There is a lot to like about arbitration because it has been shaped by the free market of clients and lawyers seeking a fair and efficient process. As a result, among other things, arbitrators and their support organizations are more “lawyer friendly” than courts in all sorts of ways.

The sensitivity of arbitration to both litigants and lawyers as consumers generally makes arbitration a more comfortable forum than court. But this tendency to try to accommodate everyone involved can be a double-edged sword, so you need to plan accordingly.

## The Market Theory of Arbitration

Put bluntly, as a simple matter of economics, arbitrators and their support organizations want and need our disputes, but judges and our judicial system don’t. For our courts, one more case, one more motion, or one more discovery dispute is always an incremental burden without any equivalent benefit in time or money for overworked judges and their staffs.

By contrast, private judges can control their workload to a much greater extent and can bill for their extra work, just like counsel who appear before them. And private arbitration organizations like JAMS and its proliferating competitors have an obvious interest in more work — especially repeat business from both parties and lawyers. So they try to make everyone feel as well treated as possible by providing nice workspaces and all the amenities — even fresh fruit and cookies. As a result, arbitration sometimes feels like the legal equivalent of shopping at Nordstrom.

Of course, the market for private dispute resolution is not driven by the refreshments. It is driven by the parties’ and, more importantly, the lawyers’ perception of the quality of justice dispensed, and that depends primarily on the arbitrator’s reputation for integrity, diligence and insight. But, the market is also influenced by the lawyer friendliness of both the arbitration organization and the arbitrator in the sense of giving lawyers more opportunities to shape the process and, sometimes unfortunately, being more tolerant of lawyers’ shortcomings and mistakes.

## Adapting to Arbitration’s Lawyer Friendliness

At the most fundamental level, arbitration accommodates lawyers by allowing them to influence the process in ways that courts do not and cannot. This often begins with drafting the contractual arbitration provision, which gives us lawyers the opportunity to specify the arbitration organization and arbitrator qualifications as well as, to the extent appropriate, the rules for discovery, confidentiality, conduct of the hearing and format of the award.

Most arbitration organizations also permit lawyers to participate in the selection of the arbitrator — either by agreeing to a particular candidate or by ranking and striking names from a list of candidates — and this can make a crucial difference. Frankly, I’d rather have an arbitrator that is not too lawyer friendly, especially when I have a particularly strong case, so I usually prefer former judges who are accustomed to deciding cases and telling counsel "no." In addition, former judges also provide some assurance of predictability in following the law, and this is often very important to parties who fear that an arbitrator will "split the baby" and leave them with no meaningful recourse.

Once selected, any arbitrator is likely to have more time and patience for your particular dispute than any court could devote to it. So, you and your opponent will probably find it easier to get the arbitrator’s attention on a scheduling matter or motion, and you and your opponent will probably get more latitude about the timing, length and number of briefs. But, don’t assume that an arbitrator’s generally greater willingness to consider motions necessarily means any greater willingness to grant them.

In fact, most litigators think that it is more difficult to win a dispositive motion in arbitration than in court. Cynics might say that’s because denying such a motion means more work and that judges and arbitrators have a very different economic incentive to take on more work. I think that arbitrators’ reluctance to grant dispositive motions is more a result of trying to be lawyer (and client) friendly. Waiting to decide a case until after listening directly to the parties gives everyone a greater sense of being heard and therefore a greater sense of justice being done.

So don’t count on winning a dispositive motion in arbitration, especially one that is even arguably dependent on the credibility of a party. Try to be patient if the arbitrator seems to be too accommodating with your opponents about scheduling matters or even too tolerant of arguments that you think are misleading or unethical. In such situations, the lawyer friendliness of arbitration can be inefficient and frustrating, but you won’t gain much by complaining. You will probably do more for your client by accepting that an arbitrator is less likely than a court to throw out claims or arguments (or even make negative comments about them before hearing testimony) and then planning accordingly on both offense and defense.