

HOW TO SUCCESSFULLY PRESENT YOUR CASE IN ARBITRATION

©1999 Michael G. Hanlon*
Portland, Oregon

*Presented to a Continuing Legal Education Seminar sponsored by the Oregon State Bar and Consumer Law Section June 18, 1999: "Arbitration - How to Avoid it, Make it Stick, and Succeed in It."

LAW OFFICES OF MICHAEL G. HANLON
A PROFESSIONAL CORPORATION
1001 S.W. FIFTH AVENUE, SUITE 1300
PORTLAND, OREGON 97204
TELEPHONE (503) 228-9787
FACSIMILE (503) 224-4200

I. PRIMARY OREGON AUTHORITY¹

- A. ORS 36.300 et seq. (Private Arbitration by Written Agreement)
- B. ORS 36.400 et seq. (Court Arbitration Program)
- C. UTCR Chapter 13 (only applicable to Court Arbitration Program)
- D. Each Circuit Court's SLR 13 (only applicable to Court Arbitration Program)
- E. Common Law Halvorson-Mason Corp. v. Emrick Const. Co., 304 Or 407, 412, 745 P2d 1221 (1987); Kaiser Foundation Health Plan v. Doe, 136 Or App 566, 577, 903 P2d 365 (1995), modified 138 Or App 428, 508 P2d 850 (1996) (stating when arbitration statutes do not apply, the common law of arbitration is still in place and an oral agreement to arbitrate is enforceable).

II. ARBITRATION SHOULD BE AN INEXPENSIVE, SIMPLIFIED PROCESS

- A. The primary purpose of arbitration is to avoid litigation. Brewer v. Allstate Insurance Co., 248 Or 558, 562, 436 P2d 546 (1968).
- B. Unless the amount in dispute warrants the time and expense, minimize discovery requests.
 - 1. UTCR 13.140 permits the arbitrator to balance the benefits of discovery against the burdens and expenses. Most arbitrators will use the same standard.
 - 2. ORS 36.335 gives arbitrators the power to compel the attendance of witnesses and to enforce the production of documents from parties if the arbitrator deems them "material to the cause."
- C. Organize your presentation.
 - 1. Pre-mark your exhibits with sequentially numbered exhibit stickers. Make an additional full set of exhibits for your opponent and yourself. Exhibit numbers should attempt to follow the order of your witnesses.

¹International arbitration rules are found at ORS 36.450 et seq. Collective Bargaining Grievance Procedures exist at ORS 243.650 et seq.

2. UTCR 13.170 requires the exchange of lists of exhibits and witnesses 14 days prior to the hearing.
3. In preparing for the hearing, the elements of your claim or defense should be listed together with your method of proof (see sample forms).
4. Prepare a brief memorandum of controlling legal authorities (with pin cites).
 - a. Consider enclosing copies of highly relevant cases for the arbitrator's ease of reference, especially if from a foreign jurisdiction.

III. FILING THE AWARD

A. Private arbitration awards.

1. The award **and** the agreement to submit the matter to arbitration must be filed with the Circuit Court **together with a fee of \$35**. Exceptions must be filed within 20 days of service of the award. ORS 36.350. No exceptions can be filed without the payment of a \$35 fee. ORS 36.355 (2).
2. The grounds for exceptions to an arbitrator's award are:
 - a. The award was procured by corruption, fraud or undue means.
 - b. There was evident partiality or corruption on the part of the arbitrators, or any of them.
 - c. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party were prejudiced.
 - d. The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.
 - e. There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.
 - f. The arbitrators awarded upon a matter not submitted to them, unless it was a matter not affecting the merits of the decision upon the matters submitted.

g. The award was imperfect in matter of form not affecting the merits of the controversy.

3. Standards of Judicial Review.

Oregon favors the view that confines judicial review to the strictest possible limits. Brewer, 248 Or at 561-62. Neither a mistake of law or fact vitiates an award. Mahaffy v. Gray, 242 Or 522, 525, 410 P2d 822 (1966); Native Sun v. L & H Development, Inc., 149 Or App 623, 629, 944 P2d 995 (1997). In order to overturn an arbitration award, the award must be deemed “so grossly erroneous as to strike at the heart of the decision - making process.” Brewer, 248 Or at 563; Native Sun, 149 Or App at 629.

B. Court Mandated Arbitration Awards

1. The arbitrator files the award at the conclusion of the proceeding together with proof of service on the parties. ORS 36.425
2. Within 20 days of the filing of the award, a party may file a notice of appeal and request a trial de novo. The party must pay a trial or jury fee together with a \$150 fee. ORS 36.425

PERTINENT OREGON REVISED STATUTES

ORS 36.300. Controversies arbitrable.

All persons desiring to settle by arbitration any controversy or quarrel, except such as respect the terms or conditions of employment under collective contracts between employers and employees or between employers and associations of employees, may submit their differences to the award or umpirage of any person or persons mutually selected.

(Formerly 33.210)

ORS 36.305. Written arbitration agreements valid.

A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between persons to submit to arbitration any controversy then existing between them, shall, provided the arbitration is held within the State of Oregon, be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(Formerly 33.220)

ORS 36.310. Court order compelling parties to arbitrate as agreed.

A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in ORS 36.305, shall petition the circuit court, or a judge thereof, for an order directing that the arbitration proceed in the manner provided for in the contract or submission. Ten days' notice in writing of the application shall be served upon the party in default, in the manner provided for personal service of a summons. The court or judge shall hear the parties, and if satisfied that the making of the contract or submission or the failure to comply therewith is not an issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission. If the making of the contract or submission or the default is an issue, the court or the judge shall proceed summarily to the trial thereof. If no jury trial is demanded by either party, the court or judge shall hear and determine such issue. Where such an issue is raised, any party may, on or before the return day of the notice of application, demand a jury trial of the issue, and if such demand is made, the court or judge shall make an order referring the issue to a jury in the manner provided by ORCP 51 D. If the jury finds that no written contract providing for arbitration was made or submission entered into, as the case may be, or that there is no default, the proceeding shall be dismissed. If the jury finds that a written contract providing for arbitration was made or submission was entered into and there is a default in the performance thereof, the court or judge shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(Formerly 33.230)

ORS 36.315. Abatement of action or suit involving arbitrable issue.

If any action, suit or proceeding is brought upon any issue arising out of an agreement which contains a provision for arbitration of the matter in controversy in such action, suit or proceeding, then, upon application, any judge of a circuit court, upon being satisfied that the issue is referable to arbitration, shall abate the action, suit or proceeding so that arbitration may be had in accordance with the terms of the agreement. The application shall be heard similarly to hearings on motions.

(Formerly 33.240)

ORS 36.320. Appointment of arbitrator; number of arbitrators.

If, in the arbitration agreement, no provision is made for the manner of selecting the arbitrators, or if, for any reason, there is a failure to act or a vacancy, and no provision in the agreement for the filing thereof, then, upon application of any party to the agreement, any court of record shall appoint an arbitrator or arbitrators to fill the vacancy, who shall act with the same force and effect as if specifically named in the arbitration agreement. Unless otherwise provided, the arbitration shall be by a single arbitrator.

(Formerly 33.250)

ORS 36.330. Compensation of arbitrators.

The compensation of arbitrators shall be determined by agreement between the parties to the arbitration, or, in case of their inability to agree, then by any judge of the circuit court.

(Formerly 33.270)

ORS 36.340. Coercion of witness or party.

Whenever, on motion of any arbitrator or party in interest, it appears to the circuit court of the county in which the arbitration proceedings are pending that any witness or party has refused to answer a subpoena or obey any lawful order of the arbitrator, the court may require the witness or party to show cause why the witness or party should not be punished for contempt of court, to the same extent and purpose as if the proceedings were pending before the court.

(Formerly 33.290)

ORS 36.355. Exceptions to award; filing fees.

1. Within the period specified in ORS 36.350, the party against whom an award was made may file with the circuit court exceptions in writing to the award for any of the following causes:
 - a. The award was procured by corruption, fraud or undue means.
 - b. There was evident partiality or corruption on the part of the arbitrators, or any of them.
 - c. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party were prejudiced.
 - d. The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.
 - e. There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.
 - f. The arbitrators awarded upon a matter not submitted to them, unless it was a matter not affecting the merits of the decision upon the matters submitted.
 - g. The award was imperfect in matter of form not affecting the merits of the controversy.
2. The clerk of the court shall collect from the party filing exceptions under subsection (1) of this section a filing fee of \$35, and from a party filing an appearance in opposition to the exceptions a filing fee of \$21. However, if the exceptions relate to an arbitration award made following abatement under ORS 36.315 of an action, suit or proceeding in respect to which the parties have paid filing fees under ORS 21.110, no filing fees shall be collected under this subsection. No exceptions or appearance in opposition thereto shall be deemed filed unless the fee required by this subsection is paid by the filing party.

(Formerly 33.320; 1997 c. 801 § 54)