

Solution #1- Arbitration

Introduction to Arbitration

States: **New York, North Carolina, Texas**

Estimate of Active Community Programs: **7**

Estimated Cases per Year: **300**

Case Types: **Lemon law, family**

Arbitration is the oldest community solution to justice in the United States, but little utilized in the community today. While Native Americans used arbitration to settle disputes between neighboring tribes, it did not catch on with early American colonists until travelers from Europe brought the practice, already used heavily in maritime trade, to the colonies. Total case numbers are difficult to obtain, our research indicates that there are at least 7 community arbitration programs active today, which arbitrate around 300 cases per year.

Arbitration is incredibly similar to the traditional justice system, with one key exception - the parties choose the judge. Instead of being assigned a judge by a court, the parties may choose an organization, an individual, or a group of individuals as neutral arbitrators of the case. Arbitration is primarily used today for consumer claims, employment disputes, and commercial cases.

While arbitrations are less formal than traditional justice, a typical arbitration consists of 4 steps. First, parties choose an arbitrator. The arbitrator can be a judge, lawyer, and legal professional, but they can also be an expert in an industry or just a trusted neutral party. Then, after the arbitrator is chosen, the parties will agree to

the rules of the arbitration. Parties will then hold hearings and present evidence and testimony to the arbitrator. Finally, when the arbitrator has heard all the evidence presented by each party, they will render a decision, often called an award.

Because arbitration is a private process, research on the benefits and drawbacks is incredibly limited. However, some limited research indicates that arbitration is faster and more cost-effective than traditional justice processes. Some drawbacks of arbitration included that there are fewer standard rules than civil litigation, and that the process is nontransparent and thus less viable for public interest cases.

History of Arbitration

Arbitration is the oldest approach to community justice in the United States. While Native Americans used arbitration to settle disputes between neighboring tribes, it did not catch on with early American colonists until travelers from Europe brought the practice, already used heavily in maritime trade, to the colonies. The first state to recognize arbitration as a legal procedure for dispute resolution was Massachusetts in 1632.²⁶ History of Community Justice in the United States

26 Ibid.



Arbitration also played a key role in early America. In one of the last attempts to avoid the revolutionary war, a group of colonists led by John Dickinson created the Olive Branch Petition, which pledged loyalty to King George III and asked him to choose arbitration over bloodshed.²⁷ The King refused to even read the petition, which led to a committee of the Continental Congress drafting the Declaration of Independence in 1776.

In the aftermath of the Civil War, disputes between former slaves and slave owners were common, and would often be resolved via three-man arbitration panels. Arbitration was also used to address the Alabama Claims, the claims for damages the United States sent to Britain after British shipyards helped build confederate warships during the war. Britain ultimately ended up paying the U.S. a \$15.5 million arbitration award for her role in creating the ships.²⁸

After the Civil War, arbitration took off in American industry. In 1871, the New Orleans Cotton Exchange adopted arbitration for the resolution of its disputes. The New York Stock Exchange adopted arbitration for disputes between members shortly afterward. In 1902, President Franklin Theodore Roosevelt used arbitration to resolve one of the nation's most crucial miners' strikes - the Philadelphia and Reading Iron Company strike.²⁹

As the industrial revolution continued, arbitration became more and more common. In 1925, Congress passed the Federal Arbitration Act to express support for and remove judicial barriers to the practice. One year later, Moses Grossman and Charles Bernheimer founded the American Arbitration Association (AAA), still the primary provider and promoter of arbitration in the United States.³⁰

Since most arbitrations are private, it is

27 *Petition to the King*. Journals of the Continental Congress 1774-1779 2 (July 8, 1775): 158–72. https://avalon.law.yale.edu/18th_century/contcong_07-08-75.asp.

28 *The Alabama Claims, 1862-1872*. U.S. Department of State. U.S. Department of State. Accessed January 29, 2023. <https://history.state.gov/milestones/1861-1865/alabama>.

29 Certilman, Steven A. *Throw Down the Muskets, Seek Out the Town Elders: This Is a Brief History of Arbitration in the United States*. New York Dispute Resolution Lawyer 3, no. 1 (2010): 10–13.

30 *Ibid.*

difficult to accurately estimate the number of arbitrations performed in the United States each year. However, the AAA and its counterpart, the International Center for Dispute Resolution, release business arbitration statistics each year. In 2021, these two organizations alone arbitrated nearly 10,000 disputes with over \$15 billion in claimed damages.³¹ Community arbitration statistics are even more difficult to obtain, but one report from the New York State Unified Court system indicated that New York community mediation centers had handled 250 arbitrations from 2018-2019.³² Our research indicates that there are at least 7 community arbitration programs active today.

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31 Rep. *2021 B2B Dispute Resolution Infographic*. American Arbitration Association. Accessed January 29, 2023. https://www.adr.org/sites/default/files/document_repository/2021_B2B_Infographic.pdf.

32 Rep. *Community Dispute Resolution Program*. New York State Unified Court System. 4. Accessed January 29, 2023. <https://ww2.nycourts.gov/sites/default/files/document/files/2020-10/CDRC%20Annual%20Statistical%20Report%202018-2019.pdf>.

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How Arbitration Works

The arbitration process is incredibly similar to the traditional justice system, with one key exception - the parties choose the judge. Instead of being assigned a judge by a court, the parties may choose an organization, an individual, or a group of individuals as neutral arbitrators of the case. Once the arbitrator or arbitrators have been chosen, the parties will agree on the rules that bind that particular arbitration. Arbitration is primarily used today for consumer claims, employment disputes, and commercial cases.

Arbitrations typically follow the following steps:

1. Choosing an arbitrator - Once parties have agreed to start arbitration, they will choose an arbitrator or arbitrator(s) for their dispute. The

parties can choose an organization with existing rules for arbitration, like the AAA or Judicial Arbitration and Mediation Services, Inc. (JAMS) or an individual arbitrator. This arbitrator does not have to be a judge, lawyer, or legal professional, and can instead be an expert in an industry or just a trusted neutral party.

2. Choosing arbitration rules - Organizations like AAA or JAMS may have existing arbitration rules,³³ but no specific set of rules is required. The parties can use existing rules or agree on their own rules of evidence and procedure for the arbitration.

3. Hearings - When the parties have agreed on rules and an arbitrator, they will introduce evidence and the arbitrator or arbitrators will hear testimony from each party. Hearings will continue until all the relevant evidence has been presented.

4. Awards - When the arbitrator(s) have heard all the evidence from each party, they will render a decision, often called an award, to the party they determine presented a better case.

Some arbitrations are binding, meaning they cannot be taken to a court after the arbitration is complete except under limited circumstances, such as fraud or collusion on the part of the arbitrator. Others are nonbinding, meaning that either party can reject the award and take the case to court after the arbitration is complete.³⁴

33 *ADR Clauses, Rules, and Procedures: Jams Mediation, Arbitration, ADR Services*. ADR Clauses, Rules, and Procedures | JAMS Mediation, Arbitration, ADR Services. Accessed January 29, 2023. <https://www.jamsadr.com/adr-rules-procedures/>.

34 Repa, Barbara Kate. "Arbitration Basics." [www.nolo.com](https://www.nolo.com/legal-encyclopedia/arbitration-basics-29947.html#:~:text=In%20binding%20arbitration%2C%20the%20arbitrator%27s,and%20demand%20a%20trial%20). Nolo, June 8, 2012. <https://www.nolo.com/legal-encyclopedia/arbitration-basics-29947.html#:~:text=In%20binding%20arbitration%2C%20the%20arbitrator%27s,and%20demand%20a%20trial%20>

Benefits of Arbitration Over Traditional Justice Approaches

SUPREME COURT



Short-term Benefits

Reduced Case Processing Times

The main benefit of arbitration is a significant reduction in case processing time. One study by the Consumer Financial Protection Bureau found that while the average time to settlement for a class action in federal court was nearly two years, and the average time to settlement in state court was over one year, the average time to settlement for arbitration cases was two to five months.³⁵

Reduced Case Costs

While this data may not apply to all arbitrations, arbitration may also be cheaper than filing a similar case in civil court. One report from the National Arbitration Forum from 2003-2004 indicated that consumers paid under \$50 per arbitration in filing fees, while businesses paid under \$150.³⁶ These are cheaper than civil filing fees in some states. However, fees for counsel may outweigh the savings in arbitration.

Drawbacks of Arbitration

There are also a few drawbacks of arbitration to note, including a lack of formal rules of evidence and a lack of public transparency.

Lack of Formal Rules of Evidence

Because arbitration often has few formal rules of evidence, parties may not have the information they might usually be entitled to in a civil court hearing. This can lead to “trial by surprise” and one party entering the proceedings without a clear understanding of the other party’s case, their evidence, or witnesses to be called.³⁷

Lack of Public Transparency

In contrast to court cases, arbitrations and their agreements are confidential. Therefore, these agreements do not create court precedents.³⁸ This may reduce the viability of arbitration for addressing disputes in which there is a significant public interest, such as constitutional challenges, class action lawsuits, and conflicts between individuals and governments.

35 Rep. *Arbitration Study*. Consumer Financial Protection Bureau, March 2015. https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

36 Drazohal, Christopher R. *Arbitration Costs and Forum Accessibility: Empirical Evidence*. University of Michigan Journal of Law Reform 41 (2008): 818. <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1299&context=mjlr>.

37 Stipanowich, Thomas J. *Rethinking American Arbitration*. Indiana Law Journal 63, no. 3 (1988)

38 Kaufmann-Kohler, Gabrielle. *Arbitral Precedent: Dream, Necessity, or Excuse?* The 2006 Freshfields Lecture. Lecture. Accessed January 29, 2023. <https://lk-k.com/wp-content/uploads/Arbitral-Precedent-Dream-Necessity-or-Excuse.pdf>.