

NON-BINDING ARBITRATION: AN INTRODUCTION

By Steven C. Bennett

When practitioners think of arbitration, they usually mean a process that results in a final, binding and enforceable award, which serves as an alternative to litigating in court. But there are many circumstances where a process that is not as binding as arbitration may be useful to parties involved in a dispute. Non-binding arbitration may be what the circumstances demand. However, this process rarely receives much attention. This article attempts to fill that gap.

The Spectrum of ADR Processes

Alternative dispute resolution (ADR) processes may be arranged on a spectrum from simple and voluntary to complicated and mandatory. The simplest ADR process involves having settlement discussions. The parties can easily have such discussions on the telephone or at in-person meetings. Unless a court or other legal body mandates that settlement discussions take place, the process is entirely voluntary and generally quite flexible. The parties can meet when they desire as many times as they like, using whatever format for discussion they prefer.

One step up from settlement discussions is mediation. This process introduces a neutral third party into the picture, whose role is to assist and encourage the parties to reach an agreement on some or all of their differences. The mediator facilitates the discussions by, among other things, asking the parties to state

Binding arbitration has received much more attention than non-binding. Steven Bennett, a practitioner who frequently writes about arbitration, remedies this imbalance. Here, he discusses how non-binding arbitration works and the advantages of this process. He distinguishes between private and court-referred processes and discusses how to design the process. He also addresses enforceability and the effect of a non-binding award.

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their views on the issues, try to see the issues from each other's point of view, identify what each wants and needs from the mediation, and encourage the parties to begin the process of making settlement offers. The mediator may also help the parties evaluate the strengths and weak-

require all (or some class of) cases to be screened through non-binding arbitration first.⁵ Only if the results are unsatisfactory must the court or agency decide the matter after a formal hearing *de novo*.

In addition to these institutional forms of non-

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nesses of their claims, and even suggest an amount (or range) for a reasonable settlement. Although mediation can involve limited discovery and briefing in appropriate cases, the goal that is always at the center of the mediation process is to reach an agreed-upon settlement.

One step above mediation in the spectrum of ADR processes is non-binding arbitration. This process is more formal and involves more mandatory procedures. Indeed, non-binding arbitration resembles conventional arbitration in that some discovery and briefing usually take place, and there are often formal hearings where evidence is presented and witnesses are examined and cross-examined. A non-binding arbitration award differs from a traditional arbitration award only in that it is not binding. However, in some circumstances it could become binding.

Many states sponsor ADR programs that offer non-binding arbitration,¹ sometimes for cases valued under a certain amount.² These programs usually provide that the award *will* become final unless one of the parties files a request for a trial *de novo* within the time provided in the statute or rules.³

There is a downside to requesting a trial *de novo*, which is that the requesting party could be assessed arbitration and court costs, plus attorney's fees, if the judgment in the new trial is not more favorable than the arbitration award.⁴

Some courts and agencies may direct parties to participate in non-binding arbitration on an *ad hoc* basis. Others may have standing orders or rules that

binding arbitration, parties may agree to have a non-binding arbitral process to address their dispute. There is a business purpose to this: The purpose is to provide the parties with an advisory opinion which they can adopt as their settlement, if they wish to. Or the parties may use the award as an indicator of the probable result in the event of a full-scale trial, and proceed with settlement discussions, making use of the arbitrator's opinion as they see fit.

Benefits of Non-Binding Arbitration

On its face, non-binding arbitration may appear to be quite inefficient. The parties go through the motions of traditional arbitration only to end up with an award that has no binding effect. If the parties do not settle, they may be forced to repeat the entire process at a trial, administrative hearing, or in binding arbitration.

Yet, when properly implemented, non-binding arbitration can serve several useful purposes.⁶ First, it can be a "springboard for discussion"⁷ because it provides the parties with important information about how a knowledgeable fact finder might decide the case. Second, because the award is advisory, there is no need to argue that the arbitrator failed to follow proper procedure or ignored the essential facts and law of the case. Thus, non-binding arbitration eliminates the possible need to appeal an adverse decision, thereby making it less costly in time, money and frustration.

A party who is unhappy with a non-binding award and chooses not to settle may litigate the dispute in court (or binding arbitration, if the parties agree). But because this is a costly decision, the disappointed party is likely to think hard about it and try to find a more businesslike solution.

In addition, non-binding arbitration shares some of the benefits of traditional arbitration: it is more flexible and more private than litigation because the parties can agree to keep arbitration

Non-binding arbitration could be structured so that the award never becomes binding. In essence, it is advisory only. If the parties wish to adopt the award as their settlement, they may do so. If they decide against adopting the award, they could be forced to repeat the entire process at a subsequent court trial, administrative hearing, or in binding arbitration.

proceedings and information exchanges confidential. The parties can also agree to appoint an experienced arbitrator with expertise in the field of the dispute.

These advantages, combined with the “fail safe” element—the ability to reject the award and seek a *de novo* trial or arbitration hearing—make non-binding arbitration a highly practical process, especially for less complex commercial disputes that companies do not wish to mediate (either because the parties are too far apart in their settlement positions or because they need a detailed evaluation of the merits of their position).

In some instances, courts and administrative agencies seek the case-screening benefits of non-binding arbitration.⁸ The process gives the parties a chance to hear a decision maker’s view of the case. A party to judicial or government-annexed non-binding arbitration always has the right to reject the award and literally have a day in court at a trial on the merits, but this right need not be exercised. The disappointed party can agree to accept the non-binding award as a settlement, or seek to negotiate a different settlement with the adversary.

The Non-Binding Arbitration Agreement

As with conventional arbitration, private non-binding arbitration is most likely to begin with an agreement in writing entered into at the beginning of the parties’ relationship. If the parties do not enter into a pre-dispute arbitration agreement, they can agree to arbitrate after a dispute arises.

When negotiating their agreement, the parties should decide whether they want the award to be non-binding and advisory only, or whether they want it to become final within a stated period of time unless one party objects and requests a trial or arbitration *de novo* (following the court ADR program model).

The parties also should decide whether they want to use the services and rules of an arbitration service provider, and whether they have any specific qualifications that the arbitrator must meet. These and any other terms that they agree on should be reflected in their arbitration agreement.

Whenever parties contemplate a non-binding

arbitration arrangement, they and their attorneys should be aware of several issues that may affect the conduct of the proceeding. Some of these issues are discussed below.

Effect of the Arbitration Award

It is not foolish to ask whether an award rendered in a non-binding arbitration is truly not binding. The answer is “no” if the non-binding arbitration was ordered by a court or government agency and neither party takes the steps required to avoid the award. The answer may be the same if the parties’ agreement states that the award becomes final within a stated period of time, unless certain conditions are met. These conditions might include service of a notice, or filing an objection to the award or a request for a trial *de novo* within a specified period after issuance of the award.

The answer should be different if the parties state in their agreement that any award will be entirely non-binding and advisory only. For the sake of clarity, the parties may also wish to incorporate terms such as the following:

- The award cannot be entered as a judgment in any court (except on mutual consent of the parties).
- The award may not be cited as evidence or precedent, with any preclusive effect, in any court, arbitration, or other proceeding.
- The fact that the non-binding arbitration took place, and any award, pleadings, briefs, testimony, or evidence from that process may not be referred to in any subsequent proceedings.

Is Non-Binding Arbitration Mandatory?

Participation in non-binding arbitration is mandatory if a court so orders. It is also mandatory if the parties agree in their transaction documents to use non-binding arbitration before resorting to litigation or any other process. A mandatory ADR clause providing for non-binding arbitration is no different from other conditions imposed on the initiation of litigation or administrative review (for example, notice of claim, meeting to discuss settlement, or mandatory mediation). Of course, even if non-binding arbitration is required, the parties may resolve

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their dispute through other means, such as settlement or mediation, even if their agreement does not require such ADR processes.

Terms that convey the idea that the parties intend to make participation in non-binding arbitration mandatory include the following:⁹

- Unless both parties otherwise agree, non-binding arbitration must be pursued and an award issued before any party may initiate litigation or binding arbitration. This statement clarifies that completing non-binding arbitration is a condition precedent to initiating further adversarial proceedings, unless both sides agree to forgo the non-binding process. If one party wishes to pursue non-binding arbitration but the other refuses to partici-

candidates in the agreement, but this could cause problems if the named individuals are not available to serve.

- Broad discovery and briefing. Discovery and briefing take up valuable time and are wallet eaters. Limit discovery to essential documents. Avoid depositions unless absolutely necessary. Set page limits on the length of briefs.
- Having no limits on the hearing. This can also lead to higher arbitration costs. Set a time limit for the hearing or use a chess clock.
- A reasoned award. This is usually desirable when the purpose is to encourage settlement

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pate, the party seeking to arbitrate could enforce the arbitration agreement in court.

- Any litigation commenced without both parties' consent prior to completing non-binding arbitration shall be subject to a stay pending non-binding arbitration. The parties may also wish to designate the court in which a motion to compel non-binding arbitration may be brought.

Scaling Down the Process

One of arbitration's greatest advantages is its flexibility. Parties generally may structure the process as they see fit. Parties who choose arbitration usually want an efficient process—meaning a rapid decision by an experienced neutral decision maker. With an efficiently managed process conducted in accordance with arbitration (not litigation) procedures, the parties can quickly learn how the case might come out in a binding adversarial proceeding. Then they can decide whether to settle or litigate. To achieve this end, the parties should try to avoid the following:

- Haggling over the number of arbitrators and/or the selection of the arbitrator or tribunal members. This can absorb valuable time and delay the process. The parties might be better off with one arbitrator and a simple method of selection. Or they could name the arbitrator or provide a short list of

by providing a full understanding of the strengths and weaknesses of each side's case. But the time and effort required to prepare a reasoned award is likely to prolong a non-binding arbitration process and make it much more expensive.

What Rules Exist for Non-Binding Arbitration?

The major arbitration provider organizations have not created special rules for non-binding arbitration. However, their standard arbitration clauses and rules could be tailored to non-binding arbitration. Such tailoring would eliminate some of the problems discussed above (i.e., lengthy discovery, unlimited hearing time, etc.) and increase the efficiency of the process.

State court systems that use non-binding arbitration have rules that might prove useful to practitioners who need to draft a non-binding arbitration agreement between private parties. But crafting a clause for an "advisory only" non-binding arbitration modeled on judicial rules is dangerous because those rules usually make the award binding unless one of the parties timely complies with the statutory requirement for seeking a trial *de novo*. Thus, attention must be paid to ensure that the parties' desires for a truly non-binding process is accurately reflected in their agreement. ■

ENDNOTES

¹ See, e.g., Fla. Stat. § 44.103(2) (“A court, pursuant to rules adopted by the Supreme Court, may refer any contested civil action filed in a circuit or county court to non-binding arbitration.”). For a summary of a North Carolina ADR program, see George Walker, *Non-Binding, Court-Ordered Arbitration: Practice Pointers* (N.C. Acad. of Trial Law. 1998) (available on Westlaw at 1998 WL 34002805). See also Steven C. Bennett, “Court-Ordered ADR: Promises and Pitfalls,” 7:12 *Met. Corp. Counsel* 11 (1999). For a summary of federal agency non-binding arbitration in Federal Administrative Agencies,” 9 *Admin. L.J.* 165 (1995).

³ See Jay E. Grenig, *Alternative Dispute Resolution* § 22:51 (West 2004) (in a court-annexed process, “one or more of the parties may choose to go to trial rather than to accept the decision”). See, e.g., Fla. Stat. § 44.103(5).

⁴ See, e.g., Fla. Stat. § 44.103(6).

² See, e.g., Nev. Arb. R. 3 (limited to civil cases with a probable jury award value not exceeding \$40,000 per plaintiff). See also Robert L. Haig, “Case Evaluation,” in *Commercial Litigation in New York State Courts* § 5:52 (West 2005) (cost-benefit analysis” indicates that non-binding arbitration “usually makes sense only in small cases” because “[a]s a practical matter ... once the parties have gone to the expense of non-binding arbitration, it is unusual for the losing side to then insist on a trial”).

⁵ For a bankruptcy case using non-binding arbitration, see *In re Federated Dep’t Stores*, 328 F.3d 829 (6th Cir. 2003) (creditors directed to non-binding arbitration).

⁶ See Kathryn L. Hale, “Non-binding Arbitration: An Oxymoron?,” 24 *U. Toledo L. Rev.* 1003 (1993) (outlining benefits of the process). Non-binding arbitration may be particularly effective in employment disputes and collective bargaining negotiations where obtaining an independent view of the circumstances could be especially valuable. See, e.g., Merrick T. Rossein, *Employment Law Deskbook* § 39:34 (West 2005) (“[c]ompanies ... generally report that employees rarely pursue other legal remedies at the conclusion of a non-binding arbitration procedure”); Editorial, Non-binding Arbitration, *Bucks County Courier Times*, Oct. 26, 2005 (suggesting non-binding arbitration for teacher contract dispute); Katie Pesznecker, “Teachers Unhappy with Arbitration,” *Anchorage Daily News*, June 2, 2005 (noting the use of non-binding arbitration); Zachary A. Mider, “Warwick Talks Go to Non-binding Arbitration,” *Providence J. Bull.*, Aug. 29, 2004 (same).

Non-binding arbitration has been used in complex disputes. See “Honeywell Thales, L-3 Submit to Non-Binding Arbitration to Settle Patent Disputes,” *Defense Daily*, Jan. 10, 2003.

⁷ Ted A. Donner & Brian L. Crowe, *Attorney’s Practice Guide to Negotiations* § 20:6 (Clark Boardman Callaghan 1995).

⁸ See authorities in n. 1 *supra*.

⁹ There are conflicting decisions on the applicability of the Federal Arbitration Act to non-binding arbitration. Cases holding that the FAA does not apply: *Dluhos v. Strasberg*, 321 F.3d 365 (3rd Cir. 2003) (non-binding arbitration does not constitute arbitration subject to the FAA); *Bombardier Corp. v. National R.R. Passenger Corp.*, 333 F.3d 250 (D.C. Cir. 2003) (non-binding arbitration is not a precondition to litigation); *Lightwave Technologies v. Corning Glass Works*, 725 F. Supp. 198 (S.D.N.Y. 1989) (court did not compel parties to engage in non-binding mini-trial). Cases holding that the FAA does apply: *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001) (parties were compelled to participate in non-binding arbitration); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) (arbitration need not be binding to fall within scope of the FAA); *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985) (non-binding arbitration clause was enforceable under the FAA).

Agreeing to specific terms under which non-binding arbitration would be implemented could aid courts in determining the reach of their authority and provide a contractual basis for relief, separate and apart from relief under the FAA.

¹⁰ For general insight into the process of creating an effective arbitration clause, see Steven C. Bennett, *Arbitration: Essential Concepts*, ch. 5 (American Law Media 2002).