties. On the other hand, the arbitrator has one less tool to control the behavior of the parties and their counsel. Thus, it may make more sense to give the arbitrator discretion to take into account the facts and circumstances of each case, and fairly apportion fees and costs based on the conduct of both parties.

Res Judicata and Collateral Estoppel

In general, whether a prior arbitration award can have a preclusive effect on a related proceeding is left to the discretion of the arbitrator or other decision maker in the related proceeding.

However, the payor-provider rules contain a unique provision stating that awards in proceedings under these rules do not have *res judicata*, collateral estoppel, or precedential effect unless the parties otherwise agree in writing.[49]

If operating outside the payor-provider rules, the parties can specify that arbitrations will not have *res judicata* or collateral estoppel effect using language similar to that in the payor-provider rules or to the following:

> Findings accompanying the award are not binding on any other person or entity in any other proceeding.

Res judicata and estoppel affect how parties approach arbitration, and may color their decisions to enter arbitration in the first place. If *res judicata* and collateral estoppel were to attach to awards, parties would fight tooth and nail for favorable awards. With so much at stake, they could decide that their rights are better protected by litigation instead. Eliminating *res judicata* and collateral estoppel would enable losing parties to contest factual allegations if re-litigated in future arbitrations and lawsuits. Additionally, they could then mount a defense that would be more appropriate to the sums at stake. If *res judicata* and collateral estoppel were to apply, respondents would have to invest more time and money to defend their position because awards could have broader impact.

In some situations the parties may want an award to provide guidelines for their future dealings under the same contract. In that situation *res judicata* and estoppel would not need to be eliminated as to future cases involving that contract.

Appeals to a Second Arbitral Panel

One of the main benefits of arbitration is that the right to judicial review of an award is limited. Nevertheless, especially in legally complex cases, parties want to be able to remedy legal errors that would otherwise not be correctable by a reviewing court since arbitration awards are final and binding. In order to obtain this remedy, drafters of arbitration clauses must include a review provision. Instead of providing for review by a court, drafters could provide for review by a second panel of arbitrators.

A typical provision for appellate arbitration is as follows:

> Within 30 days of receipt of any award (which shall not be binding if review is sought under this provision), any party may notify the AAA of an intention to appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award as its own, modify the initial award, or substitute its own award for the initial award. The appeal tribunal shall not modify or replace the initial award unless the [majority of the] tribunal finds the award [violates the law or any of the grounds for vacatur in the Federal Arbitration Act have been satisfied]. The award of the appeal tribunal shall be final and binding, and judgment may be entered thereon by a court having jurisdiction thereof.

The parties can obviously change the terms within the brackets.

Clauses that Could Be Added to the Arbitration Clause

Arbitrator Qualifications

Arbitrators are required to be neutral and independent of the parties.[50] In administered arbitration with the AAA, parties have access to arbitrators with arbitration experience and knowledge of many fields of law and business. In the healthcare field, according to Rule R-3 of the payor-provider rules, the National Healthcare Roster is composed of qualified healthcare arbitrators with a minimum of 10 years of experience in either healthcare or the law. Before admission to the roster, applicants are required to list on a lengthy biographical form all healthcare arbitrations they have conducted over the past 10 years, together with other information.

Although the parties should have confidence in AAA healthcare arbitrators, they could require additional qualification, such as a law license in the state where arbitrations will be conducted, or special expertise, such as in medical software or accounting. The following are typical examples of additional qualifications:

> The arbitration proceeding shall be conducted before a single neutral arbitrator who shall be an active member of the bar of the state of [____________], actively engaged in the practice of [__________] law for at least 10 years.
>
> The arbitration proceeding shall be conducted before a panel of three neutral arbitrators, all of whom shall have experience with, and knowledge of, electronic computers and the computer business, and at least one of the arbitrators selected will be an attorney.
>
> The arbitrator shall be a certified public accountant.

It is sometimes difficult to know at the time of contracting the kinds of disputes that will arise. When a case is filed with the AAA, the parties can describe to the case manager the expertise and skills they want their arbitrator to possess.

Like any other decision, there are pros and cons to adding arbitrator qualifications. On the plus side, specifying additional qualifications can ensure a certain level of expertise in the arbitrator. On the other hand, additional requirements can make the selection process more time consuming and expensive. Another risk associated with adding arbitrator qualifications is that the pool of available arbitrators may be unnecessarily be reduced.

If the parties want the arbitrator to award attorney fees to the prevailing party, they should provide for that in the arbitration clause.

Contractual Preconditions to Arbitration

It is not uncommon to specify conditions to commencing arbitration, such as that the parties undertake "senior executive negotiations" first, and then mediation. In arbitration under the payor-provider complex track, Rule C-3(d) provides that at the preliminary conference, the parties consider "mediation or other non-adjudicative methods of dispute resolution."

No preliminary conference is required for the other payor-provider tracks; however, Rule R-8 allows for an administrative conference with the case manager, where the parties may discuss mediation and other non-adjudicative measures.

Thus, it may make sense to provide for a tiered approach in the arbitration clause. Here is a three-tiered dispute resolution clause:

> If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions between senior executives of the parties, the parties agree to endeavor first to settle the dispute by mediation, administered by the American Arbitration Association under its Commercial Mediation Procedures, before resorting to arbitration. If the dispute is not fully resolved within 60 days through either of the previous techniques, any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its [__________] Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Contractual prerequisites are desirable because they give the parties an opportunity to resolve disputes early, before they escalate and require costlier, more contentious dispute resolution

measures. The prospect of having to invest in an arbitration proceeding can also motivate the parties to put an end to their dispute by settlement. But when the parties are far apart and unwilling to compromise, the existence of contractual prerequisites to arbitration may needlessly prolong the process.

Governing Law

Parties can select the substantive and procedural laws they want to apply. The procedural law is the arbitration law (*lex arbitri*) that will govern the effectiveness, interpretation, and construction of the arbitration clause and future arbitration proceedings,[51] while the substantive law will governs the merits of the dispute. Including the *lex arbitri* in the arbitration clause is beneficial in terms of predictability. The parties know in advance which law will apply in future arbitration proceedings. Furthermore, agreeing on the procedural and substantive law eliminates the prospect of conflict on these issues. Without such a provision, arbitrators may have to spend a great deal of time deciding choice-of-law issues. If the parties include a governing-law clause, it is desirable to exclude the jurisdiction's choice-of-law rules in order to prevent another jurisdiction's law from unexpectedly applying.

The following governing law provisions may be helpful:

> This agreement shall be governed by and be interpreted in accordance with the laws of the State of New York, not including its conflict-of-law rules. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The Federal Arbitration Act shall govern the interpretation, and enforcement of this arbitration agreement, as well as any proceedings thereunder.
>
> Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the U.S. Code (Federal Arbitration Act) and the [Healthcare Payor-Provider] Arbitration Rules of the American Arbitration Association.

On the other hand, it is often hard to decide in advance which laws to select as the exact nature of future disputes is not always foreseeable. Parties may go to considerable expense to have their legal team determine which laws are desirable. A party unwilling to finance that research may subject itself to laws that place it at a significant disadvantage to the other party.

Anther decision is whether to select the FAA as the *lex arbitri*. In general, the FAA is a good choice in that it provides the parties with a federal forum for enforcement. In addition, the FAA limits the grounds to challenge enforceability. On the other hand, it does not allow the parties to enlarge the court's judicial review powers and therefore may be considered too inflexible.

Burden and Standard of Proof

The payor-provider rules and the commercial rules both provide that the claimant shall present its evidence first followed by the respondent, and that the arbitrator has discretion to vary this procedure and "direct the order of proof."[52] These rules could be interpreted to mean that the claimant has the burden of proving its claims and that the respondent has the burden of proving its counterclaims. Even if there is some uncertainty, arbitrators typically direct that the party asserting a claim bears the burden of proof. The rules, however, are silent on the standard of proof.

The parties could agree to choose the standard of proof and incorporate it into the arbitration clause. The usual standard of proof in civil litigation is a preponderance of the evidence. Parties may agree to an elevated burden of proof (e.g., clear and convincing evidence) in order to deter frivolous claims. The following provision specifies both the standard and burden of proof:

> The party that initiated the arbitration must prove all material facts with clear and convincing evidence.

A potential claimant with a weak case is less likely to bring a claim that has to be proved by clear and convincing evidence. Raising the standard of proof obviously eliminates the arbitrator's ability to decide based on a more liberal standard of proof. A higher standard of proof could raise fairness concerns if the parties are in unequal bargaining positions.

Arbitrator Authority

Summary Disposition Motions. In theory, arbitrators may entertain any summary disposition motion that would lead to the early termination of unmeritorious claims. However, arbitrators are rarely willing to entertain dispositive motions unless they are based on the statute of limitations or failure to satisfy a condition precedent. The reason is usually concern that the award could be challenged on the ground that the arbitrator did not allow a party to present its case and, therefore, failed to consider all of the relevant evidence.

Many arbitrators require the parties to obtain the arbitrator's consent in order to make a dispositive motion. If parties want to remove that authority from the arbitrator, they could agree in the arbitration clause that:

> Either party may file a summary disposition motion of any kind with the arbitrator.

But they should not do this lightly, in view of the fact that summary disposition motions are rarely granted, and even more rarely are those denials overturned. The briefs supporting these motions take a great deal of time for the attorneys to research and write, and time for the arbitrator to review, analyze and decide. Therefore, the cost of dispositive motions may significantly increase the cost of the proceeding.

Punitive, Special and Consequential Damages. The U.S. Supreme Court has held that arbitrators can order punitive damages unless expressly prohibited by the agreement.[53] Parties can avoid the assessment of such damages in an award by including in their agreements language similar to either of the following:

> The arbitrator has no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute.

> The arbitrator has no authority to award punitive, consequential, or special damages in any arbitration initiated under this agreement.

When punitive, consequential, and special damages can be awarded, arbitrators can more closely replicate the recovery available in court proceedings. However, these types of damages substantially raise the stakes of arbitration for the parties.

Consolidation. Neither the commercial rules nor the payor-provider rules provide for consolidation of related arbitrations involving the same parties and common issues of fact, or joinder of necessary non-parties. If the parties want to be able to consolidate related cases and join non-parties, they must provide for it expressly in their arbitration agreement.

The following is a clause allowing joinder and consolidation:

> All parties concerned are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interests of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s).

However, there is no way to force every potential party into arbitration at the same time. Nonsignatories are especially unwilling to join in arbitration, which usually leads to collateral litigation, increasing the length and cost of arbitration.

The usual standard of proof in civil litigation is a preponderance of the evidence. Parties could agree in their arbitration clause to an elevated burden of proof (e.g., clear and convincing evidence) in order to deter frivolous claims.

If any non-signatories are joined, the proceeding will change from a two-party arbitration to a multiple-party proceeding. Multiple-party proceedings are more complicated and expensive to conduct. Often there are problems in selecting a panel of arbitrators. It is possible to devise a method for appointing arbitrators that will satisfy the parties to a multi-party case. Absent agreement among the parties, however, the AAA practice under R-11(c) of the commercial rules is for the AAA to appoint all arbitrators.

As previously noted, only the payor-provider rules allow aggregation of reimbursement claims. Rule R-4(a) permits either party to file as a single case all reimbursement-related claims. Rule-4(b) explains that all claims arising out of a single contract may be filed as a single case, even if it involves multiple patients or multiple dates of service. Even when no contract exists between a Payor and a Provider, Rule R-4(c) allows the parties to agree to submit arbitration claims arising out of the same "bases for payment."

Payor-provider Rule R-5 permits the parties to substitute the same or similar claim involving the same or a different patient and the same provider prior to the appointment of the arbitrator, provided the substituted claim is equal to or less than the amount of the withdrawn claim.

The ability to aggregate and substitute claims in this manner provides a flexible and more streamlined dispute resolution process than the commercial rules, which has no claims aggregation or substitution provisions.

Class-Based Arbitration. Generally speaking, parties may be able to preclude or provide for class-based arbitration proceedings brought on behalf of all similarly situated individuals who have agreed to arbitrate disputes with the same respondent. However, any provision for class-based arbitration must be sufficiently clear in expressing the parties' agreement to arbitrate class claims. In *Stolt-Nielsen v. AnimalFeeds International*, the Supreme Court held that courts cannot interpret a clause's silence on the issue of class treatment as allowing class arbitration.[54]

The Supreme Court, in a 5-4 decision, recently held in *AT&T Mobility LLC v. Concepcion* that the FAA preempts a state court rule holding that class- action waivers in arbitration agreements are unconscionable and unenforceable.[55] Thus, under the FAA, states may not condition the enforceability of arbitration agreements on the availability of class procedures.

The *AT&T Mobility* decision, however, rested on preemption grounds and did not specifically resolve the question of whether class-action waivers can be enforced against plaintiffs in federal antitrust claims. The 2nd Circuit addressed this issue in *In re American Express Merchants' Litigation*[56] shortly before *AT&T Mobility* was decided. It held that class-action waivers contained in the arbitration agreements were not enforceable against a class of merchant plaintiffs pursuing claims against *American Express* under the Sherman Act. The decision was based on public policy grounds. The 2nd Circuit had the opportunity to reconsider this decision in light of *AT&T Mobility* and reached the same conclusion.[57]

This could lead the Supreme Court to decide to review the issue. Meanwhile, the law concerning class arbitration waivers continues to develop.

Conclusion

Drafting healthcare arbitration clauses involves a lot of decisions. This article is intended to highlight these decisions and help drafters navigate them. Through a well-considered arbitration clause, parties to healthcare contracts can gain a measure of predictability in upcoming disputes, and can ensure that the rules, timing, and arbitration procedures are acceptable. In short, parties to arbitration clauses that are tailored during the contract-negotiation stage are less likely to be surprised or disappointed in future arbitrations. ■

ENDNOTES

1 The AAA standard arbitration clause can be found in the "introduction" to every set of AAA rules. It provides: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its [_______] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." Many parties find that this clause, which triggers AAA administration and the applicability of the specified rules, adequately serves their needs.

2 One such alternative is baseball arbitration and the other is high/low arbitration. Baseball arbitration is used by professional baseball teams and players to resolve salary disputes. Under this method, each party submits their best offer to the arbitrator. The arbitrator will hold a hearing and then pick one of the two offers, which will be the final award. Baseball arbitration is supposed to encourage the parties to make a reasonable offer from which the arbitrator will select the most reasonable. This type of arbitration prevents a compromise award.

In high/low arbitration, each party either submits its best offer or the parties agree on the highest and lowest amounts the arbitrator may award; the arbitrator can choose either offer or any number in between. This gives the arbitrator discretion to decide what would be the most reasonable award. However, it does not prevent a compromise award.

3 These rules are available on the AAA Web site (www.adr.org) under the category "Rules and Procedures."

4 From the "Introduction" to the payor-provider rules.

5 The source of this authority is in R-1(a) of the commercial rules and R-1(c) of the payor-provider rules. After the arbitrator is appointed, the arbitrator's consent is required to modify a rule.

6 Payor-provider rule R-1(c).

7 Payor-provider rule R-1(d).

8 Payor-provider rule R-10.

9 Payor-provider rule R-11.

10 Payor-provider rule R-18(e).

11 Payor-provider rule R-20.

12 Payor-provider rule R-19.

13 Payor-provider rules D-1–D-6.

14 Payor-provider rule D-1.

15 If the parties feel the need to supplement the record, they are usually allowed to do so only telephonically.

16 Payor-provider rule D-5.

17 Payor-provider rules C-1– C-5.

18 Payor-provider rules C-5(b).

19 Payor-provider rules C-4.

20 Payor-provider rules C-5(c).

21 Expedited Procedures E-1–E-10 and LCCP L-1–L-4.

22 LCCP rule L-2.

23 Commercial rule R-1(b) and Expedited procedure E-2.

24 Expedited Procedure rule E-6.

25 LCCP L-2.

26 Payor-provider rule R-36.

27 Payor-provider rule R-10.

28 Commercial rule R-15.

29 See notes 26 & 27. Also, under commercial rule R-15, the AAA could decide that three arbitrators are appropriate.

30 See Rule R-11 of both sets of rules. Under this procedure, the AAA furnishes each party with a list of arbitrator candidates (a maximum of 10 names). The parties have 15 days to either agree on one of the names on the list, or, failing to agree, strike the names of objectionable arbitrators from the list, rank the remaining names in order of preference, so that the AAA can select from among the remaining arbitrators "in accordance with the designated order of

mutual preference."

[31] R-51(a) of both the commercial rules and the payor-provider rules.

[32] *Id.*

[33] Payor-provider rule R-9.

[34] Commercial rule R-10.

[35] The Code of Ethics for Arbitrators in Commercial Disputes is available on the AAA Web site www.adr.org, under the heading "Arbitrators and Mediators."

[36] Commercial rule R-23 and payor-provider rule R-22(a).

[37] Payor-provider rule R-46(a).

[38] Payor-provider rule R-18(a). Preliminary hearings are scheduled "[a]s promptly as is practicable after the selection of the arbitrator."

[39] Commercial rule R-30(a) and payor-provider rule R-29(a).

[40] Commercial rule R-32(a) and payor-provider rule R-31(a).

[41] *Id.*

[42] Rules O-1–O-8.

[43] Optional rule 1 provides in relevant part: "Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection…."

[44] Commercial rule R-30(b) and payor-provider rule R-29(b).

[45] Commercial rule R-42(a).

[46] Commercial rule R-42(b).

[47] Payor-provider rule R-41(a) and (b).

[48] Commercial rule R-43(d)(ii) and payor-provider rule R-42(d)(ii).

[49] Payor-provider rule R-46(b). Typically, each arbitration stands on its own and does not have any precedential effect on unrelated arbitration proceedings.

[50] Commercial rule R-17(a) and payor-provider rule R-15(a). All AAA arbitrators must comply with the AAA arbitrator disclosure rules concerning actual and potential conflicts of interest. The same rule lists the reasons for disqualifying an arbitrator. The reasons are "(i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law." Even when the parties have agreed to name one arbitrator, R-12(b) of the commercial rules and the payor-provider rules require the arbitrator so named to satisfy the rule of impartiality and independence. (See commercial rule R-17 and payor-provider rule R-15.) However, the parties could agree that an arbitrator they directly appoint be non-neutral. See commercial rule R-17(a)(iii) and payor-provider rule R-15(a)(iii).

[51] While the arbitration law (*lex arbitri*) is usually the FAA, contracts to which the FAA do not apply will specify state arbitration law.

[52] Payor-provider rule R-29 and commercial rule R-30.

[53] See *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 58, 60-61 (1995).

[54] 130 S. Ct. 1758 (2010). In *Stolt-Nielsen*, the Supreme Court held that the imposition of class arbitration on parties who had "reached 'no agreement' on that issue" was fundamentally at odds with the consensual nature of arbitration and thus violated the FAA. Therefore, arbitrators exceeded their powers when they, using public policy justifications, imposed class arbitration on parties that did not expressly agree to it.

[55] No. 09-893 (U.S. Apr. 27, 2011). The U.S. Supreme Court held that the California Supreme Court's ruling in the *Discover Bank* case directly conflicted with the FAA, which is intended to ensure that private arbitration agreements are enforced according to their terms. In so ruling, the U.S. Supreme Court clearly expressed its strong aversion to class arbitrations.

[56] 634 F.3d 187 (2d Cir. 2011).

[57] Case No. 06-1871-cv (Feb. 1, 2012). On May 29, 2012, the 2nd Circuit denied an *en banc* rehearing in this case.