Arbitration

Arbitration is a form of dispute resolution. Arbitration is the private, judicial determination of a dispute, by an independent third party.

An arbitration hearing may involve the use of an individual arbitrator or a tribunal. A tribunal may consist of any number of arbitrators though some legal systems insist on an odd number for obvious reasons of wishing to avoid a tie. One and three are the most common numbers of arbitrators. The disputing parties hand over their power to decide the dispute to the arbitrator(s). Arbitration is an alternative to court action (litigation), and generally, just as final and binding (unlike mediation, negotiation and conciliation which are non-binding).

General principles of arbitration are as follows:

- The object of arbitration is to obtain a fair resolution of disputes by an impartial third party without unnecessary expense or delay.
- Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.
- Courts should not interfere.

Arbitrators, or Tribunal members, are commonly appointed by one of three means:

1. Directly by the disputing parties (by mutual agreement, or by each party appointing one arbitrator)
2. By existing tribunal members (For example, each side appoints one arbitrator and then the arbitrators appoint a third)
3. By an external party (For example, the court or an individual or institution nominated by the parties)

Arbitration, while being nicknamed the 'businessman's method of resolving disputes', is governed by state and federal law. Most states have provisions in their civil practice rules for arbitration. These provide a basic template for the arbitration as well as procedures for confirmation of an arbitrator's award (the document that gives and explains the decision of an arbitrator), a procedure that gives an award the force and effect of a judgment after a trial in a court. Many states have adopted the Uniform Arbitration Act, although some states have specific and individual rules for arbitration.

Classifications Of Arbitration.

1. *Commercial Arbitration* is the most common of disputes. Just as it sounds, it is a dispute between two commercial enterprises.
2. *Consumer Arbitration* surrounds disputes between a consumer and a supplier of goods or services.
3. *Labor Arbitration* involves the settlement of employment related disputes. This form or arbitration can be divided into two main categories: Rights Arbitration and Interest Arbitration.

Rights Arbitration (a.k.a. Grievance Arbitration) deals with the allegation that an existing collective agreement has been violated or misinterpreted. Various legislatures require that the parties

who enter into a collective agreement set out a procedure for the handling of disputes and differences. The idea is that parties should be obliged to meet at different steps in their own specific grievance procedure to review and discuss the grievance. However, the fact is that the parties themselves cannot resolve many disputes and for this reason arbitration is necessary so that the matter may be determined. Typical arbitration awards deal with a complaint that a specific item in collective agreement has been violated.

Interest Arbitration (a.k.a. Contract Arbitration) is normally imposed by a statute, and involves adjudication on the terms and conditions of employment to be contained in a resulting collective agreement. Since statutes, usually prohibit a legal strike, or lock out, these contract disputes must be resolved somehow; in this case by interest arbitration. For example, collective bargaining in a new collective agreement covering a fire force or a hospital may break down into an irresolvable deadlock. The contractual matters still in dispute between the parties would be put to an interest arbitrator or tribunal for a ruling and determination, which would then form the relevant provisions of the collective agreement between the two parties.

The kinds of labor disputes taken to an arbitrator are as many and as different as the wide range of decisions and actions that effect employers, employees and trade unions. Liability can span from cents to millions, and there can be a solitary griever or a union of grievers.

It is also worthy to note that some labor disputes employ 'med/arb' to resolve their differences as opposed to straight arbitration. Med/arb takes place when disputants agree from the start that if mediation fails to result in agreement the mediator, or another neutral third party, will act as arbitrator and be empowered to reach a binding decision for disputants.

Advantages Of Artbitration

Supporters of arbitration hold that it has a multitude of advantages over court action. The following are a sample of these advantages:

- *Choice of Decision Maker* – For example, parties can choose a technical person as arbitrator if the dispute is of a technical nature so that the evidence will be more readily understood.
- *Efficiency* – Arbitration can usually be heard sooner than it takes for court proceedings to be heard. As well, the arbitration hearing should be shorter in length, and the preparation work less demanding.
- *Privacy* – Arbitration hearings are confidential, private meetings in which the media and members of the public are not able to attend. As well, final decisions are not published, nor are they directly accessible. This is particularly useful to the employer who does not want his 'dirty laundry' being aired.
- *Convenience* – Hearings are arranged at times and places to suit the parties, arbitrators and witnesses.
- *Flexibility* – The procedures can be segmented, streamlined or simplified, according to the circumstances.
- *Finality* – There is in general, no right of appeal in arbitration. (Although, the court has limited powers to set aside or remit an award).

Having cited the above list of advantages, it is only appropriate to mention some of the most commonly perceived drawbacks of arbitration:

- *Cost* - One or both of the parties will pay for the arbitrator's services, while the court system provides an adjudicator who does not charge a fee. The fees for an arbitrator

can be hefty. To give an example, for an amount of claims up to $100,000, the minimum fee for a single arbitrator is $2,000. The maximum fee can reach ten percent of the claim. However, supporters of arbitration argue that this should be more than compensated for by the potential for the increase in the efficiency of arbitration to reduce the other costs involved.

- '*Splitting the Baby'* – Thomas Crowley states that because of the relaxation of rules of evidence in arbitration, and the power of the arbitrator to 'do equity' (make decisions based on fairness), the arbitrator may render an award that, rather than granting complete relief to one side, splits the baby by giving each side part of what they requested. Thus both parties are leave the table feeling that justice was not served.
- *No Appeal* – Unless there is evidence of outright corruption or fraud, the award is binding and usually not appealable. Thus if the arbitrator makes a mistake, or is simply an idiot, the losing party usually has no remedy.
- *Narcotic/Chilling Effects* – The chilling and narcotic effects are two related concepts, which many theorists, including David Lipsky, believe to be inadequacies of interest arbitration. Chilling occurs when neither party is willing to compromise during negotiations in anticipation of an arbitrated settlement. Two measures most commonly used to weigh this effect are: the number of issues settled during negotiations versus the amount of issues left for arbitration, and a comparison with the management's and union's initial offers (chilling takes place when the two parties take extreme positions and are not willing to budge). The narcotic effect refers to an increasing dependence of the parties on arbitration, resulting in a loss of ability to negotiate. Common methods of assessing the narcotic effect are: the proportion of units going to arbitration over time and, perhaps more importantly, the number of times an individual unit returns to arbitration over a series of negotiations.

<u>Typical Steps in an Arbitration</u>

The process of arbitration differs among cases. The following is a list of the main steps in arbitration, however it should not be viewed as an exhaustive list:

1. *Initiating the Arbitration* – A request by one party for a dispute to be referred to arbitration.
2. *Appointment of Arbitrator* – Arbitrators may be appointed by one of three ways: (1) Directly by the disputing parties, (2) By existing tribunal members (For example, each, each side appoints one arbitrator and then the arbitrators appoint a third), (3) By an external party (For example, the court or an individual or institution nominated by the parties).
3. *Preliminary Meeting* – It is a good idea to have a meeting between the arbitrator and the parties, along with their legal council, to look over the dispute in question and discuss an appropriate process and timetable.
4. *Statement of Claim and Response* – The claimant sets out a summary of the matters in dispute and the remedy sought in a statement of claim. This is needed to inform the respondent of what needs to be answered. It summarizes the alleged facts, but does not include the evidence through which facts are to be proved. The statement of response from the respondent is to admit or deny the claims. There may also be a counterclaim by the respondent, which in turn requires a reply from the

claimant. These statements are called the ‘pleadings’. Their purpose is to identify the issues and avoid surprises.

5. *Discovery and Inspection* – These are legal procedures through which the parties investigate background information. Each party is required to list all relevant documents, which are in their control. This is called ‘discovery’. Parties then ‘inspect’ the discovered documents and an agreed upon selection of documents are prepared for the arbitrator.
6. *Interchange of Evidence* – The written evidence is exchanged and given to the arbitrator for review prior to the hearing.
7. *Hearing* – The hearing is a meeting in which the arbitrator listens to any oral statements, questioning of witnesses and can ask for clarification of any information. Both parties are entitled to put forward their case and be present while the other side states theirs. A hearing may be avoided however, if the issues can be dealt with entirely from the documents.
8. *Legal Submissions* – The lawyers of both parties provide the arbitrator with a summary of their evidence and applicable laws. These submissions are made either orally at the hearing, or put in writing as soon as the hearing ends.
9. *Award* – The arbitrator considers all the information and makes a decision. An award is written to summarize the proceedings and give the decisions. The award usually includes the arbitrator’s reasons for the decision