I. INTRODUCTION

Traditionally, where two parties have a legal dispute, it is settled in a court of law. However, in recent years litigants have sought faster and less costly methods by which to resolve their differences. Litigants have sought to create a system of dispute resolution independent from the judicial system. It is with these goals in mind that arbitration and other forms of alternative dispute resolution (ADR) were created.

Arbitration is a legal process that takes place outside of the courts. The parties involved in arbitration effectively opt out of the court system and agree to submit their case for resolution by a neutral, third party arbitrator. Although outside the traditional judicial system, arbitration can result in a final and legally enforceable decision. This decision is similar in content and form to a court judgment. Further, as it is outside the court system, arbitration has the advantage of being private and confidential.

Arbitration can be binding or non-binding. Binding arbitration is one in which the ruling of the arbitrator is final and enforceable. The arbitrator's ruling becomes a judgment, just as if the case were tried before a judge or jury. For example, many contracts have a provision requiring binding arbitration so that if a dispute arises between the parties to the contract which cannot be worked out voluntarily, they have agreed in advance to submit it to arbitration for a decision, rather than by filing a lawsuit.

Non-binding arbitration refers to arbitration wherein the ruling of the arbitrator is not enforceable against the parties. Although the arbitrator issues a ruling, the losing party retains a right to go to court and have the case decided by a judge or jury. Even with the ability of the losing side to go to court, in practice, the vast majority of cases are resolved by non-binding arbitration without recourse to the court system.

Arbitration can be used to settle a variety of disputes. Despite the wide range of possible uses for arbitration and other methods of ADR, arbitration has been most prominently utilized in international disputes, commercial disputes, and labor disputes.

This paper will focus on the use of arbitration in labor disputes. More specifically, I examine arbitration in terms of collective bargaining agreements. Part II examines the historical development of arbitration. Part III looks at the process of arbitration, from the initial agreement to place an arbitration clause into a collective bargaining agreement to the final award. Part IV outlines some of the various types of arbitration to determine their applicability to collective bargaining agreements.

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1 Alternative Dispute Resolution refers to any method of resolving a dispute outside the judicial system including, but not limited to, arbitration, mediation, early neutral evaluation, and conciliation.
2 WIP Arbitration and Mediation Center, Guide to WIPO Mediation, March 1996.
3 http://www.whit.org/spatin/adr.html
II. HISTORY OF ARBITRATION

The use of arbitration can be traced to Greek city-states and various Catholic Popes who acted as arbitrators of conflicts between European countries during the Renaissance. International attempts to provide a foundation for lasting, global peace have also incorporated arbitration. Two examples of this are the Permanent Court of Arbitration, which resulted from international meetings conducted between 1899 and 1907 in The Hague, Netherlands and the development of the League of Nations in 1918, which employed arbitration as one mechanism of dispute resolution.4

Outside the political arena, arbitration has been used by businesses world wide to settle commercial disputes. In Europe, businesses of differing national origins have frequently submitted their controversies to arbitration. In the United States, arbitration is most often used to settle labor disputes arising from conflicting interpretations of employment contracts, construction disputes between general contractors and subcontractors relating to construction damage claims, and shareholder disputes concerning the valuation of stock in closely held corporations.

The submission of a commercial dispute to arbitration may be done voluntarily or at the prompting of a federal agency. The federal government has promoted commercial arbitration dating back to 1887, when it passed the Interstate Commerce Act. This Act set up a mechanism for the voluntary submission of labor disputes to arbitration by the railroads and their employees. Then, in 1925, Congress passed the Federal Arbitration Act, which governs the arbitration of contractual disputes involving commerce. More recently, the federal judiciary has found that employment disputes, civil rights violations, securities fraud, RICO and anti-trust claims, contain arbitrable issues.

Although arbitration is voluntary, there is historical precedent for governments requiring the submission of commercial disputes to compulsory, binding arbitration. This has been done when it appeared that national interests so required.5 In the United States similar tactics have been utilized. For example, the United States ordered mandatory arbitration of a railway labor-management dispute in 1963 after a lengthy strike by railroad workers.

Similarly, the United States government has required parties to submit their dispute to non-binding arbitration. In 1926, Congress enacted the Railway Labor Act to monitor the labor-management relations of both the railways and the airlines. Under the Act, the National Mediation Board may intervene in a dispute and require mediation.6 If the dispute is not resolved by mediation, the Board will ask, but cannot require, that the parties submit to binding arbitration.

In modern times, federal and state laws govern the arbitration process and procedures. Within the limits permitted by the applicable jurisdiction, parties are free to negotiate the ground rules under which they want the arbitration to take place. This

5 Governments in Australia, New Zealand and Norway have required binding arbitration. See Bierman Law Firm, A Brief History of Arbitration and Mediation, (1999).
6 Mediation is an informal method of dispute resolution whereby a third-party neutral facilitates settlement negotiations between the adverse parties.
includes such provisions as the number of arbitrators and/or whether formal rules of evidence will apply.

As the two most prominent forms of ADR, arbitration and mediation are often confused.7 Despite this confusion, arbitration and mediation are distinct processes. Arbitration is a simplified version of a trial. Generally speaking, parties give opening statements, present witnesses and evidentiary support, and give closing arguments. However, unlike judicial litigation, arbitration may not involve discovery and may utilize simplified rules of evidence.8 Arbitration hearings are time efficient in that they usually last only a few hours. Further, as the rulings are not made part of the public record, arbitration affords a greater degree of privacy to its participants.9 Finally, where the parties agree that the arbitrator's decision is binding, the ruling becomes legally enforceable in a court of law.

By contrast, mediation is the continuation of direct negotiations between the parties with the aid of a neutral intermediary.10 In mediation, a neutral third party conducts informal meetings with the disputants in an attempt to facilitate negotiations between the parties. The mediator discusses the dispute with the parties jointly and in separate caucuses.11 The mediator learns the respective parties' positions, and then attempts to bridge the interests of the parties to assist in the development of a resolution. The mediator cannot compel the parties to reach an agreement, nor can he or she bind the parties to any decision with which they do not agree.12

There are two primary differences between mediation and arbitration. First is the source of decision-making power. In mediation, the parties retain responsibility for and control over the dispute. Therefore, the decision-making power does not transfer to the mediator. However, once an agreement has been reached and reduced to writing, the agreement is a binding, enforceable contract.13

In deciding upon an outcome, the parties to mediation can take into account a broader range of standards, most notably their respective personal interests. Taking into account personal interests means that the parties can negotiate the settlement by reference to their future relationship, rather than by reference to their past conduct. It is for this reason that mediation is often referred to as an interest-based procedure.

8These topics will be explored in Part III.
9Unless sealed by the court, or a confidentiality agreement, court proceedings are a matter of public record. Contents of arbitration/mediation are confidential and contents of conversations and/or documents used at the hearing cannot be discovered subsequent to the hearing. See California Code of Civil Procedure §1775.10 and Garstang v. Superior Court (California Institute of Technology, (1995) 39 Cal.App.4th 526, 533-534 (holding that contents of hearing are protected by constitutional right of privacy).
11A caucus is a discussion between the mediator and one of the parties to the dispute. For a discussion of the use of joint sessions and caucuses, see Karl A. Slaikeu, When Push Comes to Shove: A Practical Guide to Mediating Disputes (San Francisco: Jossey-Bass Inc., 1996), 10, Ch. 7.
12Sochynsky, California ADR Practice Guide, § 12.02, 12-5.
13Ibid., § 12.02, 12-3.
By contrast, in arbitration the arbitrator reaches the decision for the parties and depending upon the arbitration agreement, the parties may be bound by that decision. It is for this reason that arbitration is often referred to as a rights-based procedure.

The second difference stems from the roles, or tasks, of the respective parties during the hearing. In arbitration, a party's task is to persuade the arbitrator that his or her position is superior to that of the opposing side. The individual parties address arguments to the arbitrator directly and not to the other side. This task is a direct result of the fact that the decision making power rests with the arbitrator.

By contrast, in mediation a party's task is to negotiate with the other side in an attempt to reach mutual agreement. Thus, the parties address each other directly, although they may confer their position through the mediator.14

III. THE ARBITRATION PROCESS

In the 1960 “Steelworkers Trilogy” cases, the United States Supreme Court found that arbitration is the preferred method to resolve labor/management disputes.15 Although arbitration is the preferred method of the Court, the Court left for the contracting parties to determine the details of how and when an arbitration clause will be utilized. This wide latitude raised some interesting questions. First, how does one determine when a dispute will be subject to arbitration? Secondly, once this determination is made, how does one decide the applicable rules for conducting the arbitration hearing?

In terms of a collective bargaining agreement, these questions are ideally addressed when the parties negotiate for the inclusion of an arbitration provision within the bargaining agreement itself. The arbitration provision should provide the procedural and substantive guidelines for the arbitration process. These provisions include the selection of an arbitrator, determining the issues in dispute, discovery, the hearing and evidence and the award. However, as with any contract, there must first be an agreement.

A. The Agreement

Arbitration provisions are a matter of contract law.16 Two or more parties contractually agree to submit any future dispute(s) that may arise between them to arbitration rather than to the judicial system. By entering into such an agreement, the parties voluntarily waive their right to adjudication of the dispute in a court of law, and agree to be bound to an arbitrator’s decision.17

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17 Ibid.
The only formal requirement of an arbitration agreement is that it be in writing.\textsuperscript{18} Beyond this, the parties can agree to submit as little as a single specific issue to arbitration, or any and all issues that arise between the parties. However, a party cannot be required to submit to arbitration any dispute that she has not previously agreed to submit.\textsuperscript{19}

There are several informal clauses that are required to produce an effective agreement. A standard arbitration agreement should include clauses for determining issues to be arbitrated, as well as procedural guidelines for selection of the arbitrator, conduct of hearing, discovery and evidence, and the award. Where the agreement is silent as to the issues to be arbitrated, a court may be forced to determine the extent of the agreement.\textsuperscript{20} Where only the procedural guidelines are omitted, state or federal statutory law applies.\textsuperscript{21}

\textbf{B. Selection of Arbitrator}

One of the advantages to using arbitration in collective bargaining agreements is the fact that the parties have the ability to select the arbitrator.\textsuperscript{22} The method for selecting an arbitrator is open to negotiation. The parties can either agree to abide by the selection method for a given organization, such as the American Arbitration Association (AAA),\textsuperscript{23} or devise some alternative method. Where the AAA, or any other organization, is referred to in the agreement, the parties incorporate the AAA’s rules by reference.

One of the most common methods for designating an arbitrator is for each party to select from five to ten arbitrators. The parties then review the opposition’s selections and gradually eliminate candidates until a consensus selection can be made. In the event a consensus cannot be achieved, the agreement should provide for an alternative method of selecting the arbitrator.\textsuperscript{24}

\textbf{C. Determining Issues in Dispute}

The fastest and easiest way to determine the issue in dispute is for the parties to stipulate to the issue(s) to be submitted to arbitration. However, where a stipulation cannot be reached, the key to determining the scope of the arbitration clause is the language used. Take for example where the language states that any “dispute” may be submitted to arbitration and it has been held that misconduct by a party was not a “dispute,” and thus is outside the arbitration clause.\textsuperscript{25} Had the language read, any

\begin{itemize}
\item \textsuperscript{18}Ibid., § 5.07(1). See also, California Code of Civil Procedure § 1281.
\item \textsuperscript{19}Ibid. See also, \textit{AT&T Technologies, Inc. v. Communication Workers of America}, 475 U.S. 643 (1986).
\item \textsuperscript{20}Ibid., § 5.07(1).
\item \textsuperscript{21}Ibid., § 5.07(1).
\item \textsuperscript{22}Weil and Brown, California Practice Guide: Civil Procedure Before Trial (The Rutters Group 1997), § 13:18 [herein after The Rutters Group].
\item \textsuperscript{23}The American Arbitration Association [herein after AAA] is an administrative organization that provides standardized rules for arbitration agreements and procedures in a variety of situations where arbitration is frequently used. They can be contacted on the internet at http://www.aaa.org.
\item \textsuperscript{24}AAA Rule 13 provides that if the parties cannot agree on an arbitrator, one will be selected for them.
\item \textsuperscript{25}\textit{Mesquite Lake Association v. Lurgi Corporation}, 754 F.Supp. 161 (N.D. Cal. 1991).
\end{itemize}
“controversy” may be submitted to arbitration, the moving party would have the right to submit the matter to arbitration.26

This is a fine line that necessitates clarification. In terms of misconduct, the parties may agree that misconduct took place, yet disagree as to the extent or ramifications of the misconduct. As the underlying action (the misconduct) is not “disputed,” the matter is beyond the contractual language of the arbitration agreement. Where the language states that any “controversy” may be submitted to arbitration, then the extent or ramifications of the misconduct would be subject to arbitration.

D. Discovery, the Hearing and Use of Evidence

Discovery and use of evidence are procedural issues that should be written into the arbitration clause.27 Generally speaking, discovery in the aid of arbitration is not permitted.28 Therefore, absent prior agreement, the parties will be governed by applicable state or federal law.

The procedural conduct of the hearing can also be written into the arbitration clause. By doing this the parties insure that the arbitrator must follow specified guidelines at the hearing. Such guidelines can include provisions for opening statements, witness testimony, and closing arguments. However, in the absence of specified guidelines, the arbitrator is free to conduct the hearing in any manner he or she sees fit. Thus, while the hearing will be defined as arbitration, the arbitrator can turn the hearing into a mediation session as a means to facilitate settlement. If the parties wish to avoid this outcome, they should provide for the conduct of the hearing in the agreement.

E. The Award

Arbitration awards must be in writing and signed by the arbitrator(s).30 However, absent prior agreement, no other formal elements are required. As a result, arbitrators have greater flexibility in determining the proper award than do judges. Absent prior agreement, findings of fact and/or law are not required,31 nor is there a limit on the amount of monetary compensation the arbitrator may award.32 By contrast, judicial arbitration33 is limited to $50,000.34 Therefore, arbitrators may render a decision based on general principles of equity and fairness.35

27 Cal. Code of Civil Proc., § 1283.1 (discovery is permitted if the parties make it part of the agreement).
28 Nile, California Arbitration Handbook, § 12.01, 12-1. See also Federal Arbitration Act, 9 U.S.C. § 1 et seq.,
29 Ibid., §12.01, 12-1.
30 Nile, California Arbitration Handbook, § 5.07(19). See also, California Code of Civil Procedure, § 1283.4 (award must also include a decision on all issues presented to arbitrator); and AAA Rule 42.
31 Ibid., § 5.07(19). See also, Sapp v. Barenfiled, 34 Cal.2d 515 (1949).
32 The Rutters Group, § 13:34.3.
33 Judicial arbitration refers to cases ordered to non-binding arbitration by a court of law. See e.g., California Code of Civil Procedure, section 1280 et seq.
34 The Rutters Group, 13:34.3. See also, California Code of Civil Procedure section 1775.3, California Rules of Court 1631(a)(1).
The jurisdiction of a court to review an arbitration award is limited. Once a decision has been entered, the award will not be set aside except on statutory or public policy grounds, or where the arbitrator has acted beyond the authority provided for in the agreement. However, where the parties agree that the award is reviewable, it is subject to review. This can be accomplished in a variety of ways. One way is to use clear and unambiguous language of the intent to make the award reviewable. A second option would be to make the award subject to state statutory law. Thus in California, the parties would have an absolute right to challenge the arbitration award by requesting a trial de novo.

The award is to be made in accordance with the terms of the agreement. If AAA is utilized, Rule 41 provides that the award shall be made “promptly,” but no later than thirty (30) days following the hearing.

IV. Types of Arbitration

Arbitration can take several forms. In other words, arbitration agreements can provide for specific guidelines separate and distinct from what has been discussed above. The question that must be addressed is whether, and to what extent, the various types of arbitration apply to collective bargaining agreements. This section focuses on some of the types of arbitration and explores their applicability to collective bargaining agreements.

A. Interest Arbitration

Interest Arbitration involves the arbitration of the terms of a collective bargaining agreement. Interest arbitration is concerned with disputes that arise over the very terms and conditions to be included in a collective bargaining agreement. Traditional interest arbitration involves the parties to the agreement selecting a neutral person or panel to hear their respective bargaining positions. Following the presentation of the bargaining positions, the arbitrator makes a final and binding decision on what is to be included in the negotiated labor agreement.

In the United States, interest arbitration is more common in the public sector. This is true because public employees striking over collective bargaining agreements has generally been deemed unreasonable or not in the best interest of the public. Conversely in the private sector, interest arbitration is not very common and is used in only about two percent of negotiations.
Interest arbitration clearly applies to the functional area of collective bargaining agreements. Interest arbitration occurs if an arbitrator is asked to make an award or to render a decision that "specifies" the language to be placed into the collective bargaining agreement. Therefore, the parties are required to relinquish to the arbitrator decision-making power on mandatory bargaining issues such as wages, hours of work and other vital terms and conditions of employment. In other words, the arbitrator determines what actual terms of the contract are established.\footnote{Raymond L. Hilgert and Sterling H Schoen, \textit{Cases in Collective Bargaining: A Decisional Approach}, 8th ed. (Chicago, Illinois: Irwin, 1996), 197-199.}

Although applicable to collective bargaining agreements, interest arbitration can have both positive and negative consequences. One positive effect is that a party need only persuade the arbitrator of its position, and not the opposing side. Therefore, the parties need not worry about straining future relationships; they can blame the arbitrator for the language and terms of the agreement. In terms of the negative effect, the parties must relinquish decision-making authority and may not be satisfied with the arbitrator’s final decision.

\section*{B. Rights Arbitration}

Rights Arbitration involves arbitration of the interpretation of the language found within a collective bargaining agreement.\footnote{This is synonymous with the term grievance arbitration.} This is distinguishable from interest arbitration in that interest arbitration is concerned with the language to be placed within the agreement. In rights arbitration, the arbitrator is primarily charged with interpreting either the language of previously executed collective bargaining agreement or the intent of the parties in entering into the collective bargaining agreement.\footnote{Hilgert and Schoen, \textit{Cases in Collective Bargaining: A Decisional Approach}, 198-201.}

Rights arbitration applies to the functional area of labor relations. Rights arbitration is concerned with disputes that arise over the interpretation or application of any provision of the collective bargaining agreement. Therefore where the parties use vague language, the arbitrator will examine the language to determine the intent of the parties. Practically speaking, rights arbitration may deal with such issues as discovery, evidence, selection of the arbitrator and the terms and conditions of employment.

\section*{C. Compulsory Arbitration}

Compulsory Arbitration requires parties to an agreement to submit their dispute to an arbitrator. A mandatory arbitration agreement is an agreement by an employee, usually in writing, that he or she will submit any claims against the employer, including statutory ones, to arbitration instead of litigating them in court. These agreements are widely-used by companies, and their application has increased since 1991 when the Supreme Court approved the use of mandatory arbitration.\footnote{\textit{Gilmer v. Interstate/Johnson Lane Corporation}, 500 U.S. 20 (1991).} Since then, the use of this type of mandatory arbitration has grown.\footnote{http://diana.law.yale.edu/diana/db/6398-1.html.} Employers who did not have compulsory arbitration agreements implemented them, and those who did have arbitration policies
felt more secure that these agreements would be enforced. However, within the last year, mandatory arbitration policies have been attacked based on individual rights protected by the Civil Rights Act of 1991.

D. Binding Arbitration

Binding Arbitration, as discussed above, requires parties to an agreement to accept the decision of the arbitrator. Binding arbitration applies to collective bargaining agreements. In fact, when one speaks of collective bargaining and arbitration, one typically means binding arbitration.

E. Final-Offer Selection (FOS) Arbitration

Final-Offer Selection (FOS) arbitration is a type of interest arbitration. FOS requires the parties to an agreement to submit a best and final offer to the arbitrator. The arbitrator is given the authority to select one of the offers submitted by the parties in its entirety. This type of arbitration is a win-lose situation for the parties; there is no middle ground.

Because this is a type of interest arbitration, FOS deals directly with labor-management relations and is applicable to collective bargaining agreements. The fact that the arbitrator can select only one of the proposals eliminates any opportunity for compromise. Therefore, the parties must attempt to make reasonable submissions to the arbitrator. The theory is that if the parties make reasonable submissions on their points of interest, their positions will converge and a settlement may possibly occur without the neutral's intervention. In the event no settlement can be reached, the arbitrator will select one offer and it will become the terms of the collective bargaining agreement.

F. High-Low Contract Arbitration

High-Low Contract Arbitration involves the parties agreeing to limit the range of possible outcomes before they enter into the arbitration process. High-low contract arbitration protects the parties involved in the arbitration process to a certain extent. It ensures that the complainant will receive some award while ensuring that the respondent will not have to pay an excessive award. This fact was illustrated in a recent personal injury case involving an automobile versus bus rear-end collision. In Roberts v. Greyhound Bus Company, the parties agreed to $400,000/$1 million high/low binding arbitration. Upon hearing the evidence, the arbitrator awarded the

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51 Ibid.
54 United States District Court, Central District, February 2, 1999 (as the case was decided by binding arbitration, a case number and citation are not available).
injured party $1,087,539.87. Pursuant to the high/low arbitration, the award was reduced by $87,539.87. In this situation, by agreeing to high/low arbitration, the plaintiff was guaranteed $400,000, but in the end lost nearly $100,000. Conversely, the defendant could pay no more than $1 million, and ultimately saved nearly $100,000.

High-low arbitration has limited applicability to collective bargaining agreements. The primary focus of the agreement will be on the terms and conditions of employment, not the amount of monetary compensation a party will receive or pay for injuring the other party. Thus the parties cannot use high-low arbitration to determine such issues as work hours or benefits. However, high-low arbitration can be used to determine salary increases and wages and as liquidated damages for breaching the agreement. In such situations, the parties can agree to a high-low range for salary increases and as a penalty for breach of contract.

G. Advisory Arbitration

In Advisory Arbitration, the arbitrator's decision is only informational and non-binding. Advisory arbitration can be negotiated into a collective bargaining agreement and, therefore, applies to labor relations. The outcome of advisory arbitration is not binding on the parties; however, it can provide the parties with valuable information concerning their case. This information comes without the risk that is associated with other types of arbitration. After submitting their case to advisory arbitration, the parties have a better understanding of their legal positions and the costs associated with litigation.

H. Court-Annexed Arbitration

Court-Annexed Arbitration is mandatory but is non-binding. Court-annexed arbitration requires the parties to a civil case to submit to arbitration before proceeding to trial. The process is specific to civil litigation and does not apply to labor relations and the collective bargaining process. The court mandates the arbitration process so that the parties may resolve their differences before litigating the dispute. If the parties are dissatisfied with the court-annexed arbitrator's decision, they can still litigate because the decision is not binding on them.

V. CONCLUSION

Arbitration has wide applicability to collective bargaining agreements, and for good reason. Arbitration is less costly, more efficient, and is usually more informal than a court of law. Further, the parties to the agreement have extensive control of the procedural and substantive issues involved in arbitration. Additionally, many types of arbitration can be utilized. Parties to the collective bargaining agreement are not limited to one method of arbitration.

In general, it is the opinion of the researched authors that labor and management should attempt to mediate prior to arbitrating. Mediation can save additional time and

55 Burgess and Burgess, Encyclopedia of Conflict Resolution, 22.
money, by either resolving the matter or narrowing the issues to be arbitrated. A mediation first, arbitration second clause can be a useful tool in dispute resolution.

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