PDHonline Course P101F (4 PDH)

Alternate Dispute Resolution (General)

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2020

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Module #3
Arbitration

How it Works

Arbitration is a private, informal process by which all parties agree to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a decision. It is used for a wide variety of disputes. This includes commercial disagreements involving construction, securities transactions, computers, real estate, insurance claims, and labor-union grievances (to name just a few). When an agreement to arbitrate is included in a contract, it might expedite peaceful settlement without the necessity of going to arbitration at all. Thus, an arbitration clause could be considered a form of insurance against loss of goodwill.
There are two types of arbitration, binding and non-binding. The difference is in the name. Non-binding arbitration is identical to binding arbitration, except the arbitrator(s) ruling is not binding on the parties. In effect, it is an advisory opinion. It gives the parties the view of a neutral (or neutrals) on the case. The parties are then free to take that information and negotiate, mediate, arbitrate (binding), or file a civil lawsuit. To my way of thinking, non-binding arbitration is a waste of time and money in most cases. Binding arbitration on the other hand results in a final solution.

MAJOR FEATURES of ARBITRATION

1. ***A Written Agreement to Resolve Disputes by the Use of Impartial Arbitration.***
   Such a provision should be inserted in the contract for the resolution of future disputes.
2. ***Informal Procedures.***
   Under the American Arbitration Association (AAA) rules, the procedure is relatively simple; courtroom rules of evidence are not strictly applicable. There is limited "motion" practice and limited "formal discovery". The AAA rules have no requirements for transcripts of the proceedings or for written opinions of the arbitrators.

3. ***Commercial Rules*.**
   Allows the arbitrator to require the production of relevant information and documents. The AAA's rules are flexible and may be varied by mutual agreement of the parties.
4. ***Impartial and Knowledgeable Neutrals to Serve As Arbitrators.***
   Arbitrators can be selected for specific cases because of their knowledge of the subject matter. Based on their experience, arbitrators can render an award grounded on thoughtful and informed analysis.
5. ***Final and Binding Awards that Are Enforceable in a Court.***
   Court intervention and review are very limited by applicable state or federal arbitration laws and award enforcement is facilitated by those same laws.

As outlined in the course overview arbitration is not a given right. Courts are powerless to order binding arbitration. Everyone has their right to trial by jury unless they agree to give it up and settle a dispute by ADR. If you want to use arbitration to settle a dispute, it is best to have the arbitration clause in the contract. Typical arbitration clauses that have stood the test of time are outlined in Module #4. The arbitration clause should be definitive on what you are agreeing to arbitrate---any, all or only certain types of disputes. Properly worded arbitration clauses are hard to overturn in court. Both Federal and State law recognized arbitration as an alternative to civil trials and judges are reluctant to overturn them. In fact, the U. S. Supreme Court has ruled that party-agreed arbitration is in support of public policy, which is not to be taken lightly by federal or state judges.

Arbitration Panels

The parties can decide (in the contract) if the dispute is to be arbitrated before one arbitrator (neutral) or a panel of three arbitrators (neutrals). They may even decide to have each party select one arbitrator and then those selected arbitrators select the third. If the selected arbitrators cannot agree on a third, the parties could have the American Arbitration Association select the third.

Based on my experience I believe it best to use a single neutral arbitrator for small and simple disputes (One Million Dollars or less). As the dispute becomes larger and more complex you may want more than one view of the

dispute, so you should use a "three neutral arbitrator" panel. I see no value in having each party select one arbitrator (who is actually an advocate for the selecting party) and then only having one real neutral. In effect, you have a single arbitrator. All of the arbitration votes will be 2 to 1 with the real neutral as the swing vote.

How Arbitration Works

Assuming there is a contractual clause to settle disputes by arbitration, or that the parties agree to arbitrate, the process usually starts with one of the parties filing a "Demand for Arbitration" (see the attached form at the end of Module #4) with the AAA. This party becomes the Claimant. The other party becomes the Respondent (Notice not Plaintiff and not Defendant). The Claimant files the "Demand for Arbitration" with the AAA along with the appropriate administrative fee (the AAA has a schedule of fees depending on the value of the claim). It is best to attach the part of the contract that spells out arbitration to the "Demand for Arbitration" form. It is not mandatory to use lawyers for arbitration. If the case is simple and straightforward, a Claimant and/or Respondent may represent him/herself. If one side employs legal counsel, usually the other side does also. However, most of the time lawyers are employed by the parties.

The AAA notifies the Respondent about the "Demand for Arbitration". The Respondent "answers" the "Demand for Arbitration" and may even file a counterclaim (a counterclaim requires the same administrative fee as the claim). So do not file frivolous claims or counterclaims, it just costs more money. A case administrator will be assigned by the AAA who will guide the parties through the process.

The first task is to establish the locale of the arbitration if it is not specified in the arbitration clause of the contract. If the contract does not specify and the parties cannot agree, then the AAA case administrator will select a site, usually a neutral site.

The next task is to select the arbitrators. The AAA usually employs what is called "a listening process." The AAA will develop a list of 9 or 10 or even more, as the case demands, arbitrators who are near the arbitration site who appear to be knowledgeable about the types of issues in dispute. This list of potential arbitrators along with copies of their resumes will be sent to both parties. Either party may strike whoever they wish for whatever

reason they wish. The parties then list the remaining potential arbitrators in order of their preference. The AAA case administrator then picks the arbitrator(s) from the potential arbitrators that remain on both lists. The AAA case administrator will contact the arbitrator candidates and have them check on their interest in the case and their availability for the case. They will also ask the potential arbitrator to disclose any interest or knowledge the arbitrator may have about the parties, their lawyers and/or any of the potential witnesses. The intent is to select arbitrators who are completely neutral but at the same time are knowledgeable.
The potential arbitrators **must** disclose any knowledge they have about the case, lawyers, witnesses, or parties. Failure to disclose a conflict of interest is one of the very few reasons for a court to overturn an arbitrator's ruling.
Assuming all goes well, the arbitrator(s) are selected and they take their oath of office. The parties are notified of who has been selected to be the arbitrator(s). The next task is to conduct what is called a "preliminary hearing". The newly appointed arbitrators will conduct the preliminary hearing where the following issues will be discussed/determined:

1. ***A Brief Written Statement, Usually Not To Exceed Five Pages, Setting Forth Each Party's Outline of Its Claims*** –
   The parties are given the opportunity to briefly describe the subject of the dispute, which issues are expected to be resolved, and other brief comments that will educate the arbitrator(s) about the issues to be decided.

2. ***Specification of Claims and Counterclaims*** –
   The parties will specify the amounts involved in their claims and counterclaims.

3. ***Stipulation of Uncontested Facts-***
   Whichever facts the parties can stipulate should be reduced to writing, and each party should sign and receive a copy. The arbitrator should be given a copy of the stipulated agreements.

4. ***Exchange of Information and a Schedule for the Exchange (Including Reports from Experts)*** –

   The parties will be informed that they are required to cooperate in committing to, conducting, and completing the exchange of information concerning documents, and witnesses. If they do not agree to exchange particular information, the arbitrator(s) will hear their disagreement, and

make a ruling on the issue. After the information to be exchanged has been specified, a schedule will be established.
While arbitrators do not have the authority to hold a party in contempt, most parties are reluctant to antagonize an arbitrator by refusing to obey their directives. Where the arbitrator's request is reasonable, no court will be inclined to overturn it. In some cases, arbitrators have enforced their orders by directing the case administrators to advise a reluctant party that failure to obey may result in their claim or counterclaim being stricken.

5. ***Lists of Witnesses with Outlines of Testimony (Including Biographies) of Expert Witnesses-***
The arbitrator will inform the parties that they will be required to provide each other with lists of intended witnesses arranged in the order in which they will be called. A summary by name for each witness, with the subject matter of the anticipated testimony of each, should be included.

6. ***Advance Filing and Advance Identifications of Exhibits*** –
The arbitrator will inform the parties that they will be required to identify and exchange exhibits in advance of the formal evidentiary hearing.

7. ***Estimated Length of the Case and the Schedule of Hearings-***
The parties should be prepared to give a realistic estimate as to the number of hearing days needed to present their respective cases and should be ready to agree to a schedule for the evidentiary hearings as soon as feasible. Keeping in mind that a prompt award is an important part of the arbitration, the arbitrator(s) should encourage the scheduling of consecutive hearing days. Full hearing days will be scheduled with short lapses for lunch and breaks. Requests to postpone scheduled hearings will be granted only for just cause.

8. ***The Number of Copies of Exhibits to be Made*** –
It will save time and effort if the parties know how many copies of exhibits and other evidence to provide (enough for each arbitrator and each party).

9. ***Briefs*** –
The arbitrator and parties will discuss whether briefs will be allowed. When briefs are to be filed, the arbitrator will establish a schedule for their production.

10. ***The Award*** –
It is not required for arbitrators to render written opinions and findings of facts with the awards. However, factual findings, including a breakdown of amounts awarded, may be requested by the parties if done so prior to the opening of the formal hearings.

11. ***Conduct of the Evidentiary Hearing and Concluding Remarks*** –
At the conclusion of the preliminary hearing, the arbitrator will reiterate the opening remarks; namely, the goal to is move the arbitration to a fair and speedy conclusion. Making the parties aware of their respective responsibilities will set the right tone and facilitate the management of the case. The arbitrator will talk about how the evidentiary hearing is to be conducted. This is also the time to announce that documents and/or pictures will be self-identifying wherever possible and that repetitious testimony and evidence will be interrupted. Whichever other timesaving devices the arbitrator(s) wishes will be indicated at this time.

12. ***Arbitrators' Directive(s)*** –
Directions to exchange information can be confirmed in a directive issued by the arbitrator following the preliminary hearing. Any controversy regarding exchanges of information will be resolved by the arbitrator.

THE EVIDENTIARY HEARING
(This might be the first time the parties actually are face to face with the arbitrators)

1. The filing party, (the Claimant), usually makes an opening statement first. Upon completion of the Claimant's opening statement, the Respondent is given the same opportunity. The Claimant usually presents its case first, through the testimony of witnesses and/or the introduction of exhibits. The Respondent may cross-examine the Claimant's witnesses. The Respondent then presents its case and the Claimant is given the same opportunity to cross-examine the Respondent's witnesses.

2. Rulings at the Hearing
   (a) No new or different claims may be submitted without the arbitrators' consent.

   (b) When it is clear that evidence or testimony being introduced is irrelevant or repetitive, the arbitrators have the authority to so rule and direct the party to move forward with its presentation.

   (c) Arbitrators must rule on objections as they are made.

3. All documents introduced as exhibits must first be presented to the opposing party for examination before being given to the arbitrators. Each exhibit should be clearly marked to indicate which party submitted the exhibit and to whom each exhibit should be returned.

4. Stenographic records of the proceedings are not required in arbitration. Any party may request the presence of a stenographer, the cost of which is borne equally among the parties requesting a transcript.

5. The arbitrators may ask questions to witnesses, counsel and any other individual to clarify issues in dispute. They should be careful not to interrupt the presentation of either side's case by asking such questions.

6. If the arbitrators determine that an on-site inspection is necessary, they will notify the AAA case administrator, who will ensure that all parties are duly notified prior to the inspection.

7. Arbitrators are not to suggest specific terms of settlement to the parties. Settlement discussions into which the parties decide to enter must be beyond the presence of the arbitrators.

CLOSING of the HEARING

1. When both parties have completed the presentation of their respective cases, the Respondent will be requested to make a closing statement, if

desired. The Claimant is then given an opportunity to make a final closing statement.

2. Usually, closing briefs are not required. If post-hearing briefs are to be filed, usually limits are set on the number of pages and the issues to be covered. The arbitrator will establish a specific date with the parties for the filing of the briefs. The hearings will not declare closed until the date set for receipt of the final briefs.

3. If post-hearing briefs will not be submitted, the arbitrator chairing the panel is requested to read the following statement to the parties at the closing of the hearing "The parties are requested to advise us if any further evidence or testimony is to be presented at this time. Both parties have affirmed that the presentation of their case has been completed. We, the arbitrators, declare these hearings closed."

4. The award is due within thirty days of the closing of the hearing or the receipt of the transcript or briefs, if any. If the parties' contract contains some other time limit for rendering the award or if the case is heard under the AAA Expedited Procedures (Commercial Arbitration Rules), which allow fourteen days to render the award, that time limit is to be observed. An extension of the award due date may only be granted upon consent of both parties.

5. **VERBAL AWARD WILL NOT BE GIVEN AT THE HEARING!**

6. An "Arbitrator's Opinion" is not required unless the parties so agree **in advance** of the hearings. The award may take the form of a simple, short statement. It should include apportionment of the AAA's administrative fees, and of your fees (e.g., equally, all by one party, etc.).

7. The award should be clear and definite, leaving no doubt of the rights and obligations of the parties. It should address every issue in the claim and/or counterclaim and must not go beyond the scope of the arbitrator's authority.

SOME GENERAL GUIDELINES/RULES to FOLLOW

OVERALL

One of the reasons that parties resort to arbitration is their desire for privacy. Therefore, all parties should maintain the privacy of proceedings, unless both parties agree to open the hearings or unless a statute requires otherwise.

Persons directly concerned in arbitration have the right to attend hearings. Others wanting to attend may be permitted by mutual agreement, with due regard to the right of privacy. Witnesses may be retired from the hearing room during the testimony of other witnesses.

Parties are usually represented by attorneys, although that is not required. In either event, the parties bring the case to the arbitrator, presenting such evidence and arguments as they deem pertinent. The arbitrator may directly question witnesses. But, the parties must be allowed to develop the facts in their own way and ask questions or call for the production of additional evidence as required.

At times, testimony may become repetitious or wander from essential matters. The arbitrator will insist on an expeditious presentation. Asking the disputants to stipulate mutually agreed facts is often an effective way to save time and clarify the issues.

EVIDENCE

Arbitration awards can be subject to attack if arbitrators refuse to hear material testimony or accept relevant evidence. Therefore, arbitrators often accept doubtful material but give it little weight. Indiscriminate acceptance of irrelevant, repetitious, or immaterial evidence can be costly and delay the arbitration process. One guiding principle must be kept in mind: everything that could further an understanding of the case should be heard and accepted. Arbitrators should be sensitive to the type of evidence that might be offered by a party. An arbitrator might have to rule on an objection to evidence offered on the ground that it is privileged for being attorney-client communications or terms of settlement negotiations. There are public-policy reasons that encourage open attorney-client communications in the first instance and frank settlement negotiations in the latter instance. Occasionally, a person will testify about actions that he or she did not personally witness. An objection might be raised that this is hearsay

evidence. There might also be times when an arbitrator is asked to accept evidence that one party alleges to contain trade secrets. In such instances, arbitrators must rule on the objection raised, bearing in mind that conformity to legal rules of evidence is not required in arbitration.

AFFIDAVITS and SUBPOENAS

Business people generally prefer arbitration because of its convenience. When witnesses are in a distant city and it would be costly to bring them to the hearing, parties may ask the arbitrator to accept testimony in the form of affidavits. The arbitrator may agree if convinced that there is a good reason for the request. If there is an objection, the arbitrator should hear arguments from both sides before making a decision. In evaluating affidavits, the arbitrator should take into account the fact that witnesses were not subject to cross-examination, as they would have been had they appeared in person.

Occasionally, one party will wish to put into the record a document held by the other party. The decision as to whether the document should be produced is made by the arbitrator. Again, the parties should be asked to comment. If the arbitrator is convinced that the document is essential, the party should be directed to produce it. This usually results in compliance because few parties in arbitration wish to risk the adverse conclusions that might be drawn from a refusal.

The AAA form for "Demand for Arbitration" follows on the next two pages

DEMAND FOR ARBITRATION

DATE:_____

TO: Name _____

Address _____

City and State_____ **ZIP Code** _____

Telephone ( ) _____ **Fax** _____

Name of Representative_____

Representative's Address _____

Name of Firm (if Applicable) _____

City and State _____ **ZIP Code** _____

Telephone ( ) _____ **Fax** _____

The named claimant, a party to an arbitration agreement contained in a written

contract, dated _____**and providing for arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association, hereby demands arbitration thereunder.**

THE NATURE OF THE DISPUTE:

THE CLAIM OR RELIEF SOUGHT (the Amount, if Any):

Please indicate the industry category of each party.
CLAIMANT: ☐ Owner ☐ Architect ☐ Landscape Architect ☐ Engineer ☐ Contractor ☐ Subcontractor (Specify. _____) ☐ Interior Designer ☐ Other_____

RESPONDENT:☐ Owner ☐ Architect ☐ Landscape Architect ☐Engineer ☐ Contractor ☐ Subcontractor (Specify. _____) ☐ Interior Designer ☐ Other_____

HEARING LOCALE REQUESTED: _____
(City and State)

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association at its _____ _____ office, with a request that it commence administration of the arbitration. Under the rules, you may file an answering statement within ten days after notice from the administrator.

Signed _____ Title _____
(May Be Signed by a Representative)

Name of Claimant _____

Address (to Be Used in Connection with This Case) _____

City and State _____ ZIP Code _____

Telephone ( ) _____ Fax _____

Name of Representative_____

Representative's Address _____

Name of Firm (if Applicable) _____

Representative's Address _____

City and State _____ ZIP Code _____

Telephone ( ) _____ Fax _____