



INSTITUTE FOR CHRISTIAN CONCILIATION

presents

ARBITRATION PRACTICUM -- ADJUDICATING GOD'S WAY!

in cooperation with

THE CHRISTIAN LEGAL SOCIETY

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SUMMARY OF KEY LEARNING AND PRACTICE POINTS

Arbitral Service – Nature of Office and Foundations

1. The office of arbitrator is adjudicative and quasi-judicial in nature.
2. It features relaxed procedures and evidentiary standards, confidentiality, and tribunal expertise.

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3. It is contractually based, meaning, it can be had only by express party agreement; other sources of arbitral authority include any applicable arbitration rules and governing arbitration law, both statutory and decisional.

4. Parties are bound to arbitrate only those issues they have agreed to arbitrate; indeed, a primary ground for vacatur of an arbitral award is “exceeding jurisdiction.”

5. Arbitral service does not allow for delegation of arbitral authority.

6. Arbitrators are afforded immunity from civil liability in most jurisdictions; however, such immunity does not extend to a material breach of the arbitration agreement or failure to perform. Careful arbitrators will determine independently whether or not statutory or common law immunity exists in their jurisdiction before accepting an appointment for arbitral service.

7. Arbitrators may not be deposed for purposes of clarifying or impeaching their awards, absent a *prima facie* showing of “misconduct.”

8. Seasoned arbitrators care careful to hear all evidence that may be relevant, material and helpful in resolving a dispute, while entertaining absolutely no argument or evidence from one party that the other party or parties have not been afforded with due notice and an opportunity to comment on or rebut.

9. Arbitrators generally may grant any remedy or relief that they deem just and equitable and within the scope of the agreement of the parties.

10. Upon rendition of the award, an arbitrator’s service is “*functus officio*,” meaning, such service is concluded unless, by party agreement, arbitration rules or otherwise, the arbitrator has retained jurisdiction for specific purposes such as enforcement of award terms, resolution of future disputes, and the like.

11. Perhaps the key attributes of serious, seasoned and insightful arbitrators may be depicted by the mnemonic “**A-R-B-I-T-R-A-T-O-R**”³:

- **A**uthoritative
- **R**eliable
- **B**alanced
- **I**ntuitive
- **T**eachable
- **R**esponsive
- **A**ttentive
- **T**horough
- **O**bjective
- **R**esponsible

Private, Binding Contractual Arbitration Distinguished

1. Key distinctions: Mediation versus Litigation versus Arbitration

(a) Nonbinding Mediation:

- Non-adjudicative, private/confidential, discussion-focused forum

³ Courtesy of the American Arbitration Association © 2017

- Parties own process/outcomes
- Resolution is negotiated
- Party “needs and interests” outweigh “law and facts”
- Goal is resolution and reconciliation, not fault and blame
- Comparatively lower costs, less time than with litigation or arbitration
- High national resolution rate (over 80% success rate)
- Settlements specifically enforceable

(b) Civil Litigation:

- Formal, adjudicative, adversarial hearing process
- Public forum
- Tribunal is judge and/or jury; judge controls process
- Judge rules on law; jury finds facts and determines outcome
- Formal rules of evidence and procedure apply
- Automatic right of appeal

(c) Private, Binding Contractual Arbitration Contrasted:

- Formal, adjudicative, private/confidential adversarial process
- Decision-making tribunal is sole or panel arbitrator
- Arbitrator finds facts, rules on law, decides and awards case
- Parties bound by arbitrator’s award, enforceable in court
- Very limited grounds for review/appeal of arbitral award

Rules of Procedure for Christian Conciliation (Binding Arbitration Focus)

1. Foundational precepts:

- Christians are commanded to address conflict in a biblically faithful manner, beginning with Godly confrontation, attempts at reconciliation, and, if need be, final adjudication before the church. (*Matthew 18:15-18*)
- Christians are not to resolve their differences publicly through the civil courts, but, rather, in a Biblically-faithful manner modernly known as “Christian Conciliation,” i.e., conflict coaching, mediation, and then, if necessary, binding arbitration. (*1 Corinthians 6:1-8*)
- The church is vested with authority over believers for guidance, reproof, conflict resolution and reconciliation of the brethren. (*Id.*)
- Glorifying God is the central objective to embracing His model of conflict resolution and Godly reconciliation. (*Id.*)
- Binding arbitration before the church is the final conflict resolution step in God’s divine economy. (*Matthew 18:15-18*)

2. Organization – Key Conciliation/Arbitration Rules of Procedure:

- R1: Purpose
- R3: Definitions
- R4: Application of Law

- R5: Commencing Conciliation
- R8: Administrator
- R16: Confidentiality
- R25-42: Arbitration Rules

Ethical Cannons

1. ICC Peace Standards of Conduct for Christian Conciliation (see www.iccpeace.com/standards)

- a. Responsibility to God
 - i. Christian Arbitrator is a high office
 - ii. One of God's immutable attribute is Justice
- b. Responsibility to Civil Authorities and Other Professionals and Organizations
- c. Responsibility to the Parties
- d. Responsibility to the Public

2. AAA Code of Ethics for Arbitrators in Commercial Disputes

- a. Preamble
 - i. Arbitrators like judges have the power to decide cases. Persons who act as arbitrators therefore undertake serious responsibilities to the public as well as to the parties. Those responsibilities include important ethical obligations
- b. 10 Cannons:
 - i. An Arbitrator should uphold the integrity and fairness of the arbitration process
 - ii. An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality
 - iii. An Arbitrator should void impropriety or the appearance of impropriety in communicating with the parties
 - iv. An Arbitrator should conduct the proceedings fairly and diligently
 - v. An Arbitrator should make decisions in a just, independent and deliberate
 - vi. An Arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office
 - vii. An Arbitrator should adhere to Standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses
 - viii. An Arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

- ix. Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this Code, except as exempted by Canon 10
- x. Exemptions for Arbitrators appointed by one party who are not subject to rules of neutrality

Legal Standards

1. Statutory grounds for award vacatur under Federal Arbitration Act (FAA)
 - a. Corruption, fraud or undue means
 - b. Evident partiality
 - c. Misconduct in refusing to postpone hearings
 - d. Refusing to hear relevant and material evidence
 - e. Exceeding powers
 - f. Any other behavior causing undue prejudice
2. Principle goals of binding contractual arbitration
 - a. Maintaining integrity of the process
 - b. Protecting the sanctity of the award

Process Phases and Ethical Challenges

1. Invitation and Appointment Phase

- a. Pre-Appointment Considerations
 - i. Disclosures

1. Standards for Disclosure

- a. Disclosure obligations are continuing and ongoing throughout all phases of arbitration
- b. FULL disclosure is required (who, what, When, where, why, how, subject to confidentiality safeguards)
- c. For disclosure purposes, “relationships” include family, social, business, financial
- d. When in doubt Arbitrators should DISCLOSE, DISCLOSE, DISCLOSE
- e. Arbitrators should disclose all circumstances of:
 - i. Justifiable doubt
 - ii. Appearance of partiality (objectively speaking)
- f. Arbitrators must know how to address disclosures occurring prior to hearing vs. those arising from new developments during the course of a hearing
- g. An Arbitrators ethical disclosure obligation is a tremendously important aspect of the overall arbitral engagement

2. Pre-Hearing Phase

- a. HYPO – Are you called by God to be the Arbitrator? The Standards of Conduct for Christian Conciliators provide under Standard 4, Responsibility to the Public that “The Christian conciliator shall not represent him/herself as having qualifications, affiliations, or experience that he or she does not possess”. When is a conciliator not called by God to be the Arbitrator?
- b. HYPO – Can non attorney biblical arbitrators accept an appointment to adjudicate contract disputes? Cf. Christian Standards of Conduct v. AAA Ethical Standards for Commercial Arbitrators
 - i. What is your disclosure obligation?
 - ii. May you accept the appointment if the parties consent?

1. ISSUES:

- a. Can you be faithful to office?
- b. Are parties required to pay extra to educate the arbitrator?
- c. When is the arbitrator required to ask for additional help/expertise to make a decision?

3. Course of Hearing Phase

- a. HYPO – When does your relational connections or business affiliations with individuals or church create either an appearance of conflict of interest or actual conflict of interest? Is it wise for an arbitrator to accept an assignment with knowledge that a personal relationship may be adversely affected by an arbitration decision even if the parties are willing to consent to the appointment?
- b. HYPO – what do you do when a witness shows up at hearing that you had a prior business dealing or personal relationship? Is the answer differently if the witness was previously disclosed in the pre-hearing phase of the arbitration but the arbitrator did not recognize the conflict?

4. Post-Hearing Phase

- a. HYPO: The governing arbitration rules say that, “The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the agreement of the parties. Suppose that after reviewing all the evidence and testimony, you the arbitrator are convinced that it would be “just and equitable” to award a party an amount greater than requested during the hearing and asked for in it’s brief. Editorial: you believe in your heart that justice demands this and the Holy Spirit is leading you in this direction.
- b. HYPO: Claimant’s brief makes reference to biblical authority on a crucial point that was not discussed in the hearing. Respondent’s brief addresses the issue but uses different biblical authority and reaches a different conclusion. Arbitrator is focusing on other biblical authority on the crucial issue that neither party has discussed in either the hearing or their briefs. How should the arbitrator handle the situation?

- c. HYPOTHESIS: After the award is finalized and served on the parties, but before expiration of the 20 day reconsideration period, a party sees the arbitrator at a church event and mentions that the arbitrator failed to award an undisputed item of damage to the party. The arbitrator agrees with the party that the award should be modified. What is the arbitrator's duty to correct the award?

- d. HYPOTHESIS: During an request for reconsideration of the award, a party raises a new issue that was either not raised during the arbitration hearing or was only briefly raised at the arbitration hearing and then brought up in the parties post hearing briefs. How should the arbitrator handle this situation? Is there a different result under the Rules of Procedure for Christian Conciliation vs. the AAA Rules for Commercial Arbitrations?

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