This page was exported from - The Arbitration Law Forum
Export date: Mon Apr 12 18:17:13 2021 / +0000 GMT

What is the Difference Between "Commercial" and "Industry" Arbitration?

If you bothered to read even this much of the first sentence of this post, you probably have a pretty good idea of what commercial arbitration is, and what it encompasses. To us, and, we suspect most others, ?commercial arbitration? is simply arbitration arising out of or relating to a commercial transaction. It includes arbitrations involving only sophisticated parties as well as disputes involving one or more ?unsophisticated? parties, such as consumer arbitration. It is not generally understood to include labor arbitration arising out of collective bargaining agreements (which is not governed by the Federal Arbitration Act, although FAA precedents are frequently cited in Labor Management Relations Act Section 301 cases and vice-versa). And it is debatable whether arbitration arising out of an employment contract dispute (which may or may not be governed by the FAA) is truly a species of commercial arbitration, yet we consider it one.

?Industry arbitration? is a less commonly-used term than commercial arbitration. To us, it means any form of arbitration adopted within a particular industry for the resolution of disputes between or among industry participants. Judge Easterbrook of the Seventh Circuit Court of Appeals once described ?industry arbitration? as the ?modern law merchant.? See Sphere Drake Insurance Co. v. All American Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002), cert. denied, 538 U.S. 961 (2003). It usually employs industry experts as decision makers, and the rules of decision are often the customs, practices and norms of the industry, rather than the strict rules of law. Reinsurance arbitration and maritime arbitration are two excellent examples of industry arbitration, but there are many others, including the forms of arbitration used in the construction, textile, securities, and telecommunications industries.

But isn't industry arbitration ? the ?modern law merchant? ? merely a subspecies of commercial arbitration? Not exactly. A very large percentage of intra-industry disputes are commercial in nature and arbitration of those disputes is undoubtedly both industry and commercial arbitration. Yet not all intra-industry disputes arise out of commercial transactions; many arise out of collective bargaining agreements.

We believe that labor arbitration is a form of industry arbitration because it shares many of the same features that differentiate industry arbitration of commercial disputes from ordinary commercial arbitration. First, it usually features expert decision makers with experience in the industry out of which the dispute arises. Second, just as, say, reinsurance industry arbitrators draw heavily on custom, practice and industry norms, labor arbitrators are permitted to rely (sometimes quite heavily) on ?the law of the shop? ? the labor norms, customs and practices specific to a particular industry.

So industry arbitration is not necessarily commercial arbitration. And by the same token, commercial arbitration is not necessarily industry arbitration. Arbitration is used as a dispute resolution mechanism in many different types of commercial transactions which are not specific to a particular industry, involve parties from different industries, involve parties that are not involved in any particular industry, or are not governed by any particular set of norms, customs and practices. Industry arbitration is therefore both narrower and broader in scope than commercial arbitration.