

Arbitration Process and Arbitration Agreement

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Overview

- Benefits and Detriments of Arbitration
- Stages of the Arbitration Process
- Arbitration Legal Overlay and Federal Arbitration Act
- Parties to Arbitration Agreement
- Agreement to Arbitrate
- Miscellaneous

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Benefits and Detriments of Arbitration

- Time and Expense
- Disclosures by Arbitrator
- Expertise of Arbitrators
- Confidentiality
- Finality of Award and/or Possible Appeals
- Inapplicability of Civil Litigation Rules
- Equity

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Stages of Arbitration Process

- Dispute and Agreement to Arbitrate and Related Issues
- Commencement of Arbitration and Related Issues
- Invitation and Appointment of Arbitrator
- Responses to Arbitration Demand

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Stages of Arbitration

- Preliminary Status Conference (aka Preliminary Hearing)
- Evidentiary Hearing
- Award

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Federal Arbitration Act

Section 2: Validity, irrevocability, and enforcement of agreement to arbitrate.

Section 4: Failure to arbitrate under agreement; petition to United States court having jurisdiction to order to compel arbitration; notice and service thereof; hearing and determination

Section 5: Appointment of arbitrators or umpire

Section 7: Witnesses before arbitrators; fees; compelling attendance

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Federal Arbitration Act (cont.)

Section 9: Award of arbitrators; confirmation; jurisdiction; procedure

Section 10: Same; vacation; grounds; rehearing.

Section 11: Same; modification or correction; grounds; order

Section 16: Appeals

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Federal Arbitration Act (cont.)

- General rule is that FAA applies to practically all arbitrations under its Section 2 “involving commerce” provision
- General rule is swallowed up by applicable law that recognizes that the FAA will not apply when the clear intent of the parties is that it not apply
- Overall Result: most arbitrations will be procedurally governed by the Neutral Services’ rules and state law will apply substantively
- Most state arbitration statutes based, at least in part, on Uniform Arbitration Act
- Practical application of FAA in a healthcare arbitrator’s everyday practice

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Arbitration Legal Overlay

- Arbitrations are not always contract disputes
- State arbitration statutes do not usually apply to procedural issues unless specified in the arbitration agreement
- Substantive issues governed most often by state law
- Parties may incorporate State procedural law, state arbitration statute, or federal evidentiary law into their Arbitration Agreement
- Procedural issues governed most often by arbitration agreement and/or Rules of Neutral Service, e.g., Commercial Rule of the American Health Law Association Dispute Resolution Service

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Threshold Issues: Parties and Arbitrability

- In most cases, parties are written signatories to an arbitration agreement
- Who decides on whether non-signatories can enforce an arbitration agreement or be compelled to submit to arbitration?
- Who decides on other issues of arbitrability?
 - Rule 3.1 states: "...once appointed, the arbitrator shall have the power to determine his or her jurisdiction and any issues of arbitrability".

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Arbitration Agreement

- Jumping off step for arbitrator
- Pre-arbitration mediation and dispute resolution

"K. All disputes shall be resolved through the following process:

(a) **Business Representatives.** Either party shall first give written notice of the issues(s) to the other party and the usual business representative of each party shall work in good faith to resolve the issue.

(b) **Senior Executive.** If the usual business representatives are not able to resolve the matter to the parties' mutual satisfaction within sixty (60) days, either party may submit the matter to the parties' senior executives. Within twenty (20) days of such submission, senior executives with the authority to resolve the matter shall meet and attempt to resolve the matter."

(c) If the foregoing steps to not produce a resolution to the satisfaction of both parties, the unsatisfied party(ies) may submit the matter to nonbinding mediation. The mediator shall be as mutually agreed upon by the parties or if the parties are unable to agree, the parties shall allow _____ to select a mediator. If the dispute cannot be resolved to the mutual satisfaction of the parties within ninety (90) days of the selection of a mediator, either party may submit the dispute to arbitration (as provided for below)."

- Arbitrators encouraged to promote settlement mediation under AHLA Rule 4.1(c)

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Arbitration Agreement (contd.)

- Meet and confer prior to preliminary status conference
- Example of a met and confer pre-condition to arbitration:

After the Arbitration Demand is served and before the first conference call with the Arbitrator(s), representatives of the parties and counsel shall meet and confer to discuss the most efficient process of resolving the dispute, including discussion of early briefing of legal issues, exchanges of information, bifurcation of issues, joinder or severance of issues or parties, methods of reconciling accounts and claims data, and any other matter that may be germane to the goal of a streamlined dispute resolution process. This meet-and-confer shall be attended by a representative of each party at the Vice-President level or higher, together with lead litigation counsel and in-house counsel for both parties. The failure of a party to comply with this provision shall be grounds for the award of sanctions, in the exercise of sound discretion in favor of the party prepared to participate in accordance with the Arbitration Rules.

- Different scopes of arbitration terms

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Arbitration Agreement (contd.)

- Example of Narrow Arbitration Scope:

Any dispute arising out of this agreement will be resolved through arbitration administered pursuant to the American Health Law Association Dispute Resolution Service Rules of Procedure for Commercial Arbitration (effective September 1, 2023). Judgment on the award may be entered and enforced in any court of competent jurisdiction.

- Example of Broader Arbitration Scope:

A. Any controversy or claim arising out of or relating to this Agreement, or the breach, termination, or validity thereof, shall be determined by arbitration in XYZ County, [State], in accordance with the provisions of the rules of the American Health Law Association Dispute Resolution Service in effect on the date of this Agreement by a single arbitrator who is selected as provided in Section B below. **The arbitrator shall base the award on this Agreement and applicable law and judicial precedent** and shall accompany the award with a written explanation of the reasons for the award. The arbitration shall be governed by the substantive and procedural laws of the State of _____ applicable to contracts made to be performed therein. The decision of the Arbitrator shall be binding upon the parties and enforceable in the courts of the State of _____.

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Arbitration Agreement (contd.)

- Example of Broadest Arbitration Scope:

Any dispute arising out of, relating to, or in connection with this contract or the subject matter thereof, or any breach of this contract, including any dispute regarding the scope of this clause, will be resolved through arbitration administered by the American Health Law Association Dispute Resolution Service and conducted pursuant to the AHLA Rules of Procedure for Arbitration. Judgment on the award may be entered and enforced in any court having jurisdiction thereof.

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Arbitration Agreement (contd.)

- Fee and expense shifting
- Choice of law
- Location of evidentiary hearing
- Final award
 - Standard Award
 - Reasoned Award

Form of Award. The Arbitrator shall issue a [brief] Reasoned Award”.

- Findings of Fact and Conclusions of Law

Form of Award. The form of the Award by the Arbitrator shall be Findings of Fact and Conclusions of Law.

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Arbitration Agreement (contd.)

- Tentative Decisions before Final Award
- Sample Tentative DecisionTerm:

The Arbitrator shall issue a tentative decision stating findings of fact and conclusions of law and applying [State] and applicable federal law within forty-five days of the conclusion of the arbitration hearing. Either party may submit written notice to the case manager within fifteen calendar days of service of the tentative decision that the party elects to have a hearing to state any objections to the tentative decision. No additional briefs or letters shall be filed stating reasons for the objection, unless requested by the Arbitrator. The hearing shall not be longer than one-half day unless more time is requested by the Arbitrator....

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Arbitration Agreement (contd.)

- Three-member arbitration panels
- Examples of 3-member panel terms:

- The first example states that:

The claim or claims will be heard by a panel of three arbitrators. Each party will appoint a panel member, and the two panel members will appoint a chair. The chair will resolve all pre-hearing disputes regarding discovery, confidentiality, subpoenas, and other matters on his or her own, except for dispositive motions.

- The second example states that:

In cases where the amount in controversy exceeds _____ Dollars (\$_____), the three neutral Arbitrators shall appoint one of the three of them to serve as the chair of the panel, and the chair will decide routine case management issues, as well as discovery issues that arise during the pendency of the proceeding [alternative option: provided, however all case management, discovery and procedural disputes between the parties will be decided by the panel].

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Arbitration Agreement (contd.)

- Provision allowing for defaulting a party:

Each party will bear his, her or its own costs and expense of such arbitration except as set forth in Section 14.2 (Indemnification). All forum fees and expenses, including AAA's fees, will be advanced equally by the parties and will not be assessed against any party as part of an award, except as set forth in Section 14.2 (Indemnification), provided, however, that the failure of a party to timely advance his, her or its portion of any arbitration fees will entitle the other party(ies) to a default award (if non-paying party is the respondent) or dismissal with prejudice (if non-paying party is the claimant).

- Defaults not expressly provided for under the AHLA rules:

Rule 6.7-- If a party or a party's authorized representative who has been notified of a hearing fails to appear, or fails to request and receive a postponement, the arbitrator must take evidence from whichever parties and representatives are present.

Rule 5.3(b) -- Sanctions may include limiting a party's ability to assert or pursue its claim or counterclaim or to defend against another party's claim or counterclaim. A non-paying party can avoid sanctions by proving to the arbitrator's satisfaction that paying the deposit would cause financial hardship and the sanction would be unreasonable.

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AHLA's Frequently Asked Questions

<https://www.americanhealthlaw.org/dispute-resolution-services/frequently-asked-questions#Independent>

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