

AN ANALYSIS OF THE ARBITRATION RULE OF THE INDIANA RULES OF ALTERNATIVE DISPUTE RESOLUTION

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INTRODUCTION

On November 7, 1991, the Indiana Supreme Court entered an Order effective January 1, 1992, approving and instituting rules of alternative dispute resolution ("ADR") in Indiana. The rules, although recognizing various ADR methods, govern five different ADR procedures: mediation, arbitration, mini hearings, summary jury trials and private judges. This Article will discuss and analyze Rule 3 of the Rules for Alternative Dispute Resolution, providing for arbitration ("ADR Arbitration Rules").

Rule 1.3(B) of the Rules for Alternative Dispute Resolution defines arbitration as a "process in which a neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision."¹ Arbitration cannot be ordered by a court and will only occur under the rules as a result of an agreement between the parties. That agreement by the parties may also provide that the arbitration decision be binding or non-binding.² Once an agreement to arbitrate is reached, the court enters an order and names a panel of three arbitrators from which the parties can, absent an agreement, strike.³ A hearing is scheduled by the arbitrator or the chair of the arbitration panel.⁴ Although traditional rules of evidence need not apply to the presentation of testimony,⁵ the rules of discovery are applicable to the arbitration process and the regular judge of the court retains jurisdiction to rule on discovery matters and other disputes.⁶ If the parties agreed that the arbitration was to be binding, the decision of the arbitrator or the arbitrators is entered as a judgment.⁷ If the arbitration is not binding, and one of the parties disagree with the arbitrator's decision, the parties may proceed to trial.

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1. Rule 1.3(B), *Rules for Alternative Dispute Resolution, in* INDIANA RULES OF THE COURT 169 (West 1993) [hereinafter IND. A.D.R. RULE].

2. *Id.*

3. IND. A.D.R. RULE 3.3.

4. IND. A.D.R. RULE 3.4(A).

5. IND. A.D.R. RULE 3.4(D).

6. IND. A.D.R. RULE 3.4(C).

7. IND. A.D.R. RULE 3.4(E).

I. HISTORICAL BACKGROUND OF THE ADR ARBITRATION RULE

Rule 3 must be read in conjunction with the common law and statutory provisions relating to arbitration which existed prior to the enactment of the ADR Rules. The ADR Arbitration Rules do not repeal or replace either the common law applicable to arbitration, nor the two previously enacted arbitration statutes, Indiana Code section 34-4-1-1 *et seq.*, ("Indiana Arbitration Act") and Indiana Code section 34-4-2-1 *et seq.*, ("Indiana Uniform Arbitration Act").

A. *Common Law of Arbitration*

Common law arbitration and statutory arbitration have coincided in Indiana since its statehood.⁸ At common law, any person competent to enter into a contract could agree to submit a dispute or controversy, or even a difference of opinion, to arbitration.⁹ Common law arbitration, however, had two significant limitations. First, although both existing and future disputes could be submitted to arbitration, the arbitrator's decision was only binding or conclusive as to existing disputes and not future ones.¹⁰ Secondly, under common law arbitration, if no lawsuit was pending, the arbitrator's decision did not become a judgment enforceable in court. Rather, the defaulting party was liable on the bond which each party to the arbitration was required to provide.¹¹ Some of the early arbitration statutes were enacted to address these deficiencies in common law arbitration.

Just as the common law concerning arbitration preceded statehood, so did statutory provisions concerning arbitration. The relationship between territorial and state statutes and the common law of arbitration was discussed in two early Indiana cases. The first case, *Mills v. Conner*,¹² having been "argued and determined in the Supreme Court of Judicature of the State of Indiana at Corydon, May Term, 1818, in the second year of the State,"¹³ set forth in a footnote the following: "The statute 9 and 10 Will. 3, authorizes the making submissions, where no cause is pending, rules of Court, by agreement of the

8. Common law arbitration refers to the cumulative decisions of the Courts of England and the Acts of the English Parliament in aid of that common law, in existence prior to the fourth year of James I, which common law decisions and parliamentary enactments are of a general and not specific or local nature and which are not inconsistent with the Constitution of the United States, the Constitution of the State of Indiana or Acts of the United States Congress or the Indiana Legislature. *Shroyer v. Bash*, 57 Ind. 349, 353 (1877).

9. *Milhollin v. Milhollin*, 125 N.E. 217, 218 (Ind. Ct. App. 1919).

10. *Supreme Council of Order of Chosen Friends v. Forsinger*, 25 N.E. 129, 130 (Ind. 1890).

11. *Titus v. Scantling & Wife*, 4 Blackf. 89, 92 (1835).

12. *Mills v. Conner*, 1 Blackf. 7 (1818).

13. *Id.*

parties. This act puts these submissions on the same footing with those where a cause is pending.”¹⁴

The second case, *Titus v. Scantling & Wife* also discussed the history of arbitration and the relationship between common law and statutory arbitration:

In the earliest periods of the history of that law, we find that any persons, though no suit was pending between them, might agree to submit their matters of difference to arbitrators; and that their agreement for this purpose might be without any writing, or by a writing without seal, or it might be by mutual bonds. If the agreement was by bond, and either party refused to comply with the award, his opponent might sue him on the award or on the bond. (Citation omitted.) We find in the old English books of Reports, previously to any statute on the subject, frequent suits on arbitration-bonds. Those bonds contained no agreement, that the submission should be made a rule of Court. The insertion of such an agreement in the bond, originated with the English statute of 9th and 10th of Will. 3d. The object of that statute was to give to persons, submitting their disputes to arbitration where no suit was pending, the same remedy that the common law gives in cases referred after commencement of a suit. (Citation omitted).¹⁵

B. *The Indiana Arbitration Act*

The Indiana Arbitration Act, now codified at Indiana Code section 34-4-1-1, was enacted in 1852 and has been changed little since that time. The first section of the original Act provided as follows:

All persons, except infants, married women and insane persons, may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them, which might be the subject of a suit at law, except as otherwise provided in the next section, and may agree that such submission be made a rule of any court of record designated in such instrument.¹⁶

The comments to that Act referred to *Mills* and *Titus* and stated:

When a cause is pending it may be referred to arbitration by consent of parties, and such submission made a rule of court. At common law, however, if no suit were pending, and any matter in controversy were submitted to arbitration, such submission could not be made a rule of court; but the party was left to his action on the award or arbitration

14. *Id.* at 8 n.1.

15. *Titus*, 4 Blackf. at 91-92.

16. 2 Revised Statutes 1852, Ch. 3, § 1, p. 227.

bond. The object of the statute is to give the parties the same remedies that the common law gives in cases referred after the commencement of a suit.¹⁷

Although the statute extended common law arbitration by providing that arbitration of disputes not yet in litigation could nevertheless be enforced after award as a judgment (or "rule of any court"), the statute perpetuated the previous deficiency in the common law in that it provided that only existing, and not future, disputes could be submitted to arbitration. As indicated above, section 1 is clear that parties were free to submit to arbitration "any controversy *existing* between them."¹⁸ (emphasis added). As will be discussed below, the Indiana General Assembly adopted the Indiana Uniform Arbitration Act in part to address this deficiency.

The 1852 Indiana Arbitration Act has been amended infrequently, and then not significantly. For example, a 1939 amendment deleted married women from the first sentence of Section 1. The 1852 statute contained 26 sections, most of those remaining unchanged to this date. Section 2 excepts certain real estate matters from the category of cases which can be arbitrated.¹⁹

Section 3 of the 1852 Act, (now codified at Title 34, section 4-1-3 of the Indiana Code) required the parties, at the time of the agreement to arbitrate, to execute mutual bonds to secure performance of the arbitration award.²⁰ Section 3 also provided that the parties must agree to make the agreement or submission a rule of court, thereby enabling the parties to execute either on the judgment created by the award or to institute an action on the bond.²¹ Under the current statute, as in the 1852 Act, either party can appoint or designate a time and place for the arbitrator or arbitrators to meet.²² Witnesses can be required to attend by issuance subpoenas and, unless the parties agree otherwise, the award of a majority of arbitrators is valid.²³

The Indiana Arbitration Act provided that if either party failed to comply with an award, it could be filed in the court named in the submission.²⁴ The award had to be entered of record and a rule granted to show cause before judgment could be entered.²⁵

Upon a rule to show cause, an adverse party was provided with three grounds to object to the rendition of a judgment: that the award was obtained by fraud, that the arbitrators were guilty of misconduct or that the arbitrators

17. 2 Revised Statutes 1852, Ch. 3, § 1, p. 227, cmt.

18. 2 Revised Statutes 1852, Ch. 3, § 1, p. 227.

19. IND. CODE § 34-4-1-2 (1993).

20. IND. CODE § 34-4-1-3 (1993).

21. *Hawes v. Coombs*, 34 Ind. 455, 458 (1870).

22. IND. CODE § 34-4-1-4 (1993).

23. IND. CODE § 34-4-1-8 (1993).

24. Currently codified at IND. CODE § 34-4-1-12 (1993).

25. Currently codified at IND. CODE § 34-4-1-13 (1993).

exceeded their power.²⁶ The 1852 Indiana Arbitration Act also provided, and current law provides today, that any party to a submission can move the court to modify or correct an award on three bases: an evident miscalculation of figures,²⁷ a decision on a matter or matters not submitted to arbitration, and a clearly defective award.

In summary, the 1852 statute (the Indiana Arbitration Act) empowered parties to enter into *irrevocable* contracts to submit *existing* disputes to *binding* arbitration, the awards from which could be entered and enforced as *judgments*. The obvious, and commercially important, deficiency in the Indiana Arbitration Act was that it did *not* allow parties to enter into written agreements to submit *future* disputes to arbitration. This deficiency was addressed by the adoption of the Indiana Uniform Arbitration Act.

II. UNIFORM ARBITRATION ACT

The first draft of a uniform arbitration statute was considered by the National Conference of Commissioners on Uniform State Laws in August of 1954.²⁸ The final draft, called the "Uniform Arbitration Act," was approved by the American Bar Association in 1955.²⁹

Fifteen years elapsed before Indiana adopted the Act.³⁰ Prior to that time, Indiana's businessmen and women were without a significant commercial weapon. Although both at common law and under the Indiana Arbitration Act, parties could agree to submit existing disputes to arbitration, commercial contract provisions requiring *future disputes* between the parties to a transaction or a contract to be submitted to arbitration were not enforceable.

For reasons that are not clear, when the Indiana General Assembly adopted the Indiana Uniform Arbitration Act, the first section of the Uniform Act was changed significantly. The Uniform Act, as approved by the National Conference of Commissioners on Uniform State Laws, provided as follows:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for the revocation of any contract. This Act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].³¹

Indiana changed that section however, as follows:

26. Currently codified at IND. CODE § 34-4-1-16 (1993).

27. Currently codified at IND. CODE § 34-4-1-17 (1993).

28. Pirsig, *Toward a Uniform Arbitration Act*, 9 ARB. J. 115.

29. UNIF. ARB. ACT, 7 U.L.A. 1 (1985).

30. Codified at IND. CODE § 34-4-2-1 (1993).

31. UNIF. ARB. ACT § 1, 7 U.L.A. 5 (1985).

A written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. If the parties to such an agreement so stipulate in writing, the agreement may be enforced by designated third persons, who shall in such instances have the same rights as a party under this chapter. This chapter also applies to arbitration agreement between employers and employees or between their respective representatives (unless otherwise provided in the agreement).³²

No explanation is found for the changing of this language, which, it is submitted, renders nonsensical the first section of the Indiana Uniform Arbitration Act. It must be assumed that the meaning and intent is the same as that of the general Uniform Arbitration Act.

Under the Indiana Uniform Arbitration Act, arbitration is "initiated by a written notice by either party, mailed by registered or certified mail, or delivered to the other party, briefly stating a claim, the grounds for the claim, and the amount or amounts. Issues are joined by a written notice of admissions or denials and counterclaims or set-offs shall also be mailed and delivered."³³ Upon the application of a party demonstrating an opposing party's refusal to arbitrate, the court has the authority under the Indiana Uniform Arbitration Act to order the parties to proceed with arbitration.³⁴ If the opposing party denies the existing agreement to arbitrate, a summary determination of this issue is made by the court without further pleading.³⁵ Parties may apply to the court for a stay of arbitration, demonstrating that no agreement to arbitrate exists. This issue is also to be summarily determined without further pleadings.³⁶

As is true with many aspects of the Indiana Uniform Arbitration Act, the parties are given the opportunity to determine in the arbitration agreement many of the terms and conditions which will guide and bind the parties in the arbitration. Parties have, for example, the right to determine the manner in which the arbitrators are appointed.³⁷ One important provision of the Indiana Uniform Arbitration Act, however, provides that the court has the authority to stay an arbitration proceeding upon a showing that the method of appointment of arbitrators is likely to, or has, resulted in the appointment of arbitrators who are partial or biased.³⁸ If the arbitration agreement does not provide a method

32. IND. CODE § 34-4-2-1(a) (1993).

33. IND. CODE § 34-4-2-2 (1993).

34. IND. CODE § 34-4-2-3(a) (1993).

35. *Id.*

36. IND. CODE § 34-4-2-3(b) (1993).

37. IND. CODE § 34-4-2-4 (1993).

38. IND. CODE § 34-4-2-3(g) (1993).

of appointment of arbitrators, and if the parties cannot agree on any method, the court is given the authority to appoint one or more arbitrators.³⁹

The parties can also provide in the arbitration agreement for the details of the arbitration hearing. If the agreement does not so provide, the arbitrators are required under the Act to appoint a time and place for the hearing.⁴⁰ The Indiana Uniform Arbitration Act makes clear that the arbitrators have the authority to issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence.⁴¹ The arbitrators may also “order depositions to be taken for use as evidence, and not for discovery, if the witness cannot be subpoenaed or is unable to attend the hearing.”⁴²

Upon an award in arbitration, the parties have ninety days after the mailing of the award to apply to the court to vacate the arbitrator’s award.⁴³ The court has the authority to vacate an award when (1) the award was procured by corruption or fraud; (2) the award demonstrates evident partiality; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause shown or refused to hear material evidence; or (5) no arbitration agreement existed.⁴⁴ If the award is not vacated and, after the expiration of ninety days from the date of the mailing of the copy of the award, either party may apply to the court to confirm the arbitrator’s award.⁴⁵ Upon such confirmation, the court shall enter a judgment consistent with the arbitration award and cause the judgment to be docketed as if rendered in an action decided by the court.⁴⁶

In addition to the procedures for vacation of an award, parties may also apply within ninety days after the mailing of a copy of the award for “modifications or corrections” of the award. The court has the authority to modify or correct the award where (1) there was an evident miscalculation of figures; (2) the arbitrators made an award upon a matter not submitted; or (3) the award was imperfect in a matter of form which did not affect the merits of the controversy.⁴⁷

The “court” which is referred to in the Indiana Uniform Arbitration Act is any circuit or superior court in Indiana.⁴⁸ Venue for the application or applications described in the Act shall be made to the court in the county where

39. IND. CODE § 34-4-2-4 (1993).

40. IND. CODE § 34-4-2-6 (1993).

41. IND. CODE § 34-4-2-8(a) (1993).

42. IND. CODE § 34-4-2-8(b) (1993).

43. IND. CODE § 34-4-2-13(b) (1993).

44. IND. CODE § 34-4-2-13(a) (1993).

45. IND. CODE § 34-4-2-12 (1993).

46. IND. CODE § 34-4-2-12 (1993).

47. IND. CODE § 34-4-2-14 (1993).

48. IND. CODE § 34-4-2-17 (1993).

the adverse party resides or has a place of business; or, if he has no residence or place of business in the state, to the court of any county.⁴⁹

The Indiana Uniform Arbitration Act provides for limited appeals. Appeals may be taken from (1) an order denying an application to compel arbitration; (2) an order granting application to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to the Act.⁵⁰ All appeals shall be taken in the same manner and to the same extent as orders or judgments in any civil action.⁵¹ It is against this statutory and common law arbitration background that the ADR Arbitration Rule must be examined.

III. ADR ARBITRATION RULE

A. Relationship of Arbitration Under the Common Law, the Indiana Arbitration Act, the Indiana Uniform Arbitration Act and the ADR Arbitration Rules

Of the five ADR methods governed by the ADR Rules (mediation, arbitration, mini-trials, summary jury trials and private judging), only mediation and mini-trials can be ordered by a court without the agreement of all parties.⁵² The others, including arbitration, cannot be ordered *sua sponte*, but must result from an agreement of all parties.⁵³ Indiana, therefore, does not have "mandatory arbitration."⁵⁴

Arbitration under the ADR Arbitration Rules may occur if a lawsuit has already been instituted and if all parties to the lawsuit agree to arbitration. In contrast, under the Indiana Uniform Arbitration Act, if the parties to the dispute had entered into a contract or agreement to submit all future disputes to arbitration before the dispute actually arose then arbitration of the subsequent dispute would occur under the Indiana Uniform Arbitration Act and a general civil suit would not have been filed (unless the parties waived arbitration).⁵⁵

As stated, the primary purpose of the 1852 statute, The Indiana Arbitration Act, was to provide enforcement by judgment for arbitration awards entered in

49. IND. CODE § 34-4-2-18 (1993).

50. IND. CODE § 34-4-2-19 (1993).

51. IND. CODE § 34-4-2-19 (1993).

52. IND. A.D.R. RULE 2.2., 4.2.

53. IND. A.D.R. RULE 3.1.

54. Unless, of course, the parties, prior to the lawsuit, had entered into an agreement to arbitrate, enforceable under the Uniform Arbitration Act.

55. *Slutsky-Peltz Plumbing & Heating Co., Inc. v. Vincennes Community Sch. Corp.*, 556 N.E.2d 344 (Ind. Ct. App. 1990) (parties to a previously made arbitration agreement could presumably waive this contractual obligation, begin litigation under the general civil procedure and *then* agree to submit the matter to arbitration under the ADR Court Rules).

arbitration conducted where *no lawsuit was pending*.⁵⁶ At common law, if a lawsuit was pending, the parties could agree to submit the dispute to arbitration and the result would be enforceable as a judgment.⁵⁷

Section 22 of the 1852 statute provided (and provides today) as follows:

If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matters in controversy to certain persons mutually chosen by them in open court.⁵⁸

While it appears that this section would allow parties to agree *after* a law suit is filed to submit the matter to arbitration, it is probably limited to submission of the case to *referees* and not to arbitration. The 1852 Act has “referees” as a headnote for section 22 and such an interpretation is consistent with *Francis v. Ames*,⁵⁹ in which the court held that the Code of 1852 made no provision for the submission of pending lawsuits to arbitration. Rather, an agreement attempted under the 1852 code will be treated as and controlled by common law arbitration principles.⁶⁰ Such an agreement under this statute could not be revoked by the parties without the approval of the trial judge.⁶¹

Even though the right to submit issues in pending litigation existed at common law, the ADR Arbitration Rules do provide one significant difference. If the parties in litigation, at common law, agreed to subject issues to arbitration, *either* party could *revoke* the agreement to arbitrate at any time before the arbitration award is actually rendered.⁶² Clearly, under Rule 3.1 of the ADR Arbitration Rules, the agreement to arbitrate could only be revoked by consent of both parties and, probably, only with the approval of the court.⁶³

In summary, several observations can be made about the relationship between common law arbitration, the Indiana Arbitration Act, the Indiana Uniform Arbitration Act, and the ADR Arbitration Rules. First, if the parties to a dispute had a pre-existing contractual obligation to submit disputes arising in the future to arbitration, the arbitration would proceed pursuant to the Indiana Uniform Arbitration Act. Common law and the Indiana Arbitration Act did not provide for the enforcement of agreements to arbitrate future disputes. Secondly, if the parties to a dispute did not have a pre-existing agreement to arbitrate, and no lawsuit was on file, the parties could agree to submit their dispute to

56. *Titus v. Scantling & Wife*, 92 Blackf. 89, 92 (1835).

57. *Id.*

58. Currently codified at IND. CODE § 34-4-1-22 (1993).

59. 14 Ind. 251, 252 (1860); *see also* *Daggy v. Cronnelly*, 20 Ind. 474 (1863).

60. *Francis v. Ames*, 14 Ind. at 253.

61. *Heritage v. State ex rel. Crim*, 88 N.E. 114, 116 (Ind. Ct. App. 1909).

62. *Shroyer v. Bash*, 57 Ind. 349, 353 (1877); *Grand Rapids & I. Ry. Co. v. Jaqua*, 115 N.E. 73, 76 (Ind. Ct. App. 1917); *Dilks v. Hammond*, 86 Ind. 563, 566 (1882).

63. IND. A.D.R. RULE 3.1.

arbitration under common-law or under the Indiana Arbitration Act. At common law, however, the agreement could be revoked by either party prior to an award and, upon a default, the only remedy was on the arbitration bond. The parties could proceed under the Indiana Arbitration Act and, although a bond would still be required, regular judgment enforcement remedies would be available. The ADR Arbitration Rules have no application (as of this date) to disputes where no litigation is pending. Thirdly, if the parties did not have pre-existing contracts to arbitrate and a lawsuit is already pending, the parties could proceed to arbitration *either* under the common law or under the ADR Arbitration Rules. In such instances, however, the discussion of common law arbitration is primarily of academic interest as parties can be expected to generally proceed under the ADR Arbitration Rules.

B. Initiation of Arbitration Under the ADR Arbitration Rules

Under Rule 3.1 of the ADR Arbitration Rules, arbitration is initiated by the *filing* of an agreement to arbitrate ("Arbitration Agreement").⁶⁴ Clearly, the agreement requires the consent of all parties but it is not as clear whether the trial court can refuse to accept an Arbitration Agreement. Rule 3.1 provides that upon *approval*, the Arbitration Agreement "shall be noted on the Chronological Case Summary of the Case and placed in the Records of Judgments and Orders for the court."⁶⁵ Presumably the "approval" required is that of the trial court. The scope of the trial court's discretion in granting approval or non-approval for Arbitration Agreements is not specified but it is submitted that such discretion should be limited; perhaps limited to the grounds provided in ADR Court Rule 1.4.G.⁶⁶ That provision controls the application of the ADR Rules and states that the rules (including the arbitration rule) do not apply to "matters in which there is very great public interest, and which must receive an immediate decision in the trial and appellate courts."⁶⁷

One interpretation of the ADR Rules, therefore, is that if the parties agree to submit issues to arbitration, that agreement should be binding on the trial court unless the case involves issues of public interest requiring immediate decision. Another possible interpretation of Rule 3.1 is that the trial court has the discretion to approve or disapprove certain aspects of the Arbitration Agreement. Rule 3.1 provides that the parties can, by their Arbitration Agreement, designate the procedural rules to be followed during the arbitration. The trial court may

64. IND. A.D.R. RULE 3.1.

65. *Id.*

66. IND. A.D.R. RULE 1.4(G).

67. IND. A.D.R. RULE 1.4(G). This provision was added by the Indiana Supreme Court as it was not in the draft of the "Proposed Rules for Accelerated Dispute Resolution" promulgated by the Supreme Court Committee on Rules of Practice and Procedure, submitted for public hearing on July 15, 1991.

be empowered under Rule 3.1 to approve the agreement to arbitrate but reject certain aspects of the agreed procedural provisions.

Another uncertainty inherent in ADR Arbitration Rule 3.1 is whether two or more parties, in multi-party lawsuits, can agree to arbitrate issues unique to them, without the agreement of the remaining parties. It is submitted that because arbitration can be limited to certain issues, parties to a cross-claim should be free to submit that cross-claim to arbitration even over the objection of other parties.

C. Arbitration Agreement

The ADR Arbitration Rules require that the parties enter into a *written* Arbitration Agreement and that the agreement be *filed* with the trial court.⁶⁸ Because Rule 3.1 does not require signatures of the parties, the parties' attorneys can presumably sign the Arbitration Agreement.⁶⁹

The ADR Arbitration Rules are extraordinary in that they allow the parties to make the most fundamental decisions concerning the arbitration process. The parties can decide:

1. whether the arbitration process is *binding or non binding*;
2. whether *all or part* of the issues in the case will be arbitrated;
3. whether *one or more* arbitrators shall decide the case;
4. what *procedural rules* are to be followed during the mediation process.⁷⁰

Of these, the right to determine if the arbitration is binding or not binding is probably the most significant. As was indicated above, the original thrust of the ADR rules proposed by the initial committee was for "non-binding" arbitration; non-binding in the sense that either party could reject the arbitration amount or result and proceed to a trial *de novo*. An early proposal of the committee working on the ADR rules states: "The Committee believes that a form of non-binding arbitration, albeit with appeal disincentives, would be an effective alternative to litigation in many instances in Indiana."⁷¹

Although this "Michigan Model" was not adopted and a mediation-focused rule emerged, Rule 3 reserves to the parties the opportunity to proceed in the manner originally contemplated by the initial committee. "Appeal disincentives" of attorney's fees and costs as sanctions for parties rejecting non-binding arbitration awards and failing to do better at trial were not retained. However,

68. IND. A.D.R. RULE 3.1.

69. IND. A.D.R. RULE 3.1. Preferred practice would, however, be to have the parties themselves sign the Arbitration Agreement. Such signatures would preclude questions concerning authority should problems arise or subsequent counsel become involved.

70. IND. A.D.R. RULE 3.1 (emphasis added). As will be discussed below, this right is limited by specific requirements.

71. Proposal of the Young Lawyer's Section of the Indiana State Bar Association for an Alternative Form of Dispute Resolution in Indiana (on file with the author) (1988).

studies and reviews of the experience of other states with similar statutes demonstrate that a high percentage of parties accept the non-binding evaluation or arbitration "award" and do *not* seek a trial de novo.⁷² In one study, for example, during the ten years of a court-annexed arbitration program in the Eastern District of Pennsylvania, only 388 of 17,006 cases required a trial de novo.⁷³

In mediation, the neutral third party, the mediator, will generally be reluctant to state specifically his or her opinion as to the outcome of a case. Parties, therefore, who perceive a value in a mediator's opinion, but would like to have the safety net of the trial de novo, will find non-binding arbitration to be of value.

The right to determine whether all or part of the issues in a case should be arbitrated and the right to select the number of arbitrators are also significant for the parties.

Although Rule 3.1 provides that the parties may include in the Arbitration Agreement the procedural rules to be followed, the scope and extent of that right is limited by the specific procedural requirements of the remaining sections of Rule 3. Rule 3.4, for example, provides that upon accepting the appointment to serve, the arbitrator or chair of the panel "shall meet with all attorneys of record to set a time and place for any arbitration hearing."⁷⁴ Other provisions of the rule are subject to an "unless otherwise agreed by the parties" condition; one relating to the amount of the fee⁷⁵ and the other relating to whether papers must be filed and exchanged.⁷⁶

The extent to which the parties can define its procedural aspects of the arbitration process will be discussed in the context of the remaining sections of the ADR Arbitration Rules.

D. Case Status During Arbitration

Rule 3.2 provides that cases submitted to arbitration "shall remain on the regular docket and trial calendar of the court."⁷⁷ If the parties have agreed to binding arbitration on all issues, then the case shall be removed from the trial calendar but remain on the regular docket. The last sentence of Rule 3.2, which provides that the court remains available during arbitration "to rule and assist in any discovery or pre-arbitration matters or motions,"⁷⁸ would seem to contradict a full reading or full meaning of remaining on the "regular docket." Rule 1.7

72. Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1989).

73. *Id.* at 220.

74. IND. A.D.R. RULE 3.4.

75. IND. A.D.R. RULE 3.3.

76. IND. A.D.R. RULE 3.4.

77. IND. A.D.R. RULE 3.2.

78. *Id.*

provides that “during the course of any alternative dispute resolution proceeding, the case remains within the jurisdiction of the court” and that, “[f]or good cause shown and upon hearing,” the court can terminate any ADR process.⁷⁹ It is submitted that Rule 3.2 was not intended to be a limitation on Rule 1.7 and, even in binding arbitration, for “good cause” it can be terminated.

What is the significance of a case remaining on the “regular docket” of a court during an arbitration proceeding? One interpretation is that by remaining on the regular docket, cases in arbitration remain subject to other rules and procedures governing all civil cases. Rules concerning time, pleadings, third-party practice, dispositive motions, summary judgments, pre-trial, “lazy judge” rules, and all other such rules could arguably be applicable. The other interpretation, supported by the last sentence of Rule 3.2, is that the court’s only power during arbitration is to remove the case under Rule 1.7, or to rule on discovery or pre-arbitration matters or motions.

E. Assignment of Arbitrators

Rule 3.3 anticipates that arbitrators will be selected from lists of “lawyers engaged in the practice of law in the county who are willing to serve as arbitrators.”⁸⁰ The rule requires that each court maintain a list of such attorneys and that the parties can select one or more arbitrators from the court listing *or the listing of another court in the state*.⁸¹

The reality, however, is that (as of the date of this writing) few courts in Indiana maintain a list of arbitrators. Until such lists are common, the parties should select the person or persons they believe competent to act as arbitrator or arbitrators and seek an order from the court approving that selection. If the parties cannot agree on an arbitrator, they can perhaps agree on a panel and agree to strike alternatively from that panel and submit the name remaining to the court for approval.

The court’s order approving the arbitrator and decreeing that the selection and arbitration is pursuant to Rule 3 is important to ensure that the immunity, confidentiality and other rule provisions will be applicable. If the parties have agreed that the arbitration is to be conducted by a panel, they can agree on the panel members, not to exceed three.⁸² If the parties have agreed to a panel but cannot agree on its members, Rule 3.3 provides that each party shall select one arbitrator and the *court* shall select the third. Until courts have developed lists, this process will be easier if the parties agree on the arbitrators, or at least,

79. IND. A.D.R. RULE 1.7.

80. IND. A.D.R. RULE 3.3.

81. *Id.* (emphasis added).

82. *Id.*

stipulate to a selection and striking process. If a panel of arbitrators is used, the arbitrators are required to select among themselves a chair of the panel.⁸³

One question raised, but not answered, by the ADR court rules, is whether the decision of a panel of arbitrators must be unanimous or majority. At common law, if the agreement of the parties was silent, the award of the arbitrators had to be unanimous.⁸⁴ The Indiana Arbitration Act provides that the award of a majority of the arbitrators is valid, unless otherwise provided in the submission or agreement.⁸⁵ Similarly, the Indiana Uniform Arbitration Act provides that unless otherwise provided by the agreement, the powers of the arbitrators may be exercised by a majority.⁸⁶ Although courts will probably rule that a majority of arbitrators can act, the parties should nevertheless cover this issue in their Arbitration Agreement to avoid problems.

There is no specific provision indicating that those parts of the Indiana Arbitration Act and the Indiana Uniform Arbitration Act not in conflict with the ADR Rules apply to arbitrations under the ADR Arbitration Rules. The ADR Court Rules do, however, encourage the parties "use" the provisions of those rules to the extent possible and appropriate.⁸⁷ Also, in a recent Indiana Supreme Court decision, the court demonstrated a willingness to intertwine provisions of the acts by citing the preamble of the ADR Rules in a case involving an arbitration brought under the Indiana Uniform Arbitration Act.⁸⁸

F. Arbitration Procedures

1. Discovery.—Perhaps the most significant provision of the ADR Arbitration Rules is Rule 3.4(C). That rule specifically provides that the discovery rules of the Rules of Civil Procedure apply to arbitration proceedings.⁸⁹ Rule 3.2 provides that the trial court retains jurisdiction to rule on discovery matters.⁹⁰

By providing that discovery rules are applicable to arbitration, the Indiana Supreme Court has significantly changed the manner in which arbitration will proceed, as well as how it will be perceived. The right to take depositions and to require the production of documents will provide many Indiana trial lawyers with the "security" or the comfort level necessary for an agreement to arbitrate. At the same time, discovery in the arbitration process will move arbitration closer to a more "formal" process. Robert Coulson, the long-time president of

83. *Id.*

84. *Byard v. Harkrider*, 9 N.E. 294 (Ind. 1886); *Baker v. Farmbrough*, 43 Ind. 240 (1873).

85. IND. CODE § 34-4-1-8 (1993).

86. IND. CODE § 34-4-2-5 (1993).

87. IND. A.D.R. RULE 3.4(B).

88. *School City of East Chicago v. East Chicago Fed'n of Teachers*, 622 N.E.2d 166, 168 (Ind. 1993).

89. IND. A.D.R. RULE 3.4(C).

90. IND. A.D.R. RULE 3.2.

the American Arbitration Association, has observed the arbitration process develop over the last several decades. He has seen arbitration evolve from a relatively simple and uncomplicated process involving primarily the participation of the parties, to one of increasing complexity and attorney participation. "Additional procedures are being engrafted upon the relatively informal arbitration process, usually at the suggestion of attorneys. To the extent that arbitration includes such procedures, it becomes more expensive, more like litigation."⁹¹

Although Coulson submits that the American Arbitration Association encourages parties to reduce the cost of arbitration, it also believes that the parties should have the "right to decide whether their arbitration will be informal or will incorporate additional optional procedures."⁹²

2. *Evidence in Arbitration—Submission of Materials.*—ADR Arbitration Rule 3.4(D) provides that traditional rules of evidence "need not apply with regard to the presentation of testimony."⁹³ Rule 3.4(B) provides that the parties to the arbitration, unless they agree otherwise in the Arbitration Agreement, are required to file with the arbitrator or the chair of the arbitration panel (and exchange among all attorneys of record) all documents that the parties desire to be considered in the arbitration process.⁹⁴ The documents or evidence are to be exchanged, unless otherwise agreed, fifteen days prior to any hearing date. Although the ADR Arbitration Rules do not limit the type or nature of documents or evidence which can be submitted at the arbitration proceeding, Rule 3.4(B) lists medical records, bills, records, photographs and other materials supporting the claim of a party as the type of documents that can be introduced.

As indicated, the parties in the Arbitration Agreement can provide whether the arbitration is to be binding or non-binding. There appear to be differences in the manner in which the evidence will be received in non-binding and binding arbitrations. Rule 3.4(b) provides that in the case of *binding* arbitration, parties can object to the admissibility of documents under traditional rules of evidence.⁹⁵ This would seem to indicate that in non-binding arbitration proceedings, the parties have no such right of objection. This is consistent with Rule 3.4(d) which provides that traditional rules of evidence *need not* apply with regard to the presentation of testimony. It is not clear whether the parties are to agree as to whether the traditional rules of evidence apply or whether that matter is left to the discretion of the arbitrator or arbitrators. Better practice would seem to indicate that the parties should cover this topic also in the Arbitration Agreement.

91. Robert Coulson, "Away from Informality" *Arbitration and the Law*, 1992-93 AAA GENERAL COUNSEL ANNUAL REPORT 17.

92. *Id.* at 18.

93. IND. A.D.R. RULE 3.4(D).

94. IND. A.D.R. RULE 3.4(B).

95. *Id.*

There is one significant limitation on the objection to documentary evidence contained in Rule 3.4(B). If the parties intend to object to any document, such objection shall be filed with the arbitrator at least five days prior to the hearing or such objections will be deemed waived.⁹⁶ In non-binding arbitration, because no objections are contemplated, this waiver provision will have no effect.

3. *Presentation of Witnesses at Arbitration Hearing.*—The ADR Arbitration Rules appear to give to the arbitrator or arbitrators the discretion as to whether witnesses may be called by the parties.⁹⁷ The Rules provide, "as permitted by the arbitrator or arbitrators, witnesses may be called."⁹⁸ Arguably, it would be more likely for witnesses to be allowed in binding arbitrations than non-binding. Thirty days prior to arbitration hearing, each party is required to file a list of witnesses that will be called to testify.⁹⁹ In addition to "live" witnesses, the Rules anticipate that the parties can introduce or use depositions and reports. Presumably, the reference to reports would include expert reports. In the list of witnesses (which are to be filed thirty days prior to hearing), the parties are to designate whether individuals will be called in person, by deposition or by written report.¹⁰⁰ Lawyers should remember that they need to object, at least five days prior to the hearing, to any deposition or written report which the other party has indicated is intended to be introduced.¹⁰¹ The failure to object within that period of time may constitute a waiver under the provisions of Rule 3.4(B). Although the provisions concerning the applicability of discovery rules indicates a move to a more formal arbitration proceeding, the provisions of 3.4(B) granting to the arbitrator the discretion as to whether witnesses can be presented live at the hearing, together with the provision allowing oral presentations of the facts supporting a party's position, would seem to be a counter move to a more traditional and more informal arbitration process.

Under Rule 3.4(D), it is clear that the attorneys have the right to summarize orally what they believe to be the factual basis of a party's position. The limitation on this right is the provision that the representatives or attorneys of the respective parties must be able to substantiate whatever statements they make or whatever representations are made "as required by the Rules of Professional Conduct."¹⁰² Although presumably all Rules of Professional Conduct are applicable, Rule 3.3 would seem to be specifically applicable. That Rule provides that an attorney shall not knowingly make a false statement of a

96. *Id.*

97. IND. A.D.R. RULE 3.4(D).

98. *Id.*

99. IND. A.D.R. RULE 3.4(C).

100. *Id.*

101. IND. A.D.R. RULE 3.4(B).

102. IND. A.D.R. RULE 3.4(D).

material fact or law to a tribunal.¹⁰³ Presumably, in the case of the arbitration, the arbitrator would be considered a tribunal. Further, Rule 3.3 prohibits a lawyer from offering evidence that the lawyer knows to be false.¹⁰⁴

4. *Hearing.*—Upon accepting the appointment to serve, the arbitrator or the chair of the arbitration panel is required to meet with all attorneys of record to set a time and place for an arbitration hearing.¹⁰⁵ Because of the use of the word "shall" in Rule 3.4(A), it is not clear that this initial meeting can be waived. It is submitted, however, that a telephonic conference would hopefully be considered to be in compliance with the Rule. Again, the parties should cover this issue in their Arbitration Agreement.

The location of the arbitration hearing is also a subject matter for the parties' Arbitration Agreement. In the absence of such an agreement, the place of the hearing is in the discretion of the arbitrator or chair of the arbitration panel. The Rules do provide that courts are encouraged to allow access to regular courtroom facilities when use is not anticipated.¹⁰⁶ Clearly, arbitrations can be held anywhere that the parties and the arbitrators find reasonable, including law office conference rooms, public meeting rooms and other such facilities.

The Rule specifically provides that arbitration proceedings "shall" not be open to the public.¹⁰⁷ Presumably, part of the reason for a closed hearing is the fact that arbitration proceedings are considered to be settlement negotiations and subject to the same confidential restrictions as mediation proceedings.¹⁰⁸ Any evidence tending to indicate the willingness to accept or offer any valuable consideration to settle a claim is not admissible to prove liability for or in validity of the claim or its amount.¹⁰⁹ Further, evidence of conduct or statements made during the arbitration process is not admissible in any subsequent proceeding.¹¹⁰ Clearly, the confidentiality provisions and the provision requiring arbitration proceedings to be closed to the public are in part necessitated by the fact that the arbitration process may not dispose of all the issues. In cases in which the parties have agreed to non-binding arbitration, subsequent proceedings are clearly a possibility.

103. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

104. *See also* Comment, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3: However, an assertion purporting to be on the lawyer's own knowledge, as in an Affidavit by the lawyer, or in a statement in open court, may properly be made only when the lawyer knows the assertion is true, or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

105. IND. A.D.R. RULE 3.4(A).

106. *Id.*

107. IND. A.D.R. RULE 3.4(D).

108. *Id.*

109. *Id.*

110. *Id.*

5. *Confidentiality*.—Although Rule 3.4 provides that arbitration proceedings are to be considered settlement negotiations, there are important restrictions on the confidentiality provisions. First, using Federal Rule of Evidence 408 as a reference, it should be noted that that rule only protects offers of compromise regarding the "validity or amount" of a "disputed" claim.¹¹¹ Further, Rule 3.4 is clear that it does not preclude the exclusion of any evidence otherwise discoverable merely because it was mentioned or presented during the course of the arbitration process. This may prove to be a difficult rule to interpret and enforce. For example, in a non-binding arbitration hearing, the parties can be expected to present substantially all of the evidence that they believe to be relevant and necessary to prove their claims or defenses. Clearly, this same evidence would be presented at any subsequent trial, should the parties reject the arbitration determination. It is submitted that Rule 3.4 should be interpreted to prohibit parties from introducing at a subsequent trial or any subsequent legal proceeding, evidence of what any witness or party did or said during the arbitration process. If, for example, a party in an arbitration hearing testified that he or she told a company accountant that the funds were placed in an escrow account in the local bank, the adverse counsel would be unable to ask at a subsequent hearing or trial whether the statement was made. That question would be improper under Rule 3.4(D). However, Rule 3.4 does not preclude the introduction of evidence which is otherwise discoverable. Therefore, adverse counsel in the hypothetical situation would be able to ask the witness or party at a subsequent hearing whether he or she told the accountant that funds were placed in a local bank. If the witness answered in the negative, the impeaching evidence could not be used. However, the adverse party would be entitled to call the accountant independently to testify about the conversation and would also be able to present testimony of bank records or other documentation independently, showing the funds being placed in the bank. The mere fact that a party learns of a fact during an arbitration hearing, does not preclude that party from obtaining other, independent evidence to present at a subsequent hearing. Also, Rule 3.4 specifically provides that it does not require exclusion of evidence which is offered for another purpose, such as proving bias or prejudice of a witness or in negating a contention of undue delay.¹¹²

G. *Pre-Arbitration Brief*

Five days prior to the arbitration hearing, each party *may* file with the arbitrator or chair a pre-arbitration brief.¹¹³ The brief should set forth the factual and legal positions concerning the issues being arbitrated.¹¹⁴ If filed,

111. FED. R. EVID. 408.

112. IND. A.D.R. RULE 3.4(D).

113. IND. A.D.R. RULE 3.4(B).

114. *Id.*

Rule 3.4(D) provides that the arbitration briefs are to be served upon the opposing party or parties. Further, the parties in the arbitration agreement can alter the filing deadlines for the briefs.¹¹⁵

H. Arbitration Determination

The ADR Arbitration Rules provide that the arbitrator or chair shall file a written determination or award within twenty days after the hearing.¹¹⁶ The filing shall be made in the pending litigation and a copy of the determination or award is to be served on all parties participating in the arbitration.¹¹⁷

Clearly, significant differences occur depending upon whether the arbitration is binding or non-binding. If the parties had agreed that the arbitration was binding as to all issues, the determination or award is to be entered by the court as a judgment.¹¹⁸

If the arbitration was binding on part of the issues, but not all, the court shall file and accept the arbitrator's award or determination as a "joint stipulation by the parties" and proceed with the litigation on the remaining issues.¹¹⁹

If the arbitration was non-binding on any or all issues, each party is required to affirmatively reject (in writing) the arbitration determination or award within twenty days from the filing of the written determination.¹²⁰ If the arbitration award or determination is not rejected within that twenty day period, the award or determination becomes binding and shall be entered as a judgment, if it is on all of the issues or accepted as a joint stipulation if on part of the issues.¹²¹

In the event that a non-binding arbitration determination is rejected, all documentary evidence introduced at the arbitration is to be returned to the parties and the determination and acceptances and rejections sealed and filed in the case file.¹²²

I. Arbitrability of Punitive Damages

The Indiana Uniform Arbitration Act provides that the fact that the relief granted was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm an arbitration award.¹²³ Indiana courts have nevertheless held that arbitrators may not award punitive damages.¹²⁴ These decisions are based upon the public policy that the

115. *Id.*

116. IND. A.D.R. RULE 3.4(E).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. IND. CODE § 34-4-2-13(a) (1993).

124. *School City of East Chicago v. East Chicago Fed'n of Teachers Local 511*, 422

underlying purpose of punitive damages is to deter future misconduct and punish wrongdoers and not to compensate parties for damages or injuries received. Because, prior to the ADR Rules, arbitration arose only out of contractual relationships, Indiana courts held that parties could not contract to benefit from or to be penalized by punitive damages.

There is, however, an important distinction between common law and statutory arbitration and arbitration under the ADR Arbitration Rules. Common law arbitration, arbitration under the Indiana Arbitration Act and under the Indiana Uniform Arbitration Act each required a contract, either written or oral. The contract or agreement in ADR arbitration arises *after* a lawsuit has already been filed. To the extent that claims for punitive damages are at issue in the existing litigation at the time of the Arbitration Agreement, it would appear that the parties could agree to arbitrate those issues. In other words, even though parties to a dispute cannot agree *in advance* of a lawsuit to arbitrate issues of punitive damages, they may agree to submit issues of punitive damages *already existing* in a lawsuit to arbitration under the ADR Arbitration Rules.¹²⁵ If Indiana courts adopt this interpretation and allow the arbitration of punitive damage claims, the arbitrator's discretion and authority under the ADR Rules is vast.

J. Scope of Arbitrator's Authority

Although the issues which the arbitrator could resolve at common law and under statutory arbitration were limited to those specified in the arbitration agreement, the arbitrator had wide discretion in connection with the manner in which he or she decided those issues.¹²⁶ Prior to the ADR Arbitration Rules, Indiana courts joined courts of other jurisdictions in granting to arbitrators wide discretion in the remedies and results that arbitrators could reach. The arbitrators were not restricted by provisions of substantive law but rather could exercise a general sense of equity or fairness.¹²⁷

The scope of authority of arbitrators under the ADR Arbitration Rules is delineated both by the issues framed in the lawsuit and by the Arbitration Agreement. Parties to litigation can agree to submit to arbitration not only all the issues in the lawsuit but also issues between them which might not have been

N.E.2d 656 (Ind. Ct. App. 1981); *Underwriting Members of Lloyd's of London v. United Home Life Ins. Co.*, 549 N.E.2d 67 (Ind. Ct. App. 1990), adopted 563 N.E.2d 609 (Ind. 1990).

125. See also Note, *Punitive Damages in Arbitration: The Second Circuit on a Collision Course with the U.S. Supreme Court*, 8 OHIO ST. J. ON DISP. RESOL. 385 (1993); E. Allan Farnsworth, *Punitive Damages in Arbitration*, 20 STETSON L. REV. 395 (1991).

126. *Gary Teachers Union, Local 4 v. Gary Com. Sch. Corp.*, 512 N.E.2d 205; *Int'l Bhd. of Elec. Workers, Local 1400 v. Citizens Gas & Coke Util.*, 428 N.E.2d 1320 (Ind. Ct. App. 1981); IND. CODE § 34-4-2-13(a)(5) (1993).

127. *School City of E. Chicago, Indiana v. East Chicago Fed. of Teachers, Loc. 511*, 422 N.E.2d 656 (Ind. Ct. App. 1981).

included within the scope of the litigation. The arbitrator has the discretion under the ADR Arbitration Rules (as existed at common law and under prior statutory arbitration) to resolve the issues in a manner that the arbitrator decides is "equitable," even if that manner is not necessarily within the confines or restrictions of substantive law provisions. Although this issue is not specifically addressed in the ADR Arbitration Rules, it is submitted that the case law which developed under the common law and statutory arbitration should be of guidance. Under those decisions, arbitrators are *not* restricted to remedies and relief allowed by substantive law provisions. When interpreting the Indiana Uniform Arbitration Act, Indiana courts have consistently held that the fact that the arbitrator did not "follow the law" is not necessarily grounds for reversal or challenge of the award.¹²⁸

K. Subpoenas

ADR Arbitration Rule 3 does not make any provision for the issuance of subpoenas. Presumably, the provisions of the Indiana Arbitration statute and the Indiana Uniform Arbitration Act will be applicable. Again, Rule 3.4(B) specifically provides that the parties are "encouraged to use the provisions of Indiana's Arbitration Act¹²⁹ and the Uniform Arbitration Act¹³⁰ to the extent possible and appropriate under the circumstances."¹³¹ Although it is not clear whether this reference is limited to the area concerning submissions of materials (the area in which the reference is made) or whether the reference is more broad, it can be argued that the non-contradictory provisions of the two previously existing statutes should be applicable to ADR arbitration.

The Indiana Arbitration Act provides that parties may be required to attend before hearings arbitrators upon the issuance of subpoenas issued by any justice of the peace on behalf of either party.¹³² The Indiana Uniform Arbitration Act also provides that arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence.¹³³ Because the right to present testamentary evidence in arbitration could be illusory without subpoena power, it is presumed that the Indiana Supreme Court will provide access to pre-existing statutes providing the power to issue subpoenas in arbitrations.

128. *Id.* As indicated, IND. CODE § 34-4-1-13, which provides the grounds for vacating an arbitration award, specifically provides that the fact that the relief could not have been granted by a court of law or equity would not be grounds for vacating or refusing to confirm the award.

129. IND. CODE § 34-4-1-1, *et seq.*

130. IND. CODE § 34-4-2-1, *et seq.*

131. IND. A.D.R. RULE 3.4(B).

132. IND. CODE § 34-4-1-7 (1993).

133. IND. CODE § 34-4-2-8(a) (1993).

*L. Post Determination Proceedings: Appeals from
ADR Arbitration*

The ADR Arbitration Rules do not make any provision for appeals or post-determination proceedings. Clearly, if the parties have elected non-binding arbitration, the parties will either accept the arbitration determination or proceed with the litigation.¹³⁴ The above cited rule provision encouraging the parties to "use" the previous statutes would support an argument that the "appellate" provisions of the prior arbitration statutes will be applicable to ADR Arbitration.

One obstacle to this interpretation is that ADR Arbitration Rule 3.4(E) provides that the arbitration award or determination shall be made within 20 days after the hearing and, that after the rendering of the award, "the court shall enter judgment on the determination."¹³⁵ In contrast, the Indiana Uniform Arbitration Act specifically provides that judgment should *not* be entered by the court until at least ninety days after the rendering of the arbitration award.¹³⁶ During this ninety day waiting period, parties have the right to file either an application to vacate the award or an application to modify or correct an award.¹³⁷ Under the Indiana Uniform Arbitration Act, after the expiration of the 90 days and after the entry of judgment, parties then have limited rights of appeals. Appeals can be taken from:

- 1) an order denying an application to compel arbitration;
- 2) an order granting an application to stay arbitration;
- 3) an order confirming or denying confirmation of an award;
- 4) an order modifying or correcting an award;
- 5) an order vacating an award without directing a rehearing; or
- 6) a judgement or decree entered pursuant to the UAA.¹³⁸

The appeals from the Indiana Uniform Arbitration Act awards are to be taken in the manner and to the same extent as any civil action.¹³⁹

One of several conclusions could be reached in attempting to reconcile the provisions of the Indiana Uniform Arbitration Act and the Indiana ADR Arbitration rule provisions: First, it could be argued that even though the ninety day waiting period of the Indiana Uniform Arbitration Act is not contained in the ADR Arbitration Rules, such a period should be presumed. The ADR Arbitration Rules do not state *when* the court shall enter a judgment after an award. Under such an interpretation, the parties to a binding ADR Arbitration proceeding would have ninety days in which to file the application for vacation

134. Conceivably, appeal issues could be raised if a party intends, but fails, to reject the arbitration award within the 20 days period.

135. IND. A.D.R. RULE 3.4(E).

136. IND. CODE § 34-4-2-12 (1993).

137. IND. CODE § 34-4-2-13 (1993); IND. CODE § 34-4-2-14 (1993).

138. IND. CODE § 34-4-2-19(a)(1)-(6) (1993).

139. IND. CODE § 34-4-2-19(b) (1993).

or modification contemplated by the Indiana Uniform Arbitration Act. The second interpretation which could be reached is that the ninety day waiting period should not be grafted onto the ADR Arbitration Rules. Rather, the court should enter judgment immediately after the award and the parties would then have the general—but limited—right to appeal from the judgment entered on that award.

The problem with the second interpretation is that Indiana appellate decisions have limited the scope of appellate review from arbitration awards to the "grounds for challenge" permitted by sections 12 to 14 and 19 of the Indiana Uniform Arbitration Act.¹⁴⁰ If the "grounds" for vacation of an award pursuant to Indiana Code section 34-4-2-13 or for modification or correction of award pursuant to Indiana Code section 34-4-2-14 are not specifically deemed to be applicable to arbitration under the ADR Arbitration Rules, the right of appeal could be more limited than under the Indiana Arbitration Act. The general right of appeal contained in Indiana Code section 34-4-2-19, allowing appeals from a judgment or decree entered pursuant to the provisions of the Indiana Uniform Arbitration Act would presumably be applicable.

Should the parties in their Arbitration Agreement provide whether the ninety day period vacation and modification provisions apply? Although it is not clear that the parties are free to contract to that degree, such provisions should probably be included in the Arbitration Agreement.¹⁴¹

M. Scope of Appellate Review of Arbitration Awards

Two general types of arbitration exist in the United States; non-binding or advisory arbitration in which, after award, a displeased party has a right to a trial *de novo*, and binding arbitration in which no right to reject exists. In the latter, either by rule, statute or court decision, the scope of appellate review is limited.¹⁴²

140. *State Dep't of Admin. Personnel Div. v. Sights*, 416 N.E.2d 445 (Ind. Ct. App. 1981); *Indianapolis Pub. Transp. Corp. v. Amalgamated Transit Union, Local 1070*, 414 N.E.2d 966 (Ind. Ct. App. 1981).

141. *See Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333 (Ill. Ct. App. 1982) (holding that parties could not by agreement expand a trial court's limited power to review awards). *But see contra*, *Monte v. Southern Delaware County Auth.*, 335 F.2d 855 (3rd Cir. 1964). Another problem with applying the ninety day period of time to all binding ADR arbitration is that it creates an automatic three month delay between award and enforcement if the parties do not voluntarily accept the award.

142. *See* George H. Friedman, *Correcting Arbitrator Error: The Limited Scope of Judicial Review*, 33 ARB. J. 9 (Dec. 1978); Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court*, 27 IND. L. REV. 241 (1993). *See also* *Schaefer et al. v. Allstate Ins. Co.*, 590 N.E.2d 1242 (Ohio 1992). In *Schaefer*, the Supreme Court of Ohio held that "non-binding arbitration" was a contradiction in terms and found unenforceable an agreement to arbitrate which provided that the arbitration was non-binding and that the parties had a right to a trial *de novo* if either was not satisfied with the arbitration result. It could be argued that the possible extension

Although many different standards, tests and grounds exist, it can be generally stated that in the majority of jurisdictions the scope of an arbitration award is limited to:

- 1) questions of jurisdiction;
- 2) issues concerning regularity of proceedings;
- 3) questions of awards in excess of arbitration powers; and
- 4) constitutional questions.¹⁴³

Indiana courts have followed the majority of jurisdictions in holding that the purpose of arbitration generally (and the specific purpose of the Uniform Arbitration Act) is to allow parties to reach resolution of their disputes by earlier and quicker methods. Strict and limited judicial review is necessary to avoid frustration of these goals.¹⁴⁴

Several general principles should be found applicable to issues of review of arbitration awards under the ADR Arbitration Rule:

1. The award will be presumed to be based on proper grounds.¹⁴⁵
2. The fact that arbitrator did not "follow the law" will not be a ground for review, unless the Arbitration Agreement specifically so limited the arbitrator's authority.¹⁴⁶
3. Courts can review arbitration award on the basis of fraud and corruption, or if the arbitrators have ordered that an illegal act be done.¹⁴⁷
4. Courts can refuse to enforce arbitration awards when enforcement of the award would violate public policy.¹⁴⁸
5. Awards can be voided if the arbitrator or arbitrators were clearly not impartial.¹⁴⁹

of the holding in the *Schaefer* case could be that non-binding ADR arbitration is merely an evaluation tool or device without legal effect, and that if there is an *agreement* to arbitrate on a binding basis, all such proceedings should be governed by the Indiana Uniform Arbitration Act. Such an interpretation, however, ignores the clear and specific provisions of the Indiana Arbitration Rules and the manner and degree to which they differ from the Indiana Uniform Arbitration Act.

143. *Appeal of Borough of Hollidaysburg*, 453 A.2d 684 (Commw. Ct. 1982); *Sindler v. Batleman*, 416 A.2d 238 (D.C. 1980).

144. *MSP Collaborative Developers v. Fidelity & Deposit Co. of Maryland*, 596 F.2d 247 (7th Cir. 1979); *Indianapolis Pub. Transp. Corp. v. Amalgamated Transit Union, Loc. 1070*, 414 N.E.2d 966 (Ind. Ct. App. 1981).

145. *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987).

146. *School City of E. Chicago, Ind. v. East Chicago Fed'n of Teachers, Loc. No. 511*, 422 N.E.2d 656 (Ind. Ct. App. 1981).

147. *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987).

148. *Irving Materials, Inc. v. Coal, Ice Bldg. Material & Supply Drivers, Heavy Haulers, Warehousemen & Helpers, Loc. 716*, 779 F. Supp. 968 (S.D. Ind. 1992).

149. IND. CODE § 34-4-2-13(a)(2) (1993).

6. Courts can review arbitration awards on the grounds that the Arbitration Agreement was not followed.¹⁵⁰

An examination and analysis of the common law cases, the arbitration statutes, and cases decided thereunder, and the ADR Arbitration Rules support the conclusion that appeals from binding ADR arbitration are very limited. This limited appellate review can only be realized if the modification and vacation provisions of the Indiana Uniform Arbitration Act are deemed to be applicable to results of binding arbitration under the ADR Arbitration Rules.

Until the issue is settled or the rules amended, practitioners faced with binding arbitration awards from which they would like to appeal might consider attempting a combined approach by following the provisions of both Indiana Code section 34-4-2-13, 13, 14 and 19 *and* following regular appellate rules, including Trial Rules 59, 60 and 62.¹⁵¹

IV. CONCLUSION

The ADR Arbitration Rules provide Indiana lawyers with a significant new tool. The lawyers and parties have significant discretion under Rule 3 to design the arbitration procedure. They can decide whether the arbitration will be binding or non-binding. They can agree what issue or issues will be arbitrated, what procedures will be followed and who will be the arbitrator or arbitrators. Also, the application of discovery rules to arbitration under the ADR Arbitration Rules will eliminate one major reason many lawyers were reluctant to agree to arbitration.

Subsequent decisions or amendments will be necessary to determine the precise limits on the parties' right to mold the arbitration procedure and on the scope and nature of appellate review of arbitration awards. With such decisions or amendments, Indiana arbitration law and procedure will continue its evolution.

150. *International Bhd. of Elec. Workers, Loc. 1400 v. Citizens Gas & Coke Util.*, 428 N.E. 1320 (Ind. Ct. App. 1981); IND. CODE § 34-4-2-14(a)(2). This authority, however, may be limited because of the fact that the Arbitration Agreement contemplated by the ADR Arbitration Act is substantially different than the agreements to arbitrate at common law, under the Indiana Arbitration Act and the Indiana Uniform Arbitration Act. There are, however, restrictions and limitations that can be placed on the arbitrators in the ADR Arbitration Agreement. For example, the parties could agree to submit any of two issues to arbitration and the award could include a decision on both issues.

151. IND. TR. R. 59, 60, 62.

