

# Fundamental Distinctions Between Arbitration and Litigation

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# Arbitration

- Private dispute resolution (outside of a courtroom)
  - Personal injury
  - Commercial
- No jury
- Arises from contract



# **Selection of Arbitrator**

- **Arbitration**
  - **Clause will specify number of arbitrators (usually 1 or 3)**
  - **Parties can agree on who will be arbitrator(s)**
    - **If not, strike/rank method employed**
  - **Who can be arbitrator?**
    - **Anyone**
    - **Usually lawyer**
    - **Former judge**
    - **Expert in their field (accountant, engineer, etc.)**

# Litigation

- Public dispute resolution
- Judge or jury
- Can be state or federal court / law



# Selection of Judge

- **Litigation**
  - Parties have no control over judge assigned to case
  - Judge selected at random when case filed
  - Could be bench trial or jury trial
    - Jurors –
      - State – 6
      - Federal – 8+



# Venue

- Arbitration provision can provide location
  - Specified in clause:
  - Common
    - Ship's flag state
    - Country of ship owner's incorporation
- Litigation
  - Place where contract was breached, tort occurred, etc.



# Forum

- **Arbitration**
  - Confidential proceeding
  - Less formal setting than court
- **Litigation**
  - Courtroom (public)
  - Formalized rules of evidence / discovery



# Governing Law

- **Arbitration**
  - **Substantive/Procedural Law – arbitral seat vs. substantive (law of flag)**
  - **Parties may otherwise agree**
- **Litigation**
  - **Law of the venue**
  - **U.S. - state or federal**
  - **Choice of Law clauses**





# Speed

- Arbitration
  - Quicker
    - Once Arbitrator is selected, may proceed to arbitration – usually within one (1) year
- Litigation
  - Longer
    - Cantake years depending on discovery, judge's calendar, etc.



# Cost

- **Arbitration**
  - **Lower costs (theoretically)**
    - **Arbitrator – can be expensive!**
    - **Prepayment of costs**
    - **Limited discovery**
    - **Arbitrator has discretion over attorney's fees and discovery**
    - **Most rules – NO punitive damages unless agreed they are available**
  - **Some cases are becoming more like litigation**
    - **Expanded discovery**
    - **Hearings**
    - **Depositions, written discovery**
    - **Testimony by live witnesses, etc.**

# Cost

- **Litigation**
  - **Higher costs (theoretically)**
    - **Discovery (more depositions, etc.)**
    - **Punitive damages**
  - **Prevailing party entitled to their costs/fees from other side if based upon contract or statute**



# Evidence / Discovery Process

- Arbitration
  - Usually more limited than litigation
    - Controlled by arbitrator
    - Rules of evidence do not strictly apply (if at all)
    - Discovery process set forth by arbitrator at preliminary hearing.
      - Retired judges as arbitrators:
        - Like to think they are still on bench
        - Give wide range of discovery, hearings, testimony.
          - Ultimately treat like streamlined litigation
          - Awards - reasonable

# Evidence / Discovery Process

- **Litigation**
  - **Full discovery process**
    - While controlled by court, parties engage in full discovery
    - Interrogatories, depositions, admissions, production requests, etc.
    - Rules of evidence apply



# Arbitration / Trial

- Arbitration
  - Often informal process in front of arbitrator
    - Final hearing – can be by paper or hearing
    - Full final hearing vs. limited
    - Arbitrator at hearing may want live testimony (under some rules can appoint own expert)
    - “Hot tubbing”
      - Process where experts are put together and discuss their theories to make concessions and reach greater agreement
      - In Australia and moving into Europe