

ARBITRATION AND THE COURT SYSTEM

In California, there are different forms of arbitration available to disputing parties. There is judicial arbitration where the court or the parties decide to have a dispute settled before an impartial party known as an arbitrator after a lawsuit has been filed with the court. Another form of arbitration is “private” arbitration which is imposed upon the parties by a contract that the litigants signed. For example, if a producer signs a distribution contract for his or her film, there may be a provision in the contract stating that any dispute with the distributor must be settled in binding arbitration according to the rules of the The Independent Film & Television Alliance (I.F.T.A.). This type of arbitration is based upon the agreement of the parties. Often, the parties agree to arbitrate any disputes according to the rules of a named association, for example, the American Arbitration Association (AAA), I.F.T.A. or the Writers Guild of America (WGA).

There are important distinctions between choosing to arbitrate a claim through a private organization as opposed to litigating through the court system. Some of the distinctions include:

- 1) Parties to a private arbitration can choose the number of people to decide the case, whereas litigating a claim through the court system preserves the right to a jury of one’s peers. The theory underlying a person’s Constitutional right to a jury of one’s peers is that the court system strives to minimize bias and arbitrariness in the outcome of a dispute. On the one hand, a person in the court system is entitled to a jury of at least six (in a civil case) people who are questioned by the person’s attorney. On the other hand, private arbitration is often decided by three or less people (and often by only one person), and the arbitrator(s) are often appointed and approved only by the private organization named by the parties in the contract.
- 2) Private arbitration does not allow full and free discovery, a right that is guaranteed to parties bringing a claim through the court. Discovery is the process that parties engage in to find the evidence needed to prove their case. If a party does not have, or cannot find, the evidence necessary to prove his or her case, then that party loses. There are certain tools available to force the other side to provide the opportunity to look for and find the necessary evidence. These tools include the opportunity to obtain books and records of the other party, the ability to force witnesses (including the other party) to answer questions under oath, and other tools that are by law available to a party involved in a lawsuit. In private arbitration, these tools are limited and often only given to the parties at the sole discretion of the sole arbitrator.
- 3) Private arbitration does not require a proceeding to follow the rules of evidence and procedure that govern the court system. The rules of evidence are designed to maximize the chance that a particular item of evidence is reliable, truthful and relevant to the dispute. The rules of procedure are designed to ensure that each party is treated fairly, equitably and is afforded the opportunity to fully present their claim.
- 4) Private arbitration generally allows an arbitrator to make a decision that is not in accordance with established law.
- 5) Private arbitration generally ends with a “binding” resolution, with no possibility of appeal of the arbitrator’s judgment (absent fraud, corruption, undue influence or other charge that is extremely difficult to prove). For example, it’s not uncommon that a

sole arbitrator appointed by a private organization makes a decision that the parties must live with regardless of the propriety of the outcome.

Overall, private arbitration is on average a faster path to a resolution of a dispute, but it's not necessarily a less expensive one. For example, an arbitrator chosen by I.F.T.A. arbitration is entitled to charge \$300.00 per hour for the first sixteen hours (\$250.00 per hour for I.F.T.A. members) and \$325.00 per hour for every hour after sixteen (\$275.00 per hour for I.F.T.A. members). In addition to this charge, there is also a filing fee charge in the amount of one per cent of the amount claimed with a minimum charge of \$700.00 (\$200.00 for I.F.T.A. members). In contrast, there is no fee to pay the judge in a court case and the fee for filing a civil lawsuit in the Superior Court of Los Angeles county is \$320.00 for claims over \$25,000.00 and \$300.00 for claims in amounts over \$10,000.00 but up to \$25,000.00.

Perhaps the California Supreme Court best captured the differences between private arbitration and the court system when it stated in *Brennan v. Tremco* (2001): "Private arbitration is a process in which parties voluntarily trade the safeguards and formalities of court litigation for an expeditious, sometimes roughshod means of resolving their dispute. The parties accept the good with the bad."