Chapter VI

ARBITRATION

Overview

Arbitration is use of a private third party to conduct a hearing on a dispute and make a final, binding decision. There is also advisory arbitration where the decision of the arbitrator does not bind the parties.

Arbitration is a matter of contract. The parties agree to submit their dispute to arbitration and to be bound by the decision of the arbitrator. It is commonly included in collective bargaining agreements and its use has a long history in this country's labor relations.

Most collective bargaining agreements contain arbitration provisions that represent the last step in an internal grievance process. This process is characterized as grievance arbitration. Since the 1960's, some colleges have entered collective bargaining with faculty. College and university experience with arbitration has been confined, until recently, to collective bargaining agreements with staff.

Application

Arbitration can be available as one part of an internal complaint process, can occur initially due to contractual agreements, or

can arise by agreement of the parties during the conflict, including litigation. At any time, parties can agree to submit their dispute to arbitration. Arbitration is frequently used to resolve commercial or other disputes involving external business conflicts.

As with mediation, a critical factor in arbitration is the selection and the qualifications of the third party neutral and the agreement that governs the parties and the arbitration.

A key characteristic of arbitration is that it is binding on the parties. Judicial review is limited since both state and federal arbitration laws establish a very limited basis on which to appeal the decision of an arbitrator.

Other than binding arbitration, there are several other forms of arbitration; the two most common are advisory arbitration and court-annexed arbitration. In advisory arbitration, the decision of the arbitrator is not binding on the parties. In court-annexed arbitration, the court may divert litigation in its early stages to arbitration but, of course, the court cannot require the parties to accept the result of the arbitration. Accordingly, it is very similar to advisory arbitration. In both cases, however, these arbitrations provide the parties with a decision on the dispute they can then adopt, modify, or reject.

There are in addition various permeations of arbitration, some of which require the arbitrator to award the best offers of the parties. Another is where the parties give to each other their best proposal, arbitrate the case with the arbitrator who makes a decision. The parties agree that the prevailing party will accept the proposal that is closest to the actual award of the arbitrator.

There is also what is called high-low or sometimes mini-max arbitration. The parties submit their dispute to binding arbitration but agree the claimant will recover no less than a certain amount of dollars but no more than a maximum dollars. The minimum amount is oftentimes the defendant's last offer and the maximum amount is usually the claimant's last demand. The arbitrator does not know about these numbers. If the arbitrator's award falls

between the amounts identified by the parties, the claimant gets that amount. If it falls below, the claimant is awarded the minimum amount. Where the award falls above, the claimant is granted the maximum amount.

There are, as with mediation, advantages and disadvantages to arbitration. Costello lists several.

In favor of arbitration:

- Faster results than court
- Shorter and less expensive hearings
- Saving of time and money
- Ability to choose the arbitrator
- Privacy
- No irrational verdicts
- Involves parties and communities more
- Lessen burdens on courts
- Finality

Reasons against arbitration:

- The perception that arbitrators always render a compromise award
- No discovery
- No jury
- No summary disposition
- Some arbitrations are more costly than court proceedings
- Cannot be certain that the arbitrator will apply the law
- Very limited judicial review
- Arbitrators may have relationship with parties or law firms they do not have to disclose

There are many national organizations that provide arbitration support including neutrals, procedural rules, and related materials. These include the American Arbitration Association, Judicate, Jams/Endispute, and the U.S. Arbitration and Mediation Service.

FEDERAL AND STATE LAWS

Congress adopted the Federal Arbitration Act in 1925. This Act governs arbitration in federal courts and serves as the basis for the model statute prepared for the states which many states have adopted with some modification. (Appendix V contains the text of these statutes)

Both federal and state laws are premised on the assumption that arbitration is to be encouraged and courts should have a very limited role in reviewing decisions of arbitrators. Under these laws several critical issues arise relating to: (1) what is arbitral; (2) determining arbitrability; (3) predispute agreements on statutory employment claims; and (4) scope of judicial review of arbitration decisions.

What Is Arbitral

Parties desiring to substitute an arbitral forum for a judicial forum must demonstrate they have agreed to arbitrate the particular claim and issue. Accordingly, there is continuing litigation over whether a particular issue is arbitral under the arbitration agreement, which means whether the disputed issue is covered by the arbitration agreement.

Even though there is a presumption of arbitrability, it is a matter of contract interpretation and contract rules must apply. In determining the breadth of an arbitration agreement, the Supreme Court has affirmed the principle of arbitrability which dictates that "as a matter of federal law, any doubts concerning the scope of arbitral issue should be resolved in favor of arbitration, whether the problem at hand is a construction of the contract language itself or an allegation of waiver, delay, or a light defense to arbitrability." (*Moses H. Cohen Hospital v. Mercury Construction Corp*., 1983).

In a recent Supreme Court case, the court reaffirmed this point of view when it ruled that arbitration remains "simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." (*First Options of Chicago, Inc. v. Kaplan*, 1995).

This issue of what is subject to arbitration is clearly reflected in a case involving Michael Lewis Brennan, a faculty member at Northeastern University. He brought suit against the university and several named people alleging the university and other defendants violated federal and state antidiscrimination laws and breached his contract of employment. (*Brennan v. King*, 1998) Specifically, Brennan alleged he was denied tenure because he was gay and HIV-positive.

Brennan filed a federal lawsuit alleging violations of the Americans With Disabilities Act and the Rehabilitation Act of 1973 along with various state law claims and state statutory claims.

Northeastern moved to dismiss the complaint based on the fact that Brennan had failed to pursue the grievance procedure specified in his employment contract. Those procedures contained an arbitration provision. The federal district court, embracing the principle that arbitration should be encouraged, dismissed the suit since Brennan had not used these internal procedures.

On appeal, the federal court focused on the question of whether the Federal Arbitration Act or its Massachusetts counterpart required Brennan to first invoke the grievance arbitration procedures prior to seeking a judicial determination.

The court had to interpret the contract provision regarding arbitration and whether it required Brennan to arbitrate his specific tenure denial. The court determined that even though there were arbitration provisions, it did not adequately address

Brennan's denial of tenure and the relief he requested. Accordingly, since the university's arbitral procedure did not provide a forum for the entire resolution of Brennan's dispute, the presumption of arbitrability was overcome and Brennan could maintain his federal lawsuit.

Determining Arbitrability

Whether a matter is subject to federal or state arbitration laws will depend on whether the particular subject matter is one for arbitration and whether the parties have clearly agreed to arbitrate the particular dispute. Recently, the Supreme Court again reviewed what a party must do in order to clearly agree to arbitration.

In a case involving Carol Kaplan against her employer, a brokerage firm, Kaplan challenged the arbitration agreement based on the fact that she did not personally sign the agreement with the arbitration clause. She challenged the arbitration before the panel of arbiters and they rejected her claim.

She subsequently appealed to the federal district court where she lost. Her position, however, was sustained in the federal court of appeals which held the dispute between the company and Kaplan was not arbitral. The Supreme Court granted review.

Again, the U. S. Supreme Court reiterated a long-standing principle that courts have primary jurisdiction to decide whether parties have agreed to arbitrate the merits of a dispute. If parties agree to arbitrate the dispute, courts will overturn the arbiter's decision only in the narrow circumstances prescribed by the Federal Arbitration Act.

The Supreme Court concluded that whether a matter was subject to arbitration should not be resolved by arbitrators unless the agreement is very specific on that point. If not, whether a

matter is subject to arbitration should be handled by the courts as a matter of contract interpretation.

The court noted that presumptively giving arbitrators the power to decide arbitrability "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." (*First Options of Chicago, Inc. v. Kaplan*, 1995)

This case reaffirms the proposition that courts may independently review whether parties agree to arbitrate a dispute under the Federal Arbitration Act unless there is "clear and unmistakable evidence that the parties agreed to let the arbitrator decide the question of arbitrability."

In response to *Kaplan*, most commercial arbitration agreements now provide that the arbitrators have the power to determine their jurisdiction and to determine the existence of a written contract to arbitrate a particular dispute.

Predispute Agreements on Statutory Claims

There is continuing controversy about whether employees who as a condition of employment agree to arbitrate statutory employment claims are later prohibited from taking advantage of their statutory rights to litigation. Specifically, can an employee who has a right under Title VII be required to waive that right as a condition of employment.

As one court explained:

> *However, one aspect of the increased use of arbitration has recently engendered greater scrutiny and controversy—the use of mandatory pre-dispute arbitration agreements to resolve statutory claims of employment discrimination. Such agreements require an individual, as a condition of employment, to*

> *agree in advance to arbitration of future claims alleging violation of a statute prohibiting discrimination in employment.*

The Supreme Court in an important decision, upheld a predispute agreement to arbitrate an age discrimination claim: "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (*Gilmer v. Interstate/Johnson Lane Corporation*, 1991)

Further, the Supreme Court reiterated its long standing support for arbitration when it suggested that attacks on the adequacy of arbitration rest on: "Suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants and as such they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Under Section 1 of Federal Arbitration Act (FAA), most employers are permitted to contract arbitration as a mandatory form of dispute resolution with employees, however, "seamen, railroad employees, or any other class of workers engaged in interstate commerce" are exempt (See Appendix 5A). Courts have traditionally interpreted this exemption to only apply to employment contracts of transportation workers, but not other employment contracts. In *Circuit City Stores, Inc. v. Adams,*(2001), the interpretation of this exemption was challenged to include all employment contracts, rather than just the employment contracts of transportation workers.

In this case, Adams, the employee, had entered into a predispute agreement in an employment application to arbitrate with Circuit City. Two years later, Adams filed suit against Circuit City for employment discrimination in state court. Circuit

City responded by suing Adams in federal court to enjoin the state proceeding and to force arbitration pursuant to the terms of the employment application and the FAA. Adams argued the FAA exemption that applied to "seamen, railroads employees, or any other class of workers" encompasses all employment contracts, thus rendering the arbitration agreement set forth in the employment application unenforceable.

The federal district court ruled in favor of Circuit City, interpreting the statute to only apply to transportation workers. However, on appeal, the ninth circuit court reversed the district courts decision and ruled that FAA exempted arbitration in all employment contracts. The Supreme Court in its review determined that Congress had intended the Section 1 exemption to apply only to transportation workers, thus reversing the decision of the appeals court. The Supreme Court applied the statutory construction canon, *ejusdem generis*: general words following specific words in a statutory enumeration embrace only similar objects to the preceding ones. "Seamen" and "railroad employees," which are specifically cited before "any other class of workers" indicates Congress had intended this exemption to apply only to transportation worker.

Adams also argued that arbitration bypasses the parties statutory rights afforded by Congress and state legislatures. The Supreme Court, however, rejected this argument by quoting its previous ruling in Gilmer(1991):

> *[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial form.*

The Supreme Court demonstrated further support for predispute arbitration clauses in employment contracts by stating:

> *Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.*

Furthermore, some federal statutes encourage arbitration of the underlying disputes. For example, the Civil Rights Act of 1991 amending Title VII provides:

> *Where appropriate and to the extend authorized by law, the use of alternative means of dispute resolution, including...arbitration, is encouraged to resolve disputes arising under the acts or provisions of federal law amended by this title.*

Additionally, the Americans With Disabilities Act contains similar language:

> *Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including...arbitration, is encouraged to resolve disputes arising under this chapter.*

Several courts have reviewed this congressional history and affirmed Congressional policy to encourage arbitration in employment disputes.

The federal appellate courts that have reviewed Congressional legislative changes in 1991 when it amended the 1964 Civil Rights Act and provided additional benefits to claimants have concluded that a waiver of Title VII statutory claims must be "knowingly" waived. Alternatively, if an employee agrees to arbitrate when a discrimination claim arises, the employee will be held to that agreement.

Even when a valid waiver occurs, the claimant is still entitled to a fair process. Accordingly, the major arbitration organizations have promulgated fair procedures ("Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship") when employment claims are arbitrated. (Appendix II-B contains these model guidelines endorsed by arbitrators)

A national task force on ADR in employment could not agree on the appropriate approach to predispute agreements on statutory employment claims. It did, however, identify the various approaches to predispute agreements:

- Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.
- Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger predisposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.
- Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.
- Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

Although an employee may be bound by a predispute arbitration agreement, the employee may still file a compliant with the EEOC if the employer engages in unlawful employment practices. If the EEOC chooses to bring a suit, it may be able to recover "victim-specific relief" for the employee, such as reinstatement, backpay, compensatory, and punitive damages. The Supreme Court upheld this position in *EEOC v. Waffle House, Inc,* (2002).

In this case, Eric Baker, a grill operator employed with Waffle House, agreed as a condition of employment that "any dispute or claim" concerning his employment would be "settled by binding arbitration." After only sixteen days of employment, Baker suffered from a seizure at work and soon thereafter was discharged. Baker did not initiate arbitration proceedings, but instead filed a discrimination complaint with the EEOC alleging his discharge violated the Americans with Disabilities Act (ADA). The EEOC filed an enforcement action against Waffle House in a federal district court, however, Baker was not a party to the case.

The EEOC compliant alleged that Waffle House "violated the ADA" by discharging Baker "because of his disability." The EEOC sought injunctive relief to "eradicate the effects of [Waffle House's] past and present unlawful practices" and specific relief designed to make Baker whole, including backpay, reinstatement, and compensatory damages.

Waffle House filed a motion under the FAA to stay the EEOC's suit and compel arbitration, or to dismiss the action because Baker did not initiate arbitration pursuant to the terms of his employment contract. Waffle House argued that awarding Baker with victim specific relief would circumvent the predispute arbitration agreement, thus violating the FAA.

The district court denied the motion based on a factual determination that the employment contract had not included an

arbitration provision. However, on an interlocutory appeal, the appeals court determined that a valid, enforceable arbitration agreement did existed between Baker and Waffle House. The appeals court further determined that because the EEOC was not a party to the contract, the arbitration agreement did not foreclose the EEOC from exercising its independent statutory authority to bring suit in federal district courts for the public's interest and on behalf of Baker. However, the appeals court limited the recovery of the EEOC to injunctive relief only, noting that seeking "victim-specific relief" in court conflicted with "the policy goals expressed in the FAA."

On appeal, the Supreme Court had to determine whether or not the EEOC could obtain "victim-specific" relief when a predispute arbitration agreement existed. The Supreme Court concluded that mandatory arbitration agreements could not limit the remedies available to the EEOC. The court noted the effect of punitive damages not only benefits the individual employee, but also "often [has] a greater impact on the behavior of other employers than the threat of an injunction." Because neither the statutory language of the FAA or the ADA suggests "that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available," the EEOC maintains the authority to sue for victim-specific relief.

The EEOC has adamantly opposed predispute arbitration agreements. In its 1997 policy statement, it opposed such agreements since they were "contrary to the fundamental principles of U.S. employment discrimination laws."

The EEOC reasons for opposing mandatory predispute binding arbitration include:

- Arbitrations are private non-public proceedings. Because arbitration proceedings are private, there is little, if any,

public accountability. The arbitrator, who unlike a court, is not charged with the obligation to give force to the broad policy of Title VII, but is rather concerned with the narrow, immediate dispute between employee and employer.

- Arbitration does not allow for development of law. Because there is no requirement that arbitration awards be reasoned and are not make public, there is no opportunity to build a jurisprudence through precedent.
- Arbitration severely limits the procedural rights of the employee. Unlike litigation, the claimant in arbitration is not entitled to a jury, and has a severely limited discovery right. Further, arbitration is not suitable for resolving class or pattern claims of discrimination.
- Arbitration systems include structural biases against discrimination plaintiffs. The employer is a "repeat player" in the system, and as a result may manipulate the arbitrator selection process through its greater knowledge of prior results. Further, the arbitration agreement is adhesive, dictated by the employer, and may be designed to give the employer a structural advantage in the process.

The EEOC does, however, endorse postdispute agreements to arbitrate. As the commission concluded:

> *This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense. Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration.*

Scope of Judicial Review of Arbitration Decisions

Both the Federal Arbitration Act and the model state arbitration statutes provides various grounds by which parties may seek to vacate an arbitration award even though it is binding and final. See Appendix V for the text of these statutes. The Federal Arbitration Act grounds include:

- The award was procured by corruption, fraud, or undue means
- There was evident partiality or corruption in the part of the arbitrators, or any of them
- The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced
- The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Under state law, awards of arbitration can also be challenged on very limited grounds. In New York, for example, an arbitration award may not be vacated unless it is irrational, violates a strong public policy, or clearly exceeds a limitation imposed on the arbiter as set forth in the state statutes.

Nassau Community College attempted to challenge an arbitrator's award as violating public policy when the collective bargaining agreement threatened its management prerogatives. (*Meehan v. Nassau Community College*, 1998). Even though the court acknowledged there were public policy issues regarding the arbitrator's award, it was the college's own doing under the collective bargaining agreement and the court would not interfere.

Several studies of arbitration awards have analyzed the grounds upon which challenges are brought. These studies point to the grounds specifically set out in the Federal Arbitration Act

or similar state laws and in addition include: error of law; public policy; and arbitrator's "personal sense of industrial peace."

A study of arbitration awards from elementary and secondary schools notes that the categories of issues raised in judicial challenges focus on: dismissal/nonrenewal; duty assignment; salary or other financial considerations; involuntary transfer; reprimand/involuntary transfer; retrenchment; and working conditions. Similarly, challenges to arbitrator's decisions for higher education often focus on personnel issues such as tenure, promotion, and just cause sanctions.

Several studies, McKinney and Place (1993) Feuille, Leroy, and Chandler (1990) found that about 65-70 percent of the arbitrator's decisions appealed are upheld by the courts.

ARBITRATION AND COLLECTIVE BARGAINING

Arbitration has been long adopted in collective bargaining agreements. Accordingly, some campuses have extensive experience with arbitration, mostly related to collective bargaining agreements and staff employees. More recently, some public and a few independent universities are experiencing arbitration pursuant to collective bargaining agreements with faculty.

Most of the reported ADR litigation involving higher education institutions emanates from arbitration under collective bargaining agreements. Those cases raise the critical issues of whether a matter is arbitral or whether the arbitrator has violated other statutory or contractual requirements.

Collective bargaining for faculty is a relatively recent activity on college campuses. It was not until the 1960s that there was a major push toward collective bargaining and the legal framework in which it operates has developed since that time.

Faculty tend not to seek collective representation because they view themselves as individual entrepreneurs who do not

need collective negotiation or action. It was community college faculty who first moved toward collective bargaining and were followed by other public universities and some independent colleges and universities.

The *Yeshiva* decision in 1980 made it more difficult for Yeshiva-type independent institutions to be subject to faculty collective bargaining. In that case, the U.S. Supreme Court ruled that in faculty-governed institutions, faculty were managerial employers or supervisors and not subject to bargaining. This decision substantially precluded collective bargaining as an option on many private higher education campuses.

Collective bargaining, as an alternative form of dispute resolution, generally focuses on the contractual matters related to wages, hours, and conditions of employment. These agreements contain conflict mechanisms including elaborate grievance processes that oftentimes culminate in arbitration.

Adversarial to Interest Based Bargaining

In response to an increasing concern and frustration with the adversarial employer/employee model of collective bargaining which focuses mainly on money and specific working conditions, alternative approaches are being explored. The goal is to reduce the need for an outside party, i.e., an arbitrator, to resolve a collective bargaining impasse. Critics suggest the process fails to effectively deal with problems versus problem tampering.

As Dennison notes:

> *Collective bargaining has too often appeared as a process in which two opposing groups sit down every two or three years with a stack of unilaterally developed inflated issues which each hopes eventually to trade for something really needed. Around the table, steely-eyed and poker-faced lawyers keep*

> *one eye on the clock and the other on their whole cards. Because of the drama and the reputation for confrontation and conflict, the bargaining process has received an unfair share of attention. As a result, the process rather than the substantive issues has often served as the dominant influence in defining and guiding the parties' day to day relationships.*

Accordingly, in recent years, collective bargainers have turned to interest based bargaining where the parties try to identify their interests and discuss their position on them. Interest based bargaining takes a different direction from the more traditional model and for some institutions, has proved more satisfactory for problem resolution.

Several universities, as noted by Dennison, have tried to alter the course of collective bargaining:

> *They adopted a process which enabled them jointly to identify the issues; analyze the interest underlying those issues; develop options reflecting those interests; evolve the means of assessing the options; and articulate outcomes deemed efficient, legitimate, mutually acceptable, supportive of collaboration, and worthy of joint commitment.*

There are those who believe collective bargaining should focus on power allocation and basically on conflict resolution. It certainly is easier to communicate at the table if everyone lines up their issues and argues for them. On the other hand, a less adversarial and more interest based bargaining, according to Dennison, has value:

> *A realistically shared-governance process respects the power which brings the parties to the bargaining table and a dispute resolution process which effectively addresses their legitimate and defined rights.*

> *The process to resolve disputes relies fundamentally on close and continuous collaboration. A resort to arbitration or other external relief does not necessarily mark the failure of the collaborative approach. But an excessive reliance on third parties can have a corrosive effect on the parties' relationship.*

The movement toward collective bargaining based on shared interest is another marker indicating traditional models of conflict resolution need to be reexamined with a goal toward achieving conflict resolution in a more collaborative and collegial manner.

Statutory Claims and Collective Bargaining

There is ongoing debate whether a union should, through a collective bargaining agreement, possess the power to waive the right of individual members to seek judicial determination of their statutory rights. The issue arises when a union member claims a violation of federal employment discrimination laws.

The U.S. Supreme Court unanimously ruled that an agreement to arbitrate contained in a union collective bargaining agreement could not bar a Title VII suit in federal court unless there was a "clear and unmistakable" waiver of an employee's statutory rights to a judicial forum. (*Wright v. Universal Maritime Service Corp.*, 1998)

The Court did not rule on whether predispute agreements are valid since it found in *Wright* the agreement failed to meet the "clear and unmistakable" waiver requirement. The National Labor Relations Board is opposed to mandatory arbitration that precludes resort to the Board's administrative process.

Given the Supreme Court's propensity to sustain arbitration agreements but to require fairness, it is likely the court will continue to uphold these agreements. They must provide, however, the complainant with the basic rights and remedies to which parties are entitled if they were to litigate the issue in federal court.

ARBITRATION OF FACULTY DISPUTES

Absent collective bargaining agreements, few institutions provide arbitration as an alternative dispute resolution mechanism. However, for those institutions that do, it is usually a last option after the internal grievance process has been followed.

Faculty are concerned about academic judgments and the primacy of faculty decision-making. Accordingly, institutions, if they provide for arbitration, normally limit the arbitration to procedural matters and leave academic judgments with the faculty, or if pursued, with the courts of law.

The American Association of University Professors (AAUP) has addressed the use of arbitration for faculty status issues. Its policy statements embrace the notion that arbitration may have advantages in certain cases over judicial proceedings:

> *It seems clear that, where resort to a formal external agency as deemed necessary, arbitration affords some advantages over judicial proceedings. In a court challenge, the procedure and substance are prescribed by federal and state constitutions, statutes, and judicial decisions in whose formulation the profession has almost no role. In contrast, arbitration procedures and substantive rights are largely within the joint power of the administration and the faculty's collective representative to prescribe. Hence the parties to the academic relationship can shape procedures to their special needs, formulate substantive rules embodying the standards of the profession, and select decision-makers with special competence in the field. In addition, arbitration may prove a quicker and less expensive remedy.*

The AAUP is quick to point out there are hazards with "the finality of arbitral review." Early on it was concerned about the fact that arbitration was relatively new to higher education and

there were few experienced arbitrators. Times, however, have changed.

The AAUP promulgates four factors it believes are essential for the effective use of arbitration:

- Sound internal procedures preliminary to arbitration which enjoy the confidence of both faculty and administration
- Careful definition of both arbitral subjects and standards to be applied by arbitration
- Selection of arbitrators knowledgeable in the ways of the academic world, aware of the institutional implications of their decisions, and, of course, sensitive to the meaning and critical value of academic freedom
- Assurance that the hearing will include evidence relating to the standards and expectations of the teaching profession in higher education and that appropriate weight will be given to such evidence.

Dismissal Actions

The AAUP recommends that once fair process dismissal proceedings are completed, arbitral review of an adverse decision by the governing body, is appropriate.

The role of faculty in faculty status issues, it is asserted, is primary and should not be diminished by formal arbitration procedures. Accordingly, faculty participation in a mediative effort prior to dismissal and their representation on any formal hearing panel is urged. Accordingly, the AAUP notes:

> *we believe arbitral review may be appropriate after presidential and board review. Alternative procedures providing for arbitration at an early stage may be acceptable, provided they ensure faculty participation in a mediative effort prior to formulation of dismissal charges, significant faculty participation in*

> *a hearing of such charges, and adherence in the formal hearing to the procedural requirements of academic due process.*

In a subsequent statement in 1991, the AAUP reaffirmed its position toward arbitration of faculty status matters. It also suggested a tripartite arbitration in which the arbitrator serves as one member of a hearing panel together with a member of the faculty and a member of the academic administration which might improve attention to academic standards.

For example, one university provides that arbitration is allowable for nonacademic concerns. Academic disputes can only be arbitrated if a committee approves and only on limited issues.

Appendix I-A contains an example of an arbitration provision from a college faculty collective bargaining agreement.

STUDENT CONFLICTS

Student to student conflicts are also arbitrated. A policy for arbitration following efforts to mediate includes:

> If the parties involved in the dispute do not choose mediation, if the mediator reports a failed mediation, or if the nature of the complaint makes mediation unrealistic, the dispute will be resolved through arbitration. The accused student may choose to have a resolution officer or a student resolution panel arbitrate the dispute. In cases which involve more than one accused student, the resolution officer will choose the form of arbitration if the students cannot agree. Each party involved in arbitration has the right to be assisted but not represented by an advisor of her or his choice. At an arbitration, the resolution officer will be in charge of preparing and submitting information gathered during the investigation.

> Both parties may have access to this information prior to the arbitration. To ensure the privacy of the parties and to maximize the educational potential of the process, both parties must agree to the admission of any other people (except witnesses or advisors) to the arbitration.
>
> All arbitrated resolutions will result in a recommendation(s) to the dean of students, who may accept or modify the recommendation(s). The dean may not modify a sanction to include suspension or expulsion. However, when expulsion is recommended, the Dean may instead suspend the student.

STAFF ISSUES

A few institutions provide for arbitration for staff conflicts. Oftentimes arbitration is optional upon agreement of the parties. An example of a staff arbitration policy follows:

> Where a post-probationary employee is dissatisfied with the results of mediation and the employee has been demoted, suspended without pay, or discharged and the parties agree, the dispute may be submitted for final and binding arbitration.
>
> The dispute resolution office will assist in the arbitration process by:
>
> - furnishing the names of possible arbitrators;
> - preparing an agreement to submit the dispute to binding arbitration; and
> - facilitating all arrangements for the arbitration hearing such as conference room reservation and any other logistical support as may be required.

> The decision of the arbitrator will be considered final and binding upon all parties in accordance with the laws of this state.

Preventive Planning

Institutions using or considering arbitration as a form of alternative dispute resolution, with or without collective bargaining agreements, should carefully review the types of arbitration available, how the third party neutral is selected, and perhaps most importantly, what issues are arbitrable. AAUP guidelines may provide a useful platform on which to base an arbitration program where certain faculty disputes are included.

Few colleges require arbitration of faculty decisions. In limited areas it may be an option that is binding or only advisory.

Interest based bargaining can be a more suitable form of dispute resolution under a collective bargaining agreement. Its increasing popularity represents an evolution in the bargaining process whereby each side's issues and options for resolutions are analyzed.

Whether to require predispute arbitration agreement on statutory employment claims needs careful consideration. In such cases, the employee must be provided "due process" similar to that identified in the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship developed by a national group of arbitrators contained in Appendix II-B. Clearly, the parties can agree on arbitration once the dispute has developed.

Finally, all parties involved in arbitration should be aware of the conditions under which an arbitrator's decision may be appealed.

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