ARBITRATION: FREQUENTLY ASKED QUESTIONS

What is Arbitration?

Arbitration is a private adjudication process. Generally, parties make an agreement either before or after a dispute exists to engage and use an impartial third party to provide a final and binding decision with regard to any dispute between the parties. It is characterized by party choice and participation in the designing and customization of the process to suit their situation. Parties generally participate in the joint selection and payment of the arbitrator. Parties can identify a mutually acceptable arbitrator or specify the procedure for the selection of an arbitrator and the specific experience, background and skills desired in the arbitrator to be selected.

Parties can design the arbitration process and select the rules to be applied. Arbitrators derive their authority from the agreement of the parties.

What are the basic steps involved in an arbitration?

1. Making an agreement to arbitrate. At the time of entering into a contractual relationship, the decision regarding whether or not to include in arbitration clause can be an important one. The considerations can be complex. Under the new Revised Uniform Arbitration Act (RUAA), parties have wide latitude to waive and to adapt its provisions. Thus, deciding to include an arbitration provision in a particular contract is no longer a simple determination. The specific circumstances of the parties, their relationships and relative bargaining power must be considered. Designing and customizing the arbitration process to suit the circumstances can be critical. Getting the advice of an experienced incompetent arbitration attorney on this subject is highly recommended.

2. Initiating an arbitration.

When a dispute arises, a party to an arbitration agreement initiates arbitration by making a written request called a "demand for arbitration". The demand for arbitration is sent to the other involved party(ies) and to an arbitration administration agency if one has been selected by the parties.

3. Appointing the arbitrator(s).

Arbitrators can be selected by mutual agreement. If the parties are not in agreement, the selection of an arbitrator is made in accordance with the rules or process agreed upon by the parties in their agreement or adopted set of applicable arbitration rules. Commonly, an administration agency assist by providing a list of names of potential arbitrators from a panel of experienced arbitrators maintained by each agency and parties are asked to strike unacceptable names and to rank their preference of proposed arbitrators on the remaining list. The agency can then select the arbitrator with the highest preference ranking. If the parties have made no agreement regarding the selection of an arbitrator, an arbitrator can be appointed by the court upon motion of any party.

4. Pre-arbitration meeting or conference call.

After the appointment of an arbitrator, is good practice to have a preliminary meeting or conference call with the arbitrator and parties or their representatives to organize and schedule a prompt and efficient arbitration process. At such meeting or conference call, the parties can

*identify and clarify claims, counterclaims and defenses;

*arrange for the exchange of needed documents and records;

*discuss what, if any, additional discovery is necessary and appropriate consistent with making the arbitration process fair, expeditious and cost-effective;

*establish a realistic working schedule for the gathering of information, conduct of a site familiarization inspection, identification of anticipated witnesses, identification, exchange and submission of hearing exhibits, a schedule for pre-arbitration memorandum, if desired, and a schedule for the arbitration hearing;

*discuss ideas and opportunities for streamlining the arbitration process.

5. Arbitration hearing. Generally, arbitration hearings are conducted in a business conference room.

6. Post-arbitration memorandum, if desired.

7. Arbitrator's decision and award. The arbitrator prepares and issues a decision and award that is generally, final and binding.

What are the advantages of arbitration?

1. Choice and expertise of decision maker. Parties are able to choose a decision maker with technical, professional or business experience who will, hopefully, be more understanding of and familiar with the customs, terminology and issues of the particular industry or profession involved and thereby get to the heart of the issues more quickly and fairly.

2. Speed. Arbitrations are generally faster than court proceedings. Simplified procedures and freedom from procedure-bound court rules and formality allow arbitrations to be completed within a matter of months.

3. Lower cost. Arbitration is generally less expensive than litigation.

4. Flexible. The arbitration process can be customized, streamlined and simplified according to the needs of the parties and circumstances.

5. Privacy. Arbitration is a private forum and is not open to the press and public. Parties can shield their proceedings from public scrutiny and protect reputations from damage caused by a public adversarial litigation process.

6. Procedural Informality. Parties can select rules and design a process that is simpler, quicker and more informal than litigation.

7. Finality of Decision. There are fewer and limited grounds for appeal of an arbitrator's award. Courts have less power to set aside or overturn an arbitrator's award. An arbitrator's award can be overturned only if (a) the award is procured by "corruption, fraud, or other undue means"; (b) there was "evident partiality by an arbitrator", "corruption" or "misconduct by an

arbitrator prejudicing the rights of the party"; (c) the arbitrator refuses to postpone a hearing upon sufficient cause, refuses to consider material evidence or conducts a hearing so as to prejudice substantially the rights of a party; (d.) the arbitrator exceeds the powers provided under the agreement or arbitration laws; and (e) the arbitration was conducted without proper notice so as to prejudice substantially the rights of the party. (See the Revised Uniform Arbitration Act, HRS section 658A-23 and the similar, but not identical, provisions of section 10 of the Federal Arbitration Act).

8. Enforceability of award. Awards obtained in arbitration can be fully enforced in a court of law by means of a relatively simple application to court. Once an award is confirmed by the court, it can be enforced by all means available for the enforcement of a court judgment.

What are the disadvantages or drawbacks of arbitration?

1. Cost. Although parties generally pay for the services of the arbitrator and/or an arbitration agency, if one is selected, the speed, efficiency and reduced formality and procedures associated with arbitration leads to a process that is quicker and cheaper than litigation.

2. Limited rights of appeal. Arbitration statutes provide for limited grounds of appeal and fewer means to delay, challenge or overturn an arbitrator's claimed mistake or error.

3. Lack of full formal discovery. In arbitration, all the procedural discovery methods available in a judicial proceeding, such as, depositions, written interrogatories, requests for admissions and the like are available only if it is specifically provided for by the agreement of the parties or by the rules adopted or "when an arbitrator decides that it is appropriate in the

circumstances, taking into account the needs of the parties… and the desirability of making the proceeding fair, expeditious, and cost-effective." (See the Revised Uniform Arbitration Act, HRS section 658A-17 (c).)

4. Waiver of right to jury. The constitutionally protected right to a jury trial is a fundamental and valuable right that is waived when parties select arbitration.

Are there cases that are not suitable for arbitration?

Not all disputes are suitable for arbitration. If an important constitutional principle needs to be declared, a jury is desired, a legal precedent needs to be set or special judicial relief is available or required, parties may prefer to pursue judicial remedies. In such circumstance, parties may not wish to participate in or agree to submit to an arbitration process.

What should you look for and how do you find and select a qualified arbitrator ?

1. Determine the qualifications and experience of the arbitrator that you believe will be effective and suitable for your case and situation. Consider what experience, knowledge, training, technical, industry and/or legal background may be desirable.

2. Finding the right/best arbitrator with the judgment, reputation for fairness, skills, experience, training and education depends on the context and needs of your particular dispute. Look for an arbitrator with experience and proper training. Ask prospective arbitrators about their specific arbitration training and experience. See if the prospective arbitrator receives continuing education and skills training and is a member of

dispute resolution professional associations with codes of ethics.

3. Review your prospective arbitrator's resume and written qualifications.

4. Ask colleagues and business advisers for recommendations and references. Ask what other people who have had the experience with the prospective arbitrator have to say about the arbitrator's judgment, fairness, ability to conduct a fair and efficient process and ability to provide an enforceable award.

5. Request and review the written disclosure of potential conflicts of interest from your prospective arbitrator. Ask that all potential past or existing business, professional, social, or other prior existing relationships with any of the parties, their counsels and critical witnesses be disclosed.

Are there different types of arbitration?

Yes, the most common are:

1. Traditional arbitration

   In a traditional arbitration, an arbitrator conducts a hearing at which arguments, witnesses and evidence are submitted. After the hearing, parties frequently are afforded the opportunity to provide a written memorandum or brief. After consideration of all information, testimony and arguments submitted, an arbitrator renders a decision and award which is generally final and binding upon the parties.

2. "Fast Track'arbitration.

   In a "fast track" arbitration, the parties agree upon accelerated and simplified procedures for the

collection and submission of information to the arbitrator. It can be provided that an arbitrator may but need not conduct any hearings or take formal witness testimony. The goal of fast track arbitration is to quickly and simply provide all appropriate information to the arbitrator so that a prompt decision can be provided and the parties can move on.

3. Final offer or "Baseball" arbitration.

In "baseball" arbitration, parties each submit and communicate a final offer and designate that the arbitrator may not compromise between the offers and must select one or the other final offer that the arbitrator finds to be most appropriate or reasonable. Final offer arbitration thus prevents the arbitrator from "splitting the baby" and tends to encourage parties to moderate extreme positions and to encourage agreement without having to resort to arbitration.

4. High-Low arbitration.

In high-low arbitration, parties can narrow and control their risks in a particular case. Parties, for example, can agree to submit only the issue of liability to an arbitrator with the understanding that if the arbitrator finds liability, an award of damages will be fixed at a previously agreed amount and in the event the arbitrator does not find liability, an award will be made in an agreed lower amount. Savings in time and cost can be realized, the risks of appeal minimized and a cooperative atmosphere created that may itself enhance the chances for settlement.

In a variation of the high-low arbitration, parties can agree between themselves to bracket a high

and low range of outcomes before agreeing to submit a dispute to an arbitrator. The award of the arbitrator will be any value between the agreed high and low amounts or will be adjusted to an amount no higher than or no lower than the agreed bracketed amounts.

How Much Does Arbitration Cost?

That, of course depends. A number of factors determine the cost of arbitration: the nature of the dispute, complexity of the issues involved, the personalities and strategic goals of the parties and advocates involved. An arbitrator commonly charges an hourly fee which can range from $100 to $300 per hour and up. If the parties decided to engage the services of a neutral dispute resolution service provider, an additional flat fee or hourly surcharge administrative fee is charged. As a rule of thumb, arbitration can cost between 50 to 80 percent of the costs associated with traditional litigation.

Must/Should A Party Hire An Attorney To Help Handle A Dispute During The Arbitration Process?

In theory, it is not mandatory to have an attorney represent a party in arbitration. Unfortunately, arbitration has become increasingly more formal and procedure- bound. Under the new Revised Uniform Arbitration Act, arbitration has become more like traditional litigation with increased pitfalls and potential traps for the unwary. Increasingly, it is wise to have an attorney's participation and guidance through the arbitration process.