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Arbitration: Assured Resolution

Martin A. Frey and N. Kay Bridger-Riley

In recent years, arbitration has increased in popularity as a method of dispute resolution. Unlike negotiation and mediation where the parties must resolve their own dispute (without the assistance of a third-party neutral in negotiation and with the assistance of a third-party neutral in mediation) and therefore control whether the process results in the resolution of the dispute and, if so, what the outcome will be, arbitration shifts the resolution to a neutral, third party. The parties are assured that at the end of the arbitration, the dispute will be resolved.

Arbitration may be private or court-annexed (court-ordered). If private, arbitration may be designed by contracting parties when their contract is created (predispute) or by parties after their dispute arises (postdispute) (not necessarily contract-based). Predispute mandatory arbitration provisions may read:

Any dispute arising out of or relating to this contract shall be settled by private arbitration administered by [name of the arbitration service] under its arbitration rules, and any award rendered by the arbitrator or arbitration panel may be entered as a judgment in any court having jurisdiction.

Any controversy or claim arising out of or relating to this agreement or the breach of this agreement shall be settled by arbitration in accordance with the rules of the [name of the arbitration service].

In a dispute arising out of or relating to this agreement, the parties will submit the controversy to binding arbitration before a panel composed of [insert specific names or positions of people to comprise the arbitration panel]. The panel's decision is final and unappealable unless the [Federal Arbitration Act (FAA) or a version [name the state] of the Uniform Arbitration Act] provides otherwise. Each party may engage in documentary discovery prior to the arbitration hearing. The rules of procedure and the arbitrators' award shall conform to the laws of the State of [name of state]. The parties hereby knowingly and voluntarily waive their right to a trial before a judge or trial judge and jury.

In private arbitration, the parties may negotiate the rules for the arbitration. If the parties do not select the rules, the arbitration operates under rules selected by the arbitration service, the arbitrator, or the arbitration panel.

In private arbitration, the parties may select:

- the arbitrator, the arbitration panel (usually three), or the arbitration service that will provide the arbitrator or arbitration panel;
- the time and place of the arbitration;
- the rules of discovery;

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- the format of the arbitration hearing;
 - the applicable rules of evidence (e.g., admission of hearsay, testimony by document rather than in person);
 - the length of time between the hearing and the rendering of the award;
 - the format of the award, whether a written reasoned opinion or a mere statement of the award.
- Unlike litigation where a judge (and certainly juries) may not be an expert in the field being litigated, the arbitrator or arbitrators may have this expertise. The arbitrator or arbitrators may be selected because of their expertise.

Arbitration functions without a jury. The arbitrator resolves both questions of fact and issues of law. Since the parties have scheduled the arbitration hearing with the arbitrator and are paying the arbitrator, the hearing tends to adhere to the schedule with little or no interruption. The arbitrator is totally focused on the case before him or her.

An inherent drawback with private arbitration is what could be perceived as an uneven playing field. Often, one party is a frequent user of arbitration, while the other party may only use the process once. The frequent user may gain a familiarity with the arbitrator, creating the perception that the arbitrator favors the party who repeatedly uses the same arbitrator or arbitration service. This perception is often justified because the arbitrator may be more likely to create an advantage for the known party who will likely rehire the arbitrator as a result.

Another drawback with private arbitration is the fact that the arbitrator's award is rarely appealable. Judicial review is generally limited to whether:

- the agreement to arbitrate is unenforceable;
- the agreement to arbitrate was not followed;
- corruption, fraud, or misconduct was present during the arbitration;
- the arbitrator or the arbitration panel exceeded its power;
- the agreed-upon procedures were not followed during the arbitration hearing;
- the parties were denied a fair and impartial hearing;
- the statute of limitations barred the arbitrated claim.

On the other hand, the lack of judicial review that accompanies arbitration gives finality to the resolution of the dispute.

Since private arbitration is consensual (see sidebar), the parties could vary the process. For example, an agreement could be made between the parties for "Final Offer arbitration" (also known as last offer or baseball arbitration) followed by the private arbitration process with the exception that the parties agree in advance that they will each submit final offers and the arbitrator must select one or the other. Or, the parties could agree that the arbitrator may not issue an award higher, lower, or in-between the two offers.

High/low arbitration (also known as bounded arbitration) also complies with the private arbitration process with the exception that the parties agree in advance that they will each submit final offers and the arbitrator must issue an award between the two offers. The arbitrator may

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neither go higher than the higher offer nor lower than the lower offer. The arbitrator's award must come within the range of the two offers.

Private mediation may also be coupled with private arbitration. The parties first mediate their dispute in an attempt to control the outcome. If the mediation does not produce a settlement, then the dispute moves to arbitration where a neutral third party will resolve the dispute. At the end of this process, the dispute will be resolved.

Public arbitration (also known as court-ordered or court-annexed arbitration) has not been as popular as private arbitration. About 10 federal district courts and 20 states use this process. Depending on the court rule or statute, court-annexed arbitration may be mandatory or voluntary. In court-annexed arbitration, a case is filed and may or must go through the arbitration process before it may be litigated.

The New York Convention of 1958 (also known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) was prepared by the United Nations and has become a keystone of international arbitration. This convention requires courts of contracting states to give effect to an agreement to arbitrate and to recognize and enforce awards made in other states, subject to specific limited exceptions. Thus an arbitration award is more easily enforced in a foreign court than is a foreign judgment. Over 140 states have signed on to this convention.

Finally, most international contract disputes are resolved by arbitration rather than by litigation. Such groups as the International Centre for Dispute Resolution (ICDR) and the International Chamber of Commerce (ICC) are two such arbitration services.

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