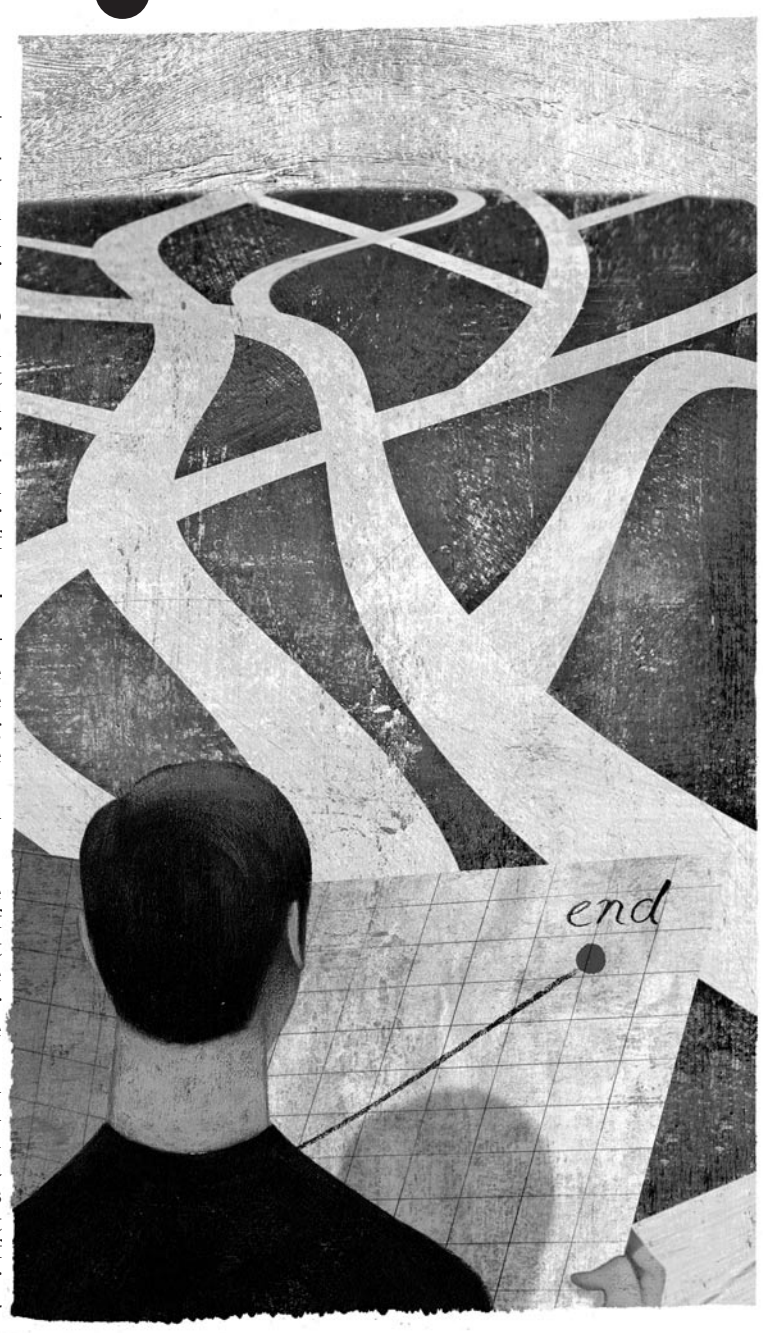
ADR

# Making it Work

By Robert D. "Bo" Links




OK, you're in an arbitration. You have the key documents, have taken a few depositions and have the case ready for hearing. Issues remain, specifically: What evidentiary standard applies? Arbitrators are less formal than judges. One of the main reasons it is virtually impossible to overturn an award is because an arbitrator cannot err in admitting certain evidence into the record; but an award is subject to attack if the arbitrator excludes evidence. See Code of Civil Procedure Section 1282.6(5).

**Second of Two Parts**

Most arbitrators are protective of their awards. They therefore tend to be liberal in admitting evidence to ensure there will be no ground to attack their award. Although arbitrators have been emboldened by *Moncharsh v. Heily & Blase,* 3 Cal.4th 1 (1992) (arbitrator's award will not be vacated even if there are errors of law on the face of the award that cause substantial injustice to the parties), arbitrators tend to err on the side of admitting evidence rather than excluding it.

Some parties have attempted to make the evidentiary standard a bit more formal by providing in the ADR clause that the California Evidence Code will govern. This may well have some impact, but it will not open an award to attack if the arbitrator errs in admitting or excluding evidence. Under *Moncharsh* , an arbitrator's error in applying the Evidence Code is not grounds for disturbing an award. *Baize v. Eastridge Companies,* 142 Cal.App.4th 293 (2006).

**Judicial Review**

Can the parties change the standard of judicial review by inserting language to that effect in their ADR clause? In the only published appellate opinion on the subject, the 2nd District Court of Appeal held that judicial review will be governed by the standard set by the Legislature in Section 1286.2, as interpreted by *Moncharsh*. The parties cannot, by agreement, alter that standard. *Cable Connection Inc. v. DirecTV Inc.,* 143 Cal.App.4th 207 (2006). The California Supreme Court has agreed to review this ruling, so stay tuned for further word from on high.

One way to allow for at least some appeal is to provide that a first arbitration award may be reviewed by a second arbitration panel, with the resulting award from the second panel being the one subject to confirmation. Although there does not seem to be a case on point in California, one would think that as long as the parties are in the arbitration context, they could write the standard of review for the second arbitrator (or second panel) to apply.

**Measure of Damages**

The parties clearly have leeway to specify how damages will be calculated. If nothing is said, traditional rules will apply. But if the parties desire, they can provide for a "baseball" type arbitration, where each side stipulates to a number and either the arbitrator must select one number or the other or the stipulated figures are not revealed to the arbitrator and the number closest to the award is the figure that governs. The parties can also agree to other formulas. The key, is to be clear so the arbitrator will know what to do and a reviewing court can determine whether the award is within the parameters of the parties' agreement.

**Punitive Damages**

Arbitrators can award punitive damages unless the ADR clause specifically strips them of that power. *Rifkind & Sterling Inc. v. Rifkind,* 28 Cal.App.4th 1282, (1994). Bear in mind that if your case involves certain statutory rights — where the governing statutes provide for punitive damages — an ADR clause that does not provide for complete statutory relief may be void as against public policy. See *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th 83 (2000).

**Attorney Fees**

Attorney fees are also a topic of concern in any contract and an ADR clause is no different. If you want to empower the arbitrator to award fees, say so. Without a contractual provision, the arbitrator cannot make the award, unless a governing statute so provides.

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**Injunctions**

One of the most vexing ADR issues involves injunctive relief. To be sure, arbitrators can utilize any remedy that flows from the parties' agreement, including injunctive remedies. *Advanced Micro Devices Inc. v. Intel Corp.,* 9 Cal.4th 362 (1994). The key for the arbitrator will be to write an award that is specific enough to be enforced as a judgment once it is confirmed by the court.

A more difficult question is preliminary relief. What if you need an injunction immediately and before the hearing on the merits (i.e., like a preliminary injunction in court)? Most established protocols provide that "the arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property" See AAA Commercial Arbitration Rules, Rule 34 (a). While an arbitrator can certainly divide the case into stages and issue interim awards that culminate in a final award, the real problem is how to enforce an interim injunction.

The code does not expressly contemplate multiple petitions to confirm arbitration awards in a single case; in fact, the code appears to work in the opposite direction: It allows an arbitrator, in an appropriate case, to issue a series of interim awards, culminating in one final award that resolves all submitted issues.

The code provides a remedy. Section 1281.8, allows a party to seek a preliminary injunction without waiving the right to arbitrate. One practical approach, if you need judicial enforcement of an arbitrator's interim injunction, file an application for injunctive relief with the Superior Court under Section 1281.8, and base the application, in part, on the arbitrator's award.

In many instances, enforcement will not be a difficult hurdle, as the parties will want to obey an arbitrator's interim decree, especially if that same arbitrator will be making a binding adjustment of the parties' rights and obligations at the end of the proceedings.

The issue in most cases will be speed. It may prove faster in some instances to go directly to court to obtain injunctive relief in the first instance. Under Section 1281.8, such a move will not be a waiver of arbitration, provided the party seeking injunctive relief expressly states that there is no intent to surrender that right.

Of course, some of the administrative organizations, sensitive to the "need for speed" have added procedures to address the issue. The AAA, for example, has a subset of rules titled "Optional Rules for Emergency Measures of Protection." They can be found as part of the general Commercial Rules. The Optional Rules state that parties may apply for interim relief before the arbitrator (or panel) has been appointed, and that matters can be considered and ruled upon within a matter of days. This procedure can be very efficient, but it only applies if the parties "by special agreement or in their arbitration clause have adopted these rules for emergency measures." If emergency injunctive relief is important — and you may not appreciate the need for it pre-deal negotiations — consider routine adoption of the "Optional Rules for Emergency Measures of Protection" in your ADR clause.

**Why?**

In the context of drafting an ADR clause, the question is: Why go through all of this if the parties are getting along?

Because they are unlikely to agree to any of this later on when they are at war with each other. When the parties are negotiating and working together cooperatively to craft a deal, it is in their mutual interest to control as much as possible the dispute resolution process, so that, should the fateful day come when they must turn outward to have a third party decide an important issue, they will have taken full advantage of pre-dispute calmness to control the procedure and thereby guarantee protocols that are fair and designed to ensure, as much as possible, quality decision making.

Isn't that what good lawyering is all about? Or do you just want to put your feet up on the desk and wait for a client to saunter in and ask if the contract he's already signed was a good idea?

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