

# AMERICAN LEGAL SYSTEM AND INTERNATIONAL DISPUTES: ARBITRATION AND MEDIATION ALTERNATIVES

Masaryk University – Law Faculty  
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# Arbitration and Mediation Alternatives

## A. How does Arbitration work?

- Contract designates an organization that will administer the arbitration
- Professional arbitrators are designated, sometimes with special experience: For example:
  - Arbitrators with certain technical expertise
  - Arbitrators who are fluent in English and Czech
  - Arbitrators who have been approved by an organization
- Arbitrators are not employees of an organization but are private professionals, usually lawyers, who are associated with an organization.

# Arbitration and Mediation Alternatives

- Arbitrators are best for technical fields like:
  - Construction disputes (architects or engineers)
  - Scientific areas such as patents or intellectual property
  - Other specialized fields where judges will not understand the technical issues
- There can be one arbitrator or a panel of three.
  - Panels of three guard against an unfair arbitrator, but are more expensive.
- Place of arbitration is usually identified: sometimes, it is in the location of the opposite party to the one asserting the claim.
- Unlike a court action, the parties must pay for the costs of the arbitrator(s) and administrative costs.

# Arbitration and Mediation Alternatives

- Arbitrators must apply the law; they cannot “make it up” or just “do what they think is fair”
- But what law applies?
- For example, if the dispute is between a company in the Czech Republic and a company in the U.S., does Czech law or U.S. law apply
  - Contract can specify which law applies.
- Selection of place of arbitration may also control which law applies, so important to consider when preparing the contract.

# Arbitration and Mediation Alternatives

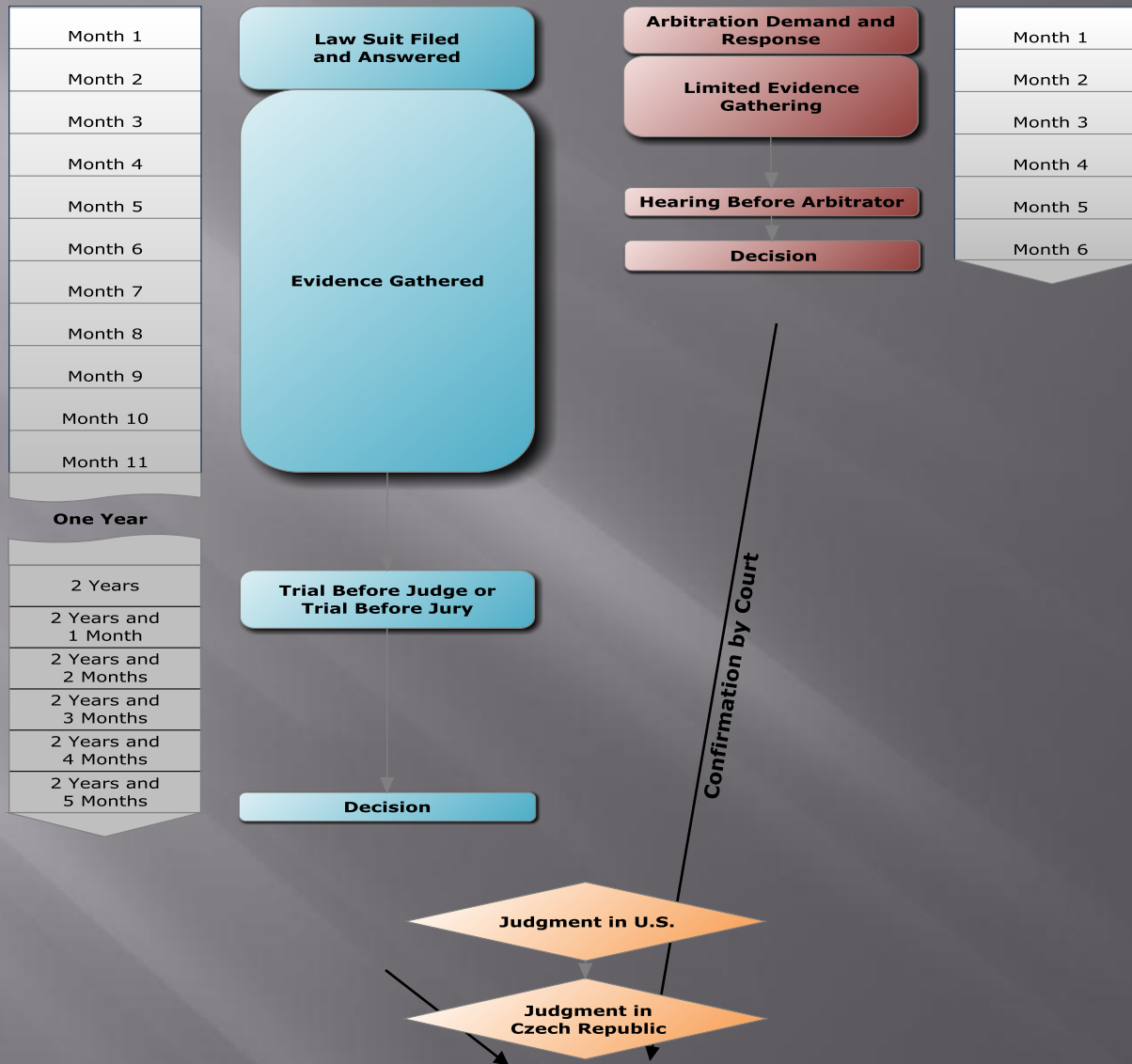
- Arbitration happens quickly: less time than a court action (usually).
- Cost of the hearing is usually less than for litigation.
  - But the parties must pay for the arbitrators.
- Arbitration “Hearing” – like a trial.
- Documents and witnesses are produced for arbitrator(s) to consider.
- Witness may not be as “available” as they would be in a court action because of more limited power to compel attendance.
- Arbitration decision is usually required in a particular time period, normally 30 days.

# Arbitration and Mediation Alternatives

- Appeal is very limited
  - Typically only for claimed violations of procedure that makes the process seem corrupt or improper
  - Such as:
    - Arbitrator(s) had private meetings with one of the parties
    - Arbitrators did not disclose a business relationship to one of the parties
    - Arbitrators exceeded their authority
  - Different from the kinds of legal errors that can be reviewed on appeal of a trial:
    - For example, in court cases: the trial judge misunderstood the law or failed to follow the legal code or, in U.S., failed to follow binding precedent
    - Arbitration review is much more limited than if a trial were reviewed by an appeals court.
    - Arbitration review takes place in court.



# Litigation vs. Arbitration



# Arbitration and Mediation Alternatives

- Now, you have an “award” but you don’t have the money yet
- How is the award enforced?
- Arbitration award is recorded in court and considered like a judgment.



- Collect from the bank account.
- Why would you want to arbitrate?
  - Speed
  - Cost
  - If you don’t trust the court system
  - If you think the arbitrators’ specialty (technical experience) is useful to resolving your dispute.



# Arbitration and Mediation Alternatives

- What steps can be taken to assure the integrity of the arbitrators?
- Use recognized, international organizations who screen the arbitrators for qualification and integrity
- Build in restrictions so that arbitrators don't have direct contact with the parties, except at conferences or the Hearing, when all parties are present
  - Administrative personnel screen all contacts

# Arbitration and Mediation Alternatives

- Arbitrators are paid for their time: the more time they spend, the more money they are paid.



- Is this good or bad? Or both ?

# Arbitration and Mediation Alternatives

- When selected, arbitrators must disclose any prior contacts they have had with any of the parties or, if known at the beginning, the witnesses.
- Selection of arbitration location is important: it may control:
  - Whether witnesses can be compelled to appear
  - Whether to apply, for example, U.S. law or Czech law in deciding who wins
  - Which law can be applied to enforce an award - (collect the money) or prevent use of information.

# Arbitration and Mediation Alternatives

## **B. Mediation - *What is it and how does it work?***

- Mediation is a voluntary process to try to resolve a dispute that occurs during and as part of the more formal dispute-resolution process
- May be – often is – used in litigation and, less often, in arbitration.
- Non-binding: if there is no agreement during the mediation, the mediator has no power to enforce a result
  - Completely voluntary
  - Confidential; statements made cannot be used outside the mediation.

# Arbitration and Mediation Alternatives

- Who is the mediator?
  - Someone agreed to by both sides, and who is not related to either side.
  - Some one who is trusted to be a person of integrity who will evaluate the claims of both sides, the strengths of their cases and will try to reach an agreement.
  - Some one who understands the dispute: if it involves a technical area (scientific, financial), it helps if the mediator specializes in that area.
  - Someone who understands the law that would be applied if the mediation does not succeed.

# Arbitration and Mediation Alternatives

- **Timing:** Most effective when each party knows about the other party's case.
  - What can my opponent show about my case?
  - How good does my case look to a neutral party who would act like a judge?
- **How does it work?**
  - Parties must agree to mediation, though some courts may also require it.
- Parties must agree on the mediator and place of mediation.
- All parties must agree that what is said in the mediation cannot be used later if the mediation does not resolve the case and the law suit or arbitration continues.
  - Why have such an agreement?



# Arbitration and Mediation Alternatives

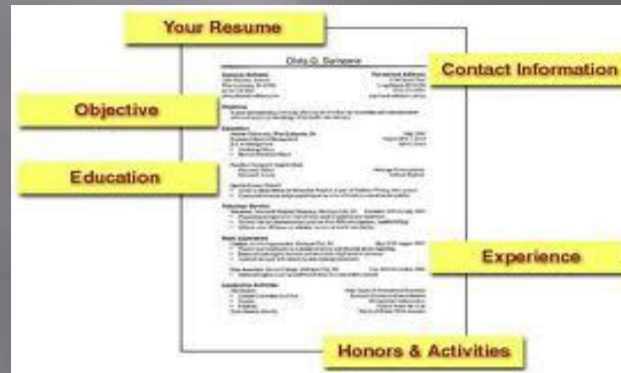
- Mediation often takes a full day;
- Most effective if the mediator receives in advance of mediation a statement outlining each side's case.
- Key evidence is presented, informally.
- The parties (clients) and the attorneys are present with the mediator.
  - The public is excluded. Why?
  - Is this contrary to "transparency"?

# Arbitration and Mediation Alternatives

- What is a “successful” mediation?
  - The dispute is resolved – “settled”.
  - There is certainty.
    - Business does not like uncertainty
  - The cost is known.
  - Usually, the result is not as much as either party had hoped for.
  - If both sides are unhappy, the settlement is good.
  - The cost of the dispute (attorney’s fees) end.

# Arbitration and Mediation Alternatives

- What does the mediator do to bring about a solution in the mediation?
  - Evaluate the case presented in outline form.



- Explain to the parties how a judge would likely see the case.
- Make each side understand the *other side's* case.

# Arbitration and Mediation Alternatives

- What is the result? *Either*:
  - (1) An agreement is reached, put in writing and money is paid, and the law suit or arbitration is ended; or
  - (2) The mediation does not resolve the dispute; and the law suit (litigation) or the arbitration resumes; and
  - (3) No one may use statements made during the mediation when proving its case for the law suit or arbitration.

# Arbitration and Mediation Alternatives

- What is the advantage, what is the disadvantage of mediation?
- Advantage: Can resolve the dispute more quickly than a trial and bring certainty to the parties.
- Disadvantage: The mediation costs money and takes time. If it is not going to work, then the money and time have been wasted because the law suit or arbitration will continue anyway.
- Therefore: Mediation makes sense *at the right time* and *if both parties are ready* to try to settle without getting all of what each wants.