Recommendation 87-5

Arbitration in Federal Programs

(Adopted June 12, 1987)

The Administrative Conference has recommended that agencies employ alternative means of dispute resolution (ADR) in Federal programs.[1] ADR techniques for rulemaking include structured negotiation and mediation; for adjudication, they also include arbitration, factfinding and minitrials.[2] The bulk of these techniques do not alter the placement of policymaking authority within the agencies, and therefore pose few of the legal and policy concerns of binding arbitration, which typically involves the use of outside arbitrators authorized to make decisions binding upon the government. If an arbitrator decides a claim by or against the government, public money will be involved. Arbitration decisions concerning other issues in administering a federal program, such as the resolution of enforcement cases or disputes between the agency and its employees, affect administration of the program. In programs where the agency's role is to resolve disputes between private parties, arbitrated disputes will relate to the purposes of the program, for example by resolving disputes related to program administration. In addition, the Constitution requires that significant duties pursuant to public law must be performed by Officers of the United States and their employees. These concerns can be met if Congress, in authorizing the use of arbitration, or the agency, when adopting arbitration, confines it to appropriate issues and provides for the agency's supervision of arbitration.

Existing law authorizes resort to arbitration in a variety of different contexts, including claims by and against the government, disputes between private individuals that are related to program administration, and labor relations issues between the government and its employees. Recommendation 86-3 calls on Congress to act to authorize agency officials to choose arbitration to resolve many additional disputes.

This recommendation contains procedural advice for Congress, and occasionally agencies, in an effort to ensure the fairness and acceptability of arbitration in federal programs. The criteria

[1] *See generally* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3.
[2] *See* Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 CFR 305.82-2; Recommendations 82-4 and 85-5, *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4 and 85-5; and Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4.

are necessarily general, and the appropriateness of particular arbitral procedures must be judged in the context of the particular functions they serve. Agencies are generally in the best position to assess the need for informal and expeditious process, and to weigh that need against considerations of accuracy, satisfaction, and fairness. While the Conference encourages granting agency officials broad "on-the-spot" discretion to use arbitration, it recognizes the need for preliminary steps to meet concerns that the process provide some executive oversight, preserve judicial functions and ensure quality decisions, and maintain legality and fairness. This recommendation sets forth procedural criteria to aid Congress and agencies in taking these first steps.

Recommendation

1. In all cases, congressional authorization for voluntary binding arbitration, whether performed by government employees or private arbitrators, should ensure that Congress has made, or the agency will make, an explicit judgment that arbitration is appropriate for the case or class of cases in question. Criteria for determining whether arbitration is appropriate include the following:

(a) Cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving.

(b) In determining whether to employ arbitration, Congress or the agency should consider the nature and weight of the private interests involved, the nature and weight of the government's interests, and the tradeoffs between the costs and benefits of arbitration and those of more formal processes. A heavy adjudicative caseload and the particularization of decisions in accord with previously declared guidelines justify the use of private arbitrators or other non-government persons.

2. Congress should assess the desirability of mandatory arbitration in light of the extent to which a person's participation in the affiliated program is voluntary.[3] For example, participation in an entitlement program is more likely to reflect need than consent, and should not be regarded as consent to arbitration of eligibility.

[3] *See* Recommendation 86-3, ¶¶7-9, *Agencies' Use of Alternative Means of Dispute Resolution*, for other limitations on the use of mandatory arbitration.

3. Congressional authorization for arbitration should ensure that:

(a) The agency has an opportunity to choose whether to resort to arbitration,[4] and to review the overall composition of any arbitral pool to ensure its neutrality and, where appropriate, specialized competence. Agencies should either employ arbitral pools and procedures that are well-established, such as those of the AAA, or should develop rosters or pools to meet their special needs;[5]

(b) Parties to an arbitrable controversy, including an agency, have a role in the selection of the arbitrator, consistent with preserving the neutrality of the decider, for example by striking names from a list; and

(c) Arbitral awards are review by agencies or by courts under the criteria of the U.S. Arbitration Act, which authorizes review of the facial validity of the award and the integrity of the process. Agencies can be authorized ordinarily to review individual awards with no specific provision for judicial review.[6] If so, no special provision need be made for judicial review of individual awards. Judicial review of the overall structure and fairness of the arbitration program should suffice. In the rare case in which a serious constitutional issue attends an individual arbitration, such as an allegation of a taking, existing law provides avenues for relief.

4. Agencies should ensure that the standard for arbitral decisions is reasonably specific, by promulgating administrative standards where statutes do not sufficiently guide arbitral decision. A substantial justice standard for arbitral awards should be used only when explicitly approved by the agency, because of the resulting difficulties of administrative or judicial review of the outcome. The sufficiency of other standards should be judged by whether the parties can consent meaningfully to arbitration and can prepare their cases, whether the arbitrators can produce reasonably consistent decisions, and whether reviewing entities can judge the facial validity of awards.

5. The following considerations should govern the ongoing administration of arbitral programs:

(a) Agencies should be careful to preserve the objectivity of arbitration by avoiding instructions or forms of oversight that would threaten to undermine the arbitrator's neutrality

[4] *See Id*.
[5] *See* Recommendation 86-8, ¶1(c), *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution.*
[6] *See* Recommendation 86-3, ¶4, *Agencies' Use of Alternative Means of Dispute Resolution.*

in a particular case. Plainly, however, generally applicable indicators of pertinent government policy, such as interpretive regulations, are meant to be controlling, whether proceedings be in the form of arbitration or agency adjudication.

(b) Authority to determine the arbitrability of particular disputes can be placed in the courts, as under the U.S. Arbitration Act, or in another neutral third party, such as the administering agency where arbitration concerns private parties, or in an agency other than one which is a party to arbitration.

(c) Interpretive rulemaking can alter the standards for future arbitration when monitoring of awards reveals outcomes inconsistent with the agency's expectations in employing arbitration.

Citations:

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