CHAPTER 5: ALTERNATIVE DISPUTE RESOLUTION

OVERVIEW

Each year, more and more cases are resolved through the use of Alternative Dispute Resolution (ADR) processes. The primary reason for this is that litigation has been increasingly expensive and parties seek to resolve their disputes more quickly. As a consequence, litigants have become increasingly receptive to using ADR to resolve cases that traditionally were resolved through the jury trial process.

Over the years, litigants have considered and used a number of ADR processes. Among them, the most popular have been arbitration, mediation, short trials and early neutral case evaluation. This chapter will discuss the advantages and disadvantages of each of these ADR methods and offer useful practice tips to maximize the benefit of each.

Recognizing the cost and time involved in resolving disputes through the jury trial process, the courts have increasingly turned to ADR to manage caseloads and make litigation more efficient and affordable for all litigants. The right to a jury trial is no longer automatic. Each county In Arizona now has a minimum dollar value for cases before litigants are entitled to a jury trial. Cases that do not reach this minimum threshold must go to mandatory arbitration, as discussed in more detail below.

Previously, litigants were required to meet very early on in the case to discuss settlement and the use of ADR. While that rule was abrogated about ten years ago, the courts still require parties, as part of their scheduling orders for each case, to participate in a mandatory settlement conference or private mediation before a trial date will be set. Rule 16(c), Ariz.R.Civ.P.

ARBITRATION

The subject of arbitration can be broken down into three separate categories:

- Mandatory arbitration;
- Voluntary arbitration; and
- UM/UIM arbitration.

There are differences between these three types of arbitration, but generally they hold the same advantages and disadvantages.

Advantages of Arbitration

Arbitration saves time and money. Most arbitration procedures can be completed in less than six months, and the defense costs involved should be less than those involved in litigation. Because the Rules of Evidence for most arbitration proceedings are greatly relaxed, less discovery is normally necessary, and certainly fewer witnesses are called during the proceeding. The actual length of the proceeding is generally just a day or two days, as opposed to trial which might last several weeks. Often, cases are resolved in a half day or less. As a result, arbitration generally saves thousands of dollars in attorney's fees over a court trial.

Arbitration can also yield a better result in the right kind of case. If a claimant is particularly sympathetic (i.e., especially personable, a child, or a vulnerable or incapacitated adult), an arbitrator is less likely to be swayed by sympathy than a jury. Similarly, if the defendant is particularly unsympathetic (i.e., an intoxicated driver, a large corporation with a "deep pocket," or a person who is not personable) the arbitrator will likely be less swayed by prejudices that could affect a jury. This factor should always be given consideration in addition to the financial advantage of arbitration.

Arbitration should also be considered as a way of avoiding publicity and exposure that can come with a public jury trial. Generally, arbitrations are private matters and the decision of the arbitrator may not become part of the court record. As an example, a business owner sued for employment discrimination by a former employee might prefer arbitration as a way to avoid the potential negative publicity that might come with a very public jury trial.

Arbitration might also be the preferred method to resolve a dispute where a party is concerned about setting a negative precedent for future claims. When an insured sues his or her insurer, the insurer might want to resolve the claim without setting a precedent for the resolution of similar claims in the future – such as where a policy provision might be interpreted to have unintended consequences. The insurer might want to avoid a judge or jury determination of the intent of the specific policy language and a subsequent appeal that would establish binding precedent on the interpretation of that policy provision in the future.

Finally, in mandatory court arbitration proceedings where the court appoints the arbitrator, the court compensates the arbitrator for his or her time and there is no cost to the parties for the arbitrator's time. Rule 76(f), Ariz.R.Civ.P. This results in a cost savings to the parties, as arbitrator fees can run as high as $500/hour or more.

Disadvantages of Arbitration

Arbitration has its disadvantages, and these can outweigh the advantages.

In most arbitrations, attorneys are the arbitrators. Experience has shown that attorney arbitrators are less likely to find for the defendant entirely, but are also less likely to award excessive amounts to plaintiffs. This is probably because attorney arbitrators view arbitration as a compromise. Especially in arbitrations that are appealable, such as mandatory court arbitration, attorney arbitrators tend to "split the baby" in the hope of discouraging an appeal from the arbitration award. When considering arbitration, the sympathy factor addressed above should always be considered.

Another significant disadvantage to arbitration occurs in cases where the arbitration is not binding and the arbitration decision is appealed. When arbitration is non-binding, the parties will incur not only the expenses of the arbitration, but also the expenses of the ultimate jury trial if an appeal from the arbitration award is taken. In this circumstance, the arbitration becomes a wasted procedure in terms of both time and expense. Fortunately, statistics show that most arbitrated cases are resolved at that point or through settlement after arbitration. Very few cases end up going to a jury trial after an arbitration. The courts have attempted to minimize the number of appeals from court arbitrations by imposing significant sanctions on the appealing

party if the award on appeal is not substantially greater than the arbitration award. *See* Rule 77(h), Ariz.R.Civ.P.

MANDATORY ARBITRATION

Arizona law requires the superior courts of each county to establish arbitration limits up to $50,000. Each county in Arizona has established arbitration limits that vary from $1,000 to $50,000. The following chart shows the arbitration limits for each county in Arizona.

2023 County Limits for Mandatory Court Arbitration

County	Arbitration Limit
Apache	$10,000
Cochise	$65,000
Coconino	$65,000
Gila	$25,000
Graham	$30,000
Greenlee	$1,000
La Paz	$1,000
Maricopa	$50,000
Mohave	$50,000
Navajo	*
Pima	$1,000
Pinal	$40,000
Santa Cruz	$1,000
Yavapai	$50,000
Yuma	$50,000

*A.R.S. § 12-133 states that the superior court, by rule of court, *shall* (1) establish jurisdictional limits of not to exceed sixty-five thousand dollars for submission of disputes to arbitration, and (2) require arbitration in all cases which are filed in superior court in which the court finds or the parties agree that the amount in controversy does not exceed the jurisdictional limit. But Rule 72, Ariz.R.Civ.P., states that the arbitration rules will apply "*if* the superior court in a county, by a majority vote of the judges in that county, decides to require arbitration of certain claims and establishes jurisdictional limits by local rule under A.R.S. § 12-133." Navajo County does not have a compulsory arbitration rule. But its court clerk has stated telephonically that the limit is $25,000.

Rule 72(e), Ariz.R.Civ.P., requires a plaintiff to file a "Certificate of Compulsory Arbitration," which specifies whether the case is subject to compulsory arbitration. A case is subject to compulsory arbitration if only money damages are sought, and if the amount sought is no more than the

maximum amount shown above (set by local rule). A defendant can contest the plaintiff's certification that a case either is or is not subject to compulsory arbitration, and the court may, on its own motion, certify a case for compulsory arbitration at any time.

Even where a plaintiff certifies that the case comes within the mandatory arbitration limit, however, the arbitrator **may** award more than the jurisdictional limit. In other words, a plaintiff could certify a case for compulsory arbitration in Maricopa County, which has a $50,000 limit, and the arbitrator **could** award that plaintiff $60,000. As in any other arbitration, the only recourse is to appeal and have a jury trial in superior court. Either party always has the right to appeal. Rule 77(a) Ariz.R.Civ.P. Once a case is certified for arbitration, unless the parties agree otherwise to the appointment of an arbitrator to hear the case, the superior court clerk selects a name at random from a list of all lawyers qualified to serve as arbitrator. The only qualification is that the lawyer be an active member of the State Bar for at least 4 years. Rule 73(c)(1) Ariz.R.Civ.P. In ***Scheehle v. Justices of the Supreme Court of the State of Arizona***, 211 Ariz. 282, 120 P.3d 1092 (2005), the Arizona Supreme Court upheld the rule authorizing superior courts to require active members of the State Bar to serve as arbitrators.

Each side is entitled to one change of arbitrator. Rule 73(f) Ariz.R.Civ.P. A party waives the right to change of arbitrator if it is not exercised within 10 days after the date of the written notice of appointment. Once the arbitrator has been assigned, he or she fixes a time for the hearing. The arbitration hearing shall commence not fewer than 60 days, nor more than 120 days after his or her appointment. Rule 74(c) Ariz.R.Civ.P. Once the arbitration hearing is held, the arbitrator has 10 days to file his or her "Notice of Decision." Rule 76(a) Ariz.R.Civ.P. The actual award should be filed within 10 days thereafter. Rule 76(b)(1) Ariz.R.Civ.P. These rules are intended to provide a quick resolution of the case.

It is a good idea to see if the opposing party will agree on an arbitrator. If so, the matter can be taken off the court system and into a private arbitration where the parties can customize the terms and conditions under which the matter will be arbitrated. One of the biggest complaints litigants have with the use of mandatory arbitration is that the litigants have no control over the selection of the arbitrator. Many times an arbitrator is appointed who is not familiar with the area of law involved in the dispute. Sometimes this can result in an unjust award which then results in an appeal. Choosing a private arbitrator, while more expensive because the litigants will be required to pay for the cost of the arbitrator, can sometimes be cheaper in the long run because the arbitration award will likely be more predictable, which reduces the likelihood of either side appealing the award.

MANDATORY ARBITRATION PROCEDURES

The rules of procedure for arbitration are relaxed. For example, depositions can be read during the arbitration without the need to call witnesses. Other evidence, such as medical bills and reports can be presented in written and summary fashion without the need to call witnesses to prove that summary evidence. Under certain circumstances, witness statements may also be admitted. There are, of course, procedures for screening this type of evidence prior to the hearing. Rule 75(d) Ariz.R.Civ.P. As noted above, most arbitration proceedings are concluded in a day or less.

At the conclusion of the arbitration, the arbitrator issues a written award. Either party then has a right to appeal. Rule 77 Ariz.R.Civ.P. *See also* ***Valler v. Lee***, 190 Ariz. 391, 949 P.2d 51 (Ct. App. 1997). If that right to appeal is exercised, the case reverts back to the superior court judge assigned to the matter, and the case proceeds as any other lawsuit de novo. Rule 77(d) Ariz.R.Civ.P. Discovery is permitted, and a regular jury trial is conducted. In *Valler*, the court of appeals held that an appeal of an arbitration award must be "tried de novo as to all parties, claims, and issues of law and fact" in order to prevent any unappealed portion of the award "from becoming final under Uniform Rule 5(c)." But in ***Orlando v. Superior Court***, 194 Ariz. 96, 977 P.2d 818 (Ct. App. 1998), the court held that one plaintiff's appeal had no effect on the non-appealing plaintiff's award. There, two plaintiffs sued a motor-vehicle defendant who rear-ended the plaintiffs' cars. The arbitrator awarded damages to one plaintiff only. The defendant appealed and the other plaintiff was not a party to the appeal. The court of appeals held that the appeal was effective only as to parties named in the appeal. The de novo appeal did not need to include all of the parties unless joinder was required by law. The Court distinguished *Valler* because joinder was necessary in that case.

The appealing party must deposit with the court a sum equal to the arbitrator's total compensation (unless the party certifies he has insufficient funds). The arbitrator's fee in Maricopa County is $75 per hearing day. The ultimate jury award must be least 23% more favorable than the arbitration award, or else the appealing party must pay:

- The arbitrator's compensation;
- Taxable costs;
- Reasonable attorney's fees as determined by the trial judge for services necessitated by the appeal; and
- Reasonable expert witness fees incurred by the appeal.

Rule 77(h) Ariz.R.Civ.P. In ***Farmers Ins. Co. v. Tallsalt***, 192 Ariz. 129, 962 P.2d 203 (1997), the Arizona Supreme Court addressed how the superior courts should assess attorney's fees on appeal from an arbitration award when the arbitrator has awarded one or both parties $0. The court held that in order for the appellant of an arbitration award of $0 to avoid paying the appellee's attorney's fees, the appellant must obtain a judgment more than $0, no matter how much greater.

A party's failure to appear at an arbitration hearing precludes him from appealing an arbitration award against him. Ariz.R.Civ.P. 74(k). Whether the party's failure to appear was in good faith is a factual determination to be made on a case-by-case basis. ***Lane v. City of Tempe***, 202 Ariz. 306, 308, 44 P.3d 986 (2002). In some situations, a party's appearance may be necessary. But a party who failed to attend arbitration did not forfeit their right to appeal when the party completed discovery and the opposing party took no independent steps to secure the absent party's attendance. *Id*. A party's offer to testify by phone constitutes a good faith attempt to appear at the arbitration hearing and does not constitute a waiver of the right to appeal. ***Sabori v. Kuhn***, 199 Ariz. 330, 18 P.3d 124 (Ct. App. 2001).

In summary, the rule requiring mandatory arbitration of cases within the arbitration limits is designed to shorten the life of a case and reduce its expenses. The rule is also designed to reduce the backlog of cases with a value less than the arbitration limits. The arbitration rules generally serve these purposes. The reduction in expense and time needs to be weighed against the potential for an award, when deciding whether to certify a case for arbitration. Normally, however, a defendant will not have a choice in whether a case is arbitrated, although he can be successful in persuading a judge that the facts of a case show it should be arbitrated despite the plaintiff's opposition. Rule 72(e) Ariz.R.Civ.P.

VOLUNTARY ARBITRATION

Any case can be arbitrated, despite its size, upon agreement of the parties. The same considerations discussed above apply in determining whether a case is appropriate for voluntary arbitration. Once that decision is made, the guidelines for how to conduct the arbitration are limitless.

The arbitrator can be selected in many ways. The parties can agree to have the court select the arbitrator through the mandatory procedure discussed above; the parties can agree on a single arbitrator; or the parties can agree to use UM/UIM-type arbitration in which each side selects one arbitrator and those two arbitrators select a third. It is also becoming more common for the parties to agree on a particular expert who serves either with the other arbitrators or as a sole arbitrator. For example, if the key issue in a case involves an orthopedic injury, the parties might agree to appoint a particular orthopedic surgeon or medical malpractice lawyer to serve as arbitrator or as co-arbitrator.

The same freedom applies to selecting the procedures to be used. Limits can be placed on the type of discovery that will be permitted or whether formal discovery will be permitted at all. Often, arbitrations are conducted with an agreed-upon high and low figure. The defendant is guaranteed not to pay more than the maximum amount agreed upon, but the plaintiff is guaranteed the minimum amount agreed upon. The arbitration could, of course, either be binding or non-binding, and many times the parties agree in advance on the evidence that will be introduced or the amount of time that each side will have to present their evidence.

All the options for customizing the arbitration process should be carefully considered when using a voluntary arbitration so as to maximize the benefits of arbitration in a particular case.

If appealing a voluntary arbitration, A.R.S. § 12-3023(A) sets out the reasons an award can be vacated. It states that the superior court "shall vacate" an award that is alleged to have been procured by corruption, fraud or undue means; or the arbitrator engaged in "evident partiality," corruption or misconduct; or the arbitrator exceeded his powers, conducted the arbitration without notice or refused to postpone the hearing despite sufficient cause; or that "[t]here was no agreement to arbitrate." The parties cannot stipulate to bypass the superior court and have their appeal go directly to the court of appeals, ***Chang v. Siu***, 234 Ariz. 442, 446, 323 P.3d 725, 729 (Ct. App. 2014); but *Chang* declined to consider whether the parties may contract for expanded appellate review of the merits of an arbitrator's award (beyond those set forth in the statute).

CONTRACTUAL ARBITRATION CLAUSES

Arizona now follows the majority of jurisdictions in the country that have adopted the Federal Uniform Arbitration Act. The AZ-RUAA applies to all arbitration agreements made after January 1, 2011, except those agreements between an employer and employee, agreements contained in a contract of insurance, and certain other agreements involving banking institutions. The RUAA makes clear that certain provisions in agreements to arbitrate may not be waived before an actual dispute arises. The AZ-RUAA also provides for interim remedies before a final judgment – such as an injunction or provisional remedy, whether issued by an arbitrator or a court before an arbitrator is appointed and able to act. The AZ-RUAA also provides for the consolidation of separate arbitration proceedings unless the agreement to arbitrate specifically prohibits consolidation. Finally, the RUAA now gives arbitrators greater authority in the manner in which the arbitration proceeding is conducted.

Under the AZ-RUAA, a contractual agreement to arbitrate extends to claims arising out of a related contract that lacks an arbitration provision; to non-contract claims so long as a resolution of the claim requires reference to the contract; and to non-signatories in certain circumstances. ***Sun Valley Ranch, 308 LP v. Robson***, 231 Ariz. 287, 294 P.3d 125 (Ct. App. 2012). Arbitrators also have the power under the AZ-RUAA to appoint receivers and dissolve limited partnerships. Arizona courts thus appear willing to broadly interpret the scope of the RUAA and increase arbitrators' powers.

The enforceability of a contractual arbitration clause centers on whether the clause was part of an adhesion contract or is otherwise unenforceable as not within the contracting parties' reasonable expectations. In ***Broemmer v. Abortion Services of Phoenix, Ltd.***, 173 Ariz. 148, 840 P.2d 1013 (1992), the court refused to enforce an arbitration clause contained in a contract for abortion services, and allowed plaintiff to sue the abortion services entity and physician for malpractice. Because there was no conspicuous or explicit waiver of the fundamental right to a jury trial, or any evidence that such rights were knowingly, voluntarily and intelligently waived, the arbitration clause was part of a contract of adhesion and outside the plaintiff's reasonable expectations.

In ***North Valley Emergency Specialists, L.L.C. v. Santana***, 208 Ariz. 301, 93 P.3d 501 (2004), the court similarly refused to apply Arizona's Arbitration Act to arbitration agreements between employers and employees. In ***Schoneberger v. Oelze, Sr.***, 208 Ariz. 591, 96 P.3d 1078 (2004), the arbitration provision was in a document creating an inter vivos trust. The court held that the beneficiaries were not required to arbitrate their claims because such a trust was not a "written contract."

In ***Harrington v. Pulte Homes Corp.***, 211 Ariz. 241, 119 P.3d 1044 (2005), the Supreme Court upheld the enforceability of an arbitration clause in a contract between home purchasers and a home builder. Requiring the homeowners to arbitrate their construction defect claims against the homebuilders, the court rejected the homeowners' argument that the arbitration clause was unconscionable and violated their reasonable expectations. These cases demonstrate that courts are in favor of enforcing an arms' length agreement to arbitrate disputes. The courts will enforce them so long as the terms are reasonable and do not otherwise violate a party's reasonable expectations.

In ***Klesla v. Wittenberg***, 240 Ariz. 438, 380 P.3d 677 (Ct. App. 2016), the court addressed the enforceability of an arbitration award. The Kleslas moved for entry of judgment after receiving an arbitration award, and they requested attorney's fees. The trial court denied the fee request because the arbitration award did not include an award of attorney fees. The court of appeals affirmed because the Kleslas had sought entry of a judgment that encompassed more than they were awarded in the original arbitration award. The case is instructive because it demonstrates that the courts will not infringe upon the terms of parties' private arbitration agreements.

UM/UIM Arbitration

Most uninsured and underinsured motorist (UM/UIM) policies require the parties to arbitrate a dispute over the amount to be paid. The results of these arbitrations are not usually satisfactory to the defense. It seems that when three lawyers get together to arbitrate a case, a compromised result occurs that may be higher than any single attorney or jury might value the case. This factor should be considered when deciding an amount for which to settle a case prior to a UM/UIM arbitration. As long as arbitration provisions remain in insurance policies, this is a "fact of life." That is why some carriers are changing their UM/UIM policies to require a single arbitrator or to provide for a limited right of appeal. Some now even require the insured to file suit against the insurer in superior court, where the matter is taken completely out of arbitration and resolved through the traditional jury trial process.

Most UM/UIM arbitrations are conducted by a "panel of three" arbitrators. Each side selects an arbitrator and the two arbitrators select a third. To reduce costs and expedite the matter, opposing attorneys might agree on the third arbitrator in advance and only use that arbitrator rather than using three. As noted above, however, arbitrators in these settings generally compromise between the amount offered and the amount demanded. Sometimes, a jury would have provided a better result for the defense. Therefore, evaluating cases that will go to UM/UIM arbitration is different than evaluating cases that will be subject to a jury trial.

Preparing for arbitration is critical to success. Most people consider arbitration a money-saving method of resolving a case. Often times it is. One danger of arbitration is that parties can become overly lax in their preparation, thus resulting in a higher arbitration award. Adequate preparation is necessary, and often the preparation for an arbitration should be no less than preparation for a trial. This is particularly true when contesting the reasonableness or necessity of claimed medical expenses. Experience has shown that arbitrators will not consider an argument to reduce claimed medical expenses unless the defense presents competent expert medical testimony. Most policies do not provide a full right of appeal from a UM/UIM result, and therefore, adequate preparation insures the lowest award possible.

Most UM/UIM policies do not allow for an award of attorney's fees to the prevailing party unless expressly provided in an arbitration clause. ***Canon Sch. Dist. No. 50 v. WES Constr.***, 180 Ariz. 148, 882 P.2d 1274 (1994). Similarly, most policies do not provide for an award of costs to the prevailing party in arbitration. Typically each side pays its own costs and the parties split the cost of the arbitrator(s).

Some plaintiffs' attorneys take the position that no discovery is allowed in UM/UIM arbitrations, and have refused to answer interrogatories, submit to depositions or exchange disclosure statements. These issues must ultimately be resolved by the arbitrator(s), but the policy provisions could be useful in this regard. For example, most policies require the insured to cooperate in resolving disputes, and almost all policies require a statement by the insured under oath. The policies also require the insured to submit documentation to support a claim and perhaps submit to a medical examination where those issues are involved. Some policies require the parties to follow the local rules of procedure for arbitration. All of these policy provisions can and should be used, where necessary, to force compliance with discovery requests in preparing for arbitrations.

Sample UM/UIM Policy Arbitration Clauses

Sample Clause No. 1
If there is no agreement, these questions shall be decided by arbitration upon written request of the insured or us. Each party shall select a competent and impartial arbitrator. These two shall select a third one. If unable to agree on the third one within thirty (30) days either party may request a judge a court of record in the county in which the arbitration is pending to select a third one. The written decision of any two arbitrators shall be binding on each party.

The arbitration shall take place in the county in which the insured resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.

Sample Clause No. 2
If we and you, or your representative, do not agree on the legal responsibility of the uninsured motorist to pay your damages or the amount of damages, then upon the consent of both parties, the disagreement will be settled by arbitration.

The arbitration will take place in the county where you live. It will be conducted under the rules of the American Arbitration Association unless we, you, or your legal representative objects. In that case, you will select one arbitrator and we will select another. The two selected arbitrators will then select a third. If the two arbitrators are unable to agree on a third arbitrator within thirty (30) days, the judge of the court of record in the county of jurisdiction where arbitration is pending will appoint the third arbitrator.

Local court rules governing procedure and evidence will apply unless the arbitrators agree on other rules. The decision in writing of any two arbitrators will be binding on you, subject to the terms of insurance. Judgment on any award may be entered in any court having jurisdiction.

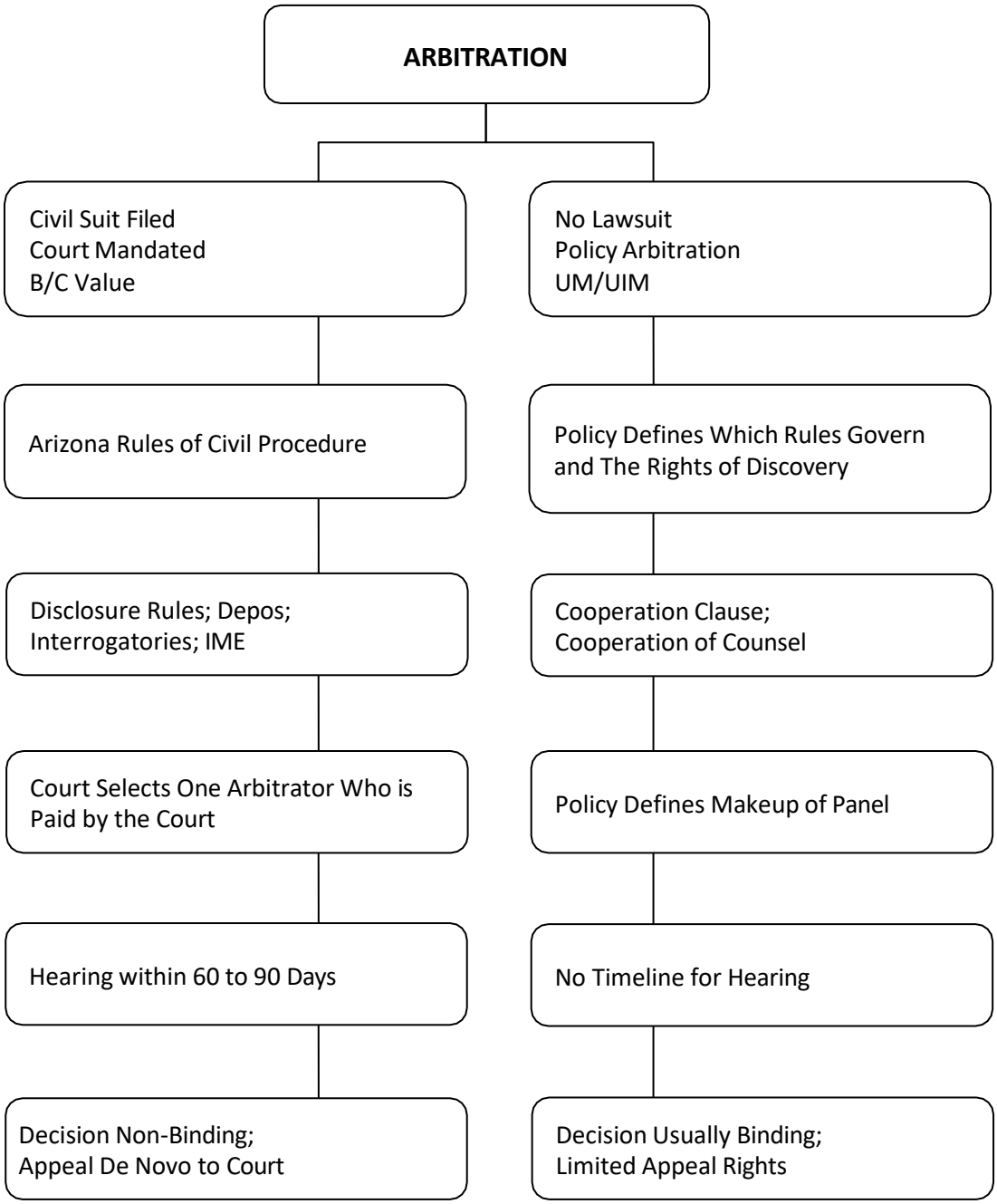
Sample Clause No. 3
If we and a covered person do not agree whether that person is legally entitled to recover damages under this part or as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within thirty (30) days, either may request that selection be made by a judge of court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally. Unless both parties agree otherwise, arbitration will

take place in the county in which the covered person lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to whether the covered person is legally entitled to recover damages and the amount of damages.

The following diagram illustrates the differences between mandatory and UM/UIM arbitrations:

SEE NEXT PAGE

Comparison of Mandatory Court Arbitration and UM/UIM Arbitration



MEDIATION AND SETTLEMENT CONFERENCES

Mediation is a voluntary procedure where parties present their cases before an impartial mediator who discusses the case jointly and/or individually with the parties to try and assist them in arriving at a settlement. Mediation is effective if the mediator is skilled and the parties are willing to be reasonable in settling the claim. An effective mediator can achieve a settlement even when there is a vast difference of opinion in case value at the outset of the mediation.

Mediation typically involves a discussion of the dispute by the parties, as opposed to the presentation of witnesses and evidence as would take place at an arbitration or trial. Therefore, a mediation will normally be attended only by the parties and their representatives, their attorneys, and the mediator. The mediator has no power to render a decision or force the parties to accept a settlement. The mediator has no real authority to exert any pressure on either party, other than through persuasion.

Some mediation sessions begin with all parties together. The mediator may open the discussion by allowing both sides to present their positions. Usually, each side then meets individually with the mediator to present his or her case and perhaps present positions that are not to be disclosed to the other side. Often, a party will confidentially tell the mediator the actual maximum or minimum amount they would pay or accept in settlement. The mediator might meet with each side individually numerous times, and might at times get everyone back together for a joint session. Mediations generally last one-half to one full day.

Mediations are very much like settlement conferences conducted by superior court judges. Parties can request a “pro tem” judge to hear their settlement conference. Many lawyers volunteer their time to serve as pro tem settlement conference judges. A list can be obtained from the court. The settlement conference process is also entirely voluntary and non-binding. One advantage of utilizing a pro tem judge is that there is no cost to the parties for the pro tem’s time. One disadvantage of participating in a court settlement conference before a pro tem judge is that the parties do not have any control over which pro tem judge is appointed to the case.

Mediation and settlement conferences are often beneficial, and seldom detrimental. The only real disadvantage of a mediation or settlement conference is the time spent and the potential for “tipping one’s hand” regarding strategy that would otherwise be saved for trial. Under the current rules of disclosure, however, there is not much strategy than can be saved for trial anyway. Many times, a mediation provides valuable information about an opponent’s case or strategy. Thus, even if the case does not initially settle at a mediation or settlement conference, the discussion can focus future discovery and narrow the issues in dispute, ultimately leading to resolution of the case – sometimes with the parties returning again to mediation or a settlement conference. As such, a mediation or settlement conference risks only the time and money involved in the actual process. For that reason, parties should strongly consider mediation or a settlement conference early on in the case.

Some attorneys, former judges and services that specialize in conducting private mediations. Individuals involved have likely received specialized training in mediation techniques or are experienced attorneys or judges who have specialized skill or subject matter knowledge in the

particular area in dispute. Careful consideration in selecting a mediator should be taken. Furthermore, the expenses involved should be clearly disclosed before proceeding with the mediation. Be careful to agree with the mediator in advance how much it will cost, and be certain to document with all parties exactly who will pay what portion of that cost. Some mediations, even for fairly simple personal injury claims, can cost several thousand dollars simply for the expense of the mediator. Alternatively, the parties will save the cost of a mediator if all parties can agree on an appropriate judge pro tem to conduct a settlement conference. A good settlement conference judge pro tem might be able to accomplish the same result – a reasonable settlement.

Because mediation is not a formal court proceeding and is voluntary, parties tend to prepare less for a mediation than for an actual arbitration or jury trial. This can be a big mistake. Parties should approach mediation with the intent to put forward the best possible case, sufficiently documented. Lawyers and clients should prepare to address all aspects of the case with the mediator. The greater the preparation for a mediation, the more likely the case will settle at the mediation. In this regard, it is extremely important to make certain that each person with sufficient settlement authority to settle the case attend the. An effective mediation tool can be to present the mediator with actual jury research of similar claims to support a party's settlement position.

The parties should approach mediation with a flexible attitude. Often, the inclusion of a non-monetary concession, such as an apology by the defendant or a change in a safety procedure in a worksite accident case can make a big difference in whether a case will settle at mediation. Therefore, the parties should approach mediation with a creative attitude and an open mind.

The importance of documenting the agreement reached by the parties during mediation cannot be stressed strongly enough. Because mediation is an informal proceeding, there is no court reporter to record the agreement of the parties. Many times an agreement will be reached at the end of a very long day when the parties are eager to conclude the process. However, great caution should be taken to adequately document all of the key terms and conditions agreed upon before the parties and their representatives leave the mediation – and to have the parties and their representatives sign the documented terms and conditions. If the terms and conditions are not adequately documented, they can later be held unenforceable by a court of law if disputed by one of the parties. *See* Rule 80(D) Ariz.R.Civ.P. Furthermore, parties can have buyer's remorse immediately after a mediation or will claim a position contrary to what was agreed upon during the mediation. Thus, it is extremely important to document all of the key terms and conditions **and** to ensure that the parties and their representatives acknowledge these terms and conditions in writing.

SUMMARY JURY TRIALS

The general idea of a summary jury trial is to drastically reduce the amount of time and expense involved in conducting a jury trial, while at the same time, obtain a result from a jury, rather than a panel of attorneys. The idea is to combine the advantages of arbitration and jury trial. The rules for summary jury trials are limited only by the imaginations of the attorneys involved. There are no specific court rules for summary jury trials.

As with arbitration, summary jury trials can be either binding or non-binding. The parties can agree for the summary jury trial to be wide open as to result, or it can contain a high-low agreement. The lawyers simply need to agree on the guidelines ahead of time. They should then prepare a comprehensive order for the judge to sign, specifying exactly how the trial will proceed.

The simplest form of a summary jury trial is for the lawyers to only present closing arguments. This can be effective where there is no real disagreement on the facts or the injuries, but the real disagreement is whether those facts create liability and/or how much the injuries are worth. The lawyers could agree, for example, that they will select a jury through the normal jury selection process, including voir dire, and they will then each have two hours (or any amount agreed upon) to present a closing argument. The jury will then deliberate as they would in any trial, and render a verdict. Again, this can be binding or non-binding by agreement.

A more complex summary jury trial would involve the presentation of evidence. A case that would be scheduled for a six week trial could easily be conducted in three or four days. The lawyers have to agree on as many facts as possible, and divide up the time they spend on presentation of their respective cases. For example, they can agree to conduct standard voir dire in selecting a jury; to allot thirty minutes for opening statements; and ten hours for presenting their respective cases. During that ten hours, they may call witnesses, and read from depositions and exhibits. The time they spend cross-examining the opponent's witnesses could count against the ten hour allotment for presenting their case. The parties would need to select a monitor to keep track of time; but the judge's bailiff or courtroom clerk often agrees to perform that role. Finally, the lawyers might agree to perhaps two hours each for closing argument. The jury would deliberate in normal fashion and render a verdict, which could be either binding or non-binding.

In large cases, defendants can use the summary jury concept to help them prepare for trial. Defense attorneys can conduct a summary jury trial in their office without the plaintiff present. Two lawyers from the defense firm would participate, with one arguing the plaintiff's side and one arguing the defense side. "Jurors" willing to participate for a fee are generally easy to find. However, they must be impartial, and unaware which side the firm represents. The lawyers may present live testimony, particularly if there is concern about how a key witness will come across to a jury. The rest of the evidence can be presented in written or oral form. Both lawyers can make opening and closing arguments. The panel of jurors then deliberates and renders a decision. This allows defense counsel the opportunity to see how a jury is likely to react to the case. It also allows the attorney to discuss with the jurors which evidence was most important, how they reacted to a particular witness, what kind of arguments would have been more persuasive or less persuasive, etc. This can be an extremely valuable tool and typically costs as little as $5,000 to conduct. In a lawsuit with a potential exposure of several hundred thousand dollars or more, a $5,000 investment can be an excellent one.

EARLY NEUTRAL EVALUATION (ENE)

This ADR process provides a forum in which each side presents its case to a neutral evaluator who has expertise in the subject matter of the case. The evaluator might serve as a mediator or simply provide the parties with an evaluation of the strengths and weaknesses of their positions and an opinion on the value of the case. The evaluator can also assist with narrowing the issues and helping the parties establish realistic discovery schedules. The theory behind early neutral

evaluation is to narrow the issues in dispute early on in the case and either settle the case or reduce litigation costs.

Mediation/Arbitration

This ADR process is a hybrid of mediation and arbitration in which the dispute is first mediated. A decision is then made by the neutral mediator on any issues left unresolved. In effect, the mediator becomes the arbitrator and the decision may be binding or advisory as determined by the parties in advance. This procedure can be effective where the parties agree on most, but not all of the issues.

Short Trial

Short trial is a form of the summary jury trial and is available through the court system. It is designed to be completed in one day. The short trial is a binding procedure employing a four-member jury and requiring about two hours for presentation of the case by each side. Most of the information is taken from depositions rather than using live witnesses in order to stay within the time limitations. No official record is kept of the short trial, and appeals are allowed only upon showing of fraud. A short trial is frequently used as an alternative to an arbitration because it has the same expeditious nature but allows for the merits to be decided by a panel of jurors as opposed to a single arbitrator. Pro tem judges are assigned to preside over the trial. Recordings of short trials are kept by the ADR Office in the Maricopa County superior court building, which can be viewed for reference.

A plaintiff must file a certificate stating whether (1) the complaint requests monetary damages only; (2) the amount sought exceeds the limit set by local rule for compulsory arbitration; (3) the amount sought does not exceed $50,000, excluding interest, costs, and attorney fees; and (4) the plaintiff does not need to serve the summons and complaint on any defendant in a foreign country. A plaintiff qualifying for and choosing a short trial is thereby entitled to an expedited jury trial and may appeal a decision to the court of appeals, but a plaintiff choosing arbitration forfeits the right to appeal. In essence, FASTAR was designed to provide an attractive alternative to arbitration, which can entail a protracted process when a party pursues a trial de novo afterward. ***Duff v. Lee***, 250 Ariz. 135, 137 (2020).

ADR AT THE APPELLATE LEVEL

ADR has also taken hold at the appellate court level. While most are familiar with arbitration, mediation and summary jury trials at the trial court level, few are as familiar with the introduction of ADR at the appellate level.

Rule 29 — Accelerated Appeals

Rule 29 Ariz.R.Civ.App.P. provides a procedure for civil litigants to accelerate the appeal process. Civil appellate litigants may invoke the special Rule 29 procedures by stipulation or motion. Alternatively, the appellate court can order an appeal to be accelerated under Rule 29 on its own motion. Any party can object within ten days.

Under Rule 29(b) Ariz.R.Civ.App.P., briefs in accelerated appeals are prepared and filed as usual, unless the parties stipulate at the outset to filing "summary briefs." Summary principal briefs, governed by Rule 29(c) Ariz.R.Civ.App.P., shall not exceed 3,600 words and reply briefs shall not exceed 1800 words. The argument section of the briefs contains only an outline of each argument presented, consisting of a summary statement of the argument and a list, without elaboration, of the authorities and specific pages thereof relied upon. No motion may be filed to vary the provisions of this subsection.

If the parties do not request oral argument, Rule 29(d) Ariz.R.Civ.App.P. states that the court must dispose of the appeal within 90 days of when briefing is complete. If oral argument has been requested, oral argument shall be heard within 90 days of when briefing is complete**.** If oral argument is heard, the parties get 30 minutes each (as opposed to the normal 20). After oral argument, the court must decide the appeal within three days. That decision need not be by memorandum decision or opinion. The court may enter an order summarily stating the basis for the disposition. Rule 29(e) Ariz.R.Civ.App.P. Alternatively, the court may render decision orally from the bench after oral argument.

If a petition for review is filed from an accelerated appeal, Rule 29(f) Ariz.R.Civ.App.P. requires the Supreme Court to give that appeal priority. If review is granted, the Supreme Court may decide the case by order, by memorandum decision, or by opinion.

A Rule 29 Ariz.R.Civ.App.P. procedure could be utilized in cases that are not complex, are not fact intensive, and which require a quick ruling. The usual appeal process can take a year currently, which makes accelerated appeals seem attractive. However, accelerated appeals are not for everyone. There is the concern that the parties are not able to fully argue their case, and due to the quick turnaround time, that the judges will not spend as much time pondering over the decision.

Rule 30 — Arizona Appellate Settlement Conference Program

The court of appeals also has an appellate settlement program to help litigants settle cases on appeal before they spend the time and money preparing briefs. Most civil appeals to the Arizona Court of Appeals are eligible for the program, with a few exceptions. The program is available at no additional cost to the parties beyond the normal appellate filing fees. A sitting court of appeals judge presides over the settlement conference. This allows the parties to get a realistic view as to the strength or weakness of their appeal. If the conference occurs but the parties do not settle, the judge conducting the conference will not sit on the panel that decides the appeal. See the policies for each division of the court of appeals for their specific procedures for conducting appellate settlement conferences.

If you have questions regarding the information in this chapter, please contact the author or any JSH attorney.

CONTRIBUTING AUTHOR:

DAVID COHEN, PARTNER David's ADR practice focuses on meditating tort claims, including those involving medical malpractice, elder abuse, wrongful death and personal injury. David understands objectives and goals, and is well equipped to mediate cases quickly and successfully for both plaintiffs and defendants.
dcohen@jshfirm.com | 602.263.7372 | jshfirm.com/dcohen