

QUESTIONNAIRE

1. The Actual Administration and Use

About your organization or the representative organization in your country.

(1) Provide the definition and kinds of ADR.

Arbitration is a process, similar to but less formal than a judicial court proceeding, whereby a dispute is presented to one or more impartial persons for a final and binding decision. Mediation (or conciliation) is the voluntary resolution/settlement of a dispute with the assistance of a neutral third party.

(2) Provide the number of arbitration and mediation cases accepted and disposed of, with a breakdown as to type, if possible.

The American Arbitration Association (AAA) handled 218, 032 cases in 2001. Many of these were insurance, labor, construction, and employment cases. 17, 297 of the cases were commercial arbitration cases; 3,302 were filed as commercial mediation cases. Of the 17, 297 commercial arbitrations, many were resolved by settlement prior to proceeding to arbitration. 133 of the commercial arbitrations were listed as patent disputes. The AAA does not otherwise breakdown its commercial cases according to whether the cases include intellectual property claims. The AAA's International Center for Dispute resolution (ICDR) handled 649 international commercial arbitrations during 2001. The AAA web site is located at www.adr.org.

(3) Generally, what is the frequency of hearing of other procedure and how long is the elapsed time for an arbitration award or a mediation? Are the answers different for different types of cases?

Arbitrations tend to be resolved within a few months. Mediations tend to be resolved within a few weeks. Typical U.S. practice is to complete arbitration proceedings with as few adjournments as possible (i.e., to proceed over successive days rather than to have individual hearings followed by lengthy adjournments between hearings). The actual length of an arbitration or mediation can vary widely depending on the complexity and importance of the dispute.

(4) How many persons, in each field, are listed as candidates or applicants? (Aside from lawyers, what are the qualifications and occupations of such persons?)

The AAA maintains a list of over 11,000 neutral arbitrators and mediators. Qualifications include a minimum of ten years of senior level business experience or legal practice, honors and

awards indicating leadership in a particular field, and training or experience in arbitration or other forms of dispute resolution.

(5) What requisites are necessary to be listed as a candidate? (For example, are certain specified qualifications, career records and specializations necessary?) Who decides this?

See answer to Question 4, above.

(6) Have policies been devised to improve the quality of arbitrators and mediators?

See answer to Question 4, above. The AAA and many other U.S. organizations and universities offer arbitration and mediation training, education, and certification programs.

(7) How is the compensation for arbitrators and mediators determined? Also, what are the actual amounts?

The AAA Rules provide that the per-diem fee for each neutral arbitrator shall be agreed upon between the parties and the arbitrator prior to the commencement of any activities by the arbitrator, and that all fee negotiation discussions must occur through the AAA and not directly between the parties and the arbitrator. The AAA has the sole power to set the fee if the parties and arbitrator fail to agree.

(8) When you have a procedure that transfers from the arbitration to the mediation, or from the mediation to the arbitration, do the members of panel change?

It is customary in the United States for persons who have served as mediators in an unsuccessful mediation not to serve as arbitrators with respect to the same matter.

2. Relationship with the Court System

Please show any act or law related to the below topics.

(1) When a case is instituted, does the court refer the matter to arbitration or mediation? If so, is it referred to a private sector organization or to an organ of the court? (Here and below, if there is a relevant law or regulation, please provide the text.)

In the United States, there are multiple levels and jurisdictions of courts in both the federal and state judicial systems. Court-adjunct arbitration and mediation rules can and do vary by jurisdiction. As a general matter, referrals to arbitration by a court require the parties' consent. Some courts will require parties to participate in a settlement conference or mediation effort, but any resolution of the dispute still depends on party consent. Courts typically maintain lists of qualified members of the bar willing to serve as court-adjunct mediators, and make appointments from these lists.

(2) In a case where the matter is referred to a private sector organization, how is the liability for the costs of the arbitration or mediation allocated?

(3) Is there court supervision? Also, is there some sort of cooperation between the arbitration or mediation organization and the court? How does the court participate? (For example, does it cooperate in the examination of evidence, in the provision of information or the like?)

(4) In the event that mediation ends in failure, how is the matter disposed of? For example, how is the issue of extinctive prescription (similar to the statute of limitations) handled?

If a dispute is referred to mediation by a court following the filing of a lawsuit in the court, the statute of limitations is tolled by the filing of the lawsuit and that is not affected by a failed mediation (the lawsuit simply resumes). If the parties attempt mediation prior to the filing of a lawsuit and the mediation continues until the limitations period is about to expire, the typical practice is for the parties to sign a written agreement tolling the statute of limitations. If no such agreement can be reached, the party subject to the limitations period ordinarily files a lawsuit as a precaution.

(5) How is the enforceability of the arbitration award or the mediation agreement ensured? Does the court participate in that process?

Arbitration agreements and awards are enforced by courts pursuant to the Federal Arbitration Act, or, if the agreement is an international agreement, pursuant to the 1958 New York Convention (implemented in the United States at 9 U.S.C. Sections 201 et seq.). Mediation agreements must be enforced as actions on a contract seeking specific enforcement. Mediation settlements not incorporated into an arbitration award must be enforced as actions on a contract seeking specific enforcement or damages.

3. Particular Issues

(1) Have special rules been established for cases related to intellectual property rights? For example, is it possible to arbitrate with respect to the validity of a patent?

The AAA has enacted Patent Arbitration Rules, effective September 1, 2000. The Rules are available on the AAA's web site (www.adr.org).

(2) Are there disputes when arbitration is rejected?

See the SOFTIC Symposium paper by Philip McConnaughay for a discussion of this issue.

(3) Is there a specialized arbitration or mediation system (or rules) for computer software and the like?

No.

(4) In the event of a dispute concerning computer software, how is a decision made as to grasping the facts of the technology issues? How are qualified persons selected for that purpose?

It is possible to appoint persons as arbitrators on the basis of their special expertise with respect to the subject matter at issue. It also is possible to address special technical issues through the use of expert witnesses.

(5) What measures are in place for the protection of secrets? (For example, are there methods of controlling records, limiting the scope of disclosure to agents, and so on?)

Trade secrets are protected in whatever manner is proposed by the owning party and approved by the arbitrator(s) consistent with a fair resolution of the matter in dispute. The range of protective measures varies depending on the importance and value of the trade secret(s) at issue.

(6) Have some measures been conceived to promote prompt settlements?

Pre-arbitration settlement conferences or multi-tiered dispute resolution proceedings (e.g., attempting mediation or senior executive meetings before proceeding with arbitration hearings) are the most effective means of promoting early settlements.

(7) How is ADR publicized? How can potential users learn about your ADR organization's system?

See the AAA's web site at www.adr.org.

(8) What kind of dispute is suitable for the online ADR? How about the actual use?

The AAA has published Supplementary Procedures for Online Arbitration, available from the AAA's web site at www.adr.org. Online ADR is used for a variety of disputes, from those over defamatory postings on Internet Bulletin Boards (often resolved by the "Virtual Magistrate Project"), to disputes arising from simple internet sales transactions, to disputes arising from more extended negotiated transactions. As a general matter, online ADR is suitable for any dispute susceptible of decision on the basis of documentary submissions only.

4. Please attach any court precedents related to the above topics.

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