Even Better than the Real Thing

[The following is the final installment of a four-part series examining alternatives to traditional civil litigation in the American courts.]

Among the various alternative dispute resolution ("ADR") processes, arbitration most closely resembles a judicial proceeding. Classically, arbitration is known as a "creature of contract." As such, the mechanism affords private parties unparalleled flexibility to resolve disputes which may arise. Shrouded in strict confidentiality, however, arbitration is the least understood ADR practice.

The aggrieved party, known as the claimant, commences the process by filing a claim against the alleged wrongdoer, known as the respondent. These roles are substantially similar to "plaintiff" and "defendant", respectively, in a courtroom civil action. Although parties may appear *pro se* (without legal counsel), the complexities of the arbitral process most often necessitate the engagement of an attorney.

Unlike a federal or state trial court, there is no judge in an arbitration; rather, industry-experienced individuals assume the role of a quasi-judicial officer. Depending on the amount of monetary damages in controversy, the claim may be decided by a single arbitrator or a triumvirate panel. The decision to select one or more individuals is controlled by operation of rule. Some arbitrations are *ad hoc*, meaning that the parties are free to craft their own procedure. More commonly, though, parties rely on established procedures. For example, the National Association of Securities Dealers ("NASD") governs disputes arising between securities brokerage houses and private investors. If a claimant seeks more than US$50,000.00, then a panel must be selected. The majority of controversies fall under the auspices of the American Arbitration Association ("AAA"), an organization which provides third-party neutrals. Another major clearinghouse is the Judicial Arbitration Mediation Service ("JAMS"). In consideration for their professional services, NASD, AAA and JAMS charge fees for both initiation of the claim and hourly rates for performance rendered during pre-arbitration conferences and the arbitral hearing itself.

Much as a civil law suit involves "motion practice" (the submission of memoranda on discrete points of law or procedure), an arbitral panel has broad discretion to either permit or proscribe parties from engaging in extended pre-hearing legal argument. Moreover, a period of "discovery" precedes the arbitral hearing. In the "fact discovery" phase, there will be an exchange of relevant documents and the opportunity to depose those individuals with knowledge of the underlying events. In the subsequent "expert discovery" phase, professionals will render reports based upon the available evidence which will be introduced at the hearing.

The hearing itself usually consists of opening statements, direct and cross examination of witnesses and closing arguments. This format is identical to traditional civil litigation. The arbitrator or panel may chose to relax evidentiary rules of admissibility, thus affording attorneys greater latitude for zealous advocacy. Most significantly, arbitrations do not follow *stare decisis*, the common law system of legal precedence which governs all United States federal and state

court decisions. The result is that awards may reflect the arbitrator(s)' notion of equity rather than comport with established legal authority.

In contrast to legal negotiation or mediation, an arbitral decision – known as an award – is binding upon the parties. The award is not self-executing, however, and must be confirmed by a federal court. The court derives its authority to do so from the Federal Arbitration Act ("FAA"), which in turn is based upon the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention". (Romania ratified the Convention in 1961, nine years before the United States.) This legislation provides for enforcement of both United States domestic awards, as well as those issued by foreign arbitral panels.

Arbitration offers disputants the promise of expediency and cost-containment. Through the assistance of experienced legal counsel, superior results can be obtained for both claimants and respondents.

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