## ALTERNATIVE DISPUTE RESOLUTION ("ADR") – Part III

This is part III of our article examining ADR. Part I focused on ADR in general. Part II focused on mediation as a well-recognized ADR tool. In this final part in the series, we will focus on remaining ADR alternatives, most notably arbitration, from Texas perspective. ADR methods should be considered in light of the facts, circumstances and allegations in each contested matter. They can be a valuable alternative to limit the expense and delay attributed to litigation.

### Moderated Settlement Conference

Some state laws provide for a procedure similar to a mini-trial to aid settlement - the moderated settlement conference ("**MSC**"). The MSC provides a forum for case evaluation by a neutral panel of third parties. It is not arbitration, as discussed below. The MSC panel may issue an advisory opinion, which maybe used by the parties to further the settlement process. Section 154.025 of the Texas Civil Practice and Remedies Code ("**Texas CPRC**") provides:

> (a) A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.
>
> (b) Each party and counsel for the party present the position of the party before a panel of impartial third parties.
>
> (c) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.
>
> (d) The advisory opinion is not binding on the parties.

MSC differs from mediation because it permits the neutral third parties to actually decide the controversy. The parties must agree to the process. The MSC is conducted in confidence. The result may not be revealed, even to the court.

### Summary Jury Trial

Summary jury trials involve the presentation of cases, in an abbreviated fashion, to a panel of jurors (usually 6 in number) who may issue a nonbinding advisory decision. The summary jury trial works best in factually complex litigation and provides a vehicle to obtain a snapshot prediction of the outcome of a full jury trial. Section 154.026 of the Texas CPRC provides:

> (a) A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.
>
> (b) Each party and counsel for the party present the position of the party before a panel of jurors.
>
> (c) The number of jurors on the panel is six unless the parties agree otherwise.

(d) The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

(e) The advisory opinion is not binding on the parties.

Summary jury trials are conducted similar to regular jury trial, only they are shorter in duration and less formal. They typically take less than a day to complete. Attorneys will select a jury in the same fashion as a full trial, but will know more about jurors to aid them in evaluating their case. Argument and evidence is presented in summary fashion and witnesses are not typically called to testify. The rules of evidence apply because they will apply at trial. The court instructs the jury and the jury returns a verdict. The verdict is advisory in nature (which the jury knows). After the verdict, the attorneys are free to discuss the case with jurors. Following the summary trial, negotiations toward settlement continue.

**Judicial Settlement Conferences**

Federal judges, being Article III judges appointed for life, are free of the political and other pressures which sometimes encumber state judicial processes. As such, it is not unusual to observe federal judges involving themselves in the settlement process.

The level of federal court involvement in the settlement process can range from simply requiring the parties to certify consideration of ADR to holding a formal settlement conference as part of the pre-trial conference procedures permitted under the Federal Rules.

At the settlement conference, nonbinding in nature, the court (a non-neutral observer because it is typically the ultimate trier of fact) may require the parties to present and justify (with fact and documentary evidence) their respective positions, criticize the parties' approaches, and press the parties for concessions. Representatives of the parties may be compelled to attend these conferences.

**Mini-Trials**

Mini-trials are used most often in complex litigation. A mini-trial is a nonbinding procedure which enables the parties to hear about their respective. Typically, the parties will present their positions before selected representatives for each party or before an impartial third party, often a retired judge or senior attorney.

The impartial third party observing the mini-trial may issue an advisory opinion which is nonbinding, unless the parties agree to permit it to be binding and enter into a written settlement agreement. Section 154.024 of the Texas CPRC provides:

(a) A mini-trial is conducted under an agreement of the parties.

(b) Each party and counsel for the party present the position of the party, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations.

(c) The impartial third party may issue an advisory opinion regarding the merits of the case.

(d) The advisory opinion is not binding on the parties unless the parties agree that it is binding and enter into a written settlement agreement.

The parties may agree to participate in a mini-trial or may be referred by a court. The parties usually select the neutral third party or representative who will hear the matter. Discovery is limited and may be directed by agreement of the parties. At the mini-trial, the parties make informal, summary presentations of their positions aided, if necessary, by expert or fact witnesses. The neutral party or selected representatives may ask questions and comment on the strengths and weaknesses of the party's position. Mini-trials typically last on a day or two. The neutral advisor or selected representatives may issue an advisor opinion. If negotiations do not result in settlement, the matter will return to the path of litigation or other ADR procedures.

**Court-Annexed Arbitration**

In 1988, Congress enacted the 1988 Judicial Improvements and Access to Justice Act (the "**JIAJA**") (Pub. L. 100-702), which took effect on May 18, 1989. (28 U.S.C. §§ 651-658). The JIAJA included provisions for "court-annexed arbitration" (as distinguished from private, consensual arbitration governed by title 9 of the United States Code). The JIAJA permits district courts to adopt local rules requiring referral of certain cases to non-binding arbitration "in any civil action, including an adversary proceeding in bankruptcy." (28 U.S.C. §651(a)). Accordingly, many jurisdiction are experimenting with the concept of directing the parties to non-binding arbitration.

**Contractual Arbitration**

Arbitration clauses in commercial agreements are common place. Parties may contract in writing to refer a matter to arbitration and courts will enforce these agreements and, if necessary, stay litigation on such disputes until arbitration has been accomplished.

Section 154.027 of the Texas CPRC provides:

(a) Nonbinding arbitration is a forum in which each party and counsel for the party present the position of the party before an impartial third party, who renders a specific award.

(b) If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, the award is not binding and serves only as a basis for the parties' further settlement negotiations.

The American Arbitration Association offers the following generic type of arbitration clause for use in commercial contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction
thereof. (AAA Rules at 2).

Because it is a matter of contract, the parties are free to expand or limit the matters subject to arbitration and may provide any number of discrete procedures to apply to arbitration. The parties may also want to specify or limit the remedies available, including the availability of punitive damages.

There is a strong presumption in the federal courts favoring arbitration. The United States Supreme Court has stated that the Federal Arbitration Act ("FAA") (9 U.S.C. § 1, *et seq*.), which provides for the enforcement of written contractual arbitration provisions, reflects a "national policy favoring arbitration." The FAA obligates the parties to arbitrate existing or future disputes arising from the transaction if the written contract is one involving interstate commerce or foreign commerce within admiralty jurisdiction. (9 U.S.C. § 2). The FAA is substantive in nature (rather than procedural) and, therefore, must be applied in state and federal courts.

Arbitrators are selected by the method provided in the parties' agreement. If no method is provided, a party may petition the court to appoint arbitrators. (9 U.S.C. § 5). Typical arbitration provisions provide for 3 arbitrators: one selected by each party and a third selected the two party-appointed arbitrators. The parties should take care that the arbitrators selected are neutral. Avoiding the selection of compromised arbitrators can be important. A common method of selecting a neutral arbitration panel is to appoint an independent body to select the panel, such as the American Arbitration Association (AAA).

Arbitrators have the power to issue summons and subpoenas compelling the attendance of witnesses and production of documents. (9 U.S.C. § 7). There are no cut and dry rules for the conduct of the arbitration proceeding. The parties may determine the process so long as the goals of arbitration are achieved. The parties may chose to apply the AAA rules of arbitration. Typically, the parties will request a pre-hearing conference to define the parameters under which the proceeding will take place. (*See* AAA Rule 10).

Discovery may be had in arbitration proceedings, although traditional discovery does not generally occur. The AAA rules do not address discovery. AAA Rule 10 provides for a method by which documents may be requested and produced. The parties may chose to permit limited discovery in advance of the hearing. The parties may also want to discuss the ability to depose witnesses and identification of witnesses and documents to be used at the hearing. If an agreement cannot be reached, the arbitrator will decide whether and to what extent discovery should be allowed to proceed.

The traditional rules of evidence are also not applicable to arbitration proceedings. AAA Rule 31 provides: "conformity to legal rules of evidence [is not]... necessary." (AAA Rule 31). Hearsay evidence and other prejudicial evidence often enters arbitration proceedings.

## ADR Organizations

There are a variety of professional organizations, profit and non-profit, who specialize in alternative dispute resolution procedure. Because state and federal laws do not often provide clear mechanisms for conducting ADR, these organizations have established rules which govern the conduct of such proceedings. For example, the American Arbitration Association - nonprofit - has established detailed rules governing arbitration in various areas. These rules cover the administration, submission of claims, selection of arbitrators, setting of time and place, conduct of the proceedings, evidence, scope of awards, and expenses and fees. Many parties chose to adopt the procedural mechanisms of these organizations at the time they contract.

## Practice Tips

- Be prepared; treat ADR as a trial run of your case
- Reduce any agreement reached in ADR to writing **before** you leave
- Have clients sign any agreement, not just lawyers
- Participate as much as possible in the selection of the mediator
- Consult other practitioners on the skills and judgment of the mediator
- Make sure your client representative actually has authority to settle the dispute
- Complete the mediator's information sheet and submit it sufficiently in advance of the mediation to provide the mediator adequate opportunity to gain knowledge about your position and other information about the action
- Use the process as informal discovery, gain as much information about the other sides position should the mediation fail (understanding that anything gained may not be used unless obtained from an alternate source)
- In selecting or approving the appropriateness of ADR consider such factors as:
    - the nature of issues raised by the action
    - the number of parties involved in the action
    - the status of discovery in the action
    - whether ADR will be cost effective
    - whether information can be disclosed and issues analyzed
    - whether privacy and confidentiality permits your client to freely and openly discuss its position
    - whether your client will actively or passively participate in the process