

4.4: Arbitration

Arbitration is a method of ADR in which parties vest authority in a neutral third-party decision maker to hear their case and issue a decision, which is called an **arbitration award**.

An arbitrator presides over arbitration proceedings. **Arbitrators** are neutral decision makers who are often experts in the law and subject matter at issue in the dispute. Arbitrators act like judges during trials. For instance, they determine which evidence can be introduced, hear the parties' cases, and issue decisions. They may be certified by the state in which they arbitrate, and they may arbitrate only certain types of claims. For instance, the Better Business Bureau trains its own arbitrators to hear common complaints between businesses and consumers (B2C). However, their decisions do not form binding precedent like appellate court decisions.

Participation in the arbitration proceeding is sometimes mandatory. Parties must arbitrate if they signed a contract requiring mandatory arbitration for that type of dispute. Arbitration is also mandatory when state law requires it.

Voluntary arbitration is frequently used in business disputes. Sometimes parties simply agree that they do not want to litigate a dispute because they believe that the benefits of arbitration outweigh the costs of litigation, so they choose arbitration in hopes of a speedy and relatively inexpensive outcome.

In binding arbitration, the arbitration award is final. Therefore, appealing the merits of a binding arbitration award to court is not available. An arbitration award may be converted to a judgment by the court, thereby creating the legal mechanism through which the judgment can be collected. This process is called **confirmation**.

Although courts review arbitration awards, their review is very limited and all doubts are resolved in favor of the validity of the award. Courts review whether (1) the arbitration award covered matters beyond the issues submitted; (2) the arbitrator failed to apply the law correctly; and (3) fraud occurred. Courts do not review the merits of the award.

Like any other form of dispute resolution, arbitration has certain benefits and drawbacks. Arbitration is an adversarial process like a trial, and it will produce a "winner" and a "loser." Arbitration is more formal than negotiation and mediation and, in many ways, it resembles a trial. Parties present their cases to the arbitrator by introducing evidence. After both sides have presented their cases, the arbitrator issues an arbitration award.

The rules of procedure during arbitration are often less formal or less restrictive on the presentation of evidence than in litigation. Arbitrators decide which evidence to allow, and they are not required to follow precedents or to provide their reasoning in the final award. In short, arbitration adheres to rules, but those rules are not the same as the rules for litigation.

Arbitration can be more expensive than negotiation or mediation, but it is often less expensive than litigation. Parties must pay the costs of the arbitrator, and they often hire attorneys to represent them. Additionally, in mandatory arbitration clause cases, the arbitration may be required to take place far from one of the parties. This means that a party may have to pay travel costs during the arbitration proceeding. Arbitration is also faster than litigation.

A common issue is whether mandatory arbitration is fair in certain circumstances. It's easy to imagine that arbitration is fair when both parties are equally situated. For example, **business to business (B2B)** arbitration is often perceived as fair, especially if businesses are roughly the same size or have roughly equal bargaining power. This is because they will be able to devote approximately the same amount of resources to resolve the dispute, and they both understand the issues involved.

However, issues of fairness often arise in **business to employee (B2E)** and **business to consumer (B2C) disputes**, particularly where parties with unequal bargaining power have entered into a contract that contains a mandatory arbitration clause. In such cases, the weaker party has no real negotiating power to modify or to delete the mandatory arbitration clause, so that party is required to agree to such a clause if it wants to engage in certain types of transactions. In B2E contexts, unequal bargaining power alone is insufficient to hold arbitration agreements unenforceable.

In B2C cases, different issues of fairness exist. As noted previously, when the parties possess unequal power, these issues can be magnified. Consumers tend to fare better in litigation than in arbitration. Incentives exist to favor businesses over consumers in the arbitration process, including the lack of appeal rights to the courts, the limits on consumers' remedies, prohibitions against class-action suits, limitations on access to jury trials, limitations on abilities to collect evidence, and greater out-of-pocket expenses.

Not all binding arbitration clauses have been upheld by courts in B2C cases. The FAA does not prevent the courts from applying state law, including the unconscionability of contract terms. In other words, if the terms of the contract make it unreasonable to enforce the arbitration provision, then a party may still bring claims to court for resolution.

Similarly, arbitration agreements may be rescinded on the same grounds as other contracts. Fraud, mutual mistake, and lack of capacity are grounds for voiding arbitration contracts. Revocation is also possible in the event of death or bankruptcy of one of the parties, as well as destruction of the subject matter of the underlying contract.

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