

ARBITRATION 101

The arbitration process has many similarities to the procedures used in court, but there are also many differences. Arbitrations are usually concluded much more quickly and often with much less exchange of information than would happen in the typical court case. As a result, an arbitration can be a lot less costly in terms of attorney's fees than litigating a case. Below I will outline the general process of how an arbitration works and some of the important differences between using the arbitration process and litigating a case in court.

USING THE ARBITRATION PROCESS

So how do you get to arbitration instead of fighting in court? There are two ways, either (i) the parties mutually agree that the case should be determined in arbitration or (ii) there is a contractual dispute and the contract has an arbitration provision that states all disputes under the contract must be resolved through arbitration. Anyone can, if both parties are willing, decide to arbitrate their dispute instead of filing a case in court. Both sides must agree to do so and if one side is not willing, the only other way to force a resolution of the matter is to file a lawsuit.

The other way to get to arbitration is if the contract states that all disputes are to be arbitrated. Some arbitration provisions in contracts are very detailed and set forth not only that any disputes under the agreement must be arbitrated, but also how that arbitration will proceed, what types of discovery (i.e. information exchanged by way of written questions, requests for documents and depositions) will be allowed, and where the arbitration will be held. Others merely state that the arbitration will be help pursuant to the rules of one of the many companies that provide arbitrations services, like the American Arbitration Association ("AAA") which is probably the most widely used company. In this article, in providing you with this analysis, I am assuming that the AAA Commercial Arbitration Rules are being utilized for the arbitration.

THE PROCESS

To initiate an arbitration proceeding, one of the parties files a short form with the AAA indicating the type of dispute and the amount in controversy. This differs from a lawsuit where the process is initiated by filing a complaint, often many pages long, detailing all the various legal causes of action and alleging facts in support of the case. In arbitration, there is no need for all that work, the AAA requires only the barest summary of the case to proceed. The other party may also file its own claims so that conceivably both parties would have claims and be able to recover in the case. The AAA charges a fee that increases based upon the amount in controversy claimed by the parties. So, if you inflate your claim and say it is worth a lot more than it is, you may end out paying a hefty administrative fee to the AAA as a result.

Once the arbitration has been filed, the AAA appoints an administrator to oversee the case. The first job of the administrator is to help the parties pick an arbitrator. Arbitrations almost always have either a single arbitrator or three arbitrators. If there is a single arbitrator, the parties will either try to agree on an arbitrator or pick one from a list provided by the AAA. If there are to be three arbitrators, each party will pick one arbitrator (arguably favorable to that party's position) and then those two arbitrators will pick a third arbitrator, which most of the time is a retired judge. The three arbitrator panel then comes to a verdict by a majority vote.

Once the arbitrator or arbitrators are picked, there is usually a conference call to determine the timeline for any discovery and to pick an arbitration date. Some parties will want to do extensive discovery and other parties will want to just proceed to the arbitration without any discovery at all. For most cases unless they are very complicated, the arbitration will occur within six months to a year from when the first party filed with the AAA. This may seem like a long time but a court case can take a minimum of twelve to eighteen months to get to trial and in some states it can be years before you ever see the inside of a courtroom.

Discovery is not mandatory in the AAA Commercial Arbitration Rules so that means that the parties have to agree to discovery or there will be none. If there is no discovery the parties cannot get any information about the case from the other side but just have to show up at the arbitration with whatever information they have and whatever they can get from third parties. This can make an arbitration a lot less expensive since the attorneys are not doing a lot of work, but it also means that you could be in for a shock when you get to the arbitration, given you have no idea what type of information and documents the other side has.

As the parties get ready for the arbitration, they can prepare a legal brief to provide to the arbitrators. In the legal brief, a party can provide the arbitrators with a statement of their version of the case along with legal authority to support their position. Preparing such a brief is usually a very good tactic to get your case seen first by the arbitrators. The arbitrators do not have to read the brief, but usually do. If your opponent does not provide a brief to the arbitrators, then the arbitrators will know your side of the story when the arbitration commences and not the other side's version, hopefully giving you an advantage.

The arbitration itself is less formal than the typical court case for the most part taking place in a conference room and not a courtroom. The arbitrators preside over the arbitration like judges (and many of them are retired judges) and the same legal objections are utilized as would be in a court setting. However, the arbitrators will not be so sensitive to sustaining objections given there is no jury present. The arbitrators will

allow pretty much any relevant information in the case and then disregard any information which should be excluded based on evidentiary issues or for other reasons.

Given the lack of a jury, an arbitration can proceed much more quickly than a typical legal proceeding, as just picking a jury can often take days. If the parties have provided arbitration briefs, the arbitrators will generally skip opening statements and just start with witness testimony. As in court, the main way of entering evidence into the record is through witnesses and the documents the parties are able to get into evidence. The arbitration usually concludes with closing statements shorter than those you would expect in court. The real closing arguments more often come in the form of an after arbitration brief that the arbitrators will request from each party essentially asking, based on the evidence presented, why that party should prevail.

After the case is closed and the arbitrators have all the requested briefs and information, they will provide a ruling. The ruling can be a reasoned ruling that states the legal basis and facts supporting why a certain party prevailed, or it can be a simple verdict that merely states who won and how much money is awarded. Either way, the arbitration award can be taken down to the local courthouse, filed and then it is just as good as any judgment obtained in court. Absent fraud on the part of the arbitrator, there is almost no way to appeal or get rid of the judgment rendered from the arbitration award.

Arbitration has the advantage of being less time consuming and generally much less expensive to engage in compared to the average judicial proceeding. However, for those that are unprepared or do not have the right information to prove their case, it can still end up to be a very costly proposition.

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