

Arbitration, Binding and Non-Binding v. Mediation

WHAT, WHEN AND HOW

*PRESENTED BY THE BROWARD COUNTY BAR ASSOCIATION
ALTERNATIVE **D**ISPUTE **R**ESOLUTION SECTION*

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Arbitration v. Mediation defined

ARBITRATION

a process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and ***renders a decision***

MEDIATION

a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. ...***decision making authority rests with the parties***

Court-ordered, non-binding arbitration

- Constitutional Right to Access to Courts – not violated: Trial De Novo
- Statutory authority F.S §44.103
- Hearing Procedures FRCP 1.820
- Reasons for use; vices and virtues
- Benefits – Third person objective evaluation and cost savings
- Vices - Fee shifting provision – Good or bad?

What cases can be sent to non-binding arbitration?

Any contested civil action filed in a circuit or county court may be referred to non-binding arbitration.

§44.103(2)

Who pays the arbitrator(s)?

Arbitrators shall be selected and compensated in accordance with rules adopted by the Supreme Court. Arbitrators shall be compensated by the parties. At no time may an arbitrator charge more than \$1,500 per diem, unless the parties agree otherwise

§44.103 (3)

What powers does the arbitrator(s) have?

An arbitrator or, in the case of a panel, the chief arbitrator, shall have such power to administer oaths or affirmations, issue subpoenas and to conduct the proceedings as the rules of court shall provide.

How is the arbitration conducted?

The hearing shall be conducted informally. Presentation of testimony and evidence shall be kept to a minimum, and matters shall be presented to the arbitrators primarily through the statements and arguments of counsel.

When and how will the decision be rendered?

The arbitration decision shall be presented to the parties in writing. An arbitration decision shall be final if a request for a trial de novo is not filed within the time provided by rules promulgated by the Supreme Court.

Does the judge learn of the arbitrator's decision?

The decision shall not be made known to the judge who may preside over the case unless no request for trial de novo is made as herein provided or unless otherwise provided by law.

What if everyone is satisfied with the arbitrator's decision?

If no request for trial de novo is made within the time provided, the decision shall be referred to the presiding judge in the case who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court,

What if a party does not like the arbitrator's decision?

Request for trial de novo and go to trial

§44.103 (5)

Hearing Procedures for Non-binding Arbitration – FRCP 1.820

Completion of the Arbitration Process

- **completed within 30 days** of the first arbitration hearing
- arbitrator(s) shall render a decision. In the case of a panel, a decision shall be final upon a majority vote of the panel

Within 10 days ...

- arbitrator(s) shall notify the parties, in writing, of their decision
- arbitrator(s') decision and the originals of any transcripts **shall be sealed and filed with the clerk**

Within 20 days ...

- any party may file a motion for trial
- If a motion for trial is not made, the decision shall be referred to the presiding judge

I went to Trial and it didn't go well. Did arbitration expose my client to fees?

Upon motion made by either party within 30 days after entry of judgment, **the court may assess costs against requesting party**, including arbitration costs, court costs, reasonable attorney's fees, and other reasonable costs such as investigation expenses and expenses for expert or other testimony which were incurred after the arbitration hearing and continuing through the trial of the case, **IF:**

If & Maybe...

- **The plaintiff**, having filed for a trial de novo, obtains a judgment at trial which is at least 25 percent less than the arbitration award.
- **The defendant**, having filed for a trial de novo, has a judgment entered against the defendant which is at least 25 percent more than the arbitration award.

Voluntary Binding Arbitration

TWO OR MORE OPPOSING PARTIES IN A CIVIL DISPUTE MAY AGREE
TO SUBMIT THE CONTROVERSY TO VOLUNTARY BINDING
ARBITRATION OR VOLUNTARY TRIAL RESOLUTION IN LIEU OF
LITIGATION, PRIOR TO OR AFTER A LAWSUIT HAS BEEN FILED,
PROVIDED NO CONSTITUTIONAL ISSUE IS INVOLVED.

44.104 Voluntary binding arbitration and voluntary trial resolution.

Arbitration – Considerations, Preparation & Presentation

Reasons for use; vices & virtues Cost savings Speed, control & simplification of adjudicated process	Arbitrators role and powers Issuing subpoenas Determining what is and is not arbitrable
Voluntary binding by agreement The agreement - details Agreement Enforceability	Arbitrator(s) Selection 3-person panel or single arbitrator Advocate v. neutral and expertise
Pre-arbitration Discovery Scope of discovery Discovery dispute resolution & limitations	Mediation AND arbitration Med-Arb, Arb-Med and MEAC
Presentation of Evidence summaries or live witnesses Court reporters	Post arbitration timeline Requests for Trial De Novo appeals

The proceedings

Chief arbitrator or trial resolution judge may “conduct the proceedings as the rules of court shall provide,” including:

- Administering oaths or affirmations
- Issuing subpoenas for “the attendance of witnesses and for the production of books, records, documents, and other evidence.” (And may ask court to order this.)
44.104(7)
- All of the appointed arbitrators conduct the hearing, but only a majority is required to make a final decision.
44.104(8)
- Florida Evidence Code applies to all proceedings.
44.104(9)

Permitted appeals to the Circuit Court

Limited to review on the record and not de novo, of:

- “Any alleged failure of the arbitrators to comply with the applicable rules of procedure or evidence.
- “Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party.
- “Whether the decision reaches a result contrary to the Constitution of the United States or of the State of Florida.”

44.104(10)(a)(b) & (c)

When there is no appeal

If parties don't appeal the decision within the provided time, the decision goes to the presiding judge in the case. If there is no presiding judge, the chief judge of the circuit will assign a circuit judge, who enters orders and judgments to carry out the terms of the decision. Orders are enforceable by the contempt powers of the court. The presiding judge will issue judgments to enforce the final decision "on request of a party."

44.104(13)

Please note

This section shall not apply to any dispute involving:

- child custody
- visitation
- child support
- rights of a third party not a party to the arbitration or voluntary trial resolution
“when the third party would be an indispensable party if the dispute were resolved in court or when the third party notifies the chief arbitrator or the trial resolution judge that the third party would be a proper party if the dispute were resolved in court, that the third party intends to intervene in the action in court, and that the third party does not agree to proceed under this section.”

44.104(14)

Rule 1.830 Voluntary Binding Arbitration

EXPANDING ON 44.104

Absence of Party Agreement

- **Compensation.** If parties did not agree on compensation for the arbitrator(s), the court “shall determine the amount of compensation subject to the provisions of section 44.104(3), Florida Statutes.”
- **Hearing Procedures.** Parties may, by written agreement before the hearing, establish the hearing procedures for voluntary binding arbitration. Otherwise, the court decides the hearing procedures.

Arbitration Decision and Appeal

- Within 10 days of the arbitration's final adjournment, the arbitrator(s):
 - serve the parties with notice of the decision
 - file the decision with the court
- "A voluntary binding arbitration decision may be appealed within 30 days after service of the decision on the parties. Appeal is limited to the grounds specified in section 44.104(10), Florida Statutes."
- If no appeal is filed, the decision is referred to the presiding judge. The judge will enter orders and judgments "as required to carry out the terms of the decision as provided under section 44.104(11), Florida Statutes."

Chapter 682 - Arbitration Code

682.01 Short title.

682.011 Definition

682.012 Notice.

682.013 Applicability of revised code.

682.014 Effect of agreement to arbitrate;
nonwaivable provisions.

682.015 Petition for judicial relief.

682.02 Arbitration agreements made valid,
irrevocable, and enforceable; scope.

682.03 Proceedings to compel and to stay
arbitration.

682.031 Provisional remedies.

682.032 Initiation of arbitration.

682.033 Consolidation of separate arbitration
proceedings.

682.04 Appointment of arbitrators by court.

682.041 Disclosure by arbitrator.

682.05 Majority action by arbitrators.

682.051 Immunity of arbitrator; competency to
testify; attorney fees and costs.

Chapter 682 - Continued

682.06 Hearing.

682.07 Representation by attorney.

682.08 Witnesses, subpoenas, depositions.

682.081 Judicial enforcement of preaward ruling by arbitrator.

682.09 Award.

682.10 Change of award by arbitrators.

682.11 Remedies; fees and expenses of arbitration proceeding.

682.12 Confirmation of an award.

682.13 Vacating an award.

682.14 Modification or correction of award.

682.15 Judgment or decree on award.

682.181 Jurisdiction.

682.19 Venue.

682.20 Appeals.

682.23 Relationship to Electronic Signatures in Global and National Commerce Act.

682.25 Disputes excluded.

Comparison

AAA

AAA, the oldest provider of ADR worldwide, was formed following the enactment of the Federal Arbitration Act 1926 (FAA).

CPR

CPR was founded in 1979 as an effort to bring together corporate counsel and their law firms to find a way to lower the cost of litigation. CPR provides both administered and non-administered arbitration services. Unlike AAA or JAMS, CPR does not receive a portion of the fees paid to its arbitrators.

JAMS

Also founded in 1979, JAMS is amongst the largest private ADR providers in the world. Founded by the Hon Warren Knight, JAMS offers nearly 300 full-time neutrals to resolve disputes in most legal fields. In 2011, JAMS partnered with the ADR Centre in Italy and formed JAMS International to provide mediation and arbitration of cross-border disputes.

Rule/Topic	AAA Commercial Arbitration Rules	JAMS Comprehensive Rules & Procedures	CPR Administered Arbitration Rules
Filing Fee for \$1,000,000 Claim	\$8,475	For a two-party matter: \$1,500 initial filing fee paid by the party initiating the arbitration and \$1,500 for counterclaims	Non-refundable filing fee: \$1,750 Admin Fee: \$7,250
Time to Hearing	None specified	None specified	The dispute should in most circumstances be submitted to the tribunal within six months after the initial pre-conference.
Number of Arbitrators * (if not specified in arbitration agreement or agreed upon by parties)	If claim or counterclaim is under \$1,000,000, the dispute will be heard by one arbitrator. If it is above that, then three arbitrators shall determine the case.	The dispute will be heard by one arbitrator.	The dispute will be heard by three arbitrators.
Mediation "Required" *	In all cases where a claim or counterclaim exceeds \$75,000, during the time that the arbitration is pending, the parties shall mediate their dispute, unless one or both parties opts out.	Not required; however, the Parties may agree	Not required, however, the arbitrator may request CPR to arrange for mediation by a mediator acceptable to the parties.

Modification of Rules	Parties may modify rules or procedures by written agreement.	Parties may modify rules as long as modification is legal	Modifications are allowed;
<p>Authority to Determine Jurisdiction</p>	<p>The arbitrator has the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement</p>	<p>the arbitrator has the authority to determine jurisdiction and arbitrability issues, including the existence, scope, and validity of an arbitration agreement,</p>	<p>The tribunal has the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.</p>
<p>Discovery *</p>	<p>For cases of all sizes, the arbitrator manages the exchange of information “with a view to achieving an efficient and economic resolution of the dispute</p> <p>Cases with claims under \$1,000,000 contemplate just document exchange, while those with claims exceeding \$1,000,000 clarify that the arbitrator has discretion to order depositions “upon good cause shown.”</p>	<p>or cases of all size, the parties are expected to exchange all relevant ESI and documents within 21 days after pleadings are filed. In addition, each party may take one deposition of an opposing party.</p>	<p>Empowers the tribunal to facilitate “such discovery as it shall determine is appropriate,” but must take into account the needs of the party and the desirability of making discovery efficient and cost effective.</p>
<p>Confidentiality *</p>	<p>None</p>	<p>JAMS and the Arbitrator are required to maintain the confidential nature of the Arbitration</p>	<p>Unless otherwise agreed, the parties and the arbitrators shall treat the proceedings and related discovery as confidential, unless disclosure is necessary</p>