

Key Concepts In Arbitration

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Arbitration is a method of resolving disputes through which parties, *having agreed to do so in advance*, submit their differences to a third, *neutral* party for *final and binding determination*. These concepts are critical to an understanding of the process.

Advance Agreement. Unlike court litigation, there can be no arbitration without advance agreement by the parties. Although that agreement can be reached at any time, it is usually made during the collective bargaining process and included in the collective bargaining agreements as the sole and exclusive method of resolving disputes arising thereunder. Depending upon the language of the arbitration provisions of the contract, some or all of the disputes arising between the parties will be arbitrable, that is, subject to being submitted by one side or the other to an arbitrator. If the clause states that any and all disputes and grievances arising between the parties shall be submitted to arbitration, then there is no limitation on the nature of the disputes subject to arbitration. If, however, the language limits arbitration to those disputes which arise under the collective bargaining agreement, then one side or the other could argue that a particular dispute involves a question not covered by the contract and could refuse to submit to arbitration. The procedures for compelling or enjoining arbitration are highly technical and should be engaged in only with the assistance of counsel.

In addition, certain disputes may be expressly and specifically exempt from arbitration. An example would be non-renewal cases in which a Players Committee makes the “final and binding decision”. In another instance, one of the Music Director’s prerogatives might be specifically excluded from grievance or arbitration. Thus, if musicians are seeking arbitration, or if management is demanding it, an initial determination as to arbitrability must be made: Is this particular dispute covered by and subject to the arbitration process?

In a set of cases known collectively as the Steelworkers trilogy, the U.S. Supreme Court announced the policy which continues to be the law today, that there is a strong presumption that a dispute under a collective bargaining agreement is presumed arbitrable, unless there is a clear and unambiguous expression otherwise in the contract.

In some cases, an employee’s statutory claims, such as claims that the employer unlawfully discriminated against an employee, may be subject to the collective bargaining agreement’s grievance procedure. This might be the employee’s only remedy if the collective bargaining agreement’s waives the right to bring an individual claim in court and to bring it only under the collective bargaining agreement’s requirement to arbitrate these claims under a grievance procedure and if this waiver is “clear and unmistakable.” We recommend that the provision make clear is without waiver of any rights to pursue statutory claims in court. This is another reason why it is important to obtain the assistance of counsel in negotiating grievance and arbitration provisions in a collective bargaining agreement.

Neutrality. The arbitrator or, more commonly, the organization through which that person or persons is to be selected, is usually set forth in the contract. Since arbitration can occur only by mutual agreement, the selection of the arbitrator must also be agreed upon.

If the arbitrator is specifically named in the contract, the decision has already been made. However, if only an organization is named (the American Arbitration Association, State Mediation Board, Federal Mediation and Conciliation Service) then, once arbitration is demanded over an arbitrable controversy, a specific arbitrator must be selected. The process is time-consuming and ticklish. Although the arbitrator is supposedly neutral, they are also human and many arbitrators have a reputation of favoring one side or the other. It is important to know the arbitrator's background, his or her cases and any apparent bias in the cases and his or her position and associations in the community. A case can be, and is often, won or lost at the selection stage.

Even when the parties have selected a seemingly neutral arbitrator, many parties to arbitration feel that with respect to arbitrators, in order to continue to earn a living, the arbitrator must continue to be acceptable to both sides. Thus, the parties must always be cognizant of the arbitrator's propensity to "split the baby", that is, to award one issue to one side and another issue to the other side. A common example of this occurs in discharge cases: an arbitrator who decides on reinstatement will often refuse to award back pay.

It is important to keep in mind the fact that no matter how clear and solid you think your case is, the arbitrator might be looking to give something to the other side, if only to create the appearance of neutrality. If more than one issue is submitted to the same arbitrator, you may be setting yourself up for a least one loss.

Final and Binding Determination. There is virtually no appeal from an arbitrator's award. While statutes covering the validity of an arbitrator's award vary somewhat from state to state, they all provide only very limited grounds for vacating the award. Such grounds include actual or probable bias on the part of the arbitrator, an arbitrator exceeding his or her authority, or an arbitrator totally misunderstanding the facts of the case. Your conviction that an arbitrator rendered a wrong or bad decision is insufficient grounds for setting aside the award.

Arbitration is different from mediation. A mediator has no authority to issue binding decisions. He or she is brought in to try to bring the parties together, if possible, but if the mediation fails, the parties are left to their own devices. An arbitrator acts like a judge, and after hearing all of the evidence and reading briefs, etc., he or she makes a final and binding award. Arbitration was conceived as a way of resolving disputes without recourse to strikes or lockouts. One sometimes wonders whether it was a good trade.

For answers to many detailed questions about the arbitration process, there is an excellent treatise entitled "*How Arbitration Works*", by Frank and Edna Elkouri, published by BNA, Inc.