



General Concepts

"Judicial Arbitration" is a statutory procedure (Ca Civ Pro § 1141.10 et seq.) by which certain civil cases are "diverted" before trial to nonbinding "arbitration" before a neutral third party. This court-controlled process is designed to reduce court congestion by facilitating settlements through third party evaluation.

The statutorily-articulated purposes of mandatory judicial arbitration are:

- Reduction of civil court case backlog; encouraging pretrial settlement
- Simplifying and economizing resolution of civil disputes

Sources of arbitration rules in California:

- Statutes: The California Judicial Arbitration Law is codified in Ca Civ Pro § 1141.10 et seq.
- California Rules of Court: Ca Civ Pro § 1141.14 directs the Judicial Council to promulgate rules of practice and procedure to carry out the statutory scheme. Rules 1600-1618 of the California Rules of Court have been adopted pursuant thereto.
- Local court rules: Both the Code (Ca Civ Pro § 1141.11(b),(c)) and the Judicial Council Rules (Ca Rules of Court Rule 1600.5(g)) authorize the courts to adopt local rules affecting the arbitration process and adapting it to special local circumstances. [See S.F. Unif. Rule 4.1; Orange Sup.Ct. Rule 446; San Diego Sup.Ct. Rules 2.24-2.29; Los Angeles Sup.Ct. Rules 12.0-12.14]

Contractual Arbitration Distinguished

There are fundamental differences between "judicial arbitration" and arbitration in the traditional sense (i.e., parties agreeing by contract to submit their disputes to binding arbitration, bypassing the common law courts):

Agreement to arbitrate: Contract arbitration applies only if the parties have agreed to resolve the dispute by arbitration rather than litigation, and it is the agreement that determines the details of the process (Ca Civ Pro § 1282 et seq.). Judicial arbitration, on the other hand, is not dependent upon an agreement between the parties. Rather, it may be ordered by the court whether or not the parties agree, in writing or otherwise. [Mercury Ins. Group v. Sup.Ct. (Wooster), supra, 19 Cal.4th at 344, 79 Cal.Rptr.2d at 314]

Binding effect of award: Contract arbitration awards are binding upon the parties. Except under very limited circumstances, a court cannot review the correctness of the arbitration decision; it must enter judgment confirming the award (unless there is a showing of misconduct by the arbitrator, acts in excess of the arbitrator's authority, etc.). [See Ca Civ Pro § 1285 et seq.] In contrast, a judicial arbitration award is not binding unless the parties either (a) stipulate for binding arbitration or (b) accept it as final by failing to file a timely request for trial de novo. [Ca Civ Pro § 1141.20; Ca Rules of Court Rule 1616(d)]

Selection of arbitrator: In contract arbitration, the arbitrator may be designated in the agreement, or by a procedure provided therein. If there is no such specification, the parties may apply to the court for an appointment. The arbitrator need not be a lawyer. [Ca Civ Pro § 1281.6] In judicial arbitration, the selection procedure is governed by statute and Judicial Council Rule. The arbitrator must be a member of the state bar or a retired judge or retired court commissioner if appointed by the court. [Ca Civ Pro § 1141.18; Ca Rules of Court Rule 1604(b)]

Dismissal for delay in arbitration: Contract arbitrations have a life of their own outside the judicial system. Therefore, normally only the arbitrator may decide whether the arbitration should be dismissed for delay in prosecution. But judicial arbitration "is a different animal" and the matter is only on a "sabbatical" from the courthouse. The court thus retains full power to dismiss for delay in prosecution--before, after or during the arbitration.

Discovery: Absent agreement, there generally is no right to discovery in contractual arbitration proceedings. (But there are some exceptions--e.g., arbitrations of claims for personal injury or wrongful death and claims for employment discrimination under the FEHA.) [See Ca Civ Pro §§ 1283.05-1283.1] Judicial arbitration, on the other hand, permits full and complete discovery. [Ca Rules of Court Rule 16124]

Rules of evidence: Unless the arbitration agreement provides otherwise, courtroom rules of evidence and procedure need not be observed in contractual arbitration proceedings. [See Ca Civ Pro § 1282.2(d)] Generally, the rules of evidence governing civil actions apply in judicial arbitration proceedings. [See Ca Rules of Court Rule 1613(b) & 1614]

Rulings: In contractual arbitration proceedings, the arbitrator generally is not required to make a decision strictly in accordance with the law. In judicial arbitration proceedings, however, the arbitrator must "decide the law and facts of the case and make an award accordingly." [Ca Rules of Court Rule 1614(a)(7)]

Costs, prejudgment interest: If awarded by the arbitrator in a contract arbitration proceeding, prejudgment interest and costs may be recoverable in proceedings (pursuant to Ca Civ Pro § 1287.4) to confirm the arbitration award. In Judicial arbitrations, the cost-shifting penalties for failure to accept a Ca Civ Pro § 998 settlement offer also apply to arbitrations. [Ca Civ Pro § 998(c)(1)]

Cases Subject To Judicial Arbitration

The judicial arbitration law is applicable only to certain courts and, within those courts, to specified civil cases.

Courts: The judicial arbitration provisions apply on a mandatory basis to unlimited civil cases (except exempt cases, below) where the amount in controversy does not exceed \$50,000 in superior courts having 18 or more judges. [Ca Civ Pro § 1141.11(a); Ca Rules of Court Rule 1601 (a)(1)]

In superior courts with fewer than 18 judges, it is left up to each court whether to adopt mandatory arbitration. I.e., cases that would otherwise qualify are diverted to arbitration only if the court has so required by local rule. [Ca Civ Pro § 1141.11(b); Ca Rules of Court Rule 1600(a)(2)] Likewise, courts may adopt local rules that provide for mandatory judicial arbitration in limited civil cases (except exempt cases, below). [Ca Civ Pro § 1141.11(c); Ca Rules of Court Rule 1600(a)(3); S.F. Unif. Rule 4.1(C)(2)--nonexempt "limited jurisdiction actions" diverted to arbitration if jury trial demanded or if trial estimate exceeds one day]

Regardless of the decision of otherwise exempt courts to adopt the judicial arbitration program, all courts in all cases are mandated by Ca Rules of Court Rule 1601(a)(4) to provide for arbitration upon stipulation of the parties. Cases: Where judicial arbitration is required or provided by court rule, all civil cases not otherwise exempt from arbitration shall be diverted to judicial arbitration if "the amount in controversy in the opinion of the court will not exceed \$50,000 for each plaintiff." [Ca Civ Pro § 1141.11(a),(b)]

Courts may adopt local rules that provide for mandatory judicial arbitration in all at-issue limited civil cases. [Ca Civ Pro § 1141.11(c); Ca Rules of Court Rule 1601 (a)(3)] Limited civil cases include those in which the amount in controversy does not exceed \$25,000. [See Ca Civ Pro § 85]

However the following types of cases are exempt from judicial arbitration:

- cases with a nonfrivolous or substantial prayer for equitable relief; class actions;
- small claims cases or trials de novo on appeal from small claims cases; unlawful detainer actions;
- Family Code proceedings except as provided in Ca Fam § 2554;
- any case the court finds "not amenable to arbitration" on the ground that "arbitration would not reduce the probable time and expense necessary to resolve the lawsuit";
- any category of cases excluded by local rule as "not amenable to arbitration" because under circumstances relating to the particular court judicial arbitration of such cases would not reduce the probable time and expense necessary to resolve the litigation; and

- cases involving multiple causes of action or a cross-complaint if the amount in controversy as to any cause of action or cross-complaint exceeds \$50,000. [Ca Rules of Court Rule 1601(b)(1)-(8)]

The Arbitrator

Superior courts with 18 or more judges are required to maintain an "ADR committee." The committee's function is to appoint panels of arbitrators from which the court may make an appointment, and to administer the arbitration program. [Ca Rules of Court Rule 1603(b)(1)]

Panel members must be active or inactive members of the State Bar, retired judges and retired court commissioners who were licensed to practice law before their appointment as commissioner. A former judicial officer (as opposed to retired) is not eligible for appointment unless he or she is an active or inactive member of the State Bar. [See Ca Rules of Court Rule 1604(b)]

The parties may stipulate to an arbitrator once the case is placed on the arbitration hearing list. On stipulation, any person may serve--lawyer or nonlawyer, retired or active judge. [Ca Civ Pro § 1141.18(a); Ca Rules of Court Rule 1605(a)]

Within 15 days after the case is set for arbitration at the case management conference or review conference (see Ca Rules of Court Rule 1602), the arbitration administrator must mail a list of potential arbitrators to the parties. [Ca Rules of Court Rule 1605(b)(1)] Each side then has 10 days "from the date of mailing" of the list to file a written rejection of one name on the list. If there are two or more parties to a side, they must all join in the rejection of a single name. [Ca Rules of Court Rule 1605(b)(3)] At the end of the 10-day period for rejection of names, the administrator must "promptly" appoint at random one of the persons on the list whose name was not rejected by the parties if more than a single name remains. [Ca Rules of Court Rule 1605(b)(4)] The administrator must then assign the case to the arbitrator and notify the parties accordingly. [Ca Rules of Court Rule 1605(b)(5)]

The arbitrator's fees are set by the local administrative committee and are usually modest (e.g., \$150 per day). These fees are payable by the court, not by the parties, except as noted below. [Ca Civ Pro § 1141.28(a)]

- Parties stipulating to arbitration are required to split the arbitrator's fees unless this would cause substantial hardship to either party, in which event the county will pay that party's share of the fees. [See Ca Civ Pro § 1141.28(b)]
- Parties requesting a trial de novo after arbitration may end up having to reimburse the court for the arbitrator's fees if they fail to do better at trial. [See Ca Civ Pro § 1141.21(a);
- Under some local rules, parties who settle prior to the arbitration hearing and who fail to notify the arbitration clerk are subject to monetary sanctions for the arbitrator's fees. [See L.A. Sup.Ct. Rule 12.5]

The Arbitration Hearing

Within 15 days after his or her appointment, the arbitrator must set the time and place of hearing (no weekends or holidays without the parties' consent) and notify the parties and the arbitration administrator accordingly. [Ca Rules of Court Rule 1607(a),(b)]

The hearing date may not be earlier than 30 days after the arbitrator sends the notice of hearing (35 days, if served by mail; see Ca Civ Pro § 1013(a)) (Ca Rules of Court Rule 1607(b)) or 210 days after the complaint is filed, unless the parties have stipulated to a 30-day hiatus from fast-track time standards, in which event the arbitration hearing may be no sooner than 240 days after the complaint is filed (Ca Civ Pro § 1141.16(c)). These minimum time limits may be disregarded, if the parties stipulate to an earlier arbitration hearing; or all plaintiffs request an earlier date, subject to defendant's motion to delay the hearing for good cause shown. [Ca Civ Pro § 1141.16(c)(2)]

The arbitrator's powers are set forth in Ca Rules of Court Rule 1614(a). They are generally those of any trial judge--i.e., to administer oaths, adjourn hearings, rule on admissibility of evidence, decide the case and make an award (including statutory costs). [See Ca Rules of Court Rule 1614(a)]

Arbitration proceedings are not recorded or transcribed unless the arbitrator so desires. And even if a record is made, it is considered merely the arbitrator's "personal notes." Such record is not subject to discovery; and the arbitrator cannot give it to either party. Except for the arbitrator's purposes, no court reporter, stenographer or recording device may be present or used. [Ca Rules of Court Rule 1614(b)]

Generally, the rules of evidence governing civil actions apply to arbitration hearings as well. [Ca Rules of Court Rule 1613(b)] There are, however, some exceptions:

Documentary evidence [Ca Rules of Court Rule 1613(b)(1)]: Subject to certain procedural requirements (below), the arbitrator must receive the following, if proffered by either party:

- Written reports of any expert witness;
- Written medical or hospital reports;
- Medical bills (doctors, hospitals, physiotherapy, nursing, prescriptions, etc.);
- Loss of earnings records;
- Property damage repair or estimate bills (but estimates must be accompanied by a statement as to whether repairs were made in whole or in part, and by a copy of the receipted bill showing amounts paid, if any);
- Police reports (but the arbitrator may not consider any opinion as to ultimate fault expressed in such report);

- Other bills, invoices, purchase orders, checks, written contracts and similar documents "prepared and maintained in the ordinary course of business." [Ca Rules of Court Rule 1613(b)(1)]

As a condition to admissibility of any of the above items, a copy must be delivered to all other parties at least 20 days before the hearing: "The arbitrator shall receive them in evidence if copies have been delivered to all opposing parties at least 20 days before the hearing." [Ca Rules of Court Rule 1613(b)(1)(A)]

Witness statements [Ca Rules of Court Rule 1613(b)(2)]: The written statements of any other witness may be presented by declaration or affidavit. However, as a prerequisite to admissibility, copies must be "delivered" to all opposing parties at least 20 days prior to the hearing (25 days if served by mail). [Ca Rules of Court Rule 1613(b)(1)(B)] Such declarations or affidavits are not admissible as a substitute for live testimony, if any other party has, at least 10 days before the hearing, "delivered" to the proponent a written demand that the witness be produced in person to testify. [Ca Rules of Court Rule 1613(b)(2)(C)]

Depositions [Ca Rules of Court Rule 1613(b)(3)]: Depositions of any witness, party or nonparty may be received, subject to any of the objections that may be raised to use of a deposition at trial under Ca Civ Pro § 2025.620. There is, however, no requirement that the deponent be "unavailable as a witness" or that he or she live beyond the distance limitation governing use of depositions at trial.

The proponent must "deliver" to all other parties notice of intent to use the deposition at least 20 days before the hearing (25 days if service by mail). [Ca Rules of Court Rule 1613(b)(3)(A)(ii)] Any other party then has the option of subpoenaing the deponent. In such event, the arbitrator, in his or her discretion, may exclude the deposition, or admit it subject to cross-examination of the witness by the subpoenaing party. [Ca Rules of Court Rule 1613(b)(3)(B)]

The Arbitration Award

It is the arbitrator's duty to decide the law and facts of the case "and make an award accordingly." [Ca Rules of Court Rule 1614(a)(7)] The award "shall determine all issues properly raised by the pleadings, including a determination of any damages . . ." [Ca Rules of Court Rule 1615(a); see *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 270, 11 Cal.Rptr.2d 498, 499, fn. 1--improper for parties to hold back an issue for decision by court] The award should state the full names of the parties for and against whom the award is made. (E.g., "Plaintiff George Jones shall recover \$25,000 from defendant Mary Smith"; rather than merely "Plaintiff is awarded \$25,000 against Defendant.")

The award may include costs as well as damages. But costs cannot exceed those authorized by statute. [Ca Rules of Court Rule 1614(a)(8), 1615(a)] In some courts, the arbitrator simply determines whether costs are recoverable. If no request for trial de novo is filed and judgment is then entered on the award, the court must determine any dispute as to what costs are recoverable or the amount of costs. If the arbitration award makes no mention of costs, and judgment is entered thereon (i.e., no request for trial de novo), the prevailing party may recover its costs by filing a costs memorandum as in civil cases generally. I.e., the prevailing party is not punished for the arbitrator's oversight.

An award for plaintiff that includes "costs" also includes such attorney fees as are authorized by contract (Ca Civil § 1717(a)) or statute. Such fees are recoverable as "costs of suit." [Ca Civ Pro § 1033.5(a)(10)].

A defendant may be subject to costs and interest penalties for failing to accept plaintiff's Ca Civ Pro § 998 demand if the judgment entered on the judicial arbitration award is not "more favorable" to the defendant. Such costs and penalties can be awarded only by the court, not the arbitrator.

The arbitrator need not make any tentative ruling or statement of decision. [Ca Rules of Court Rule 1615(a)(2)]

The arbitrator must file the award within 10 days after conclusion of the hearing. An additional 20 days to file may be granted in unusually lengthy or complex cases, upon application by the arbitrator. [Ca Rules of Court Rule 1615(b)(1)] The arbitrator must serve each party with a copy of the award and file the award together with proof of service on the parties within the time limits stated above. [Ca Rules of Court Rule 1615(b)(1)]

The arbitrator may award an amount in excess of the \$50,000 "amount in controversy" cut-off where the case has been ordered to arbitration by the court. [Ca Civ Pro §§ 1141.26, 1141.16(b)] Likewise, arbitration pursuant to party stipulation can result in an award of any amount; i.e., there is no \$50,000 limit (unless, of course, the parties themselves stipulate to a maximum amount awardable). [Ca Civ Pro § 1141.16(b)]

However, a plaintiff's election to arbitrate is also an election to forfeit recovery in excess of \$50,000. Thus, any award exceeding that amount would be void as beyond the arbitrator's jurisdiction. [Ca Civ Pro § 1141.12(b); Ca Rules of Court Rule 1601(a)(5)]. Nor may plaintiff, after obtaining the maximum award, demand a trial de novo to seek more money.

The arbitration award becomes final if neither party requests a trial de novo within 30 days after the award and proof of service are filed. The court clerk will enter a judgment on the award without further order of court. [Ca Civ Pro § 1141.20(a); Ca Rules of Court Rule 1615(c)(1)] The judgment will have the same force and effect as any other civil judgment and may be enforced accordingly. [Ca Civ Pro §§ 1141.23, 680.010 et seq.]

"Within the time for filing the award, the arbitrator may file and serve an amended award." [Ca Rules of Court Rule 1615(b)(2) (emphasis and parentheses added)]

A party dissatisfied with a judicial arbitration award usually simply demands a trial de novo. But to avoid the risk of costs penalties for a less favorable outcome at the trial de novo, the party may seek a court order setting aside the award before a judgment is entered thereon. [See Ca Civ Pro § 1141.23] Once the clerk has entered judgment on a judicial arbitration award, it is too late to request a trial de novo. A party dissatisfied with the judgment, however, may seek a court order setting aside the judgment. [See Ca Rules of Court Rule 1615(d)]

Trial De Novo

After entry of the arbitration award, any party may demand a trial de novo, both as to the law and the facts. The right must be timely exercised, but otherwise is absolute. "Good cause" or justification for the demand is not required. A party's deliberate refusal to participate in judicial arbitration proceedings does not affect his or her right to a trial de novo, nor justify dismissal of the action.

A trial de novo will be granted only if one or more of the parties files a written request therefor within 30 days after the arbitration award is filed and served. Otherwise, the award becomes final automatically. [Ca Civ Pro § 1141.20; Ca Rules of Court Rule 1615(c)(1) and 1616(a)] A request for trial de novo is valid even if filed before the award is filed.

After a request for trial de novo, the case must be restored to the civil active list for prompt disposition. Insofar as possible, it is entitled to be placed in the same position on the civil active list it would have had if there had been no arbitration in the case. [Ca Civ Pro § 1141.20; Ca Rules of Court Rule 1616(b)] However, it is not the trial court's duty to recalendar the case sua sponte. Plaintiff must notify the court of the date of expiration of the five-year dismissal statute, and request that the trial be scheduled before that date.

If the party requesting a trial de novo does not obtain a result "more favorable in either the amount of damages awarded or the type of relief granted," he or she:

- May not recover costs of suit;
- Must reimburse the court for compensation paid to the arbitrator;
- Must pay the other party or parties all costs specified in Ca Civ Pro § 1033.5;
- Must also pay opposing parties' expert witness costs incurred in preparation or trial of the case. [Ca Civ Pro § 1141.21(a)]

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